

THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.43543 of 2010

Arising Out of PS.Case No. -94 Year- 2009 Thana -null District- WEST CHAMPARAN
(BETTIAH)

=====

Prakash Jha, son of Shri Tej Nath Jha, resident of Village-Barharwa, P.O.-
Turhapatti, Sirisia-Adda O.P. under Chanpatia police station, Distrit-West
Champaran, Bihar.

.... Petitioner/s

Versus

1. The State of Bihar
2. The Director General of Police
3. The District Magistrate, West Champaran at Bettiah
4. The Superintendent of Police, West Champaran at Bettiah
5. The Sub-Divisional Officer, Bettiah.
6. The Officer-in-charge, Bettiah Town P.S., Bettiah.

.... Opposite Parties

=====

Appearance :

For the Petitioner/s : Mr. Y.V. Giri, Senior Advocate
Mr. Tuhin Shankar, Advocate
Vipula Kanoria, Advocate
Mr. Gopal Kumar, Advocate

For the Opposite Party/s : Mr. Parmeshwar Mehta, APP

=====

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 31-07-2017

Heard Mr. Y.V. Giri, learned Senior Advocate for the
petitioner and Mr. Parmeshwar Mehta, learned Additional Public
Prosecutor for the State.

2. The present application under Section 482 of the



Code of Criminal Procedure (for short 'Cr.P.C.') has been filed for quashing the order dated 08.04.2010 passed by the learned Additional Chief Judicial Magistrate, Bettiah by which cognizance has been taken of the offences punishable under Sections 188, 171-F, 171-H/34 of the Indian Penal Code (for short 'IPC') and Section 123 of the Representation of the People Act (for short 'R.P. Act') in Bettiah Town P.S. Case No.94 of 2009 registered on 22.04.2009.

3. Brief facts leading to filing of the first information report are that the petitioner was a candidate contesting Lok Sabha Election, 2009 on Lok Janshakti Party symbol from West Champaran constituency. The opposite party no.4, Sub-divisional Officer, Bettiah Sadar has alleged in his written report submitted to the Officer-in-charge of the police station that he received secret information in respect of bribing voters by the petitioner in the West Champaran Lok Sabha constituency. Thereafter, he himself together with the police party raided rented house of the petitioner situated at Supriya Road at 11:45 p.m. on 24.04.2009. In the said raid, the police party found altogether 38 persons present inside the house. An amount to the tune of Rs.10,25,350/- kept in two bags in one of the rooms of the said premises was recovered. On inquiry, no satisfactory answer regarding possession of huge amount was given by the occupants of the premises. It is stated that a seizure memo was



prepared and the amount was deposited with the Officer-in-charge of the Bettiah Town Police Station. It is also stated that at the time of raid, the petitioner was not present in the said premises.

4. On the basis of the aforesaid allegation, a case was registered against the petitioner and 38 others, who were found present inside the house.

5. On completion of investigation, the police submitted charge-sheet against the petitioner and others named in the First Information Report (for short 'FIR'). After going through the materials available on the record, the learned Additional Chief Judicial Magistrate, West Champaran, Bettiah vide order dated 08.04.2010 took cognizance of the offences punishable under Sections 188, 171-F, 171-H/34 of the IPC and Section 123 of the R.P. Act against the accused persons, who were sent up by the police in their report under Section 173(2) of the Cr.P.C. and summoned them to face trial. The aforesaid order dated 08.04.2010 is under challenge in the present application.

6. The main grievances urged by Mr. Giri, learned Senior Advocate for the petitioner are that there was absolutely no material during investigation to even remotely corroborate the allegations made by the police in the FIR and the allegations made in the FIR against the petitioner with regard to distribution of money to



voters remained presumptuous throughout the investigation, but the police with total vindictiveness, as against the petitioner, filed charge-sheet dated 03.09.2010 against the petitioner and 38 more persons. He has contended that there has been no independent evidence whatsoever found with regard to allegation of the distribution of money to voters to influence them and there was no occasion at all to lodge the FIR in question. According to Mr. Giri, the charge-sheet also is based only on surmises and conjectures and none of the ingredients of the offences under the IPC and R.P. Act are attracted in the present case. He has contended that Section 188 of the Indian Penal Code is an offence covered under Section 195 of the Cr.P.C. according to which the Court cannot take cognizance unless a public servant files a private complaint under Section 200 of the Cr. P.C. He has contended that the offences under Section 171-F and 171-H are non-cognizable offences and the police cannot investigate such offences without permission of the Jurisdictional Magistrate under Section 155(2) of the Cr. P.C. He has contended that Section 123 of the R.P. Act defines corrupt practices, but no punishment has been provided for the said offence and the same can only be agitated for disqualification of a candidate by way of filing an election petition.

7. On the contrary, Mr. Parmeshwar Mehta, learned



Additional Public Prosecutor for the State has submitted that the ingredients of the offences alleged in the FIR are clearly attracted in the present case. He has submitted that there are materials in the case diary to show that the money recovered belonged to the petitioner and the same was kept for bribing the voters during Lok Sabha Election. He has submitted that simply because the offences under the provisions of Sections 171-F and 171-H are non-cognizable offences, the investigation of the case conducted by the police cannot be held to be bad, as the FIR was also under Section 188 of the IPC which is cognizable. He has submitted that there was no illegality in investigation of the case as the FIR was based on a complaint instituted by the Sub-divisional Officer who is a public servant. According to him, subsequent to the completion of investigation, the charge-sheet which was filed in the court was also in the form of a complaint. Hence, there was no illegality either in institution of FIR or in the order taking cognizance of the offence. He has submitted that it is well settled in law that the police may investigate non-cognizable offences also if the FIR is also for cognizable offence and under such circumstance permission of Magistrate is not required.

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

9. I find substance in the arguments advanced by Mr.



Giri, learned Senior Advocate for the petitioner. The offence punishable under Section 171-F of the IPC prescribes punishment for undue influence or personation at an election. It reads as under:-

“171F. 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 essential ingredients of the offence under Section 171F are as follows:-

(i) The accused interfered at attempted to interfere with free exercise of right of voting of any electorate;

(ii) The accused did it voluntarily;

For personation at an election:-

(i) The accused applied for a voting paper;

(ii) The accused voted for any other person who is dead or alive;

(iii) The accused voted under a fictitious name;

(iv) Having once voted the accused again applied for a voting paper for the second time as if at the same election;

(v) The accused procured or attempted to procure vote by any person in any of the ways.

11. Similarly, Section 171-H of the IPC deals with punishment for the offence of illegal payments in connection with an election. It reads as under:-



“171H. Illegal payments in connection with an election.-Whoever without the general or special authority in writing of a candidate incurs or authorizes expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extend to five hundred rupees:

Provided that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate”.

12. The essential ingredients of the offence punishable under Section 171H of the IPC are as follows:-

- (i) An election is impending;
- (ii) The candidate has not given any general or special authority to the accused in writing to spend money at the election;
- (iii) The accused made unauthorized expenses on-
 - (a) public meeting,
 - (b) advertisement or circular or publication, or
 - (c) in any other way;
- (iv) The accused did it for promoting, or procuring the election of the candidate;
- (v) Such unauthorized expenses exceeding the sum of Rs.10 were not ratified in writing by the candidate within 10 days of the expenditure.



13. From the reading of the above penal provisions, it is manifest that the allegation, which has been made in the FIR as well as during investigation is that an amount of Rs.10,25,350/- had been seized from a rented premises of the petitioner. The mere recovery of the amount without there being any assertion that the same was being used for undue influence or personation at an election and that the candidate had not given any general or special authority in writing or that the accused had kept the amount for promoting or procuring the election of the candidate, the ingredients of the offences under Sections 171-F and 171-H would not be attracted.

14. Moreover, the offences under Sections 171F and 171H are non-cognizable offences. Learned Senior Advocate appearing for the petitioner has rightly contended that for non-cognizable offences an FIR could not have been registered and investigated upon without the permission of the Jurisdictional Magistrate under Section 155(2) of the Cr. P.C. The contention of the State that since section 188 of the IPC is a cognizable offence, the police had power to investigate the non-cognizable offences together with the cognizable offence and no permission of the Magistrate was required is not correct for the reasons I shall discuss hereinbelow.



15. So far as the offence punishable under Section 188 of the IPC is concerned, the same relates to disobedience to order duly promulgated by public servant. It reads as under:-

“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”.

16. It would be apparent from perusal of Section 188 of the IPC that for any act to constitute an offence under this particular statute, there must be an order lawfully passed by a public servant, duly authorized in this regard. The said order must be



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, who despite having the knowledge that his disobedience of the order will or is likely to cause harm, disobeys such order resulting in the obstruction, annoyance or injury or risk thereof or causes danger to human life, health or safety or a riot or affray.

17. Neither the FIR nor the investigation, as would be manifest from the contents of the charge-sheet (Annexure-2) to the present application, discloses any details essential to constitute an offence under Section 188 of the IPC. On the contrary, both the FIR and the charge-sheet make no mention of what order had been promulgated, which was allegedly disobeyed, by which authority such order has been promulgated, by what means was the promulgation of this order intimated/informed to the petitioner or the public for that matter.

18. There is also no mention how any alleged disobedience of the order resulted in obstruction, annoyance or injury or risk thereof or caused danger to human life, health or safety or a riot or affray.

19. At this stage, it would also be pertinent to take note



of Section 195(1) of the Cr.P.C., which bars the court to take cognizance of the offence punishable under Section 188 of the IPC or abatement of criminal conspiracy to commit such an offence unless there is a complaint in writing by a public servant concerned or public servant to whom he is administratively subordinate for contempt of his lawful order. It reads as under:-

“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 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, 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;

(b) (i) of any offence punishable under any of the following section of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence



specified in sub-clause (i) or sub-clause (ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.”

20. The word “complaint” used in Section 195(1)(a)(iii) of the Cr.P.C. has been defined under Section 2(d) of the Cr.P.C., which reads 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.”*

21. 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.

22. In **M.S. Ahlawat Vs. State of Haryana & Anr.** [(2000) 1 SCC 278], the Supreme Court considered the provisions prescribed under Section 195 of the Cr. P.C. at length and observed as under: “....*Provisions of Section 195 Cr.P.C 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.*”

23. In **Daulat Ram v. State of Punjab** [AIR 1962 SC 1206], the Supreme Court considered the nature of the provisions prescribed under Section 195 of the Cr.P.C. In that case, cognizance



had been taken on the basis of police report submitted under Section 173(2) of the Cr.P.C. by the Magistrate and the appellant therein had been tried and convicted though the public servant concerned, the *Tehsildar* had not filed any complaint. While deciding the appeal, the Supreme Court observed as under:

“...The cognizance of the case was therefore wrongly assumed by the court without the complaint in writing of the public servant, namely, the Tahsildar in this case. The trial was thus without jurisdiction ab initio and the conviction cannot be maintained. The appeal is, therefore, allowed and the conviction of the appellant and the sentence passed on him are set aside.”

24. In the **State of U.P. Vs. Mata Bhikh & Ors.** [(1994) 4 SCC 95], the Supreme Court observed: “*The object of this section is to protect persons from being vexatiously prosecuted upon inadequate materials or insufficient grounds by person actuated by malice or ill- will or frivolity of disposition at the instance of private individuals for the offences specified therein. The provisions of this section, no doubt, are mandatory and the Court has no jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing of 'the public servant concerned' as required by the section without which the trial under Section 188 of the Indian Penal Code becomes void ab initio. In the said case, the Supreme Court further held: “To say in other words a written*



complaint by a public servant concerned is sine qua non to initiate a criminal proceeding under Section 188 of the IPC against those who, with the knowledge that an order has been promulgated by a public servant directing either 'to abstain from a certain act, or to take certain order, with certain property in his possession or under his management' disobey that order. Nonetheless, when the court in its discretion is disinclined to prosecute the wrongdoers, no private complainant can be allowed to initiate any criminal proceeding in his individual capacity as it would be clear from the reading of the section itself which is to the effect that no court can take cognizance of any offence punishable under Sections 172 to 188 of the IPC except on the written complaint of 'the public servant concerned' or of some other public servant to whom he (the public servant who promulgated that order) is administratively subordinate”.

25. In **C. Muniappan & Ors. Vs. State of Tamil Nadu**, [(2010) 9 SCC 567], the Supreme Court observed: “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.P.C. 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



complaint. In the absence of such a complaint, the trial and conviction will be void ab initio being without jurisdiction.”

26. Hence, on going through the provisions of Section 195 of the Cr.P.C., as also in the light of the ratio laid down by the Supreme Court in the decisions noted above, one can safely hold that there is a statutory bar to the court for taking cognizance unless a private complaint in writing is made by a public servant whose lawful order has not been complied with. As per ratio laid down by the Supreme Court, there is an absolute bar to the court for taking cognizance of a case registered under Section 188 of the Indian Penal Code except in the manner provided under Section 195 of the Cr.P.C.

27. Thus, I am of the considered opinion that the registration of the case by the police for the offence under Section 188 of the IPC was illegal and on the basis of such FIR, the investigation conducted by the police and the charge-sheet filed before the court was wholly illegal and without jurisdiction. Once, it is held that registration of FIR under Section 188 of the IPC was not permissible in law, the registration of FIR for other offences, which are non-cognizable and investigation of the same without the permission of Jurisdictional Magistrate was not permissible in view of the express bar created under sub-section (2) of section 155 of the Cr. P.C.



28. So far as Section 123 of the R.P. Act is concerned, the same relates to corrupt practices. It reads as under:-

“123. Corrupt practices. – The following shall be deemed to be corrupt practices for the purposes of this Act:-

[(1) “Bribery”, this is to say, -

(A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the objects, directly, or indirectly, of including-

(a) a person to stand or not to stand as, or to withdraw or not to withdraw from being a candidate at an election; or

(b) an elector to vote or refrain from voting at an election, or as a reward to-

(i) a person for having so stood or not stood, or for having withdrawn or not having withdrawn his candidature; or

(ii) an elector for having voted or refrained from voting”.

29. The corrupt practices defined under Section 123 of the R.P. Act do not prescribe any punishment for term or fine. It is not an offence for which determination can be made by a criminal court. The corrupt practices defined under Section 123 of the R.P. Act can be agitated in an election petition filed before the court of competent jurisdiction and, if proved, the same may lead to disqualification of a candidate who is elected. On proof of such charge, a candidate may be disqualified even for future election. However, the police had no jurisdiction to investigate into such



charge. Similarly, the court exercising criminal jurisdiction could not have taken cognizance of such offence on the basis of police report submitted under Section 173(2) of the Cr. P.C.

30. In view of the discussions made above and keeping in mind the facts and the law involved in the present case, I am of the opinion that allowing the prosecution to continue any more would be nothing but an abuse of the process of the court, as there was a express legal bar against institution of FIR and investigation of the case, as also on summoning of an accused on the basis of the police report. Furthermore, the allegations made in the FIR, even if taken at their face value and accepted in their entirety, do not attract the ingredients of the offences alleged.

31. In that view of the matter, the entire criminal prosecution arising out of Bettiah Town P.S. Case No. 94 of 2009 including the order dated 08.04.2010 is, hereby, quashed.

32. The application stands allowed.

(Ashwani Kumar Singh, J.)

Sanjeet/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	05.08.2017
Transmission Date	05.08.2017

