SPECIALS

The Rediff Special/ **Shrikant Bhat**

'In no case, is arrest compulsory'

Advocate Shrikant Bhat provides a ready reckoner to the legal issues involved in the Bal Thackeray case.

A charge sheet:

In India, when a suspect, also called an accused, is prosecuted, the prosecution case against him is given to him in writing. For example, statements made by the witnesses against him, a chemical analyser's report or any other material that is intended to be used against the accused in the trial against him or the material that is intended to be used against him, will be given to him in writing.

A charge sheet basically means a compilation of papers, statements, *panchnama,* chemical analyser's report or an expert evidence statement. The idea being that the accused should know the precise case against him -- who are the witnesses against him, what do they say? The accused cannot be called by surprise. There is no element of surprise in a criminal case. This element is eliminated by giving him a copy, so that he knows what the case against him is and he comes prepared. That is called a charge sheet.

The charge sheet against Bal Thackeray:

As of today, the copy of the charge sheet is not ready. It is getting ready. Now, with respect to Bal Thackeray's case, the charge sheet will consist of editorials in *Saamna,* published way back in 1992-1993.

It could also consist of a statement saying that the riots resulted after those articles were published.

I must emphatically say I have no knowledge of the contents of the proposed charge sheet other than what has been appearing in the press.

Anticipatory bail:

Yes, Thackeray can take anticipatory bail.

Section 153 (A) of the Indian Penal Code:

Promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc and doing acts prejudicial to maintenance of harmony. The punishment could be imprisonment which may extend to three years or fine or both. The fine is not limited. The maximum limit can be levied by the magistrate. The Act was first formed in 1969. It was mainly done by Indira Gandhi to curb the RSS.

Nobody has been arrested under this Section yet, but under an equivalent Section, a prosecution was filed. The section that is being referred to here is Section 153, which deals with provocation to cause a riot.

Dr Syedna Burhanuddin, leader of the Bohra community, during his discourses which were given over a loudspeaker, was alleged to have said something that hurt the followers of Prophet Mohammed. This infuriated a section of people which resulted in a riot in 1988.

The then chief minister of Maharashtra, Sharad Pawar moved the high court and said that the peace which existed between the Sunnis and the Shias would be hampered and hence no further action should be taken.

Today, there exists peace between the Hindus and the Muslims. But Chhagan Bhujbal does not want to apply the same logic.

Thackeray's defence:

Section 468 of the Indian Penal Code states that if you have to prosecute anyone under Section 153(A), or any other case that carries a sentence of three years, you have to file the case within three years. Similarly, if the maximum punishment is seven years, one has to file the case within seven years. But if you fail to do so, you have to tell the court why you could not come within the stipulated time.

After the reasons as to why the court should take cognisance of the case in spite of it being time-barred, have been stated, it will issue a notice to Thackeray and inform him that it has received an application from the police, asking it to condone the time limit.

The court has to take into consideration Thackeray's side of the story. It has to then take a decision on the question of time limit keeping in mind Sections 468, 469, 470 and 473 of the Criminal Procedure Code which relate to time limit and exceptions. And lastly, the court may or may not condone the delay of the prosecution. If the court condones the delay, the prosecution against Thackeray can proceed. If it does not, then the prosecution cannot proceed.

Thackeray's defence would definitely be Section 468 -- that the case is time barred. Also considering the Syedna's case, he may ask for quashing the case, that is terminating it.

I would like to say that arrest is absolutely discretionary. In no case, is arrest compulsory.

Advocate Shrikant Bhat spoke to Kanchana Suggu

'On the face of it, there is no need to arrest'

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Part I: **'In no case, is arrest compulsory'**

Section 2(b) of the Criminal Procedure Code defines the phrase investigation as 'all the proceedings under this Code for collection of evidence conducted by the Police Officer.' In other words, the primary function of the Investigating Officer (the police) is to collect evidence of an offence and to see whether the accused/suspect is connected with it or not.

The powers to arrest are thus directly related to the need to collect evidence.

To understand powers of arrest, one has to understand some key definitions and topics in criminal procedure. Offences are divided into two kinds. The first is non-cognisable for example: a taxi driver slaps a citizen over parking. This comes as simple hurt. Second example is defamation, one commits the offence of defamation, commits non-cognisable offence.

A non-cognisable offence is an offence in which the police officer has 'no authority' to arrest without a warrant from a Magistrate (Court) (Section 2(l) Cr PC. Classification of offences into non-cognisable and cognisable offences is given in Cr PC (Schedule One).

However, dacoity, robbery, cheating, etc, etc are cognisable offences.

Cognisable offence means an offence for which a police officer may arrest without a warrant from the Magistrate (Court) (Section 2© Cr PC.

Just because the allegations made by somebody constitute a cognisable offence, it does not automatically empower the police to arrest the accused/suspect.

In this context, Section 157 of Cr PC assumes critical significance. It says that after that after receiving information about a cognisable offence, the police officer shall 'proceed to the spot to investigate the facts and circumstances of the case and, if necessary, take measure for the discovery and arrest of the offender' (Section 157(1) Cr PC..

Thus, an arrest becomes necessary only if evidence of offence cannot be collected, except by interrogating the accused in police custody or if

the offence is heinous.

In a historic judgment, in *Joginder Kumar vs State of UP,* the Supreme Court(1994) 4 SC 260) observed thus:

'The National Police Commission in its Third Report referring to the quality of arrests by the police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails. The said Commission in its Third Report at p.31 observed thus:

'It is obvious that a major portion of the arrests were connected with very minor prosecutions and cannot therefore, be regarded as quite necessary from the point of view of crime prevention. Continued detention, in jail of the persons so arrested has also meant avoidable expenditure on their maintenance. In the above period it was estimated that 43.2 per cent of the expenditure in the connected jails were over such prisoners only who in the ultimate analysis need not have been arrested at all".

As on today, arrest with or without warrant depending upon the circumstances of a particular case is governed by the Code of Criminal Procedure.' (para 12)

'An arrest during the investigation of a cognisable case may be considered justified in one or other of the following circumstances:

i. The case involves a grave offence like murder, dacoity, robbery, rape etc, and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror-stricken victims.

ii. The accused is likely to abscond and evade the process of law.

iii. The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.

iv. The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines ….'

The above guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so.

Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of

commission of an offence made against a person.

It would be prudent for a police officer in the interest of protection of the Constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuiness and bonafides of a complaint and a reasonable belief both as to the persons complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter.

The recommendations of the Police Commission merely reflect the Constitutional concomitants of the fundamental rights to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to persons to attend the Station house and not to leave the station without permission would do. (para 20 *ibid*)

In the case of Mr Bal Thackeray, the allegation seems to be that he was a party or wrote the editorial which promoted enmity between Hindus and Muslims (Section 153(A) on the Indian Penal Code. This was done in the editorial in Marathi published by *Saamna,* the Shiv Sena daily in 1992/1993.

At this moment, I shall assume for sake of argument, that editorials in *Saamna* did promote enmity between Hindus and Muslims. The present article is on the legal position regarding arrest and not on the merits of the editorials.

The maximum sentence for the offence under Section 153A is three years. In this case, the evidence against Mr Thackeray would be *Saamna* editorials. This is available with the prosecution agency. On the face of it therefore, there is no need to arrest. Arrest would be violative of the principles of Constitutional jurisprudence laid down by the Supreme Court in the *Joginder Kumar vs State of UP* case.

The police can file a charge sheet in the magistrate court and without arresting Mr Thackeray, the court can send summons to him to appear personally or through his advocate, in the court.

The media was also full with the reports that Mr Thackeray would be 'technically' arrested. Perhaps, by this is meant that he can be arrested by the police under Section 153A. But the police themselves can release Mr Thackeray on bail.

It will come as a revelation to all including the legal community that the police themselves have the powers to release the accused on bail, if the charge against that accused carries a sentence which is not more than seven years (Section 437 Cr PC). In fact under Section 437(2), Mr Thackeray can even be released on his own bond.

There is wide spread feeling that the moment the police register an offence which is in the category of a cognisable offence, arrest must

follow. This feeling is totally wrong and has no foundation in the Criminal Procedure or the Constitution of India.

When we talk about law governing arrest, the primary law is the Constitution of India and the Supreme Court in the *Joginder Kumar vs State of UP* has already given the principles that if any executive authority consciously violates the principles laid down by the Supreme Court, it would be in contempt of the Supreme Court.

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