

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPLICATION (APL) NO. 1149/2019

- 1) Geeta w/o Sushil Hinge,
Age 48 years, Occ. - Private,
R/o Ashirwad Nagar, Chamorshi
Road, Gadchiroli.
- 2) Anil s/o Keshavrao Pohankar,
Age 46 years, Occ. - Private,
R/o Rampuri Ward, Camp Area,
Gadchiroli.
- 3) Prashant s/o Anil Bhugwar,
Age 49 years, Occ. - Private,
R/o Dhanora Road, Gadchiroli.
- 4) Anand Namdeorao Shrugarpawar,
Age 51 years, Occ. - Private,
R/o Dhanora Road, Gadchiroli.
- 5) Sudhakar Buchanna Yengandalwar,
Age 39 years, Occ. - Private,
R/o Subhash Ward, Gadchiroli.
- 6) Anil s/o Tulshiram Kapre,
Age 43 years, Occ. - Private,
R/o Bazaar Road, Gadchiroli.
- 7) Nandkishor s/o Mistrilal Kabra,
Age 52 years, Occ.- Private,
R/o Main Road, Gadchiroli.
- 8) Anil s/o Pandurang Kunghadkar,
Age 43 years, Occ. - Private,
R/o Indira Nagar, Gadchiroli.
- 9) Gajanan Bucchanji Yengandalwar,
Age 63 years, Occ. - Private,
R/o Subhash Ward, Gadchiroli.

- 10) Pramod s/o Shankarrao Pipre,
Age 51 years, Occ. - Private,
R/o Ramnagar, Gadchiroli.
- 11) Bharat s/o Narayanrao Khati,
Age 49 years, Occ. - Private,
R/o Trimurty Square, Gadchiroli.
- 12) Prakash s/o Ramkumar Arjunwar,
Age 52 years, Occ. - Private,
R/o Chamorshi Road, Gadchiroli.
- 13) Ramesh s/o Vithobaji Bhurse,
Age 50 years, Occ. - Private,
R/o Ramnagar, Gadchiroli.
- 14) Prashant s/o Pundlik Waghre,
Age 42 years, Occ. - Private,
R/o Rampuri Ward, Gadchiroli.
- 15) Ravindra s/o Rangyaji Olalwar,
Age 48 years, Occ. - Private,
R/o Bori, Taluka – Aheri,
District – Gadchiroli.
- 16) Avinash s/o Bhaskarrao Mahajan,
Age 43 years, Occ. - Private,
R/o Rampuri Ward, Gadchiroli.
- 17) Baburao s/o Jasuji Kohle,
Age 54 years, Occ.- Private,
R/o Ashti, Taluka – Aheri,
District Gadchiroli.
- 18) Prakash s/o Tulshiram Gedam,
Age 53 years, Occ. - Private,
R/o Hanuman Nagar, Gadchiroli.
- 19) Bhupesh s/o Umashankar Kulmethe,
Age 38 years, Occ. - Private,
R/o. Chamorshi Road, Gadchiroli.

- 20) Rekha w/o Ramesh Dolas,
Age 43 years, Occ. - Private,
R/o Chamorshi Road, Gadchiroli.
- 21) Sangita Shamrao Pillare,
Age 49 years, Occ.- Private,
R/o Chamorshi Road, Gadchiroli.

.... APPLICANTS

VERSUS

- 1) State of Maharashtra,
through Police Station Officer,
Police Station, Gadchiroli,
District Gadchiroli.
- 2) ~~Najuk s/o Gosai Kharkar/Head of
Model Code of Conduct, Election of
Municipal Council, General Election
2016/Naiib-Tahsildar, Gadchiroli,
District Gadchiroli.~~

- (Deleted as per order
dated 02-3-2020)

.... NON-APPLICANTS

Mr. Rajnish Vyas, Counsel for the applicants,
Mrs. K.R. Deshpande, Addl.PP for non-applicant/State.

CORAM : ROHIT B. DEO, J.
DATED : 23rd DECEMBER, 2021

ORAL JUDGMENT :

The applicants have been charge-sheeted for commission of offences punishable under Sections 188 and 171-F read with Section 34 of the Indian Penal Code (IPC).

2. Mr. Najuk Kharkar lodged complaint dated 20-11-2016 alleging

that on 30-10-2016 applicant 1-Geeta Hinge published an advertisement in the daily newspaper 'Dainik Bhaskar' extending Diwali Greetings and using the symbol of Bhartiya Janata Party (BJP).

3. Gadchiroli Police Station investigated into the complaint and submitted final report under Section 173 of the Criminal Procedure Code (Code) in the Court of the jurisdictional Magistrate.

4. The learned Chief Judicial Magistrate, Gadchiroli (CJM) took cognizance of the final report and the particulars of charge were framed on 07-9-2017. The accusation that the applicants committed an offence punishable under Section 171-F of the IPC is on the premise that by displaying the Lotus symbol of the BJP in the advertisement, an attempt was made to interfere with the free exercise of electoral right by the voters. Section 188 of the IPC is invoked on the premise that by publishing such advertisement, the Model Code of Conduct is violated.

5. Applicants preferred an application (Exhibit 149) seeking discharge. Applicants contended that offence punishable under Section 171-F of the IPC is non-cognizable and the cognizance of offence punishable under Section 188 of the IPC is *non est* in law since the procedure envisaged under Section 195 of the Code is not followed.

6. The learned CJM rejected the application seeking discharge reasoning that the prosecution is not exclusively under Section 188 of the IPC and that since Section 171-F of the IPC is also invoked, partial discharge is impermissible. The learned CJM rejected the submission that cognizance of offence punishable under Section 188 of the IPC is barred in view of the mandate of Section 195 of the Code. The learned CJM reasoned that the report made by the police officer in case of disclosure of commission of non-cognizable offence is deemed to be complaint and, therefore, it cannot be said that there is contravention of Section 195 of the Code. In parting, the learned CJM observed that since cognizance is already taken, the clock cannot be set back.

7. Dissatisfied, the applicants preferred Criminal Revision 51/2018. The learned Additional Sessions Judge, Gadchiroli dismissed the revision vide judgment dated 14-10-2019. The learned Additional Sessions Judge observed that since the particulars are already framed, it would be impermissible to discharge the applicants/accused. The submissions of the applicants on the touchstone of the mandatory provisions of Section 195 of the Code, are not dealt with by the learned Additional Sessions Judge. The applicants are invoking inherent powers under Section 482 of the Code.

8. At the outset, it may be observed that irrespective of the maintainability of the discharge application, the learned Magistrate did have ample power to terminate the proceedings, at any stage. In any event, the inherent powers under Section 482 of the Code would be available, if the cognizance taken is found to be illegal, and the contentions of the applicants are, therefore, dealt with on merits.

9. Section 171-F of the IPC reads thus :

“171-F Punishment for undue influence or personation at an election- *Whoever commits the offence of undue influence or personation at an election shall be punished with imprisonment of either description for a term which may extend to one year or with fine, or with both.”*

10. The *sine qua non* ingredient is “undue influence” which is defined in Section 171-C of the IPC thus :

“171-C. Undue influence at elections *-(1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.*

(2) Without prejudice to the generality of the provisions of sub-section (1), whoever -

(a) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or

(b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).

(3) A declaration of public policy or a promise of public action, or the mere exercise or a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section.”

11. The prosecution contends that the use of the symbol Lotus in the publication extending Diwali Greetings attracts Section 171-C of the IPC, and is, therefore, an offence punishable under Section 171-F of the IPC. It is difficult to accept such sweeping assumption. The Model Code of Conduct did permit posters and banners extending festival greetings, with photographs of the candidate/s. The only rider was that such posters or banners must not incorporate reference to election campaigning. In the factual matrix, the fact that the advertisement extending Diwali Greetings displayed the picture of Lotus, which is the symbol of BJP, leads to no inference, *per se* that there was interference or attempt to interfere with the free exercise of any electoral right. The Diwali Greetings makes no reference either to the election or to the political party. Every infraction, assuming *arguendo* that there is any infraction of the Model Code of Conduct, cannot lead to the inference that the attempt was to interfere with the electoral right. In my considered view, the material in the final report, does not make out a *prima facie* case of commission of offence punishable under Section 171-F of the IPC.

12. Section 188 of the IPC, which is the other offence invoked reads thus :

“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.”

13. Section 188 of the IPC will have to be read conjointly with Section 195 of the Code which mandates that no Court shall take cognizance of any offence punishable under Section 188 of the IPC except on a complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate.

14. It is common ground that the authorised officer did not approach

the Court and he lodged a complaint with the Gadchiroli Police Station, which the police investigated, and then submitted the final report.

15. The issue is whether the report submitted by the police can be treated as a complaint by the officer concerned, within the meaning of Section 195(1)(a)(i) of the Code.

16. The Division Bench of this Court did consider the issue in *Shrinath Gangadhar Giram vs. The State of Maharashtra & Another*, **2018 ALL MR (Cri) 325** and held that the word “complaint” referred in the relevant provision of Section 195 of the Code denotes “complaint in writing to a Magistrate” and “not a police report”. The relevant observations read thus :

“9. The word, "complaint" referred in the above mentioned provision of Section 195 of the Cr.P.C., denotes, "complaint in writing to a magistrate" and "not a police report". At this juncture, it would be necessary to make reference of definition of the word, "complaint" given in section 2(d) of the Code, which prescribes as under :-

"2(d) "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.

Explanation.- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is

made shall be deemed to be the complainant"

On conjoin reading of the provision of Section 188 of IPC and Section 195 of Cr.P.C., it is evident that if the alleged offence is punishable under Section 172 of 188 of IPC, the court cannot take cognizance except on a complaint in writing of the public servant concerned, or some other public servant, to whom he is administratively subordinate. In such peculiar circumstances, no FIR could have been registered by the police for an offence punishable under Section 188 of IPC. The legislative intention appears to be clear from the language of section 195(1) of Cr.P.C. itself, which categorically prescribes that where an offence is committed under Section 188 of IPC, it would be obligatory for the public servant before whom such offence is committed, to file a complaint before the concerned Magistrate having jurisdiction to take cognizance of it. Therefore, in view of the aforesaid principles of law, the FIR given by the police personnel in the police station, cannot be termed as a "complaint" given to the Magistrate in writing."

17. In my considered view, in view of the settled position of law, the very cognizance taken is in contravention of the mandatory provisions of Section 195(1)(a)(i) of the Code and the proceedings would be an abuse of the process of the law.

18. The applicants are entitled to succeed and accordingly, the application is allowed in terms of prayer clause (ii) which reads thus :

"(ii) Upon perusal of same, quash and set aside, Summary Criminal Case No.245/2017 for commission of offences punishable under Section 171-F, 188, 34 of Indian Penal Code (Annexure No.1), pending before the Chief Judicial Magistrate, Gadchiroli, District Gadchiroli, so also order dated 14-10-2019 (Annexure No.VIII) passed by the Additional Sessions Judge, Gadchiroli, District Gadchiroli in Criminal

Revision Application No.51/2018 and order dated 04-9-2018 (Annexure No.IV) passed in Summary Criminal Case No. 245/2017, by the Chief Judicial Magistrate, Gadchiroli, District Gadchiroli, on such terms and conditions, in the interest of justice.”

JUDGE

adgokar