

In The Court of Addl. Chief Metropolitan Magistrate, Court No. 18, Ahmedabad.

Order Below Exh. No.1

(1) The Chargesheet is filed for the accusation of Section 188, of IPC, Section 3 of the Epidemic Disease Act, 1897 read with Section 188 of the IPC and Section 51(b) of the Disaster Management Act, 2005 after investigation of the the F.I.R. lodged by the Police Officer in concerned Police station. But I/O has not submitted the above promulgation with the Chargesheet.

(2) Questions arises,

(1) Whether the court can take the cognizance of offence under sections 188 of IPC without complying with the provisions of section 195 of the Code of Criminal Procedure and offence under sections 51(1)(b) of the Disaster Management Act, 2005 without complying with the provisions of section 60 the said Act..?

(2) Whether Section 3 of the Epidemic Disease Act, 1897 can be separated and tried independently by removing Sections 188 of the IPC and 51(b) of the Disaster Management Act, 2005 from the charge-sheet for separate trial..?

(3) To answer the above referred questions it is necessary to look into few relevant provisions of law.

Section 195 of the Cr.P.C. reads as under;

"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;

Section 60 of the Disaster Management Act, 2005 which reads as under;

"60.Cognizance of offences.— No court shall take cognizance of an offence under this Act except on a complaint made by—

(a) the National Authority, the State Authority, the Central Government, the State Government, the District Authority or any other authority or officer authorised in this behalf by that Authority or Government, as the case may be; or

(b) any person who has given notice of not less than thirty days in the manner prescribed, of the alleged offence and his intention to make a complaint to the National Authority, the State Authority, the Central Government, the State Government, the District Authority or any other authority or officer authorised as aforesaid.

Section 3 of the Epidemic Disease Act 1897, which reads as under;

3. Penalty.—Any person disobeying any regulation or order made under this Act shall be deemed to have committed an offence punishable under section 188 of the Indian Penal Code (45 of 1860).

Section 2(d) of the Cr.P.C. defines the term complaint. The same reads as under;

2(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.— A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complaint.

(4) In the case of **Govardhankumar Thakordas Asrani Versus State of Gujarat & 1** in **Criminal Misc. Application No. 24632 of 2015** Hon'ble High Court of Gujarat has observed that, "As a general rule, any person, having knowledge of commission of an offence may set the law in motion by a complaint, even though he is not personally interested or affected by the offence. There are exceptions to this general rule, as evident from sections 195 and 196 of the Cr.P.C. Section 195 is one of the sections, which prohibits a court from taking cognizance of certain offences unless and until a **complaint** has been made by some particular authority or person." Along with offences punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code, this observation of Hon'ble High Court applies also to the offences under the Disaster Management Act, 2005 also

because section 60 of said Act prohibits a court from taking cognizance of certain offences unless and until a complaint has been made by some particular authority or person.

(5) As far as word '**Complaint**' in aforesaid sections is concerned it is well settled, as appears from plain reading of provision of Section 2(d) of the Cr.P.C., that the complaint shall be oral or in writing directly to a Magistrate. As the section 2(d) of Cr.P.C. specifically excludes the Police report hence complaint does not include a F.I.R. under section 154 and Police Report (generally known as charge-sheet) under Section 173 of Cr.P.C.

(6) Regarding issue that whether charge can be separated for offences to which bar of Section 195(1)(a) of the Cr.P.C. and/or Section 60 of the Disaster Management Act, 2005 does not apply from Sections to which the bar applies because the case is not filed on Complaint before the Magistrate but is filed as police report (Charge-sheet) after investigation of F.I.R. filed in police Station. **Hon'ble High Court of Gujarat** has observed on 15/02/2019 in case of **Mo.Mohsin Mo.Irfan Chhalotiya Versus State of Gujarat**, in *Special Criminal Application NO.4105 of 2017* as under,

(a) There is no bar of taking cognizance under section 195(1)(a) of the Cr.P.C. if the offences are separate and distinct having different ingredients and characteristics from those contained in section 195 (1)

(a) of the Cr.P.C.;

(b) Bar of taking cognizance under section 195 of the Cr.P.C. will apply if the offences cannot be segregated and they form integral part;

(c) The offences must be committed as a part of the same transaction;

(d) Such offences can be segregated on the basis of element of public justice (viz. offences occurring in Chapter X of the Cr.P.C.) and personal element (viz offences under Chapter XVI of the Cr.P.C.) though committed as a part of the same transaction. If the personal element largely predominates, cognizance of such offence can be taken without a written complaint; and

(e) Change of label or garb of an offence or mis-describing an offence will create a bar of section 195 of the Cr.P.C.

-The Very same view has been taken by the Hon'ble Supreme Court in the case of Pankaj Aggarwal & Ors. Versus State of Delhi & Anr.2001(3)Crimes(SC)361 and Hon'ble High Court of Gujarat in the case of Kandhal Sarman Jadeja Versus State of Gujarat, 2019 (2) GLR 1462. If we consider the Charge of sections 269 of IPC

to which bar under section 195(1) of the Cr.P.C. and Section 60 of the Disaster Management Act, 2005 does not apply, in the light of above mentioned observation of Hon'ble courts the Charge of section 188 of the IPC and section 51(b) of the Disaster Management Act, 2005, to which bar under section 195(1) of the Cr.P.C. and Section 60 of the Disaster Management Act, 2005 applies, it can be said that all the offences are committed as a part of the same transaction, element of public justice is attached with all the offences and the personal element is not present in any of the offences, hence taking it other way round it can be said that if the public justice element largely predominates, cognizance of such offence can not be taken without a written complaint and can not be taken on a charge-sheet. It can also be said that the bar of taking cognizance under sections 195 of the Cr.P.C. and section 60 of the Disaster Management Act will apply to the Sections 269 of IPC also as the offences cannot be segregated and they form integral part of each other.

(7) In the case of Muniappan & Ors. Vs. State of Tamil Nadu Criminal Appel Nos.127-130 OF 2008 Hon'ble Suprem Court has held in Para 25 that, "the law can be summarized to the effect that there must be a complaint by the public servant whose lawful order has not been complied with. The complaint must be in writing. The provisions of Section 195 Cr.P.C. are mandatory and Non-compliance of it would vitiate the prosecution and all other consequential orders. The Court cannot assume the cognizance of the case without such complaint. In the absence of such a complaint, the trial and conviction will be void abinitio being without jurisdiction." Same View also taken in the case of M.S.Ahluwat Vs. State of Haryana, AIR 2000 SC 168, In the case of Daulat Ram v. State of Punjab, AIR 1962 SC 1206 and In the case of Babita Lila V/s. Union of india, Criminal Appeal No. 824 of 2016 Arising out of S.L.P. (CRL) No. 1474 of 2012.

Hon'ble High Court of Gujarat has taken same view in the cases of, Bechar Wala Vs. State of Gujarat in Criminal Misc. Application No. 509/2001 Dtd. 27/12/2002, Kanjibhai Babaldas Patel Vs. State of Gujarat in the Criminal Misc. Application No. 348 of 1995, Dtd. 16/03/2010 and Arundhati Bhattacharya Vs. State of Gujarat Criminal Misc. Application No.12818/2014, Dtd. 24/04/2015. Merubhai Mandanbhai Chandra & vs State Of Gujarat Criminal Misc. Application No.17286/2017 Dated 10/11/ 2017 and In the case of Govardhankumar Thakoredas Asrani Vs. State of Gujarat and Ors. 2018 1 GLH 63. Therefore, I am of view that considering similar provision this ratio laid down by Hon'ble Hon'ble Court of Gujarat applies to section 51(b) of the Disaster Management Act, 2005 and section 60 of the Disaster Management Act, 2005 also.

(8) In Writ Petition(Criminal) Diary No. 10953/2020, Dr. Vikram Singh Vs. Union of India & Anr., decided on 05.05.2020, Hon'ble Apex Court has passed very limited order which reads as under,

"We are not inclined to entertained this petition under Article 32 of the Constitution. The writ petition is accordingly dismissed."

From reading this order it cannot be said that Hon'ble Supreme Court has done away with the legal bar provided under section 195 of the Code of Criminal Procedure on taking Cognizance of cases filed during the pandemic though they are filed in way of chargesheets and without complaint of particular authorities prescribed by the law. Recently, Hon'ble Division Bench of Bombay High Court, in case of **Hla Shwe & 7 Others vs State Of Mah.** in Criminal Application (APL) No. 453/2020, decided on 21/09/2020, has observation that,

"We are of the opinion that allowing the prosecution to continue would be nothing but an abuse of the process of the Court in as much as there was an express legal bar against the institution of F.I.R. against an accused based on the police report."

(9) If the court has taken the cognizance of offence punishable for section 188 of IPC and Section 3 of the Epidemic Disease Act, 1897 (which is punishable under section 188 of IPC only) without complying with the mandatory requirement of section 195 of Cr.P.C. and of the offence punishable under Section 51(b) of the Disaster Management Act, 2005 without complying with the mandatory requirement of section 60 of the said Act, and tries the accused, **it can not only be the abuse of the process of the court but will also be without jurisdiction and it is an grave irregularity under Section 461(1) of Cr.P.C which vitiates whole proceedings therefore trial will be void ab-anitio.**

(10) In present case it is not in dispute that the case is based on a charge-sheet filed after the investigation of a F.I.R. with allegation that the accused has caused breach of the Notification issued by the District Magistrate/ Police Commissioner and therefore committed offences punishable under section 188 IPC, Section 51(b) of the Disaster Management Act, 2005 and Section 3 of the Epidemic Disease Act, 1897 read with Section 188 of the IPC. It is also not in dispute that there is no complaint before this Court as prescribed in Section 2(d) of Cr.P.C. by the authority mentioned in section 195 of Cr.P.C. or Section 60 of the Disaster Management Act. Hence, it can be said that prohibition for taking cognizance clearly applies to all the alleged offences in this case.

(11) This Court is of view that if this Court take cognizance of this case and try it on merits like any other Criminal case to which bar under section 195 of the Code of Criminal Procedure does not apply, the same will be a breach of instructions issued on administrative side by Hon'ble High Court of Gujarat in the **Circular No.D.2912-13/2017 dated 29.07.2017.**

(12) In light of the aforesaid noted decisions and as per the ratio laid down in the Case of K. Prabhakar Rao v/s. State of A. P., decided on 25/11/2014 by the Hon'ble Apex Court and Govardhankumar Thakoredas Asrani Vs. State of Gujarat 2018(1)GLH 63 the proceeding of the present Criminal Case should be stopped as this Court is lacking the Jurisdiction. Upon aforesaid discussion proceedings of this case requires to be dropped and hence I pass the following final order In the **The Special Magisterial Sitting** organize by the Chairman and Chief Metropolitan Magistrate,Ahmedabad.

FINAL ORDER

The proceeding for offences punishable under Section 188, of IPC, Section 3 of the Epidemic Disease Act, 1897 and Section 51(b) of the Disaster Management Act, 2005 against the accused is hereby dropped without the effect as to acquit or discharge.

Order passed in the Open Court Today on 10 July 2021.

Date: 10/07/2021
Place: Ahmedabad

(H.S.Patel)
Addi. Chief Metropolitan Magisterial,
Court No. 18, Ahmedabad.
Code No. GJ00969