IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.40735 of 2012

Arising Out of Complaint Case No. -1180(C) Year- 2004 Thana -null District- PATNA

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1. Badri Parasad Bijpuria son of Late Gauri Shanker Lal Bajpuria, resident of Mohalla- Kali Asthan, Patna City, P.S.- Chowk, District- Patna.
2. Rameshwar Prasad Bijpuria son of Late Gauri Shanker Lal Bijpuria, resident of flat no.402, Duplex, 4th floor Sahnti Kutir, Exhibition Road, P.S. Gandhi Maidan, District- Patna.

.... Petitioner/s

Versus

1. The State of Bihar
2. Ved Prakash Agarwal son of late Geeg Raj Agarwal, Proprietor of Rup Sangam, Patna Market, P.S.- Pirbahore, District- Patna.

.... Opposite Party/s

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Appearance :
For the Petitioner/s : Mr. Sudhir Kumar Bijpuria, Advocate
For Opposite Party No.2 : Mr. Suresh Kumar, Advocate,
For the State : Mr. Nand Kumar, 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 24.07.2012 passed by the learned Judicial Magistrate 1st Class, Patna in Complaint Case No. 1180(C) of 2004, by which he has rejected the application of the petitioners filed under section 245 of the Code for discharge from the case.

2. It has been alleged that the complainant is a businessman and the accused persons (petitioners) were known to him for several years and they were on visiting terms. They approached him on 23rd October, 1999 and requested for a friendly loan of Rs.50,000/- with an assurance to return the amount by September, 2001. Relying on

the promise made by the accused persons, he gave Rs.50,000/- in cash to them. On 12.08.2001, the accused persons paid Rs.12,500/- to the complainant and assured to pay remaining dues amounting Rs.37,500/- by December, 2003. Since they failed to return the remaining amount by December, 2003, he approached them several times and demanded back his due amount. Despite repeated requests made by the complainant, the accused persons failed to repay the due loan advanced to them. Seeing no way out, he sent a notice through lawyer to them on 17th April, 2004 by registered post with acknowledgement requesting them to return the amount within thirty days of receipt of the notice. To his utter surprise, after receipt of the notice they sent a reply contending therein that the entire loan amount has already been repaid by them and no amount of the complainant advanced as loan was due against them.

3. On the basis of the aforesaid allegations, the complainant has alleged that the petitioners have cheated him. He was examined on oath and in support of the complaint, two witnesses were examined in course of enquiry conducted under section 202 of the Code. The Magistrate concerned took cognizance of the offence under section 418 of the Indian Penal Code (for short 'IPC') against the petitioners and summoned them under section 204 of the Code to face trial.

4. At the stage of framing of charge, an application under

section 245 of the Code for discharge was filed by the petitioners but the learned Magistrate rejected the same on the ground that the allegations made in the complaint have duly been supported by the complainant and the witnesses in course of enquiry and the evidence recorded during pre-charge stage which are sufficient to frame charge against the petitioners and put them on trial.

5. I have heard learned counsel for the petitioners, learned counsel for the State and learned counsel for the opposite party no.2.

6. It has been contended by the learned counsel for the petitioners that there is no whisper in the complaint that there was any dishonest or fraudulent intention on the part of the petitioners at the time of taking loan and that the complainant was deceived by any representation made by the petitioners at the time of giving loan amount. It has further been contended that the dispute is purely a civil dispute in nature and the same cannot be allowed to be converted into a criminal trial.

7. On the other hand, learned counsel for the opposite party no.2 has submitted that the averments made in the complaint do attract the ingredients of the offences punishable under sections 406, 418 and 420 IPC. The complainant has corroborated the allegations made in the complaint in his statement made on oath and the witnesses examined in course of enquiry and at pre-charge stage have also corroborated the allegations made in the complaint. He has

contended that there is no error in the impugned order passed by the court below. He submits that the allegations made in the complaint do constitute criminal offence as well as civil liability and the law is well settled that even if a person has filed a civil case that will not deprive him from filing a criminal case.

8. Learned counsel for the State has adopted the arguments advanced by the learned counsel for the opposite party no.2.

9. In order to see whether the allegations made in the complaint attract the ingredients of the offences alleged, it would be proper to examine the relevant provisions of the Penal Code.

10. Section 415 IPC defines the offence of cheating, which reads as under :-

> **415. Cheating —**
> Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

11. It would be evident Section 415 IPC consists of two distinct parts, each part dealing with one way of cheating. The first part contemplates where by deception practiced upon a person the accused dishonestly or fraudulently induces that person to deliver a property to any person or to consent that any person shall retain any

property, and the second part envisages where by deception practiced upon a person the accused intentionally induces that person to do or omit to do so, if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

12. Section 417 IPC prescribes punishment for cheating, which reads as under :-

> **"417. Punishment for cheating —**
> Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

13. The essential ingredients of the offence under section 417 IPC are as follows :-

(i) Accused fraudulently or dishonestly induced complainant;

(ii) He did so for delivery of some property either to accused or to some other person;

(iii) The accused intentionally induced the complainant to do a thing which he would not do or omit to do a thing which he would not have omitted to have done if not so deceived.

(iv) Such act was caused or was likely to cause some damage or harm in his body, mind reputation or the property.

14. In the present case, the learned Magistrate has taken cognizance for the offence punishable under section 418 of the Indian Penal Code which deals with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect. It reads as under :-

> **"418. Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect —**
>
> Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound, either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

15. The essential ingredients for the offence under section 418 IPC are as follows :-

(i) The accused cheated a person;

(ii) At the time of offence the accused was bound by law or by legal contract to protect the interest of the person whom he cheated;

(iii) Obligation related to transaction involving cheating; and

(iv) The accused had the knowledge that the act was likely to cause wrongful loss to the person cheated and whose interest he was bound to protect.

16. The principles that emerge in order to sustain a pre-

condition of cheating is that the complainant must show that the accused had dishonest or fraudulent intention at the time the complainant had parted with the property or that the accused by making a representation on or before the time the complainant had parted with the property, deceived the complainant to deliver the property and that the accused knew such representation to be false. It is inbuilt in the offence relating to cheating as defined under section 415 IPC that there has to be dishonest intention from the very beginning. When the allegations are made in regard to failure on the part of the accused to keep up his promise, in the absence of culpable intention at the time of making such promise, no offence under section 415 IPC punishable under sections 417, 418 or 420 IPC can be said to be made out.

17. Let me now advert to the complaint petition. The complainant had long standing friendly relationship with the accused, who was in need of Rs.50,000/- and requested the complainant to give him loan with an assurance to repay the same within two years. Admittedly, he repaid Rs.12,500/- within the stipulated period. When the complainant requested the petitioners to repay the remaining amount of loan, they refused to return the same. When he sent a legal notice in this regard, they replied that the amount of the loan advanced to them has already been repaid. There is no averment or

allegation that there was any fraudulent or dishonest intention on the part of the petitioners at the time of receiving the loan. On the contrary, it is an admitted fact that the petitioners had repaid Rs.12,500/- to the complainant within the time they had promised to repay the loan amount. This clearly goes to show that the petitioners had no dishonest intention right at the beginning when the loan amount was advanced to them by the complainant.

18. On the facts and in the circumstances of the case, it appears to me that the dispute between the parties is purely of civil nature arising out of breach of contract. Subsequent refusal to pay the balance amount/repay the loan amount does not satisfy the ingredients of cheating or criminal breach of trust inasmuch as the dishonest intention at the time of initial transaction is lacking in the present case. The evidence of cheating would be constituted when the accused had fraudulent or dishonest intention at the time of making promise or representation. The complaint petition is conspicuously silent that the accused had any dishonest or fraudulent intention at the time when the loan was advanced. It is also not the case of the complainant that he was induced to pay loan to the accused as a result of being deceived by the accused. In that view of the matter, I am of the opinion that no criminal liability can be fastened upon the accused petitioners under any provisions of the Penal Code.

19. I am also of the opinion that the present complaint is an

abuse of the process of law. A purely civil dispute is sought to be given a colour of criminal offence to wreak vengeance against the petitioners. In such type of cases, it is necessary to draw a distinction between civil wrong and criminal wrong as has been held by the Supreme Court in Devendra Vs. State of U.P. [(2009) 7 SCC 495], relevant part thereof is reproduced herein below :-

> "27. …………A distinction must be made between a civil wrong and a criminal wrong. When dispute between the parties constitute only a civil wrong and not 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."

20. Thus, looking to the matter from all angles, I am of the considered opinion that the prosecution of the petitioners for the alleged offence under section 418 IPC or for any purpose under sections 406 or 420 IPC would be a clear abuse of the process of law.

21 . In the circumstances, the application is allowed. The impugned order dated 24.07.2012 Passed by the learned Judicial Magistrate 1st Class, Patna in Complaint Case No. 1180(C) of 2004 is set aside. The Complaint Case No. 1180(C) of 2004 and all criminal proceedings emanating therefrom also stand quashed.

(Ashwani Kumar Singh, J)

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