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IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 11TH DAY OF SEPTEMBER, 2020

BEFORE

THE HON'BLE MR.JUSTICE SURAJ GOVINDARAJ

CRIMINAL PETITION NO.100964/2020

Between:

Sri. B.S. Yediyurappa,
S/o. Late Siddalingappa,
Occ: Chief Minister, State of Karnataka,
Member of Legislative Assembly,
Aged about 77 years,
No.381, 6th Cross, 80 Ft. Road,
RMV 2nd Stage, Dollars Colony,
Bengaluru-560 094.

... Petitioner

(By Shri C.V. Nagesh, Sr. Counsel
for Shri Sandeep Patil, Advocate)

And:

1. State of Karnataka,
Through Gokak Town Police Station,
Gokak Circle, Belagavi District,
Belagavi-590 001,
Rep. by State Public Prosecutor,
High Court of Karnataka,
Dharwad-580 001.
2. Shri Laxman Allapur S/o.Tukkappa,
Occ: Executive Engineer,
Karnataka Niravari Nigam,
GRBC Division No.3, Gokak,
Aged about 58 years,
Gokak, Near Bamby Chal,
Gokak, Belagavi-590 001.

... Respondents

(By Shri V.M. Sheelvant, SPP for R1;
Notice to R2 is dispensed with v/o/dtd.27.08.2020)

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This criminal petition is filed under Section 482 of Cr.P.C. praying to quash the complaint dated 26.11.2019 in C.C.No.1065/2020 for offences under Section 123(3) of the Representation of Peoples Act, 1951 and Section 171(F) of the Indian Penal Code, pending on the file of the Prl. JMFC Court Gokak and quash the order dated 26.11.2019, passed under Section 155(2) of Cr.P.C. registered as C.C.No.1065/2020 for the offences under Sections 123(3) of the Representation of Peoples Act, 1951 and Section 171(F) of the Indian Penal Code by the Prl. JMFC Court Gokak and quash the order of taking cognisance and issuance of summons dated 26.06.2020 in C.C.No.1065/2020 for offences under Section 123(3) the Representation of Peoples Act, 1951 and Section 171(F) of the Indian Penal Code, passed by the Prl. JMFC Court Gokak and consequently quash the entire and all further proceedings in C.C.No.1065/2020 for the offences punishable under Section 123(3) of the Representation of Peoples Act, 1951 and Section 171(F) of the Indian Penal Code, pending on the file of the Prl. JMFC Court Gokak.

This criminal petition coming on for orders and having been heard and reserved for Orders on 27.08.2020, this day, the Court pronounced the following:

ORDER

1. The Petitioner is before this Court seeking for
 - 1.1. quashing the complaint dated 26.11.2019, registered in C.C.No.1065/2020 for the alleged offences under Section 123(3) of the Representation of the People Act, 1951 (for short "the R.P. Act") as also under Section 171F of the India Penal Code (for short "the IPC"), pending

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on the file of the Prl. JMFC Court, Gokak (for short "the Magistrate").

1.2. quashing of the order dated 26.11.2019, passed under Section 155(2) of the Code of Criminal Procedure, 1973 (for Short "the Cr.P.C.") in the above proceedings

1.3. quashing the order of taking cognisance and issuance of summons dated 26.06.2020 in the above proceedings and

1.4. consequently quash the entire and all further proceedings in the said matter.

2. The facts, in brief, are that:

2.1. One Laxman Allapur (informant), Executive Engineer, Karnataka Niravari Nigama was deputed on election duty as a Flying Squad by the District Election Officer, Belagavi for Gokak Constituency Bye-Elections. He had filed a complaint before the respondent No.1-Police on

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26.11.2019, alleging that on 23.11.2019 between 5:00 to 6:40 p.m., while he along with one M.G.Uppar were on election duty in Valmiki Stadium, the Petitioner who was campaigning for the BJP Candidate had appealed in his speech that the Veerashaiva Lingayat Community Members vote must be consolidated, that they should not be divided and called upon the members to vote in favour of the said candidate.

2.2. This is stated to be in violation of the Election Code of Conduct, and as such, he requested respondent No.1-Police to take action against the Petitioner.

2.3. Respondent No.1-Police registered a non-cognisable case in N.C.No.24/2019 under Section 123(3) of the R.P. Act, and Section 171F of the IPC and forwarded the same to the Prl. JMFC, Gokak in pursuance of Section 155(1) of

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the Cr.P.C. requesting for permission to investigate.

2.4. The Prl. JMFC, Gokak, vide his order dated 26.11.2020, on perusal of the requisition and examination of the Informant found that there was a prima facie case made out requiring permission to be granted. Hence, exercising his powers under Section 155(2) of the Cr.P.C. he accorded permission to the Investigating Officer of Gokak Town P.S., Gokak to investigate the non-cognisable offence and to file the final report.

2.5. The respondent-Police, after completion of the investigation, submitted a final B-report in Crime No.147/2019 before the Prl. JMFC, Gokak on 25.06.2020 stating that after examination of all witnesses as also conducting enquiry at the spot, it was found that there was no violation committed by the Petitioner of the Election Code.

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2.6. Along with the B-report, panchanama in regard to the place of offence with a hand sketch, map of the place of occurrence of offence along with photographs were produced. So also the entire video footage of entire election campaign held on 23.11.2019 was annexed in the form of a 'CD'.

2.7. The Investigating Officer had recorded the statements of the first Informant, L.T.Allapur, M.G.Uppar, Junior Engineer, PWD, and videographer, Kiran Ningappa Silanavar.

2.8. The first Informant in his statement stated that the first information was given under a wrong assumption, due to pressure of work and that the Petitioner has not violated the model Code of Conduct. The Petitioner had only stated in his speech that the votes of workers should not be dispersed here and there. Similar statements were made by M.G.Uppar and Kiran Ningappa

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Silanavar. It is on the basis of the above statements that the B-report came to be filed.

2.9. While considering the said B-report, the Magistrate went into the statement of witnesses as also watched the actual video footage. The Magistrate considering that

2.9.1. The first information was lodged by a Government Official, who was on deputation to the Election Commission, that there was an election offence committed by the Petitioner had lodged a complaint with the Gokak P.S. for the offences under Section 123(3) of the R.P. Act and Section 171F of the IPC

2.9.2. The first informant had thereafter sought for permission for registering the case and carrying out the investigation.

2.9.3. That there was an appeal made by the Petitioner in the video recording of the speech to a specific community seeking their

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votes in favour of the candidate of Gokak Constituency.

2.10. The Magistrate was of the opinion that the B-report could not be accepted, there was enough material in the form of video recording indicating, prima facie, the commission of the offence as alleged, rejected the B-report.

2.11. The Magistrate came to the conclusion that there was enough material in the B-report to proceed against the Petitioner and subject the Petitioner to trial for the offences punishable under Section 123(3) of the R.P. Act and Section 171F of the IPC proceeded to take cognisance of the offences, after rejecting the B-report and directed the registration of the criminal case against the Petitioner. The Magistrate also directed the issuance of summons against the Petitioner through the Commissioner of Police, Bengaluru.

3. It is aggrieved by the above that the Petitioner has filed the above petition seeking for reliefs as aforestated.
4. Shri C.V. Nagesh, learned Senior Counsel, instructed by Shri Sandeep Patil, learned counsel appearing for the Petitioner submitted as under:

Section 155 of the Cr.P.C.,

- 4.1. Relying on Section 155(1) of the Cr.P.C., he submitted that the Investigating Officer could not have by himself forwarded the complaint to the Magistrate seeking for permission to investigate, he could only record the information in the book kept for that purpose in the Police Station and refer the Informant to the Magistrate so as to seek permission from the Magistrate for investigation. He submitted that the forwardal of the requisition note sent by the Police through P.C.No.2979, is contrary to the requirement under law, this indicates as if the Police

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themselves are the Informants, that not being permissible under Section 155(1) of the Cr.P.C., the Informant not having been referred to the Magistrate, the initial permission granted for the investigation itself is bad in law and is therefore required to be quashed. In this regard, he relies on the decisions of this Court in **Crl.P.No.3082/2007** in the case of **Anand Singh vs. State of Karnataka**, disposed of on **22nd October 2008**, more particularly, paragraph Nos.6 and 7 thereof, which are reproduced hereunder for easy reference.

6. *A plain reading of sub-Section (1) of Section 155 Cr.P.C. makes it abundantly clear that the information over commission of a non-cognisable offence to the jurisdictional Police Station, requires the officer to enter or cause to be entered the substance of the information in a book to be kept by such officer, in such form as the State Government may prescribe, in that behalf, and refer the Informant to the Magistrate. In other words, if the information did not disclose the commission of a cognisable offence,*

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the Police Officer having no power to investigate into the matter, is duty bound to refer the Informant to approach the Magistrate, in the matter of permission to investigate into the non-cognisable offence. It is for the Informant to seek the orders of the Magistrate. In any event, sub-Section (1) of Section 155 Cr.P.C. does not empower the Police Officer to make a request to the Magistrate to permit investigation into a non-cognisable offence.

7. If the Informant desires to seek a direction to the police officer to investigate into the non-cognisable offence, at the hands of the Magistrate, has to lodge a complaint under Section 200 Cr.P.C., when the Magistrate would apply his mind to the averments in the complaint and on being satisfied that there are reasons to believe that a non-cognisable offence is committed may direct investigation by the jurisdictional Police. In any event, such a power cannot be exercised either arbitrarily or capriciously and must result in a judicial order. The judicial order does not mean extracting the entire text of the complaint and the evidence adduced before the Magistrate. What is required by law is application of mind to the material on record, satisfy himself that there is a need to investigate into the commission of the non-cognisable offence. It is only

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thereafter that the Magistrate under sub-Section (2) of Section 155 Cr.P.C., 1973 directs the Police Officer to investigate into the non-cognisable as otherwise, the Police Officer has no power to investigate into such an offence. Sub-Section (3) of Section 155 Cr.P.C., 1973 requires the Police Officer who receives the order of Magistrate, to exercise the same power in respect of investigation (except the power to arrest without warrant) as the officer may exercise in a cognisable case."

4.2. He also relies on the decision of this Court in **W.P.No.102248/2016** in the case of **Praveen Basavanneppa Shivalli vs. the State of Karnataka and others**, disposed of on **11th July 2016**, more particularly, paragraph No.17 thereof, which is reproduced hereunder for easy reference:

"17. Statutory safeguard given under S.155(2) Cr.P.C. must be strictly followed, since the same has been conceived in public interest and as a guarantee against frivolous and vexatious investigation."

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4.3. He further submitted that the order dated 26.11.2019 being illegal, this alone would be sufficient to quash the entire proceedings.

Section 123 of the R.P. Act

4.4. That Part-VII of the R.P. Act deals with Corrupt Practices and Electoral Offences; Part-VII, consists of three chapters, Chapter-I relates to Corrupt Practices; Chapter-II has been deleted; and Chapter-III relates to Electoral Offences.

4.5. Section 123 of the R.P. Act comes under Chapter-I, therefore, the complaint is as regards a Corrupt Practice in an election and not an Electoral Offences. Electoral Offences are separately dealt under Chapter-III from Sections 125 to 136 of the R.P. Act.

4.6. Section 123(3) of the R.P. Act under which the complaint had been registered, relates to Corrupt Practices. A proceeding for corrupt practice can be taken only as against the

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candidate and cannot extend to initiating proceedings against a third party like the Petitioner.

4.7. That even though the words agent or any other person is used in Section 123(3), any action of such agent or any other person would only result in action to be taken against the candidate. The Petitioner, therefore, cannot be subjected to any action under Section 123(3). More so, when Section 123(3) can at the most be stated to be Corrupt Practice/s and not electoral offence/s, inviting penal prosecution.

4.8. On enquiry, Shri C.V. Nagesh learned Senior Counsel submitted that even if a mistake has been committed by registering the case under Section 123(3), since the complaint by itself did not mention any provision of the R.P Act, at the most, it could come under Section 125 of Chapter-III, Part-VII relating to Electoral

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Offences and for this purpose, there must be an allegation of promoting enmity between classes of people in connection with an election. He, therefore, submitted that there being no such allegation of promoting enmity, a reading of the complaint in its entirety indicates that even an offence under Section 125 of the R.P. Act has not been alleged to have been committed. Therefore, there is no Electoral Offence which can be alleged to have been committed by the Petitioner.

Section 171F of the IPC

4.9. That Section 171F of the IPC is also not attracted since the same relates to punishment for undue influence or personation in an election, there is no personation committed by the Petitioner. As regards undue influence, there is no undue influence exercised by the Petitioner so as to warrant invocation of Section 171F of the IPC,

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since the requirement of undue influence as mandated under Section 171C of the IPC are not satisfied. Hence, there is no offence, which could be said to have been committed under Section 171F of the IPC. He submitted that the proceedings are required to be quashed.

Violation of Procedure to be followed on receipt of B Report

4.10. That the Magistrate has not followed the procedure to be followed upon receipt of B-report, the Magistrate ought to have issued notice to the complainant-the first Informant seeking for his acceptance or objection to the B-report. Only in the event of the first Informant challenging the B-report, the Magistrate could have rejected the B-report. The Magistrate cannot by himself reject the B report without the same being opposed by the Informant. Towards this end, notice has to be issued to the first Informant; if the Informant agrees to the B

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report, the B report is to be accepted by the Magistrate. If the B report is opposed by the Informant than the sworn statement of the first Informant was to be recorded, the first Informant was to be heard and only thereafter orders could be passed on accepting or rejecting the B-report.

4.11. In the present case, the Magistrate has *suo moto* rejected the B-report without there being any objection to the B-report by anybody. More so, when no notice was issued to the first Informant. Hence, the entire procedure being contrary to law, the rejection of B-report and taking cognisance is violative of the applicable law, therefore, the same has to be quashed. Shri C V Nagesh Learned Senior Advocate relied on the following decisions:

4.12. ***H.S.Bains, Director, Small Saving-Cum-Deputy Secretary Finance, Punjab,***

Chandigarh Vs. State (Union Territory of Chandigarh) reported in **(1980)4 SCC 631**, more particularly, paragraph No.6 thereof, which is reproduced herein under for easy reference:

"6. It is seen from the provisions to which we have referred in the preceding paragraphs that on receipt of a complaint a Magistrate has several courses open to him. He may take cognisance of the offence and proceed to record the statements of the complainant and the witnesses present under Sec. 200. Thereafter, if in his opinion there is no sufficient ground for proceeding he may dismiss the complaint under Sec. 203. If in his opinion there is sufficient ground for proceeding he may issue process under Sec. 204. However, if he thinks fit, he may postpone the issue of process and either enquire into the case himself or direct an investigation to be made by a Police Officer or such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. On the other hand, in the first instance, on receipt of a complaint, the Magistrate may, instead of taking cognisance of the offence, order an

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investigation under Sec. 156(3). The Police will then investigate and submit a report under Sec. 173(1). On receiving the police report the Magistrate may take cognisance of the offence under Sec. 190(1)(b) and straightaway issue process. This he may do irrespective of the view expressed by the Police in their report whether an offence has been made out or not. The Police report under Sec. 173 will contain the facts discovered or unearthed by the Police and the conclusion drawn by the Police therefrom. The Magistrate is not bound by the conclusions drawn by the Police and he may decide to issue process even if the Police recommend that there is no sufficient ground for proceeding further. The Magistrate after receiving the Police report, may, without issuing process or dropping the proceeding decide to take cognisance of the offence on the basis of the complaint originally submitted to him and proceed to record the statements upon oath of the complainant and the witnesses present under Sec. 200 Criminal Procedure Code and thereafter decide whether to dismiss the complaint or issue process. The mere fact that he had earlier ordered an investigation under Sec. 156(3) and received a report under Sec. 173 will not have the effect of total effacement of the complaint and therefore the Magistrate will not be barred from proceeding under Sections

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200, 203 and 204. Thus, a Magistrate who on receipt of a complaint, orders an investigation under Sec. 156(3) and receives a police report under Sec. 173(1), may, thereafter, do one of three things: (1) he may decide that there is no sufficient ground for proceeding further and drop action; (2) he may take cognisance of the offence under Sec. 190(1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the Police in their report; (3) he may take cognisance of the offence under Sec. 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Sec. 200. If he adopts the third alternative, he may hold or direct an inquiry under Sec. 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be.

4.13. Vasanti Dubey Vs. State of Madhya Pradesh

reported in **(2012) 2 SCC 731**, more particularly, paragraph Nos.27, 28 and 29 thereof, which are reproduced hereunder for easy reference:

"27. It may be worthwhile to highlight at this stage that the

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enquiry under Section 200 Cr.P.C. cannot be given a go-bye if the Magistrate refuses to accept the closure report submitted by the investigating agency as this enquiry is legally vital to protect the affected party from a frivolous complaint and a vexatious prosecution in complaint cases. The relevance, legal efficacy and vitality of the enquiry enumerated under Section 200 Cr.P.C., therefore, cannot be undermined, ignored or underplayed as non-compliance of enquiry under Section 200 Cr.P.C. is of vital importance and necessity as it is at this stage of the enquiry that the conflict between the finding arrived at by the investigating agency and enquiry by the Magistrate can prima facie justify the filing of the complaint and also offer a plank and a stage where the justification of the order of cognisance will come to the fore. This process of enquiry under Section 200 Cr.P.C. is surely not a decorative piece of legislation but is of great relevance and value to the complainant as well as the accused.

28. It is no doubt possible to contend that at the stage of taking cognisance or refusing to take cognisance, only prima facie case has to be seen by the Court. But the argument would be fit for rejection since it is nothing but mixing up two different and distinct nature of cases as the principle and procedure applied in a case based on Police report which

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is registered on the basis of First Information Report cannot be allowed to follow the procedure in a complaint case. A case based on a complaint cannot be allowed to be dealt with and proceeded as if it were a case based on Police report.

29. While in a case based on Police report, the Court while taking cognisance will straightaway examine whether a prima facie case is made out or not and will not enter into the correctness of the allegation levelled in the F.I.R., a complaint case requires an enquiry by the Magistrate under Section 200 Cr.P.C. if he takes cognisance of the complaint. In case he refuses to take cognisance he may either dismiss the complaint or direct the investigating agency to enter into further investigation. In case, he does not exercise either of these two options, he will have to proceed with the enquiry himself as envisaged and enumerated under Section 200 Cr.P.C. But, he cannot exercise the fourth option of directing the Police to submit a charge-sheet as such a course is clearly not envisaged under the Cr.P.C. and more so in a complaint case."

Reliance on a recording in a Compact Disk without a Section 65 B Certificate, is impermissible.

4.14. Shri C.V Nagesh learned Senior Counsel submitted that the Magistrate could not have

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relied on the video recording in a compact disk without a certificate under Section 65-B of the Evidence Act, being produced along with said compact disk, the same being an electronic record. The Magistrate could not have looked into the compact disk and the entire order dated 26.06.2020 being on the basis of the compact disk is bad in law. In this regard, he relies on the decision of the Apex Court in the case of **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal** reported in 2020 **SCC OnLine SC 571**, more particularly, paragraph Nos.66 and 67 thereof, which are reproduced hereunder for easy reference:

"66. We may reiterate, therefore, that the certificate required under Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V. (supra), and incorrectly "clarified" in Shafhi Mohammed (supra). Oral evidence in the place of such certificate cannot possibly suffice as Section 65B(4) is a mandatory

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requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor (1876) 1 Ch.D 426, which has been followed in a number of the judgments of this Court, can also be applied. Section 65B(4) of the Evidence Act clearly states that secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render Section 65B(4) otiose.

67. In view of the above, the decision of the Madras High Court in K. Ramajyam (supra), which states that evidence aliunde can be given through a person who was in-charge of a computer device in the place of the requisite certificate under Section 65B(4) of the Evidence Act is also an incorrect statement of the law and is, accordingly, overruled."

Issuance of Summons to a person residing outside the territorial jurisdiction of the Magistrate.

4.15. Shri C V Nagesh Learned Senior Advocate submitted that without an enquiry, no summons could have been issued to the Petitioner who admittedly is not a resident within the territorial jurisdiction of the Magistrate.

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4.16. That the Magistrate has not followed the procedure as contained under Section 202(2) of the Cr.P.C. for issuance of summons to the Petitioner, who admittedly is residing, outside the jurisdiction of the Magistrate, which is clear from the fact that the Magistrate has directed the Commissioner of Police, Bengaluru to serve the summons on the Petitioner. No enquiry having been held by the Magistrate to arrive at a conclusion that sufficient cause is made out to issue such notice. The issuance of summons being contrary to Section 202(2) of the Cr.P.C., the same is required to be quashed.

4.17. That before issuance of summons to the Petitioner, the Magistrate ought to have come to a conclusion that there are sufficient grounds for issuance of such summons and in that regard, necessary procedure thereto as laid down by the

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various decisions of the Hon'ble Apex Court had to be followed. In this regard he relied on

4.18. ***Udai Shankar Awasthi Vs. State of Uttar Pradesh and another*** reported in **(2013)2 SCC 435**, more particularly, paragraph No.40 thereof, which is reproduced hereunder for easy reference,:

"40. The Magistrate had issued summons without meeting the mandatory requirement of Section 202 Cr.P.C., though the appellants were outside his territorial jurisdiction. The provisions of Section 202 Cr.P.C. were amended vide the Amendment Act 2005, making it mandatory to postpone the issue of process where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned. The same was found necessary in order to protect innocent persons from being harassed by unscrupulous persons and making it obligatory upon the Magistrate to enquire into the case himself, or to direct investigation to be made by a police officer, or by such other person as he thinks fit for the purpose of finding out whether or not, there was sufficient ground for proceeding against the accused before issuing summons in such cases.. (See also: Shivjee Singh v. Nagendra Tiwary,

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SCC p.584, para 11 and National Bank of Oman v. Barakara Abdul Aziz,)."

4.19. ***Pepsi Foods Ltd. and another Vs. Special Judicial Magistrate and others*** reported in ***(1998)5 SCC 749***, more particularly, paragraph No.28 thereof, which is reproduced hereunder for easy reference:

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and

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may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

4.20. **Sunil Bharti Mittal Vs. Central Bureau of Investigation** reported in **(2015)4 SCC 609**, more particularly, paragraph Nos.51 to 54 thereof, which are reproduced hereunder for easy reference:

"51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognisance of an offence, there is sufficient ground for proceeding. This Section relates to commencement of a criminal proceeding. If the Magistrate taking cognisance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e., the complaint, examination of the complainant and his witnesses if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

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52. *A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into Court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.*

53. *However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect.*

54. *However, there has to be a proper satisfaction in this behalf which should be duly recorded by the Special Judge on the basis of material on record. No such exercise is done. In this scenario, having regard to the aforesaid aspects coupled with the legal position explained above, it is difficult to sustain the impugned order*

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dated 19.03.2013 in its present form insofar as it relates to implicating the appellants and summoning them as accused persons. The appeals arising out of SLP (Crl.) No. 2961 of 2013 and SLP (Crl.) No. 3161 of 2013 filed by Mr. Sunil Bharti Mittal and Ravi Ruia respectively are, accordingly, allowed and order summoning these appellants is set aside. The appeals arising out of SLP (Crl.) Nos. 3326-3327 of 2013 filed by Telecom Watchdog are dismissed."

4.21. GHCL Employees Stock Option Trust Vs.

India Infoline Limited reported in **(2013)4**

SCC 505, more particularly, paragraph No.14

thereof, which is reproduced hereunder for easy

reference:

"14. Be that as it may, as held by this Court, summoning of accused in a criminal case is a serious matter. Hence, criminal law cannot be set into motion as a matter of course. The order of Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The Magistrate has to record his satisfaction with regard to the existence of a prima facie case on the basis of specific allegations made in the complaint supported by

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satisfactory evidence and other material on record."

4.22. On the basis of the above submissions, Shri C.V. Nagesh, learned Senior Counsel contends that looked at from any angle, the entire proceedings are misconceived, it is politically motivated and all procedures required to be followed have been violated.

4.23. Violation if at all of Section 123(3) of the R.P. Act does not amount to an offence. The requirement of Section 171F of the IPC have not been made out.

4.24. On all these grounds, the petition is to be allowed and the reliefs as prayed for therein ought to be granted.

5. Shri V.M. Sheelavant, learned Special Public Prosecutor for respondent No.1 submitted that

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5.1. The entire procedure as required has been followed and there are serious allegations made against the Petitioner, it cannot at this stage be contended that there are no offences made out against the Petitioner. The same requires a proper and complete trial to be conducted;

5.2. The Magistrate having come to the conclusion that there is prima facie case, this Court therefore at this stage ought not to quash the complaint pending trial in the matter, which would establish whether the offences have been committed or not.

5.3. Though the offences complained of against the Petitioner is under Section 123 of the R.P Act 1951, it does not debar the prosecution of the Petitioner.

5.4. The offence alleged relating to an election, it is, but required that the same is looked at in a

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larger conspectus so as to preserve the dignity and veracity of an election.

5.5. He therefore submitted that the petition requires to be rejected.

6. On the basis of the submissions made by both the counsels, the points, which would arise for consideration of this Court are as under:

- (i) Whether when a complaint has been lodged and/or information furnished of an offence to a Station House Officer, the Station House Officer can himself seek for permission to investigate a non-cognisable offence or as a corollary to it, it is only the informant/complainant, who is to seek permission for investigation from the Magistrate?**
- (ii) Whether the complaint as regards violation of Section 123(3) of the Representation of Peoples Act, 1951 is limited to the candidate or does it extend to any third party?**
- (iii) Whether the violation of Section 123(3) of the Representation of Peoples Act, 1951 would amount to a penal offence making such person liable for criminal prosecution?**

- (iv) Whether promotion of enmity or hatred is a *sine qua non* for invoking section 125 of the Representation of Peoples Act, 1951?
- (v) Whether in the present case on the basis of the allegation made in the complaint can it be prima facie concluded that the Petitioner has committed an offence under Section 171F of the IPC by exercising undue influence on the persons who had gathered for election rally in terms of Section 171C of the IPC?
- (vi) What is the procedure to be followed by the Magistrate when a B-report is filed? Can a Magistrate *suo moto* reject the B-report without notice being ordered on the complainant?
- (vii) Whether the Magistrate can *suo moto* take cognisance of the offence without issuance of notice to the complainant?
- (viii) What is the procedure to be followed by the Magistrate before issuance of summons to a accused, who is not residing within its jurisdiction?
- (ix) Whether the Magistrate could have at the stage of taking cognizance relied upon the video recording in a compact disk, without it being accompanied by a certificate under Section 65-B of the Indian Evidence Act?
- (x) Is this a fit and proper case for this Court to interfere in the orders passed by the Magistrate under Section 482 of Cr.P.C.? and

(xi) What order?

ANSWER TO THE ABOVE POINTS ARE AS UNDER:

7. Point No.(i):

(i) Whether when a complaint has been lodged and/or information furnished of an offence to a Station House Officer, the Station House Officer can himself seek for permission to investigate a non-cognisable offences or as a corollary to it, it is only the informant/complainant, who is to seek permission for investigation from the Magistrate?

7.1. It would be profitable to refer to and extract Section 155 of the Cr.P.C., which reads as under:

"155. Information as to non-cognisable cases and investigation of such cases.-

(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognisable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the Informant to the Magistrate.

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(2) No police officer shall investigate a non- cognisable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognisable case.

(4) Where a case relates to two or more offences of which at least one is cognisable, the case shall be deemed to be a cognisable case, notwithstanding that the other offences are non- cognisable.

7.2. A perusal of the said provision would indicate that when information is given to an officer in-charge of a Police Station of the Commission of non-cognisable offence within the limits of such Police Station, he shall enter or cause to be entered the substance of the information in a book kept for that purpose and refer the Informant to the Magistrate. Thus, in terms of the said provision, on receipt of information from

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a third party informant, the Investigating Officer can only record the said information and direct the Informant to approach the Magistrate seeking for permission to investigate into a particular matter.

7.3. On this basis, Shri C.V. Nagesh, learned Senior Counsel submitted that the Investigating Officer has sent requisition to the Magistrate, which is not permissible and it was for Informant to approach the Magistrate and seek for permission to investigate into the matter. This not having been done, he submitted that the sending of requisition note to the Magistrate and the Magistrate accepting the requisition note and thereafter directing the Investigating Officer to investigate into the offence, is contrary to the requirement of Section 155(1) of the Cr.P.C. and contrary to the mandate of this Court laid down in its judgements in Crl.P.No.3082/2007 and

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W.P.No.102248/2016 (Supra) and as such the same has to be quashed.

7.4. At first blush, the contention urged by the learned Senior Counsel Shri C.V. Nagesh appears to be attractive, however, it is not in dispute that

7.4.1. information was given to an officer in charge of a police station

7.4.2. the offence is alleged to have been committed within the limits of such station

7.4.3. the offence is a non- cognisable offence,

7.4.4. the Station house officer entered or caused to be entered the substance of the information in a book kept for such purpose.

7.4.5. the station house officer referred the Informant to the Magistrate.

7.5. A magisterate can take cognisance of an offence in terms of Section 190 of the Cr. P.C., the said provision is hereunder reproduced for easy reference.

190. Cognisance of offences by Magistrates.—

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(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognisance of any offence—

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognisance under sub-section (1) of such offences as are within his competence to inquire into or try

7.6. In the present case, the complaint has been filed by "any other person relating to a non-cognisable offence", hence the same would have to be treated as a private complaint, in terms of Section 200 of the Cr. P.C and procedure thereunder required to be followed. Section 200 of Cr. P.C is reproduced hereunder for easy reference.

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

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

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

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192: Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

7.7. On perusal of the records, it is found that though requisition has been sent by the Investigating Officer, the requisition was accompanied by the Informant, which is clear from the endorsement made by the Magistrate on 26.11.2019, which reads as under:

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"Read Requisition

Through PC 2979 in open Court on 26.11.2019 at about 1:00 p.m and Informant by named Mr.L.T. Appapur is present before Court. Perused the information and acknowledgement.

Heard Informant. Office to put up along with Order Sheet.

*Sd/-
26.11.2019"*

7.8. Thus, when the matter was before the Magistrate, the Informant was also present and heard. It is only after hearing the Informant that the Magistrate directed for an Order Sheet to be put up in the matter, it is not as if that the entire process was conducted by the Investigating Officer, the Informant was available and heard by the Magistrate when he took up the matter.

7.9. After putting up of the Order Sheet while passing the order permitting the Investigating officer to investigate into the non-cognisable offence, it is seen that the Magistrate had examined the

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Informant and the information submitted, which is clear from the order dated 26.11.2019, which is reproduced hereunder for easy reference:

"26/11/2019

The P.S.I. of Gokak Town P.S. has filed a requisition for permission of investigation and filing F.I.R.

Submitted for orders.

A requisition by I.O. of Gokak Town P.S. is submitted and also referred the Informant by name Mr. L. T. Allapur, who is public servant and Flying squad of by-election to Gokak Constituency and he is present before Court. On enquiry of the said Informant and on perusal of the requisition acknowledgement and information it is found that, the prima facie case is made and which requires permission from this Court for registration of offence and for further investigation. I am satisfied to grant permission to I.O., for investigation of the above said non-cognisable offence.

Hence, in view of the same, proceed to pass the following;

ORDER

- *In exercise of Sec.155(2) of Cr.P.C. the Investigating Officer of Gokak Town P.S. Gokak is*

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accorded with permission for investigation of the said non-cognisable offence and to file report.

- *Intimate this order to said I.O., along with the copy of this order forthwith."*

7.10. The Magistrate enquired with the Informant, perused the requisition and found that there is a prima facie case made out, requiring permission to be granted for investigation.

7.11. Even otherwise, since the Informant herein is a public servant acting or purporting to act in the discharge of his official duties as belonging to the flying squad deputed by the Election Commission, there was no need for sworn statement of the Informant to be recorded, since the Provisio to section 200 exempts the same.

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7.12. In the above circumstances, it cannot be said that the order permitting the investigation has been passed only on the basis of the requisition sent by the Investigating Officer. The same has been passed after the Investigating Officer having referred the Informant to the Magistrate, who having enquired with the Informant passed the order. As such the contention of Shri C.V. Nagesh, learned Senior Counsel in this regard is liable to be rejected, the decisions relied upon by Shri C.V. Nagesh learned Senior Counsel in Crl.P.No.3082/2007 and W.P.No102248/2016 would be of no avail.

7.13.1 answer the above point by holding that

7.13.1. When a complaint has been lodged and/or information is furnished of an offence to a Station House Officer, the Station House Officer cannot himself seek for permission

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to investigate a non-cognisable offence, unless he is the first Informant.

7.13.2. It is only the informant/complainant, who is to seek permission for investigation from the Magistrate.

7.13.3. The Informant being present before the Magistrate when an order directing investigation is passed and having been examined the requirement under Section 155 (1) are satisfied.

7.13.4. There would be no need for recording of the sworn statement of the Informant if the Informant were to be a public servant acting or purporting to act in the discharge of his official duties.

8. Point Nos.(ii), (iii) and (iv):

- (ii) Whether the complaint as regards violation of Section 123(3) of the Representation of Peoples Act, 1951 is limited to the candidate or does it extend to any third party?**
- (iii) Whether a violation of Section 123(3) of the Representation of Peoples Act, 1951 would amount to a penal offence making such person liable for prosecution? and**
- (iv) Whether promotion of enmity or hatred is a *sine qua non* for invoking section 125 of the Representation of Peoples Act, 1951?**

8.1. The above points being related to each other are taken up together for consideration. For easy reference, Sections 123 and 125 of the R.P. Act are extracted below:

Section 123

"123. **Corrupt practices.**—The following shall be deemed to be corrupt practices for the purposes of this Act:—

- (1) "Bribery", that is to say—
 - (A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent

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of any gratification, to any person whomsoever, with the object, directly or indirectly of inducing—

(a) a person to stand or not to stand as, or to withdraw or not to withdraw from being a candidate at an election, or

(b) an elector to vote or refrain from voting at an election, or as a reward to—

(i) a person for having so stood or not stood, or for [having withdrawn or not having withdrawn] his candidature; or

(ii) an elector for having voted or refrained from voting;

(B) the receipt of, or agreement to receive, any gratification, whether as a motive or a reward—

(a) by a person for standing or not standing as, or for [withdrawing or not withdrawing] from being, a candidate; or

(b) by any person whomsoever for himself or any other person for voting

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or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate [to withdraw or not to withdraw] his candidature.

Explanation.—For the purposes of this clause the term "gratification" is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses bona fide incurred at, or for the purpose of, any election and duly entered in the account of election expenses referred to in section 78.]

(2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person 7[with the consent of the candidate or his election agent], with the free exercise of any electoral right:

Provided that—

(a) without prejudice to the generality of the provisions of this clause any such person as is referred to therein who—

(i) threatens any candidate or any elector, or any person in whom a candidate or an elector is interested, with

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injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or

- (ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause;

- (b) a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this clause.

(3) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the

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election of that candidate or for prejudicially affecting the election of any candidate:

Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.

(3A) The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.]

(3B) The propagation of the practice or the commission of sati or its glorification by a candidate or his agent or any other person with the consent of the candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

Explanation.—For the purposes of this clause, "sati" and "glorification" in relation to sati shall have the meanings respectively assigned to them in the Commission of Sati (Prevention) Act, 1987 (3 of 1988).]

(4) The publication by a candidate or his agent or by any other person with the consent of a candidate or his election

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agent], of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, 3* * * of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election.

(5) The hiring or procuring, whether on payment or otherwise, of any vehicle or vessel by a candidate or his agent or by any other person 4[with the consent of a candidate or his election agent], 6[or the use of such vehicle or vessel for the free conveyance] of any elector (other than the candidate himself, the members of his family or his agent) to or from any polling station provided under section 25 or a place fixed under sub-section (1) of section 29 for the poll:

Provided that the hiring of a vehicle or vessel by an elector or by several electors at their joint costs for the purpose of conveying him or them to and from any such polling station or place fixed for the poll shall not be deemed to be a corrupt practice under this clause if the vehicle or vessel so hired is a vehicle or vessel not propelled by mechanical power:

Provided further that the use of any public transport vehicle or vessel or any tramcar or railway carriage by any elector at his own cost for the purpose of going to or coming from any such polling station or place fixed for the poll shall not be deemed to be a corrupt practice under this clause.

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Explanation.—In this clause, the expression "vehicle" means any vehicle used or capable of being used for the purpose of road transport, whether propelled by mechanical power or otherwise and whether used for drawing other vehicles or otherwise.

(6) The incurring or authorising of expenditure in contravention of section 77.

(7) The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person 1[with the consent of a candidate or his election agent], any assistance (other than the giving of vote) for the furtherance of the prospects of that candidate's election, 2[from any person whether or not in the service of the Government] and belonging to any of the following classes, namely:—

- (a) gazetted officers;
- (b) stipendiary judges and magistrates;
- (c) members of the armed forces of the Union;
- (d) members of the police forces;
- (e) excise officers;
- (f) revenue officers other than village revenue officers known as lambardars, malguzars, patels, desh mukhs or by any other name, whose duty is to collect land revenue and who

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are remunerated by a share of, or commission on, the amount of land revenue collected by them but who do not discharge any police functions; and

- (g) such other class of persons in the service of the Government as may be prescribed:
- (h) class of persons in the service of a local authority, university, government company or institution or concern or undertaking appointed or deputed by the Election Commission in connection with the conduct of elections.

Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid, in the discharge or purported discharge of his official duty, makes any arrangements or provides any facilities or does any other act or thing, for, to, or in relation to, any candidate or his agent or any other person acting with the consent of /the candidate or his election agent (whether by reason of the office held by the candidate or for any other reason), such arrangements, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election;

8) booth capturing by a candidate or his agent or other person.]

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Explanation.—(1) In this section, the expression "agent" includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate.

Explanation.—(2) For the purposes of clause (7), a person shall be deemed to assist in the furtherance of the prospects of a candidate's election if he acts as an election agent * * * of that candidate.]

Explanation.—(3) For the purposes of clause (7), notwithstanding anything contained in any other law, the publication in the Official Gazette of the appointment, resignation, termination of service, dismissal or removal from service of a person in the service of the Central Government (including a person serving in connection with the administration of a Union territory) or of a State Government shall be conclusive proof—

- (i) of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, and
- (ii) where the date of taking effect of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, is stated in such publication, also of the fact that such person was appointed with effect from the said date, or in the case of

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resignation, termination of service, dismissal or removal from service, such person ceased to be in such service with effect from the said date.

Explanation.—(4) For the purposes of clause (8), "booth capturing" shall have the same meaning as in section 135A."

Section 125

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

8.2. Shri C.V. Nagesh, learned Senior Counsel contended that Section 123 comes under Chapter-I of Part-VII, which relates to Corrupt Practices and not Electoral Offences. Thus, the corrupt practices cannot be said to be an offence requiring registration of the complaint hence, the

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registration of non-cognisable complaint under the said provision is bad in law.

8.3. With the advent of democracy and the election process there have been several aspects relating to the elections, which have resulted in litigations. With the passage of time, laws have been evolved to regulate the electoral system. These electoral laws are aimed at maintaining a level playing field, so no one gets an undue advantage over the same.

8.4. Various laws over a period of time have restrained or regulated various actions on the part of the candidate or his agent or representatives. Generally speaking, any violation of these electoral laws was regarded to be corrupt practices. Essentially any corrupt practices used by the candidate to get an unfair advantage would result in disqualification of the candidate.

8.5. The Government of India Act, 1919, for the first time introduced the concept of corrupt practices, which was in essence based on the British Act of 1883, with slight modification, next came the Indian Election Offences and Enquiries Act, 1920, by virtue of which certain amendments, more particularly to Section 171 of the IPC, were brought about. Thus, starting the prosecution for corrupt practices; finally the above culminated in the Representation of People Act, 1951, which is the pre-eminent law applicable to and regulates all the aspects of an election.

8.6. The R.P. Act has distinguished any violation of the R.P. Act into corrupt practices and/or electoral offences. The difference being that for corrupt practices, any person claiming a candidate to be involved in such corrupt practices has to approach appropriate Election Commission seeking for disqualification of the

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candidate if such a candidate has resorted to using of corrupt practices during his/her election.

8.7. The electoral offences however, on the other hand being more than mere corrupt practices, would though result in disqualification, but would also entail criminal prosecution. Thus the degree of proof and/or the requirement in respect of the corrupt practices and/or electoral offences are different.

8.8. The corrupt practices are basically of eight types in terms of Section 123 of the R.P. Act, namely

8.8.1. bribery,

8.8.2. undue influence,

8.8.3. appeal on the ground of religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols,

8.8.4. the promotion of enmity, or attempt to promote feelings of enmity or hatred

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between different classes of citizens of India on grounds of basis of religion, race, caste, community or language.

8.8.5. The publication by a candidate or his agent or by any other person, with the consent of a candidate, any defamatory statement as regards the opposing candidate,

8.8.6. illegal hiring or procuring of vehicle or vessel by the candidate or his agent

8.8.7. incurring of expenses beyond the permissible limits;

8.8.8. the obtaining or procuring the services of a Government Officials during the course of election process etc.

8.9. The Electoral offences on the other hand are of higher category, namely:

8.9.1. Promoting or attempting to promote on the ground of religion, race, caste,

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community or language, feelings of enmity or hatred;

8.9.2. Filing of false affidavit;

8.9.3. Prohibition of meetings as per the electoral schedule

8.9.4. Violation of Restriction on publication and determination of exit polls;

8.9.5. Disturbances at election meetings;

8.9.6. Wrongly printing pamphlets, posters etc.,

8.9.7. Violating secrecy of voting;

8.9.8. Canvassing, disorderly conduct or misconduct at the polling station;

8.9.9. Removal of ballot papers, booth capturing; selling of liquor during election etc.

8.10. There is an overlap as regards some of the aspects between electoral offences and corrupt practices. This being so for the reason that even an electoral offence if proved would result in disqualification of the candidate in terms of corrupt practices under Sections 123 of the R.P. Act.

8.11. Section 123(2) of the R.P. Act deals with the undue influence, which requires direct or indirect interference or an attempt to interfere on the part of the candidate or his agent, with the consent of the candidate or his election agent with the free exercise of any electoral right. Provided that a threat has been held out to any candidate or an elector or any other person in whom a candidate or an elector is interested, with an injury of any kind including social ostracism and ex-communication or expulsion from any caste or community or induces such a

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candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure. Thus, Section 123(2) of the R.P. Act, there is a restrictive interpretation of undue influence, without the requirement of the proviso being fulfilled it cannot be said that there is undue influence.

8.12. Section 123(3) of the R.P. Act deals with any appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of

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that candidate or for prejudicially affecting the election of any candidate:

8.13. Section 123(3A) of the R.P. Act deals with the promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

8.14. Thus, even if a corrupt practice which is alleged against the Petitioner coming within the parameters of Sections 123(2) or 123(3) or 123 (3A) of the R.P. Act, is proved, then if the Petitioner were to be said to be an agent of the candidate or a person who is acting with the consent of the candidate or his election agent,

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then action for violation of Sections 123(2) or 123(3) or 123 (3A) of the R.P. Act would have to be taken against the candidate for his disqualification by filing a petition before the Election Commissioner in terms of Section 81 of the R.P Act read with Section 100 and 101 thereof, which are reproduced hereunder for easy reference.

“81. Presentation of petitions.—

(1) An election petition calling in question any election may be presented on one or more of the grounds specified in 3 sub-section (1) of section 100 and section 101 to the 4 [High Court] by any candidate at such election or any elector 5 [within forty-five days from, but not earlier than the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates.

Explanation: In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

[(2) Omitted by Act 47 of 1966, w.e.f. 14-12-1966]

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(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition, and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."

"83. Contents of petition.—

(1) An election petition—

- (a) shall contain a concise statement of the material facts on which the petitioner relies;
- (b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and
- (c) shall be signed by the petitioner and verified in the manner laid down in that Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the

petitioner and verified in the same manner as the petition.”

“84. Relief that may be claimed by the petitioner.—

A petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected.”

“100. Grounds for declaring election to be void.—

(1) Subject to the provisions of subsection (2) if the High Court is of opinion—

- (a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act 9 [or the Government of Union Territories Act, 1963 (20 of 1963)]; or
- (b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or
- (c) that any nomination has been improperly rejected; or
- (d) that the result of the election, in so far as it concerns a returned

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candidate, has been materially affected—

- (i) by the improper acceptance or any nomination, or
- (ii) by any corrupt practice committed in the interests of the returned candidate 1 [by an agent other than his election agent], or
- (iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or
- (iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

the High Court shall declare the election of the returned candidate to be void.

(2) If in the opinion of 2 [the High Court], a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice 4 *** but 2 [the High Court] is satisfied—

- (a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and [without the consent], of the candidate or his election agent;

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- (b) [Omitted]
- (c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and
- (d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents,

Then the High Court may decide that the election of the returned candidate is not void."

"101. Grounds for which a candidate other than the returned candidate may be declared to have been elected.—

If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the High Court is of opinion—

(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes,

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the High Court shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected.”

8.15. The R.P Act does not contemplate any action against the agent or any other person, who is acting with the consent of the candidate. As stated above, any action for violation of Section 123 of the R.P. Act leads back only to the candidate, if proved resulting in disqualification of the candidate or voiding the result of the election.

8.16. Similar provisions as under Section 123(2) and (3) of the R.P. Act are not available under Chapter III Part VII relating to Electoral Offences. There is no provision which makes a corrupt practice under Section 123(2) or (3) of the R.P. Act as an offence under the said Chapter. Thus, no criminal prosecution can be laid on account of the violation of Section 123 of

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the R.P. Act against any person. Of course, if there is any violation of a penal statute or special statute, separate prosecution could always be laid.

8.17.A perusal of Section 100 read with Section 123 of the R.P Act, would indicate that the only remedy provided, as of now, is for the election to be voided, thus though the corrupt practice may be committed by an agent or a person authorised by the candidate, the action in regard thereto can only be taken as against the candidate for having indulged in corrupt practices; the same cannot extend to the Petitioner, who at the most can be stated to be the agent or a person, who is acting with the consent of the candidate.

8.18.As can be seen from the above, Section 123 coming under the heading Corrupt Practices and there being a separate chapter for Electoral

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Offences, it cannot be said that violation of Section 123 would amount to a penal offence.

8.19. The legislature in its wisdom has categorised the Corrupt Practices and Offences differently and it is only offences under Chapter-III, Part VII, which can be said to be penal offences.

8.20. From the extracted Section 125 above, promotion of enmity between classes of people in connection with an election would amount to an offence under Section 125. Section 125 is not restricted to the candidate but extends to any person not necessarily an agent or a person acting under the instruction of the candidate. Proceedings under Section 125 is taken against that person irrespective of and dehors the connection of that person with the candidate. Thus, the action under Section 125 can be taken even against a third party, like the Petitioner, if requirements under Section 125 are satisfied

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namely such person has promoted or attempted to promote on the ground of religious, caste, community or language, feeling of enmity hatred between class of citizens of India, *sine qua non* being the promotion of enmity.

8.21. Having carefully perused and gone through the first information placed before the Investigating Officer and in turn before the Magistrate, I find that there is no allegation as regards the promotion of enmity found in the said complaint. Even if there is a mistake in registering the complaint under Section 123(3) instead of Section 125 and the ingredients of Section 125 are taken into consideration, I do not find any allegation as regards an offence as required under Section 125 having been committed.

8.22. It is trite law that if there is a violation of Section 123 or if there is a corrupt practice, the same would only result in a proceedings under the R.P.

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Act for disqualification of the candidate or for voiding the result of the election in the event of such candidate having returned successful and not for the prosecution of the candidate or his agent or a person authorised by him for any penal offence.

8.23. Hence I answer the above points by holding that:

8.24. An action on a complaint as regards violation of Section 123 of the Representation of Peoples Act, 1951 , i.e., on account of a corrupt practice being committed is limited to the candidate, resulting in his disqualification or voiding of his/her result in the event of such candidate having returned successfully.

8.25. An action for violation of Section 123 of the Representation of Peoples Act, 1951, can only be initiated against the candidate

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seeking for his/her disqualification and voiding of his/her result in the event of such candidate having returned successfully, hence no action can be taken against the agent or a person authorised by him for such corrupt practice in terms of section 123 of the Representation of Peoples Act, 1951.

8.26. Violation of Section 123 of the Representation of Peoples Act, 1951 in the present scheme of the legislation would amount to corrupt practice, providing a cause of action for filing of an election petition under Section 81 read with Section 100 and 101 of the Representation of Peoples Act, 1951; there can be penal action initiated by way of criminal prosecution.

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8.27. For initiation of Criminal prosecution, the violation complained of should come within the ambit of Chapter III part VII of the Representation of Peoples Act, 1951, in the present case at the most the allegations can be said to come under section 125 thereof, which require the establishment of promotion of enmity or hatred as a *sine qua non*, which has not been so done.

9. Point Nos.(v)

(v) Whether in the present case on the basis of the allegation made in the complaint can it be prima facie concluded that the Petitioner has committed an offence under Section 171F of the IPC by exercising undue influence on the person/s, who had gathered for election rally in terms of Section 171C of the IPC?

9.1. Sections 171F and 171C of the IPC come under Chapter-IXA, which was inserted pursuant to Amendment of IPC by Act 39 of 1920 as a

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consequence of the Indian Election Offences and Enquiries Act, 1920.

9.2. Sections 171C, 171D and 171F are reproduced hereunder for easy reference:

Sections 171C

"171C. Undue influence at elections.— (1) *Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.*

(2) *Without prejudice to the generality of the provisions of sub-section (1), whoever—*

(a) *threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or*

(b) *induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).*

(3) *A declaration of public policy or a promise of public action, or the*

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mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section.]

Sections 171D

171D. Personation at elections.—Whoever at an election applies for a voting paper or votes in the name of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election for a voting paper in his own name, and whoever abets, procures or attempts to procure the voting by any person in any such way, commits the offence or personation at an election:

[Provided that nothing in this section shall apply to a person who has been authorised to vote as proxy for an elector under any law for the time being in force in so far as he votes as a proxy for such elector.

Sections 171F

171F. Punishment for undue influence or personation at an election.—Whoever commits the offence of undue influence or personation at an election shall be punished with imprisonment of either description for a term which may

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extend to one year or with fine, or with both.

CLASSIFICATION OF OFFENCE

*Para I" Punishment-
Imprisonment for 1 year, or fine, or
both-Non-Cognisable-Bailable-
Triable by Magistrate of the first
class-Non-compoundable.*

*Para II: Punishment-
Imprisonment for 1 year, or fine, or
both-Cognisable-Bailable-Triable by
Magistrate of the first class-Non-
compoundable."*

9.3. Chapter IXA deals with offences relating to elections. Section 171F relates to punishment for undue influence or personation at an election. The same would require that the ingredients of an offence coming within the definition and meaning of undue influence in terms of Section 171C and personation in terms of Section 171D to be satisfied.

9.4. In respect of personation a person voting in the name of any other person or votes in a fictitious

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name then it is said to be personation. The offence of personation ex-facie is not involved in the present matter.

9.5. Undue influence as defined under Section 171C of the IPC is a truncated definition, much more restricted than the definition of undue influence under Section 16 of the Indian Contract Act, 1872. Thus, contrary to the normal understanding of undue influence, the restricted understanding of undue influence under Section 171C would have to be taken into consideration to verify and identify if an offence has been committed.

9.6. The exercise of undue influence in terms of Section 171C would only arise in the event of a person threatening any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind or induces or attempts to induce a candidate or voter to

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believe that he or any person in whom he is interested will become or will be rendered an object of divine displeasure or spiritual censure.

9.7. That means to say that there have to be statements made or threat given to a voter that if he were to vote in any particular manner, he may incur displeasure of the divine or censure by spiritual censure. Unless these two ingredients are satisfied, there cannot be undue influence said to be used and therefore an offence under Section 171F could not be said to be committed;

9.8. As regards undue influence, if it is to be contended that the speech of the Petitioner amounted undue influence it has to satisfy the dual requirement under Section 171C of the IPC. An ex-facie reading of the complaint does not make any allegation to satisfy the requirement of Section 171C of the IPC. Thus, when the basic requirement is not fulfilled, the criminal law

cannot be set in motion, as regards an action, which does not amount to a penal offence.

9.9. Hence I answer this point by holding that in the present case on the basis of the allegation made in the complaint it cannot be prima facie concluded that the Petitioner has committed an offence under Section 171F of the IPC by exercising undue influence on the persons who had gathered for an election rally in terms of Section 171C of the IPC.

10. Point Nos. (vi) and (vii):

(vi) What is the procedure to be followed by the Magistrate when a B-report is filed? Can a Magistrate suo moto reject the B-report without notice being ordered on the complainant?

(vii) Whether the Magistrate can suo moto take cognisance of the offence without the issuance of notice to the complainant?

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10.1. Both the points being related to each other are taken up for consideration together.

10.2. As held by the Apex Court in the cases reported in **H.S.Bains, Director, Small Saving-Cum-Deputy Secretary Finance, Punjab, Chandigarh** (supra) **and Vasanti Dubey** (supra), relevant paragraphs having been extracted hereinabove; the Magistrate had the following three options, after completion of the investigation and the Police having submitted a B-report namely:

i. If he agrees with police report, and finds that there is no sufficient ground for proceeding further, he may drop the proceeding and dismiss the complaint.

ii. He may not agree with the police report and may take cognisance of the offence on the basis of the original complaint, under Section 190(1)(a) and proceed to examine the complainant under Section 200.

iii. Even if he disagrees with the police report, he may either take cognisance at once upon the

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complaint, direct an enquiry under Section 202 and after such enquiry take action under Section 203. However, when the Police submits a final report or closure report in regard to a case which has been lodged by the Informant or complainant, the Magistrate cannot direct the Police to straightway submit the charge-sheet."

10.3. In the present circumstances, it is seen that firstly the Magistrate has not issued a notice to the complainant, let alone the examination of the complainant under Section 200 of the Cr.P.C. by recording sworn statement of the complainant, post the submission of the B report inviting the comment or statement of the Informant as regards the B report submitted.

10.4. This procedure has been enshrined in order to protect a citizen of the Country from unnecessary harassment after submission of the B-report, when a B-report has been submitted, it is generally accepted. It is only in exceptional cases, where the B-report has been filed and the

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complainant is not agreeable to the B-report that the enquiry is conducted under Section 200 of Cr.P.C.; in a proceedings pertaining to non-cognisable offences, the station house officer is not entitled to take cognisance of the non-cognisable offence, it is only on being directed by the jurisdictional Magistrate that he conducts an investigation to enquire as to whether there is prima facie offence made out; once the investigation leads an adverse report in terms of no offence having been made out, it is only the complainant, who can find fault with such investigation or B-report and requests the Magistrate to continue with the matter on the basis of the complaint filed by finding out defects in the investigation and/or by establishing otherwise that there is a prima facie case made out for the prosecution of the accused. In the present case, no notice was issued to the complainant, the Magistrate has rejected B-

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report without anyone objecting to the B-report and has taken cognisance of the alleged offence suo moto, such a procedure is neither contemplated nor sanctioned under the provisions of Criminal Procedure Code.

10.5. The Hon'ble Apex Court has in the aforesaid decisions clearly stated about the procedure to be followed in order to safeguard the interest of parties; these safeguards not having been followed by the Magistrate, the rejection of the B-report and taking cognisance of the offences without service of notice on the complainant and/or objection on the part of the complainant is not sustainable.

10.6. Be that as it may. Even if the complainant filed objections or questioned the B report, for the Magistrate to take cognisance of offences, there should be an offence prima facie made out under

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Section 125 of the R.P. Act or Section 171F of IPC.

10.7. As held above, no criminal prosecution can be laid for violation of Section 123 of the R.P. Act. As answered to the points above, I am of the considered opinion that the complaint as such does not make out any case under Section 125 of the R.P. Act or Section 171F of IPC. Thus the question of setting the criminal law into motion on the basis of the complaint which does not prima facie make out an offence, is not sustainable.

10.8. I answer the above points by holding that

10.9. On the filing of the B report, the Magistrate is required to notify the Informant/Complainant about the same. It is only if the Informant opposes or objects to the B report that the

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Magistrate can record the sworn statement of the Informant. If the sworn statement were to establish defects in the investigation, the Magistrate may set aside the B report and proceed with the case after taking cognisance.

10.10. A Magistrate cannot *suo moto* reject the B-report without notice being ordered on the complainant.

10.11. A magistrate can reject the B-report only if the sworn statement of the Informant were to prima-facie make out an offence having been committed by the Accused.

10.12. A Magistrate cannot *suo moto* take cognisance of the offence without the issuance of notice to the complainant.

11. Point No.(viii):

(viii) *What is the procedure to be followed by the Magistrate before*

issuance of summons to an accused who is not residing within its jurisdiction?

11.1. Sri.C.V.Nagesh, learned Senior Counsel submitted that insofar as the accused residing outside the jurisdiction of the Magistrate Court, the Magistrate ought not to have ordered for issuance of the summons without holding an enquiry in terms of Section 202(1), more particularly in view of the Cr.P.C Amendment Act, 2005.

11.2. In the event of issuance of process against an accused residing beyond the area in which the Magistrate exercises his jurisdiction, the Magistrate is to postpone the issuance of such process against the said accused and enquire into the case himself and/or direct the investigation to be made by a police officer or by such other person as he thinks fit for the

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purpose of deciding whether or not there is sufficient ground for proceeding.

11.3.No such summons could be issued without first examining the complainant and his witness if any on oath in terms of Section 200 of the Cr.P.C. Since in the present case, the Petitioner is not resident within the territorial jurisdiction of the Magistrate, the above procedure ought to have been complied with.

11.4.The registration of complaint and issuance of summons to the accused is violative of Section 202(1) and 202(1) proviso (b) of the Cr.P.C.

11.5.The question that would arise in regard to the above contention is what is the enquiry that the Magistrate would have to conduct. There would have to be an order passed under Section 202(1) of the Cr.P.C. to indicate as to why process is being issued by the Magistrate to an accused who is not residing within the jurisdiction of that

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Court and for this purpose, sworn statement of the complainant as also the affidavit evidence if any of the complainant's witnesses could be recorded leading to an order by the Magistrate based on his satisfaction that there are sufficient grounds for issuing summons to such accused residing outside its jurisdiction. Such order not having been passed by the magisterate, the summons could not have been so issued. Point No.(viii) is answered accordingly.

12. Point No.(ix):

(ix) Whether the Magistrate could have at the stage of taking cognizance relied upon the video recording in a compact disk, without it being accompanied by a certificate under Section 65-B of the Indian Evidence Act?

12.1. Shri C.V. Nagesh, learned Senior Counsel submitted that the compact disk could not have been referred to by the Magistrate in the

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absence of a certificate under Section 65-B of the Indian Evidence Act, relying upon the decision of the Apex Court in the case of **Arjun Panditrao Khotkar** (Supra), relevant paragraphs having been extracted hereinabove.

12.2.A reading of the entire decision of the Hon'ble Apex Court in the above matter would indicate that the electronic document cannot be considered to be evidence during trial without a certificate under Section 65-B of the Indian Evidence Act, being accompanied with it. In the present case, admittedly there is no trial, which has commenced. Thus, there would be no requirement of Section 65-B certificate at the stage of examination by the Magistrate whether to take cognisance or not, a Magistrate can always look into any electronic evidence, even if unaccompanied by a certificate under Section 65-B of the Indian Evidence Act for the purpose

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of taking cognisance or not of an offence. Hence, the submission made by Shri C.V. Nagesh in this regard is rejected.

13. Point No.(x):

(x) *Is this is a fit and proper case for this Court to interfere in the order passed by the Magistrate under Section 482 of Cr.P.C.?*

13.1. In the light of the above, it cannot be said that violation of Section 123 of the R.P. Act would require the initiation of criminal prosecution, no allegation or offence in terms of Section 125 within Chapter-III of Part-VII of the R.P. Act, 1951 is made out. The ingredients of the offences under Section 171C and 171F of the IPC have also not been made out. Hence, prima facie there is no offence, which can be said to have been committed by the Petitioner requiring prosecution. Of course, this does not prevent

any action to be taken against the candidate for violation of Sections 123 of the R.P. Act.

14. Hence, I summarise the findings as follows:

14.1. When a complaint has been lodged and/or information furnished of an offence to a Station House Officer, the Station House Officer cannot himself seek for permission to investigate a non-cognisable offence, unless he is the first Informant.

14.2. It is only the informant/complainant, who is to seek permission for investigation from the Magistrate.

14.3. The Informant being present before the Magistrate when an order directing investigation is passed and having been examined the requirement under Section 155 (1) are satisfied.

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14.4. There would be no need for recording of a sworn statement of the Informant if the Informant were to be a public servant acting or purporting to act in the discharge of his official duties.

14.5. An action on a complaint as regards violation of Section 123 of the Representation of Peoples Act, 1951, i.e., on account of a corrupt practice being committed is limited to the candidate, resulting in his disqualification or voiding of his/her result in the event of such candidate having returned successfully.

14.6. An action for violation of Section 123 of the Representation of Peoples Act, 1951, can only be initiated against the candidate seeking for his/her disqualification and voiding of his/her result in the event of such

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candidate having returned successfully, hence no action can be taken against the agent or a person authorised by him for such corrupt practice in terms of section 123 of the Representation of Peoples Act, 1951.

14.7. Violation of Section 123 of the Representation of Peoples Act, 1951 in the present scheme of the legislation would amount to corrupt practice, providing a cause of action for filing of an election petition under Section 81 read with Section 100 and 101 of the Representation of Peoples Act, 1951; there can be no penal action initiated by way of criminal prosecution.

14.8. For initiation of Criminal prosecut/-ion the violation complained of should come within the ambit of Chapter III part VII of the

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Representation of Peoples Act, 1951, in the present case at the most the allegations can be said to come under section 125 thereof, which require the establishment of promotion of enmity or hatred as a *sine qua non*, which has not been so done.

14.9. In the present case on the basis of the allegation made in the complaint it cannot be prima facie concluded that the Petitioner has committed an offence under Section 171F of the IPC by exercising undue influence on the person/s who had gathered for an election rally in terms of Section 171C of the IPC.

14.10. On the filing of the B report, the Magistrate is required to notify the Informant/Complainant about the same. It is only if the Informant opposes or objects to the B report that the Magistrate can record

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the sworn statement of the Informant. If the sworn statement were to establish defects in the investigation, the Magistrate may set aside the B report and proceed with the case after taking cognisance.

14.11. A Magistrate cannot *suo moto* reject the B-report without notice being ordered on the complainant.

14.12. A magistrate can reject the B-report only if the sworn statement of the Informant were to prima-facie make out an offence having been committed by the Accused.

14.13. A Magistrate cannot *suo moto* take cognisance of the offence without the issuance of notice to the complainant.

14.14. A Magistrate would have to pass an order under Section 202(1) of the Cr.P.C. to

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indicate as to why process is being issued by the Magistrate to an accused who is not residing within the jurisdiction of that Court and for this purpose, sworn statement of the complainant as also the affidavit evidence if any of the complainant's witnesses could be recorded leading to an order by the Magistrate based on his satisfaction that there are sufficient grounds for issuing summons to such accused residing outside its jurisdiction.

14.15. There would be no requirement of Section 65-B certificate at the stage of examination by the Magistrate whether to take cognisance or not, a Magistrate can always look into any electronic evidence, even if unaccompanied by a certificate under Section 65-B of the Indian Evidence Act for

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the purpose of taking cognisance or not of an offence.

15. In the result I pass the following order

15.1.The complaint dated 26.11.2019, registered in C.C.No.1065/2020 for the alleged offences under Section 123(3) of the Representation of the People Act, 1951 (for short "the R.P. Act") as also under Section 171F of the India Penal Code (for short "the IPC"), pending on the file of the Pri. JMFC Court, Gokak is hereby Quashed.

15.2.The order of taking cognisance and issuance of summons by order dated 26.06.2020 Pri. JMFC Court, Gokak is hereby Quashed

15.3.The entire and all further proceedings in C.C.No.1065/2020 pending on the file of the Pri. JMFC Court, Gokak is hereby Quashed.

SD/-
JUDGE

Vnp*