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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on:- 26th November, 2018

+ CRL.M.C. 5918/2018 & Crl.M.A. 47943-44/2018

SANDEEP KUMAR

..... Petitioner

Through: Mr. Amitesh Chandra Mishra &
Mr. Niteen Kr. Sinha, Advs.

versus

STATE

..... Respondent

Through: Mr. Sanjeev Sabharwal, APP
for the State with SI Birender
Singh, PS Dwarka North.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. The petitioner stood summoned by the Metropolitan Magistrate, by order dated 02.08.2018, whereby cognizance was taken of the offence under Section 188, Indian Penal Code, 1860 (IPC) on the basis of report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C) which was submitted on that date, upon conclusion of investigation into first information report (FIR) no. 214/2018 of police station Dwarka North which had been registered on 18.07.2018, at the instance of Head Constable Ravi Prakash, after his visit to the business premises – shop no. G-1 &2, plot no.2, Sector 12, Dwarka, Delhi – where the petitioner was working as the branch manager, the business being run in the style of Vodafone store. The Metropolitan

Magistrate, by his subsequent order dated 17.09.2018, commenced with the trial of the petitioner on the accusations for offence under Section 188 IPC for which a “notice” is indicated to have been framed separately. It is, however, noted (as per page 90 of the paper book) that the procedure adopted by the Metropolitan Magistrate is that of trial of warrant case inasmuch as charge has been framed against the petitioner.

2. The petitioner, feeling aggrieved, has come up with the petition at hand under Section 482 Cr.P.C. submitting that the order whereby cognizance had been taken and process issued is bad in law, referring in this context to the pre-requisite of Section 195 Cr.P.C, reliance being placed on a ruling of a learned single judge of Punjab and Haryana High Court reported as *Ashwani Garg vs. State of Punjab & Ors.* 2010 SCC Online P & H 2932.

3. Issue notice. State through Mr. Sanjeev Sabharwal, Additional Public Prosecutor accepts notice. Since the question of law raised is short and all the requisite material for its consideration is available, it having been presented with the petition, with the consent of both sides, the matter has been finally heard.

4. Having regard to the facts set out in the FIR and in the report under Section 173 Cr.P.C. (charge-sheet), it appears that the Assistant Commissioner of Police (ACP) of the sub-division in exercise of the jurisdiction vested in him had issued a notification on 06.07.2018 (referred to in the documents as one dated 08.05.2018) in terms of

which the dealers in mobile phone *sim cards* are obliged to maintain certain records with respect to the sale and purchase of such *sim cards* by general public, it also being a requirement of the said notification, that the dealers selling such *sim cards* are to procure proof of identity of the purchaser/receiver of *sim cards*, such purchaser/receiver being called upon to sign the register kept for such purposes. It is alleged that when the first informant of the case visited the business premises of the petitioner, it was found that there was no compliance being made with the said requirements of the notification, this allegedly constituting the offence punishable under Sections 188 IPC (*disobedience to an order lawfully promulgated by a public servant*).

5. Though the Metropolitan Magistrate is empowered by Section 190 Cr.P.C. to take cognizance of any offence upon receiving a complaint of facts which constitute such offence or upon a police report of such facts, or further, upon information received from any person other than the police officer, the provision contained in Section 195 Cr.P.C. inhibits taking cognizance of certain offences, that include the offence under Section 188 IPC, it being a pre-requisite under the said provision of law that a “*complaint in writing, be made by a public servant concerned or of some other public servant to whom he is administratively subordinate*”.

6. It is the argument of the petitioner that having regard to the provision contained in Section 195 Cr.P.C. it was impermissible for the FIR itself to be registered and, on this plea, the prayer made in the

petition at hand is for quashing of the FIR and the proceedings arising therefrom.

7. Indeed, in *Ashwani Garg* (supra), the learned single judge of Punjab and Haryana High Court had accepted the argument to the above effect with observations that in the context of an offence under Section 188 IPC “*no FIR can be registered by the police*”, it being also observed in the penultimate para of the said judgment that “*it was not within the domain of the police to register a case against the offender for offence under Section 188 IPC and after investigation submit a final report*”.

8. This Court, with respect, finds it difficult to accept the said statement as the correct proposition of law. It cannot be ignored that in terms of the prescription of the first schedule appended to Cr. P.C., the offence under Section 188 IPC is classified as “cognizable”. The fact that the offence in question is “cognizable”, the registration of the FIR in such context in terms of section 154 Cr.P.C. cannot be questioned. Since the FIR was registered within its power, responsibility and jurisdiction by the police in terms of Section 154 Cr.P.C., there are no restrictions against investigation to be carried out into the said FIR. It is trite that investigation into a cognizable offence, of which formal note has been taken by the police under Section 154 Cr.P.C. would eventually culminate in a report under Section 173 Cr.P.C. After all, the process has to be brought to a logical end, the evidence gathered during the investigation brought to

the knowledge and information of the Metropolitan Magistrate in accordance with law.

9. But, there is merit in the submissions of the petitioner that the Metropolitan Magistrate could not have taken cognizance on the charge-sheet i.e. the report under Section 173 Cr.P.C. The inhibition of Section 195 Cr.P.C. had to be kept in mind. It is noted from the documents submitted on record that the complaint dated 31.07.2018 of the ACP of the sub-division (the public servant in question) was part of the material submitted with the report under Section 173 Cr.P.C. Instead of such being the procedure taken, the complaint under Section 195 Cr.P.C. should have been separately presented for appropriate order to be passed thereupon by the Metropolitan Magistrate in exercise of the power vested in him under Section 190 read with Section 195 Cr.P.C. Though the complaint under Section 195 Cr.P.C. was before the Metropolitan Magistrate on the date (02.08.2018) when he took cognizance of the offence under Section 188 IPC, the order passed is conspicuously silent in such regard. From this, it cannot but be inferred that the cognizance was taken not on the complaint under Section 195 Cr.P.C. but on the report under Section 173 Cr.P.C, as expressly so stated, which was impermissible in law. This error would itself vitiate the proceedings that were held in the follow up in the case against the petitioner in the concerned criminal court including the order dated 17.09.2018 whereby the case was put to trial.

10. It must, however, also be added that even the order dated 17.09.2018, was bad in law. The offence under Section 188 IPC attracts the punishment of simple imprisonment for one month or fine of Rs. 200 or both in certain set of circumstances and with imprisonment for either description for a term which may extend to six months or fine that may extend to Rs. 1,000/- or both in certain others.

11. Having regard to this, the criminal case sought to be initiated against the petitioner would be ordinarily triable as a summary case or a summons case. No doubt, the Metropolitan Magistrate has the discretion to convert such a case into a warrant trial case. But then, for such purposes, he would have to pass a speaking order setting out the reasons as to why he would choose to do so.

12. In view of the above, the petition is allowed, the impugned orders dated 02.08.2018 and 17.09.2018, as indeed the proceedings that may have been carried out on subsequent date (05.11.2018) are hereby quashed.

13. But, given the nature of the case, this cannot be the end of the matter. The Metropolitan Magistrate will have the discretion and prerogative in law to consider the complaint dated 31.07.2018 under Section 195 Cr.P.C. which was also presented before him with the report under Section 173 Cr.P.C. on 02.08.2018 and pass appropriate order thereupon in accordance with law.

14. Nothing in this order shall, however, be construed as an expression of opinion on the merits of the case against the petitioner.

15. The petition and the application filed therewith are disposed of in above terms.

R.K.GAUBA, J.

NOVEMBER 26, 2018

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