



GAHC010040202022

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./172/2022

DR. HIMANTA BISWA SARMA
S/O- LATE KAILASH NATH SARM, R/O. CHIEF MINISTER' QUARTER,
DISPUR, GUWAHATI- 781006, UNDER DISPUR POLICE STATION, DIST-
KAMRUP(M), ASSAM

VERSUS

THE ELECTION COMMISSION OF INDIA AND 5 ORS
REP. BY THE CHIEF ELECTION COMMISSIONER, ELECTION COMMISSION
OF INDIA, NIRVACHAN SADAN, ASHOK ROAD, NEW DELHI-110001

2:CHIEF ELECTION COMMISSIONER
ELECTION COMMISSION OF INDIA
NIRVACHAN SADAN
ASHOK ROAD
NEW DELHI- 110001

3:SENIOR PRINCIPAL SECRETARY
TO THE ELECTION COMMISSION OF INDIA
NIRVACHAN SADAN
ASHOK ROAD
NEW DELHI- 110001

4:STATE ELECTION COMMISSION
ASSAM
REP. BY CHIEF ELECTORAL OFFICER
ASSAM
BLOCK-C
ASSAM SECRETARIAT
DISPUR
GHY-781006



:: BEFORE ::

HON'BLE MRS. JUSTICE RUMI KUMARI PHOOKAN

Date of hearing : 01.06.2022.

Date of judgment: 10.06.2022.

JUDGEMENT AND ORDER (CAV)

Heard Mr. D. Saikia, learned Senior Counsel for the petitioner as well as Mr. A. Sarma, learned Standing Counsel, Election Commission of India (ECI) representing respective respondents.

2. The present petition has been preferred under Section 482 r/w Section 397 CrPC challenging CR Case No.1843^C/2019 under Section 126(1)(b) of the Representation of People's Act (for short, "RP Act") pending before the court of learned CJM, Kamrup (M) at Guwahati along with various orders passed by the learned court dated 10.01.2022, 24.01.2022, 11.02.2022, 25.02.2022 and for quashing of impugned orders as well as entire proceeding.

3. Case of the petitioner, as narrated in the petition is that, one Vibekananda Phookan, Secretary, Election Department-cum-Addl. Chief Electoral Officer, Assam filed a complaint petition before the court of learned CJM, Kamrup (M) as per direction of the Election Commission of India (ECI) against the present petitioner who is a Member of the Assam Legislative Assembly holding the post of Chief Minister of Assam as well as against the news channel "News Live" represented by its Chairman-cum-Managing Director alleging violation of Model Code of Conduct (MCC) of the Lok Sabha Election by telecasting a Live Interview at 7.55 P.M. on 10.04.2019 i.e. within 48 hours of first phase of polls scheduled on 11.04.2019 with a prayer for taking cognizance of the offence under Section 126(1)(b) of the RP Act.

4. The complaint was lodged on 14.05.2019 and complainant stated himself to be the sole witness. The learned court of CJM, Kamrup (M) however did not take the cognizance on the very first day of filing of complaint and directed the complainant to submit all the relevant documents including the electronic records of the alleged occurrence and the original complaint filed by the President and General Secretary, APCC, fixing 20.05.2019 for submission of documents. As the complainant failed to submit documents as directed, the case was again listed on 31.05.2019, 06.08.2019 and 11.11.2019 for submission of necessary documents. Again, no documents were submitted by the complainant despite specific direction, the learned court vide order dated 30.11.2019 directed the Chief Secretary, Government of Assam to submit a report as to whether the State is interested to proceed with the case and submit their stand as regard the complaint, otherwise case will be dropped, fixing 31.12.2019. On the date so fixed on 31.12.2019 and subsequent date on 28.02.2020, the complainant remained absent and unrepresented. Subsequent thereto, on 30.03.2020 to 12.08.2021, case was adjourned on different dates due to COVID-19 pandemic and after assuming normal court work on 07.12.2021, although the complainant's side was represented on few occasions but no report was submitted as directed, and subsequently complainant remained absent.

5. As there was no representation on behalf of the complainant side, the learned court on 10.01.2022, issued fresh notice to ECI and the present Secretary, Election Department-cum-Addl. Chief Electoral Officer, Assam to take necessary step as the complainant remained absent without steps. Thereafter, on 24.01.2022, the complainant Vibekananda Phookan filed a petition before the court that he was authorized to file the complaint but as he already retired from his service, he has no more authority to handle any paper or document of the office. The court again directed the Chief Electoral Officer, Assam to authorize other person or appear himself in the case in compliance of the earlier letter issued by the ECI dated 18.04.2019 to the complainant.

6. Pursuant to the aforesaid direction, one Pradip Doley, Joint Secretary to the Government of Assam, Election Department as well as Addl. Chief Electoral Officer, Assam, appeared on

behalf of the complainant on 04.02.2022 and submitted that he has been authorized to take steps on behalf of the Chief Electoral Officer and Election Commission of India. Along with the petition, he also submitted certain documents which is as below:

- (i) Copy of complaint petition submitted by the President, APCC on 10.04.2019.
- (ii) Copy of complaint petition submitted by General Secretary, APCC on 10.04.2019.
- (iii) Transcript of interview of Dr. Himanta Biswa Sarma.
- (iv) Copy of report dated 11.04.2019, submitted to the Election Commission of India by the then Secretary to the Government of Assam, Election Department, Dispur in connection with alleged violation of MCC by the petitioner.
- (v) copy of letter dated 18.04.2019 containing instructions for filing of complaint against the petitioner for violation of MCC.
- (iv) A Pen drive containing audio-visual of interview of Dr. Himanta Biswa Sarma telecasted in the News Live channel.

7. On the basis of the aforesaid documents on 11.02.2022, the learned court of CJM took cognizance of the offence. Relevant order is reproduced below:-

“Although there was prima facie allegation or material against the two accused under Section 126(1)(b) of Representation of the People’s Act, but my learned predecessor instead of issuing summons to the accused directly, directed the complainant to file/submit the complaint submitted by the then President and General Secretary, A.P.C.C. (Assam Pradesh Congress Committee) before the Election Commission of India which directed the complainant of the case to file this complaint and the electronic records of the alleged occurrence, but till date since 15.05.2019, complainant side represented by Vibekananda Phookan had not filed the same before this court till 04.02.2022 for which this court was compelled to pass the order dated 10.01.2022 and order dated 24.01.2022.

Now, on perusal of the documents filed by the complainant in compliance with

the order dated 10.01.2022 in the light of complaint petition, I have found prima facie material under Section 126(1)(b) of the Representation of the People's Act against the two accused to take cognizance of the offence mentioned above."

8. The court directed the complainant to take step against the accused person including the present petitioner and issued summon against both the accused persons, fixing 25.02.2022. The summon that was issued against the present petitioner was received on his behalf on 22.02.2022 without any other documents that was filed in the complaint petition. An application was filed before the court on 23.02.2022 for furnishing the copy of complaint petition along with the documents which was filed. The certified copy of which was furnished to them at late hours on the same day. On the date so fixed on 25.02.2022, due to arrival of the President of India in Guwahati as per scheduled programme, the petitioner could not appear before the court and by the time a petition was filed for and on behalf of the petitioner at about 10.58 A.M., the learned trial court passed the order at 10.50 A.M. for issuance of bailable warrant of arrest against him. Thereafter, on the petition moved on behalf of the petitioner assigning that due to the visit of President of India, petitioner could not remain present before the court, the court allowed the petition with payment of cost of Rs.2,000/- and made observation that the case was filed on 14.05.2019 and summons were issued against accused on 11.02.2022 after more than two and half years and accused side prayed for 3 weeks' time for their appearance.

9. Now, grievances raised by the petitioner against the various impugned orders as well as order for taking cognizance on the following counts:-

a) The learned trial court miserably failed to appreciate the ingredients of Section 126 of the Representation of People's Act as it failed to apply the judicial mind while taking cognizance and has not updated itself with the developments of legal principles relating to Section 126. No documents were filed at the time of filing the complaint and the original complainant was not examined by the court in support of the documents and whereas the complaint was filed only at the behest of the Election

Commission of India.

b) In a complaint case, burden lies on the complainant to substantiate the allegations by examining the relevant witnesses and the documents but same was not done in the present case. Even after absence of complainant for more than 3 year from the date of filing of the complaint, the learned CJM pursued the matter of his own directing the Election Commission to produce the documents and/or to authorize other person as a complainant to pursue the case which is against the mandate of law.

c) By order dated 10.01.2022 and 11.02.2022, the court has reviewed the order passed by his predecessor dated 30.11.2019 which is impermissible as by order dated 30.11.2019 his predecessor has issued a direction that the complainant to submit documents or else the complaint shall be dropped. But the subsequent order passed by the present CJM, successor in office, has diluted the aforesaid order and issued fresh orders relentlessly directing the officials of ECI to furnish documents to make out a case.

d) Referring to the various notifications, issued by the Election Commission of India dated 18.03.2019, 19.03.2019 and 28.03.2019 as regard the General Election of India 2019 and polling in Assam was scheduled in three phases.–

The first phase of polling was scheduled to be held on 11.04.2019 in Tezpur, Kaliabor, Jorhat, Dibrugarh and Lakhimpur Parliamentary Constituencies.

Second phase of polling was scheduled to be held on 18.04.2019 in Karimganj, Silchar, Autonomous District, Mangaldai and Nagaon, Parliamentary Constituencies.

Third phase of polling was scheduled to be held on 23.04.2019 in Dhubri, Kokrajhar, Barpeta and Guwahati Parliamentary Constituencies.

e) In view of above, the polling at Guwahati was scheduled on 23.04.2019 in the third phase, whereas the alleged live interview of the petitioner on News Live channel was telecasted on 10.04.2019, and no polling was scheduled to take place on 11.04.2019 (within the silence period). That being so, the allegation in the complaint that the live interview on 10.04.2019 within 48 hours of first phase of poll on 11.04.2019 is not applicable to the petitioner inasmuch as on the day of telecast there was no poll in the

Guwahati constituency. More so, there is no evidence on record that the said interview was live or recorded.

f) The prohibition imposed under Section 126(b) of Representation of People's Act is applicable only in any polling area during the period of 48 hours and ending with the hour fixed for conclusion of the poll for any election in that polling area.

In the present matter, interview of the petitioner was telecasted at Guwahati where there was no polling scheduled to take place within 48 hours as indicated in Section 126(1)(b).

g) In a similar situation, on 13.12.2017 the Principal Secretary to the Election Commission of India issued notice to Shri Rahul Gandhi, star campaigner of the Indian National Congress (INC) on the basis of report and complaint received from other political parties alleging violation of Section 126(1)(b) of the RP Act for giving TV Interview during 48 hours of polling scheduled to be held on 14.12.2017, granting him an opportunity to explain as to why action should not be taken against him for violation of MCC. Responding to the reply given by Shri Rahul Gandhi to the aforesaid notice, the Principal Secretary to the Election Commission of India issued a letter dated 17.12.2017 to the General Secretary, Indian National Congress informing as under:

“3. The Commission is of considered view that due to multifold expansion of digital and electronic media, the extent Model Code of Conduct, Section 126 of R.P. Act, 1951 and other related provisions require re-visiting to cater to the requirement and challenges of the present and emerging situations. The Commission will deliberate soon on the above subjects and will consult political parties, media, NBA and other stake holders to seek suggestions for necessary modification in the extent provisions. Accordingly, a committee is being set up for which detailed orders including Terms of Reference shall be issued separately to deliberate on these issues. The Committee will submit a report to the Commission in this regard.

4. In light of foregoing observation, the above December, notice dated 13th 2017 given to Sri Rahul Gandhi, star campaigner, INC is hereby withdrawn.

5. *INC is advised not make mention of any election matter pertaining to area going for poll during the prohibited period of 48 hours, henceforth."*

h) But in the present case, Senior Principal Secretary, Election Commission of India in his letter dated 18.04.2019 and the complainant knowingly suppressed the earlier stand of Election Commission of India vide letter dated 17.12.2017. Prior to filing of the complaint, no notice was served upon the petitioner for proper explanation thereby reflecting the partisan and arbitrary manner of working of Election Commission.

i) Subsequent to the aforesaid letter of Election Commission, a Committee was constituted under Chairmanship of Senior Deputy Election Commissioner to study and examine the provisions of Section 126 and other related provisions of the Representation of People's Act 1951, to identify the difficulties/typical gaps to regulate the violation of the provision of the Act, particularly during the prohibitory period of 48 hours before completion of the poll as mentioned in Section 126 and to suggest necessary amendments/modification. The committee submitted a report to the Election Commission on 10.01.2019 with following recommendation:

- Amendment to the Model Code of Conduct to ensure that political parties release their manifesto at least 72 hours before voting ends in first phase of polls.
- The provision of election silence, which prohibits any form of poll campaign in the last 48 hours leading up to voting to be extended to cover print and social media, internet, cable channels and online version of print media.
- Social media platforms should work with EC to evolve a mechanism by which the latter can flag content violating electoral law and social media sites can take it down as soon as possible.
- EC should issue directions to private cable TV channels to follow NBSA guidelines for election broadcasts during poll period.

Although the amendment of 126 of RP Act as suggested by committee has not yet taken place but on 15.03.2019 on the eve of General Election, 2019, the Election Commission of India issued an advisory stating *inter-alia*,

“**3.** In a multi-phased election, the silence period of last 48 hours may be on in certain constituencies while campaigning is ongoing on other constituencies. In such event, there should not be any direct or indirect reference amounting to soliciting support for parties or candidates in the constituencies observing the silence period.”

j) In view of above, it is contended by the petitioner that in a multi-phased election situation, prohibition mentioned in Section 126 of RP Act is only on advisory in nature and same has not been banned any election campaigning in the constituencies of a State where there is no polling in next 48 hours, while in some other constituencies there may be silence period in force. Therefore, Section 126 in its present form does not contemplate violation of MCC in a multi-phased election. In view of the above, complaint filed against the petitioner is not maintainable as no offence is made out under Section 126(1)(b) of the RP Act for taking cognizance, there being no any *prima facie* case.

10. An affidavit has been filed by respondent no.7 for and on behalf of respondent nos.1, 2, 3, 5 and 6 denying the allegation made in the present petition, without making any specific denial. It is submitted that in terms of Article 324(1) of the Constitution of India, Election Commission of India is mandated with the superintendence, direction and control and preparation of electoral rolls for and conduct of all elections of the Parliament and the Legislature of every State and election to the offices of Hon’ble President and Hon’ble Vice President. Provision of Section 126 of the RP Act, prohibits displaying any election matter by means of television or similar apparatus during the period of 48 hours before the hour fixed for conclusion of poll in a Constituency bound for elections. It is admitted that the complaint petition was filed as per direction of Election Commission of India for telecasting live interview as alleged in the complaint and as directed by the learned CJM on 15.05.2019 and 30.11.2019, as the earlier complainant retired from service, another person was authorized to take steps as complainant who filed the documents on 04.02.2022 as indicated in the record.

11. Save and except aforesaid averment in the affidavit, respondents has not refuted the

other contentions and the relevant documents that has been referred and relied by the petitioner. Respondent no.7, Joint Secretary to the Government of Assam, Election Department has sworn the affidavit for and on behalf of other respondents (save and except respondent no.4) and no separate affidavit has been filed by the respondent no.4, the State Election Commission, Assam.

12. Mr. D. Saikia, learned Senior Counsel for the petitioner has in his argument reiterated all above grounds that has been given in the petition and has vehemently argued that the entire proceeding before the trial court suffers from severe illegality, irregularity and biasness, which has not only vitiated the proceeding but has also resulted in serious prejudice to the petitioner as the learned trial court has failed to advance the cause of justice in every stage of proceeding.

13. The argument that has been advanced can be categorized in following manner:

- The proceeding is stated to be illegal as even in absence of the complainant the court choose to proceed with the case of its own and kept the complaint petition alive for years together while the complainant did not adhere to proceed with the case neither produced the relevant documents as directed.
- The learned court acted overboard while the court tried to carry out the complaint case with further direction to the officials of the Election Commission to appear and produce the documents, overriding the order of the learned predecessor in office, which tantamount to review of the earlier order and same is not permissible and it is a gross irregularity.
- The learned CJM ought not to have proceeded with the case only on the formal complaint filed by the Secretary-cum-Addl. Chief Electoral Officer who at the behest of the original complainant and the two APCC leaders, filed the complaint. It was the duty of the leaned CJM to examine the original complainants and documents in order to check the veracity of the allegations.
- The learned court has taken the cognizance without proper application of

judicious mind to the facts as well as law applicable thereto which reflects from the orders dated 11.02.2022 and 25.02.2022 while taking cognizance and issuing warrant of arrest against petitioner, inasmuch as all other orders passed since inception of the case is beyond its jurisdiction.

- From the materials on record and the existing law in force, as indicated above, it is abundantly clear that in multi-phased election situation, restriction of campaigning during 48 hours period till conducting hour of polling is not applicable in those constituencies where there is no polling is scheduled in next 48 hours. The present law in force does not contemplate or visualize the election campaign restriction in multi-phased election now a days and the ECI being well aware about the grey area in the existing law under Section 126 of the RP Act has expressed its observations and issued directions by way of advisory and withdrew the notice issued to star campaigner of INC on 13.04.2017 and the present petitioner is similarly situated.
- In view of the above stand of the Election Commission of India, the letter dated 18.04.2019 issued by the Senior Principal Secretary, Election Commission of India to Electoral Officer, Assam to lodge the case is not legally acceptable as it will result in conflict with their own decision (in case of Rahul Gandhi).
- May be because of such background the complaint that was filed on the basis of the aforesaid letter 18.04.2019, was not pursued by the complainant without producing documents but due to repeated directions given by the learned CJM submitted the documents approx about four years after the filing of the complaint.
- The interview in question that was aired in Guwahati where there was no polling within the silence period of 48 hours and there is nothing to show that it was a live interview.

With the above submissions, the learned counsel for the petitioner Mr. D. Saikia has submitted that a *prima facie* case has been made out for causing interference into the aforesaid complaint *vis-à-vis* various orders passed by the learned trial court including the



order of taking cognizance and has urged this Court to quash the entire proceeding, to uphold the principle of justice and fair play.

14. Also heard the learned counsel Mr. A. Sarma, appearing for and on behalf of ECI and Mr. A.I. Ali, learned Standing Counsel for and on behalf of State Election Commission. No separate argument was advanced for and on behalf of respondent no.4.

15. It has been argued by Mr. A. Sarma, learned counsel appearing for ECI that relevant documents have been filed before the court as directed and matter of taking cognizance is a discretion of the court and they have nothing to submit against the cognizance taken by the court. Mr. Sarma however offered no any comment over the documents filed by the petitioner's side stating that it is in public domain. So far as the irregularity/illegality alleged to have been committed by the learned trial court while taking cognizance, they offered no any comment stating that it is between the court and the complainant.

16. Learned counsel appearing for the other respondents adopted the argument as advanced by the learned counsel appearing for ECI.

17. In view of the challenge made in the present petition, this Court is to adjudge the following aspect precisely.

- Correctness/ legality of the various impugned orders and the proceeding pertaining to the aforesaid complaint case.
- Whether there was a *prima facie* case for taking cognizance of the offence?
- Whether in view of the documents that has been brought on record by the petitioner's side about the communication made by the Election Commission *vis-à-vis* the advisory issued, is to be taken into account to consider whether there is any violation of MCC by the petitioner, which may attract the offence under Section 126 of RP Act?

- Whether the interference to the proceeding is called for invoking Section 482 CrPC?

18. I have given anxious consideration to the rival submission of both the parties and also gone through the documents relied. Also, examined the scanned copy of the LCR which was called for.

19. As has been contended by the petitioner, it reveals from the LCR that on the very first day of the receipt of the complaint on 15.05.2019, fixing 20.05.2019 and although initially complainant took time for producing the documents but subsequently remained absent and did not produce documents. On 30.11.2019, the court further directed the Chief Secretary to submit their stand otherwise the court shall drop the case. Even thereafter the complainant remained unrepresented. In such absence of the complainant, the learned court on 10.01.2022 issued fresh direction to the ECI and present Secretary to the Election Department, Assam to take necessary step as the complainant has not taken any step as no report was furnished from ECI as well as Chief Secretary as directed. The court also made certain observation in the said order which is self contradictory and difficult to dilute as it does not conform to the procedure to be followed in a complaint case. On that day while there was no representation of the complainant, the court passed the following order:-

“10.01.2022 The complainant side is unrepresented today as Sri Vibekananda Phookan is absent without any steps today. Issue notice to Election Commission of India and present Secretary, Election Department-cum-Addl. Chief Electoral Officer, Assam to take necessary steps in this case as Vibekananda Phookan has not taken steps.

I have perused the case record. No report form Election Commission of India and Chief Secretary received.

On perusal of the case record, I find the following:

1. *This is a case u/s 126(1)(b) of the Representation of People's Act as per which "No person shall display to the Public any election matter by means of*

cinematography, television or other similar apparatus during the period of 48 hours ending with the hour fixed for the conclusion of the poll for any election in that polling area and any person who contravenes the provision shall be punishable with imprisonment for a term which may extend to 2 years or with fine, or with both.”

- 2. As per the complaint petition filed by the complainant being the Secretary, Election Department-cum-Addl. Chief Electoral Officer, Assam who is a Public Servant in discharge of his official duty filed the complaint, the two accused namely Dr. Himanta Biswa Sarma and the News Live Channel owned by M/S Pride Entrainment Pvt. Ltd. represented by the then Chairman-cum-Managing Director, violated the Model Code of Conduct of Lok Sabha Election by telecasting a Live Interview of the Opposite Party No.1 (Dr. Himanta Biswa Sarma) at 7.55 PM on 10-4-19 i.e., within 48 hours of the 1st Phase of Polls scheduled on 11-4-19. Hence, the allegation or the case of the complainant comes under the purview of the section 126(1)(b) of the Representation of People's Act i.e., as per the complaint petition, the two accused or opposite parties prima facie committed the offences u/s 126(1)(b) of the Representation of People's Act.*
- 3. As the complainant being a Public servant in discharge of his official duty made the complaint in writing, hence there is no need to examine the complainant and the witnesses as per proviso to section 200 of CrPC,*
- 4. Although there was prima facie allegation or material against the two accused, u/s 126(1)(b) of the Representation of People's Act, but my learned predecessors instead of issuing summons to the accused directly, directed the complainant to file/submit the complaint submitted by the then President and General Secretary of A.P.C.C. (Assam Pradesh Congress Committee) before the Election Commission of India which directed the complainant of the case to file this complaint and the Electronic Records of the alleged occurrence, but till date since 15-5-19, the complainant side represented by Sri Vibekananda Phookan has not filed the same before this court.*



5. *The non submission of the above documents by the complainant till date since 15-5-19, creates doubt regarding disappearance of such documents or proof against the accused and regarding the conduct of the complainant as the complainant may willingly delaying the case by not filling the above documents or he may be prevented from filing the same by any person. The Election Commission of India being a Autonomous body is at liberty to enquire into the conduct of Sri Vibekananda Phookan in this case who is absent without any steps today and has not informed this court about the steps taken by him for production of relevant documents of the case till date, as this case was filed as per direction of Election Commission of India, vide letter No.437/ASHP/2019/NES-II dtd 18/4/19 and Vibekananda Phookan did not file this case in his personal capacity.*
6. *No report has been received from the Election Commission of India which was called for vide order dated 30-11-19 to submit their stand with regard to the present complaint and Sri Vibekananda Phookan might not have taken steps for the same for which no report from Election Commission of India is received till date.*

Considering the above findings, the complainant side i.e., the present Secretary, Election Department-cum-Addl. Chief Electoral Officer, Assam, the Election Commission of India are directed to file the relevant documents of this case on or before next date without fail.

The case record reveals that-on many dates of the case, the case was adjourned due to restricted or limited court work/function for Covid 19 and hence before passing any order regarding the disposal of the case, I find it necessary to issue notice to the Election Commission of India and the person who filed the complaint before the Election Commission of India by serving copy (hard/soft copy) of this order to submit their stand with regard to the present complaint as they are the main authority/person under whose direction and complaint this case was filed by the then Secretary, Election Department-cum-Addl. Chief Electoral Officer, Assam.



The present Secretary, Election Department-cum-Addl. Chief Electoral Officer, Assam to take steps as per direction of Election Commission of India in this case as Sri Vibekananda Phookan is absent without any steps today.

Send copy (soft/hard copy) of this order to all the concerned.

Fix 24-01-2022 for document(s) and necessary order.”

Further, on 24.01.2022, when the earlier complainant appeared before the court submitting that he has retired from the service and no more authorized to handle the documents, the court passed the following order:-

“24.01.2022 The complainant Sri Vibekananda Phookan has appeared and has filed petitions and order No.ELE.49/2019/Pt-1/ dated 29-4-19 of Chief Electoral Officer, Assam vide which Sri Phookan was authorized to file the complaint for violation of Model Code of Conduct by the accused before the court as per direction communicated vide Election Commission of India’s Letter No.437/AS-HP/2019/NES-II dated 18-4-19. Now as per the submission of Sri Vibekananda Phookan, he has retired from service and hence he is not authorized to handle any paper or document of the office or of the case.

In my view, Sri Vibekananda Phookan who was absent without any steps on the last date of the case should have informed this court, Election Commission of India and Chief Electoral Officer, Assam about his inability to file relevant documents of the case soon after his retirement so that any other person authorized by Chief Electoral Officer, Assam can represent the prosecution side and file relevant documents of the case.

Therefore, now, the Chief Electoral Officer, Assam is to authorize other person or appear himself in this case in compliance to direction communicated vide Election Commission of India’s Letter No.437/AS-HP/2019/NES-II dated 18-4-19 and to file the relevant documents of the case as per earlier orders of this court on next date without fail.

The Chief Electoral Officer, Assam may inform the Election Commission of India and the President cum General Secretary, APCC under whose direction and complaint this case was filed, regarding the steps already taken and to be taken in this case as they are necessary parties of the case for filing the complaint.

The Election Commission of India is also to take action in a impartial manner by directing the concerned authorities/Chief Electoral Officer, Assam to file the relevant documents etc in the court as the prosecution side (Election Department, Dispur, Assam) is not complying with the orders including last order dated 10-1-22 of this court by not filing the relevant documents of the case till date which directly or indirectly helped the two accused – Dr. Himanta Biswa Sarma and News Live TV Channel from being prosecuted in this case. In other words, Election Commission of India can monitor the steps taken by the complainant side to be represented by Chief Electoral Officer, Assam or any other person authorized by him in this case.

Let copies (soft/Hard copy) of this order be sent to the Election Commission of India and Chief Electoral Officer, Assam for information and compliance of this order and earlier orders including order dated 10-1-21 passed by this Court.

Fixed 11-2-22 for documents and necessary order.”

20. Obviously, while passing the aforesaid order, the learned CJM, has exceeded the jurisdiction. Being an officer of justice delivery system, no one can conduct the affairs of the prosecution as an inquiry officer. As the original complainant did not pursue the matter nor produced the relevant documents, as directed, such a complaint is liable to be dismissed for non-prosecution u/s.203 CrPC and/or other relevant orders as to whether complainant has been able to make out a prima facie case for proceeding etc. But a court of law is never assigned to undertake an inquiry to pursue the matter with the higher authority as has been revealed from various orders of the court. Accordingly, all these orders suffers from serious illegality.

21. So far as regard the order of taking cognizance dated 11.02.2022, the learned trial court



has taken cognizance on the basis of the complaint as well as the copy of documents that has been filed by the newly substituted complainant. The relevant portion of the order is quoted below:

“As per the above mentioned documents and complaint petition filed by the complainant being the Secretary, Election Department-cum-Addl. Chief Electoral Officer, Assam who is a Public Servant in discharge of his official duty, the two accused namely Dr. Himanta Biswa Sarma and the News Live Channel owned by M/S Pride Entertainment Pvt. Ltd. represented by the then Chairman-cum-Managing Director, violated the Model Code of Conduct of Lok Sabha Election by telecasting a Live Interview of the accused No.1 (Dr. Himanta Biswa Sarma) at 7.55 PM on 10-4-19 i.e., within 48 hours of the 1st Phase of Polls scheduled on 11-4-19. Hence, the allegation or the case of the complainant comes under the purview of the section 126(1)(b) of the Representation of People’s Act i.e., as per the complaint petition and the above mentioned documents submitted by the complainant, the two accused prima facie committed the offence u/s 126(1)(b) of the Representation of People’s Act.

Although there was prima facie allegation or material against the two accused, u/s 126(1)(b) of the Representation of People’s Act, but my learned predecessors instead of issuing summons to the accused directly directed the complainant to file/submit he complaint submitted by the then President and General Secretary of A.P.C.C. (Assam Pradesh Congress Committee) before the Election Commission of India which directed the complainant of the case to file this complaint and the Electronic Records of the alleged occurrence, but since 15-5-19, the complainant side earlier represented by Sri Vibekananda Phookan had not filed the same before this Court till 4-2-22 for which this court was compelled to pass the order dated 10-1-22 and order dated 24-1-22.

Now on perusal of the documents filed by the complainant in compliance with the order dated 10-1-22 in the light of the complaint petition, I have found prima facie material u/s 126(1)(b) of the Representation of People’s Act against the two accused to take cognizance of the offence mentioned above.”

22. Section 190 CrPC empowers the Magistrate to take cognizance of an offence upon receiving a complaint of facts which constitutes such offence, which indicates, the complaint must constitute the ingredients of the offence alleged. In the present case, in absence of original complainants along with relevant documents as indicated above, it cannot be held that given facts in the complaint constitutes such offence. Section 204 CrPC provides that the court can take cognizance of an offence if there is sufficient ground for proceeding. The court is duty bound to make scrutiny *qua* definition given by penal provisions of the relevant law brought in the complaint. In the given case, the court has not undertaken any such scrutiny/the inquiry as regard the polling in the first phase of election was scheduled to be held on 11.04.2019 in Guwahati where the news item was telecasted. Nothing has been mentioned in the complaint nor in the court order, whether the said news telecast was recorded or live. As per law, Magistrate is only concerned with the allegations in the complaint and the evidence laid in support of the same and is to satisfy itself, if a *prima facie* case is made out which is sufficient for proceeding for alleged violation of law, but such satisfaction is not recorded in the present case.

23. The Hon'ble Supreme Court in *S.K. Sinha, Chief Enforcement Inspector v. Videocon International Ltd., (2008) 2 SCC 492* has discussed about taking of cognizance in the following manner:

“The expression cognizance has not been defined in Cr.PC. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means “become aware of” and when used with reference to a Court of a Judge, it connotes “to take notice of judicially”. It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.

“Taking cognizance” does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is, thus, a sine qua non or condition precedent for holding a valid trial.

Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance.

The underlying object of the inquiry under section 202 is to ascertain whether there is prima facie case against the accused. It, thus, allowed a Magistrate to form an opinion whether the process should or should not be issued. The scope of inquiry under section 202 is extremely limited.”

24. The same principle has been elaborately reiterated in *Mehmood Ul Rahman v. Kazi Mohmmad Tunda and Others*, (2015) 12 SCC 420, with the following words:

“Cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process for taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It is not a mechanical process of matter of course. To set in motion the process of criminal law against a person is a serious matter. Though no formal or taking or reason orders are required at the stage of taking cognizance under Section 190/204 CrPC but there must be sufficient indication in the order of application of mind by the Magistrate to the facts constituting commission of an offence and the statements recorded Section 200 CrPC so as to proceed against the offender.

Under Section 190(1)(b) CrPC, the Magistrate has the advantage of police report and under Section 190(1)(c) has the information or knowledge of commission of offence but under Section 190(1)(a) CrPC he has only a complaint before him. The Code of Criminal Procedure hence specified that the Magistrate may take cognizance upon receiving a complaint of facts which constitutes such offence. Therefore, if the complaint on the face of it does not disclose commission of an offence, the Magistrate

shall not take cognizance under Section 190(1)(a) CrPC. The complaint is simply to be rejected. Thus, the steps taken by the Magistrate under Section 190(1)(a) CrPC followed by Section 204 should reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further asking the person against whom, the violation of law arose to appear before the court. In other words, the Magistrate is not to act as a post office in taking cognizance in each and every complaint filed before him and issue process as a matter of course. The application of mind is best demonstrated by disclosure of mind on the satisfaction if there is no such invitation in a case where the Magistrate proceeds under Section 190/204 CrPC, the High Court under Section 482 CrPC is bound to invoke its inherent power in order to prevent abuse of the power of criminal court. To be called to appear before the criminal court as an accused is a serious matter affecting ones dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment.”

25. Upon taking cognizance, the court has also issued summon to the petitioner and the Chairman-cum-Managing Director, News Live channel owned by M/S. Pride Entertainment Pvt. Ltd., fixing 25.02.2022 for appearance of the accused. Thus, while taking cognizance of the offence, the learned court has not discussed as to why the court did not procure the attendance of the original complainant who can only support their documents and has not recorded any reasons as to what basis the court was convinced as about the violation of MCC by the petitioner as nothing was placed before the court as to the polls scheduled to be held on 11.04.2019 and the relevant notifications in this regard. The cognizance was taken only on the basis of few documents (all copies) without any other supporting documents.

26. In *Pepsi Foods Ltd. and Another v. Special Judicial Magistrate and Others*, (1998) 5 SCC 749, it has been held as under:

“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 the preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinize the evidence brought on record and 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.”

27. The offence alleged is violation of MCC by the petitioner and for proper appreciation of the matter, the complaint that was filed is reproduced below:

“Petition under Section 126 of the Representation of People’s Act, 1951

The complainant begs to stage as follows:-

- 1. That the Election Commission of India, vide letter no.437/AS-HP/2019/NES-II dated 18.04.2019 directed the Chief Electoral Officer, Assam to get a complaint lodged before a competent court; as one complaint was received by them from the President and the General Secretary of APCC alleging violation of Model Code of Conduct of Lok Sabha Election by the opposite parties by telecasting a Live Interview of the opposite party no.1 at 7.55 P.M. on 10.04.2019 i.e. within 48 hours of the first phase of polls scheduled on 11.04.2019.*
- 2. In compliance to the direction of the Election Commission of India, the Chief Electoral Officer, Assam authorized the complainant to lodge this complaint before the Chief Judicial Magistrate, Kamrup (Metro), Assam.*
- 3. Hence this complaint is lodged before the Hon’ble Court for taking appropriate action against the opposite parties as per provision of law.*

It is therefore, prayed that your honour may be pleased to take cognizance of the above- mentioned matter against the opposite parties under Section 126(1)(b) of the Representation of People's Act,1951 in the interest of justice.

List of witnesses-

1. Complainant himself."

28. Now from the Gazette Notification, notifying the General Election dated 18th March, 2019, 19th March, 2019 and 28th March, 2019 (Annexure-II, III and IV), it reveals that polling in a first phase of election, scheduled to be held at Tezpur, Kaliabor, Jorhat, Dibrugarh and only in the third phase the election was scheduled to be held at Guwahati on 23.04.2019. That being so, there was no first phase of polling in Guwahati as on 11.04.2019. There is no dispute as regard the aforesaid Gazette notification.

Section 126 of the Representation of People's Act is reproduced below:

"126. Prohibition of public meetings during period of forty-eight hours ending with hour fixed for conclusion of poll-

(1) No person shall-

(a) Convene, hold, attend, join or address any public meeting or procession in connection with an election; or

(b) Display to public any election matter by means of cinematograph, television or other similar apparatus; or

(c) Propagate any election matter to the public by holding, or by arranging the holding of, any musical concert or any theatrical performance or any other entertainment or amusement with a view to attracting the members of the public thereto, in any polling area during the period of forty-eight hours ending with the hour fixed for the conclusion of the poll for any election in that polling area.

2. Any person who contravenes the provisions of sub-section (1) shall be punishable

with imprisonment for a term which may extend to two years or with fine, or with both.

3. *In this section, the expression "election matter", means any matter intended or calculated to influence or affect the result of an election."*

Thus, it is implicit that prohibition imposed under Section 126 is applicable to the polling area during the 48 hours ending with the hour fixed for conclusion of the poll for any election in that area.

29. In the present matter, at the time of news telecast in Guwahati on 10.04.2019, no polling was scheduled to take place in Guwahati on the next 48 hours because as per the notification poll was scheduled to be held on 23.04.2019 in Guwahati. The aforesaid aspect was not disclosed in the complaint petition neither the learned trial court examined the same while taking cognizance of the offence.

30. In course of the hearing learned counsel for the petitioner has drawn the attention of the court towards news report dated 13.02.2022 (ETVBharat/National) wherein former Election Commissioner of India Dr. SY Quraishi said that "it is impossible to implement the Model Code of Conduct in multi-phase elections in the age of the electronic media. If a speech is made outside the silence zone, legally it can't be faulted."

31. Furthermore, various communication by the Election Commission of India as well as the advisory issued reveals that the Election Commission is also aware about multi-phased election and expansion of digital and electronic media, which required re-visiting the extent of MCC under Section 126 RP Act and on similar situation although notice was issued to the star campaigner of Indian National Congress but subsequently it was withdrawn. A committee was also constituted to examine the provision of 126 of the RP Act so as to regulate the violation of said provision and in turn the committee has also put forward certain recommendations towards amendment of Section 126 of the RP Act and same is under consideration (all these discussed above). In view of such special background and peculiar circumstances that has emerged, there is still scope for deliberation as to violation of MCC in a multi-phased election

in the silence period. In the context of changing social scenario as well as the expansion of electronic/digital arena where the Election Commission itself has declared election in phased manner in certain constituencies, it is perhaps the high-time to re-visit the provision enunciated in the Section 126 of RP Act which was enacted far back in the year 1951.

32. So far as the other challenges to the order dated 11.02.2022 and 25.02.2022 is concerned, it appears there are two parts in the order dated 11.02.2022. First part relates to taking of cognizance which is already discussed and the second part relates to the observation made by the court whereby it has criticized the predecessor that despite there being *prima facie* allegation against the accused person, his predecessor instead of issuing summons to the accused directly has directed the complainant to submit document by the President and General Secretary of APCC is not sustainable as being a successor in office, he assumes no jurisdiction to pass such contrary order which may be a subject matter of revision by the higher court.

33. On the next, the order dated 25.02.2022 was passed without adhering to judicial discretion by an officer of court of law. Admittedly, 25.02.2022 is the first day for appearance of the accused person and the learned trial court allowed the petition filed on behalf of the complainant considering the ground that he was on election duty. But the petition filed by the petitioner side was allowed imposing cost of Rs.2,000/- whereas there is justifiable ground to allow the prayer, rather than to impose cost. There being no any willful negligence on the part of the petitioner in his appearance before the court nor it is a case of defaulter, there cannot be any reason for imposing cost. The Magistrate has totally failed to discharge its judicial discretion while conducting a proceeding. The conduct of a judicial officer must be above the personal whims and traits and every order should be founded on cogent and reasonable grounds, which is not reflected in the present case. It is said "*justice should not only be done but also seen to be done*".

34. In view of the legal proposition discussed above, the impugned order of taking cognizance by the learned trial court is nothing but a mechanical one, without due application

of judicial mind, which is bad in law.

35. So far as the power possessed by the High Court under Section 482 CrPC, is of very wide and plentitude and same can be exercised to give effect to an order under the Code –

“Inherent power under Section 482 CrPC can be exercised: (i) to give effect to an order under the Code; (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent jurisdiction of the High Courts under Section 482 CrPC though wide has to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in the section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the statute. The court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurise the accused.”

36. The power under Section 482 CrPC is wide enough and if judiciously and consciously exercised, can take care of almost all the situations where the interference by the High Court becomes necessary. In a proceeding instituted on complaint the exercise of inherent power to quash the proceeding is called for in a case where the complaint does not disclose any offence. While exercising its inherent power for quashing a proceeding in which the process has been issued, the High Court can look into and rely upon the materials besides those on which process was issued but may not embark an inquiry on such materials.

37. The Hon’ble Supreme Court in *1992 Supp (1) SCC 335, State of Haryana and Others v. Bhajan Lal and Others*, has enunciated various principles of law as to when the inherent power under Section 482 CrPC can be exercised. Relevant paragraph is quoted below:-

“(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accept in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) 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.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but 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 Code.

(5) Where the allegations made in the FIR or complaint are 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.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide 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.”

38. Further, in (1988) 1 SCC 692, *Madhavrao Jiwajirao Scindia and Others v. Sambhajirao Chandrojirao Angre and Others*, a three-Judge Bench of the Hon’ble Supreme Court



summarized the law with regard to quashing of criminal proceedings under Section 482 of the CrPC which is as under:

“The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilized for any oblique purpose and where in the opinion of the court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.”

39. In view of the findings and discussions above, and taking into consideration the uncontroverted documents produced and relied by the petitioner, this Court is of the considered opinion that continuation of criminal proceeding would amount to abuse of process of court causing injustice and quashing of the proceeding would otherwise serve the ends of justice. Resultantly, the impugned orders as well as entire proceeding pertaining to CR Case No.1843^C/2019 under Section 126(1)(b) of the Representation of People’s Act pending before the court of learned CJM, Kamrup (M) at Guwahati is hereby quashed and set aside.

In terms of above, the petition stands allowed.

JUDGE

Comparing Assistant