03.12.2019

In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side

W.P. No.21526 (W) of 2019

Sanmay Banerjee
Vs.
State of West Bengal and others

Mr. Bikash Ranjan Bhattacharya,
Mr. Kallol Basu,
Mr. Samim Ahmed,
Mr. Sabyasachi Chatterjee,
Mr. Sourav Mondal,
Mr. Pintu Karar,
Mr. Akashdeep Mukherjee,
Ms. Saloni Bhattacharya,
Mr. R. Singh,
Ms. Debolina Sarkar,
Mr. Koustav Bagchi.
…for the petitioner.

Mr. Sirsanya Bandhopadhyay,
Mr. Arka Kumar Nag.
…for the State.

The petitioner claims to be a freelance journalist and a whistleblower, who runs two vernacular newspapers and YouTube channels. It is the contention of the petitioner that due to his exposure of corruption in political quarters, he has earned the wrath of the ruling party and has been constantly subjected to threats. The cause of action of the present writ petition arose when the petitioner was allegedly picked up

around 7.30-7.45 p.m. on October 17, 2019 without any prior notice, by the Officer-in-Charge of the Khardah Police Station, along with hoodlums of the local ruling party, and was subjected to tremendous torture within the precincts of the Khardah Police Station and mercilessly beaten up the petitioner against all established norms of human rights. Ultimately, the petitioner was taken into custody by the Purulia District Cyber Crime Police Station at around 4.30 a.m. and purportedly arrested in connection with Purulia District Cyber Crime Police Station Case No. 2 of 2019 dated September 23, 2019 under Sections 465/469/500/504/505(1)(b) of the Indian Penal Code, 1860 (hereinafter referred to as "the IPC"), read with Section 66 of the Information Technology Act, 2000 (hereinafter referred to as "the IT Act").

During interrogation, the petitioner was allegedly asked to admit that he had manipulated and manufactured documents, including some forged appointment letter issued by the West Bengal Board of Primary Education. The Inspector-in-Charge of the Khardah Police Station, it is alleged, took the lead role in perpetrating torture upon the petitioner, which will easily be revealed from the CCTV footage of the Khardah Police Station of the relevant date.

Although the petitioner was produced ultimately before the Chief Judicial Magistrate, Purulia on October 18, 2019, the bail application of the petitioner was rejected and October 20, 2019 was fixed as the date for production of the petitioner. On the latter date, the Chief Judicial Magistrate granted bail to the petitioner. According to the petitioner, he had to be admitted to a hospital under acute mental and physical condition after his release on bail and had to be treated in the hospital till November 3, 2019.

Learned senior counsel appearing for the petitioner argues that the sections under which the petitioner was allegedly booked were either non-cognizable or bailable or both, in which case the police cannot initiate investigation on their own, without an order of the competent Magistrate. Most of the charges were also unrelated to the acts alleged to have been done by the petitioner.

It is next argued that no notice under Section 41A of the Code of Criminal Procedure (hereinafter referred to as "the CrPC") was issued by the Khardah police station, whereas a notice under the said provision had been served upon the petitioner by the Nandigram Police Station for a similar case against the petitioner.

By placing reliance upon the judgment of *Arnesh Kumar vs. State of Bihar and another*, reported at *(2014) 8 SCC 273*, it is submitted that the said judgment stipulated inter alia that a notice of appearance in terms of Section 41A of the CrPC has to be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for reasons to be recorded in writing, in case of offences having punishment of less than seven years of imprisonment. Moreover, it was held that failure to comply with the directions aforesaid shall, apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court, to be instituted before the High Court having territorial jurisdiction.

It was further held that authorizing detention without recording reasons by the Judicial Magistrate shall also be liable for departmental action by the appropriate High Court. It was further added that the directions given therein shall not only apply to the cases under 498A IPC of Section 4 of the Dowry Prohibition Act, as in that case, but also such cases where offence is punishable with imprisonment for a

term which may be less than seven years or which may extend to seven years, whether with or without fine.

Learned senior counsel for the petitioner next argues that the FIR was registered on the basis of a complaint lodged by the Assistant Public Prosecutor of the Raghunathpur Court, who was in no way connected with the allegations made. The nature of the allegations revolved around alleged forgery and cyber crimes, although the persons against whom such offences were alleged to have been committed, did not come forward to lodge any complaint. Certain offences pertaining to inciting the public against the State were also clubbed with other charges in the complaint, merely because there was criticism of the Chief Minister, other Ministers and a Member of Parliament, although none of them lodged any complaint in that regard. It is argued that the Assistant Public Prosecutor of Raghunathpur had no *locus standi* to lodge the complaint at all, particularly regarding forgery of documents and regarding the statements made in the petitioner's YouTube channels being incorrect.

Although Ministers have certain privileges under the law, Members of Parliament do not have such privileges, in any event, according to the petitioner.

That apart, it is argued that the acts of the police were in patent violation of human rights.

Moreover, the FIR, on the face of it, ought to be quashed, since none of the offences could be investigated in law by the police of their own and most of those offences alleged were, in any event, *ex facie* not applicable to the acts of the petitioner as complained of.

Learned senior counsel for the petitioner cites a judgment reported at *(2017) 11 SCC 731 [Common Cause and others vs. Union of India and others],* which, in turn, relied on *State of Haryana and others vs. Bhajan Lal and others [(1992) Supp (1) SCC 335].* In the said judgments, the circumstances and principles regarding quashing of FIRs were discussed. Based on the said judgments, learned senior counsel submits that where the allegations made in the FIR or the complaint, even if taken at their face value and accepted in their entirety, do not *prima facie* constitute any offence or make out a case against the accused, the FIR can be quashed.

The same principle applied to allegations in the FIR and other materials accompanying the FIR if those did not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the CrPC, except

under an order of a Magistrate within the purview of Section 155(2) of the CrPC.

Where the uncontroverted allegations made in the FIR or complaint, and the evidence collected in support of the same, do not disclose the commission of any offence and make out a case against the accused or where the allegations in the FIR constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the CrPC.

The same principles for quashing of FIR also applies to situations where the allegations made in the FIR were so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused. Where a criminal proceeding is manifestly attended with mala fides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, the FIR ought to be quashed.

In the present case, it is submitted, the petitioner was the victim of a political vendetta since the petitioner had

rubbed up functionaries of the State Government the wrong way.

It is further argued that the Fundamental Right of the petitioner of freedom of speech and expression, as engrafted in Article 19(1)(a) of the Constitution of India, was squarely violated by the action of the police and as such, the FIR ought to be quashed and necessary action ought to be taken against the alleged perpetrators of the criminal action against the petitioner. Relying on a judgment of a co-ordinate bench of this court reported at *2012 SCC OnLine Cal 8661 [Tamalika Ponda Seth vs. State of West Bengal & Ors.]*, learned senior counsel submits that in the event the FIR disclosed no offence, the same could be stayed as an interim measure.

In reply, learned counsel for the respondents/authorities argues that the investigation is still at a nascent stage and ought not to be stayed at this premature juncture. It is argued that there are several safeguards available to the petitioner under the CrPC, such as Section 173(3), which permits further investigation, Section 216, under which the court can alter the charges, Section 221, which provides for measures in case it is doubtful as to what offence has been committed and Section 222, as regards the reduction of offences to minor ones upon

investigation, all of which provide sufficient relief to the petitioner even at the stage of further investigation.

As such, it would be premature to stay the investigation altogether at this initial stage, which would give an undue boost to the illegal activities of the petitioner and would prevent the police from gathering sufficient evidence and conducting a proper investigation in the matter.

It is further argued on behalf of the respondents-authorities that the petitioner was produced before the concerned Judicial Magistrate and his bail was refused at first and subsequently granted. As such, the detention of the petitioner was not unlawful.

Arnesh Kumar (supra), it is argued, was rendered in connection with an anticipatory bail matter and there was no question of detention. As such, the guidelines laid down therein do not apply to the present case, where there was an order by the Magistrate subsequent to detention, sanctioning such detention further.

It is also sought to be established by learned counsel for the respondents-authorities that paragraph no. 8.2 of *Arnesh Kumar (supra)* itself provides for the Magistrate

passing an order sanctioning continuance of detention beyond 24 hours, which was done in the present case.

It is further argued that the order under Section 167, CrPC, passed by the Magistrate for further detention of the petitioner, was never challenged at any point of time and has attained finality.

It is to be presumed that the judicial power conferred on the Magistrate under Section 167 of the CrPC was exercised only after proper satisfaction as regards due compliance in all regards, including prior notice to the petitioner.

Learned counsel for the respondents-authorities submits that the petitioner's argument as to applicability of Article 144 of the Constitution of India, by virtue of which all authorities are to act in aid of the Supreme Court's directives, is not squarely applicable in the matter.

It is further argued that *Arnesh Kumar (supra)* also contemplated criminal contempt and not a civil contempt, for which appropriate steps could have been taken by the petitioner, but have not. The petitioner, under Article 226, cannot pray for such a relief. In this context, learned counsel places the provisions of Sections 2(c) and 2(d) to distinguish

between a criminal and a civil contempt. It is further argued that the form prescribed for criminal contempt applications, as provided in the Rules of this court, have not been followed in the present case. Moreover, it is argued, the petitioner, if so keen to punish the police officer concerned, ought also to have sought for a departmental enquiry against the Magistrate concerned, but deliberately did not do so for reasons best known to the petitioner.

Relying upon paragraph no. 11.6 of the *Arnesh Kumar (supra)*, it is submitted that a notice under Section 41A of the CrPC was to be served under the said paragraph. In the present case, however, the notice was repeatedly sought to be served on the petitioner but was eluded by the petitioner under various pretexts. As such, the issuance of the said notice ought to be deemed sufficient service in the peculiar facts of the case, thus rendering the argument of the petitioner as regards non-compliance of Section 41A, CrPC fruitless.

In conclusion, learned counsel for the respondents-authorities submits that, in the event the writ petition is not dismissed but entertained and/or any interim protection is granted to the petitioner, the respondents-authorities shall use an affidavit-in-opposition to controvert the facts alleged

in the writ petition and to bring the necessary documents on record.

The first feature of the present case, which defies logic, is that the complainant, on the basis of whose allegations the FIR-in-question was registered, was in no way connected with the alleged offences, nor the victim of any of those. The complainant was an Assistant Public Prosecutor of the State in the Raghunathpur Court.

A bare perusal of the offences with which the petitioner was charged shows that all offences under the IPC were non-cognizable offences, apart from Section 469 of the IPC, which was cognizable but bailable. As such, the police could not, of its own, commence investigation on any of such allegations.

That apart, a bare perusal of the sections mentioned in the FIR reveals that those do not stand a moment's scrutiny, at least on the complaint of the Assistant Public Prosecutor, who was in no way connected with the matter.

The first charge slapped on the petitioner was under Section 465 of the IPC, which pertains to commission of forgery. The next offence alleged, under Section 469 of the IPC, pertains to forgery being committed, intending that the

document or electronic record forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose.

It is evident that, by merely viewing the YouTube channels-in-question, the complainant could not have any idea about whether the document shown therein were forged or forged for the purpose of harming the reputation of anybody. The complaint lodged does not indicate any basis whatsoever for the wild apprehension of the complainant that such documents were forged.

As far as Section 500 of the IPC is concerned, the same relates to defamation of another and is even compoundable by the person defamed, if she/he agreed to have the charge dropped against the accused. Section 504 of the IPC provides about intentional insult with the intent to provoke breach of the peace. Such insult has to be intentional, giving provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence.

Pertaining to both the aforesaid sections, being Sections 500 and 504, the persons against whom the defamation or the insults were allegedly committed, have

not come up with any allegation whatsoever in that regard. It begs explanation as to how the Assistant Public Prosecutor of the Raghunathpur Court could have an inkling of an idea as to whether the statements were perceived to be defamatory by the recipients of such alleged defamatory statements or insults, or would cause the victims of the acts to break public peace or commit any other offence.

No basis for such bald allegation has also been disclosed in the complaint.

Next taking into consideration Section 505(1)(b) of the IPC, which is one of the other provisions under which the investigation was apparently started by the police, the same relates to publication or circulation of any statement, rumor or report with intent to cause, or likely to cause fear or alarm to the public, or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility.

It is not clear at all as to how the criticism of the State Government and its functionaries and a Member of Parliament could be deemed to be publication of a statement likely to cause fear or alarm to the public at all, let alone

whereby such person may be induced to commit an offence against the State or against the public tranquility.

In this context, it has to be noted that there is a common misconception of identifying the 'State' with the 'Government'. This may be a fallout of the failure of the Indian polity to implement the Constitutional vision as to separation of powers between the three wings of the Government, in particular among the Legislature and the Executive.

'State', as commonly understood, is a body or association of people which comprises a polity and is an independent political entity having sovereignty. There may be different forms of governance in running the State. However, unlike the political fiction of a 'State', generally having geographical boundaries, a Government is a dispensation which runs the bureaucratic administration of the State at a particular point of time and cannot be identified with the State itself.

Particularly in a multi-party democracy like India, it is often seen that the ideologies of political parties in control of the State machinery acquire pre-dominance over the actual will of the public, although on paper elected representatives

of the people run the Government. As such, it would be an infinitely risky proposition to equate the State with the Government in power, since that would be the very antithesis of a democracy.

The people always have a right to criticize the dispensation running the administration of the country, being the Government or the Executive. Even the Judiciary and the Legislature are not exempt from fair criticism. That is what the freedom of speech and expression, as enshrined in the Constitution, is all about.

However, to say that transmission made in a website channel, making certain allegations against some persons, who happen to be Ministers or Members of Parliament, does not and cannot tantamount to a publication or circulation of a statement instigating people to commit an offence against the 'State' or against the 'public tranquility'. Such allegations are of personal nature and, if aggrieved, the persons concerned could very well have approached the police authorities with legitimate complaints. In the absence of any such complaint by the said persons, it would be attributing to the said functionaries of the Government or a Member of Parliament the sovereignty associated with the concept of

'State', which was never contemplated by the framers of the Constitution or law-makers.

In fact, it is criticism which helps in good governance and keeps a leash on public functionaries, providing a touchstone for the Executive to test the worth of their public endeavours.

In such view of the matter, the inclusion of Section 505(1)(b) of the IPC in the FIR is *ex facie* not maintainable.

As regards Sections 500 and 504 of the IPC, those relate to defamation against particular persons and insults made to particular persons knowing that the person is likely to break public peace or to commit any other offence.

No ingredient in the acts of the petitioner, as alleged in the complaint and FIR, satisfies the criteria of Sections 500 and 504 of the IPC. As such, there is no basis to the allegations of defamation or intentional insult, as envisaged in Sections 500 and 504, in the complaint, on the basis of which the police started investigation.

Taking into account Sections 465 and 469, the question of the complainant having direct knowledge or even indirect information about any forgery being committed, merely on perusal of a video clipping on a social media, is incredible to

even the most gullible among us. Such allegations are baseless, in so far as they relate to forgery of documents which the complainant did not even have the scope of going through. The complaint did not even disclose any basis of the complainant's source of knowledge, or reasons for apprehension, as to the documents shown on the petitioner's social media channels being forged.

Hence, all the offences under the IPC, on which investigation was started against the petitioner, were *ex facie* baseless and could not be the ground of a valid First Information Report.

As regards Section 66 of the IT Act, the said section is restricted in operation to a person dishonestly or fraudulently doing any act referred to in Section 43 of the said Act and does not go any further.

Section 43 of the IT Act entirely revolves around any person, without permission of the owner or any other person in charge of a computer, computer system or computer network, committing the offences as mentioned therein. Such offences are in the nature of unauthorized access, causing damage, disruption of the system or preventing access to the system and/or destruction or deletion of

information as well as stealing or concealing any computer source code used for a computer resource with an intention to cause damage.

Section 43 is in no way connected with the nature of the offences alleged in the present case, since admittedly, the petitioner was using his own equipment to run his social media channels. As such, Section 66 of the IT Act could not be attracted under any stretch of imagination.

That apart, as already discussed, the police did not have any authority to start investigation independently on such allegations, since all of them were either non-cognizable or bailable or both.

On the other aspect of the matter, as regards the concerned Magistrate having granted permission for detention of the petitioner beyond 24 hours under Section 167 of the CrPC, learned counsel for the respondents-authorities seeks to impress upon the court that, since the said order was never challenged, the same has attained finality and as such, the present writ petition is not maintainable at this juncture, since it should be presumed from such order that the police followed due procedure of law.

However, the present writ petition is not confined to mere technical violations of provisions of law but to an assault on democratic rights of the petitioner as well. The Fundamental Right of freedom of speech and expression, as guaranteed by the Constitution of India under Article 19(1)(a), was prima facie thoroughly violated by the over-action of the police in the present case. Such suspicion gains momentum all the more because all the persons, against whom the allegations were made allegedly in the social media channels, belong to the ruling dispensation of the State of West Bengal and/or the political party running such dispensation. Hence, it is rather peculiar that the police sprang into action and nabbed the petitioner without complying with Section 41A of the CrPC without any instigation and without having any jurisdiction, on the face of it, to commence investigation of its own.

Subsequent extension of the period of detention by a Magistrate cannot retrospectively validate an erroneous act of the police in starting the investigation in the first place and registering the FIR at all. The Magistrate's order under Section 167 of the CrPC was at best final as regards the extension of the period of detention and could not be binding on any court any further than such limited scope.

Merely because the order of the Magistrate extending the period of detention was not challenged, it does not mean that the same lends credence or vindicates the commencement of investigation and registration of FIR against the present petitioner.

As regards the argument made, that this is only a nascent stage of the investigation and it would always be open to the courts and other authorities, if necessary, to alter the charges or attribute minor offences in place of the major offences alleged in the FIR, although learned counsel for the respondents-authorities is correct in submitting that Sections 173(3), 2016, 221 and 222 permit further investigation, for the court to alter the charges and for the remission of the offences to minor ones, all of those powers are based on the premise that the investigation started was legitimate and lawful at its inception.

The argument, that the investigation is in a nascent stage, is fallacious on the ground that the said subsequent powers to alter the offences while submitting the charge-sheet or punishing the alleged offender, do not vindicate retrospectively the erroneous commencement of the investigation itself. In the event it is found on the face of it that the commencement of the investigation was beyond the

jurisdiction of the police and was based on entirely fictitious and baseless allegations, there cannot arise any question of the investigation proceeding even for a moment, since the investigation was bad *ab initio.* Subsequent damage control exercises under the quoted provisions would be a mere autopsy after the damage was already done by subjecting a free citizen of India to unnecessary investigation and torture, unlawfully restraining him and putting at stake her/his personal liberty and freedom of speech and expression at the drop of a hat.

The other contention raised by learned counsel for the respondents-authorities, as to *Arnesh Kumar (supra)* being only applicable in cases of anticipatory bail, falls flat on a meaningful reading of the said judgment and its ratio. Although *Arnesh Kumar (supra)* emanated from a case of anticipatory bail, clause 11 and its sub-clauses of the judgment make it clear that the endeavour of the Supreme Court in the said judgment was to ensure that police officers do not arrest the accused unnecessarily and the Magistrate does not authorize detention casually and mechanically. Only in order to ensure such observations, the directions given in *Arnesh Kumar (supra)* find their proper context. Such directions covered all offences, as mentioned in Clause 12 of

the judgment, which are punishable with imprisonment for a term less than seven years or which may extend to seven years, whether with or without fine. The principle laid down in the sub-clauses of clause 11 of *Arnesh Kumar (supra)* make it very clear that those relate to instructions by the State Governments to their police officers not to automatically arrest, and for the police officers to be provided with a check-list containing the specified sub-clauses under Section 41(1)(b)(ii). Clause 11.6 categorically provides that notice of appearance in terms of Section 41A CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for reasons recorded in writing. Failure to comply with such directions, as per clause 11.7 of the judgment, apart from rendering the police officers concerned liable for departmental action, also makes them liable to be punished for contempt of court, to be instituted before the High Court having territorial jurisdiction.

The argument of the respondents-authorities as to attempts having been made to serve a notice under Section 41A of the CrPC on the petitioner, which should satisfy the tests laid down in *Arnesh Kumar (supra)*, cannot be accepted

in view of clause 11.6 of the said decision contemplates 'service' of such a notice and not 'attempts to serve'.

The argument, that the present writ petition is not in the proper form of a contempt application as contemplated in the Rules of this court, being in the nature of criminal contempt, is neither here nor there, since, in the event ingredients of contempt are found, there is no bar for the court to take up the matter by converting the same to a contempt petition as well.

The other argument, that the petitioner has not complied with clause 11.8, for taking departmental action against the Judicial Magistrate, who authorized detention without recording reasons, does not hold water since that was not a mandatory pre-condition for the petitioner approaching this court under Article 226 of the Constitution for getting appropriate reliefs. It was the choice of the petitioner, for the time being at least, not to take such action against the Judicial Magistrate, which does not *ipso facto* absolve the police authorities from their illegal action in detaining the petitioner on frivolous grounds, that too on the complaint of a person who, on the face of it, could not have any direct knowledge of the allegations made, more so since the allegations were baseless on the face of it and were not

even maintainable against the petitioner in the context of the petitioner's actions, on the basis of which such offences were alleged.

Moreover, the action of the police in the present case appears to be patently mala fide and reeks of political rather than legal motivation, in view of all the persons who were alleged to be victims of the petitioner's act in the complaint belonging to the present ruling dispensation of the state and the complaint being lodged by an Assistant Public Prosecutor of the Raghunathpur court, who ought not to be affected in any manner with, or even any basis of knowledge of, the offences alleged, particularly those of forgery, unless the complainant perceived an allegiance owed by him to his political nominators.

Since counsel for both sides painstakingly advanced detailed arguments even on the prayer for interim protection, this court had no other option but to go into such a detailed discussion, as made above. However, it is made clear that the findings made in this order are tentative as far as the final disposal of the present writ petition is concerned and are only made for the purpose of deciding on the ad interim prayer and the *prima facie* maintainability of the writ petition.

In the circumstances as discussed above, W.P. No.21526(W) of 2019 is directed to be enlisted under the heading "For Hearing" in the monthly list of January, 2020. The respondents are directed to file their affidavit(s)-in-opposition within a fortnight from date. Reply/replies, if any, shall be filed within January 3, 2020.

During pendency of the writ petition, the respondents-authorities are restrained from acting upon and/or taking any coercive measure against the petitioner on the basis of the impugned FIR, annexed as Annexure P1 at page 42 of the instant writ petition and the connected complaint, annexed immediately thereafter, both dated September 23, 2019. The operation of the said complaint and the FIR shall remain stayed till disposal of the writ petition.

That apart, the respondents are directed to preserve and secure the entire CCTV footage of the Khardah police station from 12 Noon of October 17, 2019 till 12 Noon of October 18, 2019 for production, if necessary, before this court as and when called for, also during pendency of the writ petition.

Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)