

Order below Exh.1

1. Perused the record. In this Case the Investigating Agency filed the Charge-sheet against the accused for commission of an offence under Section 188 of the Indian Penal Code, 1860, on the basis of First Information Report lodged against the accused. On perusing the record, it appears that the Investigation Agency filed the Charge-sheet on the ground that accused violated the term of promulgation issued by the District Magistrate, Botad, and committed the crime under Section 188 of the Indian Penal Code, 1860.
2. Therefore, prior to issuance of the summons against the accused and at the stage of taking the cognizance, it is required to be taken into consideration that whether this Court is empowered to take cognizance or not and for that this Court finds it pertinent to discuss Section 195 (1) of the Code of Criminal Procedure, 1973.

Section 195- "(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;" Therefore, while considering the provisions as envisaged under Section 195 (1) of the Code of Criminal Procedure, it is clearly envisaged that no Court shall take cognizance of the offence punishable under Section 172 to 188 (inclusive of both) of Indian Penal Code, 1860 save and

except on the written complaint of the public servant or of some other public servant to whom he is administratively subordinate.

Further, while on plain reading of the provisions as envisaged under Section 195 of the Code of Criminal Procedure, the term "complaint" is to be considered as defined under Section 2 (d) of the Code of Criminal Procedure, which is as: "*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 complainant;"

Therefore, after considering the definition as defined regarding the term "complaint" under Section 2 (d) of the Code of Criminal Procedure, it is crystal clear that the report of the police does not fall under the ambit of term "complaint" as defined under Section 2 (d) of the Code of Criminal Procedure. Therefore, considering the above facts, it is crystal clear that there is bar to take cognizance if the provisions of section 195 of The Code of Criminal Procedure, 1973 are not complied with.

3. In ***Daulat Ram v/s. State of Punjab, 1962 AIR 1206***, Hon'ble Supreme Court described the scope of Section 195 of the Code of Criminal Procedure, 1973 and held that as per Section 195 of the Code of Criminal Procedure, 1973, the Complaint must be in writing by the Public Servant concerned and if, there is no compliance of this provision then the trial would be without jurisdiction and the conviction cannot be maintained.
4. In ***Kanjibhai v/s. State on 16th March, 2010, Criminal Misc. Application No.348 of 1995***, Hon'ble High Court of Gujarat held in Para-7 that, in view of the provisions of Sub-Section (1) of Section 195, which expressly bars taking of cognizance of an offence under Section 188 except as provided thereunder, read with Section 2(d) of the Code, it was not permissible for the learned Judicial Magistrate to take cognizance of the offence in question on the basis of a Charge-sheet filed pursuant to the First Information Report lodged by the Respondent No.2. In light of the provision of Section 195(1)(a), the Court could not have taken cognizance of the offence under Section 188 of the Indian Penal Code, 1860 except on a Complaint in writing by the Public Servant concerned or some other Public Servant to whom he/she is administratively subordinate Further, as per the ratio laid down in the case of ***P. D. Lakhani & Anr. v/s. State of Punjab & Ors. Reported in AIR 2008 SC (Supp) 1825***, the Hon'ble Apex Court has observed that a cursory reading of Section 195(1)(a) makes out that in case a Public Servant concerned who has promulgated an order which has not been obeyed or which has been disobeyed, does not prefer to give a Complaint or refuses to give a Complaint then it is open to the Superior Public Servant to whom the Officer who initially passed of the Order promulgated by his subordinate. The Said decision is squarely applicable to the facts of the present Case.
5. In light of the above mentioned 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***, the proceedings of the present Criminal Case are required to be stopped as this Court is lacking the jurisdiction.

6. Further, in the recent Judgment of the Hon'ble High Court of Gujarat in the case of ***Sahidkhan Vahidkhan Pathan vs state of Gujarat, R/Criminal Misc. Application no. 17473 of 2020, decided on 14/06/2021***, wherein the Hon'ble High Court of Gujarat has held in para.12.1 as follow:

12.1 The Supreme Court has set out categories of cases by way of illustration wherein power could be exercised as reproduced hereinabove and whereas in the considered opinion of this Court regard to express legal bar engrafted in any of the provisions of the Code with regard to institution and continuance of the proceedings, would be applicable with the case on hand since as clearly seen from the discussion hereinabove, Section 195 of the Code of Criminal Procedure requires that for taking cognizance for offence punishable under Section 172 to 188 of the Indian Penal Code, the complaint is to be in writing by public servant or any person subordinate to public servant. In the instant case the complaint is in the form of First Information Report and thus the present FIR would be hit by the bar of Section 195 of the Code of Criminal Procedure.

7. Further, The Hon'ble District Court, Botad has also directed to put maximum cases for disposals in special sitting. Further, The Hon'ble District Court, Botad has also vide Notification has organised Special Sitzings of Magisterial Courts for disposal of cases according to the prescribed procedure of the law on this National Lok Adalat i.e. 11th September, 2021. Hence, as per above discussions at length, I pass the following final order :

: FINAL ORDER :

1. The Present Criminal Case is hereby disposed off accordingly.
2. It is clarified that the complainant side is hereby permitted under section 300 (5) of the Criminal Procedure Code to file fresh proceedings against the accused by following the procedure prescribed by law (i.e. by way of filing a private complaint).
3. The Muddamal, if any seized by the authorities in this case, is hereby ordered to disposed of as per the provision of the criminal manual.

Pronounced in this Open Court today i.e. on this 11th day of the September, 2021.

Date: 11/09/2021

Place: Botad

Sagar Satishbhai Parikh
Chief Judicial Magistrate
Botad
(GJ01135)