

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

Delivered on: 11th September, 2015

+ CRL.M.C. No. 4517/2014

PANKAJ PRAKASH

..... Petitioner

Represented by: Mr.Sacchin Puri,
Mr.Rahul Khosla,
Mr.Arun Vidyarathi,
Mr.Soayib Qureshi and
Mr.Gurmehar Sistani,
Advs.

versus

THE STATE AND ANR

..... Respondents

Represented by: Mr.Amit Chadha, APP for
the State.
Respondent No.2/Mr.B.K.
Periwal in person.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Vide present petition, petitioner seeks direction to set aside the order dated 07.02.2014 passed by learned Metropolitan Magistrate – 03, South-East District, Saket Courts, New Delhi on a protest petition filed by a private third party i.e. Sh B. K. Periwal in FIR No.81/2008 registered at police station Amar Colony, New Delhi.

2. Further seeks direction to set aside the order dated 16.09.2014 passed by learned Additional Sessions Judge – 02, South-East District, Saket Courts, New Delhi in Criminal Revision Petition No.11/2014.

3. The brief facts are that on 05.06.2007, respondent No.2 filed a complaint with the police station Amar Colony, New Delhi wherein he alleged that the seal of leased premises bearing No.F-36, Second Floor, East of Kailash, New Delhi was removed by the petitioner and the petitioner has stolen the electricity meter. Also stated that the leased premises was given for residence purpose, but was used for office purpose by the petitioner. The said complaint was simultaneously sent to the MCD as well.

4. Accordingly, the Police investigated the matter and found that the seal put on the leased premises was intact and was not tampered with and that the electricity meter was not removed. The allegations of respondent No.2 that the leased premises was leased for residential purpose, but was being used for office purpose was also proved wrong. Accordingly, MCD did not file any complaint in the said matter.

5. It is pertinent to mention here that on 13.12.2007, petitioner handed over the possession and keys of leased premises to the Court at Tis Hazari, where the civil dispute in relation to leased premises was being adjudicated upon. However, on 20.02.2008, MCD filed a complaint with the police station Amar Colony, New Delhi that seal put by MCD on leased premises has been broken. Accordingly, police registered the FIR No.81/2008 on 05.03.2008.

6. After investigation, charge sheet dated 30.10.2008 was filed in the Court. In the said report, it is stated that no evidence was found against the petitioner that he was responsible for breaking the seal of

leased premises and also there was no eye-witness.

7. Accordingly, learned Magistrate vide order dated 31.10.2008 while discharging the accused granted liberty to the complainant to take steps under Section 200 of the Cr P C. However, respondent No.2 challenged the aforesaid order by filing Criminal Revision Petition No.46/2009 which was disposed of vide order dated 17.11.2009 by holding that *“Therefore this revision petition is being disposed of with the direction to the learned Magistrate to give an opportunity of hearing to the petitioner while considering the final report submitted by the police and thereafter, proceed as per law”*.

8. Vide order dated 07.02.2014, learned Magistrate decided the protest petition, filed by the respondent No.2 against untraced report filed by police, holding that prima facie offence under Section 188 of the IPC is made out against the petitioner and accordingly issued summons through the Investigating Officer.

9. Being aggrieved, the petitioner filed a Criminal Revision Petition No.11/2014 which was disposed of vide order dated 16.09.2014 whereby upholding the order dated 07.02.2014 passed by learned Magistrate. Hence, the present petition with aforesaid prayers.

10. The legal questions raised by learned counsel for the petitioner is that by express provisions of law, for offence under Section 188 of the IPC, a complaint can only be filed by a public authority by way of written complaint to the Court and the Court only then can pursue the same in terms of Section 195 of the Cr P C. Learned counsel for

petitioner submitted that there is an express legal bar, under the provision of Section 188 of the IPC and Section 195 of the Cr P C, on a private party to pursue such a complaint, much less a right to file a protest petition. Overlooking the express provision of law, as contained in Section 195 of the Cr PC, however, learned Magistrate issued summons against the petitioner vide order dated 07.02.2014.

11. For effective adjudication of the present petition, it is pertinent to reproduce Section 188 of the IPC and Section 195 of the Cr P C:-

“188. Disobedience to order duly promulgated by public servant.—Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or trends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation.—It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm.

Section 195 of the Cr P C

“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;

(b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub- clause (i) or sub- clause (ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.

(2) Where a complaint has been made by a public servant under clause (a) of sub- section (1) any

authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint:

Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.

(3) In clause (b) of sub- section (1), the term" Court" means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section.

(4) For the purposes of clause (b) of sub- section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court in situate: Provided that-

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed."

12. Learned APP appearing on behalf of the State has admitted that there is a procedure prescribed under Section 195 of the Cr P C to take cognizance under Section 188 of the IPC. Thus, there was no scope for

the police to register the case, however, after investigation the closure report was filed and same was accepted by the Trial Court. Further opportunity was given to the complainant to take steps under Section 200 of the Cr P C. It cannot be denied that MCD had taken no steps under Section 200 of the Cr P C and the cognizance was taken on the protest petition filed by the respondent No.2, who is a private party, on consideration of his protest petition. Learned APP fairly conceded that there is no sanction under Section 195 of the Cr P C, however, letter was issued by the MCD that the case may be proceeded further. Thus, it is not denied by the competent authority not to proceed with the matter, hence that may be considered as sanction under Section 195 of the Cr P C.

13. Respondent No.2 appearing in person submitted that FIR No.81/2008 was registered on 05.03.2008 at police station Amar Colony on a written complaint dated 20.02.2008 of MCD. The MM has accordingly taken cognizance of the offence under Section 188 of the IPC against the petitioner as contemplated under Section 195 of the Cr P C. Moreover, the issue raised by the petitioner has already been dealt with by learned Additional Sessions Judge in Criminal Revision Petition No.11/2014 and accordingly dismissed the petition filed by the petitioner. He submitted that under Section 465 (1) of the Cr P C, the judgment passed by the Trial Court will not be reversed or altered by a Court of appeal, however, petition can be considered on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before the Trial

Court. Section 188 of the IPC is cognizable offence under the statute and non-compoundable as per the Code. The case is in favour of respondent and against the petitioner and there are clinching evidence against the petitioner, thus the petition has no merit and is liable to be dismissed.

14. To strengthen his submissions, respondent No.2 has relied upon case of *Dayal Singh v State of Uttranchal : AIR 2012 SC 3046(1)* whereby held that defective investigation, deliberate dereliction of duty, intentional acts of omissions and commission prejudicial to the case of prosecution has to be met with disciplinary action or other action as per law.

15. I have heard learned counsel for parties as well as respondent No.2 appearing in person.

16. It is not in dispute that respondent No.2 made complaint of seal breaking to the police station mentioned above and to the MCD as well. Consequently, FIR bearing No.81/2008 registered under Section 188 of the IPC against the petitioner. As per the provisions of Section 195 of the Cr P C, it is specifically provided that no Courts shall take cognizance of any offences punishable under Sections 172 to 188 (both inclusive) of the IPC, except a complaint in writing is filed in the Court by officer of the Public Authority. Thus, the police had lodged the FIR under Section 188 of the IPC without jurisdiction despite the bar under Section 195 of the Cr P C. The MCD ought to have filed complaint before the concerned Court and thereafter that Court is competent to

take cognizance thereon.

17. In the present case, the informant of the FIR is MCD. Police registered the case and filed the charge sheet stating therein that no case is made out. On filing the protest petition by the respondent No.2, learned Trial Court has taken the cognizance and issued summons against the petitioner under Section 188 of the IPC. Moreover, learned Trial Court considered the respondent as first informant and accordingly passed the impugned order. The fact remained that while taking cognizance under Section 188 of the IPC, two elements are pre-requisite, firstly, that the complainant should be a public authority; and secondly, that complaint should be filed to the concerned Court. In the present case, though the complainant is MCD, however they made complaint to the police and accordingly registered the FIR. The MCD has taken wrong route and accordingly, police also registered FIR No.81/2008 despite bar under Section 195 of the Cr P C. Though, the closure report filed by the concerned police station was accepted by the Trial Court, however further directed the complainant to take steps under Section 200 of the Cr P C. It is not disputed that MCD which is a public authority, has not taken any steps under Section 200 of the Cr P C. However, respondent No.2 filed the protest petition whereupon the Trial Court issued summons against the petitioner under Section 188 of the IPC.

18. Therefore, the legal position emerges that the private person cannot be a complainant. He can only inform the concerned public authority and it is the said authority which can take action against the

offender. In the present case there are two lapses; one is that the police registered the FIR against the petitioner despite bar under Section 195 of the Cr P C; second despite the MCD did not take any steps under Section 200 of the Cr P C, the Trial Court issued summons under Section 188 of the IPC against the petitioner. It is also not in dispute that even sanction under Section 195 of the Cr P C has not been granted despite numerous opportunities given by the Trial Court as is evident from order sheets.

19. The issue raised in the instant petition is not *res-integra*. In case of ***C Muniappan & Ors v State of Tamil Nadu : (2010) 9 SCC 567*** the Apex Court held as under:-

“28. Section 195 (a) (i) Cr P C 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. The court lacks competence to take cognizance in certain types of offences enumerated therein. The legislative intent behind such a provision has been that an individual should not face criminal prosecution instituted upon insufficient grounds by persons actuated by malice, ill-will or frivolity of disposition and to save the time of the criminal courts being wasted by endless prosecutions. This provision has been carved out as an exception to the general rule contained under Section 190 Cr P C that any person can set the law in motion by making a complaint, as it prohibits the court from taking cognizance of certain offences until and unless a complaint has been made by some

particular authority or person. Other provisions in the Cr P C like Sections 196 and 198 do not lay down any rule of procedure, rather, they only create a bar that unless some requirements are complied with, the court shall not take cognizance of an offence described in those Sections.”

20. Similar view was taken in case of ***Bajranglal Parikh & Ors v State of Assam : 2008 (Suppl) GLT 486*** as under:-

“17. Having considered the provisions of Section 195, which bars the taking of cognizance of offences under Sections 172 to 188 (i.e., inclusive of Section 182, IPC) except on a complaint, in writing, of the public servant concerned, or of some other public servant to whom he is subordinate, the Court, in Daulat Ram (supra), observed:

...The words of the section, namely, that the complaint has to be in writing by the "public servant concerned" and that no Court shall take cognizance except on such a complaint clearly show that in every instance the Court must be moved by the appropriate public servant. We have to decide therefore whether the Tehsildar can be said to be the "public servant concerned" and if he had not filed the complaint in writing, whether the police officers in filing the charge-sheet had satisfied the requirements of Section 195. The words "no Court shall take cognizance" have been interpreted on more than one occasion and they show that there is an absolute bar against the Court taking seisin of the case except in the manner provided by the section.

18. From what have been observed and held in Daulat Ram (supra) and Mata Bhikh and Ors. (supra), there remains no room for doubt that no Court can take cognizance of any offence, under Sections 172 to 188, unless and until a 'complaint', in writing, has been made by the public servant concerned, i.e., who had

promulgated the order and whose order has been disobeyed or his successor-in-office or of some other public servant to whom he is administratively subordinate.

19. What logically follows from the above discussion is that if a 'complaint', as envisaged in Section 195 (1) (a), is not received by a Magistrate in respect of an offence under Section 188 IPC. the Magistrate cannot, on the basis of a 'police report' submitted under Section 173 (2), take cognizance, for, the 'police report' in the light of what has been discussed above, cannot be treated as the 'complaint', in writing, of the 'public servant concerned'.

20. We have, now, in our hands, a situation, where the police has been given the power to arrest a person without warrant if he is alleged to have committed an offence under Section 188, IPC, investigate the case, make seizure, if necessary, and submit 'police report'. We have, on the other hand, Section 195 (1) of the Code, which debars every Court from taking cognizance of such an offence unless a complaint, in writing, is received by the Magistrate from the 'public servant concerned' or his successor-in-office or of some other public servant to whom he is administratively subordinate. Though, granted by law, the power to arrest and submit report, the fact remains that when such arrest or investigation cannot lead to prosecution of a person, who is found to be an offender, it would be an abuse of the powers given to the police if they arrest a person for commission of an offence under Section 188 IPC. The abuse of the process of law is not necessarily confined to situations where an action is taken without law, but also when an action is taken under the law, though while taking such action, it is known to the law enforcement machinery that no fruitful purpose would be served."

21. In case of ***C.Muniappan & Ors (supra)*** it is held that Section 195 (a)(i) Cr P C bars the Court from taking cognizance of any offence punishable under Section 188 of the 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 legislative intent behind such a provision has been that an individual should not face criminal prosecution instituted upon insufficient grounds by persons actuated by malice, ill-will or frivolity of disposition and to save the time of the criminal courts being wasted by endless prosecution.

22. It is not in dispute that there are litigation pending between the petitioner and respondent No.2, who had made complaint and also filed protest petition against the closure report of the police and thereon learned Trial Court has taken cognizance and same has been confirmed by learned Revisional Court. It establishes that respondent No.2 wants to settle the score with the petitioner in these proceedings, which is not permissible under law. In case of ***State of Haryana v Ch.Bhajan Lal & Ors : AIR 1992 SC 604*** wherein the Supreme Court has held as under:-

“108.....

.....
7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

23. In view of above discussion and the settled law, I am of the considered opinion that the Trial Court has no power to take cognizance under Section 188 of the IPC as the same is barred by Section 195 of the Cr P C. Consequently, the order dated 07.02.2014 passed by learned Magistrate and order dated 16.09.2014 passed by learned Additional Sessions Judge are hereby quashed.

24. Accordingly, the petition is allowed with no order as to cost.

Crl.M.A.Nos.15460 & 19126 of 2014;
Crl.M.A.Nos.597-600 & 1623-1624 of 2015

Dismissed as infructuous.

SURESH KAIT, J

September 11, 2015

M/RS