

ORDER BELOW EX.1

1. Read the chargesheet & police papers.
2. In this case the investigation officer has filed the chargesheet under section 188 of IPC as well as Sec.135 of Gujarat Police Act upon the basis of FIR. Whether the court can take the cognizance of offences under sections 172 to 188 of IPC without complying with the provisions of section 195 of the criminal procedure is answered by the Hon'ble Calcutta High Court in the case of **Aft. Lachmi Devi V. Emperor** wherein it was held that Section 195 of the Criminal Procedure Code prescribes that no court shall take cognizance of offence punishable under sections 172 to 188 of Indian Penal Code except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. It would not be possible to prosecute a person on the basis of 'police report' even when the offence has been made cognizable without complying with the provisions enumerated in section 195(1)(a).
3. In **Daulat Ram vs State Of Punjab 1962 AIR 1206**, Hon'ble Supreme Court described the scope of Section 195 Cr.P.C and held that as per section 195 Cr.P.C. complaint must be in writing by the public servant concerned and if there is no compliance of this section then the trial was without jurisdiction and the conviction cannot be maintained.
4. Hon'ble Gujarat high Court in **KanjiBhai Vs State** in Cr.M.A No. 348 of 1995 held that as per section 195 Cr.P.C. Complaint by the concerned public servant is the Sine Qua Non for initiating the proceedings of offence under sections 172 to 188 of IPC against the accused and if there is no complaint of concerned public servant cognizance taken by court is bad in law.
5. Words used in the section 195 connotes the meaning that complainant may be the person who has promulgated the order or any person who is administratively senior to him thus the subordinate here is used in the context of administratively superior officer.

If the courts have taken the cognizance of offence punishable from section 172-188 of IPC without complying without the mandatory requirement of section 195 of Cr.P.C. then courts are supposed to be guided by the ratio laid down in **Gauri shankar Jha Vs. State Of Bihar** in which it is specifically held that when it comes to the knowledge that the court has no jurisdiction to proceed with the matter then no order as to acquittal or discharge be passed and it is better to drop the proceedings and dismiss the case.

If the court has taken the cognizance of the offences punishable from section 172 to 188 of IPC and proceeded with the matter to convict or acquit the accused inspite of lack of jurisdiction then it is bad in law. In the similar way if the accused is acquitted or discharged on the basis that court has no jurisdiction to take cognizance then this will curtail the right of prosecution to file fresh proceedings as per procedure prescribed by law.
6. This case is also filed under The Gujarat Police Act for the violation of orders passed by appropriate authority under the provision of the G.P. Act, 1951 (Here in after referred as The Act). The Gujarat Police Act has been enacted for regulating the method of working throughout the state by the police and for the maintenance of public order. One of the purpose of The Act is embedded in the preventive measures taken by police, such preventive measures are often spontaneous and requires arrest without warrant, otherwise without such power the preventive

measures will become infructuous. After the preventive measures are taken and when circumstances so require then the situation ripens into registration of case. At this stage, the scheme of the Act is also required to be looked into. It is clear from provisions of the act that section 90A is declared cognizable through its sub clause (4) and section 118 through its sub clause 1C and section 143-B thus whenever legislature intends to make particular provision cognizable, the same is specifically made while rest are left undeclared.

7. In the case of **State Of Gujarat v. Bhimji Manji and Ors. reported in 1968 Cr.L.J.156**, Divisional Bench of Hon'ble High Court observed in para-3 that,

"This is subject only to an enactment, if any, which regulates the manner or place of investigation, enquiry, trial or otherwise dealing with such offence. Thus, it appears that even when an investigation is to be made and an enquiry, trial or otherwise dealing with such offence. Thus, it appears that even when an investigation is to be made and an enquiry and a trial have to be held for offences against other laws, the Courts have to look to the provisions of the Code, unless it appears that any special enactment in force at the material time makes a special provision in the matter of dealing with such offences."

8. There is no specific provision provided for the trial in the Gujarat Police Act, 1951. Therefore, in that circumstances, sec.4 of the code of Criminal Procedure, 1973 is applicable and it is clear from section -4 of the code, when ever no specific provision provided in special or local act, the investigation, trial and inquiry will be conducted according to provisions of Cr.P.C.
9. Similarly in Gujarat Police Act, there are certain provisions for instance Section 62, 70, 71, 72, 73, 79, 80, 81 where in a police officer has been given the power to arrest but nowhere it is written that for violation of these sections, the offence is made cognizable. The power to arrest seems to be given to the police officer to meet emergent conditions but the power to arrest it self does not convert non cognizable offence into cognizable. In this Act no general power of arrest is given to police but limited power of arrest under different circumstances is given like under section 62 if externment order is passed against any person under section 55, 56, 57 and 57-A and that person fails to remove himself or having removed but enters without permission or breaches condition of permission then that person be arrested and removed in police custody to such place outside the area as that authority may in each case prescribe. Similarly, limited power of arrest is given to police in section 79 of this Act when any offence punishable under section 117 or section 125 or section 130 or sub section (I), (IV) or (V) of section 131 or Cl (i) of section 135 in respect of contradiction of any order made in section 39 or 40 if committed in the presence of police. It means if offence is not committed in the presence of police then police has no power to arrest without warrant. Similar power of arrest like in section 42 Cr.P.C. is given to police under section 81 where if non cognizable offence is committed in the presence of police then police has power to arrest without warrant. If we correlate power of police to arrest without warrant as cognizable offence then it means if non cognizable offence if committed in the presence of police then the offence becomes cognizable one and police get the power to investigate the non cognizable offence without the permission of concerned magistrate.

Legislation specifically in schedule -I part I make the offences in IPC as cognizable or non-cognizable, bailable or non-bailable and for other laws clearly made the provision in schedule-I part II that if punishment prescribed by law is for less than three years or fine or with both then the offence is non-cognizable one.

10. From these provisions it is therefore clear that whenever the Legislature wants to give power to the police officers to effect an arrest of a person or to investigate into an offence falling under any of the provisions of The Act, they have accordingly so provided, but so far as section 135 of The Act is concerned, there is no such reference is given to investigate the offence without prior permission of the competent Magistrate. Further the offence cannot be said to be cognizable, only because a power is conferred to arrest any person committing such offence, without warrant. Section 135 of The Act does not specifically prescribe, whether the offence is cognizable or non-cognizable and therefore, in the absence of any such specific reference therein, in order to determine as to whether an offence under section 135 of The Act is cognizable or non-cognizable, one has to fall back upon the definition contained under section 2(c) and 2(l) read with part II of the First Schedule of the Criminal Procedure Code. The maximum punishment provided for offence punishable under sec.135 is one years. Therefore conjoint reading of schedule-I part-II of the Code and section 135 of G.P. Act made the offence non cognizable and bailable. Now the question arises in non-cognizable offence which of the provision of the Criminal Procedure Code would govern the investigation in the cases like the present. When the offence is non cognizable then Police is required to investigate the offence with the permission of the court and as per section 155(2) of Cr.P.C. "(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.."It is clear from this provision that, Non Cognizable offence is required to be investigated after the order of the Magistrate having power to try such case.
11. The Honorable High Court of Gujarat in the case of Waghari Vs State of Gujarat on 14th December,2009 in Criminal Misc. Application No. 15226 of 2007 observed that even if the section 79 and 80 of The Act empower the police officer to cause arrest of the petitioner, there is no provision pointed out either in the Act or under the Criminal Procedure Code to show as to how the entire incident was investigated without permission of the Magistrate. Admittedly, the offence alleged was non-cognizable offence. Under section 155(2) of The Criminal Procedure Code, therefore no police officer could have investigated such an offence without order of Magistrate having power to try such a case.
12. In MOIN BASHA KURNOOLI S/O LATE HAJI ABDUL GAFOOR V/S STATE OF KARNATAKA, 2014 Law Suit(Kar) 2048, Hon'ble Karnatka High observed in para 39 to 41 that Power to arrest without warrant in the offences where punishment prescribed is less then three years in Karnatka Police Act under different circumstances does not confer the power to investigate the offence to police without prior permission of the Magistrate. Further Honourable Kerla High Court in Kunhumammed Vs. State of Kerala in Cri.M.C. No. 702 of 2011 held, that as per explanation to section 2(d) of the Criminal Procedure Code the report of the police officer cannot be deemed as a complaint and police officer can not be deemed as a complainant because said explanation has

no application to the case where non-cognizable offence alone is alleged at the ab initio of Investigation.

13. Gujarat Police Act is made for maintaining public peace and order and power to arrest is given to police for urgent action so that for every breach of order police has not to rush to concerned Magistrate for taking permission to arrest. It is the principle of interpretation of Statute that when the Statute itself expressly provides express provisions then it is to be read as it is. In G.P. Act, only three offences are made cognizable. Therefore, except Section 90(A), 118 and 143(B), the other offences are deemed to be non cognizable.
14. It is established that in cognizable case police has power to arrest and investigate without the permission of concerned magistrate and subsequently police files charge-sheet under section 173 of Cr.P.C. but if power to arrest under different circumstances is given under any law then as per above discussion it does not mean that police automatically get the power to investigate the offence without prior permission of the concerned Magistrate. In the present case that there is no confusion in the mind of a Investigation Officer that he is going to investigate only offence of section 135 G.P. Act and such investigation is carried out by the police in respect of Non-cognizable offence without the prior permission of concerned Magistrate under section 155(2) of Criminal Procedure code, which is illegal and bad in law.
15. In the present case also, police has investigated the offence without the permission of this court. It is clear from record that no permission is sought for by the police for the investigation. Therefore, chargesheet filed by the police against accused is illegal in the eye of law. Considering the above situation, when the chargesheet is illegal in the eye of law, in that circumstances "principle of nullity" will apply and all the subsequent proceedings are also become illegal. Upon discussion of aforesaid provision of law and Judgment Pronounced by the Hon'ble Supreme Court in Keshav Lal (Supra) and various Honorable High Courts, it is clear that if police investigated the non cognizable offence without the prior permission of the concerned Magistrate and subsequently filed the chargesheet then as per law it is not proper for the Court to take cognizance or to conduct the trial on that charge-sheet or to treat that charge sheet as complaint. So, this Court passes the following final order in the interest of justice -

FINAL ORDER

The Proceeding against the accused person u/s 135 of Gujarat Police Act as well as Sec.188 of Indian Penal Code is hereby dropped with liberty to prosecution to take such steps as he deems fit in accordance with law. If any muddamal recovered shall be disposed as per rules.

Rajkot.

Date: 11/09/2021

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