

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.972 of 2019

Arising Out of PS. Case No.-147 Year-2019 Thana- DHAKA District- East Champaran

1. Faisal Rahman, S/o Late Motiur Rahman, R/o village- Sapahi, P.O.- Jhitkahi, P.S.- Dhaka, District-East Champaran at Motihari.
2. Amjad Khan, S/o Shah Mohammad Khan, R/o village- Pandari, P.O.- Jamua, P.S.- Dhaka, District- East Champaran at Motihari

... .. Petitioners

Versus

1. The State of Bihar through the Principal Secretary, Home Police Department, Government of Bihar , Patna.
2. The Director General of Police, Bihar, Patna,
3. Sri Raman Kumar, S/o not known, presently posted as the District Magistrate, East Champaran at Motihari, District - East Champaran at Motihari - cum- Returning Officer, 4, Sheohar Parliamentary Constituency.
4. The Superintendent of Police, East Champaran at Motihari, District- East Champaran at Motihari.
5. Sri Gyan Prakash, S/o not known, presently posted as the Sub-Divisional Officer, Sikrahana, District- East Champaran at Motihari-cum-Assistant Returning Officer, 4, Sheohar Parliamentary Constituency.
6. Sri Shashi Prakash, S/o not known, presently posted as the Block Development Officer, Dhaka, District- East Champaran at Motihari,
7. The Station Head Officer, Dhaka Police Station, District- East Champaran at Motihari.

... .. Respondents

Appearance :

For the Petitioners : Mr. S.B.K. Mangalam, Advocate
Ms. Anita Kumari, Advocate
For the Respondents-State: Ms. Divya Verma, AC to AAG-3

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
ORAL JUDGMENT

Date : 26-06-2019

Heard learned counsel for the petitioners and learned
counsel for the State.

2. This application under Articles 226 and 227 of the
Constitution of India has been filed by the petitioners for quashing



the First Information Report (for short 'FIR') of Dhaka P.S. Case No.147 of 2019 dated 12.05.2019 registered under Sections 130 and 133 of the Representation of the People Act, 1951 (for short 'RP Act' and Section 188 of the Indian Penal Code (for short 'IPC').

3. Mr. S.B.K. Mangalam, learned counsel appearing for the petitioners submitted that the allegations made in the FIR do not constitute any cognizable offence. In the absence of any cognizable offence having been committed, the police had no authority to institute an FIR. He submitted that the ingredients of the offence punishable under Section 130 of the RP Act are not attracted. There is no allegation that vehicle in question was being used for displaying any poster or banner within the distance of hundred meters of the polling station. He has submitted that similarly the offence punishable under Section 188 of the IPC is also not attracted. As per Section 195(1) of the Code of Criminal Procedure (for short 'CrPC') the Court cannot take cognizance under Section 188 of the IPC unless there is a complaint in writing of a public servant or other public servant to whom he is administratively subordinate whose order has been disobeyed. Lastly, he contended that in any view of the matter, a prosecution under Section 188 of the IPC can not be launched against any



person by way of instituting an FIR. He has submitted that petitioner no.1 is the owner of the vehicle bearing Registration No. BR-01BG-0007 and petitioner no.2 is its driver. In support of his submission, he has placed reliance on the decisions of this Court in the matter of **Parveen Amanullah vs. The State of Bihar [2017 (3) PLJR 101]** and **Dharmesh Prasad Verma vs. The State of Bihar [2017 (1) PLJR 401]**.

4. Ms. Divya Verma, learned counsel appearing on behalf of the State submitted that there is no illegality in the institution of the FIR. She contended that section 130 of the RP Act is a cognizable offence and its ingredients are clearly attracted in this case. She pleaded that as far as Section 188 of the IPC is concerned, the same is also a cognizable offence. The offence was committed on the date of election and it was known to all that on the date of election campaigning in any form was strictly prohibited. Since the vehicle in question was being used for displaying poster and banner of a political party, the offences under RP Act and the IPC are clearly attracted. She argued that for the disobedience of the duly promulgated order of the public servant, an FIR would be maintainable. She further contended that in view of Section 155(4) of the CrPC where a case relating to two or more offences of which at least one is cognizable, the offence



would be deemed to be a cognizable offence notwithstanding that the other offences are non-cognizable.

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

6. The FIR of Dhaka P.S. Case No.147 of 2019 has been registered on the basis of a written report dated 12.05.2019 submitted by the Block Development Officer, Dhaka, East Champaran to the Officer-in-charge, Dhaka, East Champaran.

7. In his written report, the informant has stated that he has received letter no.554 dated 12.05.2019 of the Assistant Returning Officer-cum-Sub Divisional Officer, Sikrahana with a direction that in view of the facts stated in his letter, an FIR is to be lodged against the driver of the concerned vehicle. The FIR contains the aforesaid letter no. 554 dated 12.05.2019 wherein reference has been made to the violation of Model Code of Conduct. In his letter, the Assistant Returning Officer has stated that the District Election Officer-cum-District Magistrate, East Champaran, Motihari has intercepted a four wheel vehicle displaying banners for the purpose of election campaign, but no permission was granted to the vehicle. The same has been seized and kept at the Dhaka Police Station's compound.



8. The seizure list prepared under the signature of Mr. Shashi Prakash, the Block Development Officer, Dhaka has been made part of the FIR. On perusal of the same, I find that there is no mention of banner or poster from the seized vehicle bearing Registration No. BR-01BG-0007. It is surprising that the informant has stated in his written report that he came to know about the seizure of the vehicle on the basis of the letter issued by the Assistant Returning Officer, as mentioned above whereas the letter of the Assistant Returning Officer, which is also part of the FIR would suggest that the vehicle in question was seized by the District Election Officer-cum-District Magistrate, East Champaran, but the seizure list would show that the seizure was made by the Block Development Officer, Dhaka himself.

9. There is no explanation that when the seizure was made by the District Election Officer-cum-District Magistrate and the same was communicated by him to the Assistant Returning Officer, who informed about the seizure to the Block Development Officer, Dhaka as to how the seizure list was prepared under the signature of the Block Development Officer, Dhaka.

10. In case, a cognizable offence is reported to the Officer-in-charge of Police Station, he is duty bound to institute an FIR and investigate the same.



11. Learned counsel for the State has rightly submitted that where a case relates to two more offences of which at least one is cognizable, the case would be deemed to be a cognizable offence notwithstanding that the other offences are non-cognizable. However, the moot question in the present case is as to whether any cognizable offence was committed giving right to the police to institute an FIR and investigate the same or not.

12. Learned counsel for the State has also rightly pointed out that Section 188 of the IPC and Section 130 of the RP Act are cognizable offences. However, it has to be seen as to whether the ingredients of those offences are attracted justifying the institution of the FIR or not.

13. As far as Section 130 of the RP Act is concerned, the same reads as under:-

“130. Prohibition of canvassing in or near polling stations.”-(1) No person shall, on the date or dates on which a poll is taken at any polling station, commit any of the following acts within the polling station or in any public or private place within a distance of one hundred meters of the polling station, namely:-

- (a) canvassing for votes; or
- (b) soliciting the vote of any elector; or
- (c) persuading any elector not to vote for any particular candidate; or



(d) persuading any elector nor to vote at the election; or

(e) exhibiting any notice or sign (other than an official notice) relating to the election.

(2) Any person who contravenes the provisions of sub-section (1) shall be punishable with fine which may extend to two hundred and fifty rupees.

(3) An offence punishable under this section shall be cognizable.” (underlining mine)

14. There is no allegation that on the date on which the poll was going on, any person had committed any of the acts mentioned in clause (a) to (e) of sub-section (1) of Section 130 of the RP Act within the polling station or in any public or private place within the distance of one hundred meter of the polling station. In absence of contravention of the provisions of sub-section (1) within the polling station or any public or private place within the distance of one hundred meters of the polling station, the ingredients of the offences under Section 130 of the RP Act would not be attracted. Neither in the written report submitted by the Block Development Officer nor in the letter issued by the Sub Divisional Officer to the Block Development Officer, it has been mentioned that the vehicle in question carrying banner or poster was found within the distance of one hundred meters of the polling



station. As such, the offence punishable under Section 130 of the RP Act is clearly not attracted.

15. As far as Section 133 of the RP Act is concerned, the same prescribes penalty for illegal hiring or procuring of conveyance at elections. It provides that if any person is guilty of any such corrupt practice as is specified in clause (5) of section 123 at or in connection with an election, he shall be punishable with imprisonment which may extend to three months and with fine.

16. Section 123 of the RP Act describes the corrupt practices during election.

17. Sub-section (5) of Section 123 reads as under:-

“**123(5)**. The hiring or procuring, whether on payment or otherwise, of any vehicle or vessel by a candidate or his agent or by any other person with the consent of a candidate or his election agent, or the use of such vehicle or vessel for the free conveyance of any elector (other than the candidate himself, the members of his family or his agent) to or from any polling station provided under section 25 of place fixed under sub-section (1) of section 29 for the poll:

Provided that the hiring of a vehicle or vessel by an elector or by several electors at their joint costs for the purpose of conveying him or them to and from any such polling station or



place fixed for the poll shall not be deemed to be a corrupt practice under this clause if the vehicle or vessel so hired is a vehicle or vessel not propelled by mechanical power:

Provided further that the use of any public transport vehicle or vessel or any tramcar or railway carriage by elector at his own cost for the purpose of going to or coming from any such polling station or place fixed for the poll shall not be deemed to be a corrupt practice under this clause.

Explanation.- In this clause, the expression “vehicle” means any vehicle used or capable of being used for the purpose of road transport, whether propelled by mechanical power or otherwise and whether used for drawing other vehicles or otherwise.”

18. Firstly, there is no allegation in the FIR that the vehicle in question was hired or procured on payment or otherwise by a candidate or his agent or by any other person with the consent of candidate or his election agent or the vehicle was used for the free conveyance of any elector to or from any polling station.

19. In absence of the aforesaid allegations, there can not be any penalty for illegal hiring or procuring of conveyance at elections.

20. Secondly, section 133 of the RP Act prescribes punishment with imprisonment which may extend to three months



and with fine. The said offence has not been classified as a cognizable offence.

21. Since the punishment prescribed is only three months and with fine, in absence of the classification of the offence under the special act as cognizable, the same shall be treated to be a non-cognizable offence in view of the second schedule of the Code of Criminal Procedure (for short 'CrPC').

22. As far as section 188 of the IPC is concerned, the same 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.”

23. 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 this section.

24. It is pertinent to note that Section 195(1) of the CrPC bars the Court from taking cognizance of the offence punishable under Section 188 of the IPC, 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.

25. Section 195(1) of the CrPC 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;

(b)(i) of any offence punishable under any of the following sections 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 by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate.”



26. The aforesaid provision 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. Section 195 of the CrPC 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 of the IPC is not permitted by the CrPC.

27. In **Dharmesh Prasad Verma (supra) and Parveen Amanullah (supra)**, this Court had occasion to examine the issue as to whether an FIR would be maintainable under Section 188 of the IPC or not in detail and after discussing the relevant provisions of the CrPC and the ratio laid down in **M.S. Ahlawat vs. State of Haryana and Anr. [(2000) 1 SCC 278]**; **State of U.P. vs. Mata Bhikh & Ors. [(1994) 4 SCC 95]**; **C. Muniappan and Ors vs. State of Tamil Nadu [(2010) 9 SCC**



567]; Pratik Sinha vs. State of Bihar [2016 (4) PLJR 274]; and Anirudh Prasad Yadav @ Sadhu Yadav vs. State of Bihar [Cr. Misc. No.33259 of 2013], this Court has held that there is an express legal bar against institution of FIR and summoning of an accused on the basis of police report under Section 188 of the IPC.

28. Since in the present case an FIR has been instituted under section 188 of the IPC and some other sections of the RP Act and I have already held that the ingredients of the offences punishable under Sections 130 and 133 of the RP Act are not attracted, I am of the considered opinion that allowing the prosecution to continue under Section 188 of the IPC on the basis of an FIR would be an abuse of the process of the court.

29. Accordingly, the FIR of Dhaka P.S. Case No.147 of 2019 is set aside. The application is allowed.

(Ashwani Kumar Singh, J.)

Sanjeet/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	06.07.2019
Transmission Date	06.07.2019

