IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.9927 of 2015

Arising Out of PS. Case No.-459 Year-2010 Thana- KHAGARIA District- Khagaria

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Pashupati Kumar @ Pashupati Kumar Paras S/o Late Jamun Das Resident of village - Belahi Sharbani, P.S. Alauli, Distt. - Khagaria

... ... Petitioner/s

Versus

1. The State of Bihar
2. The C.O. (Circle Officer), Khagaria, Distt- Khagaria

... ... Opposite Party/s

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Appearance :
For the Petitioner/s : Mr. Din Bandhu Mishra, Advocate
For the State : Mr. Jharkhandi Upadhyay with
Mr. Ram Bachan Singh APP

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CORAM: HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH

ORAL JUDGMENT

Date : 13-05-2019

Heard learned counsel for the petitioner and learned APP for the State.

2. The petitioner has moved the Court under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code') for the following relief:

> *"That, this is a application for quashing the cognizance order dated 05/03/2011 which is taken by the C.J.M, Khagaria in Khagaria (Chitragupta Nagar P.S. Case No-459/10, G.R.N 1625/10 which is pending before Sri Anjani Kumar gond, Magistrate Khagaria."*

3. The allegation against the petitioner in the complaint by the Anchal Adhikari (Circle Officer), Khagaria to the Officer Incharge, Chitragupta Nagar, Khagaria P.S., is that while filling up the nomination form for contesting from 148, Alauli *Vidhan Sabha*

seat, on 12.10.2010 at 1:10 P.M, the crowd of his supporters and slogan raising was violative of the Model Code of Conduct and Section 144 of the Code.

4. Learned counsel for the petitioner submitted that an order under Section 144 of the Code can be passed only by the Sub Divisional Magistrate and not a person below that rank and, thus, the law requires that the complaint against the violators has to be filed either by that officer, i.e., Sub Divisional Magistrate or his superior but a person subordinate to the authority which had issued the prohibitory order cannot maintain such complaint. For such proposition, learned counsel relied upon a decision of a Bench of this Court in **Surendra Prasad Yadav v. State of Bihar** reported as **2007 (4) PLJR 533,** the relevant being at paragraph no. 7. Learned counsel submitted that even otherwise, the violation of a prohibitory order for making out offence under Section 188 of the Indian Penal Code, disobedience must either cause or have tendency to cause obstruction, annoyance or injury and there has to be factual proof thereof. Learned counsel relied upon a judgment of a Bench of this Court in **Pratik Sinha vs. State of Bihar** reported as **2016 (4) PLJR 274**, the relevant being at paragraphs no. 39 to 41. It was submitted that in the instant case, the Court had held that there was no allegation that disobedience

of prohibitory order had tendency to cause obstruction, annoyance or injury and risk of obstruction, annoyance or injury to any person lawfully employed as also that without a written complaint of the public servant concerned, no prosecution can be launched.

5. Learned APP, in view of the decisions relied upon by learned counsel for the petitioner, was not in a position to controvert the legal and factual position.

6. Having considered the facts and circumstances of the case and submissions of learned counsel for the parties, the Court finds that a case for interference has been made out.

7. As has rightly been submitted by learned counsel for the petitioner, on the short legal point of lack of competency of the *Anchal Adhikari* to lodge the case, in view of the decisions of the Court in **Surendra Prasad Yadav (**supra**)** and **Pratik Sinha** (supra), the present complaint against the petitioner itself was not maintainable in the eyes of law.

8. Another glaring legal infirmity in the prosecution lodged against the petitioner is the fact that provisions of Section 195(1) of the Code have not been adhered to and, thus, the investigation conducted by the police is also without jurisdiction.

9. A co-ordinate Bench of this Court in **Parveen Amanullah vs. The State of Bihar** reported as **2017 (3) PLJR**

101, by judgment dated 19.10.2016, under similar circumstances has quashed the order by which cognizance has been taken under Section 188 of the Indian Penal Code. The Court deems it apt to quote paragraphs no. 17 to 40 of the said judgment which read as under:

"17. 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*."

18. From a close reading of sub-section (1) of Section 195 of the Cr.P.C., it would be abundantly clear that the criminal courts are mandated not to take cognizance of any offence under Sections 172 to 188 of the IPC except on the "complaint" in writing of the public servant or of some other public servant to whom he is administratively subordinate.

19. 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."*

20. 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.

*21. In **M.S. Ahlawat Vs. State of 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 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."*

22. One may also refer to some other judgments with regard to scope of Section 195 of the Cr.P.C.

*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 the said case, the facts of the case was that 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 held in paras 4 and 5 as under:*

> *"4. ...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.*
>
> *5. 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**. (Supra), the Supreme Court observed in paras 6 and 7 as under:*

"6. 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. See Daulat Ram v. State of Punjab (AIR 1962 SC 1206)'. 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.

7. A cursory reading of Section 195(1)(a) makes out that in case a public servant concerned who has promulgated an order which has not been obeyed or which has been disobeyed, does not prefer to give a complaint or refuses to give a complaint then it is open to the superior public servant to whom the officer who initially passed the order is administratively

subordinate to prefer a complaint in respect of the disobedience of the order promulgated by his subordinate. The word 'subordinate' means administratively subordinate i.e. some other public servant who is his official superior and under whose administrative control he works."

25. *In* ***C. Muniappan & Ors.*** *(Supra), the 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 pubic 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 complaint. In the absence of such a complaint, the trial and conviction will be void ab initio being without jurisdiction."

26. *In* ***Pratik Sinha Vs. State of Bihar & Ors. [2016 (4) PLJR 274]****, this Court has held in paras 39 to 41 as under :*

"39. As noted above, in the present case, the prohibitory order was passed by the Municipal Commissioner, PMC in Vigilance Case No. 203-A of 2013, whereas the FIR has been instituted on the basis of a written report submitted by one Kedar Prasad, Tax Collector, Bankipore Circle of the PMC, who is neither the public servant, who had passed the prohibitory order nor the successor-in-office to the public servant nor a public servant to whom the public servant, who had passed the prohibitory order is administratively subordinate. The Municipal Commissioner, PMC is not a subordinate officer to aforesaid Kedar Prasad.

40. 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.

41. Furthermore, no FIR could have been registered by the police for an offence punishable under Section 188 of the IPC. The legislative intention appears to be clear from the language of Section 195(1) of the CrPC, which clearly prescribes that where an "offence" is committed under Section 188 of the 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, registration of an FIR for an offence under Section 188 IPC is not permitted in law."

27. In an unreported judgment in ***Dharmesh Prasad Verma Vs. The State of Bihar (Cr.Misc. No. 41702 of 2015- disposed of on 10th May, 2016)****, this Court held in para 17 as under:*

"17. The provision prescribed under Section 195 of the CrPC has been carved out as an exception to the general rule contained under Section 190 of the CrPC that any person can set the law into 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 legislative intention appears to be clear from the language of Section 195 of the CrPC 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 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 CrPC."

*28. In yet another unreported judgment in **Anirudh Prasad Yadav @ Sadhu Yadav Vs. The State of Bihar (Cr.Misc. No. 33259 of 2013 - disposed of on 4th August, 2016)**, this Court in paras 10 to 12 held as under :*

> *"10. Section 171-G IPC penalizes a person who makes/publishes any statement, which he knows/believes to be false, relating to the personal character or conduct of any candidate, with intent to affect the results of an election. Apparently, there is no such allegation that the accused persons including the petitioner made any statement, which they knew to be false relating to the personal character and conduct of any candidate with intent to affect the result of an election. In that view of the matter, the ingredients of the offence punishable under Section 171-G of the IPC are clearly not attracted in the present case.*
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> *11. Similarly, section 171-H of the IPC penalizes a person who incurs/authorizes any expenses in connection with the purpose of promoting or procuring the election of any candidate, without the general or special authority in writing of such candidate. There is no such allegation in the present case and this Court is of the opinion that none of the ingredients of the offence punishable under Section 171-H of the IPC are attracted in the present case.*
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> *12. Further, Section 188 of the IPC penalizes disobedience to an order duly promulgated by a public servant, its prerequisite being:-*
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> *(a) Lawful order promulgated by a public servant empowered to promulgate it;*
> *(b) Knowledge of the order;*
> *(c) Disobedience of the order; and*
> *(d) Result that is likely to follow such disobedience i.e. obstruction, annoyance, injury or risk of the same to a person lawfully employed or danger*

to human health, life or safety or riot affray."

29. This Court is mindful of the fact that the inherent powers under Section 482 of the Cr.P.C. to quash a criminal proceeding are to be exercised sparingly and with great circumspection. It has to be exercised only in exceptional cases. For exercising powers under Section 482 of the Cr.P.C. this Court cannot enter into any finding of facts. At the same time, Section 482 of the Cr.P.C. casts a duty upon the High Court to remove injustice in appropriate cases.

30. Section 482 of the Cr.P.C. reads as under :

> "***482. Saving of inherent power of High Court.***
> *Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."*

31. From a reading of the above provision, it would be apparent that the inherent powers of the High Court are not limited to any provision of the Cr.P.C. and in appropriate cases this Court may make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of the Court or otherwise to secure the ends of justice.

32. In ***R.P. Kapoor Vs. State of Punjab [AIR 1960 SC 866],*** *the Supreme Court laid down certain provisions under which*

the inherent powers under Section 482 of the Cr.P.C. are to be exercised. They are -

> *(1) Where institution/continuance of criminal proceedings against an accused may amount to an abuse of the process of the court or that the quashing of the impugned proceeding would secure the ends of justice;*
> *(2) Where it manifestly appears that there is a legal bar against the institution or continuance of the proceeding, e.g. want of sanction;*
> *(3) Where the allegations in the First Information Report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;*
> *(4) Where the allegations constitute an offence alleged, but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge."*

33. In the ***State of Karnataka Vs. L. Muniswamy & Ors.*** ***[(1977) 2 SCC 699]****, the Supreme Court held as under :*

> *"In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the; ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to. achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the, ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is*

> *that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."*

34. In ***Madhaorao J. Scindhia Vs. Sambhaji Rao [AIR 1988 SC 709],*** *the Supreme Court held as under :*

> *"The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilized for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.*

35. In the ***State of Haryana & Others Vs. Bhajan Lal and Others [1992 Supp (1) SCC 335],*** *the Supreme Court has dealt in detail the provisions of Section 482 of the Cr.P.C. and the power of the High Court to quash the criminal proceedings or the FIR. The Supreme Court summarized the legal position by laying down the following guidelines to be followed by the High Court in 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 extra-ordinary 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 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."

36. Having seen the ambit and scope of Section 195(1) of the Cr.P.C. and the ratio laid down by the Supreme Court and this Court in the decisions, referred to hereinabove, this Court is of the opinion that the investigating authorities acted without jurisdiction in registering the FIR under Section 188 of the IPC on the basis of a letter written to them by the informant in the capacity of Revenue Karamchari. The investigation conducted by the police was also without jurisdiction. Sub-section (1) of Section 195 of the Cr.P.C. creates a further bar in so far as it also restricts the Magistrate from accepting written complaint from any person other than the public servant who issued the concerned order or of some other public servant to whom he is administratively subordinate.

37. This Court is also of the view that the learned Magistrate has also failed to apply his judicial mind to the facts and law involved in the case while passing the impugned order. It is well settled that taking of cognizance and summoning the accused in a criminal case has a serious consequence on the liberty of the accused as pursuant to such an order the accused is compelled to face trial of a criminal offence.

38. The need for proper application of mind by the courts at the stage of summoning has been highlighted by the Supreme Court in ***Pepsi Foods Ltd. and Another*** *Vs.* ***Special Judicial Magistrate and Others[(1998) 5 SCC 749],*** *in para 28 as under:-*

> *"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any*

> *offence is prima facie committed by all or any of the accused."*

39. Once again in ***Fakhruddin Ahmad Vs. State of Uttaranchal and Another [(2008) 17 SCC 157]****, in para 17, the Supreme Court held as under:-*

> *"17. Nevertheless, it is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusations and applied his mind to the allegations made in the complaint or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs little emphasis that it is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence. Cognizance is in regard to the offence and not the offender."*

40. Regard being had to the facts and the law involved in the present case and the ratio laid down by the Supreme Court in respect of exercise of power under Section 482 of the Cr.P.C. in the decisions, noted above, this Court is of the opinion that allowing the prosecution to continue any more would be nothing but an abuse of the process of the Court as apart from the fact that the complainant was not authorized to institute a case under Section 188 of the IPC, there was also an express legal bar against institution of FIR and summoning of an accused on the basis of 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 offence alleged."

10. In the aforesaid background, the application is allowed. The entire criminal proceeding arising out of Khagaria (Chitragupta Nagar) P.S. Case No. 459 of 2010, G.R. No. 1625 of 2010, pending before the Court below at Khagaria, including the order dated 05.03.2011, by which cognizance has been taken, as far as it relates to the petitioner, stands quashed.

(Ahsanuddin Amanullah, J)

Anjani/-

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