

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.728 of 2014

Arising Out of PS.Case No. -null Year- null Thana -null District- PATNA

Jai Kishun Sao, S/o Late Ram Karan Sao, Resident of M.I.G. Colony More, P.S. -
Kanker Bagh, Distt- Patna

.... Petitioner

Versus

1. The State of Bihar through District Magistrate, Patna.
2. Sri Gopal Chandra Pd. S/o Late Suresh Chandra Pd. resident of New Jakkanpur,
Dr. N.C. Ghosh Lane, P.S. Gardani Bagh, Distt. Patna. A/P Revenue Officer,
Kanker Bagh Circle Patna Nager, Nigam.

.... Respondents

Appearance :

For the Petitioner/s : Mr. Tilak Sao, Advocate

For the Respondent-PMC: Mr. Sanjay Prakash Verma, Advocate

For the State : Mr. Sumant Kumar Singh, AC to GA-7

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 31-08-2015

The present application under Articles 226 and 227 of the Constitution of India has been filed for quashing the first information report (For short 'FIR') in Kankarbagh P.S. Case No. 169 of 2014 registered under Sections 188 and 420 of the Indian Penal Code (For short 'IPC') pending in the court of learned Judicial Magistrate-1st Class, Patna awaiting report of police officer on completion of the investigation.



2. The prosecution case has been launched on the basis of a written report dated 6.5.2014 submitted by Sri Gopal Chandra Prasad, Revenue Officer, Kankarbagh Circle, Patna Municipal Corporation, Patna (For short “PMC”) submitted to the Officer-in-Charge, Kankarbagh Police Station. The said report had been submitted pursuant to the direction of the Commissioner, PMC.

3. In the written report of the informant it is stated that on the basis of complaint made against the ongoing construction of building of the petitioner, the Executive Officer of PMC made spot inspection and found that the building was being constructed in contravention or breach or deviation of building bye-laws. On the basis of such finding, in compliance of letter no. 2262 dated 24th May, 2013, issued by the Commissioner, PMC, the Executive Officer, PMC directed the petitioner to stop the construction. Thereafter, Vigilance Case No. 04/B/2014 was instituted against the petitioner and in the said case, the Vigilance Officer of PMC issued notice to the petitioner in exercise of power conferred under sub-section (1) of Section 323 and sub-section (1) of Section 324 of the Bihar Municipal Act, 2007 (For short “the Municipal Act, 2007”) vide Memo No. 2243 dated 24.03.2014, asking him to file his explanation within 15 days as to why the unauthorized construction made by him be not demolished. By the said notice



the petitioner was also directed to stop ongoing construction of the building forthwith till further orders. However, despite service of notice to the petitioner, prohibiting him to proceed with further construction of the building, in a joint inquiry conducted on 06.05.2014 by the officers of PMC consisting of the Executive Officer, Kankarbagh Circle, the Executive Engineer, Kankarbagh Division, the Revenue Officer and the Regional Tax Collector, Kankarbagh Circle, it was found that construction work of the building in question was continuing. Under the circumstances, the Commissioner, PMC directed the informant to lodge an FIR in the local police station.

4. On the basis of the aforesaid allegations Kankarbagh P.S. Case No. 169 of 2014 dated 07.05.2014 was registered under Sections 188 and 420 of the IPC against the petitioner and investigation was taken up.

5. It has been contended by learned Counsel for the petitioner that the allegations made in the FIR do not disclose the ingredients of any cognizable offence. He has submitted that the petitioner had purchased a piece of land measuring 2 kathas and 3 dhurs appertaining to Tauzi No. 73, Thana No. 6, Khata Nos. 242 and 243 (part), situated at Mauza Lohanipur, Survey P.S.-Patna City (Pirbahore), by a registered sale deed dated 23.01.1999 from



the erstwhile landlord, namely, Sri Rajeshwar Prasad Singh and Sri Suresh Prasad Singh, and since the date of purchase, the petitioner is coming in peaceful possession over the said piece of plot. The land was mutated in his name and revenue receipts are also being issued in his name. He has further submitted that the PMC is receiving Municipal Tax from the petitioner and the land is free from any litigation. The plan of construction on the said plot was sanctioned by the PMC on 20.12.2012 pursuant to which the petitioner had started construction of the building.

6. *Per contra*, learned Counsel for the PMC has submitted that there is no merit in the present case. The allegations made in the FIR do attract the ingredients of the offences alleged. The police have rightly registered the case and took up investigation. According to him, after sanctioning of map on 20.12.2010, in the year 2011, the petitioner had started construction of the building. A complaint was made against the construction of the building, pursuant to which the authority concerned made spot inspection and, thereafter, Vigilance Case No. 04/B/2014 was instituted against the petitioner and as per Sections 324(1) and 323(1) of the Municipal Act, 2007, notice was issued to the petitioner vide letter no. 2245 dated 24.3.2014 for stopping the construction work forthwith. The petitioner was fully



aware of the pendency of the Vigilance case before the Commissioner, PMC and issuance of order for stopping the construction work, but in spite of the same he was deliberately constructing the building and, therefore, steps were taken for instituting an FIR in the light of Section 399 of the Municipal Act, 2007. Accordingly, an FIR under Sections 188 and 420 IPC has been lodged against the petitioner which is legal, valid and justified.

7. Learned AC to GA-3 has adopted the arguments advanced by learned counsel for the PMC.

8. I have heard respective counsel for the parties and perused the record.

9. Admittedly, the building in question was sanctioned by the PMC on 20.12.2010. The authorities of PMC have alleged that the work relating to construction of building was being executed in violation or breach, or deviation of building bye-law. The violations alleged are yet to be adjudicated by the Commissioner, PMC before whom Vigilance Case No. 04/B/2014 is pending.

10. Having considered the allegations made in the FIR and the arguments advanced on behalf of the parties, this court is required to dwell upon whether or not the allegations made in the

written report submitted by the informant would justify investigation of the case to be conducted by the police in respect of the offences alleged under Sections 420 and 188 of the IPC.

11. In order to examine the aforesaid issue, I would now consider the provisions in question, but before examining the application of the penal provisions of the IPC, I deem it proper to examine the ambit and scope of the relevant provisions of the Municipal Act, 2007.

12. Sections 323 and 324 of the Municipal Act, 2007 under which notice was sent to the petitioner by the PMC reads as under:-

“323. Order of demolition and stoppage of buildings or works in certain cases and appeal.-

(1) Where the erection of any building or the execution of any work has been commenced, or is being carried on, or has been completed without, or contrary to, the sanction referred to in Section 314 or in contravention of any of the provisions of this Act or the Rules or the Regulations made thereunder, the Chief Municipal Officer may, in addition to any other action that may be taken under this Act, make an order directing that such erection or work shall be demolished by the person at whose instance the erection or the work has been commenced or is being carried on or has been

completed, within such period, not being less than five days and more than fifteen days from the date on which a copy of the order of demolition with a brief statement of the reasons therefor has been delivered to such person, as may be specified in the order:

Provided that no order of demolition shall be made unless such person has been given, by means of a notice served in such manner as the Chief Municipal Officer may think fit, an opportunity of showing cause why such order shall not be made:

Provided further that where the erection of any work has not been completed, the Chief Municipal Officer may, by the same order or by a separate order, whether made at the time of the issue of the notice under the first proviso or at any other time, direct such person to stop the erection of such building or the execution of such work until the expiry of the period within which an appeal against the order of demolition, if made, may be preferred under sub-section (3).

Explanation.- In this chapter, “the person at whose instance” shall mean the owner, or the occupier, or any other person who causes the erection of any building or the execution of any work, including alterations or additions, if any, to be done, or does it by himself.

(2) The Chief Municipal Officer may make an

order under sub-section (1), notwithstanding the fact that the assessment of such building has been made for the levy of the property tax on lands and buildings.

(3) Any person aggrieved by an order of the Chief Municipal Officer under sub-section (1) may, within thirty days from the date of the order, prefer an appeal against the order to the Municipal Building Tribunal appointed under Section 329.

(4) Where an appeal is preferred under sub-section (3) against an order under sub-section (1), the Municipal Building Tribunal may stay the enforcement of the order on such terms, if any, and for such period, as it may think fit:

Provided that where the erection of any building or the execution of any work has not been completed at the time of the order under sub-section (1), no order staying the enforcement of the order under that sub-section shall be made by the Municipal Building Tribunal unless a surety, sufficient in the opinion of that Tribunal, has been given by the appellant for not proceeding with such erection or work pending the disposal of the appeal.

(5) Save as provided in this Section, no Court shall entertain any suit application or other proceeding for injunction or other relief against the Chief Municipal Officer to restrain him

from taking any action, or making any order, in pursuance of the provisions of this Section.

(6) Every order made by the Municipal Building Tribunal on appeal and, subject to such order, every order made by the Chief Municipal Officer under sub-section (1), shall be final and conclusive.

(7) Where no appeal has been preferred against an order made by the Chief Municipal Officer under sub-section (1) or where an order under that sub-section has been confirmed on appeal, whether with or without modification, the person against whom the order has been made shall comply with the order within the period specified therein or, as the case may, within the period, if any, fixed by the Municipal Building Tribunal on appeal, and, on the failure of such person to comply with the order within such period, the Chief Municipal Officer may himself cause the building or the work to which the order relates to be demolished, and the expenses of such demolition shall be recoverable from such person as an arrear of tax under this Act.

(8) Notwithstanding anything contained in this Chapter, if the Empowered Standing Committee is to the opinion that immediate action is called for in relation to a building or a work being carried on in contravention of the provisions of this Act, it may for reasons to be recorded in

writing, cause such building or work to be demolished forthwith.

324. Order of stoppage of building or work in certain cases.-(1) Where the demolition of any building or the erection of any building or the execution of any work has been commenced or is being carried on without, or contrary to, the sanction referred to in Section 314 or in contravention of any condition subject to which such sanction has been accorded or in contravention of any provisions of this Act or the Rules or the Regulations made thereunder, the Chief Municipal Officer may, in addition to any other action that may be taken under this Act, by order, require the person at whose instance the building or the work has been commenced or is being carried on to stop the same forthwith.

(2) (a) Notwithstanding anything contained elsewhere in this Act or in any Rules or Regulations made thereunder, no owner of any building, and no person engaged in the construction of any building on behalf of the owner thereof, shall allow storage or stagnation of water in the site for the construction of such building and every such owner or every such person, as the case may be, shall completely empty all collections of such water at least once in a week.



(b) Where the construction of a building is carried on in contravention of the provisions of clause (a), the Chief Municipal Officer may, in addition to any other action that may be taken under this Act, by order, in writing require the person at whose instance such storage or stagnation of water in the site for the construction of the building is made, to stop forthwith any further construction of the building, and such order shall remain in force till the person as aforesaid complies with the requirements of the order as aforesaid, to the satisfaction of the Chief Municipal Officer.

(3) If an order by the Chief Municipal Officer under clause (b) of sub-section (2) directing any person to stop the construction of any building is not complied with, the Chief Municipal Officer may take such measures as he deems fit or may require any police officer to remove such person and all his assistants and workmen from the premises within such time as may be specified by the Chief Municipal Officer, and such police officer shall comply with such requirement.

(4) If an order by the Chief Municipal Officer under Section 323 or under sub-section (1) of this Section, directing any person to stop the erection of any building or the execution of any work, is not complied with, the Chief Municipal

Officer may take such measures as he deems fit or may require any police officer to remove such person and all his assistants and workmen from the premises within such time as may be specified by the Chief Municipal Officer, and such police officer shall comply with such requirements.

(5) No Court shall entertain any suit, application or other proceeding for injunction or other relief against the Chief Municipal Officer to restrain him from taking any action or making any order in pursuance of the provisions of this Section.

(6) On the compliance with the requirement under sub-section (5), the Chief Municipal Officer may, if he thinks fit, depute, by an order, in writing, a police officer or an officer or other employee of the Municipality to watch the premises in order to ensure that the erection of the building or the execution of the work is not continued.

(7) Where a police officer or an officer or other employee of the Municipality has been deputed under sub-section (6) to watch the premises, the cost of such deputation, to be determined by the Municipality by Regulations, shall be paid by the person at whose instance such erection or execution is being continued or to whom notice under sub-section (1) has been given, and shall

be recoverable from such person as an arrear of tax under this Act.”

13. Section 399 of the Municipal Act prescribes that the offences committed under Section 323 and Section 324 shall be cognizable within the meaning of the Code of Criminal Procedure (For short “Cr. P.C.). It reads as under:-

“399. Certain offences to be cognizable.- The offences mentioned in Section 313, Section 323, Section 324, Section 326, Section 370 and Section 435 shall be cognizable within the meaning of the Code of Criminal Procedure, 1973.”

14. A plain reading of the provisions of the Municipal Act, 2007 would make it evident that though the offence under Section 323 of the Municipal Act, 2007 has been made cognizable, the same gives no power to the police to investigate the offence. It simply confers power to the Chief Municipal Officer to pass an order of demolition and stoppage of erection of any building or execution of any work which has been commenced, or is being carried in certain cases. It also confers right to the person aggrieved against the order of the Chief Municipal Officer to prefer an appeal before the Municipal Building Tribunal.

15. Similarly, under Section 324 of the Municipal Act, 2007, the Chief Municipal Officer may by order require the person



at whose instance erection of any building or the execution of any work has been commenced or is being carried without, or contrary to the sanction referred to in Section 314 of the Municipal Act, 2007 or in contravention of any condition subject to which such sanction has been accorded or in contravention of any provisions of the Act or the rules or the regulations made thereunder to stop construction forthwith, and if his order is not complied with, he may require any police officer to remove such person and all his assistants and workmen from the premises within such time as may be specified by him, and such police officer shall comply with such requirement. Under this provision the Chief Municipal Officer may, if he thinks fit, by an order in writing depute a police officer to watch the premises in order to ensure that the erection of building or execution of the work is not continued, and where a police officer has been deputed to watch the premises, the cost of such deputation to be determined by the Municipality by regulations, shall be realized from such person at whose instance such erection or execution is being continued or to whom notice under sub-section (1) has been given, and shall be recoverable from such person as an arrear of tax under the Act.

16. Apparently, it would be evident from perusal of Sections 323 and 324 of the Municipal Act, 2007 that the police



have not been vested with the power of investigation as provided under Sections 156 and 157 of the Cr. P.C. in the matter of investigation of a cognizable offence in respect of penal offences. Though the offences under Sections 323 and 324 have been made cognizable, the provisions prescribed therein are of civil nature. They only authorize the police to ensure compliance of the prohibitory orders passed by the Chief Municipal Officer under the Municipal Act, 2007. These cognizable offences are not punishable with imprisonment for a term.

17. Let it be noted that the municipal laws are public regulatory laws. It has rightly been said that while every crime violates the law, not every violation of law counts as a crime. Breaches of sections 323 and 324 of the Municipal Law are not automatically breaches of the penal provisions of the Indian Penal Code. Such breaches are basically civil infraction and chapter XXXVI of the Municipal Act, 2007 itself governs the procedure for prosecuting municipal civil infractions.

18. Having considered the ambit and scope of Sections 323 and 324 of the Municipal Act, 2007, I would now consider the relevant provisions of the penal code under which the prosecution has been launched against the petitioner. Section 420 of the IPC deals with the offence of cheating and dishonestly inducing



delivery of property. In order to establish an offence under Section 420 IPC, it is necessary to prove that the accused induced someone fraudulently or dishonestly so as to deliver any property or do something in the form of an act or omission. The complainant must also show that at time of the alleged false representation made or the inducement offered by the accused, the accused had no intention of honouring the promise.

19. In the present case, there is no such allegation that the petitioner induced someone fraudulently or dishonestly so as to deliver any property and, hence, there would be no application of Section 420 IPC.

20. The allegation made in the present case is in respect of obtaining sanction order for construction of building by suppressing or misrepresenting the facts, and for continuation of construction work after expiry of validity of the sanctioned map. In my opinion, such an allegation would not attract the necessary ingredients of the offence punishable under Section 420 IPC.

21. So far as the offence alleged under Section 188 IPC is concerned, the allegation against the petitioner is that despite the prohibitory order served upon him, he continued with the construction work of the building.

22. Disobedience to an order duly promulgated by a



public servant has been made an offence under Section 188 of the IPC. This Section states that when an accused knows that a public servant has lawfully promulgated an order which, he is empowered to do by which he has either directed the accused to abstain from a certain act, or directed him to take certain order with certain property in his possession or under his management, and he disobeys such direction, he shall be punished with simple imprisonment for a term extending to one month, or with fine extending upto 200 rupees, or with both. If such disobedience causes or has tendency to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed; and if such disobedience causes or has tendency to cause danger to human being health or safety or causes or a tendency to cause riot or affray, he shall be punished more severely, that is to say with simple imprisonment or rigorous imprisonment for a term extending to six months or with fine extending upto 1,000/- rupees or with both.

23. The explanation attached with this section clarifies that intention to produce harm or contemplation that the disobedience is likely to produce harm is not necessary; and this section is applicable if there is knowledge on the part of the person sought to be punished about the existence of the order which he disobeys and that his disobedience either produces or is likely to

produce harm.

24. In order to attract an offence under Section 188 of the IPC, the disobedience must either cause or it must have tendency to cause obstruction, annoyance or injury as stated in this section. There has to be a factual proof of annoyance, mere mental annoyance of the concerned authorities is not intended to be included in the section. In the present case there is no such allegation that the disobedience of the prohibitory order had any tendency to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed.

25. At this stage, it is also pertinent to note here that Section 195(1) of the Cr. P.C. bars the Court from taking cognizance of the offence punishable under Section 188 IPC or abetment or criminal conspiracy to commit such offence, unless, there is a written complaint in writing by the public servant concerned or some other public servant to whom he is administratively subordinate for contempt of his lawful order.

26. Section 195(1) of the Cr. P.C. reads as under:-

“195(1). No Court 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, or 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.”

27. This provision prescribed under Section 195(1) of the Cr. P.C. has been carved out as an exception to general rule contained under Section 190 of the Cr. P.C. that any person can set the law in motion by making a complaint, as it prohibits the Court from taking cognizance of certain offences until and unless a complaint has been made by some particular authority or person. The provision of section 195(1)(a) of the Cr. P.C. being mandatory, any private prosecution in respect of the said offence is totally barred. Only the concerned public servants can make a complaint and initiate proceedings in respect of these offences. The power to make the complaint can be exercised only by the public servant who is for the time being holding the office or is a successor-in-office of the public servant or by some other public servant to whom he is administratively subordinate, whose order is disobeyed or lawful authority disregarded and thus an offence under section 172 to 188 IPC has been committed. The bar of limitation imposed by sub-section (1)(a) of Section 195 equally extends to both cognizable as well as non-cognizable offences. Let it be noted that



all the offences covered by sections 172 to 188 IPC except the one under Section 188, are non-cognizable offences. It may be noted that Section 195 being mandatory taking cognizance of any offence referred to therein without a proper complaint by the concerned public servant would be an illegality which cannot be cured by Section 465 of Cr. P.C. The Supreme Court in **Basir-Ul-Haq and Others Vs. The State of West Bengal** held that Section 195 of Cr. P.C. requires that without a written complaint of the public servant concerned, no prosecution for an offence under Section 182 IPC, can be launched nor any cognizance of the offence can be taken by the Court.

28. In **C. Muniappan & Ors. Vs. State of Tamil Nadu [(2010) 9 SCC 567]**, the Supreme Court after taking into consideration its earlier decisions in **Govind Mehta Vs. State of Bihar, AIR 1971 SC 1708; Patel Laljibhai Somabhai v. State of Bihar, AIR 1971 SC 1935; Surjit Singh v. Balbir Singh, (1996) 3 SCC 533; State of Punjab v. Raj Singh, (1998) 2 SCC 391; K. Vengadachalam v. K.C. Palanisamy, (2005) 7 SCC 352; Iqbal Singh Marwah v. Meenakshi Marwah, (2005) 4 SCC 370; M.S. Ahlawat v. State of Haryana, (2000) 1 SCC 278; Sachida Nand Singh v. State of Bihar, (1998) 2 SCC 493; and Daulat Ram v. State of Punjab, AIR 1962 SC 1206**, observed as under in

paragraph no. 28:-

“28. Section 195(1)(a)(i) CrPC bars the court from taking cognizance of any offence punishable under Section 188 IPC or abetment or attempt to commit the same, unless, there is a written complaint by the public servant concerned for contempt of his lawful order. The object of this provision is to provide for a particular procedure in a case of contempt of the lawful authority of the public servant. The court lacks competence to take cognizance in certain types of offences enumerated therein. The legislative intent behind such a provision has been that an individual should not face criminal prosecution instituted upon insufficient grounds by persons actuated by malice, ill will or frivolity of disposition and to save the time of the criminal courts being wasted by endless prosecutions. This provision has been carved out as an exception to the general rule contained under Section 190 CrPC that any person can set the law in motion by making a complaint, as it prohibits the court from taking cognizance of certain offences until and unless a complaint has been made by some particular authority or person. Other provisions in CrPC like Sections 196 and 198 do not lay down any rule of procedure, rather, they only create a bar that unless some requirements are complied with, the court shall not take cognizance of an offence

described in those sections.”



29. As noted above, in the present case, the prohibitory order was passed by the Commissioner, PMC in the Vigilance case instituted against the petitioner and on the direction of the Commissioner, the notice was served to the petitioner under the signature of the Vigilance Officer of the PMC, whereas the FIR has been instituted on the basis of a written report submitted by one Gopal Chandra Prasad, who was certainly not the public servant who had passed the prohibitory order. The Commissioner, PMC was certainly not a subordinate officer to said Gopal Chandra Prasad, a Revenue Officer of Kankarbagh Circle of PMC. In that view of the matter, no prosecution could have been launched against the petitioner under Section 188 of the IPC on the basis of a written report submitted by the informant of the present case.

30. Furthermore, no FIR can be registered by the police for an offence under Section 188 of the IPC. The legislative intention appears to be clear from the language of Section 195(1) of the Cr. P.C. which clearly prescribes that where an offence is committed under Section 188 IPC, 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, it would not be within the domain of the police

to register a case against the offender for an offence alleged under Section 188 of the IPC and investigate the same, as registration of an FIR for an offence under Section 188 IPC, is not permitted by the Cr. P.C.

31. In **Jiwan Kumar Vs. State of Punjab & Ors.** [2008 Cr. L.J. 3576], a Division Bench of the Punjab and Haryana High Court has held that proceedings for offence under Section 188 IPC can be started on the basis of complaint filed by the public servant concerned and not on the basis of FIR culminating in filing of the charge-sheet.

32. It is, thus, clear that the prosecution against the petitioner under Section 188 IPC initiated on the basis of FIR is not permitted.

33. Resultantly, the FIR in Kankarbagh P.S. Case No. 169 of 2014 registered for the alleged commission of offences under Sections 188 and 420 of the IPC along with all proceedings arising therefrom, is hereby quashed and set aside.

34. The application stands allowed accordingly.

(Ashwani Kumar Singh, J.)

Sanjeet/-

AFR/-

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