



Reserved on : 09.09.2024
Pronounced on : 27.09.2024

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 27TH DAY OF SEPTEMBER, 2024

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

CRIMINAL PETITION No.7526 OF 2024

BETWEEN:

SRI BASANAGOUDA R. PATIL (YATNAL)
S/O RAMANAGOUDA PATIL
AGED ABOUT 60 YEARS
OCC: MLA, VIJAYAPURA CONSTITUENCY
R/AT OLD IB, STATION ROAD
VIJAYAPURA – 586 101, KARNATAKA.

ALSO AT
R/AT SINDAGI ROAD
MAHAL AINAPUR, AINAPURA BIJAPUR
KARNATAKA – 586 104.

... PETITIONER

(BY SRI VENKATESH P. DALWAI, ADVOCATE)

AND:

SRI SHIVANANDA S. PATIL
S/O SIDRAMAPPA PATIL
AGED ABOUT 63 YEARS
OCC: MLA
ADDRESS: NEAR JAMKHANDI CROSS
OPPOSITE TO PETROL PUMP
JAMKHANDI ROAD
VIJAYAPURA – 586 101.

... RESPONDENT

(BY SMT. NIVEDITHA C. SHIVANAİKAR, ADVOCATE)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C/528 OF BNSS PRAYING TO SET ASIDE THE ORDER DATED 16.07.2024 PASSED BY THE LEARNED 42ND A.C.J.M BENGALURU IN PCR NO.9136/2024 PRODUCED AT ANNEXURE-A.

THIS CRIMINAL PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 09.09.2024, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

CORAM: THE HON'BLE MR JUSTICE M.NAGAPRASANNA

CAV ORDER

The petitioner is before this Court calling in question an order dated 16-07-2024 passed by the 42nd Additional Chief Judicial Magistrate, Benagluru in P.C.R. No.9136/2024.

2. Heard the learned counsel Sri. Venkatesh P. Dalwai, appearing for the petitioner and the learned counsel Smt. Niveditha C. Shivanaikar, appearing for the respondent.

3. *Sans* details, facts in brief, germane are as follows:

The respondent - a member of the legislative assembly registers a complaint against the petitioner before the jurisdictional Magistrate invoking Section 223 of the Bharatiya Nagarika Suraksha Sanhita, 2023 ('BNSS' for short). The crux of the complaint is, the

petitioner allegedly made a defamatory speech at an election rally. The issue in the *lis* at this juncture does not concern the merit of the complaint or its defence by the parties to the present *lis*. What has driven the petitioner to this Court in the subject petition is, a unique circumstance of interpretation of Section 223 of the BNSS.

4. Learned counsel Sri Venkatesh P Dalwai appearing for the petitioner would submit that the petition itself is preferred owing to a procedural aberration by the learned Magistrate. It is his contention that under Section 223 of the BNSS, the concerned Court has to issue notice to the accused prior to taking of cognizance. The Court has issued notice the moment complaint is filed by the respondent before the concerned Court. He would submit that this procedure is contrary to law.

5. Learned counsel appearing for the respondent would refute the submission by contending that the proviso to Section 223 of the BNSS mandates that prior to taking of cognizance the accused would be heard and it is nowhere said that notice should be issued only at a particular time either immediately

after filing the complaint or recording of sworn statement, as the case would be. He would seek dismissal of the petition.

6. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

7. The registration of the private complaint for offences punishable under Section 356(2) of the BNSS is not in dispute. The fulcrum of the complaint was that the petitioner made a defamatory speech against the respondent at an election rally. The issue that is brought before the Court, at this juncture, is not on the merit of the matter. The complaint is filed by the respondent invoking Section 223 of the BNSS, which is Section 200 in the earlier regime - Cr.P.C. The moment complaint is registered, a notice is issued to the accused. Issuance of notice to the accused has driven the petitioner to this Court, in the subject petition, contending that it is contrary to the procedure to be adopted in law. Therefore, it becomes germane to notice certain provisions of the BNS 2023. Filing of the private complaint is dealt with under

Section 223 of the BNSS, which was Section 200 of Cr.P.C., it reads as follows:

"223. Examination of complainant.—(1) A Magistrate having jurisdiction while taking cognizance 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 no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard:

Provided further 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 212:*

Provided also that if the Magistrate makes over the case to another Magistrate under Section 212 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

(2) A Magistrate shall not take cognizance on a complaint against a public servant for any offence alleged to have been committed in course of the discharge of his official functions or duties unless—

(a) such public servant is given an opportunity to make assertions as to the situation that led to the incident so alleged; and

(b) a report containing facts and circumstances of the incident from the officer superior to such public servant is received."

(Emphasis supplied)

Proviso to sub-section (1) of Section 223 of the BNSS mandates that a Magistrate while taking cognizance of an offence, on a complaint, shall examine upon oath, the complainant and the witnesses present if any and reduce it into writing. The proviso further mandates that no cognizance of an offence shall be taken by the Magistrate without giving an opportunity to the accused of being heard. Section 227 of the BNSS deals with issuance of process which is akin to Section 204 of the Cr.P.C. This stage is yet to arrive in the case at hand.

8. The obfuscation generated in the case at hand is with regard to interpretation of Section 223 of the BNSS, as to whether on presentation of the complaint, notice should be issued to the accused, without recording sworn statement of the complainant, or notice should be issued to the accused after recording the sworn

statement, as the mandate of the statute is, while taking cognizance of an offence the complainant shall be examined on oath. The proviso mandates that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard.

9. To steer clear the obfuscation, it is necessary to notice the language deployed therein. The Magistrate while taking cognizance of an offence should have with him the statement on oath of the complainant and if any witnesses are present, their statements. The taking of cognizance under Section 223 of the BNSS would come after the recording of the sworn statement, at that juncture a notice is required to be sent to the accused, as the proviso mandates grant of an opportunity of being heard.

10. Therefore, the procedural drill would be this way:

A complaint is presented before the Magistrate under Section 223 of the BNSS; on presentation of the complaint, it would be the duty of the Magistrate / concerned Court to examine the complainant on oath, which would be his sworn statement and

examine the witnesses present if any, and the substance of such examination should be reduced into writing. The question of taking of cognizance would not arise at this juncture. The magistrate has to, in terms of the proviso, issue a notice to the accused who is given an opportunity of being heard. Therefore, notice shall be issued to the accused at that stage and after hearing the accused, take cognizance and regulate its procedure thereafter.

11. The proviso indicates that an accused should have an opportunity of being heard. Opportunity of being heard would not mean an empty formality. Therefore, the notice that is sent to the accused in terms of proviso to sub-section (1) of Section 223 of the BNSS shall append to it the complaint; the sworn statement; statement of witnesses if any, for the accused to appear and submit his case before taking of cognizance. In the considered view of this Court, it is the clear purport of Section 223 of BNSS 2023.

12. Swinging back to the facts of the case the concerned Court has passed the following order:

"This complaint is filed against the Accused alleging the offence P/U/Sec.356(2) of BNS, 2023.

Issue notice to the Accused as per proviso to section 223 of BNSS, 2023.

For hearing.

Call on 13.08.2024."

The moment complaint is filed, notice is issued to the accused. This procedure is erroneous. Therefore, the petition deserves to succeed on this short ground of procedural aberration and the matter is to be remitted back to the hands of the concerned Court to redo the exercise from the beginning, bearing in mind the observations made in the course of the order.

13. For the aforesaid reasons the following:

ORDER

- (i) Criminal Petition is allowed.
- (ii) Impugned order dated 16-07-2024 passed by the XLII Additional Chief Judicial Magistrate, Bengaluru in PCR No.9136 of 2024 stands quashed.

- (iii) Matter is remitted back to the learned Magistrate to redo the exercise afresh, from the stage of entertainment of the complaint, bearing in mind the observations made in the course of the order.
- (iv) The said exercise shall be undertaken within 4 weeks from the date of receipt of the copy of this order.

Consequently, I.A.No.2 of 2024 stands disposed.

Sd/-
(M. NAGAPRASANNA)
JUDGE

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CT:SS