



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 09.10.2020

CORAM:

THE HONOURABLE MR.JUSTICE **G.K.ILANTHIRAIYAN**

CRL.O.P.No. 19257 of 2016

A. Lawrence Kennady ... Petitioner/Accused

Vs.

1. The State represented by
Inspector of Police,
S.S. Colony Police Station,
Madurai City, Madurai. ...R-1/complainant

2. S.Kannan ... R-2/Defacto complainant

PRAYER: Criminal Original petition is filed under Section 482 of Criminal Procedure Code, to call for the records relating to C.C. No. 255 of 2016 pending on the file of the learned Judicial Magistrate No.V, Madurai and quash the same.

For petitioner : Mr.J. Mathesh

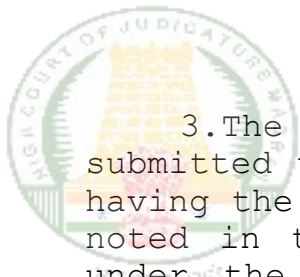
For R-1 : Mr.K. Suyambulinga Bharathi
Government Advocate

For R-2 : No appearance

ORDER

This Criminal Original Petition has been filed to quash the proceedings in C.C. No. 255 of 2016 pending on the file of the learned Judicial Magistrate No.V, Madurai, thereby having been taken cognizance for the offences under Sections 171E and 188 of I.P.C, against the petitioner.

2. The case of the prosecution is that during the Tamil Nadu Assembly Election 2016, in Vaithyanathapuram, Muniyandikovil Corner, the flying squad officers have found that the petitioner was kept in the cash of Rs.10,500/-with cell phone and the small bit paper which was containing 39 names. On the basis of the above said allegation, the respondent police registered the complaint and filed a charge sheet against the petitioner and others for the offences under Sections 171E and 188 of I.P.C, in C.C.No.255 of 2016, on the file the learned Judicial Magistrate No.V, Madurai.



3. The learned counsel appearing for the petitioner has submitted that since the petitioner is a painting contractor he was having the money of Rs.10,500/- for purchasing the paint products and noted in the names which in a small bit paper who were employed under the petitioner/accused in the previous weeks. The learned counsel further submitted that the Hon'ble Supreme Court of India has held that the right to freely assemble and also right to freely express once view are constitutionally protected rights under Part III and their enjoyment can be only in proportional manner through a fair and non-arbitrary procedure provided under Article 19 of Constitution of India. He further submitted that it is the duty of the Government to protect the rights of freedom of speech and assemble that is so essential to a democracy. According to Section 195(1)(a) of Cr.P.C., no Court can take cognizance of an offence under Section 188 of IPC, unless the public servant has written order from the authority. Further he submitted that the petitioner or any other members had never involved in the crime but, the respondent police had registered this case, under Section 188 of IPC as against the petitioner and others. Therefore, he sought for quashing the proceeding.

4. Per contra, the learned Government Advocate (crl. Side) submitted that there are specific allegations as against the petitioner to proceed with the trial. Further, he would submit that Section 188 of IPC is a cognizable offence and therefore it is the duty of the police to register a case. Though there is a bar under Section 195(a)(i) of Cr.P.C. to take cognizance for the offence under Section 188 of IPC, it does not mean that the police cannot register FIR and investigate the case. More over, the petitioner is an habitual offender by committing this kind of crimes. Therefore, he vehemently opposed the quash petition and prayed for dismissal of the same.

5. Heard Mr.J. Mathesh, learned counsel for the petitioner and Mr. K. Suyambulinga Bharathi, learned Government Advocate (crl. Side) appearing for the respondent police.

6. On perusal of the charge, it is seen that the election flying squad officials have found that the petitioner was having a sum of Rs.10,500/- and a small bit paper which contained the names of 39 members. Therefore, the respondent police levelled the charges under Section 188 of I.P.C. as against the petitioner. Except the official witnesses, no one has spoken about the occurrence and no one was examined to substantiate the charges against the petitioner. It is also seen from the charge itself that the charges are very simple in nature and trivial. Section 188 reads as follows:

"188. Disobedience to order duly promulgated by public servant – Whoever, knowing that, by an order promulgated by a public servant lawfully empowered



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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 tends 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.

7. The only question for consideration is that whether the registration of case under Sections 188 IPC, registered by the respondent is permissible under law or not? In this regard it is relevant to extract Section 195(1)(a) of the Criminal Procedure Code, 1973 :-

"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 Courts 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, 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;..."

Therefore, it is very clear that for taking cognizance of the offences under Section 188 of IPC, the public servant should lodge a complaint in writing and other than that no Court has power to take cognizance.

8. The learned counsel for the petitioner relied upon a judgement in **Mahaboob Basha Vs. Sambanda Reddiar and others** reported in **1994(1) Crimes, Page 477**. He also relied upon a judgment in a batch of quash petitions, reported in **2018-2-L.W. (Cr1.) 606** in **Crl.O.P. (MD) No. 1356 of 2018**, dated 20.09.2018 in the case of



Jeevanandham and others Vs. State rep. by the Inspector of Police, Karur District, and this Court held in Paragraph-25, as follows :-

"25. In view of the discussions, the following guidelines are issued insofar as an offence under Section 188 of IPC, is concerned:

a) A Police Officer cannot register an FIR for any of the offences falling under Section 172 to 188 of IPC.

b) A Police Officer by virtue of the powers conferred under Section 41 of Cr.P.C will have the authority to take action under Section 41 of Cr.P.C., when a cognizable offence under Section 188 IPC is committed in his presence or where such action is required, to prevent such person from committing an offence under Section 188 of IPC.

c) The role of the Police Officer will be confined only to the preventive action as stipulated under Section 41 of Cr.P.C and immediately thereafter, he has to inform about the same to the public servant concerned/authorised, to enable such public servant to give a complaint in writing before the jurisdictional Magistrate, who shall take cognizance of such complaint on being prima facie satisfied with the requirements of Section 188 of IPC.

d) In order to attract the provisions of Section 188 of IPC, the written complaint of the public servant concerned should reflect the following ingredients namely;

i) that there must be an order promulgated by the public servant;

ii) that such public servant is lawfully empowered to promulgate it;

iii) that the person with knowledge of such order and being directed by such order to abstain from doing certain act or to take certain order with certain property in his possession and under his management, has disobeyed;
and

iv) that such disobedience causes or tends to cause;

(a) obstruction, annoyance or risk of it to any person lawfully employed; or

(b) danger to human life, health or safety; or

(c) a riot or affray.

e) The promulgation issued under Section 30(2) of the Police Act, 1861, must satisfy the test of reasonableness and can only be in the nature of a



regulatory power and not a blanket power to trifle any democratic dissent of the citizens by the Police.

f) The promulgation through which, the order is made known must be by something done openly and in public and private information will not be a promulgation. The order must be notified or published by beat of drum or in a Gazette or published in a newspaper with a wide circulation.

g) No Judicial Magistrate should take cognizance of a Final Report when it reflects an offence under Section 172 to 188 of IPC. An FIR or a Final Report will not become void ab initio insofar as offences other than Section 172 to 188 of IPC and a Final Report can be taken cognizance by the Magistrate insofar as offences not covered under Section 195(1)(a)(i) of Cr.P.C.

h) The Director General of Police, Chennai and Inspector General of the various Zones are directed to immediately formulate a process by specifically empowering public servants dealing with for an offence under Section 188 of IPC to ensure that there is no delay in filing a written complaint by the public servants concerned under Section 195(1)(a)(i) of Cr.P.C.

9. In the case on hand, the First Information Report has been registered by the respondent police for the offences under Section 188 of I.P.C. He is not a competent person to register FIR for the offences under Section 188 of IPC. As such, the First Information Report or final report is liable to be quashed for the offences under Section 188 of IPC. Therefore, the final report cannot be sustained and it is liable to be quashed.

10. Accordingly, the proceedings in C.C.No. 255 of 2016 on the file of the learned Judicial Magistrate No.V, Madurai, is quashed and the Criminal Original Petition is allowed.

Sd/-

Assistant Registrar (T&P)

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/ /2020

Sub Assistant Registrar(CS)

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<https://hcservices.ecourts.gov.in/hcservices/>



To

1. The Inspector of Police,
S.S. Colony Police Station,
Madurai City, Madurai.

2. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Copy to: The Judicial Magistrate No.V,
Madurai.

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SSS(CO)
CS(29.10.2020) 6P 4C