Reserved on : 16.02.2024
Pronounced on : 22.04.2024

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 22ND DAY OF APRIL, 2024

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.10923 OF 2023 (GM-RES)

BETWEEN:

1 . C. GANESH NARAYAN
SON OF LATE MR. C.V.NARAYAN
AGED ABOUT 43 YEARS
NO. 44, OSBORNE ROAD
ULSOOR, BENGALURU – 560 042.

2 . VIDYA NATARAJ
WIFE OF C.GANESH NARAYAN
AGED ABOUT 41 YEARS
NO. 44, OSBORNE ROAD
ULSOOR, BENGALURU – 560 042.

... PETITIONERS

(BY SRI. SANDESH J.CHOUTA, SENIOR ADVOCATE A/W.,
SMT. KRUTIKA RAGHAVAN, ADVOCATE)

AND:

1 . STATE OF KARNATAKA
THROUGH COMMERCIAL STREET
POLICE STATION
REP. BY THE PUBLIC PROSECUTOR

HIGH COURT BUILDING
BENGALURU – 560 001.

2 . RAJDEEP DAS
SON OF SUDHANSU DAS
AGED ABOUT 23 YEARS
EMPLOYEE OF C.KRISHNAIAH CHETTY AND
SONS PVT. LTD.,
THE TOUCHSTONE A BLOCK
NO. 3 AND 3A MAIN GUARD CROSS ROAD
SHIVAJINAGAR, BENGALURU CITY
KARNATAKA – 560 001.

... RESPONDENTS

(BY SRI. S.A.AHMED, AAG A/W.,
SRI. MANJUNATH K., HCGP FOR R1;
SRI. D.R.RAVISHANKAR, SENIOR ADVOCATE A/W.,
SRI. MANJUNATH K. V., ADVOCATE FOR R2)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA READ WITH SECTION 482 OF CR.P.C., PRAYING TO CALL FOR RECORDS IN CRIME NO.0044/23 REGISTERED BY THE RESPONDENT NO. 1 AND BE PLEASED TO QUASH THE FIR DATED 30.04.23 REGISTERED BY THE RESPONDENT NO.1, VIDE ANNEXURE-A; QUASH THE COMPLAINT DATED 29.04.23, VIDE ANNEXURE-B.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 16.02.2024, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The petitioners are before this Court calling in question registration of a crime in Crime No.44 of 2023 for offences punishable under Sections 323, 324, 341, 427, 504, 506 and 34 of the IPC.

2. The facts, in brief, germane are as follows:-

The 2nd respondent who an employee of C.Krishniah Chetty & Company Private Limited ('the Company' for short) is the complainant. The 1stpetitioner is said to be the Director of the Company and the 2ndpetitioner who is also the wife of the 1stpetitioner is the employee of the Company. On 21-01-2023 it appears that one Vinod Hayagriv files an injunction suit in O.S.No.1265 of 2023 against the 1st petitioner to restrain the petitioner from making any changes, construction of walls, partition and other structures that restrict all round movement of people and vehicles around the building. The concerned Court, in terms of its order dated 28-03-2023, grants an interim injunction against all the parties. After obtaining the interim order, the averment in the

petition is that, on 07-04-2023 Vinod Hayagriv attempted to construct a wall to seal the gate of the petitioners. It is thereafter, the dispute between the two arose and appears to have gone amiss. It is alleged that on 29-04-2023 the petitioners, when the employees of Vinod Hayagriv attempted to interfere with the petitioners' property, are said to have indulged in fight both verbal and physical as also using pepper spray. It is said to have been used as a defence by the petitioners. Upon the said incident, the 2nd respondent, employee of the Company, is said to have registered a complaint which becomes a crime in Crime No.44 of 2023. The moment the crime is registered, the petitioners are before this Court in the subject petition.

3. Heard Sri Sandesh J.Chouta, learned senior counsel appearing for the petitioners, Sri S.A. Ahmed, Additional Advocate General appearing for respondent No.1 and Sri D.R. Ravishankar, learned senior counsel appearing for respondent No.2.

4. The learned senior counsel representing the petitioners would vehemently contend that the petitioners were forced to use pepper spray in their defence and that is protected under Section

100 of the IPC. They had to do so on account of the 2nd respondent and other security personnel attempted to interfere with the petitioners' property and the 2nd petitioner has injured her knee and, therefore, the petitioners too registered a complaint which becomes a crime in Crime No.43 of 2023. The said crime is said to be under investigation. The following day, the impugned crime comes to be registered. The complainant is one of the employees/security guard who is said to have been injured by the petitioners. Learned senior counsel would submit that if the complaint is registered on *mala fides*, it must not be permitted to be investigated into, as it would run completely contrary to law as laid down by the Apex court in the case of ***STATE OF HARYANA v. BHAJAN LAL[1].***

5. Per-contra, the learned senior counsel representing 2nd respondent would vehemently refute the submissions of the petitioners to contend that a clear case of ingredients of the provisions invoked in the case at hand are made out. He would submit that power to quash the proceedings under Section 482 of

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[1] *1992 Supp (1) SCC 335*

the Cr.P.C. or even under Article 226 of the Constitution of India should be sparingly used. It is his submission that right to private defence has been misused in the case at hand, as there was no threat or danger to the life of the petitioners, but pepper spray is used only to cause injury to the complainant and others. He would submit that pepper spray is a dangerous weapon which would clearly come within the ingredients of Section 324 of the IPC.

6. In reply to the said submissions, the learned senior counsel for the petitioners would contend that for invoking Section 341 of the IPC, it must be proved that the complainant faced obstruction from all direction. For invoking Section 427 of the IPC the accused must have the intention and there must be loss or damage. Likewise, Section 324 of the IPC should be proved by way of demonstration of hurt being caused. None of these being present, the learned senior counsel for petitioners would contend that the FIR should be quashed.

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

8. The afore-narrated facts are not in dispute. They are all a matter of record. The subsisting dispute between the two is also a matter of record. The incident happened on 29-04-2023. The incident narrated is that when the petitioners wanted to enter through the gate of their property which was said to be the subject matter of civil proceedings and grant of an injunction, altercations between the petitioners and the security guards of Vinod Hayagriv happen. In the altercation, the complaint is that, it turned into fists and blows as well. Based upon the said incident, the petitioners have registered a crime against security guards in Crime No.43 of 2023 on 29-04-2023. The impugned complaint, in fact, narrates several instances that have happened prior to the said incident as well. It is a detailed complaint.

9. The issue now would be,'***whether this Court in exercise of its jurisdiction under Article 226 of the Constitution of India r/w Section 482 of the Cr.P.C.quash the proceedings at the stage of crime, notwithstanding a counter case in Crime No. 43 of 2023 being investigated into?***'

10. The incident is one, but the crimes are two – Crime Nos. 43 of 2023 and 44 of 2023. If crime No.43 of 2023 registered by the petitioners is sustainable the same goes with crime No.44 of 2023, as the offences alleged are identical. The projection in the case at hand is for the purpose of private defence, which would be a matter of investigation or evidence as the case would be. Usage of pepper spray is said to be for the said private defence. Pepper spray is projected by the learned counsel for the petitioners to be only for the purpose of defence and not used as a dangerous weapon, for it to become an offence under Section 324 of the IPC. Section 324 of the IPC reads as follows:

> *"**324. Voluntarily causing hurt by dangerous weapons or means**.—Whoever, except in the case provided for by Section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."*

Section 324 of the IPC directs that whoever voluntarily causes hurt by means of any instrument for shooting, stabbing or any instrument of weapon which is likely to cause death would be committing the offence. Pepper spray is undoubtedly a dangerous weapon. There is no determination by any law being laid down in this country with regard to usage of pepper spray being dangerous weapon. But, a Court in the United States of America in ***PEOPLE v. SANDEL***[2] has held that noxious chemical sprays, like pepper sprays are dangerous weapons. The Court has held as follows:

> *"Dangerous Instrument*
>
> *The legal definition of a "dangerous instrument" is "any instrument, article or substance . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury." (Penal Law § 10.00 [13] [emphasis supplied].)* ***Serious physical injury is defined as "injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement,*** *protracted impairment of health or protracted loss or impairment of the function of any bodily organ." (Penal Law § 10.00 [10].)* ***The focus of the statute is not on whether an instrument, article or substance is dangerous per se but whether the manner of use transforms the item into something that can cause death or serious physical injury.***
>
> ***It is obvious that some items are inherently dangerous and capable of causing serious physical injury if improperly used:*** *an automobile (People v Diaz, 129 AD2d*

[2] *84 N.Y.S. 3d 340 (N.Y. Sup.Ct.2018)*

968 [4th Dept 1987]); a lead pipe (People v Jones, 196 AD2d 889 [2d Dept 1993], lv denied 82 NY2d 897 [1993]); a pistol (People v Gamble, 135 AD3d 1078 [3d Dept 2016], lv denied 27 NY3d 997 [2016]); a red-hot barbecue fork (People v Greene, 72 AD3d 1279 [3d Dept 2010], lv denied 15 NY3d 750 [2010]); a baseball bat (People v Johnson, 63 AD3d 470 [1st Dept 2009], lv denied 13 NY3d 745 [2009]); a bicycle chain (People v Hiraeta, 117 AD3d 964 [2d Dept 2014], lv denied 24 NY3d 1002 [2014]); and steel-toed boots (People v Roblee, 70 AD3d 225 [3d Dept 2009]).

*But less obviously, benign objects can be "dangerous instruments," capable of causing the requisite injuries under the right circumstances. Examples abound: a plaster arm cast (People v Davis, 96 AD2d 680 [3d Dept 1983]); a kitchen fork (Matter of Monos v Monos, 123 AD3d 931 [2d Dept 2014]); a knife handle (People v Burns, 122 AD3d 1435 [4th Dept 2014],{**61 Misc 3d at 847} lv denied 26 NY3d 927 [2015]); a frayed electrical cord (People v Woodard, 83 AD3d 1440 [4th Dept 2011], lv denied 17 NY3d 803 [2011]); a door (People v Parker, 62 AD3d 1195 [3d Dept 2009], lv denied 13 NY3d 704 [2009]); a piece of cloth (People v Marshall, 105 AD2d 849 [2d Dept 1984]); hot water (People v Mableton, 17 AD3d 383 [2d Dept 2005], lv denied 4 NY3d 888 [2005]); sneakers (People v Lappard, 215 AD2d 245 [1st Dept 1995], lv denied 86 NY2d 737 [1995]); and a pit bull terrier (People v Mateo, 77 AD3d 1374 [4th Dept 2010], lv denied 15 NY3d 922 [2010]). [FN3]*

A can of mace, pepper spray or any other noxious chemical is something of a hybrid. The defense argues that such a spray is sanctioned as a nonlethal weapon for law enforcement and sold commercially for use by civilians for self-defense, which signals it cannot be classified as a dangerous instrument. Moreover, the defendants contend that the way the noxious chemical was used here, it did not cause serious physical injury, was not capable of causing such injury and no rational jury could have determined otherwise. The People counter that the way the noxious chemical substance was used here turned it into a dangerous instrument, much the way the handle of a knife or a pair of sneakers became dangerous instruments in the cases cited above. They assert the focus of the statute is not on whether the

chemical caused serious physical injury but whether it was used in a way that rendered it capable of doing so.

Noxious Chemical Spray: A Dangerous Instrument

*Surprisingly, there appears to be no appellate authority in New York addressing whether a noxious chemical spray—by whatever name it is marketed—constitutes a dangerous instrument. Two New York City criminal courts, however, have found mace to be a dangerous instrument in the context of whether charging it as such could survive motion to dismiss for facial{**61 Misc 3d at 848} insufficiency. In People v McCullum (184 Misc 2d 70, 73 [2000]), the court held that "[a] cannister of mace has the potential to do serious damage to a person. If the mace cannister is operable, it is a dangerous instrument." However, in McCullum the case was dismissed [*3]because the People failed to establish a prima facie case that the can of mace was operable at the time the defendant was arrested, as required by Penal Law § 265.01 (2). And, in another case where a motion to dismiss a criminal court complaint for facial insufficiency was filed, People v Wilkerson (184 Misc 2d 949, 951-952 [2000]), it was held that allegations that the victim who was sprayed with a noxious material suffered "redness and swelling to the . . . face and burning and swelling to his eyes" was sufficient to plead that the substance was a dangerous instrument.*

An Appellate Division case cited by defendant Cruz, People v LaDuca (292 AD2d 851 [4th Dept 2002], lv denied 98 NY2d 652 [2002]), is not on point. In LaDuca, a deputy sheriff doused a resisting suspect with pepper spray and in the ensuing scuffle, the substance got into the sheriff's eyes. As a result, the suspect was charged with assaulting a police officer in violation of Penal Law § 120.05 (3). The question arose whether the deputy sheriff suffered sufficient injuries to support the physical injury element of the charge. The sheriff received a multitude of injuries in his attempt to subdue the defendant, which in tandem with the pepper spray, resulted in the physical injury necessary to sustain the felony assault charge. The statute under which the defendant in LaDuca was charged, designed to create a unique felony crime of assault against a police officer,

required only that the prosecutor prove physical injury. Accordingly, there is no holding in that case, or even dicta for that matter, that addresses whether pepper spray either in and of itself or in the manner it was used, could constitute a dangerous instrument capable of causing serious physical injury.

*Accordingly, the court must look elsewhere for guidance. In Maryland, "pepper mace" is listed as a dangerous weapon when used "with the intent or purpose of injuring an individual in an unlawful manner." (Md Code Ann, Crim Law § 4-101 [a] [3] [i]; [c] [2].) In a case of first impression in that state, the Maryland Court of Appeals in Handy v State (357 Md 685, 689-690, 745 A2d 1107, 1108-1110 [2000]) determined that whether pepper spray could be a dangerous weapon in a robbery constituted a mixed question of law and fact: whether it is possible for an{**61 Misc 3d at 849} object to be used as a deadly or dangerous weapon and whether its use constituted such was a question of law and, in any given case, whether the facts alleged by the state to support the allegation were proved beyond a reasonable doubt was a question for the jury.*

The defendant in Handy, like the defendants here, argued that the pepper spray used against the victim, a postal carrier who was sprayed in the face by the defendant who stole mail from him, could not have been a dangerous weapon because the victim's injuries were not protracted or permanent. But the court ruled: "[W]hen, as a matter of law, an object or substance can be used as a deadly or dangerous weapon, the potential for bodily harm suffices, regardless of the extent of resulting harm in an actual case." (357 Md at 699, 745 A2d at 1114.) [FN4] The court determined that because the victim testified that he was "blinded by the pepper spray for several hours and experienced a burning sensation in his eyes," the injuries were sufficiently serious to support the jury's findings (357 Md at 700, 745 A2d at 1115).

In Connecticut, the legal definitions of "serious physical injury" and "dangerous instrument" are similar to, but not exactly like, New York's (see Conn Gen Stat § 53a-3 [4], [7]). [FN5] Thus, in State v Ovechka (292 Conn 533, 543, 975 A2d 1, 7 [2009]), which relied in part on Handy, the Supreme Court of Connecticut held that an assault with pepper spray which

temporarily blinded the victim and resulted in irritated, swollen and red eyes that had to be treated in a hospital emergency room, constituted the severity of injury necessary "to support a finding [by the jury] that pepper spray is a dangerous instrument or dangerous weapon."

*[*4]*

Pepper spray seems to be a popular choice of weapon in bank robberies, which may explain the many federal court decisions on the subject. [FN6] In United States v Neill (166 F3d 943 [9th Cir 1999], cert denied 526 US 1153 [1999]), the defendant was convicted following a jury trial on two counts of bank robbery. On appeal, he argued that his sentence had been improperly enhanced for using a dangerous weapon, in his case, pepper spray. The defendant had sprayed a loan secretary at the target bank causing her to "cough and choke and her eyes and nose to burn," which resulted in a severe asthma attack (166 F3d at 949). The victim testified that she felt "like somebody took a match and stuck it up both sides of [her] nostrils . . . it was like I was on fire." (Id.) The court ruled: "Because in this case, pepper spray caused extreme pain and prolonged impairment of a bodily organ, it satisfied the definition of a dangerous weapon." (Id. at 950; see also United States v Bartolotta, 153 F3d 875 [8th Cir 1998], cert denied 525 US 1093 [1999] [bank robber sprayed driver of armored car with mace and his sentence was enhanced because of it; Circuit Court upheld District Court's determination that mace is a dangerous weapon because victim suffered chemical pneumonia]; United States v Dukovich, 11 F3d 140 [11th Cir 1994], cert denied 511{**61 Misc 3d at 851} US 1111 [1994] [Circuit Court upheld finding that tear gas is a dangerous weapon capable of inflicting death or serious bodily injury when sprayed on employees placed on the floor during bank holdup].)

Noxious Chemical Spray: Not a Dangerous Instrument *Courts that have considered this issue have not spoken with one voice. In Austin v State (336 So 2d 480, 481 [Fla Dist Ct App, 3d Dist 1976]) an intermediate appellate court found the evidence did not support a jury*

verdict of aggravated assault, but only simple assault, where a defendant sprayed a mother in the mouth with mace to wrest her child away from her at the behest of the child's father, who insisted the child was wrongfully being withheld from him. "The evidence that 'mace' would not, under such circumstances, produce death or serious bodily harm was uncontroverted," the court wrote. (Id.)

The Legal Argument as Applied to the Instant Facts The defendants assert the People did not prove beyond a reasonable doubt that pepper spray is a dangerous instrument because there was no evidence it "causes protracted impairment{**61 Misc 3d at 852} of health." Further, they argue the People failed to provide any expert testimony describing the long-lasting effects of pepper spray on humans or attesting to whether it could cause death or serious physical injury. In fact, the defendants allege, the [*5]only evidence the People did provide showed the opposite: a photo of a label on a can of the noxious substance containing a warning describing it as an "irritant." Additionally, they argue that Penal Law § 265.20 (a) (14) (a) refers to pepper spray as a " 'self-defense spray device' . . . which is intended to produce temporary physical discomfort or disability," thus demonstrating that the New York Legislature recognized this substance was not a dangerous instrument.

These victims were not standing upright, running away or in an open field when they were sprayed with a noxious chemical.{**61 Misc 3d at 854} One was doused in the close quarters of an elevator, another shortly before a heavy man sat on her chest to tie her up and a third right before a gag was shoved in her mouth. Any of these women could have choked or suffered life-threatening breathing injuries because of the way the defendants used the noxious chemical spray. Viewing the evidence in the light most favorable to the prosecution, as the law requires, a rational trier of fact could have found beyond a reasonable doubt that the defendants' use of a noxious chemical spray constituted the use of a dangerous instrument which was readily capable of

causing death or serious physical injury. Accordingly, the defendants' motions pursuant to sections 290.10 and 330.30 are denied and the matter will proceed immediately to sentencing."

(Emphasis supplied)

11. Right to private defence, as is projected to defend the action of the petitioners, is a matter of evidence. The Apex Court in the case of ***RANVEER SINGH v. STATE OF M.P.***[3] has held as follows:

"…. …. ….

8. *"11. The only question which needs to be considered is the alleged exercise of right of private defence. Section 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence.* ***The section does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Evidence Act, 1872, the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for***

[3] *(2009) 3 SCC 384*

the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. *The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram v. Delhi Admn. [AIR 1968 SC 702] , State of Gujarat v. Bai Fatima [(1975) 2 SCC 7 : 1975 SCC (Cri) 384 : AIR 1975 SC 1478] , State of U.P. v. Mohd. Musheer Khan [(1977) 3 SCC 562 : 1977 SCC (Cri) 565 : AIR 1977 SC 2226] and Mohinder Pal Jolly v. State of Punjab [(1979) 3 SCC 30 : 1979 SCC (Cri) 635 : AIR 1979 SC 577] .) Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft quoted observation of this Court in Salim Zia v. State of U.P. [(1979) 2 SCC 648 : 1979 SCC (Cri) 568 : AIR 1979 SC 391] runs as follows : (SCC p. 654, para 9)*

> *'9. … It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence.'*

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

12. … A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject-matter of right of private defence. The plea of right [of self-defence may relate to] the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101 IPC define the limit and extent of right of private defence.

13. Sections 102 and 105 IPC deal with commencement and continuance of the right of private defence of body and property respectively. The right commences as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, to commit the offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of danger to the body continues. In Jai Dev v. State of Punjab [AIR 1963 SC 612] it was observed that as soon as the

cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence.

14. In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. Similar view was expressed by this Court in Biran Singh v. State of Bihar [(1975) 4 SCC 161 : 1975 SCC (Cri) 454 : AIR 1975 SC 87] . (See also Wassan Singh v. State of Punjab [(1996) 1 SCC 458 : 1996 SCC (Cri) 119] and Sekar v. State [(2002) 8 SCC 354 : 2003 SCC (Cri) 16] .)

15. As noted in Buta Singh v. State of Punjab [(1991) 2 SCC 612: 1991 SCC (Cri) 494 : AIR 1991 SC 1316] a person who is apprehending death or bodily injury cannot weigh in golden scales on the spur of the moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation [which is] commensurate with the danger apprehended to him. Where assault is imminent by use of force, it would be lawful to repel the force in self-defence and the right of private defence commences, as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hypertechnical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private defence can legitimately be negatived. The court dealing with the plea has to weigh the material to

conclude whether the plea is acceptable. It is essentially, as noted above, a finding of fact.

9. *In the present case the High Court has rightly held that even if it is accepted that at some point of time the appellant was exercising the right of private defence, the same was exceeded and has rightly found him guilty under Section 304 Part I IPC and sentenced him to undergo imprisonment for five years. The sentence as imposed cannot be considered to be harsh. On payment of fine of Rs 20,000, same was to be paid to the heirs of the deceased. Here again there appears to be no infirmity in the order of the High Court."*

(Emphasis supplied)

12. In the light of the judgment of the Apex Court *supra,* the 2nd petitioner could not have used pepper spray as private defence, as *prima facie* there was no imminent threat or danger caused to her life. Therefore, the case at hand would require investigation in the least. If any interference at this stage is made, it would run foul of the judgment of the Apex Court in the case of ***KAPTAN SINGH v. STATE OF UTTAR PRADESH***[4] wherein the Apex Court holds as follows:

"9.1. At the outset, it is required to be noted that in the present case the High Court in exercise of powers under Section 482 CrPC has quashed the criminal proceedings for the offences under Sections 147, 148, 149, 406, 329 and 386 IPC. It is required to be noted

[4]*(2021) 9 SCC 35*

that when the High Court in exercise of powers under Section 482 CrPC quashed the criminal proceedings, by the time the investigating officer after recording the statement of the witnesses, statement of the complainant and collecting the evidence from the incident place and after taking statement of the independent witnesses and even statement of the accused persons, has filed the charge-sheet before the learned Magistrate for the offences under Sections 147, 148, 149, 406, 329 and 386 IPC and even the learned Magistrate also took the cognizance. *From the impugned judgment and order [Radhey Shyam Gupta v. State of U.P., 2020 SCC OnLine All 914] passed by the High Court, it does not appear that the High Court took into consideration the material collected during the investigation/inquiry and even the statements recorded.* ***If the petition under Section 482 CrPC was at the stage of FIR in that case the allegations in the FIR/complaint only are required to be considered and whether a cognizable offence is disclosed or not is required to be considered. However, thereafter when the statements are recorded, evidence is collected and the charge-sheet is filed after conclusion of the investigation/inquiry the matter stands on different footing and the Court is required to consider the material/evidence collected during the investigation.*** *Even at this stage also, as observed and held by this Court in a catena of decisions, the High Court is not required to go into the merits of the allegations and/or enter into the merits of the case as if the High Court is exercising the appellate jurisdiction and/or conducting the trial. As held by this Court in Dineshbhai Chandubhai Patel [Dineshbhai Chandubhai Patel v. State of Gujarat, (2018) 3 SCC 104 : (2018) 1 SCC (Cri) 683] in order to examine as to whether factual contents of FIR disclose any cognizable offence or not, the High Court cannot act like the investigating agency nor can exercise the powers like an appellate court. It is further observed and held that that question is required to be examined keeping in view, the contents of FIR and prima facie material, if any, requiring no proof.* ***At such stage, the High Court cannot appreciate evidence nor can it draw its own inferences from contents of FIR and material relied on. It is further observed it is more so, when the material relied on is disputed. It is further observed that in such a situation,***

it becomes the job of the investigating authority at such stage to probe and then of the court to examine questions once the charge-sheet is filed along with such material as to how far and to what extent reliance can be placed on such material.

9.2. In Dhruvaram Murlidhar Sonar [Dhruvaram Murlidhar Sonar v. State of Maharashtra, (2019) 18 SCC 191 : (2020) 3 SCC (Cri) 672] after considering the decisions of this Court in Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , it is held by this Court that exercise of powers under Section 482 CrPC to quash the proceedings is an exception and not a rule. ***It is further observed that inherent jurisdiction under Section 482 CrPC though wide is to be exercised sparingly, carefully and with caution, only when such exercise is justified by tests specifically laid down in the section itself. It is further observed that appreciation of evidence is not permissible at the stage of quashing of proceedings in exercise of powers under Section 482 CrPC.*** *Similar view has been expressed by this Court in Arvind Khanna [CBI v. Arvind Khanna, (2019) 10 SCC 686 : (2020) 1 SCC (Cri) 94] , Managipet [State of Telangana v. Managipet, (2019) 19 SCC 87 : (2020) 3 SCC (Cri) 702] and in XYZ [XYZ v. State of Gujarat, (2019) 10 SCC 337 : (2020) 1 SCC (Cri) 173] , referred to hereinabove.*

9.3. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, we are of the opinion that the High Court has exceeded its jurisdiction in quashing the criminal proceedings in exercise of powers under Section 482 CrPC.

10. The High Court has failed to appreciate and consider the fact that there are very serious triable issues/allegations which are required to be gone into and considered at the time of trial. The High Court has lost sight of crucial aspects which have emerged during the course of the investigation. The High Court has failed to appreciate and consider the fact that the document i.e. a joint notarised affidavit of Mamta Gupta Accused 2 and Munni Devi under which according to Accused 2 Ms Mamta Gupta, Rs 25 lakhs was paid and the possession

was transferred to her itself is seriously disputed. It is required to be noted that in the registered agreement to sell dated 27-10-2010, the sale consideration is stated to be Rs 25 lakhs and with no reference to payment of Rs 25 lakhs to Ms Munni Devi and no reference to handing over the possession. However, in the joint notarised affidavit of the same date i.e. 27-10-2010 sale consideration is stated to be Rs 35 lakhs out of which Rs 25 lakhs is alleged to have been paid and there is a reference to transfer of possession to Accused 2. Whether Rs 25 lakhs has been paid or not the accused have to establish during the trial, because the accused are relying upon the said document and payment of Rs 25 lakhs as mentioned in the joint notarised affidavit dated 27-10-2010. It is also required to be considered that the first agreement to sell in which Rs 25 lakhs is stated to be sale consideration and there is reference to the payment of Rs 10 lakhs by cheques. It is a registered document. The aforesaid are all triable issues/allegations which are required to be considered at the time of trial. The High Court has failed to notice and/or consider the material collected during the investigation.

11. Now so far as the finding recorded by the High Court that no case is made out for the offence under Section 406 IPC is concerned, it is to be noted that the High Court itself has noted that the joint notarised affidavit dated 27-10-2010 is seriously disputed, however as per the High Court the same is required to be considered in the civil proceedings. There the High Court has committed an error. Even the High Court has failed to notice that another FIR has been lodged against the accused for the offences under Sections 467, 468, 471 IPC with respect to the said alleged joint notarised affidavit. Even according to the accused the possession was handed over to them. However, when the payment of Rs 25 lakhs as mentioned in the joint notarised affidavit is seriously disputed and even one of the cheques out of 5 cheques each of Rs 2 lakhs was dishonoured and according to the accused they were handed over the possession (which is seriously disputed) it can be said to be entrustment of property. Therefore, at this stage to opine that no case is made out for the offence under Section 406 IPC is premature and the aforesaid aspect is to be considered during trial. It is also required to be noted that the first suit was filed by Munni Devi and thereafter subsequent

suit came to be filed by the accused and that too for permanent injunction only. Nothing is on record that any suit for specific performance has been filed. Be that as it may, all the aforesaid aspects are required to be considered at the time of trial only.

12. Therefore, the High Court has grossly erred in quashing the criminal proceedings by entering into the merits of the allegations as if the High Court was exercising the appellate jurisdiction and/or conducting the trial. The High Court has exceeded its jurisdiction in quashing the criminal proceedings in exercise of powers under Section 482 CrPC.

13. Even the High Court has erred in observing that original complaint has no locus. The aforesaid observation is made on the premise that the complainant has not placed on record the power of attorney along with the counter filed before the High Court. However, when it is specifically stated in the FIR that Munni Devi has executed the power of attorney and thereafter the investigating officer has conducted the investigation and has recorded the statement of the complainant, accused and the independent witnesses, thereafter whether the complainant is having the power of attorney or not is to be considered during trial.

14. In view of the above and for the reasons stated above, the impugned judgment and order [Radhey Shyam Gupta v. State of U.P., 2020 SCC OnLine All 914] passed by the High Court quashing the criminal proceedings in exercise of powers under Section 482 CrPC is unsustainable and the same deserves to be quashed and set aside and is accordingly quashed and set aside. Now, the trial is to be conducted and proceeded further in accordance with law and on its own merits. It is made clear that the observations made by this Court in the present proceedings are to be treated to be confined to the proceedings under Section 482 CrPC only and the trial court to decide the case in accordance with law and on its own merits and on the basis of the evidence to be laid

and without being influenced by any of the observations made by us hereinabove. The present appeal is accordingly allowed."

(Emphasis supplied)

13. In the light of the aforesaid judgments and the facts narrated hereinabove, the petition deserves to be rejected and is accordingly rejected. Interim order of any kind, if subsisting shall stand dissolved.

It is made clear that the observations made in the course of the order are only for the purpose of consideration of the case of the petitioners under Section 482 of the CrPC and the same would not bind any other proceeding pending against the petitioners before any other *fora*.

Sd/-
JUDGE

bkp
CT:SS