IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.47877 of 2012

Arising Out of Case No. -1032 Year- 2012 Thana -null District- SAMASTIPUR

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Md. Minatullah S/o Ekramul Haque R/o Village Salha, P.O. Parbatta, Police Station - Sarai Ranjan, District - Samastipur

.... Petitioner

Versus

1. The State of Bihar
2. Md. Mahtab Alam S/o Late Md. Ali R/o Village Salha, P.O. Parbatta, Police Station - Sarai Ranjan, District - Samastipur

.... Opposite Parties

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Appearance :

For the Petitioner/s : Mr. Abdul Mannan Khan, Advocate
Mr. Binay Kumar, Advocate

For the State : Mr. Dilip Kumar Roy, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 01-07-2015

This application under Section 482 of the Code of Criminal Procedure (For short 'the Code') is directed against the order dated 11.09.2012 passed by the learned Judicial Magistrate-1st Class, Samastipur in Complaint Case No. (C.R.) No. 1032 of 2012 whereby finding a prima facie case to be made out under Section 406 of the Indian Penal Code, the petitioner has been summoned for trial under Section 204 of the Code.

2. The complainant is cousin brother of the petitioner.

He has alleged that on 25th July, 2002, the petitioner had taken Rs. 30,000/- from him as loan for the purpose of constructing his house. Once again on 7.4.2003 he gave Rs. 20,000/- to the petitioner as loan for his medical treatment/surgical operation. He has stated that he gave the aforesaid amount to the petitioner as he was closely related to him under impression that he would return the aforesaid loan amount advanced to him. On 28.08.2003, the petitioner repaid Rs. 3,000/- to him but thereafter he refused to return the remaining loan amount despite repeated request made by him. Ultimately, on 17th June, 2012 when he requested the petitioner to repay the balance amount, he became angry and abused him.

3. The complainant was examined on oath in which also, he has reitereated the allegations made in the complaint petition. In course of inquiry conducted under Section 202 of the Code, two witnesses were examined who have stated that the entire transaction of money had taken place at Kolkata.

4. Learned counsel for the petitioner has submitted that from the allegations made in the complaint it would appear that the complainant has filed a criminal case against the petitioner for recovery of loan advanced to him. There is no averment in the complaint that the loan amount was advanced to the petitioner on the understanding that the petitioner will repay the same on/or

before any particular date. There is no whisper that there was a dishonest or fraudulent intention on the part of the petitioner at the time of taking the loan. He has contended that the dispute is purely a civil in nature and the same cannot be allowed to be converted into a criminal offence. He further submits that the order taking cognizance and summoning the petitioner in 2012 for an offence which took place in 2003 is clearly barred by law of limitation under Section 468 of the Code.

5. Learned counsel for the opposite party no. 2 has submitted that the petitioner being a close relative of the complainant took him into confidence and requested for loan in order to construct house and to meet medical expenses. Relying on the words of the petitioner, the complainant paid him Rs. 50,000/- as loan. The complainant has supported the allegations made in the complaint in the statement recorded on oath. Apart from the complainant, two other witnesses have also corroborated the version of the complainant in their statements recorded under Section 202 of the Code. According to him, the impugned summoning order passed by the learned Magistrate does not suffer from any illegality as apparently ingredients of the offence punishable under Section 406 of the Indian Penal Code are attracted in the present case.

6. Learned counsel for the State has adopted the

argument advance by learned counsel for the opposite party no. 2.

7. I have heard respective counsel for the parties and perused the record.

8. In order to examine the issue in question, it would be necessary to see whether the ingredients of the offence punishable under Section 406 of the Indian Penal Code are attracted in the present case or not.

9. Section 406 IPC prescribes punishment for criminal breach of trust. The offence of criminal breach of trust has been defined under Section 405 IPC 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".

10. A bare reading of the definition of criminal breach of trust would make it clear that the gist of the offence under this Section is entrustment of property and dishonest misappropriation thereof. 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.

11. Section 406 IPC which prescribes punishment for criminal breach of trust reads as under:-

> "406. Punishment for criminal breach of trust.- Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

12. The essential ingredients of the offence under Section 406 are as follows:-

> (i) entrusting a person with property or with any dominion over property,
>
> (ii) that person entrusted (a) dishonestly misappropriating or converting that property to his own use; or (b) dishonestly using or disposing of that property or willfully suffering any other person so to do in violation (i) of any direction of law prescribing the mode in which such trust is to be discharged, (ii) of any legal contract mode, touching the discharge of such trust.

13. The principles that emerge in order to sustain a plea of criminal breach of trust are that the complainant must show that the accused had dishonest or fraudulent intention at the time the complainant had parted with the money or before the time the complainant parted with the money misappropriated the money, the

accused knew that the representation is false. It is inbuilt in section 405 IPC that there has to be dishonest intention right from the beginning. When allegations are made in regard to the failure on the part of the accused to keep his promise, in the absence of culpable intention, no offence under Section 405 IPC punishable under Section 406 IPC can be said to be made out.

14. Let me now advert to the complaint petition, the complainant is closely related to the petitioner. According to the complainant, he gave him loan for the purposes of construction of house and to meet medical expenses for his treatment. There is no whisper in the complaint that the petitioner had promised to pay back the amount taken as loan within a particular period. There is no documentary proof to support the case that any amount was ever paid by the complainant to the petitioner. The complainant has failed to produce any evidence worth the name in support of his allegation that legally acceptable contract was concluded, whereunder the petitioner was obliged to pay back Rs. 50,000/- to the complainant. The allegations in the complaint clearly disclose a civil dispute between the parties. There appears to be no cheating or an inducement for delivery of property or a breach of trust by the petitioner. According to the complainant himself after taking the amount the petitioner had also repaid Rs. 3,000/-. This shows that

there was no *mens rea* on the part of the petitioner when the alleged amount in question is said to have been advanced by the complainant to the petitioner.

15. In **Devendra & Others** v. **State of Uttar Pradesh & Another [(2009) 7 SCC 495]**, the supreme Court in para 27 held as under:-

> "…………………A distinction must be made between a civil wrong and a criminal wrong. When dispute between the parties constitute only a civil wrong and no a criminal wrong, the courts would not permit a person to be harassed although no case for taking cognizance of the offence has been made out".

16. Coming to the another limb of argument advanced by the learned counsel for the petitioner that the order taking cognizance for the offence punishable under Section 406 IPC is barred by law of limitation prescribed under Section 468 IPC, I find that the punishment prescribed for the offence committed under Section 406 IPC is three years. Hence, in terms of Section 468(2)(c) limitation for taking cognizance of offence under Section 406 IPC would be three years from the date of knowledge about the offence alleged.

17. Admittedly, the alleged loan was advanced to the petitioner between 25.07.2002 and 07.04.2003. There is no

allegation that it was promised to be repaid within a particular period. The complainant has alleged that his repeated demand to pay back the loan amount went unheard. It is true that he has given 17.06.2012 as the last date on which demand was made by him from the petitioner which was refused and the petitioner got angry and abused him. However, in view of the nature of allegation made in the complaint, it is apparent that the said date had been given just in order to overcome the limitation prescribed under Section 468 of the Code.

18. Neither the complainant nor any of the witnesses examined in support of the complaint has stated about any particular overt act having taken place on 17.06.2012. The date of occurrence has only been mentioned in the proforma of the complaint. It appears that the alleged date has been given in the proforma of complaint just to overcome the bar of limitation prescribed under Section 468 of the Code.

19. The object of Code putting a bar of limitation on prosecutions is clearly to discourage filing cases after a long time to prevent abuse of the process of court. The actual period of limitation have been prescribed under Section 468 Cr. P.C. having regard to the gravity of the offence and other relevant factors to curb filing fictitious prosecution.

20. In the present case, the last date on which loan is said to have been handed over to the petitioner is 07.04.2003 and the complaint has been filed on 25.09.2012. Apparently, the date of occurrence mentioned in the proforma of the complaint does not inspire any confidence as the same has not been supported by the complainant or witnesses before the Court.

21. Looking at the matter from all angles, I am of the considered opinion that allowing the prosecution of the petitioner for commission of the alleged offence under Section 406 IPC in the present matter would be clearly an abuse of the process of law. The complaint deserves to be quashed at the threshold. I accordingly, do so. The application is, therefore, allowed. The impugned order dated 11.09.2012 passed by the learned Judicial Magistrate-1st Class, Samastipur in Complaint Case No. (C.R.) 1032 of 2012 is set aside. The complaint Case No. (C.R.) 1032 of 2012 stands quashed and all criminal proceeding emanating therefrom also stand quashed.

(Ashwani Kumar Singh, J.)

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