IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.119 of 2015

Arising Out of PS.Case No. -null Year- null Thana -null District- GAYA

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Sushil Kumar Saraf Son of Late Shambhu Nath Saraf Resident of Mohalla - Balajee Nagar, Chotki Nawada, P.S. Delha, District - Gaya

.... Petitioner

Versus

1. The State of Bihar through the Senior Superintendent of Police, Gaya
2. The Officer In Charge Delha Police Station, Gaya
3. Arjun Prasad Son of Krishna Yadav resident of Mohalla Chchotki Nawada, P.S. Delha, Distt. - Gaya

.... Respondents

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Appearance :

For the Petitioner/s : Mr. Gautam Kejriwal, Adv.
Ms. Aishwarya Riti, Adv.

For the State : Smt. Kumari Amrita, G. P. 10.

For the informant : Mr. Surendra Kumar Mishra, Adv.

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 17-09-2015

By way of filing an application under Articles 226 and 227 of the Constitution of India, the petitioner seeks quashing of the FIR in Delha P. S. Case No. 37 of 2013 registered on 4.5.2013 under Sections 406, 420 and 120 B of the Indian Penal Code (for short ‘IPC’).

2. The respondent no. 3 Arjun Prasad lodged an FIR on 4.5.2013 alleging therein that he had negotiated with the petitioner for

purchase of 3600 Sq. ft. @ Rs.3 lakh per katha against which Rs.50,000/- was paid in advance to the petitioner on 8.11.2011 by way of Cheque No. 946087 of Punjab National Bank. It is further alleged that the petitioner got a sum of Rs.4 lakh deposited in cash with his personal deed writer on 23.1.2012. On 26.6.2012 the respondent no. 3 further deposited a sum of Rs.2 lakh vide Cheque No. 434783 of Punjab National Bank, Bairagi Branch into an account at Punjab National Bank, Belaganj at the direction of the petitioner. It has been alleged that thereafter as and when respondent no. 3 attempted to make payment of balance amount and sought for execution of the sale deed and registration thereof the accused persons defered the same for one reason or the other. Lastly, it has been stated that on 26.4.2013 at about 10 am when the respondent no. 3 persuaded the petitioner for acceptance of the balance amount and for registry of the sale deed, he refused to do so and left respondent no. 3 to choose his remedy in law.

3. It is contended that from a bare reading of the FIR it would appear that respondent no. 3 has stated about some negotiations with the petitioner as regards sale of land measuring 3600 sq. feet but has not produced any agreement for sale on account of such negotiation which itself falsifies the claim of respondent no. 3. He further submits that even otherwise the grievance of respondent no. 3 would appear to be one of payment of part of consideration amount

and non-execution of the sale deed in his favour by the petitioner which is not an offence of criminal breach of trust nor of cheating and is a mere case of non-performance of alleged promise made by the petitioner which is a civil dispute between the parties and does not attract criminal liability. He submits that even if the entire prosecution case is taken to be true at its face value for the sake of argument, the same do not make out any criminal offence committed by the petitioner.

4. In support of his contention, learned counsel for the petitioner has placed reliance on the decisions of the Supreme Court delivered in ***Nageshwar Prasad Singh alias Sinha Vs. Narayan Singh & Anr. [(1998) 5 SCC 694], Murari Lal Gupta Vs. Gopi Singh [(2005) 13 SCC 699], Dalip Kaur & Ors. Vs. Jagnar Singh & Anr. [(2009) 14 SCC 696]*** and ***Ram Biraji Devi & Anr. vs. Umesh Kumar Singh & Anr. [(2006) 6 SCC 669]***.

5. On the other hand, learned counsel for the State has submitted that the investigation of the case is going on and during preliminary investigation the allegations made in the FIR by the informant of the case have been found to be true. He submits that the allegations made in the FIR may have some element of dispute of civil nature, but ingredients of criminal offence punishable under Sections 406 and 420 of the Indian Penal Code are also attracted in

the present case.

6. He has submitted that after receiving Rs.6.50 lacs, the petitioner has refused to execute the sale deed as agreed by him initially. He submits that though the informant always expressed his willingness to pay the balance amount, the petitioner, who happens to be the director of NLBD Marketing Company Pvt. Ltd. in whose account part of the money has been paid, has refused to execute the sale deed. He submits that factual foundation for the offence have been led in the FIR and it would not be proper for this Court at the stage of investigation to quash the proceeding in exercise of power conferred under Article 226 of the Constitution of India. He submits that simply because a commercial transaction is there, it cannot be said that no criminal offence is made out. In support of his submission, he has placed reliance on the decisions of the Supreme Court in ***Rajesh Bajaj vs. State NCT of Delhi & Ors. [(1999) 3 SCC 259]*** and ***M Krishnan vs. Vijay Singh & Anr. [(2001)8 SCC 645].***

7. I have heard respective counsel for the parties and perused the allegations made in the FIR.

8. In my view, the first and foremost question, which would arise in the present case, is that even if the entire allegations made in the complaint are taken at their face value and accepted in their entirety, whether or not the ingredients of the offences punishable

under sections 406 and 420 IPC would be attracted.

9. Section 406 IPC prescribes punishment for criminal breach of trust. Section 405 IPC defines the offence of 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. It would, thus, appear that for the offences punishable under section 406 IPC, the prosecution must prove :-

(i) that the accused was entrusted with property or with dominion over it; and
(ii) that he (a) dishonestly misappropriated it, or (b) dishonestly converted it to his own use, or (c) used it, or (d) disposed of it in violation of any direction of law prescribing the mode in which such trust was discharged.

12. The gist of the offence prescribed under section 406 IPC is misappropriation done in a dishonest manner. There are two distinct 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.

13. The offence punishable under section 420 IPC 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."

14. 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.

15. The offence of cheating is defined under section 415 IPC, 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**".”

16. The Section consists of two distinct parts, each part dealing with one way of cheating, (i) 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, (ii) 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.

17. In ***Nageshwar Prasad Singh alias Sinha Vs. Narayan Singh (supra)]***, a similar question fell for consideration before the Supreme Court and a three Judge Bench relying upon illustration (g) of section 415 IPC held that the agreement for sale of land and the earnest money paid to the owner as part of consideration and possession of land and the subsequent unwillingness of the owner to complete the same gave rise to a liability of civil nature and the criminal complaint was not competent.

18. In ***Murari Lal Gupta Vs. Gopi Singh (supra)***, a three-Judge Bench of the Supreme Court observed in paragraph 6 as under:-

"6. We have perused the pleadings of the parties, the complaint and the orders of the learned Magistrate and the Sessions Judge. Having taken into consideration all the materials made available on record by the parties and after hearing the learned counsel for the parties, we are satisfied that the criminal proceedings initiated by the respondent against the petitioner are wholly unwarranted. The complaint is an abuse of the process of the court and the proceedings are, therefore, liable to be quashed. Even if all the averments made in the complaint are taken to be correct, yet the case for prosecutuion under Section 420 or Section 406 of the Penal Code is not made out. 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 respondent parted with the money. It is not the case of the respondent that the petitioner does not have the property or that the petitioner was not competent to enter into an agreement to sell or could not have transferred title in the property to the respondent. 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 respondent. No case for prosecution under Section 420 or Section 406 IPC is made out even prima facie. The complaint filed by the respondent and that too at Madhepura against the petitioner, who is a resident of Delhi,

> seems to be an attempt to pressurize the petitioner for coming to terms with the respondent."
>
> (emphasis mine)

19. In ***Dalip Kaur & Ors. Vs. Jagnar Singh (supra)***, the question for determination before the Supreme Court was whether breach of contract of an agreement for sale would constitute an offence under section 406 or section 420 IPC. After examining the fact of the case and the relevant sections of the IPC, the Supreme Court held that an offence of cheating would be constituted when the accused has fraudulent or dishonest intention at the time of making of promise or representation. A pure and simple breach of contract does not constitute the offence of cheating. It further held that if the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants by non-refunding the amount of advance the same would not constitute an offence of cheating or criminal breach of trust.

20. In ***Ram Biraji Devi & Anr. vs. Umesh Kumar Singh & Anr. (supra)*** , the complainant paid a sum of Rs. 80,000/- to the appellants as consideration amount of the sale price of the plot on different dates. The accused were alleged to have made promise to the complainant that they would execute a written agreement in favour of the complainant but since they failed to execute the agreement the

complainant along with three other persons went to the rest of the accused and inquired about the reason for delay in execution of the agreement. Thereafter, the accused flatly denied acceptance of Rs.80,000/- and refused to transfer the plot in favour of the complainant. Though there were certain allegations of inducement in the said case, the Supreme Court held in para 10 as under:-

> "10. The learned Magistrate in his order has categorically stated that the perusal of the complaint would make it clear that there was a dispute in respect of sale and purchase of land between the parties. In our view even if the allegations made in the complaint are accepted to be true and correct, the appellants cannot be said to have committed any offence of cheating or criminal breach of trust. Neither any guilty intention can be attributed to them nor there can possibly be any intention on their part to deceive the complainant. No criminal case is made out by the complainant against the appellants in his complaint and in the statements of the complainant and his witnesses recorded by the Magistrate before taking of the cognizance of the alleged offences. The averments of the complaint and the statements of the complainant and his witnesses recorded by the Magistrate would amount to civil liability inter se the parties and no criminal liability can be attributed to the appellants on the basis of the material on

record…………..”

(emphasis mine)

21. In ***Rajesh Bajaj vs. State NCT of Delhi & Ors. (supra)***, the appellant filed an FIR alleging therein that the Managing Director of the accused company approached him for purchase of readymade garments of various kinds and induced him to believe that he would pay the price of the said goods on receiving the invoice within fifteen days from the date of invoice of goods which the complainant would despatch to Germany. Believing the aforesaid representation to be true the appellant dispatched goods worth 4,46,597.25 Deutsche Marks (for short ‘DM’). On receipt of 37 different invoices the accused got the goods released and sold them to others. But the accused paid only1,15,194 DM. The appellant further alleged that the accused induced him to believe that he is a genuine dealer, but actually his intentions were not clear. It was also alleged that one of the representatives of the appellant’s company went to Germany for realizing the amount on an understanding reached between them that the accused would pay 2,00,000 DM in lieu of the remaining part of the price. However, the accused did not honour even the subsequent undertaking. It was also alleged that the appellant came to know later about the modus operandi which the accused adopted in regard to certain other manufacturers who too were duped by the accused to the tune of Rs.10 crore.

22. The said FIR was challenged before the High Court on the premise that the allegations made in the FIR did not disclose the offence. The High Court considered the allegations made in the FIR and found out that there is nothing in the complaint to suggest that the accused had dishonest intention at the time of export of goods. In appeal preferred by the appellant (informant) the Supreme Court set aside the order of the High Court and held in paragraph nos. 10 to 13 as under:-

> " 10. It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions. One of the illustrations set out under Section 415 of the Indian Penal Code (Illustrations 'f') is worthy of notice now :
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> > "(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats."
>
> 11. The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would

become decisive in discerning whether there was commission of offence or not. The complainant has stated in the body of the complaint that he was induced to believe that respondent would honour payment on receipt of invoices, and that the complainant realised later that the intentions of the respondent were not clear. He also mentioned that respondent after receiving the goods had sold them to others and still he did not pay the money. Such averments would prima facie make out a case for investigation by the authorities.

12. The High Court seems to have adopted a strictly hypertechnical approach and sieved the complaint through a cullendar of finest gauzes for testing the ingredients under Section 415 IPC. Such an endeavour may be justified during trial, but certainly not during the stage of investigation. At any rate, it is too premature a stage for the High Court to step in and stall the investigation by declaring that it is a commercial transaction simpliciter wherein no semblance of criminal offence is involved.

13. The appellant is, therefore, right in contending that the FIR should not have been quashed in this case and the investigation should have been allowed to proceed."

23. In **M Krishnan (supra)** it was alleged that to prevent legal against them, the accused persons filed a suit on false

and flimsy claim by creating and forging documents / bonds/papers etc. These documents were alleged to have been got filled up by the 1st accused which he had obtained from the complainant on blank papers for production before the bank as guarantor. The accused were alleged to have betrayed the good faith and confidence in them by the complainant and thus withdrew huge amounts on the basis of the forged documents. After perusal of the documents produced with the complaint, the sworn statements of the complainant and his witnesses the Magistrate took cognizance and issued process against two of the three accused named in the complaint. The accused approached the High Court by way of a petition under Section 482 Cr.P.C. The High Court accepted the prayer of the accused and quashed the proceedings mainly on the ground that in view of the pendency of civil disputes between the parties where the genuineness of the documents relied upon the complainant was in dispute, no criminal action could be initiated. The order of the High Court was challenged before the Supreme Court by the complainant. After discussing merit of the case the Supreme Court set aside the order of the High Court. It held in paragraph 6, 9 and 10 as under :-

> "6. Where factual foundations for the offences have been laid down in the complaint, the High court should not hasten to quash criminal proceedings merely on the premise that one or two ingredients

have not been stated with the details or that the facts narrated reveal the existence of commercial or money transaction between the parties.

7. xxxxx

8. xxxxx

9. Right from the case of R.P. Kapur v. State of Punjab [AIR 1960 SC 866], this Court has held that revisional or inherent powers for quashing the proceedings at the initial stage can be exercised only where the allegations made in the complaint or the first information report, even if taken at their face value and accepted in their entirety, do not prima facie disclose the commission of an offence or where the uncontroverted allegations made in the FIR or complaint and the evidence relied in support of the same do not disclose the commission of any offence against the accused, or the allegations are so absurd and inherently improper that on the basis of which no prudent person could have reached a just conclusion that there were sufficient grounds in proceeding against the accused or where there is an express legal bar engrafted in any provisions of the Code or any other statute to the institution and continuance of the criminal proceedings or where a criminal proceeding is manifestly actuated with mala fide and has been initiated maliciously with the ulterior motive for wrecking vengeance on the accused and with a view to spite him due to private and personal grudge.

10. Applying the aforesaid test, it cannot be said that

> the complaint filed by the appellant did not disclose the commission of an offence or there existed any other circumstance which can be made the basis for quashing the proceedings. In fact allegations made in the complaint required adjudication and the complaint could not have been aborted in the manner it has been done by the High Court vide the impugned order."

24. There can not be any disagreement to the well-settled proposition of law that the High Court in its power under Article 226 of the Constitution of India or 482 Cr.P.C. would quash an FIR or a complaint in extreme exception with great care and caution. **Rajesh Bajaj** (supra) and **M. Krishnan** (supra) are of no help and assistance to the respondent no. 3 (informant) in the facts and circumstances of the present case. The facts of these two cases are distinguishable from the facts of the present case. The facts of the present case are squarely covered by the ratio as laid down by the Supreme Court in **Nageshwar Prasad Singh** (supra), **Murari Lal Gupta** (supra), **Ram Biraji Devi** (supra) and **Dalip Kaur** (supra).

25. Coming back to the facts of the present complaint**,** it is an admitted fact that the petitioner, NLBD Marketing Company Pvt. Ltd. owns and possesses the property for which negotiation is said to have been held between the parties. There is no written document to show that the petitioner even entered into an agreement to sell in

favour of the complainant or received any amount from the complainant in this regard. It is a case of an oral agreement to sell. It is not the case of the complainant that any of the accused tried to deceive him either by making a false or misleading representation or by any other action or omission, nor it is his case that they offered him any fraudulent or dishonest inducement to deliver any property or to consent to the retention thereof by any person or to intentionally induce him to do or omit if he were not so deceived. At best, it is a pure and simple case of breach of an oral contract between the parties.

26. Keeping in mind the aforesaid ingredients of the offences alleged and looking at the allegations made in the present FIR, I find that no allegations are made attracting the ingredients of Section 405 IPC. Likewise, there is no allegation as to cheating or dishonest intention of the petitioner in retaining the money in order to have wrongful gain or causing wrongful loss to the informant. Excepting the bald allegations that the petitioner refused to execute the sale deed after receiving Rs.6.50 lakhs, there is no iota of allegation as to the dishonest intention in misappropriating the amount in question.

27. In view of the allegations noticed hereinabove, I find that no such dishonest intention can be shown or even inferred that the petitioner had a guilty intention at the time of entering into the

agreement for sale with the informant of the present case. The FIR instituted does not disclose that an offence under Section 420 IPC is made out.

28. The principles relating to exercise of jurisdiction under section 482 Cr.P.C. or Article 226 of the Constitution of India to quash the FIR or the complaint have been considered by the Supreme Court in several decisions. In State of ***Haryana & Others Vs. Bhajan Lal and Others [1992 Supp (1) SCC 335],*** certain parameters have been pointed out in paragraph 102 by the Supreme Court under which prosecution launched in a complaint or FIR may be quashed which reads as under:-

> "102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an

exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

29. Judged on the touchstone of the principles noted above in State of Haryana Vs. Bhajan Lal (Supra), the present case would fall within the category nos. (1), (3) and (7). I am of the opinion that this is a case of extreme exception where this Court must exercise its extraordinary jurisdiction under Article 226 of the Constitution to set aside the unwarranted and unjustified FIR and its investigation as allowing the prosecution to continue would amount to an abuse of the process of Court.

30. In view of the discussions made hereinabove, the instant application deserves to be allowed. Accordingly, the application is allowed. The first information report in Delha P. S.

Case No. 37 of 2013 and all consequential proceedings arising out of the said FIR are quashed.

(Ashwani Kumar Singh, J.)

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