# IN THE HIGH COURT OF JUDICATURE AT PATNA

**Criminal Miscellaneous No.1226 of 2013**

Arising Out of Complaint Case No. -572 Year- 2011 Thana -GAYA COMPLAINT CASE District-GAYA

======================================================

Sajina Khatoon, W/o Murtaza, D/o Sheikh Gulam Rasool, resident of village-Nauranga, P.S.-Moffasil, District-Gaya, at present resident of Mohalla-Piparpanti Chatra, P.S.-Chatra District-Chatra (Jharkhand)

.... .... Petitioner

Versus

1. The State of Bihar
2. Birendra Kumar, S/o Sri Hari Prasad, resident of Village-Nauranga, P.S.-Moffasil, District-Gaya.

.... .... Opposite Parties

======================================================

**Appearance :**

For the Petitioner/s : Mr. Ambika Bhagat, Advocate

For the State : Mr. Aditya Singh-I, APP

For the Opposite Party No.2: Md. Raisul Haque, Advocate

======================================================

**CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH**

ORAL JUDGMENT

**Date: 06-07-2015**

Heard learned counsel for the petitioner and learned counsel for the State as well as learned counsel appearing on behalf of the opposite party no. 2.

2. This application under Section 482 of the Code of Criminal Procedure (For short 'the Code') is directed against the order dated 03.12.2011 passed by the learned Judicial Magistrate-1$^{st}$ Class, Gaya in Complaint Case No. 572 of 2011 by which the

learned Magistrate after taking cognizance of the offence punishable under Sections 406 and 420 of the Indian Penal Code (For short 'the IPC') issued process against the petitioner.

3. The complainant/opposite party no. 2, namely, Birendra Kumar filed a criminal complaint against the petitioner herein complaining of an offence under Sections 419, 420 and 468 of the IPC. He has alleged that the petitioner has a property in village-Nauranga P.S.-Moffasil, District-Gaya in respect of which, he entered into an agreement to sell in favour of the complainant for a consideration of Rs. 3,67,500/- on 24.11.2005 and an amount of Rs. 81,000/- was paid as advance. The balance of the amount was to be paid at the time of registration of sale deed which was to be made by 31.03.2006. After receipt of the advance amount the petitioner did not honour the agreement in spite of the repeated efforts taken by the complainant in this regard. It has further been alleged that seeing no way out the complainant got a legal notice sent to the petitioner on 1.3.2011 asking him to fulfil the promise made by him vide aforesaid agreement dated 24.11.2005 but the petitioner failed to honour the agreement. According to the complainant, the petitioner has, thus, cheated him.

4. The complainant was examined on oath and in course of inquiry, three witnesses were also examined on behalf of the

complainant. They have supported the allegations made in the complaint. After recording the statement of the complainant and the witnesses, the learned Magistrate passed the impugned order dated 03.12.2011. It would appear from the aforesaid complaint that though the complaint was filed for the offences punishable under Sections 419, 420 and 468 of the Indian Penal Code, the cognizance has been taken by the learned Magistrate for the offence punishable under Sections 406 and 420 of the IPC.

5. It has been contended by learned counsel for the petitioner that the alleged deed of agreement is a forged and fabricated document. It is an unregistered document and the same does not contain signature of the petitioner. Further, even if the entire allegations made in the complaint are taken to be true at its face value the ingredients of the offences punishable under Sections 406 and 420 of the IPC would not be attracted. At best, it would be a case of civil wrong and a criminal prosecution for such an offence would be bad in the eye of law.

6. On the other hand, learned counsel for the opposite party no. 2 has submitted that the allegations made in the complaint do attract the ingredients of the offence punishable under Sections 406 and 420 of the IPC. The complainant has supported the allegations made on oath and the witnesses on his behalf in course of inquiry

have also corroborated the case of the complainant. He has submitted that there is no error in the order passed by the court below.

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

8. At this stage, I would like to examine as to whether the allegations made in the complaint make out the criminal offence or not.

9. Section 405 of the IPC defines criminal breach of trust 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 careful reading of Section 405 IPC shows that a criminal breach of trust involves the following ingredients:-

(a) a person should have been entrusted with property, or entrusted with dominion over property;

(b) that person dishonestly misappropriated or converted to his own use that property, or dishonestly used or disposed of that property or willfully suffered any other person to do so;

(c) that such misappropriation, conversion, use or disposal was in violation of any direction of law prescribing the mode in which such trust was discharged.

11. Section 406 IPC prescribes punishment for criminal breach of trust as defined in Section 405 IPC. It 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. A careful reading of Section 405 and 406 IPC shows that for constituting an offence punishable under Section 406 IPC, prosecution must prove:-

(i) that the accused was entrusted with property or with dominion over it; and

(ii) that he (a) misappropriated it, or (b) converted it to his own use, or (c) used it, or (d) disposed of it.

13. The gist of the offence under Section 406 IPC is misappropriation done in a dishonest manner. There are two parts of the said offence. The first involves the fact of entrustment, wherein an obligation arises in relation to the property over which dominion or control is acquired. The second part deals with misappropriation

which should be contrary to the terms of the obligation which is created.

14. Section 420 IPC deals with cheating which reads as under:-

> "420. Cheating and dishonestly inducing delivery of property.- Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

15. The essential ingredients of Section 420 IPC are:

(i) cheating;

(ii) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security, and

(iii) mens rea of the accused at the time of making the inducement.

16. In the present case, looking at the allegations in the complaint from the face of it, I find that no allegations are made attracting the ingredients of Section 405 IPC. Likewise, there are no allegations as to cheating or the dishonest intention of the petitioners

in retaining the money in order to have wrongful gain to themselves or causing wrongful loss to the complainant. There is nothing in the complaint to show that the petitioners had dishonest or fraudulent intention at the time when the complainant parted with the amount of Rs. 3,67,500/- or that the accused person induced the complainant to pay Rs. 81,000/- as advance payment by deceiving him or that a representation was made by the petitioners to him at or before the time the complainant paid the money to them and that at the time the representation was made, the petitioners knew the same to be false.

17. The complaint does not make any averment so as to infer any fraudulent or dishonest inducement having been made by the petitioner pursuant to which the complainant parted with the money. It is not the case of the complainant that the petitioner does not have the property or that the petitioner was not competent to enter into an agreement to sell or would not have transferred title in the property to the complainant. Merely because an agreement to sell was entered into which agreement the petitioner failed to honour, it cannot be said that the petitioner has cheated the complainant.

18. I find that the criminal proceeding initiated against the petitioner in the present case is wholly unwarranted. The complaint apparently is an abuse of the process of court. There is substance in the argument advanced on behalf of the petitioner that

even if the allegations made in the complaint are taken to be correct yet the case of the prosecution under Section 420 or 406 of the IPC is not made out.

19. Regard being had to the facts and circumstances of the case and taking into consideration the relevant provisions of law, the instant application deserves to be allowed. Accordingly, the impugned order dated 03.12.2011 passed by the learned Judicial Magistrate-1st Class, Gaya in Complaint Case No. 572 of 2011 is set aside. Consequently, Complaint Case No. 572 of 2011 and the entire criminal proceedings emanating therefrom are also quashed.

**(Ashwani Kumar Singh, J.)**

Sanjeet/-

| | | | |
|---|---|---|---|
| U | | T | |