IN THE HIGH COURT OF KARNATAKA AT BENGALURU

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DATED THIS THE 24TH DAY OF APRIL, 2024

BEFORE

THE HON'BLE MR JUSTICE KRISHNA S DIXIT

CRL.RP.NO.1157 OF 2023 (397-ER)

BETWEEN:

SRI. B G UDAY
SON OF SRI B N GARUDACHAR,
AGED ABOUT 63 YEARS,
RESIDING AT NO. 727/1, 46TH CROSS,
JAYANAGAR, 8TH BLOCK,
BENGALURU 560 082.
PRESENTLY RESIDING AT NO. 25, KRISHNA ROAD,
NEAR BASAVANAGUDI POST OFFICE
BASAVANAGUDI, BENGALURU-560 004.

...PETITIONER

(BY SRI.UDAYA HOLLA., SENIOR COUNSEL A/W
SRI.SANTHOSH S NAGARALE.,ADVOCATE)

AND:

SRI. H G PRASHANTH
S/O SRI H N GOPINATHA RAO,
NO. 129/2, 1ST FLOOR, TEMPLE STREET,
ITI LAYOUT, BSK III STAGE, BENGALURU 560 085.

...RESPONDENT

(BY SRI. MANJUNATH H., ADVOCATE)

THIS CRL.RP FILED U/S.397 R/W 401 CR.P.C PRAYING TO SET ASIDE THE JUDGMENT DATED 11.09.2023 PASSED BY HONBLE LXXXI ADDL.CITY CIVIL JUDGE AND SESSIONS JUDGE, (SPL.COURT EXCLUSIVELY TO DEAL WITH CRIMINAL CASE RELATED TO ELECTED MPs/MLAs IN THE STATE OF KARNATAKA) IN CRL.A.NO.1303/2023 AND SUBSEQUENTLY THE ORDER OF CONVICTION DATED 13.10.2022 PASSED IN C.C.NO.30758/2021 ON THE FILE OF XLII A.C.M.M, BENGALURU (SPL.COURT FOR TRIABLE OF CASES FILED AGAINST MP/MLAs) TRIABLE BY MAGISTRATE IN THE STATE

OF KARNATAKA) AND CONSEQUENTLY DISMISSED THE COMPLAINT AND ACQUIT THE PETITIONER.

THIS CRL.RP HAVING BEEN HEARD AND RESERVED FOR ORDER, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

Petitioner is invoking the revisional jurisdiction of this court vested u/s.397 r/w Sec.401 of Code of Criminal Procedure, 1973 for calling in question the Sessions Judge's order dated 11.09.2023 dismissing Criminal Appeal No.1303/2022 and thereby confirming the order of conviction & sentence 13.10.2022 made by the learned XLII Addl. Chief Metropolitan Magistrate, Bengaluru in C.C.No.30758/2021 (Spl.C.C.No.764/2020). To put in succinctly, petitioner after trial was convicted for the electoral offence punishable u/s 125A of R.P. Act, 1951 and was sentenced to undergo a Simple Imprisonment for two months coupled with levy of Rs.10,000/- by way of fine; petitioner's appeal against the same came to be negatived.

2. SUBMISSION OF PETITIONER'S COUNSEL:

Learned Sr. Advocate Mr.Uday Holla appearing for the petitioner briefly submitted that the penal provision enacted in section 125A of the 1951 Act needs to be construed strictly and if that is done, no offence can be alleged against his client; the legal requirement to disclose pendency of criminal case arises only when such a case has attained a particular stage and not otherwise; this aspect having been wrongly approached by the courts below, the impugned orders are liable to be voided, notwithstanding that the findings therein are concurrent. In support of his submission, he pressed into service certain Rulings of the Apex Court.

3. SUBMISSION OF COMPLAINANT'S COUNSEL:

After service of notice, the respondent having entered appearance through his counsel opposes the petition with vehemence making submission in justification of both the orders and the reasons on which they have been constructed. The gist of his submission is: the revisional jurisdictional is too restrictive and therefore a deeper examination of the impugned orders cannot be

readily undertaken, two courts having concurrently held against the petitioner; whether the charges are framed or not, the candidate in the electoral fray has to disclose pendency of criminal cases and the petitioner having failed to do so, has been rightly convicted & sentenced. He read out two decisions extracted in the order of the Appellate Court, in support of his submission.

4. Having heard the learned counsel for the parties and having perused the Petition Papers, this court is inclined to grant indulgence in the matter for the following reasons:

(a) Section 125A of the 1951 Act has been brought on the Statute book by the Parliament vide Act 72 of 2002 w.e.f. 24.08.2002. It intends to bring in purity & transparency in the election process by providing necessary information to the public in general and the voters in particular so that the latter can make an 'informed decision' by knowing *inter alia* the criminal antecedents of the candidate in the electoral fray. The said provision reads as under:

> ***"125A. Penalty for filing false affidavit, etc.—***

> *A candidate who himself or through his proposer, with intent to be elected in an election,—*
> *(i)fails to furnish information relating to sub-section (1) of section 33A; or*
> *(ii)gives false information which he knows or has reason to believe to be false; or*
> *(iii)conceals any information, in his nomination paper delivered under sub-section (1) of section 33 or in his affidavit which is required to be delivered under sub-section (2) of section 33A, as the case may be, shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both."*

(b) Apparently, the above provision prescribes a punishment of imprisonment 'which may extend to six months, or with fine, or with both.' Thus, the discretion lies with the court awarding the punishment. This provision internalizes *inter alia* sub-section (2) of section 33A of the 1951 Act. Section 33A has the following text:

> ***"33A. Right to information.—***
>
> *(1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) of section 33, also furnish the information as to whether—*
>
> *(i) he is accused of any offence punishable with imprisonment for two years or more in a*

pending case in which a charge has been framed by the court of competent jurisdiction;

(ii) he has been convicted of an offence other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of section 8 and sentenced to imprisonment for one year or more.

(2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) of section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section (1).

(3) The returning officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub-section (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered."

This provision is brought on the statute book in the light of Apex Court decision in ***UNION OF INDIA vs. ASSOCIATION OF DEMOCRATIC REFORMS, (2002) 5 SCC 249***. The Parliament did not incorporate all the suggestions as directed in the said case, but provided for the disclosure of criminal antecedents as specified under the said provision by filing an affidavit in terms of

prescription, that should accompany the Nomination Papers filed u/s 33(1). The object was that the citizens are made aware of the criminal antecedents of the candidates before they can exercise their freedom of choice by way of casting votes. Suffice it to say that as the statute now stands, every candidate is obligated to file an affidavit with relevant information with regard to their criminal antecedents, assets and liabilities and educational qualifications in terms of legal prescription, and nothing beyond. The said provision in a way to some extent enacts Right to Information as its very heading shows, in favour of the electors/voters, keeping it jural correlative that is the duty to disclose on the shoulders of the candidate in the electoral fray. In section 33A of 1951 Act, the Parliament in its wisdom has employed the expression, '*in a pending case in which a charge has been framed by the court of competent jurisdiction*'. Only then this provision is attracted. However, admittedly no charge has been framed in the subject criminal case. However, that is not the end in all.

(c) Rule 4A of the Conduct of Elections Rules, 1961 mandates the candidate in the electoral fray *inter alia* to deliver to the Returning Officer a sworn affidavit in Form 26 and the said affidavit should accompany the Nomination Papers. For ease of understanding, the text of said Rule is reproduced below:

> *"4A. Form of affidavit to be filed at the time of delivering nomination paper.—The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under subsection (1) of section 33 of the Act, also deliver to him an affidavit sworn by the candidate before a Magistrate of the first class or a Notary in Form 26"*

It is now well settled that the Forms prescribed by the Rules are a part of the statutory scheme. Relevant part of this Form namely paragraphs 5,6 & 6A which deal with the requirement of disclosing criminal antecedents, are reproduced below, (other parts not being relevant):

"(5) Pending criminal cases:-

(i) I declare that there is no pending criminal case against me.
(Tick this alternative if there is no criminal case pending against the Candidate and write NOT APPLICABLE against alternative (ii) below)

OR

(ii) The following criminal cases are pending against me:
(If there are pending criminal cases against the candidate, then tick this alternative and score off alternative (i) above, and give details of all pending cases in the Table below)

TABLE

(a) FIR No. with name and address of Police Station Concerned			
(b) Case No. with Name of the Court			
(c) Sections of concerned Acts/Codes involved *(give no. of the Section, e.g. Section…….of IPC, etc.).*			
(d) Brief description of offence			
(e) Whether charges have been framed *(mention YES or NO)*			
(f) If answer against (e) above is YES, then give the date on which charges were framed			
(g) Whether any Appeal/Application for revision has been filed against the proceedings *(Mention YES or NO)*			

(6) Cases of conviction.-
(i) I declare that I have not been convicted for any criminal offence.
(*Tick this alternative, if the candidate has not been convicted and write NOT APPLICABLE against alternative (ii) below)*

OR

(ii) I have been convicted for the offences mentioned below:
(If the candidate has been convicted, then tick this alternative and score off alternative (i) above, and give details in the Table below)

TABLE

(a) Case No.			
(b) Name of the Court			
(c) Sections of Acts/Codes involved *(give no.of the Section, e.g. Section……. of IPC, etc.).*			
(d) Brief description of offence for which convicted			
(e) Dates of orders of conviction			
(f) Punishment imposed			
(g) Whether any Appeal has been filed Against Conviction order *(Mention YES or No)*			
(h) If answer to (g) above is YES, Give details and present status of appeal			

(6A) I have given full and up-to-date information to my political party about all pending criminal cases against me and about all cases of conviction as given in paragraphs (5) and (6)."

A perusal of the affidavit in the light of Rule 4A of the 1961 Rules read with section 33A of the 1951 Act leaves no manner of doubt that what is required to be disclosed is the pendency of a criminal case in which charges have been framed or cognizance of the offence alleged is taken.

(d) The vehement submission of learned counsel appearing for the respondent that the cognizance of the offence punishable u/section 125-A of the 1951 Act was taken, is

bit difficult to agree with. The word 'cognizance' has no esoteric or mystic significance in criminal law and procedure. It merely means - become aware of and when used with reference to a court or judge, then take notice of judicially, vide ***R R CHARI vs. STATE OF UP, 1951 SCR 312***. Ordinarily, cognizance is said to have been taken when the Magistrate after perusal of the papers with due advertence suspects the commission of offence alleged and makes up his mind to proceed against the accused in accordance with law. The record of the case should demonstrate this has happened, and only thereafter cognizance can be presumed to have been taken. Mechanically treating the matter and mindlessly issuing process to the accused cannot raise such a presumption. It is more so because setting criminal law in motion is a serious matter since it impinges on the rights of free citizens. The Apex Court in ***PEPSI FOODS LTD. AND ANOTHER vs. SPECIAL JUDICIAL MAGISTRATE AND OTHERS, (1998) 5 SCC 749*** at para 28 has observed as under:

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

(e) It hardly needs to be stated that 1951 Act is the parent statute which delegates power of rule making and accordingly, 1961 Rules have been promulgated; they are amended from time to time. As already mentioned above, Parliament in its legislative wisdom has restricted the duty to disclose *inter alia* criminal antecedents by enacting Section 33A byway of amendment to the 1951 Act *qua* the arguably wider duty arising from the observations in

DEMOCRATIC REFORMS case supra,. Law relating to elections is what the statute says, vide ***JYOTI BASU vs. DEBI GHOSAL, AIR 1982 SC 983***. Thus, the requirement of Rule 4A of 1961 Rules read with Form 26 has to be construed in the light of this amendment. Rules and the Forms prescribed by the Rules cannot be construed to widen the scope of duty beyond what the Parliament has intended. Therefore, it is not that every criminal case launched against a candidate either by way of registering the FIR or by moving the private complaint, has to be disclosed in the affidavit even when charges have not been framed or cognizance of the offences alleged has not been taken, as the case may be. This view gains support from the observations offering at paragraph 75 in ***KRISHNAMOORTHY vs. SIVAKUMAR, (2015) 3 SCC 467,*** which reads as under:

> *"75. On a perusal of the aforesaid format, it is clear as crystal that the details of certain categories of the offences in respect of which cognizance has been taken or charges have been framed must be given/furnished. This Rule is in consonance with Section 33-A of the 1951 Act. Section 33(1) envisages that information has to be given in accordance with the Rules. This is in addition to the information*

> *to be provided as per Sections 33(1)(i) and (ii). The affidavit that is required to be filed by the candidate stipulates mentioning of cases pending against the candidate in which charges have been framed by the Court for the offences punishable with imprisonment for two years or more and also the cases which are pending against him in which cognizance has been taken by the court other than the cases which have been mentioned in Clause (5)(i) of Form 26. Apart from the aforesaid, Clause (6) of Form 26 deals with conviction."*

In the light of discussion above, one can safely hold that the impugned orders do not accord with the law as obtaining and therefore, are liable to be voided.

(f) The vehement submission of learned counsel for the respondent-complainant that regardless of the stage, disclosure of the pendency of criminal case has to be made in the affidavit accompanying the Nomination Papers is structured keeping in mind the text of Form 26 divorcing the provisions of section 33A of 1951 Act. Such a sectarian view of law does not augur well to the criminal jurisprudence. He was stressing on the observations of the Apex Court in DEMOCRATIC REFORMS supra, in support his contention. The source of law of election, this court reiterates, is what the statute says. It is always

open to the Parliament/Legislature to dilute the requirement of law declared by the Apex Court, by removing the substratum on which such declaration is founded. That has been done by the Parliament by enacting section 33A. As long as the said provision remains on the statute book, its intent & policy content cannot be ignored, while construing the subordinate legislation such as Rule 4A which internalizes Form 26. The courts below were wrongly swayed away by the literal content of Form 26, without adverting to the substantive provisions of section 33A of the parent Act. This approach is unacceptable, to say the least.

(g) Learned Sr. Advocate Mr.Holla is justified in contending that the proceedings initiated against the petitioner that culminated into his conviction & sentence are nothing but an abuse of the process of court inasmuch as, even taking the complaint with its face value, no offence is disclosed against him. In a recent decision in ***PRABHAT KUMAR MISHRA V. STATE OF U.P.*, (2024) 3 SCC 665**, at page 673, para 20, the Apex Court has

reiterated the law as to the quashment of criminal proceedings, by observing as under:

> *"62. In State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] this Court in the backdrop of interpretation of various relevant provisions of the Code of Criminal Procedure under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 of the Constitution of India or the inherent powers under Section 482 CrPC, gave the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of the court or otherwise to secure the ends of justice…*
> *'… (1) Where the allegations made in the first information report or the complaint, even if they are 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..."*

What has been observed above, in all fours comes to the aid of petitioner and therefore, he is entitled to be relieved of the subject criminal proceedings once for all and spotlessly. He has to be given absolutely a clean chit. It is not that this court does not understand the agony & untold hardship he has undergone all these days because of the subject criminal case.

(h) This court hastens to add that it is not considering the question as to when a person is said to have become accused of an offence. Several provisions in the Code of Criminal Procedure, 1973 employ the word 'accused' in varying circumstances. Sometimes the word is employed to denote a person on trial and sometimes, a person against whom there is an accusation although he is not yet put on trial. The word 'accused' bears different meanings according to the context. In the ordinary parlance, a person is said to be an accused when a criminal proceeding is pending against him. The expression 'criminal proceeding' often employed in several statutes is of a wider amplitude. Any person against whom an investigation is to be made or has been made on an accusation, arguably may assume the mantle of 'accused in a criminal proceeding'. It can be said that the expression 'accused' or 'accused person' is used only in a generic sense and therefore, the meaning of the term need not be confined only to a person who has been publicly charged with a crime. Much deliberation is not

required inasmuch as, the duty to disclose criminal antecedents becomes choate under the provisions of section 33A of the 1951 Act read with Rule 4A of the 1961 Rules which in turn refers to Form 26, only when charge has been framed or cognizance of the offences alleged against the candidate in the electoral fray has been taken, as the case may be. Obviously at that stage, the person concerned answers the description of 'accused in a criminal proceeding'.

In the above circumstances, this petition succeeds; the impugned orders of the courts below are liable to be and accordingly are set at naught; whatever fine amount that has already been remitted in terms of the impugned orders, is liable to be refunded to the petitioner, forthwith.

Sd/-
JUDGE

Snb/Bsv/cbc