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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.M.C. 2668/2006

% Judgment delivered on: 3rd October, 2011

SHIV CHARAN & ORS. Petitioner
Through: Mr.Satish Tamta, Adv.
with Ms.Nisha Narayanan, Adv.
versus

STATE Respondent
Through: Ms. Rajdipa Behura,
APP for State.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No. |
| 2. To be referred to Reporter or not? | Yes. |
| 3. Whether the judgment should be reported in the Digest? | Yes. |

SURESH KAIT, J. (Oral)

1. Vide the instant petition, the petitioner has prayed as under:-

"Set aside the order dated 31.01.2004 passes by Sh. S.K. Sharma, Metropolitan Magistrate, New Delhi and quash the proceedings in case titled "State Vs. Shiv Charan Gupta and others" pending in the court of Sh. Chandrashekhar, Metropolitan Magistrate, Delhi."

2. The facts in brief are, on 21.08.2003 an FIR No.399/03 under Section 186/353/506/34 IPC was registered at P.S. Defence Colony on the statement of Sh.Atul Kumar Nasa, Drug Inspector.

3. During the investigation conducted by the police, Section 22(3) Drugs and Cosmetics Act, 1940 was also added. Accordingly, the charge-sheet was filed in the concerned Court, who took cognizance on 31.01.2004, thereafter, the matter was proceeded further.

4. The petitioner challenged the cognizance order dated 31.01.2004 by the instant Crl.M.C. and on the first day i.e. 08.05.2006 the proceedings were stayed till further orders and finally vide order dated 19.02.2008 an interim order passed on 08.05.2006 was made absolute.

5. On 21.08.2003 at about 04:00 PM Sh.Atul Kumar Nasa, Drugs Inspector and his colleagues, as part of their official duty visited the premises M/s Shiv Shore, Shop No.20, Defence Colony Market, New Delhi. Three persons were present in the shop namely, one Shiv Charan Gupta @ Ajay, Brij Mohan Gupta @ Anil and

Devendra Kumar Gupta. All the above mentioned three persons prevented Sh.Atul Kumar, Drugs Inspector from inspecting and examining the purchase and sale records etc. They physically pushed Sh.Atul Kumar Nasa out of the shop, further they threatened him by using abusive language. Thereafter, an FIR was lodged on the complaint made by Sh.Atul Kumar and the accused persons were arrested, and thereafter, they were released on bail.

6. Learned counsel for the petitioner raised legal issues that, Section 32 of the Drugs and Cosmetics Act, 1940 provide cognizance of offence as under:-

“Cognizance of offences:- (1) *No prosecution under this Chapter shall be instituted except by:-*

- (a) an Inspector; or*
- (b) any gazetted officer of the Central Government or a State Government authorized in writing in this behalf by the Central Government or a State Government by a general or special order made in this behalf by that Government; or*
- (c) the person aggrieved; or*
- (d) a recognised consumer*

association whether such person is a member of that association or not.

(2) Save as otherwise provided in this Act, no court inferior to that of a Court of Session shall try an offence punishable under this Chapter.

(3) Nothing contained in this Chapter shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Chapter."

7. Further he submits that under Section 22(3) if any person wilfully obstructs an Inspector in the exercise of the powers conferred upon him by or under this Chapter [or refuses to produce any record, register or other document when so required under clause (c) of sub-section (1)] he shall be punishable with imprisonment which may extend to three years, or with fine, or with both.

8. Under Section 3 (e) (II) the definition of Drugs Inspector is given which reads as under:-

"Inspector" means

(i) in relation to [Ayurvedic, Siddha or Unani] drug, an Inspector appointed by the Central Government or a State

Government under Section 33G; and

(ii) in relation to any other drug or cosmetic, an Inspector appointed by the Central Government or a State Government under section 21;]”

9. Learned counsel has pointed out that under Section 186 IPC provides as under:-

“Obstructing public servant in discharge of public functions:- Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment of either description for a terms which may extend to three months, or with fine which may extend to five hundred rupees, or with both.”

10. Further he submits that Section 195 (1)(a) Cr.P.C. also provides as under:-

“195 (1) (a).....(i) of any offence punishable under sections 171 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, 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;"

11. The learned counsel has pointed out that afore mentioned Section 195 (1) (a) is covering the offence under Section 172 to 188 and the present case is falling under Section 186, therefore this Section is relevant in the instance case to adjudicate the issue.

12. He has argued that the instant case should have been filed by the concerned public servant i.e. Drugs Inspector and the police was not competent to lodge the FIR and file the charge-sheet. The offence under Section 186 IPC is of the non-cognizable nature, therefore the police has no power to register and investigate the case without prior permission of the concerned Magistrate.

13. Admittedly, the instant case has been filed by the SHO, Defence Colony, police registered the FIR No.339/2003 and matter was proceeded and finally filed the charge-sheet before the Court. Thereafter the Magistrate has also taken cognizance vide order dated 31.01.2004 on the challan filed by the police.

14. Mr.Satish Tamta, learned counsel for the petitioner relied upon the judgment of his Court titled as **Vasudev Vs. State 1984 (2) Crimes 599** on the similar issue. In the case of **Vasudev (supra)** the challan was submitted by the SHO, PS Lahori Gate in the concerned Court for the offence under Section 186 IPC.

15. The background of the facts given was that on 22.11.1981, the SDM, Local Health Authority along with a Drugs Inspector and some other staff went to Shradhanand Market for the purpose of taking samples of food-stuff. They wanted to ensure whether any adulterated stuff was being sold. As they approached three shops bearing Nos.D-2, D-4 and D-6, the owners of the first two shops did not allow them to take any sample, and rather put the shutters of their shops on. Thus they defeated the raiding party from taking any sample. The case was registered. Taking cognizance of the case, the SHO filed the challan in the trial Court and thereafter two accused were summoned. The said order was challenged under section 482 Cr.P.C. and

following three issues were raised:-

“(i) There could not be a joint trial of the owners of the two shops, No.D-2 and D-4 as the alleged offences committed by them, were separate and distinct and did not arise out of the same transaction.

(ii) It is pointed out that the offence under Section 186 Indian Penal Code is non-cognizable, and therefore, the police could not have investigated the same, and the proper course was to have referred the complainant to the Magistrate concerned. This was not done. In this regard, reference is made to Section 155 Criminal Procedure Code.

(iii) It is contended that in terms of Section 195 Criminal Procedure Code, cognizance of an offence under Section 186 Indian Penal Code could have been taken by the court on a complaint by the public servant alone, or an officer under whom he was working. No such complaint, it is pleaded, was filed by the SDM who was heading the raiding party.”

16. In para 4 of the judgment it was observed that investigation in the case by the police office was wholly incompetent and the law did not permit the SHO to

proceed with the same unless he had specifically obtained permission from the Magistrate having power to try such case, or commit the case for trial. Under Section 155 Cr.P.C. in this regard is quite explicit. In fact, sub-section (2) prohibits the police officer to investigate a non-cognizable case without the permission of the Magistrate concerned. When this is the position of law, the investigation and the filing of the challan in the present case must be struck down.

17. In para 6 of the said judgment the Court has observed that the proceedings for an offence under Section 186 IPC could not have been into motion if there had been a formal complaint lodged with the court concerned by the public servant who had been obstructed in the discharge of his public duties, or against whom an offence had been committed. In fact, there was an absolute bar in terms of the language used in Section 195 Cr.P.C. The same issue was also decided in a case of **Daulat Ram Vs. State of Punjab AIR 1962 SC 1206.**

18. The Court has further observed in para 8 of the

judgment in **Vasudev (supra)** that the alleged offence of not allowing raiding party to take samples and abused with the raiding team by the shopkeepers are distinct and separate. There was no commonality between them. When the raiding party was went to one of the shops, and the owner declined and not allow the samples to be taken, the offence so far as he was concerned, was complete. Similarly, the offence by the other shopkeeper was independent and separate. It is not the mere going of a raiding party at a market place and seeing several persons committing certain offences, not jointly but independently and not in furtherance of any common intention which render the different offences as one transaction. The transaction as referred to in Section 223 Cr.P.C. has to be looked at from the point of view of offences committed, and not the complainant who had happened to proceed on an errand of general check-up. The joint trial of the two accused, therefore, was entirely misplaced. Accordingly, the proceedings pending in the trial Court was quashed.

19. Ms. Rajdipa Behura, learned APP for State, submits that under Section 155(2) of Cr.P.C., 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.

20. Further submits that in the present case, apart from the non cognizable offence, offence under Section 353 (2) of Indian Penal Code, 1860 is cognizable, therefore, when two offences are made, one is cognizable and another is non cognizable, the complaint case is not required. Police has to lodge FIR and file the Charge-sheet.

21. She has relied upon a Judgment of this court passed in **Virender Chopra Vs. State of Delhi** [2006] 4 Crimes 488. She has referred on paras Nos. 2,3 & 5 which are reproduced as under :-

“2. The learned Counsel for the petitioners made three submissions. His first submission was that Section 20-A does not apply at all inasmuch as the petitioners are not license holders. The second submission is that Section 25 of

the said Act would also not apply even on the basis of allegations contained in the FIR. His third and final submission was that Section 20 of the said Act refers to an offence which is bailable and non-cognizable. He submitted that if Sections 20-A and 25 of the said Act are not made out then the charge under Section 20 by itself cannot survive inasmuch as the offence under Section 20-A is non-cognizable and no permission under Section [155\(2\)](#) of the Code of Criminal Procedure, 1973 of the Magistrate has been taken. Therefore, the entire investigation with regard to the offence under Section 20 of the said Act is illegal and no charge can be framed on the basis of an illegal investigation.

3. Mr Malik, who appears on behalf of the State, submitted that Section [25](#) of the Act is clearly made out inasmuch as Section [25\(c\)](#) deals with commission of mischief. He submitted that mischief has been defined in Section [425](#) of the IPC and the acts alleged to have been committed by the petitioners would fall within the scope of mischief and, Therefore,

Section [25](#) of the Indian Telegraph Act, 1885 is clearly attracted on the basis of allegation contained in the FIR and the Charge-sheet. Therefore, according to him, the charge has been rightly framed under Section [25](#) of the said Act. Insofar as the submission with regard to the offence under Section [20](#) is concerned, he submitted that because the charge under Section [25](#) has been rightly framed, the fact that Section [20](#) was a non-cognizable offence and that no permission under Section [155\(2\)](#) of the Cr.P.C. had been taken, would not come in the way of the Investigating Agency in view of the clear provisions of Section [155\(4\)](#) of the Code which stipulates that where a case relates to more than one offence and at least one is cognizable, the case shall be deemed to be a cognizable notwithstanding that the other offences are non-cognizable. Therefore, it is his submission that the offence under Section [25](#) being cognizable, the entire case would be deemed to be cognizable notwithstanding the fact that the offence under Section [20](#) is non-cognizable. He also submitted that the charge under

Section [20A](#) was also rightly framed as there was a contravention of the provisions of Section [4](#) of the Indian Telegraph Act, 1885.

5. With regard to the submissions on Section [25](#), I am in agreement with the submissions made by Mr. Malik, who appears on behalf of the State. His submission was that the case could be covered under Section [25\(c\)](#) of the person intending to commit mischief and thereby damaging, removing, tampering with or touching any battery, machinery, telegraph lines, post or other things whatever being part of or used in or about any telegraph or in the working thereof. A reference to the FIR indicates that there are allegations that the telegraph lines of MTNL were also illegally utilised. In my view, insofar as the allegations are concerned, they make out a case for framing a charge under Section [25\(c\)](#) read with the definition of "telegraph" in Section [2\(1AA\)](#) and the description of 'mischief' under Section [425](#) of the IPC. Of course, Mr. Luthra submitted that instead of MTNL lines it was actually the

broadband service of Bharti Telecom which was allegedly utilised by the petitioners by bypassing the VSNL gateway as per the prosecution case. This, in my view, is a matter of evidence and cannot be disposed of at this stage. The allegations contained in the FIR and the Charge-sheet indicate the usage of MTNL lines and, Therefore, would come within the definition of utilisation of any telegram facility. In my view, prima facie, the charge under Section [25](#) of the Indian Telegram Act, 1885 can be framed and has been rightly framed.”

22. Further submits that under Section 155(4) of the Code of Criminal Procedure, where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.

23. Learned APP has relied upon another Judgment of Hon’ble Supreme Court in a case of **State of Orissa Vs. Saratchandra Sahu and Anr. 1996 (8) SC 806,** wherein the police filed Charge-sheet for the offences

under Section 494/498 Indian Penal Code, 1860. Section 494 is not cognizable, only section 498 A is cognizable. To support her arguments, she has referred to paras 9,10, 12 & 14 of the above cited cases, which are reproduced as under:-

“9 The High Court relied upon the provisions contained in Clause (c) and held that since the wife herself had not filed the complaint and Womens Commission had complained to the police, the Sub-Divisional Judicial Magistrate, Anandpur could not legally take cognizance of the offence. In laying down this proposition, the High Court forgot that the other offence namely, the offence under Section 498A I.P.C. was a cognizable offence and the police was entitled to take cognizance of the offence irrespective of the person who gave the first information to it. It is provided in Section 155 as under :-

“155. Information as to non-cognizable cases and investigation of such cases.—

(1) When information is given to an officer in charge of a police station

of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer, the informant to the Magistrate.

(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.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable."

10 Sub-section (4) of this Section

clearly provides that where the case relates to two offences of which one is cognizable, the case shall be deemed to be a cognizable case notwithstanding that the other offence or offences are non-cognizable.

12. Sub-section (4) of Section 155 is a new provision introduced for the first time in the Code in 1973. This was done to overcome the controversy about investigation of non-cognizable offences by the police without the leave of the Magistrate. The statutory provision is specific, precise and clear and there is no ambiguity in the language employed in Sub-section (4). It is apparent that if the facts reported to the police disclose both cognizable and non-cognizable offences, the police would be acting within the scope of its authority in investigating both the offences as the legal fiction enacted in sub-Section (4) provides that even non-cognizable case shall, in that situation, be treated as cognizable.

14. The High Court was thus clearly in error in quashing the charge under Section 494 IPC on the ground that the Trial court could not take cognizance

of that offence unless a complaint was filed personally by the wife or any other near relation contemplated by Clause (c) of the proviso to Section 198 (1)."

24. Learned counsel for the petitioner has argued that Section 195 of Cr.P.C talks about offences covered under Section 172 to 188. He submits that the other Sections have not been mentioned under Section 195, therefore, when any offence is committed, which does not fall under Section 172 to 188, then the complaint case is required to be filed in the court. The police cannot take the cognizance of the same.

25. Admittedly, on 08.01.2004, Challan was presented before the court and by order dated 31.01.2004, cognizance was taken to summon the accused and notice to surety.

26. Learned counsel for the petitioner has rebutted the submissions made by learned APP and submits that this court has already decided this issue in a case of **Gurvinder Singh Vs. State 1996(63) DLT 104** and has held as under:-

"8. I think these observations and caution

note spell out by the Supreme Court squarely apply to the facts of this case. Can the facts of this case it would hardly be possible to separate the element of insult on the so called assault because the two are so interwoven in the episode, that they become merged one with the other. Hence by adopting and resorting to the device of Section [353](#) which is a camouflage the prosecution could not evade the provisions of Section [195](#) Criminal Procedure Code in this case. The facts have to be considered as a whole. There cannot be splitting up of the facts. Considering the acts as a whole if these disclose an offence for which a special complaint is necessary under the provision of Section [195](#), Criminal Procedure Code the Court cannot take cognizance of the case at all unless that special complaint had been filed. In the instant case the very act of obstruction lies in the alleged assault and use of criminal force. In substance the offence in question would fall in the category of Section [195](#), Criminal Procedure Code and it was not open to by-pass its provisions even by choosing to prosecute under Section [353/506](#) Indian Penal Code Mr.R.D.Jolly as pointed above had conceded

that charge on the facts of this case under Section [353](#) Indian Penal Code is not made out because the public servant was not prevented or deterred in the discharge of his official duties.”

27. As the present case is concerned, the FIR No. 399/2003 was registered under Sections 186/353/506/34 Indian Penal Code, 1860. During investigation Section 22 (3) of Drugs and Narcotics Act 1940 were also added. Accordingly, the Charge-sheet was filed in the concerned Court. The concerned Court took the cognizance on 31.01.2004, thereafter, the matter was proceeded further.

28. The law is settled on the issue that, if a case relates to more than one offence and at least one is cognizable, the case shall be deemed to be cognizable notwithstanding that the other offences are non-cognizable as is provided under Section 155(4) of Code of Criminal Procedure.

29. The law is also settled and in view of Section 195 of Code of Criminal Procedure, if the offences are covered under Section 172 to 188 then as is provided

under Section 195 (1) being the offences of the non-cognizable nature. Therefore, the police has no power to register and to investigate the case without prior permission of the concerned Magistrate.

30. In the instant case, Section 353 of Indian Penal Code, 1860 is also applicable against the petitioner. In view of a Judgment passed by the Supreme Court in ***AIR 1966 SC 177(5)***, where the court has analyzed the provisions of Section 353 of Indian Penal Code, 1860 and Section 186 of Indian Penal Code, 1860 and held that the two are distinct offences and the quality of the offences are also different, the Apex Court was of the opinion that in relation to provisions of Section 353 of Indian Penal Code, 1860 would equally apply to the provisions of Section 332 of Indian Penal Code, 1860. This being the position, the Apex Court quash the criminal proceedings so far as the Charges under Section 186 of Indian Penal Code, 1860 is concerned and directed that the Criminal proceedings would continue so far as the charges under Sections 332/34 of Indian Penal Code, 1860 are concerned, as has been

opined in a case of **Pankaj Agarwal Vs. State of Delhi and Anr. 2001 (4) Scale 235.**

31. As far as the offence under Section 186 is concerned, there is absolute bar in terms of Section used in Section 195 of Cr.P.C., the same issue was also decided in a case of **Daulat Ram(supra)** and in a case of **Vasudev(supra)**.

32. In my opinion the present case is squarely covered by **Pankaj Agarwal(supra)**, and also the decision taken in the above mentioned case is applicable to the case in hand.

33. Consequently, the proceedings under Section 186 of IPC are quashed. For the remaining offences, the trial court shall proceed further as per law.

34. Accordingly, order dated 31.10.2004 passed by the Trial court is modified. Needless to mention that, the stay granted by this court stands vacated.

35. The petitioner is directed to appear before the learned Trial court on 20.10.2011 for directions.

36. Criminal M.C. 2668/2006 is disposed of accordingly.

37. No order as to costs.

SURESH KAIT, J

OCTOBER 03, 2011

j/Vld