

(2022-4)208 PLR 678
PUNJAB AND HARYANA HIGH COURT
Before : Justice Aman Chaudhary
SHUBHAM ALIAS SHUBHAM SAINI – Petitioner,
Versus
STATE OF HARYANA – Respondent.
CRM-M-47378-2022

(i) Indian Penal Code, 1860 (XV of 1860) S. 188 - Where an “offence” is committed under Section 188 of the IPC, it would be mandatory on the part of the public servant concerned to file a complaint in writing before the jurisdictional Magistrate - Section 195 Cr.PC. opens up with the word “No Court” and thus, imposes an express bar for any Court to take cognizance of the offences contemplated thereunder, except in accordance with the procedure prescribed therein - Merely because the offence under Section 188 IPC is cognizable, the police is not authorised to register FIR, as the same, if, results in submission of police report under Section 173(8) of the CrPC, is barred by Section 195(1)(a) read with the definition of “complaint” provided in Section 2(d) of the CrPC, that complaint does not include a police report - The non-compliance of the established procedure as envisaged under Section 195 CrPC is an incurable defect - In the present case the police having registered the FIR for the offence under Section 188 IPC, being explicitly hit by the aforesaid provision, has rendered the proceedings void-ab-initio - Cr.P.C., 1973 (II of 1974), Section 2(d), 173(8) , 195. [Para 10, 14, 15, 22]

Held, Registration of the FIR was impermissible to begin with, as is in the case at hand, likewise the final report. The complaint of the District Magistrate, that too of a date subsequent to the final report, appended thereto, lacked comprehensive facts with specifics of the allegations of violations in each case but listed therein 206 FIRs, which were made the sole basis of the said complaint. A reference therein was also made to a report of the Superintendent of Police, that was also of a date subsequent to the final report and did not even form part of the documents appended therewith, as presented before the Magistrate.

(ii) Criminal Trial - Framing of Charge - By mere mentioning that the charge sheet as also the documents have been gone through, would not suffice in terms of the law laid down, as referred to above, while taking cognizance by the Magistrate, as the same does not reflect due application of mind - Order framing of charge by the Magistrate ought to conform with the law laid down in *Anil Kumar v. M.K. Aiyappa* (2013)10 SCC 705, and *Maksud Saiyed v. State of Gujarat and others* (2008) 5 SCC 668, wherein it had been observed that “the application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient.” [Para 16, 17]

Cases referred to:

- 1.(2010) 9 SCC 567, *C. Muniappan v. State of Tamil Nadu*
- 2.2008 SCC Online 441, *Jiwan Kumar v. State of Punjab*
- 3.2015 SCC Online 6580, *Sweta Estates Pvt. Ltd. v. State of Haryana*
- 4.2018 SCC Online 13698, *Jeevanandham v. State*
- 5.2019 PLRonline 3403 (Del.), *Mohan Kukereja v. State (GNCTD)*
6. 2020 SCC online 959, *HLA Shwe v. State of Maharashtra*
- 7.Writ Petition (Cr.) No. 310 of 2020, *Apurva Ghiya v. State of Chattisgarh*
- 8.(2013)10 SCC 705, *Anil Kumar v. M.K. Aiyappa*
- 9.(2008) 5 SCC 668, *Maksud Saiyed v. State of Gujarat*

Mr. Sachin Saini and Mr. Rahul Makkar, for the petitioner. Ms. Aditi Girdhar, AAG, Haryana.

Aman Chaudhary, J. - (Reserved on: 11.11.2022, Decided on: 29.11.2022) - By means of the instant petition, the jurisdiction of this Court under Section 482 Cr.P.C. has been invoked seeking quashing of FIR No.116 dated 29.04.2021, registered under Section 188 of IPC

at Police Station Civil Lines, Rohtak as well as consequential proceedings arising therefrom, including the final report dated 23.6.2021 and framing of charge vide order dated 04.08.2021.

2. Pithily put, the facts are that on 29.4.2021, the outlet of Mother Dairy at Shivaji Colony Chowk, Tara Hotel Wali Gali, Janta Colony Jhajjar Road, Rohtak, of which Gobinda Saini, a cousin of the petitioner, was a franchise holder, was got closed at the hands of the police, during the onslaught of Covid-19 Pandemic. Consequent thereto, most of the dairy products, which were available therein, including a huge quantity of milk, having a close date of expiry, remained unsold. Thus, the family members of the petitioner had spread the word around in their locality, that in case of requirement of milk, Gobinda Saini or any of his family members can be contacted. It was thus at around 7:30 PM on the said day, petitioner received a call from a friend, namely, Sahil, requesting for supply of 5 litres of milk to one Satish Chahal at his tea stall near the bus stand, upon which, he went to deliver the same, that led to lodging of FIR in question, he having been found violating the order dated 26.4.2021 of the District Magistrate.

3. The final report under Section 173 Cr.P.C. was presented against the petitioner on 23.6.2021, whereafter, the trial Court framed the charges vide order dated 04.8.2021.

SUBMISSIONS

4. Learned counsel for the petitioner puts forth manifold arguments which are as follows:-

Firstly; that the petitioner, a 25 years old, was preparing of M.Sc. Math (Hons.) Examination at the time of lodging of FIR. He is a qualified IT professional searching for job opportunities at the global level, for which he had applied for a passport in June, 2022, the appointment for which was scheduled for 27.6.2022. Though, his police verification took place on 04.08.2022, however, the issuance thereof was withheld by the authorities. On 28.9.2022, an enquiry was made by the petitioner, whereupon, the officials of the passport authorities apprised him, that on account of the pendency of the FIR in question, the passport application was kept under review at the Regional Passport Office, the status as downloaded by the petitioner on 10.10.2022, is appended as Annexure P-6. In absence of the passport, which is the only acceptable proof of identity of a person at the global level, the petitioner is unable to apply for a job and his candidature will be rejected at the threshold, on account of this reason alone.

Secondly; in the wake of Covid-19 pandemic, the District Magistrate, Rohtak vide order dated 26.4.2021, had prohibited the gathering of more than 4 people, unless specifically permitted, however, no specific time of restriction was mentioned therein, which is evident from the order as attached alongwith the charge sheet. It is only in the FIR in question that the time of restriction was mentioned between 6:00 PM to 5:00 AM.

Thirdly; that after framing of charges, the case was listed before the trial Court on 10.02.2022, for prosecution evidence, however none of the prosecution witness appeared, consequently, the case was adjourned to 15.09.2022, on which date, it was further adjourned to 15.02.2023, thus, it is his case that the trial is proceeding at snail's pace.

Fourthly; even as per the FIR, taken on the face of it, the ingredients of Section 188 IPC are not met, inasmuch as there is no averment in the FIR that while the petitioner had merely gone to deliver milk, an essential commodity, he did not take the necessary precautions as per the prevailing advisories/guidelines on COVID19, thereby endangering or causing threat to the public. Besides the aforesaid, in the order dated 26.04.2021 of the District Magistrate, as attached with the final report, the time of restriction on movement was not mentioned.

Fifthly; as per Section 195(1) Cr.P.C., for taking cognizance of the offences falling under Sections 172-188 IPC, there has to be a written complaint filed by the public authority concerned, which was not made in the present case.

Instead of the same, the FIR was lodged, wherein the final report dated 23.06.2021 under Section 173 CrPC was presented in the court. Thus, the entire proceedings, being in contravention of the provisions of law, are void ab initio.

Sixthly; the final report under Section 173 CrPC dated 23.06.2021 was presented in the Court, alongwith a common complaint dated 09.07.2021 by the District Magistrate, for taking cognizance in 206 FIRs registered during that period. He makes a categorical reference to the complaint filed by the Magistrate dated 09.07.2021, in specific to para No.5 thereof, wherein it

has been averred that as per the report submitted by the Superintendent of Police, Rohtak vide No. 24562 dated 28.06.2021, the accused persons in the said FIRs have violated the order of promulgation issued by him. However, learned counsel submits that no such report forms part of either the charge sheet or the complaint as per the record. Furthermore, he refers to para 6, wherein it has been mentioned by the District Magistrate that the complaint is being filed to meet out the procedural requirement under Section 195 (1) Cr.P.C and Section 60 of the Disaster Management Act, 2005, with a prayer to take cognizance under Section 188 of the Indian Penal Code and provisions of the Disaster Management Act against the accused persons. In addition, an exemption had been sought by the District Magistrate from personal appearance as a witness being a public servant but not as a complainant, which shows that as a matter of fact the complaint even taken on its face value does not meet the requirements of Section 195(1) Cr. P.C., for the reasons more than one, namely; it being dated 09.07.2021 i.e. after the date of charge sheet 23.06.2021 and the same does not disclose any specific allegations which ought to have been disclosed, which according to the learned counsel is not sufficient as merely a list of 206 FIRs had been mentioned therein.

Seventhly; for the Magistrate to take cognizance, each complaint ought to have been set up with comprehensive facts, based on which the Magistrate could have applied his mind to take cognizance thereof or not.

Eighthly; the report of Superintendent of Police is dated 28.06.2021 which though is not appended with the charge sheet, however, the same is also much after the date of the charge sheet dated 23.06.2021, as is the complaint of the District Magistrate dated 09.07.2021, thus the documents prepared subsequent to the final report, could not form a part of the said charge sheet, which shows that the entire exercise is illegal.

Ninthly; even the learned trial Court has erred in the present case inasmuch as while framing the charges against the petitioner vide order dated 04.08.2021 (Annexure P-4), by merely mentioning that from perusal of the challan and other documents appended therewith, a prima facie case for offence under Section 188 IPC was made out against the accused, which according to learned counsel is in contravention to the provisions of Section 195 (1), as there was no specific reference to the complaint of District Magistrate. Once the FIR in itself could not have been lodged as has been held by the various Courts, the challan prepared consequent to the same could not have been presented, basis on which the Magistrate has taken cognizance without applying his judicial mind. To buttress his submissions, reliance is placed by him on the judgments in the cases of *C. Muniappan v. State of Tamil Nadu*¹ (2010) 9 SCC 567, *Jiwan Kumar v. State of Punjab*,² 2008 SCC Online 441, *Sweta Estates Pvt. Ltd. v. State of Haryana*³ 2015 SCC Online 6580, *Jeevanandham v. State*,⁴ 2018 SCC Online 13698, *Mohan Kukereja v. State*⁵ (GNCTD) 2019 PLRonline 3403 (Del.), *HLA Shwe v. State of Maharashtra*⁶ 2020 SCC online 959.

4. Learned counsel submits that in the case of *Jeevanandham and others* (supra), the Madras High Court has held that FIR cannot be registered for an offence under Section 188, as the same leads to filing of charge sheet which is barred under Section 195(1) Cr.P.C..

5. He further submits that in the judgment of Delhi High Court in *Mohan Kukereja* (supra), it was held that non-compliance of provision of Section 195(1) Cr. P.C. is a defect that cannot be cured. Reference to definition of complaint under Section 2 (d) of the Cr.P.C. was made, as per which no complaint would be considered as a complaint under Section 195(1) Cr.P.C. unless it satisfies Section 2 (d) of Cr. P.C. and that mere filing of complaint alongwith the charge sheet as has been done in the case of the petitioner, does not make it a complaint under Section 195(1) Cr.P.C.. It is his further submission that the police had no jurisdiction to lodge the FIR and to file a charge sheet under Section 173 Cr.P.C. in a case involving an offence under Section 188 IPC and the Magistrate does not have the jurisdiction to take cognizance of the same. Therefore, the order of framing of charges in pursuance thereto is liable to set aside.

6. He refers to a judgment of Bombay High Court in the case of *HLA Shwe and others* (supra), which deals with the legislative intent of incorporation of Section 195(1) Cr.P.C.

7. Opposing the petition, the learned State counsel has referred to the reply by way of an affidavit of the Deputy Superintendent of Police, Rohtak, wherein, it is submitted that the

petitioner had no concern with the Mother Dairy Franchise of his cousin brother in any manner and that there was an intentional violation of the COVID-19 guidelines issued by the District Magistrate, as per which, he had ordered for a complete lockdown in Rohtak for the said period from 6:00 P.M.- 5:00 A.M. It has been further submitted that FIR dated 29.04.2021 has been registered, after which the challan has been filed and charges against the accused have rightly been framed by the learned Magistrate vide order dated 04.08.2021. There are a total of 5 witnesses in this case and none has been examined so far. It is his further submission that the petitioner has concocted the entire story, as he alongwith four more accused persons was found standing empty handed and on inquiry by the police he failed to give any satisfactory reply. Thus, FIR has been lodged on absolutely true facts and circumstances.

8. Heard counsel for the parties.

9. Before delving in the issue, it is apposite to refer to the relevant statutory provisions of Sections 188 IPC and 195 Cr.P.C. which read thus:-

"188. Disobedience to order duly promulgated by public servant.—Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or trends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation.—It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm."

Section 195 in The Code Of Criminal Procedure, 1973

195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.

(1) No Court shall take cognizance-

(a)(i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

(b)(i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub- clause (i) or sub- clause (ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.

(2) Where a complaint has been made by a public servant under clause (a) of sub- section (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint: Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.

(3) In clause (b) of sub- section (1), the term " Court " means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section.

(4) For the purposes of clause (b) of sub- section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court in situate: Provided that-

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed."

10.Perusal of the provision aforesaid makes it manifestly clear that the legislative intent is that where an "offence" is committed under Section 188 of the Indian Penal Code, it would be mandatory on the part of the public servant concerned to file a complaint in writing before the jurisdictional Magistrate.

11. In the case of *HLA Shwe and others* (supra) the Bombay High Court observed that "in that view of the matter, no prosecution could have been launched against the applicants under Section 188 of the Indian Penal Code based on a written report submitted by the Police. It was further observed that "registration of an F.I.R. for an offence under Section 188 of Indian Penal Code is not permitted in law at the instance of Police."

12.This court in the case of *Sweta Estates Pvt. Ltd. v. State of Haryana and others*, 2015 SCC Online 6580 observed that the proceedings under section 188 IPC can only be initiated on a complaint in writing by the public servant concerned and not by the police on the basis of a report under Section 173 of the Code.

13. The High Court of Chattisgarh, in the case of *Apurva Ghiya v. State of Chattisgarh*,⁷ Writ Petition (Cr.) No. 310 of 2020 held as under:-

"..the Hon'ble High Court has held that the police cannot register an FIR for the offence under Section 188 of Indian Penal Code and entire prosecution would be rendered Void-ab-initio if the procedure given under Section 195 of Criminal Procedure Code is not complied with. The Court further observed that, merely because the offence under Section 188 of the Indian Penal Code is cognizable, does not authorize the police officer to register FIR because the registration of FIR would necessarily result in submission of police report under Section 173(8) of the Code which is specifically barred by Section 195(1)(a) read with Section 2(d) of the Code. The definition of "complaint" contained in Section 2(d) of the Code makes it clear that complaint does not include a police report."

14. It is pivotal to observe that Section 195 Cr.PC. opens up with the word "No Court" and thus, imposes an express bar for any Court to take cognizance of the offences contemplated thereunder, except in accordance with the procedure prescribed therein.

15. Pertinently, it has been explicated that merely because the offence under Section 188 IPC is cognizable, the police is not authorised to register FIR, as the same, if, results in submission of police report under Section 173(8) of the Code, is barred by Section 195(1)(a) read with the definition of "complaint" provided in Section 2(d) of the Code, that complaint does not include a police report.

16. The order framing of charge by the Magistrate ought to conform with the law laid down by Hon'ble The Supreme Court in the case of *Anil Kumar v. M.K. Aiyapp*⁸ (2013)10 SCC 705, relying on *Maksud Saiyed v. State of Gujarat*⁹ (2008) 5 SCC 668, wherein it had been observed that "the application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient."

17.It is accentuated apropos the above judgments elucidating that the registration of the FIR was impermissible to begin with, as is in the case at hand, likewise the final report. The complaint of the District Magistrate, that too of a date subsequent to the final report, appended thereto, lacked comprehensive facts with specifics of the allegations of violations in each case but listed therein 206 FIRs, which were made the sole basis of the said complaint. A reference

therein was also made to a report of the Superintendent of Police, that was also of a date subsequent to the final report and did not even form part of the documents appended therewith, as presented before the Magistrate. Similarly, by mere mentioning that the charge sheet as also the documents have been gone through, would not suffice in terms of the law laid down, as referred to above, while taking cognizance by the Magistrate, as the same does not reflect due application of mind.

18. Adverting to the period of Covid-19 pandemic, indubitably the untiring efforts of the administration, its officials, police personnel, medics and paramedics etc. are laudable, to say the least. But for the imposition of restrictions, in larger public interest, the grave situation that was emerging, would have inevitably caused much more havoc in the lives of people, than it actually did, the surge of the cases of infection having been thereby contained, which was the need of the hour. Be that as it may, the proceedings for the alleged violations committed of the administrative orders, are required to be examined in terms of the procedural requirement of the provisions and the law laid down.

19. It is trite law that the non-compliance of the established procedure as envisaged under Section 195 Cr.P.C. is an incurable defect. In the present case the police having registered the FIR for the offence under Section 188 IPC, being explicitly hit by the aforesaid provision, has rendered the proceedings void-ab-initio.

20. Hon'ble The Supreme Court of India in the case of *State of Karnataka v. L. Muniswamy*¹⁰, AIR 1977 SC 1489, held as under:-

"... Section 482 of the New Code, which corresponds to S. 561-A of the Code of 1898, provides that: "Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice." In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the; ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the, ends of mere law though justice has got to be administered according to laws made by the, legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction." Scope of Section 195(1) of the Code does not contemplate investigation in a normal way by the police and filing of the challan, but the complaint has to be presented directly to the concerned court."

21. This Court having considered the aspects germane to the issue and implored itself by the abounding pronouncements as afore referred, finds that the continuation of proceedings against the petitioner would amount to an abuse of process of law, incontrovertibly, there being procedural infirmity in the present case. Thus, in order to secure the ends of justice, the FIR and the consequent proceedings are liable to be quashed.

22. In view of the overall conspectus of facts and circumstances of the case, as also the law enunciated above, this Court is persuaded to allow the present petition. As a corollary thereto, the FIR dated 29.04.2021 and subsequent proceedings arising therefrom are hereby quashed, qua the petitioner.

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