

(2016) 07 PAT CK 0039

In the Patna High Court

Case No : Criminal Writ Jurisdiction Case No. 1109 of 2015 Arising Out of P.S.
Case No. 348 Year - 2015 Thana-Kadam Kuan District-Patna

Pratik Sinha

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 04-07-2016

Acts Referred:

Bihar Municipal Act, 2007 — Section 323, 324, 399
Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (2016) 4 PLJR 274

Hon'ble Judges : Mr. Ashwani Kumar Singh, J.

Bench : Single Bench

Advocate : Mr. Rajiv Kumar Verma, Senior Advocate and Mr. Prashant Sinha, Advocate, for the Petitioners; Mr. Rajesh Singh, GP - 16 and Mr. Dhananjay Kumar, AC to GP - 16, for the State; Mr. Prasoon Sinha, Advocate, for the Respondents No. 5 & 6

Final Decision : Allowed

Judgement

Mr. Ashwani Kumar Singh, J.—The petitioner preferred a writ application for quashing of the first information report (For short "FIR") giving rise to Kadam Kuan P.S. Case No. 348 of 2015 registered under Sections 188 and 120-B of the Indian Penal Code (For short "IPC") and Sections 323, 429, 435 of the Bihar Municipal Act, 2007 (for short "the Act").

2. The FIR has been instituted on the basis of a written report dated 29.07.2015 submitted by one Kedar Prasad, Tax Collector, Bankipore Circle of the Patna Municipal Corporation, Patna (for short "PMC") to the Officer-in-charge of Kadam Kuan Police Station. The gist of the allegation in the written report submitted by the informant is that though the construction work of the building in question was restrained by an order passed by the Municipal Commissioner of the PMC in Vigilance Case No. 203 - A of 2013 pursuant to a complaint having been received when the informant along with other officials of the PMC and police personnel jointly visited the site for inquiry on 29th July, 2015, they found that the

construction work of the building was continuing defying the prohibitory order.

3. On the basis of the aforesaid information, Kadam Kuan P.S. Case No. 348 of 2015, was registered on 29th July, 2015 under Sections 188 and 120-B of the Indian Penal Code and Sections 323, 429 and 435 of the Act against the petitioner and others and investigation was taken up.

4. I have heard Mr. Rajiv Kumar Verma, learned Senior Advocate appearing on behalf of the petitioner, Mr. Prasoon Sinha, learned Advocate appearing on behalf of the respondents No. 5 & 6 and Mr. Bhaskar Shankar, learned Assistant Counsel to the Government Pleader No. 16 appearing on behalf of the State.

5. Mr. Rajiv Kumar Verma, learned Senior Advocate appearing on behalf of the petitioner has submitted that the petitioner is one of the partners of M/s. Balaji Infra Projects (for short "the firm") which is a registered partnership firm involved in construction business. The firm entered into a development agreement on 21.11.2011 with an old lady, namely, Smt. Usha Prasad, a co-accused, for development of 24 decimals of her land bearing Khata No. 71, Tauzi No. 244, Khewat No. 2/25, Ward No. 11 (Old), 43(New), Municipal Plot No. 1410, Thana No. 5, Circle-C- 9, Sheet No. 72, Holding No. 699/1 (Old) and 1443/957 (New) situated at Branch of Road of Mauza - Prithiwipur, Mohalla - East Lohanipur, P.S.-Kadam Kuan, District-Patna within the limit of PMC. While the petitioner started construction over the land and completed construction to some extent, he came to know that the Municipal Commissioner, PMC has issued an order stopping construction over the land in Vigilance Case No. 203A of 2013. Upon coming to know about the prohibitory orders issued by the Municipal Commissioner, PMC, the petitioner stopped construction over his site.

6. He has submitted that on 29th July, 2015, while some aluminium windows were being prepared at the site and the plumber was trying to stop seepage in the down slab of the 1st floor of the apartment due to problem being faced by the caretaker and guard, who were employed to look after the goods and property at the site and were residing at the ground floor of the site, the informant along with the police authorities came at the site and lodged the FIR against the petitioner, the old lady with whom the petitioner had entered into a development agreement and the other employees of the firm.

7. It is the contention of the petitioner that the allegations made in the FIR do not attract ingredients of any cognisable offence. Hence, the institution of FIR and investigation by the police, as provided under Sections 156 and 157 of the Code of Criminal Procedure, 1973 (for short "CrPC") are bad in the eyes of law.

8. It is the thrust of the argument of the petitioner that breaches or contraventions alleged in the FIR are in the nature of civil infraction and Chapter XXXVI of the Act simply provides for the procedure for prosecuting municipal civil infractions. It has also been contended that the informant was not authorised in law to institute an FIR under the provisions of the Act.

9. It is next contended by the learned Senior Advocate for the petitioner that no FIR could have been registered against the petitioner under Sections 188 and 120-B of the IPC. He has contended 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 and the police have got no jurisdiction to register a case under Section 188 of the IPC and investigate the same.

10. In support of the above arguments, reliance has been placed upon the order dated 31st August, 2015 passed by this Court in Cr.W.J.C. No. 728 of 2014 (Jai Kishun Sao v. State of Bihar through District Magistrate, Patna & Another).

11. Per contra, Mr. Prasoon Sinha, learned Advocate, appearing on behalf of the respondents No. 5 & 6, has contended that the provisions contained in Chapter XLIII of the Act with regard to offences and penalties under different Sections of the Act could not be brought to the notice of this Court, as a result of which, in paragraph No. 16 of the aforesaid judgment in Cr.W.J.C. No. 728 of 2014 (supra), as contained in Annexure-4 to the writ petition, this Court has mentioned that though the offences under Sections 323 and 324 of the Act have been made cognisable, the provisions prescribed therein are of civil nature. They only authorised the police to ensure prohibitory order passed by the Chief Municipal Officer under the Act. These cognisable offences are not punishable with imprisonment for a term.

12. Referring to Section 429(b)(i) of the Act, he has further contended that it clearly stipulates punishment for contravention of any provisions of any of the sections, sub-sections, clauses, provisos or any other provision of the Act, with fine, which may extend to rupees five thousand, or with imprisonment which may extend to six months, or both. He has urged that due to inadvertence as well as for want of proper assistance, the FIR was quashed vide order dated 31st August, 2015 passed in Cr.W.J.C. No. 728 of 2014 (supra) by this Court holding therein that though Sections 323 and 324 of the Act are cognisable offences, they are not punishable with imprisonment for a term. He has further contended that a wrong judgment passed in favour of one individual does not entitle others to claim similar benefit.

13. Mr. Prasoon Sinha has further contended that the allegations made in the FIR do attract ingredients of the offences alleged which are cognisable in nature. Hence, the police have rightly registered the case and took up investigation. It has also been urged that the FIR was instituted by the informant under the instruction of the Municipal Commissioner, PMC, and, hence, the same can not be faulted with in law.

14. Mr. Bhaskar Shankar, learned Assistant Counsel to Government Pleader No. 16 appearing for the State has adopted the submissions made by the learned Advocate appearing on behalf of the respondents No. 5 & 6.

15. In view of the rival submissions advanced on behalf of the parties, at this stage it would be apposite to take note of the relevant provisions prescribed under Sections 323, 324, 429 and 435 of the Act, which read 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 building or the execution of any work has not been completed, the Chief Municipal Officer, 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 subsection (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 subsection (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 subsection 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 be, 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 of 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.

429. Punishment for certain offences. - Whoever -

(a) contravenes any provision of any of the sections, sub-sections, clauses, provisos, or any other provision of this Act, or

(b) fails to comply with any order lawfully given to him or any requisition lawfully made upon him under any of the said sections, sub-sections, clauses, provisos or

other provisions, shall be punishable -

(i) with fine which may extend to rupees five thousand, or with imprisonment which may extend to six months, or both :

(ii) in the case of a continuing contravention of failure, with an additional fine which may extend to rupees one hundred for every day during which such contravention or failure continues after conviction for the first such contravention or failure subject to a maximum of rupees five thousand.

435. Encroachment on streets. - No person shall cause any encroachment or obstruction on any municipal property such as a street or footpath or park without specific permission of an officer of the Municipality duly authorised to grant such permission. Any person causing such encroachment or obstruction on any municipal property as aforesaid shall, on conviction, be punishable with fine which may extend to one thousand rupees."

16. Section 399 of the Act, which is also relevant for the instant case, reads as under :-

"399. Certain offences to be cognisable.

- The offences mentioned in section 313, section 323, section 324, section 326, section 370, and section 435 shall be cognisable within the meaning of the Code of Criminal Procedure, 1973."

17. It is clear from a reading of Section 323 of the Act, particularly, Sub-section (1) & (2), that they simply confer power to a Chief Municipal Officer to pass an order of demolition of any building or stop the erection of such building, 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 of building plan referred to in Section 314 or in contravention of any of the provisions of the Act or the rules or the regulations made thereunder. Sub-section (3) confers right upon a person aggrieved by an order of the Chief Municipal Officer under sub-section (1) to prefer an appeal before the Municipal Building Tribunal appointed under Section 329 of the Act within thirty days from the date of order. Sub-section (4) provides that 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, as it may think fit. Sub-section (5) puts a bar upon any court to 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 Section 323 of the Act. Sub-section (6) provides that 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. Further, sub-section (7) provides that 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 subsection 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, as the case may be, 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 the Act. Subsection (8) is a non-obstante clause. It gives overriding power to the Empowered Standing Committee to demolish building or a work forthwith, for reasons to be recorded in writing, if it is of the opinion that immediate action is called for in relation to a building or a work being carried on in contravention with the provisions of the Act.

18. Similarly, under Section 324 of the Act, 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 Act 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 realised 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.

19. Much stress was laid by Mr. Prasoona Sinha, learned Advocate appearing for the respondents No. 5 & 6 that while passing order in Cr.W.J.C. No. 728 of 2014 (supra) due to inadvertence as well as for want of proper assistance, it was held by this Court that Sections 323 and 324 of the Act are not punishable with imprisonment for a term, whereas from a reading of Section 429(b)(i) of the Act, it is clear that for contravention of any provisions of any of the sections, sub-sections, clauses, provisos or any other provision of the Act, the person responsible has been made liable for punishment which may extend to five thousand rupees, or with imprisonment, which may extend to six months, or both. According to him, in view of the punishment prescribed under Section 429(b)(i) of the Act, the offences under Sections 323 and 324 of the Act are punishable with imprisonment and fine both and the judgement of this Court in Cr.W.J.C. No. 728 of 2014 (supra) is erroneous in law. However, on appreciation of the provisions prescribed under Sections 323, 324 and 429(b)(i) of the Act, it

seems to me that the contention of the learned Advocate for the respondents No. 5 & 6 is without force.

20. The word "offence" has not been defined under the Act.

21. Thus, in absence of any other definition given under the Act, the word "offence" under the Act shall have the same meaning as given under Section 40 of the IPC, wherein the definition of the word "offence" has been given in three parts. In the first part, an act or a series of acts, or an illegal omission or series of illegal omissions which is made punishable by the IPC is an "offence". In the second part, some chapters and sections have been specifically mentioned in which the word "offence" denotes a thing which the IPC or any "Special law" or "Local law" punishable. In the third part, certain sections of the IPC have been mentioned wherein the word "offence" means the same thing punishable under the "Special law" or "Local law" with a minimum period of six months with or without fine.

22. Keeping in mind the definition of the word "offence", when I look to the provisions prescribed under Sections 323 and 324 of the Act, I find that they provide for demolition, stoppage, alteration and sealing of work not in accordance with sanction of the building plan and set out specific procedure for the same including provisions for appeal to the Municipal Building Tribunal against the order of the Chief Municipal Officer. Thus, in view of the definition of "offence" as defined under the IPC and considering the infraction of law as described under Sections 323 and 324 of the Municipal Act, the infraction cannot be termed as an "offence".

23. Apparently, the provisions prescribed under Sections 323 and 324 of the Act are public regulatory laws. They provide for the manner in which the Municipal authorities or the person aggrieved may proceed in case of any dispute relating to construction of any structure or building in contravention of any building bye-laws.

24. Section 429 under Chapter XLIII of the Act does not specify the sections, sub-sections, clauses, provisos or any other provisions of the Act to which it would apply. There are various sections prescribed under different chapters of the Act which provides for specific punishment for a specific act of omission or commission. For example, Section 325 of the Act makes the offender contravening the provisions made thereunder, liable to punishment with imprisonment of either description for term which may extend to five years and also with fine which may extend to fifty thousand rupees. Similarly, for the offence of encroachment of any municipal property, such as, a street or footpath or park, without specific permission of an officer of the Municipality, Section 435 of the Act prescribes that, on conviction, a person shall be liable to fine which may extend to one thousand rupees.

25. Having considered the provisions prescribed under Sections 325 and 435 of the Act, if this Court looks to the provision prescribed under Section 429 of the

Act, it would be apparent that both cannot be reconciled together. The punishment prescribed under Section 429 of the Act cannot be imposed on a person who is found guilty of committing an offence punishable under Sections 325 or 435 of the Act. Thus, this Court is of the opinion that the provision prescribed under Section 429 of the Act is sweeping in nature and is too vague and, it is difficult to comprehend that the punishment prescribed therein would be applicable to the alleged contraventions under Sections 323 and 324 of the Act.

26. Be it noted here that Chapter XXXVI of the Act contains provisions regarding erection of buildings within the municipal area. Section 312 of the Act defines the expression to "erect building". Section 313 of the Act says that no person shall construct, or commence to construct, any building or any structure of a permanent nature except in accordance with building bye-law. Section 314 of the Act says that no person construct or commence to construct, any building or structure of permanent nature unless the building plan is approved. Section 316 of the Act says the registered Architect, who approves a building construction plan and submit detail of construction plan along with approval granted by him to the Chief Municipal Officer of the municipality. Section 315 of the Act provides for actions which may be taken in case of construction or commencement of construction in contravention or breach or deviation of building bye-laws whereas Section 317 of the Act gives power to the Chief Municipal Officer of the municipality to condone deviations in construction of building within permitted level.

27. It would be clear from the reading of the aforesaid Sections of the Act that there is prohibition of construction of any building or structure without sanction of building plan. In case of any contravention, breach or deviation, the person responsible may be liable to pay penalty which may ranged between 1 lac to 10 lacs depending upon the size of the building or structure or deviation under Section 315 of the Act. However, certain deviations may be within permitted level, and, in such a case, the Chief Municipal Officer shall be obliged not to order for its demolition and shall condone the same on the realisation of such penalty or fine as may be prescribed under the Act, Rule or Regulation or building bye-laws as the case may be in terms of the provision prescribed under Section 317 of the Act.

28. It is, thus, evident, as a day of light, the construction of any structure or erection of any building in contravention or breach of the Act is civil infraction or is punishable by civil penalties. However, disobedience of an order duly passed by a competent authority under the Act may make a person liable for criminal prosecution.

29. It is pertinent to note here that a plain reading of Sections 323 and 324 of the Act does not give any impression that the same have been declared "offences" which are punishable either with fine or with imprisonment for a term or with both.

30. The fallacy in the argument of the counsel appearing for Respondents No. 5 & 6 can further be demonstrated from looking at the issues from another perspective. The argument preferred by the counsel of the PMC is based on the premise that Section 429 covers the entire spectrum of violation/contravention of the provisions of the Act and that Sections 323 and 324 is with regard to violation by the builder of the norms prescribed by Municipal Act. To the contrary, the said two sections are about empowerment of the Chief Municipal Officer with regard-as to how and to the extent he can stop further infraction of the norms of the Municipal Bye-laws and the remedy that a person aggrieved may have against the order of the Chief Municipal Officer. If there can be any contravention of the said section or its sub-sections, it can be by Municipal authorities alone and not by a builder.

31. This Court is of the further opinion that if the alleged offence is about mere disobedience of the orders then the only punishment that has been prescribed is 6 months of imprisonment or fine or both and thus, in terms of CrPC is a non-cognisable offence for which no FIR can be instituted and the criminal justice machinery can be moved only with the permission of the competent Magistrate.

32. The contention that Section 399 makes the "offence" under Section 323 and 324 cognisable is of no help to the Municipal Corporation especially in view of the finding by this Court that in fact Sections 323 and 324 are not "offence" at all as the same are empowering and remedial provisions ? as they only empower the authorities of the Corporation to take remedial measures against any infraction of the norms of Municipal Bye-laws and the fact that it provides remedies to the person aggrieved by the order of the Municipal Authorities.

33 This Court further finds that Section 435 of the Act has no application in the present case. It is not the case of the prosecution that the petitioner or any other accused had caused obstruction or encroachment on any municipal property, such as, a street or footpath or park without specific permission of an officer of the municipality. The ingredients of the "offence" punishable under Section 435 of the Act are completely wanting in the present case. In that view of the matter, the registration of the FIR under Section 435 of the Act is erroneous in law.

34. Now coming to the issue of "offences" registered under IPC, this court is of the opinion that 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.

35. 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."

36. This provision prescribed under Section 195(1) of the CrPC has been carved out as an exception to general rule contained under Section 190 of the 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. The provision of section 195(1)(a)(i) of the CrPC being mandatory, any private prosecution in respect of the said offence is totally barred. Only the concerned public servant can make a complaint and initiate proceedings in respect of the offences mentioned therein. 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 Sections 172 to 188 IPC has been committed. The bar of limitation imposed by sub-section (1)(a)(i) of Section 195 equally extends to both cognisable as well as non-cognisable "offences". Let it be noted that all the "offences" covered by sections 172 to 188 IPC except the one under Section 188, are non-cognisable "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 CrPC.

37. The Supreme Court in *Basir-Ul-Haq and Others v. The State of West Bengal* AIR 1953 SC 293, held that Section 195 of CrPC 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.

38. In *C. Muniappan & Ors. v. State of Tamil Nadu* (2010) 9 SCC 567, the Supreme Court after taking into consideration its earlier decisions in *Govind Mehta v. 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 in paragraph no. 28 as under :-

"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."

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.

42. The only other Section of the IPC under which the FIR has been instituted is section 120 - B, which reads as under :-

"120 - B. Punishment of criminal conspiracy. - (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy

to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."

43. The "offence" under Section 120-B of the IPC falls under two categories. Clause (1) of Section 120-B deals with cognisable "offence" whereas Clause (2) of Section 120-B deals with non-cognisable "offences". Apparently, there is no allegation in the FIR on the basis of which it can be said that the petitioner was a party to any criminal conspiracy to commit an "offence" punishable with death, imprisonment for life or rigorous imprisonment of two years or upwards as provided under clause (1) of Section 120-B of the IPC. Even, if, it is presumed that the petitioner and other accused persons were party to a criminal conspiracy to commit an offence falling within clause (2) of Section 120-B of IPC, the same would be a non-cognisable "offence" for which institution of an FIR without permission of a Magistrate is not permissible in law.

44. In that view of the matter, the institution of the FIR against the petitioner under Section 120-B of the IPC is patently bad in the eyes of law.

45. Upon considering the facts and circumstances of the case and in view of the above discussion, in the considered opinion of this Court, allowing the investigation to continue in connection with FIR of Kadam Kuan P.S. Case No. 348 of 2015 registered under Sections 188 and 120-B of the IPC and Sections 323, 429 and 435 of the Act would cause extreme injustice and would result in abuse of the process of Court. Accordingly, the aforesaid FIR and all proceedings arising therefrom are, hereby, quashed and set aside.

46. The application stands allowed.