

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[Reserved on 09.02.2015]

Pronounced on:18.02.2015

Coram

THE HONOURABLE Mr. JUSTICE SATISH K.AGNIHOTRI
AND
THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

CrI.O.P.No.17336 of 2013
and
M.P.No.1 of 2013

Dr.Ganesan

... Petitioner

v.

1. State, represented by
The Inspector of Police,
CB CID, Chennai.

2. The Inspector of Police,
District Crime Branch,
Dharmapuri.

3.Kathavariyan

... Respondents

Prayer: Petition filed under Section 482 of the Code of Criminal Procedure praying to quash the FIR in Crime No.29 of 2013 on the file of the Inspector of Police, District Crime Branch, Dharmapuri and now it has been transferred to the Inspector of Police, CB CID, Chennai.

For Petitioner : Mr.A.Ramesh, Senior Counsel
For Mr.R.Jayaprakash

For RR 1 and 2 : Mr.S.Shanmugavelayutham
Public Prosecutor

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ORDER

M.VENUGOPAL, J.

The Petitioner/A3 has filed the instant Criminal Original Petition under Section 482 of the Criminal Procedure Code praying for quashing of the F.I.R. in Crime No.29 of 2013 on the file of the 2nd Respondent (now transferred to the 1st Respondent/Inspector of Police, CB CID, Chennai).

2. Resume of Facts:

(i) According to the Learned Senior Counsel for the Petitioner/A3, the 3rd Respondent/Defacto Complainant lodged a complaint before the 2nd Respondent on 12.06.2013 alleging that his father Iyer was a chronic diabetic person (his both kidneys had failed) and he was treated by the Petitioner for dialysis. On one such occasion, when the 3rd Respondent/Defacto Complainant along with his father met the Petitioner/A3, in turn, he introduced Ayyavoo (A1) and Mrs.Saraswathi (A2) and stated that they would arrange Donor for his father's kidney transplantation and in this regard, the Defacto Complainant had to negotiate with them and to incur the expenses arising thereto. It was also informed that an amount of Rs.1,00,000/- was paid to the Petitioner/A3 (Doctor) for transplantation.

(ii) The stand of the 3rd Respondent/Defacto Complainant is that he paid a sum of Rs.1,00,000/- to the Petitioner/A3 as promised by him and also paid a sum of Rs.2,00,000/- in three instalments to A1 and A2 for arranging the Donors.

(iii) Proceeding further, the averment of the 3rd Respondent/Complainant in the complaint is that the Donor arranged by A1 and A2 along with his father were sent to the Committee formed under the Transplantation of Human Organs and Tissues Act, 1994 (42 of 1994) to the Coimbatore and they returned to Salem Vinayaga Mission Hospital where his father was treated by the Petitioner after interview by the Committee. When the 3rd Respondent/Complainant approached the Petitioner/A3, the Petitioner replied that the operation could not be performed since the blood group of the Donor and his father were mismatched.

(iv) Moreover, in view of the fact that the transplantation was not done as promised, the 3rd Respondent/Defacto Complainant demanded a sum of Rs.1,00,000/- paid by him earlier to the Doctor and that the Doctor has repaid a sum of Rs.50,000/- and refused to pay the remaining amount of Rs.50,000/-.

(v) The version of the 3rd Respondent/Defacto Complainant is that the Petitioner/A3 had threatened him not to meet him in future in connection with the balance amount. Further, A1 and A2 who had received a sum of Rs.2,00,000/- for arranging the Donor also had not returned the amount. In this background, the 3rd Respondent/Defacto Complainant had filed the complaint.

Petitioner's Contentions:

3. The Learned Senior Counsel for the Petitioner urges before this Court that the First Information Report lodged by the 3rd Respondent/Complainant is not maintainable either in law or on facts, besides the same is an illegal, unlawful, perverse and motivated one.

4. The Learned Senior Counsel for the Petitioner submits that the Respondents have no jurisdiction either to register or investigate any complaint or any offence under the TOHO and Tissues Act, 1994 is a special statute whereby and whereunder a Committee is constituted to deal with all the complaints and investigate and inquire into the matter pertaining to the 'Transplantation of Human Organs'.

5. The Learned Senior Counsel for the Petitioner contends that as per Section 13(3)(iv) of TOHO and Tissues Act, 1994, the investigation ought to be conducted by an Authorised Officer and no one can investigate the complaint of breach of any of the provisions of the Act or any of the rules made thereunder etc., therefore, the Officer in-charge of Police Station is left with no option but to handover the investigation to an 'Appropriate Authority'.

6. The Learned Senior Counsel for the Petitioner brings it to the notice of this Court that the Petitioner/A3 was called for an enquiry pertaining to the complaint dated 10.06.2013 of the 3rd Respondent and that the Petitioner was interrogated by the Superintendent of Police, Dharmapuri for three continuous days after 8.00 p.m. till 4.00 a.m. and in fact, the Petitioner had cooperated with the enquiry and produced all records relating to the 80 Nos of transplantation surgeries performed by the Team from the year 2009 to till date. At this stage, the grievance of the Petitioner is that even after the thorough enquiry, the investigation team was not able to gather any evidence against the Petitioner and on 12.06.2013, around 8.00 p.m., the Petitioner was arrested and remanded to Judicial Custody on the midnight of 13.06.2013.

7. Apart from the above, the Learned Senior Counsel for the Petitioner draws the attention of this Court that the Petitioner's

Appeal plea was rejected by the Learned Judicial Magistrate, Pennegaram and the Petitioner filed Bail Petition in CrI.M.P.No.2497 of 2013 and on 24.06.2013, the Petitioner was enlarged on interim bail and indeed, the Learned Principal Sessions Judge, while granting interim bail, had observed about the illegality of the Arrest and the Remand.

8.The strenuous contention of the Learned Senior Counsel for the Petitioner is that all the matter pertaining to transplantation of human organ is necessarily referred to the committee formed thereunder and therefore, the Respondents have no jurisdiction either to register or investigate the matter and since in the present case that has not been resorted to, the F.I.R. in Crime No.29 of 2013 on the file of the 2nd Respondent is liable to be quashed, in furtherance of substantial cause of justice.

9.The Learned Senior Counsel for the Petitioner submits that the Petitioner/A3 was not lawfully entrusted with anything and as such, Section 406 I.P.C. is not attracted in the present case. Also that, the ingredients of Section 420 I.P.C., Sections 465, 468, 471, 419, 294(b), 506(ii) I.P.C. and Section 197 I.P.C. are not attracted in the case on hand before this Court.

10.The Learned Senior Counsel for the Petitioner refers to the definition of 'Complaint' as per Section 2(d) Cr.P.C. which runs as under:

“ “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.”

11.The Learned Senior Counsel for the Petitioner adverts to Chapter IV 'an Appropriate Authority' wherein Section 13(3)(iv) of the TOHO and Tissues Act, 1994 runs as under:

“(3) The Appropriate Authority shall perform the following functions, namely:-

... (iv) to investigate any complaint of breach of any of the provisions of this Act or any of the rules made thereunder and take appropriate action.”

and contends that the investigation must be based on a complaint and that complaint should be given by an Agency adumbrated under the TOHO and Tissues Act, 1994.

12. In this connection, the Learned Senior Counsel for the Petitioner contends that the Petitioner would not come under Section 22 of the TOHO and Tissues Act.

13. At this juncture, the Learned Senior Counsel for the Petitioner places strong reliance to the ingredients of Section 22 of the TOHO and Tissues Act, 1994 under the caption 'Cognizance of offences' which runs as follows:

"Cognizance of offences,- (1) No Court shall take cognizance of an offence under this Act except on a complaint made by -

(a) the Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or the State Government or, as the case may be, the Appropriate Authority; or

(b) a person who has given notice of not less than sixty days, in such manner as may be prescribed, to the Appropriate Authority concerned, of the alleged offence and of his intention to make a complaint to the Court.

(2) No Court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(3) Where a complaint has been made under clause (b) of sub-section (1), the Court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person."

14. The Learned Senior Counsel for the Petitioner refers to Section 4 of the Criminal Procedure Code and submits that the TOHO and Tissues Act, 1994 (42 of 1994) is a special statute and as such, the ingredients of Section 4 Cr.P.C. would not be applicable. Also that, the Petitioner is a Nephrologist and he had only treated the 3rd Respondent's father and as such, the allegations in the F.I.R. prima facie do not disclose a triable offence. Even if the contents of complaint of the 3rd Respondent are taken out its face value and accepted in entirety, the same do not constitute the alleged offences in question. Therefore, the argument is put forward on the side of the Petitioner that the Petitioner need not undergo the sufferings/mental agony of legal proceeding and the proceedings in

the present stage if allowed to continue undoubtedly would amount to clear 'abuse of process of Law'.

15.Glimpse of Case Laws relied on Petitioner's side:

(a) In the decision of the Hon'ble Supreme Court in Joti Prashad V. State of Haryana, 1993 Supp (2) Supreme Court Cases 497, it is observed as follows:

“Knowledge” is an awareness on the part of the person concerned indicating his state of mind. “Reason to believe” is another facet of the state of mind. “Reason to believe” is not the same thing as “suspicion” or “doubt” and mere seeing also cannot be equated to believing. “Reason to believe” is a higher level of state of mind. Likewise “knowledge” will be slightly on higher plane than “reason to believe”. A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same. A person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of the thing concerned. Such circumstances need not necessarily be capable of absolute conviction or inference; but it is sufficient if the circumstances are such creating a cause to believe by chain of probable reasoning leading to the conclusion or inference about the nature of the thing. These two requirements i.e. “knowledge” and “reason to believe” have to be deduced from various circumstances in the case.”

(b) In the decision of the Hon'ble Supreme Court in Rajiv Thapar and others V. Madan Lal Kapoor, (2013) 3 Supreme Court Cases 330, it is observed and held that “to invoke its inherent jurisdiction to quash proceedings on basis of defence material High Court has to be fully satisfied that material produced or relied on by accused (a) leads to conclusion that his/her defence is based on sound, reasonable, and indubitable fact; (b) rules out and displaces assertions contained in charges levelled against accused without necessity of recording any evidence; (c) should not have been refuted, or alternatively, cannot be justifiably refuted, being of sterling and impeccable quality i.e. a reasonable man should be persuaded to dismiss and condemn actual basis of accusations as false; and (d) whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of

justice."

(c) In the decision Prashant Bharti V. State (NCT of Delhi), (2013) 9 Supreme Court Cases 293, it is held that 'Judicial conscience of High Court ought to have persuaded it, on basis of material available before it, to quash criminal proceedings initiated against appellant.'

Submissions of Respondents 1 and 2:

16. Per contra, the Learned Public Prosecutor appearing for Respondents 1 and 2 submits that Section 19 of the TOHO and Tissues Act, 1994 runs as follows:

"Punishment for commercial dealings in human organs.- Whoever -

(a) makes or receives any payment for the supply of, or for an offer to supply, any human organ;

(b) seeks to find a person willing to supply for payment any human organ;

(c) offers to supply any human organ for payment;

(d) initiates or negotiates any arrangement involving the making of any payment for the supply of, or for an offer to supply, any human organ."

and that Rule 4 of the Transplantation of Human Organs Rules, 1995 speaks of 'Duties of the Medical Practitioner' and in fact, Form-2 (vide Rule 4(1)(b)] in respect of Smt.G.Chitra was duly certified by the Petitioner on 22.11.2011 at Salem whereby and whereunder it was clearly mentioned that 'Donor is in proper state of health and is completely/medically fit to be subjected to the procedure of the organ removal' and on 18.11.2011 the Petitioner had addressed a communication to the Chairman of the Authorisation Committee for Organ Transplantation, Office of the Dean, Coimbatore Medical College Hospital, Coimbatore, by describing the identification marks of the kidney recipient Mr.V.Iyer.

17. Further, he refers to Rule 6-A deals with 'Composition of Authorisation Committee' and Rule 6-F(d)(i) of Transplantation of Human Organs Rules, 1995 enjoins as follows:

"(d) Where the proposed transplant is between individuals who are not "near relatives", the Authorisation Committee shall evaluate):-

(i) that there is no commercial transaction between the recipient and the donor. That no payment of money or moneys worth as referred to

in the sections of the Act, has been made to the donor or promised to be made to the donor or any other person."

18.Also, 6-F(b) of the Rules which speaks of the following:

"(b)test for Human Leukocyte Antigen-DR beta genes to be performed using the Polymerase Chain Reaction (PCR) based Deoxyribonucleic Acid (DNA), methods."

19.The Learned Public Prosecutor for Respondents 1 and 2 submits that the F.I.R. in Crime No.29 of 2013 speaks of the 3rd Respondent/Defacto Complainant's father being treated by the Petitioner/A3 and on one occasion, when the 3rd Respondent/Complainant had been to SKS Hospital, Salem for providing dialysis treatment to his father Iyer, at that time, the Petitioner/A3 introduced one Ayavoo, S/o.Subramani, Kumarapalayam and Ayavoo's wife Saraswathi and informed that they would arrange for kidney and as regards how much money, it could be talked about with them and for performing operation, separately he asked for payment of Rs.1,00,000/- and pursuant to that, he sold his goats and paid a sum of Rs.1,00,000/- in cash to the Petitioner at S.K.S. Hospital, Salem etc.

20.The Learned Public Prosecutor for Respondents 1 and 2 submits that the question of 'mala fide' cannot be gone into in a proceeding under Section 482 Cr.P.C. or under Section 226 of the Constitution of India and further, the averments made in the complaint of the 3rd Respondent/Defacto Complainant are to be proved in the manner of evidence before the Competent Court of Law.

21.The Learned Public Prosecutor for Respondents 1 and 2 refers to G.O.Ms.No.135(2) (b) which speaks of 'Donor or Recipient' and further that, sub-clause (c) does not fetter the Police to refer doubtful cases. Further, it is represented on behalf of Respondents 1 and 2 that 'Crime never Dies'.

22.Case Laws relied on Respondents 1 and 2 side:

(a) In State of NCT of Delhi and others V. Sanjay and others, [CDJ 2014 SC 736 : 2014 (3) KLT 1033], wherein, in paragraph 58, it is observed as follows:

58. Section 22 of the Act puts a restriction on the court to take cognizance of any offence punishable under the Act or any rule made

thereunder except upon a complaint made by a person authorized in this behalf.

In the aforesaid decision, in paragraph Nos.67 to 71, it is observed and held as follows:

"67. The Court shall take judicial notice of the fact that over the years rivers in India have been affected by the alarming rate of unrestricted sand mining which is damaging the eco-system of the rivers and safety of bridges. It also weakens river beds, fish breeding and destroys the natural habitat of many organisms. If these illegal activities are not stopped by the State and the police authorities of the State, it will cause serious repercussions as mentioned hereinabove. It will not only change the river hydrology but also will deplete the ground water levels.

68. There cannot be any dispute with regard to restrictions imposed under the MMDR Act and remedy provided therein. In any case, where there is a mining activity by any person in contravention of the provisions of Section 4 and other sections of the Act, the officer empowered and authorized under the Act shall exercise all the powers including making a complaint before the jurisdictional magistrate. It is also not in dispute that the Magistrate shall in such cases take cognizance on the basis of the complaint filed before it by a duly authorized officer. In case of breach and violation of Section 4 and other provisions of the Act, the police officer cannot insist Magistrate for taking cognizance under the Act on the basis of the record submitted by the police alleging contravention of the said Act. In other words, the prohibition contained in Section 22 of the Act against prosecution of a person except on a complaint made by the officer is attracted only when such person sought to be prosecuted for contravention of Section 4 of the Act and not for any act or omission which constitute an offence under Indian Penal Code.

69. However, there may be situation where a person without any lease or licence or any authority enters into river and extracts sands,

gravels and other minerals and remove or transport those minerals in a clandestine manner with an intent to remove dishonestly those minerals from the possession of the State, is liable to be punished for committing such offence under Sections 378 and 379 of the Indian Penal Code.

70. From a close reading of the provisions of MMDR Act and the offence defined under Section 378, IPC, it is manifest that the ingredients constituting the offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section 4 of the Act is an offence punishable under Section 21 of the MMDR Act, whereas dishonestly removing sand, gravels and other minerals from the river, which is the property of the State, out of State's possession without the consent, constitute an offence of theft.

71. Hence, merely because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such person. In other words, in a case where there is a theft of sand and gravels from the Government land, the police can register a case, investigate the same and submit a final report under Section 173, Cr.P.C. before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section 190 (1) (d) of the Code of Criminal Procedure."

(b) In *State of Maharashtra V. Ishwar Piraji Kalpatri and others*, (1996) 1 Supreme Court Cases 542, it is held that 'Mala fides or animus of complainant or prosecution not relevant and if on the basis of allegations in the complaint a prima facie case is made out the High Court has no jurisdiction to quash the proceedings'.

Furthermore, it is also laid down in the said decision that 'The High Court is not justified in judging probability, reliability or genuineness of the allegations made and that the Court should not, except in extraordinary circumstances, exercise its jurisdiction under Section 482 Cr.P.C. so as to quash the prosecution proceedings after they have been launched.'

(c) In the decision *Amit Kapoor V. Ramesh Chander and another*, (2012) 9 Supreme Court Cases 460 at page 464 & 465, the Hon'ble Supreme Court, while summarising the principles to be considered for proper exercise of jurisdiction, particularly with regard to quashing of a charge either in exercise of jurisdiction under Section 397 or Section 482 Cr.P.C. or together, as the case may be, had summarised, in Serial Nos.13 and 14, as follows:

"13. In exercise of its jurisdiction under Section 228 and/or under Section 482, the court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The court has to consider the record and documents annexed with by the prosecution.

14. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed *prima facie*."

Analysis:

23. In the instant case on hand, the legal plea projected on the side of the Petitioner is that the F.I.R. in Crime No.29 of 2013 (on the file of the Inspector of Police, District Crime Branch, Dharmapuri and transferred to Inspector of Police, CB CID, Chennai) is not maintainable per se, in the eye of law because of the reason that the investigation ought to be conducted by an 'Authorised Officer' in terms of ingredients of Section 13(3)(iv) of the TOHO and

Tissues Act, 1994 and except the said officer no one can carry out the investigation. Also, it is the stand of the Petitioner that the 2nd Respondent ought not to have taken on file the First Information Report in the subject matter in issue without proper investigation.

24. In effect, the core contention of the Petitioner is that under the TOHO and Tissues Act, 1994, the committee constituted is to deal with all complaints, investigate and enquire into the matter pertaining to Transplantation of Human Organs and in fact, the TOHO and Tissues Act, 1994 (42 of 1994) is a special Act will override the ingredients of Criminal Procedure Code.

25. It is to be noted that the Inspector of Police, Land Grabbing, Dharmapuri Division, when he was in charge of District Crime Branch in District Crime Branch Office on duty had received the complaint of one Kathavarayan, Kamarajpet in C.No.28/DSP-DCB/DPI/13 based on the endorsement of District Superintendent of Police and looked into the same.

26. There is no two opinion of the fact that in F.I.R. in Crime No.29 of 2013 (dated 12.06.2013), the Petitioner is shown as A3. A mere perusal of the F.I.R. in question latently and patently indicates that the Inspector of Police, Land Grabbing, Preventive Cell (in charge of District Crime Branch), Dharmapuri had registered a case in District Crime Branch in Crime No.29 of 2013 under Sections 406, 420, 465, 468, 471, 419, 294(b), 506(ii) and 197 of the Indian Penal Code and under Section 19 of the Transplantation of Human Organ Act. In the said F.I.R., other than the Petitioner (Doctor), (i) Ayyavoo and (ii) Saraswathi and one Velumani were arrayed as A1, A2 and A4. The allegation made in the F.I.R. against the Petitioner/A3 is that the 3rd Respondent had lodged a complaint against him that his father was suffering from diabetic and wanted to undergo surgery and that he paid a sum of Rs.1,00,000/- to the Petitioner (Doctor) and that the Petitioner only returned Rs.50,000/ to the patient and later his father died etc.

27. In fact, Section 405 I.P.C. speaks of 'Criminal breach of trust'. Section 406 I.P.C. deals with 'Punishment for criminal breach of trust'. Section 415 I.P.C. speaks of 'Cheating'. Section 420 I.P.C. deals with 'Cheating and dishonestly inducing delivery of

property'. Section 465 I.P.C. specifies 'Punishment for forgery'.

28.It cannot be gainsaid that 'Fraud' is an essential ingredient of 'Forgery'. 'Forgery or Fraud' is essentially a matter of evidence which could be proved as a fact by direct evidence or by inferences from proved facts as per decision of the Hon'ble Supreme Court in Indian Bank V. Satyam Fibres (India) Private Limited, AIR 1996 SC 2592. Section 468 deals with 'Forgery for purpose of cheating'. Section 471 I.P.C. relates to 'Using as genuine a forged document or electronic record'. Section 419 I.P.C. pertains to 'Punishment for cheating by personation'. In reality, the ingredients of an offence of cheating are: (i)there should be fraudulent or dishonest inducement of a person by deceiving him, (ii)(a)the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or (b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and (iii) in cases covered by (ii)(b), the act of omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property, as per decision of the Hon'ble Supreme Court in S.W.Palanitkar V. State of Bihar, 2002 SCC (Cri) 129. Section 503 I.P.C. speaks of 'Criminal intimidation'. Section 506 of the Indian Penal Code deals with 'Punishment for criminal intimidation'.

29.At this stage, this Court very relevantly points out that the Criminal Procedure Code is a parent Act providing for investigation, inquiry and trial by Criminal Courts of various designations unless specific statutes providing investigation, enquiry and trial in accordance with that Act. Ordinarily, when the offences are to be otherwise dealt with, then the procedure of code would not apply when complete procedure as enshrined in any special Act.

30.It is true that Section 2(d) Cr.P.C. defines that admittedly the term 'complaint' has a wide meaning inasmuch as it includes even an oral allegation. As such, it is candidly clear that no form is specified in which the complaint must be lodged. As a matter of fact, there must be an allegation which prima facie discloses the commission of a cognizable offence with the necessary facts. It cannot be gainsaid that the salient features of a legal complaint are: (a) It must be an allegation either orally or in writing in

regard to a fact that some individual has committed an offence; (b) that complaint must be made to a Magistrate; (3) when the purpose/object that he should take action in that law; However, a complaint does not include a police report i.e. a report forwarded by a police officer to a Magistrate under Section 173(2) Cr.P.C., as the expression is defined in Section 2(r) Cr.P.C.

31.It is a well settled proposition of law that when a special Act makes a special offence and a special procedure, then it must be followed. However, a conjoint effect of Section 4(2) and Section 5 Cr.P.C. is that all offences, whether under Penal Code or in any other law, have to be investigated, enquired into, tried and otherwise dealt with according to the provisions of Cr.P.C., unless there be an enactment regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences in which case such an enactment will prevail over the code and that the provisions of special or local law will prevail over those of Cr.P.C. unless there is a specific provision to the contrary as per decision S.P.Thiruvengadasami Naidu V. Municipal Health Officer, Karaikudi, A.I.R. 1949 Madras 547 at page 557.

32.In short, the jurisdiction under Section 4 Cr.P.C. is quite comprehensive and to the extent that no valid machinery is set up under any valid Act, for trial of any particular case the jurisdiction of ordinary criminal Court cannot be held to have been excluded as per decision Bhim Sen V. State of U.P., AIR 1955 Supreme Court 435. To put it precisely, if an Act is an offence under two different acts, it should be dealt with under the Special Act if it falls strictly within it rather than the general law as per decision Emperor V. Jiwa Ram, 1932 Vol.33 Cr.L.J. 309.

33.One cannot ignore an important fact that Section 5 Cr.P.C. (dealing with saving clause) firstly, it specifies that Criminal Procedure Code generally governs matters covered by it and secondly, if a special or local law covering the same area, this latter law will be saved and will prevail. The third component in Section 5 Cr.P.C. is that if there is a specific provision to the contrary, then that will override Special or local law.

34.It is to be relevantly pointed out that the High Court while

exercising its inherent powers under Section 482 Cr.P.C. cannot quash the First Information Report more so when investigation has not yet commenced as per decision of the Hon'ble Supreme Court in Kurukshetra University V. State of Haryana, AIR 1977 Supreme Court 2229. Indeed, the quashing of an F.I.R. under Article 226 of the Constitution of India shall be resorted to only in rarest or rare cases.

35.It is to be pointed out that the investigation made by an Officer of Railway Protection Force under Railway Property (unlawful possession) Act, 1966, is not an investigation has done by an Officer in charge of Police Station and hence Sections 161, 162 and 173 Cr.P.C. are not attracted as per decision of the Hon'ble Supreme Court in State of Bihar V. Chandra Bhusan, AIR 2001 (1) SCC 241.

36.It is to be remembered that under Section 482 Cr.P.C. the inherent power of High Court is to be exercised sparingly and judiciously and only for the purposes mentioned in Section 482 and that too in most appropriate cases. In reality, while exercising the power under Section 482 Cr.P.C., the High Court does not function as a Court of Appeal or Revision. Ordinarily, the High Court's approach ought to be cautious, careful and circumspect when it deals with the petition praying for quashing of a given proceedings under Section 482 Cr.P.C. Moreover, quashing of the prosecution at preliminary stage is impermissible in law.

37.At this stage, this Court aptly points out the decision of the Hon'ble Supreme Court in Trisuns Chemical Industry V. Rajesh Agarwal and others, AIR 1999 Supreme Court 3499, wherein it is observed as follows:

"Quashment of FIR or a complaint in exercise of inherent powers of the High Court should be limited to very extreme exceptions. provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act

may be connected with the discharge of any function under the agreement. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases."

In the aforesaid decision, at page 3499 & 3500, it is laid down as follows:

It is an erroneous view that the Magistrate taking cognizance of an offence must necessarily have territorial jurisdiction to try the case as well. Chapter XIII of the Code relates to jurisdiction of the criminal courts in enquiries and trials. That chapter contains provisions regarding the place where the enquiry and trial are to take place. Section 177 says that every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed. But section 179 says that when an act is an offence by reason of anything which has been done and of a consequence which has ensued, the place of enquiry and trial can as well be in a court within whose local jurisdiction such thing has been done or such consequence has ensued. It cannot be overlooked that the said provisions do not trammel the powers of any court to take cognizance of the offence. Section 193 imposes a restriction on the court of sessions to take cognizance of any offence as a court of original jurisdiction. But any Magistrate of the First Class has the power to take cognizance of any offence, no matter that the offence was committed within his jurisdiction or not. The only restriction contained in Section 190 is that the power to take cognizance is subject to the provisions of this Chapter. There are 9 Sections in Chapter XIV most of which contain one or other restriction imposed on the power of a first class magistrate in taking cognizance of an offence. But none of them incorporates any curtailment on such powers in

relation to territorial barrier. The jurisdictional aspect becomes relevant only when the question of enquiry or trial arises. It is therefore a fallacious thinking that only a magistrate having jurisdiction to try the case has the power to take cognizance of the offence. If he is a Magistrate of the First Class his power to take cognizance of the offence is not impaired by territorial restrictions. After taking cognizance he may have to decide as to the court which has jurisdiction to enquire into or try the offence and that situation would reach only during the post cognizance stage and not earlier. Unfortunately, the High Court, without considering any of the aforesaid legal aspects rushed to the erroneous conclusion that the judicial magistrate of first class, Gandhidham has no power to take cognizance of the offences alleged merely because such offences could have been committed outside the territorial limits of the State of Gujarat. Even otherwise, without being apprised of the fuller conspectus a decision on the question of jurisdiction should not have been taken by the High Court at a grossly premature stage in a petition under S. 482 for quashing complaint."

38. Before going into the merits of the present case, this Court pertinently points out that Section 154 Cr.P.C. provides the mode and manner in which the information relating to commission of cognizable offence if given orally to an officer in charge of police station is to be dealt with. Section 156 Cr.P.C. enjoins the police officer to investigate cognizable cases. By virtue of Section 160 Cr.P.C. a police officer is empowered to require attendance of witnesses. Moreover, Section 161 Cr.P.C. provides for examination of witnesses by police. Section 165 empowers the police officer to search any premises. As a matter of fact, Section 13 of the TOHO and Tissues Act, 1994 (42 of 1994) speaks of 'Appropriate Authority' and Section 22 of the Act specifies 'Cognizance of Offences'. Section 23 refers to 'Protection of action taken in good faith'. As such, by virtue of TOHO and Tissues Act, 1994, the Respondents are statutorily forbidden from filing a police report.

39. It cannot be forgotten that Section 22 of TOHO and Tissues Act, 1994 prohibits taking of cognizance except on a complaint made by an appropriate authority or the person who had made a complaint earlier to it as specified therein. If by reason of the provisions of TOHO and Tissues Act, 1994, filing of police report by necessary implication is barred, then, the question of police submitting a report in terms of sub-section (2) of Section 173 Cr.P.C. would not arise. To put it differently, if no police report could be filed, Section 173(2) Cr.P.C. is not attracted, in the considered opinion of this Court. Also that, upon completion of the investigation, an Authorized Officer can file a complaint and not a police report, since there is a definite bar created by the Parliament. At the risk of repetition, it is to be pointed out that Section 2(d) of the Criminal Procedure Code defines 'Complaint'. Section 2(r) Cr.P.C. defines 'Police Report' to mean a report forwarded by a police officer to a Magistrate under sub-section 2 of Section 173 Cr.P.C.

40. At this juncture, this Court aptly points out that TOHO and Tissues Act, 1994 is a special Act and considering the offences pertaining to removal of Human Organs which is a sensitive and serious one, the enactment of the said regulatory statute is a primordial one. Generally, any one can set the 'Criminal Law' in motion. But insofar as TOHO and Tissues Act is concerned, the offences/specific areas of violations are to be dealt with only by the Authorities specified under the said Act. Other than the Authorised Officer no one can carry out the investigation in connection with a complaint the method and manner of investigation to be carried out have been laid down in TOHO and Tissues Act, 1994 (42 of 1994) and the rules framed thereunder. Undoubtedly, in terms of Cr.P.C. after completion of investigation etc., the Police can file its report in an ordinary case. However, in regard to the clear-cut ingredients of Section 22 of the TOHO and Tissues Act, the police is forbidden to file its report after completion of investigation. To put it precisely, by virtue of Section 22 of the TOHO and Tissues Act, Section 173(2) Cr.P.C. by implication is inapplicable and the investigation in terms of 13(3)(iv) of the Act must be conducted by an Authorised Officer.

41. In this connection, this Court worth recalls and recollects the decision of the Hon'ble Supreme Court in Jeewan Kumar Raut and another V. Central Bureau of Investigation, (2009) 7 Supreme Court Cases 526 at special page 537, whereby and whereunder, in paragraph 23 to 28, it is observed and held as follows:

"23.TOHO being a special Act and the matter relating to dealing with offences thereunder having been regulated by reason of the provisions thereof, there cannot be any manner of doubt whatsoever that the same shall prevail over the provisions of the Code. The investigation in terms of Section 13(3)(iv) of TOHO, thus, must be conducted by an authorized officer. Nobody else could do it. For the aforementioned reasons, the officer incharge of the Gurgaon Police Station had no other option but to hand over the investigation to the appropriate authority.

24. The respondent has been constituted under the Delhi Special Police Establishment Act, 1946. In terms of the provisions of the said Act, the authorities specified therein could make investigation in connection with a complaint. The mode and manner in which the investigation could be carried out have been laid down in the Act and/ or the manual framed thereunder. It is for the aforementioned reason, upon receipt of the complaint from the officer incharge of the Gurgaon Police Station, it presumably having made a preliminary inquiry, lodged the FIR. Only because it lodged the FIR and proceeded in terms of the said Act and the manual, the same by itself would not mean that all the provisions of Chapter XII of TOHO vis-a-vis Chapter XV thereof could not be invoked.

25. Section 22 of TOHO prohibits taking of cognizance except on a complaint made by an appropriate authority or the person who had made a complaint earlier to it as laid down therein. Respondent, although, has all the powers of an investigating agency, it expressly has been statutorily prohibited from filing a police report. It could file a complaint petition only as an appropriate authority so as to comply with the requirements contained in Section 22 of TOHO. If by reason of the provisions of TOHO, filing of a police report by necessary implication is necessarily forbidden, the question of its submitting a report in terms of Sub-section (2) of Section 173 of the Code did not and could not

arise. In other words, if no police report could be filed, Sub-section (2) of Section 167 of the Code was not attracted.

26. It is a well-settled principle of law that if a special statute lays down procedures, the ones laid down under the general statutes shall not be followed. In a situation of this nature, the respondent could carry out investigations in exercise of its authorization under Section 13(3)(iv) of TOHO. While doing so, it could exercise such powers which are otherwise vested in it. But, as it could not file a police report but a complaint petition only; Sub-section (2) of Section 167 of the Code may not be applicable.

27. The provisions of the Code, thus, for all intent and purport, would apply only to an extent till conflict arises between the provisions of the Code and TOHO and as soon as the area of conflict reaches, TOHO shall prevail over the Code. Ordinarily, thus, although in terms of the Code, the respondent upon completion of investigation and upon obtaining remand of the accused from time to time, was required to file a police report, it was precluded from doing so by reason of the provisions contained in Section 22 of TOHO.

28. To put it differently, upon completion of the investigation, an authorized officer could only file a complaint and not a police report, as a specific bar has been created by the Parliament. In that view of the matter, the police report being not a complaint and vice-versa, it was obligatory on the part of the respondent to choose the said method invoking the jurisdiction of the Magistrate concerned for taking cognizance of the offence only in the manner laid down therein and not by any other mode. The procedure laid down in TOHO, thus, would permit the respondent to file a complaint and not a report which course of action could have been taken recourse to but for the special provisions contained in Section 22 of TOHO.

42. In the decision of the Hon'ble Supreme Court in *Institute of Chartered Accountants of India v. Vimal Kumar Surana and another*, (2011) 1 Supreme Court Cases 534, it is observed that 'where a person is to have committed offences under Sections 24, 24-A, and 26 of the Chartered Accountants Act, 1949 as also under Indian Penal Code but in the absence of complaint under Section 28 before Magistrate Court, no cognizance of the offence punishable under Sections 24, 24-A and 26 could be taken and held that prosecution under Indian Penal Code can still be commenced against him and further, the prosecution under IPC cannot be disallowed on the ground that 1949 Act is a special statute vis-a-vis Indian Penal Code'.

43. Further, in the aforesaid decision, at page 545, in paragraph 23, it is observed as follows:

"23. The provisions contained in Chapter VII of the Act neither define cheating by personation or forgery or countefeiting of seal, etc. nor provide for punishment for such offences. If it is held that a person acting in violation of Section 24 or contravening sub-section (1) of Sections 24-A and 26 of the Act can be punished only under the Act even though his act also amounts to one or more offence(s) defined under IPC and that too on a complaint made in accordance with Section 28, then the provisions of Chapter VII will become discriminatory and may have to be struck down on the ground of violation of Article 14."

44. As a matter of fact, Section 26 of the General Clauses Act, 1897 enjoins as follows:

"26. Provision as to offences punishable under two or more enactments.- Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

45. It is to be noted that in the present case, the F.I.R. was originally lodged in Crime No.29 of 2013 on the file of the Inspector of Police, District Crime Branch, Dharmapuri and now it was transferred to the Inspector of Police, CB CID, Chennai and that the

F.I.R. was lodged and further a case was registered under different Sections of Indian Penal Code read with 19 of the TOHO and Tissues Act, 1994.

46.It is to be borne in mind that the TOHO and Tissues Act, 1994 (42 of 1994) is enacted to provide for regulation of removal, storage and transplantation of human organs for therapeutic purposes and for prevention of commercial dealings in human organs and for matters connected therewith or incidental/ancillary thereto. However, bearing in mind the sensitivity and importance of the subject, the violations of any of the provisions of special Act like TOHO and Tissues Act, 1994 is to be dealt with only by the authorities concerned enjoined under the Act.

47.In the present case on hand, taking note of the fact that TOHO and Tissues Act is a special Act, 1994 and in terms of Section 13(3)(iv) of the said Act, the investigation is to be carried out by an Authorised Officer and no one else can investigate any complaint of the breach of any of the provisions of TOHO and Tissues Act or any of the rules made thereunder and take appropriate action, this Court, at this stage, to prevent an aberration of justice and to advance the cause of substantial justice, directs the Respondents 1 and 2 to handover the investigation to the Appropriate Authority viz., an Authorised Officer, who is empowered to investigate cases of breach of any of the provisions of TOHO and Tissues Act, 1994, in terms of Section 13(3)(iv) of the Act, within a period of four weeks from the date of receipt of copy of this order.

48.Accordingly, the Criminal Original Petition is disposed of. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Asst. Registrar

/true copy/

Sub Asst. Registrar.

Sgl

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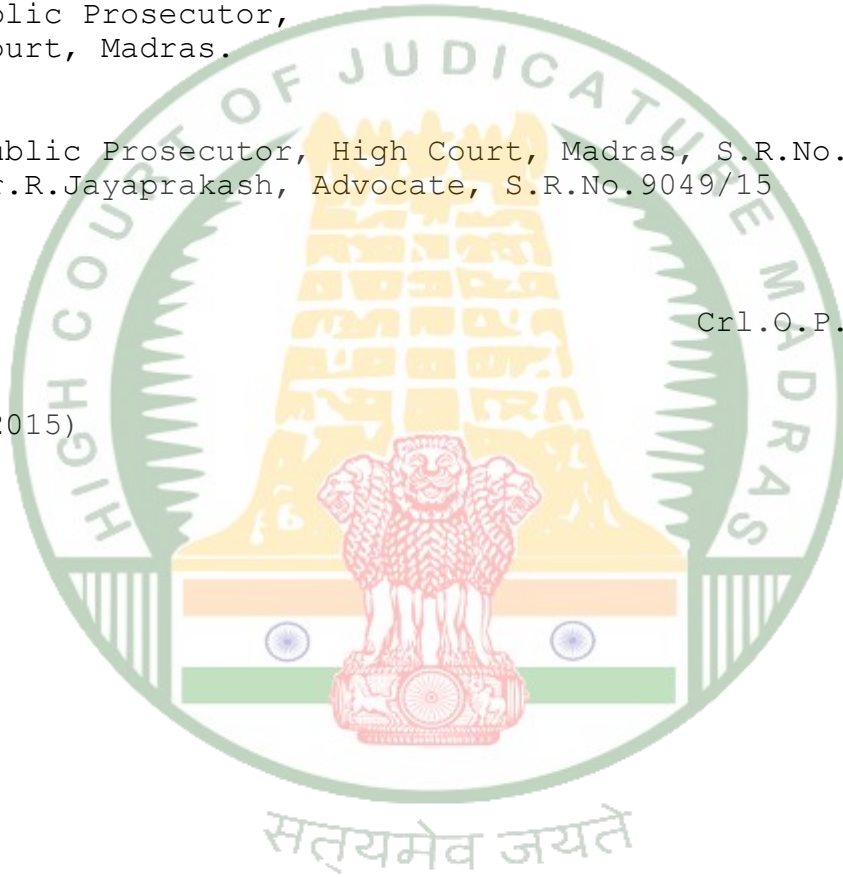
To

1. The Inspector of Police,
CB CID, Chennai.
2. The Inspector of Police,
District Crime Branch,
Dharmapuri.
3. The Public Prosecutor,
High Court, Madras.

+1cc to Public Prosecutor, High Court, Madras, S.R.No.9075/15
+1cc to Mr.R.Jayaprakash, Advocate, S.R.No.9049/15

Crl.O.P.No.17336 of 2013

CA (CO)
CA (27/02/2015)



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