

CRIMINAL CASE NO.19933 OF 2021**:: ORDER BELOW EXH. 1 ::**

- 1) The present charge-sheet has been registered against the accused under Section 188 IPC and under Section 51 of the Disaster Management Act, 2005. It has been alleged that the accused has unlawfully and negligently committed an act which is, likely to spread the infection of COVID - 19 (Novel Corona Virus) disease i.e., dangerous to life, and has therefore committed breach of Notification issued by Police Commissioner / State of Gujarat.
- 2) The charge-sheet was submitted to this Court and the same was kept for deciding the issue as to **whether the Court can take cognizance of offence registered under Section 188 of the Indian Penal Code read with other sections of the Penal Laws without complying with the provisions of Section 195 of the Code of Criminal Procedure ?**
- 3) The Ld. APP has submitted his arguments before this court in this regard and has stated that in any cognizable offence the Police can arrest the accused without warrant and Section 188 of IPC is cognizable in the State of Gujarat, therefore there is no bar to take cognizance of the offence under Section 188 of the IPC. Moreover, the cases filed by the Police are a result of action taken to restrain activities which are likely to spread the pandemic COVID - 19 and therefore, these cases also include penal provisions of special penal laws also such as offence under Section 269 and 270 of IPC, offence under the Gujarat Police Act, Section 51(3) of the Disaster Management Act, 2005 & Section 3 of the Epidemic Disease Act, 1897 and therefore, such cases cannot be disposed for the reason that there is bar to take cognizance. In this regard the Ld. APP has also referred the judgment of Hon'ble Supreme Court in the case of **Dr. Vikram Singh v. Union of India & Anr**, [Writ Petition(Criminal) Diary No. 10953/2020, decided on 05.05.2020], has also not entertained a Public Interest Litigation to quash FIRs registered under Section 188 of the Indian Penal Code, 1860 for violation of lockdown orders based on the legal bar of Section 195 of the Code of Criminal Procedure, hence such cases cannot be disposed of on applying the bar of Section 195 of the Code of Criminal Procedure. Thus, the Ld. APP has submitted to proceed with the aforesaid cases.
- 4) Heard the Ld. APP, perused the FIR, charge-sheet and other police papers. The Court opines that in order to answer the above referred issue it is necessary to look into

relevant provisions of law. In this context the provisions of Section 195 (1) (a) of Criminal Procedure Code is as follows :

"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;"***

The word complaint as referred to in the aforesaid Section 195 of Cr.P.C. is defined under Section 2(d) of the Cr.P.C. which means and includes any allegation made orally or in writing to a Magistrate which 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 Code of Criminal Procedure.

Therefore, as per the provisions of Section 195 (1) (a) of the Criminal Procedure Code no court can take cognizance of any offence until the written complaint is filed by any concerned public servant or some other public servant to whom he is administratively subordinate.

- 5) Furthermore, together with the aforesaid provisions of law there are catena of judgments of the Hon'ble Supreme Court and the Hon'ble High Courts wherein, the issue of "bar to take cognizance" has been discussed as follows:

In the case of **C. Muniyappan v. State of Tamil Nadu** reported in A.I.R. 2010 (S.C) 3719 the Hon'ble Supreme Court has held that *"Undoubtedly, the law does not permit taking cognizance of any offence under Section 188 IPC unless there is a complaint in writing by the competent Public Servant. In the instant case, no such complaint*

had ever been filed. In such an eventuality and taking into account the settled legal principles in this regard, we are of the view that it was not permissible for the trial Court to frame a charge under Section 188 IPC."

In the case of **Daulat Ram v. State of Punjab**, 1962 AIR 1206, Hon'ble Supreme Court has held that as per section 195 Cr.P.C. the 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.

In the case of **Govardhankumar Thakordas Asrani v. State of Gujarat & 1** [Criminal Misc. Application No. 24632 of 2015] Hon'ble High Court of Gujarat has observed that, 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.

In the case of **Kanjibhai Bhikhabhai v. State** [Cr.M.A. No. 348 of 1995] the Hon'ble High Court of Gujarat has held that perusal of the provisions of section 195 of the Cr.P.C., indicates that there is an express bar against taking cognizance of any offence punishable under section 188 except on a complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. On a plain reading of the provisions of section 2 (d) of the Code it is abundantly clear that a first information report is specifically excluded from the ambit of "complaint" as defined under the Code.

In the cases of **M.S. Ahlawat v. State of Haryana** reported in AIR 2000 SC 168 and **Sachidanandsinh and Ors. v. State of Bihar** reported in (1998) 2 SCC 493, it has been held that *"Provision of Section 195 of Criminal Procedure Code are mandatory and no court has jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing as required under that section"* the complaint must have been filed in writing by the public servant concerned whose notification has been breached or of some other public servant to whom he is administratively subordinate and such written complaint must have been filed before the Court.

In the case of **Nirmalaben Arvindbhai Itiwala & Anr. v. Kalavatiben Natvarlal Sindhwala & Anr.** [Criminal Misc. Application No. 1475 of 1997] the Hon'ble High Court of Gujarat has held that the complaint which is mentioned under Section 195 of Criminal Procedure Code is to be considered as the complaint filed before the Court and therefore, if the complaint is filed before the Police and on the basis of said complaint charge-sheet has been submitted, then cognizance of such complaint cannot be taken by the Court.

Thus, it is the prima facie condition of Section 188 that such complaint must be filed by the public servant/officer who had issued the notification or the written complaint must have been filed by public servant/officer superior to that officer, and if such complaint is not a written complaint then the accused may not be punished by taking cognizance of the offence. In the present case also, the complaint has been filed against the accused in the Police Station and on the basis of said complaint, offence was registered and after investigation the charge-sheet has been submitted. The complainant is neither the public servant/officer who had issued the notification nor the officer superior to that officer who has issued notification. Therefore, this Court opines that in such circumstances and as per provisions of Section 195 of the Criminal Procedure Code cognizance of such offence cannot be taken.

- 6) As far as the arguments of Ld. APP relating to judgment of the Hon'ble Supreme Court in the case of **Dr. Vikram Singh v. Union of India & Anr.**, [Writ Petition(Criminal) Diary No. 10953/2020] is concerned; the Court opines that a bare reading of the said judgment is clearly indicative that in this case Hon'ble Supreme Court has nowhere held that the legal bar under section 195 of the Code of Criminal Procedure cannot be applied to cases under section 188 of the IPC which are filed during the pandemic lockdown. In fact the Hon'ble Supreme Court has not entered in applicability of provisions of section 195 of the Code of Criminal Procedure and/or section 188 of the IPC. Hon'ble Supreme Court has merely made a note that it is not inclined to entertain this petition under Article 32 of the Constitution. And therefore, it can't be said that the Hon'ble Supreme Court has done away with the legal bar provided under section 195 of the Code of Criminal Procedure for the cases filed by way of submitting charge-sheets and without any complaint of particular authorities prescribed by the law which are filed during the pandemic, for the breach of lockdown.

It is also worth to note that after this PIL was dismissed by Hon'ble Supreme Court the Hon'ble Bombay High Court, in case of **Hla Shwe & 7 Others v. State of Maharashtra** [Criminal Application (APL) No. 453/2020, decided on 21/09/2020], has quashed the F.I.R. and charge-sheet for the offences punishable under sections Sections 188, 269, 270 of the IPC, Section 14 of the Foreigners Act, Section 3 of the Epidemic Disease Act, 1987 and Section 51 of the Disaster Management Act, 2005. In this case Hon'ble Bombay High Court has quashed the proceedings with observation 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.

- 7) As far as the argument of Ld. APP-- that the cases under Section 188 cannot be disposed of as other penal provisions are also involved with Section 188 of IPC in the same charge-sheet-- is concerned; the Court opines that such cases cannot be taken up separately as both offences have been committed in the course of same transaction. This Court relies upon the judgment of the Hon'ble High Court of Gujarat in the case of **Nayan Harishbhai Kanakhara & Anr. v. State of Gujarat & Anr.** (Criminal Misc. Application No. 23009/2015) and in the case of **Mohmadmohsin Mohmadirfan Chhalotiya v. State of Gujarat & Anr.** (Special Criminal Application No. 4105 of 2017) wherein, it has been held that when the accusations leveled against the accused for different offences form part of same transaction, then the same cannot be split up. Thus, in such circumstances even though other accusations have also been leveled against the accused together with Section 188 of IPC but because, the same cannot be split up taking cognizance of the alleged offence is barred by Section 195 of the Criminal Procedure Code.
- 8) As far as the arguments of Ld. APP that the Court can take cognizance in case where the Police submit charge-sheet in case of cognizable offence is concerned the Court opines that there is a difference between cognizable offence and taking cognizance of offence. It has been specified in detail by the Hon'ble High Court of Madras in the case of **Jeevandham v. State Represented By** (Judgment dated 20th September, 2018 in CrI. OP (MD) Nos. 1356 of 2018) wherein at Para 25,

following guidelines were issued insofar as an offence under Section 188 is concerned;

- a) **A Police Officer cannot register an FIR for any of the offences falling under Section 172 to 188 of IPC.**
- b) **A Police Officer by virtue of the powers conferred under Section 41 of Cr.P.C. will have the authority to take action under Section 41 of Cr.P.C., when a cognizable offence under Section 188 IPC is committed in his presence or where such action is required, to prevent such person from committing an offence under Section 188 of IPC.**
- c) **The role of the Police Officer will be confined only to the preventive action as stipulated under Section 41 of Cr.P.C. and immediately thereafter, he has to inform about the same to the public servant concerned/authorized, to enable such public servant to give a complaint in writing before the jurisdictional Magistrate, who shall take cognizance of such complaint on being prima facie satisfied with the requirements of Section 188 of IPC.**

Thus, the Hon'ble Madras High Court has stated that if the offence under Section 188 of IPC takes place before the Police, then the Police Officer can arrest such person and the said Police Officer has to produce such person before the public servant/authority who had issued the notification and the said public servant/authority have to file a written complaint before the Judicial Magistrate having proper jurisdiction against such person.

Also that recently, the Hon'ble High Court of Gujarat in the case of **Parshottambhai Odhavjibhai Solanki v. State of Gujarat & Anr.** (Judgment dated 04/11/2020 in Criminal Misc. Application No. 31264 of 2016) has held that;

"6.1 A plain reading of the above provisions makes it clear that it bars the Court from taking cognizance of any offence punishable under Section 188 IPC or abetment or attempt to commit the same, unless there is a written complaint by the public servant concerned for contempt of his lawful order. The object of this provision is to provide for a particular procedure in a case of contempt of the lawful authority of the public

servant. In the instant case, it appears that the Court below has not looked into the provision of section 195 of Cr.P.C. before passing the impugned orders. Even if the offence under section 188 of IPC is cognizable, it does not enable the Police Officer to register an FIR for an offence under section 188 of IPC along with other sections. The reason being, such registration of an FIR has to necessarily end with a Police Report under section 173(2) of Cr.P.C., which is specifically barred under Section 195 of Cr.P.C."

Therefore, from the aforesaid judgment it is clear that the cognizable offence and to take cognizance are two different things. In the State of Gujarat, Section 188 of IPC is cognizable offence and therefore the Police can arrest without warrant as per Section 41 of Cr.P.C., but cannot register FIR, against him. Because as per Section 195 of Cr.P.C. the written complaint under Section 188 of IPC has to be filed by the public servant concerned who had issued the notification or by some other public servant to whom he is administratively subordinate before the Judicial Magistrate having proper jurisdiction. If such procedure is not followed and still charge-sheet under Section 173 (2) of Cr.P.C. is filed on the basis of offence under Section 188 of IPC, then there is a bar to take cognizance of offence as per provisions of Section 195 of Cr.P.C.

If this court take the cognizance of offence punishable under Section 188 of IPC without complying with the mandatory requirement of Section 195 of Cr.P.C. and tries the accused, it will not only be an abuse of process of the court but will also be without jurisdiction and it is an irregularity under Section 461(l) of Cr.P.C. which vitiates the proceedings.

In present case it is not in dispute that the offence is cognizable and the case is based on a charge-sheet filed after the investigation of a F.I.R. and 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. Hence, it can be said that prohibition for taking cognizance clearly applies to all the alleged offences in this case.

This Court is of view that if this Court takes 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** instructing all Judicial Officers that if these cases are treated as regular criminal cases and disposed of by giving judgments and points are earned it is in clear violation of the judicial pronouncements of the Hon'ble Apex Court and Hon'ble High Court of Gujarat and not following these instructions scrupulously and any breach of same will be treated as misconduct on the part of Judicial Officer concerned.

- 9) In the present case, till date no cognizance has been taken against the accused and no order to issue process against the accused has been passed by this Court and the present case is pending for the order of taking cognizance. And looking to the aforesaid discussion the Court opines that as per the bar to take cognizance as stated in provisions of Section 195 (1) (a) of the Criminal Procedure Code the Court cannot take cognizance. Therefore, the following order is passed ***ex-debito justitate***.

:: O R D E R ::

- 1) The cognizance of the present case is not being taken and the proceeding for offences punishable under Section 188 of IPC and under Section 51 of the Disaster Management Act, 2005 against the accused is hereby dropped.
- 2) The appropriate authority is at liberty to file fresh complaint in aforesaid case as per the provisions of laws.

Signed and pronounced in the open Court today i.e., on 11th day of September, 2021.

(Malvika Purohit)
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1st Addl. JMFC
Ahmedabad (Rural)