

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.18912 of 2015

Arising Out of PS.Case No. -93 Year- 2013 Thana –KUNDWA CHAINPUR District-
EASTCHAMPARAN(MOTIHARI)

- =====
1. Ramadhar Rai Son of Sital Rai R/o Vill- Bara Hardia P.o.- Bara Hardia, P.s Kundwa, Chainpur, Dist- East Champaran
 2. Nurul Islam Son of Late Mokhtar, R/o Vill- Hasanpur, tola Balua, P.O- Hasanpur, P.s Kundwa, chainpur, Dist- East Champaran.

.... Petitioner/s

Versus

1. The State of Bihar

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Radha Mohan Singh, Adv.
Mr. Pravin Kumar, Adv.
For the Opposite Party/s : Mr. Dr. Mayanand Jha, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 18-05-2015

The present application under section 482 of the Code of Criminal Procedure (in short ‘the Code’) has been filed for quashing the order dated 24.11.2014 passed in Sessions Trial No. 446 of 2014 arising out of Kundwa Chainpur P.S.Case No. 93 of 2013 by the 4th Additional Sessions Judge, Motihari, whereby the application filed by the petitioners under section 227 of the Code for discharge has been dismissed.

2. The First Information Report of Kundwa Chainpur P.S.Case No. 93 of 2013 was registered for the offences punishable under sections 414, 411, 489A, 489-B, 489-C of the Indian Penal Code as well as 3 and 4 of the Foreign Exchange Regulation Act (in



short 'FERA') on the basis of self-statement of SI Harendra Kumar, SHO, Kundwa Chainpur Police Station recorded by himself at 11.00 a.m. on 08.09.2013 at Kundwa Chainpur Police Station. According to the allegations made in the First Information Report, a police raiding team, led by the informant Harendra Kumar, intercepted the petitioners, who were coming on a Hero Honda Motorcycle bearing Registration No. BR-05B-9081 on 08.09.2013 at about 7.00 a.m. near Indo-Nepal border at Pundeo Chowk situated near Kundwa Chainpur Police Station. On enquiry, they disclosed their names as Ramadhar Rai (Petitioner No.1) and Nurul Islam (Petitioner No.2). On search of their person, Rs.1,10,000/- Nepali currency was found from the possession of Ramadhar Rai whereas Rs.1,00,000/- Nepali currency was found from the possession of Nurul Islam. On further enquiry, they disclosed that they smuggle cattle from India to Nepal and the Nepali currency recovered from them was the sale proceeds derived out of the said business. It has been further alleged that on demand they could not produce papers relating to the motorcycle on which they were traveling and the mobile phones being possessed by them.

3. On the basis of the aforesaid allegations, police case was registered and investigation was taken up. On completion of investigation, the Investigating Officer submitted charge sheet against the petitioners before the learned Sub Divisional Judicial

Magistrate, Sikrahna, Motihari for the offences alleged in the First Information Report. The learned Sub Divisional Judicial Magistrate, Sikrahna, Motihari took cognizance of the offence vide order dated 17.02.2014 and thereafter committed the case to the court of Sessions for trial.

4. At the stage of framing of charge, an application under section 227 of the Code was filed on behalf of the petitioners. The contention of the petitioners was that in the given facts and circumstances of the case, none of the ingredients of the offences alleged in the First Information Report for which charge sheet was submitted by the police were attracted against the petitioners. However, the learned 4th Additional Sessions Judge, Motihari rejected the aforementioned application filed under section 227 of the Code vide impugned order dated 24.11.2014. The aforementioned order dated 24.11.2014 is under challenge before this Court.

5. Learned counsel for the petitioners has submitted that there is nothing on record on the basis of which it can be said that the petitioners were found in possession of any stolen property. Simply because no paper could be produced by the petitioners at the time of interception, in respect of the vehicle and the mobile phones possessed by them, framing of charge under section 411 or 414 of the Indian Penal Code, is not justified. He has submitted that it has



transpired in course of investigation that the seized vehicle and one mobile phone belong to Sheetal Rai, who is father of petitioner no.1 Ramadhar Rai and another mobile phone belong to petitioner no.2 Nurul Islam. The said seized articles are not stolen properties, so, there would be no application of sections 411 and 414 of the Indian Penal Code against the accused persons. He has further submitted that even if the entire allegations made in the First Information Report are taken to be true, no offence under sections 489-A to 489-C of the Indian Penal Code would be made out as there is no allegation that the currency notes found from the possession of the petitioners were forged or counterfeit currency notes. What has been alleged in the First Information Report is that the respective petitioners were found in possession of certain Nepali currency. The possession of foreign currency by a citizen is not punishable under any provisions of the Indian Penal Code. He has also submitted that the prosecution of the petitioners for the offences punishable under FERA would be bad in law in view of the fact that the said Act has already been repealed on 1st June, 2000.

6. On the other hand, learned counsel for the State has submitted that there is no error in the impugned order passed by the Sessions Court as, at the stage of passing the order in terms of section 227 of the Code, the court has merely to peruse the evidence in order



to find out whether or not there is sufficient ground to proceed against the accused. According to him, if a prima facie case is made out, charge is to be framed in terms of section 228 of the Code. He has further submitted that the standard of test and judgment which is to be finally applied before recording the finding regarding guilt or otherwise of the accused is not to be applied at the stage of deciding the matter under section 227 of the Code. At this stage, the court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or there is no sufficient ground for proceeding against him and not for the purpose of arriving at a conclusion that it is not likely to lead conviction.

7. I have heard the respective counsel for the parties.

8. In order to test the legality of the impugned order dated 24.11.2014 passed by the court below, I think it appropriate to deal with the provisions of law under which the prosecution intends to put the petitioners on trial. As noted herein above, the Investigating Officer has submitted charge sheet against the petitioners for different offences under the Indian Penal Code and FERA. First of all, I would like to deal with the relevant provisions of the Indian Penal Code under which charge sheet has been submitted.

9. Section 411 of the Indian Penal Code states that whoever dishonestly receives or retains any stolen property, knowing or having

reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

10. Apparently, section 411 of the Indian Penal Code provides punishment for dishonestly receiving the stolen property.

11. To be stolen property, it must be a property, the possession whereof has been transferred by theft or by extortion or by robbery and any property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed.

12. Hence, the basic ingredients to support the charge under section 411 of the Indian Penal Code is that the property found in possession of the accused must be a stolen property within the meaning of section 410 of the Indian Penal Code. Merely because some property is found in possession of the accused is not sufficient to frame charge under section 411 of the Indian Penal Code unless it is shown that the same is a stolen property. The essential ingredients of the offence punishable under section 411 of the Indian Penal Code are as follows :-

1. Certain property was stolen;
2. Such property was in possession of the accused;
3. Such property was in possession of some other person before the accused got possession of the

same;

4. Accused possesses the property with the knowledge that it was stolen property; and
5. Accused got possession of the property dishonestly.

13. Section 414 of the Indian Penal Code states that whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

14. In order to frame charge under section 414 of the Indian Penal Code, the prosecution is required to bring some material to show that the property recovered is stolen property and that the accused extended help in its consumption and its disposal. The essential ingredients of the offence under this section are as follows :-

1. The subject matter of offence was stolen property; and
2. Accused assisted in concealing, disposing of or making away with such property.

15. In absence of any material to show that the subject matter of offence, that is, Hero Honda Motorcycle and two mobile phones in the present case, were stolen properties within the meaning

of section 410 of the Indian Penal Code, there would be no justification to frame charge against the petitioners either under section 411 or section 414 of the Indian Penal Code.

16. Sections 489-A to 489-C of the Indian Penal Code deal with various economic offences in respect of forged or counterfeit currency notes or bank notes.

17. Section 489-A of the Indian Penal Code deals with counterfeiting currency notes or bank notes, whereas section 489-B of the Indian Penal Code deals with using as genuine the forged or counterfeit currency notes or bank notes and section 489-C of the Indian Penal Code deals with possession of forged or counterfeit currency notes or bank notes.

18. Admittedly, in the present case, there is no allegation that the petitioners were found either counterfeiting currency notes or bank notes or using counterfeit currency notes or bank notes as genuine or possessing forged or counterfeit currency notes or bank notes. In absence of any such allegation, in my considered opinion, none of the ingredients of the offences punishable under sections 489-A, 489-B and 489-C of the Indian Penal Code, are attracted in the present case.

19. After dealing with the provisions of the Indian Penal code under which prosecution intends to put the petitioners on trial, I

would like to see as to whether or not any offence under FERA is made out.

20. It is an admitted position of law that FERA was repealed on 1st June, 2000. It was replaced by the Foreign Exchange Management Act (in short 'FEMA'). Though, FEMA came into existence on 1st June, 2000 but FERA was provided a sunset clause of two years to enable the Enforcement Directorate to complete the investigation into the cases already detected by it for FERA violation before May 31, 2000.

21. In terms of section 49 of FEMA, all actions under the repealed FERA would be deemed to have been taken under FEMA if not inconsistent with FEMA. It has, however, been provided in section 49(3) of FEMA that no court shall take cognizance of an offence under the repealed FERA and no adjudicating officer shall take notice of any contravention under section 51 of the repealed FERA after the expiry of two years from the date of commencement of FEMA. Thus, it was made clear that pending FERA cases had to be completed within two years, i.e., before 31st May, 2002, beyond which the same would lapse.

22. Further, FEMA is a civil Act in nature. As such, there is no provision for launching the prosecution. Section 13 of FEMA provides for penalty upto three times the amount involved for

contravention of the rules, regulations and directions under FEMA. If the amount is not quantifiable, the penalty can go upto Rs.2,00,000/- (Rupees two lakhs). A continuing offence invite penalty which may extend to Rs. 5,000/- per day of contravention.

23. There is also a provision for confiscation and for compounding of the offence. Under FEMA, after 1st June, 2000, the Enforcement Directorate would have the powers to search and seize the foreign currencies, summon people and adjudicate and impose penalty but the Enforcement Directorate have not been given powers to arrest and prosecute.

24. In the present case, the violation in respect of foreign exchange is said to have been committed on 8th September, 2013. On that date FERA was not in existence. As noted above, it was already replaced by FEMA. Even if the act of the petitioner would be deemed to be violation of any provision of FEMA, it will not drag the petitioners to criminal courts. Since foreign exchange violations are now treated as civil offence, the police have nothing to do with FEMA violations.

25. In view of the discussions made, hereinabove, I am of the considered opinion that the petitioners cannot be put on trial either for violation of FEMA or for violation of FERA.

26. It is true that at the time of framing of the charges, the



probative value of the materials on record cannot be gone into, and the materials brought on record by the prosecution has to be accepted as true but before framing of charge, the court must apply its judicial mind on the materials placed on record and must be satisfied that the commission of the offence by the accused was made. It is also true that the charges may be directed to be framed when there exists strong suspicion but it is equally true that the court must come to a prima facie finding that there exist some materials for framing of charge. Charges cannot be framed on the basis of wild suspicion and hypothetical presumption.

27. In the present case, I am constrained to hold that while passing the impugned order dated 24.11.2014, the learned 4th Additional Sessions Judge, Motihari has acted mechanically like a mere post office to frame charge at the behest of the prosecution. He has not exercised his judicial mind to the facts of the case in order to determine as to whether or not a case for trial is made out against the accused. As noted above, there is actually no ground for proceeding against the accused persons in the present case.

28. For the reasons recorded, hereinabove, I am of the considered opinion that the ingredients of the offences alleged against the petitioners are not attracted in the present case. Accordingly, the entire criminal prosecution against the petitioners in connection with

Sessions Trial No. 446 of 2014, arising out of Kundwa Chainpur P.S.
Case No. 93 of 2013, including the impugned order dated
24.11.2014, is quashed.

29. The application stands allowed.

(Ashwani Kumar Singh, J)

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