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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (APL) NO. 453 OF 2020

1. HLA SHWE,
Aged 55 years,
R/o. No. 27, Yangon City, Myanmar
2. OHN MYINT,
Aged 54 years,
R/o. No. 27, Yangon City, Myanmar
3. KHIN MAUNG THAN,
Aged 36 years,
R/o. No. 10, Yangon City, Myanmar
4. DAW THAUNG,
Aged 57 years,
R/o. No. 10, Yangon City, Myanmar
5. SHAR HU HAR MED,
Aged 60 years,
R/o. No. 85, Yangon City, Myanmar
6. KHIN MAY THAN,
Aged 49 years,
R/o. No. 85, Yangon City, Myanmar
7. MYINT THEIN,
Aged 53 years,
R/o. No. 29, Yangon City, Myanmar
8. CHAW SULWIN,
Aged 45 years,
R/o. No. 29, Yangon City, Myanmar

... **APPLICANTS**

...VERSUS..

State of Maharashtra through
Police Station, Tahsil,
Nagpur

... **NON-APPLICANT**

WWW.LIVELAW.IN

Shri J. H. Aloni, Advocate for the applicants.
Shri V. A. Thakare, A.P.P. for the non-applicant/State.

**CORAM :- V. M. DESHPANDE AND
AMIT B. BORKAR, JJ.**

DATED :- 21.09.2020

ORAL JUDGMENT (PER : AMIT B. BORKAR, J.):-

1. Hearing was conducted through video conferencing and the learned counsel agreed that the audio and video quality was proper.
2. Rule. Rule made returnable forthwith. Heard finally by consent of the parties.
3. By virtue of this application under Section 482 of Code of Criminal Procedure Code, 1973 (in short "the Code"), the applicants, who have been arraigned for the offences punishable under Section 14 of the Foreigners Act, Section 3 of the Epidemic Disease Act, 1987 and Section 51 of the Disaster Management Act, 2005 seek quashing of the F.I.R. bearing C.R. No. 178/2020 and charge-sheet bearing registration No. 6076/2020 before the Judicial Magistrate, First Class, Nagpur.
4. The case of the applicants in nutshell is as under:-

WWW.LIVELAW.IN

(a) The applicants are nationals of Myanmar, who had obtained Tourist Visa on arrival from Netaji Subhash Chandra Bose International Airport, Kolkatta to visit India and to attend religious seminars in India. They landed in India on 02.03.2020. On 02.03.2020 itself the applicants took a flight to Delhi and stayed in Delhi till 05.03.2020. On 06.03.2020, the applicants started their journey by Kerala Express and reached Nagpur on the same day at 11 p.m. On 08.03.2020, online C-Form was prepared under the Foreigner Regional Registration Office and its hard copy was submitted on 09.03.2020 to Muslim Cell, Special Branch, Police Control Room, Nagpur, FRRO and State Intelligence Department, Nagpur. On 11.03.2020 the entire schedule of the activities of the applicants was given to Police Station, Gittikhadan. They stayed under the jurisdiction of Police Station, Gittikhadan till 21.03.2020.

(b) The Government of India called for Janta Curfew on 22.03.2020. At 06.30 am on 22.03.2020 the applicants were shifted to Markaz Center at Mominpura, Nagpur within the jurisdiction of Police Station, Tahsil and the information to that effect was provided to the Police Station but, the acknowledgement was not obtained due to Janta Curfew. Police Station, Tahsil informed the applicants that they should remain in isolation at Markaz Center at Mominpura and the ladies were kept in a private residence at Bhankhed. During their stay

WWW.LIVELAW.IN

from 24.03.2020 till 31.03.2020, Dr Kkhawaja, NMC Zonal Officer, Mominpura along with his team and Police has visited the applicants. On 03.04.2020, at about 03.30 p.m. all the applicants were sent to institutional quarantine at M.L.A. Hostel, Civil Lines, Nagpur and all the applicants have undergone a test for Covid-19, which was negative.

(c) On 05.04.2020, the applicants were informed that the F.I.R. has been registered against them under the provisions of the Foreigners Act, the Epidemic Diseases Act, 1897 and the Disaster Management Act, 2005.

(d) The applicants were formally arrested during the institutional quarantine period. The non-applicant/State thereafter carried out an investigation and filed charge-sheet under Sections 188, 269, 270 of the Indian Penal Code and Section 14 of the Foreigners Act, Section 3 of the Epidemic Disease Act, 1987 and Section 51 of the Disaster Management Act, 2005. The applications, therefore, have filed the present application.

5. This Court on 09.09.2020 issued notice to the non-applicant/State granting two weeks to the non-applicant/State as prayed. The non-applicant/State on 18.09.2020 filed the reply sworn by Shri Ramdas R. Patil, API, Police Station, Tahsil, Nagpur. The non-

WWW.LIVELAW.IN

applicant/State in their reply have not disputed the dates of arrival of the applicants in India and at Nagpur. The non-applicant/State has stated in its reply that after arriving in India on Tourist Visa for sightseeing, the applicants started preaching activities and participated in religious activities thereby violating Section 14 of the Foreigners Act and in particular condition nos. 1.25 and 19.8 of the Visa Manual. The non-applicant/State relied upon the statements of the witnesses of Mohd. Mazar, Mohd. Yasin, Faiyaz Khan Mehmood Khan and 15 others, who as per the case of the non-applicant/State stated that all the applicants were actively involved in preaching activities by taking religious education and discourses. The male applicants were residing jointly in Markaz Lal Building in contravention of the orders dated 23.03.2020 and 31.03.2020 issued under Section 144(1)(3) of the Code and violated condition no. 8 of the said order. It is submitted that charge-sheet has been filed on 21.07.2020 and therefore, from the statements of the witnesses and other evidence collected by the Investigating Agency, there is ample material on record to prosecute the applicants and therefore, prayed for dismissal of the application.

6. We have heard Shri J. H. Aloni, learned counsel for the applicants and Shri V. A. Thakare, learned A.P.P. for non-applicant/State. We have also perused the material on record including the charge-sheet filed against the applicants.

WWW.LIVELAW.IN

7. Shri J. H. Aloni learned counsel for the applicants urged that the F.I.R. was registered on the wrong premise as the applicants have informed the concerned Police Station and other Authorities till imposition of Janta Curfew about their activities and the concerned authorities including the Police machinery were monitoring the activities of the applicants and therefore, there was no question of disobedience of the order issued under Section 144 of the Code. It is submitted that during the quarantine period, the applicants had undergone a medical test for Covid-19 and they were found to be negative. Therefore, there was no question of spreading infection as contemplated in Sections 269 and 270 of the Indian Penal Code. It is further submitted that there are no restrictions on foreigners from attending religious gatherings in India under the conditions of Tourist Visa and therefore, there is no violation of Section 14 of the Foreigners Act. It is submitted that the applicants have not violated any provision of the Foreigners Act, the Epidemic Disease Act, 1897 and the Disaster Management Act, 2005 at any point of time during their stay in India, especially during their stay at Delhi and Nagpur. The applicants have relied upon the judgment of the High Court of Karnataka in ***Criminal Petition No. 2376/2020*** in the case of ***Farhan Hussain Vs. State and another*** and also the judgment of this Court in ***Criminal Writ Petition No. 548/2020 (Konan Kodia Ganstone and others Vs. State of***

Maharashtra).

WWW.LIVELAW.IN

8. Shri V. A. Thakare, learned A.P.P. for non-applicant/State submitted that as per condition nos. 1.25 and 19.8 of the Visa Manual, it was not permissible for the applicants to engage themselves in tabligh work and preaching religious ideology, making speeches in religious places. It is submitted that from the statement of the witnesses, it is clear that the applicants were actively involved in preaching activities and taking religious education and discourse. It is further submitted that the applicants have violated condition no. 8 of the orders dated 23.03.2020 and 31.03.2020.

9. We have given anxious consideration to the submissions across the bar. To consider the legality of the prosecution initiated against the applicants under Section 14 of the Foreigners Act, it is necessary to consider Section 14 of the Foreigners Act, which reads as under:-

"14. Penalty for contravention of provisions of the Act, etc.-

Whoever-

(a)

(b) does any act in violation of the conditions of the valid visa issued to him for his entry and stay in India or any part thereunder;

(c)

shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine; and if he has entered

WWW.LIVELAW.IN

into a bond in pursuance of clause (f) of sub-section (2) of Section 3, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof or show cause to the satisfaction of the convicting court why such penalty should not be paid by him."

10. The reading of Section 14 makes it clear that to prosecute a person for a contravention of the said provision, it is necessary to show that the person has done any act in violation of the condition of the valid visa issued to him for his entry and stayed in India or any part thereunder. As per the charge sheet, the allegation against the applicants is of breach of the condition nos. 1.25 and 19.8 of the Visa Manual. The said conditions read as under:-

"1.25 Restriction on engaging in tabligh activities

Foreign nationals granted any type of visa and OCI Cardholders shall not be permitted to engage themselves in tabligh work unless they are granted specific permission in accordance with para 19.8 of this Visa manual. There will be no restriction in visiting religious places and attending normal religious activities like attending religious discourses. However, preaching religious ideologies, making speeches in religious places, distribution of audio or visual display/pamphlets pertaining to religious ideologies, spreading conversion etc. will not be allowed.

* * * *

19.8 Foreigners visiting for tabligh work

All applications from foreigners intending to visit India in connection with tabligh work, or for training in such work, shall be referred to the Ministry of Home Affairs before a visa is granted. The Mission/Post must send full particulars, including details

WWW.LIVELAW.IN
about the applicants, institution/organization sponsoring the applicant, the organization/institution where the foreigner intends to work, the places proposed to be visited, details of financial status etc. All such foreign nationals shall mandatorily report to FRRO/FRO concerned within 14 days of arrival in India irrespective of the duration of the visa."

11. We have gone through the statement of the witnesses made available by way of charge-sheet. The relevant part of the statements of almost all the witnesses is similar in nature, which reads as under:-

“हमारे यहा वो दो दिन दि १९/३/२०२० से २०/०३/२०२० तक रहकर उन्होने कुराण और हदिस की पढाई की और नमाजपठण किया / उसके साथ उन्होने भारतीय मुस्लिम कल्चरकी जानकारी ली / उनको यहा की भाषा नही आती थी तो उन्होने उनकी भाषा कुराण और हदीस लाई थी उसीकी पढाई की दि २१/०३/२०२० को उनको बोरगांव मस्जिद, पो. स्टे. गिटटीखदान, नागपूर यहा पे जाना था तो उनको उस मस्जिद के लोग आके ले गए /”

12. Reading of the aforesaid statement makes it clear that on 19.03.2020 and 20.03.2020, the applicants studied Quran and Hadis and offered Namaz. They acquainted themselves about Indian Muslim culture. Since the applicants were not conversant with the local language, they studied Quran and Hadis in their language. The above statements make it clear that there is no material produced by the prosecution to prove that the applicants were engaged in tabligh work and they were involved in preaching religious ideology or making speeches in religious places. There is no material produced by the prosecution in the charge-sheet which even prima-facie proves

WWW.LIVELAW.IN

contravention of condition no. 1.25 or 19.8 of the Visa Manual. On the contrary, from the statements of the witnesses mentioned in the charge-sheet, it is clear that the applicants are not conversant with local language and they studied the Quran and Hadis in their language. From the material produced in the charge-sheet, except the statement of the witnesses referred above, there is no other material produced by the prosecution to prove ingredients of contravention of Section 14 of the Foreigners Act.

13. In so far as Sections 269 and 270 of Indian Penal Code is concerned, the said Sections read as under:-

"269. Negligent act likely to spread infection of disease dangerous to life.—Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

270. Malignant act likely to spread infection of disease dangerous to life.—Whoever maliciously does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

14. To attract ingredients of Sections 269 and 270, the person must commit any act which he knows is likely to spread infection of

WWW.LIVELAW.IN

any disease which is dangerous to life. It is not in dispute that the applicants had undergone Covid-19 test during their period of quarantine i.e. from 03.04.2020 and their test report for infection of Covid-19 was negative. It is also not disputed that they were kept in isolation from 24.03.2020 till 31.03.2020 under the supervision of Dr Khawaj, NMC Zonal Officer, Mominpura, Nagpur. There is no material on record to prove that applicants had indulged in any act which was likely to spread infection of COVID -19. Therefore, from the material produced in the charge-sheet, there is no evidence to substantiate the fulfillment of ingredients of Sections 269 and 270 of the Indian Penal Code.

15. The offence under Section 51 of the Disaster Management Act, 2005 and Section 3 of the Epidemic Disease Act, 1897 reads as under:-

"51. Punishment for obstruction, etc.—Whoever, without reasonable cause—

(a) obstructs any officer or employee of the Central Government or the State Government, or a person authorised by the National Authority or State Authority or District Authority in the discharge of his functions under this Act, or

(b) refuses to comply with any direction given by or on behalf of the Central Government or the State Government or the National Executive Committee or the State Executive Committee or the District Authority under this Act, shall on conviction be punishable with imprisonment for a term which

WWW.LIVELAW.IN

may extend to one year or with fine, or with both, and if such obstruction or refusal to comply with directions results in loss of lives or imminent danger thereof, shall on conviction be punishable with imprisonment for a term which may extend to two years."

"Section.3. Penalty. Any person disobeying any regulation or order made under this Act shall be deemed to have committed an offence punishable under section 188 of the Indian Penal Code (45 of 1860)."

16. The offences described above involve dis-obedience of regulation or order made under the said Act and if there is said dis-obedience then there is a presumption that the offence is committed under Section 188 of Indian Penal Code. The record shows that there is an allegation of breach of an order issued under Section 144 of the Code. The prosecution has alleged breach of Clause 8 of the Notification dated 14.03.2020. Clause 8 of the said Notification reads as under:-

"8. Any person with a history of travel in last 14 days to a country or area from where COVID-19 has been reported, must voluntarily report to State Control Room (020-26127394) or to the State Surveillance Officer, IDSP (020-27290066) / Toll Free number 104 or to such numbers as may be assigned, so that necessary measures may be initiated by Commissioner, Health Services, Director of Health Services (DHS-I & II), Director, Medical Education & Research (MDER), and the Collector/Municipal Commissioner as the case may be."

WWW.LIVELAW.IN

Section 188 of the Indian Penal Code 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 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.

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."*

17. The ingredients of the offence under Section 188 of Indian Penal Code are the following:-

- (1) There was promulgation of an order by a public servant lawfully empowered to promulgate such order;
- (2) Such order directed the accused to abstain from a certain act or to take certain order with certain property in his possession or under his management;
- (3) The accused was aware of such order;

WWW.LIVELAW.IN

- (4) He disobeyed such order;
- (5) Such disobedience caused or tended to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed or such disobedience caused or tended to cause danger to human life, health or safety, or a riot or affray.

18. Section 188 of the Indian Penal Code deals with disobedience to orders duly promulgated by the public servant. The offence, as already stated, is allegedly disobedience to the orders duly promulgated by the Collector. Section 195 of the Code lays down that no Court shall take cognizance of any offence punishable under Sections 172 to 188 (both inclusive) of the Indian Penal Code, except on the complaint in writing to the public servant concerned or of some other public servant to whom he is administratively subordinate. In the present case, there is no complaint filed by Collector or his subordinate officer. The Sub-Inspector of Police has filed the charge-sheet. In *Daulat Ram v. State of Punjab [AIR 1962 SC 1206]*, the Hon'ble Supreme Court held that the prosecution under Section 182 of the Indian Penal Code must be on a complaint in writing by the Tahsildar (public servant). In view of absolute bar against the Courts for taking cognizance of the offence punishable under Section 182 of the Indian Penal Code, except in the manner provided by Section 195 of the Code, the said judgment equally applies to the offence under Section

WWW.LIVELAW.IN

188 also. In the present case, there is no complaint in writing by the public servant concerned or by some other public servant to whom he is administratively subordinate. Therefore, in view of the bar under Section 195(1)(a) of the Code, the learned Magistrate ought not to have taken cognizance of the offence punishable under Section 188 Indian Penal Code on the report submitted by the Sub-Inspector of Police. Therefore, we are of the considered view that the cognizance is taken contrary to the specific bar envisaged under Section 195(1)(a) of the Code. In ***M.S. Ahlawat v. State of Haryana [2000(1) SCC 278]***, the Hon'ble Supreme Court considered the provisions prescribed under Section 195 of the Code at length and observed in paragraph 5 as under:

"5. ...Provisions of section 195 CrPC are mandatory and no court has jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing as required under that section."

19. In ***C. Muniappan v. State of T.N., [(2010) 9 SCC 567]***, the Hon'ble Supreme Court observed in para 33 as under:

"33. Thus, in view of the above, the law can be summarized to the effect that there must be a complaint by the public servant whose lawful order has not been complied with. The complaint must be in writing. The provisions of Section 195 Cr.PC are mandatory. Non-compliance of it would vitiate the prosecution and all other consequential orders. The Court cannot assume the cognizance of the case without such a complaint. In the absence of such a complaint, the trial and conviction will be void ab initio being without jurisdiction."

20. In that view of the matter, no prosecution could have been launched against the applicants under Section 188 of the Indian Penal Code based on a written report submitted by the Police. No F.I.R. could have been registered by the police for an offence punishable under Section 188 of the Indian Penal Code. The legislative intention appears to be clear from the language of Section 195(1) of the Code, which prescribes that where an "offence" is committed under Section 188 of the Indian Penal Code, it would be obligatory that the public servant before whom such an "offence" is committed, should file a complaint before the jurisdictional Magistrate either orally or in writing. Hence, registration of an F.I.R. for an offence under Section 188 of Indian Penal Code is not permitted in law at the instance of Police.

22. In so far as an offence under Section 51 of the Disaster Management Act, 2005 is concerned, the material on record does not indicate that the applicants have failed to comply with the direction issued under said act.

23. In the *State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335]*, the Hon'ble Supreme Court has dealt in detail the provisions of Section 482 of the Code and the power of the High Court to quash the criminal proceedings or the F.I.R. The Hon'ble Supreme Court

WWW.LIVELAW.IN

summarized the legal position by laying down the following guidelines to be followed by the High Court in the exercise of their inherent powers to quash the criminal proceeding:

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order

WWW.LIVELAW.IN

of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(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."

24. Having considered the ambit and scope of Section 195(1) of the Code and the ratio laid down by the Supreme Court referred to hereinabove, we are of the opinion that the investigating authorities acted without jurisdiction in registering the F.I.R. under Section 188 of the Indian Penal Code based on a complaint of police. The investigation conducted by the police was also without jurisdiction.

25. Having regard to the facts involved in the present case and the ratio laid down by the Supreme Court in respect of the exercise of power under Section 482 of the Code in the decisions, noted above, we are of the opinion that allowing the prosecution to continue would be nothing but an abuse of the process of the Court in as much as there

WWW.LIVELAW.IN

was an express legal bar against the institution of F.I.R. against an accused based on the police report.

26. In the backdrop of the exposition of the aforesaid position, we are of the considered view that the implication of the applicants herein for the offences punishable under Sections 188, 269, 270 of the Indian Penal Code and Section 14 of the Foreigners Act, Section 3 of the Epidemic Disease Act, 1987 and Section 51 of the Disaster Management Act, 2005 would be an abuse of process of law. Compelling the applicants to undergo the trial would cause grave injustice. We, therefore, deem it appropriate to quash the F.I.R. bearing No. 178/2020 and charge-sheet bearing registration No. 6076/2020 before the Judicial Magistrate, First Class, Nagpur.

27. For the foregoing reasons, the application stands allowed.

28. F.I.R. No. 178/2020 registered with Tehsil Police Station, Nagpur for the offences punishable under sections Sections 188, 269, 270 of the Indian Penal Code and Section 14 of the Foreigners Act, Section 3 of the Epidemic Disease Act, 1987 and Section 51 of the Disaster Management Act, 2005 and the resultant charge-sheet bearing registration No. 6076/2020 before the Judicial Magistrate, First Class, Nagpur stand quashed.

WWW.LIVELAW.IN

29. The order be communicated to the counsel appearing for the parties, either on the email address or on WhatsApp or by such other mode, as is permissible in law.

JUDGE

JUDGE

RR Jaiswal