

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.348 of 2013

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1. Tara Prasad Pal @ T.P. Pal S/o Late B.C. Paul Village - 27, Shekespare Sarani, Kolkata, 27 (W.B.)
 2. D. Sen Gupta @ Debdipati Sen Gupta S/o D. Sengupta, resident of Village - Simplex House, 2nd Floor, Kolkatta, 27, (West Bengal)
 3. Bhaskar Mukharjee, S/o Late K.L. Mukharjee, resident of Village - 12/1, Nenie Singupta Srani, Kolkata, 87, (West Bengal)
 4. S.K. Mishra @ Sudipta Kr. Mishra, S/o Prabhaker Mishra, resident of Village - Nuahat Naupatha, P.O. Telgapatha, NH-5, P.S. Phool Nakhra, Near Tarani Mandir Cuttak (Odissa)

.... Petitioners

Versus

1. State of Bihar
2. The Inspector General of Police (Prosecution), Bihar, Patna
3. Raj Kumar Raushan, S/o Shri Jagdish Prasad Bharati, resident of village-Sarai Gardh, P.S.-Kishanpur, District-Supaul.

.... Respondents

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Appearance :

For the Petitioner/s : Mr. Jitendra Singh, Sr. Advocate

Mr. Sudhir Singh, Advocate

For the State : Mr. Prasoon Sinha, G.A.-2

For the Respondent No.3: Mr. Uday Chandra Prasad, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 10-02-2015

Heard Mr. Jitendra Singh, learned senior advocate appearing for the petitioners, Mr. Prasoon Sinha, learned Government advocate for the State and Mr. Uday Chandra Prasad,

learned counsel appearing on behalf of the respondent no. 3, Raj Kumar Raushan.

2. By filing this application under Articles 226 and 227 of the Constitution of India, the petitioners have sought for quashing of the first information report of Raghapur P.S. Case No. 60 of 2012 registered for the offences punishable under Section 406 read with 34 of the Indian Penal Code.

3. At the outset, it would be relevant to note that after hearing learned counsel for the petitioners and learned counsel for the State by order dated 29th April, 2013, this Court had stayed the further proceedings pending in the Court of learned S.D.J.M. Biraul, Supaul in connection with the aforesaid police case. However, investigation of the case was not stayed and, as such, the police proceeded with the investigation and submitted charge sheet in the Court on 15th April, 2013 vide charge sheet no. 29/2013 dated 31.03.2013. Since this Court had already stayed further proceedings of the case, the learned Sub-divisional Judicial Magistrate, Biraul, Supaul has not taken cognizance of the offence till date.

4. As during pendency of the writ application, the police have submitted their report vide charge sheet bearing no. 29/2013 dated 31.03.2013 under Sections 406, 374, 347, 323, & 504 read with 34 of the Indian Penal Code in the aforesaid Raghapur P.S. Case No. 60 of 2012, an interlocutory application bearing I.A. No. 1682 of 2013 has been filed on behalf of the petitioners seeking quashing of the aforesaid charge sheet dated 31st March, 2013.

5. On the basis of a written report dated 01.05.2012 submitted by respondent no. 3 Raj Kumar Raushan to the Hon'ble



Chief Minister, Bihar during his *seva yatra*, the aforesaid police case was instituted on 12th May, 2012 against the petitioners under Section 406 read with 34 of the Indian Penal Code. He has alleged that being President of Kosi Mazdoor Union and being employed on the post of Supervisor in Simplex Infrastructure Ltd. (hereinafter referred to as “the company”) on raising genuine grievances, the petitioners who were employed as Project Manager, 2nd Project Manager, Accounts Manager and Manager Personnel respectively used to threaten to eliminate him. It has further been alleged that the petitioners took work from the labourers and employees of the company for 13-14 hours but they were paid wages for 8 hours only. Further, the workmen were not provided facilities like, payment of over-time wages, identity card, health card, etc. When they raised protest, they were threatened by SAP Constables. They were also threatened to be returned from employment. It is also alleged that local employees and labourers were being insulted by calling them as “Bihari”. Apart from these allegations, it has also been stated in the aforesaid representation submitted to the Hon’ble Chief Minister that the atrocities of the company were highlighted right from the block level upto the Central level but the grievances raised in this regard went unheeded. It has further been contended that the employees and labourers resorted to agitation, demonstration and hunger strike to buttress their demand and due to intervention of local M.L.A. an attempt was also made to resolve the issue but instead of fulfilling the genuine demand of the employees, the officers of the company paid only half salary to 265 workmen for the month of October to November. It is alleged that the management failed to make payment of Rs. 9 lacs towards overtime and salary deduction and



when it was protested, as many as 50 local labourers were removed from the job. It has further been stated that the company has finished 95% of its job and hence, steps be taken towards payment of due salary and overtime wages. In the written complaint, it has been stated that if the grievances of the workmen are not redressed, the Chief Minister shall be responsible for the same and in that circumstance, the workmen would lock the premises of the company, stage *dharna* and take out demonstration.

6. It has been contended by learned senior counsel appearing on behalf of the petitioners that even if the entire allegations as contained in the first information report are taken to be true, no cognizable offence would be made out. He has submitted that non-payment of overtime wages/salary and not providing labourers facilities like, identity card, health card and safety measure of the company would not, in any case, make the petitioners liable to be prosecuted for criminal offence. Even an illegal retrenchment of workers from job would not make the officers of the company liable for criminal prosecution.

7. He has further submitted that the prosecution has been brought for the principal offence of criminal breach of trust against the petitioners but there is no allegation that the petitioners were, in any manner, entrusted with any property or to be in dominion over it and dishonestly misappropriated or converted that property for their own use either contrary to law or of contract between the parties. He has further submitted that expression “entrustment” has a vital significance and it is the principal ingredient for constituting the offence under Section 406 of the Indian Penal Code.

8. He has further submitted the allegations are quite



vague and there is nothing specific that what amount of which worker is due in the company. According to him, the petitioners are salaried employees of the company and they had their job specially assigned to them and they have no such relationship with workmen i.e. master servant relationship and, hence, there is no occasion of entrustment of any amount or misappropriation thereof. The company in question is duly incorporated public limited company and the liability, if any, for payment to workmen is upon the company and not upon the petitioners. The company has not been made accused in the present case and the petitioners cannot be made vicariously liable for any due against the company even in a civil proceeding.

9. Lastly, it has been contended that the allegations made in the FIR, at best, would constitute a labour dispute for which the only remedy is to recourse provided under the Industrial Disputes Act, 1947 as well as the Minimum Wages Act, 1948.

10. On the other hand, learned counsel for the respondent no. 3 has submitted that there is a clear allegation that the petitioners being officers of the company in question failed to make payment of full wages to 265 employees for the month of October to November and they arbitrarily deducted Rs. 9 lacs due towards over-time and salary deduction of the poor employees and on protest removed 50 labourers from the job. He has submitted that apart from the aforesaid, there is also an allegation that the petitioners insulted the labourers by calling them "Bihari" and threatened them to implicate in false cases. He has submitted that in course of investigation the allegations made by the informant were found to be true and, accordingly, on conclusion of investigation, the investigating officer of the case has already

submitted his report under Section 173(2) of the Code of Criminal Procedure in Court. He has submitted that it would appear from the charge sheet that the police have found the allegations to be true for the offences punishable under Sections 407, 374, 347, 323 and 504 read with 34 of the Indian Penal Code.

11. Lastly, he has submitted that the allegations made in the FIR do constitute a cognizable offence and, hence, the writ application deserves to be dismissed.

12. Learned counsel for the State has also supported the contentions advanced by learned counsel appearing on behalf of the respondent no. 3.

13. I have heard the parties and perused the record.

14. Before examining the rival submissions of the parties, it would be proper to briefly notice the scope and applicability of Section 406 of the Indian Penal Code which prescribes the punishment defined for the offence of criminal breach of trust as defined under Section 405 of the Indian Penal Code which reads as under:-

“405. Criminal breach of trust.- Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits “criminal breach of trust”.



[Explanation [1].- A person, being an employer of an establishment whether exempted under Section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount for the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid].

[Explanation 2.- A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

15. The gist of the offence of criminal breach of trust in this Section is entrustment of property and dishonest



misappropriation thereof. Before a person can be said to have committed criminal breach of trust within the meaning of Section 405 of the Indian Penal Code, it must be established that he was either entrusted with property or entrusted with dominion over property which he is said to have converted to his own use. Even, in case of dominion over property, it must be shown that such dominion was with the result of entrustment. Thus, it would appear from the definition of criminal breach of trust that *mens rea* for the crime makes the distinction between the civil law and criminal law. The act of breach of trust *per se* may involve a civil wrong but a breach of trust with an ingredient of *mens rea* would give rise to a criminal prosecution as well.

16. The element of dishonest intention is, therefore, an essential element to constitute the offence of criminal breach of trust. Breach of trust simplicitor is not an offence as it is not associated with an intention which is dishonest. Being Explanation no. 1 and Explanation no. 2 to the offence of criminal breach of trust makes it clear that where a person being an employer deducts the employees contribution from the wages payable to the employee for credit to a provident fund or family pension fund or to the Employees' State Insurance Fund shall be deemed to have been entrusted with the amount of contribution so deducted by him and if he makes default in the payment of such contribution to the said fund in violation to the respective Laws and Acts, the employer shall be deemed to have dishonestly used the amount of the said contribution in violation of law. However, in the present case, there is no allegation of deduction from the workers' contribution for credit to the provident fund or family pension fund or Employees' State Insurance Fund. The dispute is in respect of

non-payment of full wages/salary and not providing the labourers facilities, like, identity card, health card, safety measure, etc. Admittedly, there is no allegation of entrustment of property by the informant or any employee or worker of the company to the petitioners. Under such circumstance, in my view, the ingredients in order to constitute a criminal breach of trust punishable under Section 406 of the Indian Penal Code are not attracted.

17. The facts of the present case clearly suggest that there is a dispute in relation to payment of wages. In such circumstance, the dispute essentially and purely would be a dispute of civil nature. In the present case, the grievance of the informant is essentially against the company. The company in question is incorporated under the Indian Companies Act, 1956 and, thus, it is a juristic person having right to sue with a liability to suit. The company has, admittedly, not been made accused in the present case. There is nothing on the basis of which it can be said that the petitioners dishonestly converted the due salary of the informant or of any other workmen for their own use so as to satisfy the ingredients of Section 405 of the Indian Penal Code. In case there is any due against the Company or of any workmen of the company against the company in question, the petitioners being officers of the company cannot be made vicariously liable for the same.

18. In **R. Kalyani vs. Janak C. Mehta** reported in **(2009) 1 SCC 516**, the Hon'ble Supreme Court in para 41 held as under:-

“41. If a person, thus, has to be proceeded with as being vicariously liable for the acts of the company, the company must be made an accused. In any event, it would be a fair thing to do so, as legal fiction is raised both against the company as well as the person

responsible for the acts of the company.”

19. In **S.K. Alagh Vs, State of U.P.** reported in **(2008) 5 SCC 662** in para 19, the Hon’ble Supreme Court held as under:-

“19. As, admittedly, drafts were drawn in the name of the Company, even if the appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a Company or an employee cannot be held to be vicariously liable for any offence committed by the Company itself.”

20. Taking into consideration the aforesaid decisions of the Hon’ble Supreme Court, the prosecution of the petitioners being vicariously liable for the acts of the company cannot be justified.

21. In the light of the aforesaid conclusions, I am of the considered opinion that no *prima facie* case made out against the petitioners in respect of the offence punishable under Section 406 of the Indian Penal Code.

22. Apart from Section 406, there is no other Section of the Penal code applied in the FIR in question. However, from the allegations made in the written report, it would appear that the petitioners are alleged to have threatened the informant and others with injury to the person, reputation and property. Such allegation would certainly attract the offence punishable under Section 504 of the Indian Penal Code which reads as under:-

“504. Intentional insult with intent to provoke breach of the peace.- Whoever intentionally insults, and thereby gives provocation to any person, intending

or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

23. The essential ingredients of the offence under Section 504 of the Indian Penal Code are as follows:-

- (a) the accused intentionally insulted someone;
- (b) He thereby intend to give him provocation;
- (c) He knew that it was likely that such provocation would cause that person to commit a criminal breach of peace or to commit any other offence.

24. Since in the written report, it has been alleged that the petitioners had abused and threatened the informant and others with dire consequences, in my view, an offence punishable under Section 504 of the Indian Penal Code would certainly be attracted against them. However, that alone would not have conferred upon the police a jurisdiction to investigate the case as the offence punishable under Section 504 of the Indian Penal Code is a non-cognizable offence. The investigation of a non-cognizable offence by the police without permission of a Magistrate is illegal.

25. In order to appreciate the scope and application of police investigation in cases related to commission of a non-cognizable offence, I would like to reproduce Section 155 of the Code of Criminal Procedure which reads as under:-

“155. Information as to non-cognizable cases and investigation of such cases.- (1)When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-

cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.”

26. From a bare reading of Section 155 of the Code of Criminal Procedure, it would appear that upon receiving an information in respect of a non-cognizable offence, the police officer must enter the substance of it in a book kept in such form as State Government may prescribe and then refer the informant to the Magistrate. A police officer must not investigate a non-cognizable offence without an order of a Magistrate. There is no other Section under the Code of Criminal Procedure empowering a police officer to make a report in such a case without the orders of the Magistrate. Hence, even if, I find that the allegations made in the FIR do disclose commission of an offence under Section 504 of the Indian



Penal Code but the investigation being without written order of the Magistrate is contrary to the provisions of Sub-section (2) of Section 155 of the Code of Criminal Procedure. The illegality committed in investigation of a non-cognizable offence by the police without any order of the Magistrate is not curable either under Section 460 or under Section 465 of the Code of Criminal Procedure. In that view of the matter, in my opinion, the report submitted by the police under Section 173(2) of the Code of Criminal Procedure in the Court of the Magistrate is wholly illegal and without jurisdiction.

27. Taking into consideration the aforesaid decisions of the Hon'ble Supreme Court and on the facts and in the circumstances of the present case, the prosecution of the petitioners cannot be justified. I am of the considered opinion that no *prima facie* case is made out against the petitioners in respect of the offence punishable under Section 406 of the Indian Penal Code.

28. In view of the aforesaid findings, I have no reason to doubt that allowing the prosecution to continue any more as against the petitioners in the present case would amount to an abuse of process of the Court.

29. In the result, the application is allowed. The impugned FIR of Raghapur P.S. Case No. 60/2012 and the police report submitted under Section 173(2) of the Code of Criminal Procedure vide charge sheet no. 29/13 dated 31.03.2013 are quashed.

30. It is made clear that this order shall not, in any way, prejudice the right of the informant or of any other workmen of the company in question from realizing their legal dues by

taking recourse to other appropriate remedy/remedies available in law.



Sanjeet/-

(Ashwani Kumar Singh, J.)

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