

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.26029 of 2016

Arising Out of PS. Case No.-66 Year-2014 Thana- GAMAHARIYA District- Madhepura

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Bijay Kumar @ Bijay Kumar Bimal son of Sri Pulkit Prasad Yadav, Resident
of Mohalla- Vidyapuri, Ward No. 18, Madhepura, P.O. and P.S. Madhepura,
District- Madhepura. Petitioner/s

Versus

1. State of Bihar
2. Rabindra Prasad Sah, son of Sri Banwari Sah, Resident of village and P.S.
and P.O. Phulkahan Nawada, District- Araria, the then Block Development
Officer, Gamharia, District- Madhepura.

... .. Opposite Parties

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Appearance :

For the Petitioner : Mr. Shashi Bhushan Kumar Manglam, Advocate
Mr. Awnish Kumar, Advocate
Mr. Vikash Kumar Singh, Advocate
For the Opposite Parties : Mr. Upendra Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE JITENDRA KUMAR
CAV JUDGMENT

Date :07.01.2025

The present petitions have been preferred by the petitioners under Section 482 Cr.PC against the order dated 20.06.2015 passed by Shri Avinash Kumar, learned Judicial Magistrate, 1st Class, Madhepura, whereby the learned Magistrate has taken cognizance of offence punishable under Section 188 of the Indian Penal Code against seven accused persons including the petitioner.

2. The prosecution case as emerging from the written report lodged by the Block Development Officer, Gamhariya, dated 13.04.2011 is that on the application of Shri Bijendra Narayan Yadav, Election Agent, Janta Dal (United), Sub Divisional Officer of Madhepura, vide Memo No. 907-2 and



908-2 dated 16.04.2014 had given permission for holding general meeting at Khel ground, Aurahi, Ekparaha, Block – Gamharia, Distt. Madhepura, on 17.04.2014 between 4:00 PM and 4:50 PM. But the public meeting was continued even beyond the given time and despite prohibition, Helicopter was landed, which is violation of model code of conduct.

3. On the basis of the written report, Gamhariya P.S. Case No. 66 of 2014 was lodged against sole accused Bijendra Narayan Yadav. Subsequent to lodging of First Information Report, investigation commenced and after completion of investigation, charge sheet No. 33 of 2014 dated 30.05.2014 was filed and in pursuance of the charge sheet, learned Magistrate has taken cognizance by the impugned order.

4. Learned counsel for the petitioner submits that the petitioner is innocent and has falsely been implicated in this case. He further submits that as per the allegation made in the written report, no case is made out under Section 188 of IPC. No reference to any order/proclamation of the State Government, which has been violated by the petitioner, has been made in the written report, nor is any allegation in the written report that the alleged disobedience of the petitioner has caused or tended to cause obstruction, annoyance or injury or risk to



any person lawfully employed, nor is any allegation that the alleged disobedience caused or tended to cause danger to human life, health or safety or riot or affray. Hence, Section 188 IPC is not attracted in the alleged facts and circumstances of the case.

5. He further submits that cognizance of learned Magistrate under Section 188 IPC is also not sustainable in view of Section 195(1)(a) Cr.PC, which provides that no Court shall take cognizance of any offence punishable under Section 172 to 188, (both inclusive) of Indian Penal Code, except on the complaint in writing of a public servant concerned or by some other public servant to whom he is administratively subordinate. But in the case on hand, no complaint was filed by the concerned public servant. In stead of complaint, written report was submitted before the police which registered FIR on the basis of the said written report and after investigation charge-sheet was submitted and on the basis of which, cognizance of offence punishable under Section 188 was taken by learned Magistrate against the petitioner by the impugned order.

6. However, learned APP for the State defends the impugned order submitting that there is no illegality or infirmity in it and the present petition is liable to be dismissed.

7. To substantiate his submission, he submits that the



offence under Section 188 IPC is a cognizable offence and hence, the police has rightly registered FIR and submitted charge-sheet and learned Magistrate has rightly passed the impugned order taking cognizance of offence punishable under Sections 188 and 171C of IPC against the petitioner. He refers to and relies upon **Lalita Kumari Vs. State of U.P., (2014) 2 SCC 1.**

8. In view of rival submissions of the parties, it would be pertinent to refer to **Sections 188 of IPC**, which are as follows.

“188. Disobedience to order duly promulgated by public servant.—

Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction,

shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both;

and if such disobedience causes or trends 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.

9. It is also pertinent to refer to **Section 195(1)(a)**

Cr.PC, which reads as follows:-



“(1) No court shall take cognizance-
(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 other public servant to whom he is administratively subordinate;
.....”

10. The plain reading of the aforesaid statutory provisions of Section 195(1)(a) Cr.PC, clearly shows that general power of Magistrate to take cognizance of a cognizable offence on police report is curtailed by providing that cognizance of offence punishable under Sections 172 to 188 IPC can be taken only upon the complaint in writing of the public servant concerned or his administratively superior public servant. In other words, a Magistrate cannot take cognizance of offence punishable under Section 188 IPC upon police report, though the offence under Section 188 IPC is cognizable as per schedule 1 to Cr.PC.

11. Now question is what is complaint and whether it is different from police report. Complaint has been defined by Section 2(d) of Cr.PC as per which, complaint means any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code. But it does not include a police report. Even under the Explanation to Section 2(d), a police report disclosing cognizable offence is not deemed to be



a complaint. As per Section 2(d), only such police report which discloses commission of any non-cognizable offence is deemed as complaint. **Section 2(d) of Cr.PC** reads as follows:-

“2. Definitions.- In this code, unless the context otherwise requires.-

(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.

Explanation.- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;”

12. As such, the Magistrate is not competent to take cognizance of offence punishable under Section 188 IPC on police report. He can take cognizance of such offence only on complaint of the public servant whose order has been violated or on the complaint of an administratively superior public servant.

13. The object of Section 195 Cr.PC is to protect persons from vexatious prosecution prompted by malice or ill-will at the instance of private individuals for the offences specified in Section 195 Cr.PC.

14. It has been also consistently held by Hon’ble Supreme Court that the provisions under Section 195 Cr.PC is 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 in terms of Section 195 Cr.PC, without which the trial for the offence punishable under Section 188 IPC becomes *void ab initio*.

15. In this regard, one may refer to **State of U.P. Vs Mata Bhikh case [1994 (4) SCC95]**, wherein **Hon'ble Apex Court** has held as follows:-

“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 Penal Code, 1860 becomes void ab initio. See *Daulat Ram v. State of Punjab* [1962 Supp 2 SCR 812]. 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.”

(Emphasis supplied)

16. It would also profitable to refer to **C. Muniappan vs. State of T.N., (2010) 9 SCC 567** wherein **Hon'ble Supreme Court** has held as follows:-

“33. Thus, in view of the above, the law can be summarised 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 CrPC are mandatory. Non-compliance with 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.”

(Emphasis supplied)

17. In **Apurva Ghiya v. State of Chhattisgarh, 2020 SCC OnLine Chh 454**, High Court of Chhattisgarh after referring to various judicial precedents in reference to Section 188 IPC and Section 195 Cr.PC, has held as follows:-

“32. From a conspectus of the aforesaid judgments rendered by their Lordships of the Supreme Court (supra) and the Madras High Court (supra), it is quite vivid that in order to prosecute an accused for the offence punishable under Section 188 of the IPC, it is imperative to undergo the procedure envisaged under Section 195(1)(a)(i) of the Code i.e. complaint in writing of public servant concerned or some other public servant to whom he is subordinate, otherwise cognizance of offence under Section 188 of the IPC cannot be taken and if this imperative procedure is not complied with, the entire prosecution for offence under Section 188 of the IPC would be rendered void ab



initio, as Section 195 of the Code is an exception to the general rule contained in Section 190 of the Code wherein any person can set the law in motion by making complaint. The provisions of Section 195 of the Code are mandatory and non-compliance with it will make the entire process void ab initio and without jurisdiction as well. As such, since cognizance of offence under Section 188 of the IPC can be taken on the basis of complaint in writing filed by the public servant concerned within the meaning of Section 2(d) of the Code, offence under Section 188 of the IPC being cognizable offence is not also saved by Explanation appended to Section 2(d) of the Code, as by Explanation to Section 2(d) of the Code, report made by police officer after investigation of noncognizable offence is only to be treated as complaint and person making the complaint is to be treated as complainant and police report or FIR is not a complaint and further, charge-sheet is a report of police officer. Therefore, the first information report also cannot be registered under Section 154 of the Code for offence under Section 188 of the IPC, as registration of FIR after investigation would culminate into police report under Section 173(8) of the Code which cannot be taken cognizance of by the Magistrate under Section 190 of the Code, as such registration of FIR for offence under Section 188 IPC is barred.”

(Emphasis supplied)

18. I also find unable to agree with the submission of learned APP for the State that in the light of the Lalita Kumari case (supra), the police is duty bound to register FIR under Section 154 Cr.PC, if information regarding the commission of offence punishable under Section 188 IPC is received by it, because offence under Section 188 IPC is cognizable. Here it is pertinent to refer to **Union of India Vs. Ashok Kumar Sharma, (2021) 12 SCC 674**, wherein **Hon’ble Apex Court** was considering the applicability of the principles as laid down



in Lalita Kumari case (supra) with reference to registration of FIR for offence punishable under the Drugs and Cosmetics Act, 1940. Here, in view of Section 32 of the Act of 1940, dealing with cognizance of offence and providing similar provisions like those of Section 195 Cr.PC, Hon'ble Apex Court held that the principles as laid down in the Lalita Kumari case (supra) could not be applicable to registration of FIR under the Drugs and Cosmetics Act, 1940, observing as follows:-

“Impact of Lalita Kumari Vs. State of U.P.

80. In the said case, a Constitution Bench of this Court has held that registration of an FIR is mandatory under Section 154CrPC, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation. It was further held that a preliminary inquiry may be conducted only to ascertain whether a cognizable offence is disclosed or not, if the information received does not disclose a cognizable offence but indicates the need for such an inquiry. The Court has also indicated certain cases where a preliminary inquiry may be conducted, depending on the facts and circumstances of each case. They include matrimonial disputes, commercial offences and cases where there is abnormal delay/laches. This Court also held that the aforesaid were not exhaustive of all conditions which may warrant a preliminary inquiry.

81. We would think that this Court was not, in the said case, considering a case under the Act or cases similar to those under the Act, and we would think that having regard to the discussion which we have made and on a conspectus of the provisions of CrPC and Section 32 of the Act, the principle laid down in *Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524]* is not attracted when an information is made before a police officer making out the commission of an offence under Chapter IV of the Act mandating a registration of an FIR under Section 154 CrPC.”

19. Similarly in the light of Section 195 Cr.PC, the



principles as laid down in Lalita Kumari case (supra) will not be applicable to registration of FIR for offence punishable under Section 188 IPC, though it is cognizable. The competent public servant is required to file complaint before Magistrate for prosecution of an accused for offence punishable under Section 188 IPC and only then the Magistrate may take cognizance of the offence.

20. I also find that even otherwise, no *prima facie* case is made out under Section 188 IPC as per the allegation made in the written report. For offence under **Section 188 IPC**, the following **ingredients** are required to be satisfied:-

“(a) that there must be an order promulgated by the public servant;

(b) that such public servant is lawfully empowered to promulgate it;

(c) that the person with knowledge of such order and being directed by such order to abstain from doing certain act or to take certain order with certain property in his possession and under his management, has disobeyed; and

(d) that such disobedience causes or tends to cause;

(i) obstruction, annoyance or risk of it to any person lawfully employed; or

(ii) danger to human life, health or safety; or

(iii) a riot or affray.”

21. But from perusal of the written report, it clearly transpires that there is no reference to the order which has been promulgated and disobeyed, let alone any other ingredients of the offence under Section 188 IPC being satisfied.



22. Hence, impugned order is not sustainable in the eye of law and hence, liable to be dismissed under Section 482 Cr.PC. The present case is squarely covered by the guidelines as given in sub paras (1) and (6) of para 102 of **State of Haryana Vs. Bhajan Lal, [1992 Supp (1) SCC 335]** by Hon'ble Apex Court, because neither any offence is *prima facie* made out, nor the procedure as adopted is permissible in the law. The relevant para of **Bhajan Lal case (supra)** reads as follows:-

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

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

.....
(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.

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(Emphasis Supplied)



23. Accordingly, the present petition is allowed setting aside the impugned order with reference to the Petitioner.

(Jitendra Kumar, J.)

Ramesh
S.Ali/ Chandan

AFR/NAFR	AFR
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