

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 670 OF 2014

Swararaj @ Raj Shrikant Thackeray
Aged : 46 years,
Residing at Krishnakunj,
Dr. M. B. Raut Road, Dadar (w),
Mumbai-400028

...Applicant

V/s.

The State of Maharashtra
Through Dombivali Police Station
Thane.

...Respondents

Mr. Sayaji D. Nangre, Ms. Sonal Parab, Mr. Mohd. Ayub Shaikh and Ms. Esha S. Nangre for the Applicant.
Ms. M. H. Mhatre, APP for the Respondent-State.

**CORAM : A.S. GADKARI &
SHARMILA U. DESHMUKH, JJ.**

RESERVED ON : 13th OCTOBER, 2023.
PRONOUNCED ON : 10th NOVEMBER, 2023.

JUDGMENT : (PER SHARMILA U. DESHMUKH, J.)

1. By this application filed under Section 482 of Cr.PC., the Applicant seeks quashing of the proceeding bearing SCC No. 41 of 2011 pending before the learned Judicial Magistrate, First Class, 3rd Court, Kalyan arising out of CR. No. II/94/2010 registered with Dombivali Police Station.

2. Heard Mr. Sayaji D. Nangre, learned Advocate for the Applicant and learned APP for the Respondent-State. Perused record.
3. CR. No. II/94/2010 came to be registered with the Dombivali Police Station at the instance of the Shri. Laxmikant Vasudev - Assistant Police Inspector, for the offence punishable under Section 188 of Indian Penal Code.
4. The case of the prosecution as spelt out from the FIR is that, in the year 2010 the municipal elections were scheduled for Kalyan Dombivali Municipal Corporation and the Election Commission of Maharashtra had imposed Code of Conduct by Order dated 23rd September, 2010 and the campaigning was to cease from 10.00 p.m. of 29th October, 2010. That, Circular dated 9th April, 2010, was issued by the Election Commission which provided that, any leader/worker or any other person belonging to the political parties who have entered the local jurisdiction of Kalyan Dombivali Municipal Corporation from outside for campaigning, shall not stay within the local jurisdiction after the time period for campaigning is over. That, as per Section 126 of the Representation of People Act, 1951, prior to 48 hours of the commencement of polling, no person shall convene, hold, attend, join or address any public meeting or procession in any polling area.

4.1. It is alleged that, as per the circular dated 9th October, 2010 issued by the Election Commission of Maharashtra, the Deputy Commissioner of Police, Division-3, Kalyan had issued notice dated 27th October, 2010 under Section 149 of Cr.P.C. to the Applicant directing that, the leader/worker or any other person belonging to the political party or connected with political rally from outside for campaigning shall not stay within the local jurisdiction of Kalyan Dombivali Municipal Corporation or should not visit the office of the political party, temple, hotel, lodge or guesthouse etc. for any reason, failing which, legal action will be taken for breach of Code of Conduct under Section 126 of Representation of Peoples Act, 1951. That the Complainant along with senior PI Shri. R. D. Shinde and Police Constable Shri. Sawant visited Block No. 603, Manjunath Tower, VP Road, Dombivali (East) where the Applicant was staying, for the purpose of effecting service of the notice under Section 149 of Cr.P.C. The notice was sought to be served on 29th October, 2010 at 10.00 p.m. however, the Applicant refused to accept the said notice stating that, he would not accept the service today and that the service would be accepted tomorrow. That as the Applicant refused to accept service of the notice, the notice came to be pasted on the outer door of the premises where the Applicant was staying and a

noting to that effect was made in the station diary. The allegation is that despite issuing notice to the Applicant under Section 149 of Cr.PC, the Applicant continued to reside within the jurisdiction of Kalyan Dombivali Municipal Corporation till 30th October, 2010 till 2.00 p.m. and has thereby committed an offence under Section 188 of Indian Penal Code(“IPC”) .

5. Mr. Nangre, learned Advocate for the Applicant has canvassed two submissions for consideration of this Court. Firstly, that notice under Section 149 of Cr.PC is not an order promulgated within the meaning of Section 188 of IPC and secondly, that, the FIR could not have been registered for the offence under Section 188 of IPC in view of the bar contained in Section 195 (1)(a) of Cr.PC. According to him, a plain reading of the definition of the complaint under Section 2(d) of Cr.PC. indicates that, the same does not include a police report. Alternatively, he would submit that, the allegations in the FIR taken as it is does not satisfy the second part of Section 188 of IPC. In support of his submissions he relies upon the following decisions.

- I. *C. Muniappan & Ors. vs. State of T. ND. K. Rajendran & ors.*,[AIR 2010 SC 3718].
- II. *Pankaj Dhyaneshwar Nighot vs. State of Maharashtra*, [2021(3) ABR (CRI) 950].

- III. *Hla Shwe vs. State of Maharashtra*, [AIROnline 2020 Bom 1365].
 - IV. *Shrinath Gangadhar Giram vs. State of Maharashtra & Anr.*, [2017(2) ABR (Cri) 13].
 - V. *Jiwan Kumar vs. State of Punjab & Ors.*, [2008 CRI.L.J. 3576].
 - VI. *Jeevanandham vs. State*, [AIROnline 2018 Mad 2286].
 - VII. *Ram Pravesh Rai vs. State of Bihar*, [AIROnline 2019 Pat 1410].
6. We have considered the submissions and perused the record.
7. The issues which arise for determination before us, can be formulated as under:
- (I) Whether a notice issued under Section 149 of Cr.PC constitutes an 'order promulgated' by a public servant within the meaning of Section 188 of IPC, the disobedience whereof will attract the offence under Section 188 of IPC ?
 - (II) Whether the provisions of Section 195(1)(a) of Cr.PC constitutes a bar for taking cognisance of the offence under Section 188 of IPC based on police report in the absence of complaint in writing by the public servant concerned or his superior ?
8. The allegation in the FIR is that, there is disobedience of the notice issued to the Applicant under Section 149 of Cr.PC resulting in

commission of the offence under Section 188 of IPC. The notice directed the Applicant not to continue his stay within the jurisdiction of Kalyan Dombivali Municipal Corporation after 10.00 p.m. of 29th October, 2010. The notice containing the direction was in the nature of preventive action taken by the police for the purpose of preventing the commission of any cognizable offence, which in this case, according to the prosecution was creating of law and order situation as the elections were due. The allegation is that, there was disobedience of this notice and as such, offence has been committed under Section 188 of IPC. Section 188 of IPC is a cognisable, bailable offence triable by a Magistrate. Section 188 of IPC 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 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.

9. It would be apparent from perusal of Section 188 of IPC that, the provision is in two parts. The first part is that, there must be an order lawfully passed by a public servant, duly authorized in this regard directed towards a person directing him to abstain from a certain act or to take certain order with certain property in his possession or under his management. The order must be in the knowledge of the person to whom it is directed and the person who despite having the knowledge of the order disobeys such direction. The second part provides that, if such disobedience causes or tends to cause obstruction, annoyance or injury or such risk and if such disobedience causes or tends to cause danger to human life, health or safety or a riot or affray shall be punished with the sentence prescribed therein.

10. In other words, the offence is attracted if the disobedience results or tends to result in the consequences stated in Section 188 of IPC. Mere disobedience of the order without the disobedience causing or

tending to cause or attracting the risk of the intended consequence does not attract the offence under Section 188 of IPC. In the present case, the allegation in the FIR conforms to the first part of the provision as regards the disobedience to the notice issued under Section 149 of Cr.P.C.

11. Section 188 of IPC contemplates disobedience of an order duly 'promulgated' by public servant. The notice issued in the present case under Section 149 Cr.P.C. is the nature of directions communicated privately to the person intended to be bound by the directions. No doubt that, the police were duly authorised to issue the notice, however the notice which is like private information to the noticee cannot partake the character of an 'order promulgated'. Promulgation indicates some form of publication, to publish, to proclaim. These ingredients are lacking in the notice issued by the police. As such, in our opinion, the notice issued under Section 149 of Cr.P.C to the Applicant cannot constitute an order duly promulgated by the public servant.

We may hasten to add that, it should not be interpreted as a broad proposition of law that, the preventive action taken by the police under Section 149 of Cr.P.C in all cases falls outside the purview of Section 188 of IPC. There may be cases where the order/notice/directions

issued by the police under the purview of preventive action are duly promulgated, in which case disobedience thereof will attract the offence under Section 188 of IPC and the issue will have to be decided on the facts of each case.

In the present case, the notice issued under Section 149 of Cr.P.C was only a notice communicated privately to the Applicant. The disobedience of the notice may attract other offences under the Indian Penal Code, however the same does not constitute an order duly promulgated within the meaning of Section 188 of IPC. As such the offence alleged was clearly not attracted to the facts of the present case.

12. The matter could have been set at rest here considering the discussion above. We have, however proceeded to consider the second issue as the same was placed for our consideration. The provisions of Section 195(1)(a) of Cr.P.C regulate the competence of the Court and bars the taking of cognisance except in compliance thereof. It will be worthwhile to refer to Section 195(1)(a) of Cr.P.C which reads as under:

(1) No Court shall take cognizance--

(a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of Indian Penal Code (45 of 1860), or

(ii) of any abatement 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;

.....

13. Section 195 of Cr.P.C. places an embargo on the power of the Court to take cognizance of an offence under Section 188 of IPC except on a complaint in writing of the public servant concerned. Complaint is defined under Section 2(d) of Cr.P.C. and police report has been defined under Section 2(r) of Cr.P.C. as under:

2. Definitions. –

(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.

(r) “police report” means a report forwarded by a police officer to a Magistrate under sub-section(2) of section 173;

14. Thus, from a reading of the definition of the word "Complaint", it would be crystal clear that, the complaint does not include a police report. Admittedly, in the present case, there is no written complaint filed by the public servant and provisions of Section 154 of Cr.P.C have been invoked to lodge the first information report.

Record indicates that, pursuant to the investigation, the final report was submitted under Section 173(2) of Cr.PC which is culminated in SCC No. 41/2011.

The meaning of the expression "taking cognisance" is no longer *res integra* and has been explained in various decisions to mean judicial application of the mind to the facts mentioned in the complaint with a view to taking further action. The scheme of the Cr.PC in regard to the cognisable cases is that, trial follows cognisance and cognisance is preceded by investigation. What is barred is taking of cognisance by the Magistrate except on a written complaint filed. The bar is absolute and the Court could not have taken cognisance except on written complaint.

15. The decisions relied upon by Mr. Nangre, learned counsel for the Applicant are squarely applicable to the facts of the present case. The decision of the Apex Court in the case of *C. Muniappan & Ors. vs. State of T. ND. K. Rajendran & Ors.* (supra) would also lend credence to the proposition that, the provision of Section 195 of Cr.PC. bars the Court from taking cognizance under Section 188 of IPC without a written complaint. That non compliance of it would vitiate the prosecution and all other consequential orders and in absence of such a complaint, the trial and conviction will be void ab initio being without

jurisdiction.

16. Having regard to the discussion above, it is not necessary for us to venture into the issue, as to whether on plain reading of the FIR the alleged offence under Section 188 of IPC is made out or not.

17. Our conclusions based on the discussion above can be summarised as under:

(i) In the facts of the present case, the notice issued to the Applicant under Section 149 of Cr.PC does not constitute an order duly promulgated within the meaning of Section 188 of IPC.

(ii) The cognisance of the offence under Section 188 of IPC can be taken by the Magistrate only on the basis of complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate.

18. As indicated above, the notice issued to the Applicant under Section 149 of Cr.PC does not constitute an order duly promulgated and as such, no offence under Section 188 of IPC is made out. Admittedly, as cognisance was taken of the offence without any written complaint being filed, the prosecution stands vitiated being barred under Section 195(1)(a) of Cr.PC. Considering the aforesaid facts, there was an

express legal bar to institution and continuation of the proceedings and as such, clause (6) of paragraph No. 102 of the decision of the Apex Court in the case of *State of Haryana vs. Bhajan Lal*, [Air (1992) SC 604] clearly applies.

19. For the forgoing reason, the Application stands allowed and the proceeding being SCC No. 41 of 2011 arising out of CR. No. II/94/2010 registered with Dombivali Police Station and pending before the Judicial Magistrate, First Class, 3rd Court, Kalyan is hereby quashed.

20. Application is allowed. Rule is made absolute in the above terms.

(SHARMILA U. DESHMUKH, J.)

(A.S. GADKARI, J.)