IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.17391 of 2015

Arising Out of PS.Case No. -426 Year- 2014 Thana -MUNGER COMPLAINT CASE District- MUNGER

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1. Himadry Dutta son of Ajit Kumar Dutta, R/o Mohalla- Nayatola Keshopur (In the house of Basuki Paswan), Jamalpur, P.S.- Jamalpur, District- Munger
2. Kumar Shailendra Narayan, Son of Late Shyam Bihari Prasad
3. Binod Yadav, Son of Late Surendra Prasad Yadav, Both are petitioner nos. 2 and 3 are residents of quarter No. 716/C, North Road, East Colony, Jamalpur, P.S. East Colony, Jamalpur, District- Munger
4. Mahendra Yadav, Son of Late Bajo Yadav, resident of Mohalla- Kabragah East Colony, Jamalpur, P.S.- East Colony, Jamalpur, District- Munger

.... Petitioner/s

Versus

1. The State of Bihar
2. Naresh Prasad Sah, son of Late Lakhan Lal Sah, resident of Mohalla- Mungraura, P.S.- East Colony, Jamalpur, District- Munger

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. C. M. Chaurasia, Adv.
Mr. P. K. Chaurasia, Adv.

For the Opposite Party/s : Mr. Raj Kumar Chaubey, Adv.

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 07-09-2015

The present application under section 482 of the Code of Criminal Procedure (for short 'Cr.P.C.') has been filed for quashing the order dated 09.07.2014 passed by the learned Judicial Magistrate 1st Class, Munger in Complaint Case No. 426-C of 2014, whereby the petitioners have been summoned to face trial for the offences punishable under Sections 406 and 417 of the Indian Penal Code.

2. Initially, the Opposite Party No.2, namely, Naresh Prasad Sah filed a written report before the S.H.O. of East Colony Police

Station, Jamalpur on 12.11.2013 against the petitioners alleging, interalia, that petitioner no.1 Himadry Dutta, owner of M/s A.B. Construction does the work of Railway Contractor along with sub-contractors, namely, Kumar Shailendra Narain (petitioner no.2), Binod Yadav (petitioner no.3), Mahendra Yadav (petitioner no.4) and Opposite Party No.2 i.e. the informant himself. They had done the construction of the restoration and remodeling of ten rooms of a Yantrik Niwas Hostel through a tender which was allotted to M/s A.B. Construction by the Railway vide Tender dated 23.07.2008 at the cost of Rs.28,65,105/- and the aforesaid tender work allotted to M/s A.B. Construction was done by the petitioners including Opposite Party No.2 on the basis of 5% licensee commission on equal profits and on equal investment of the cost in the same, but after completion of the said tender work, M/s A.B. Construction and petitioner nos.2 to 4 in collusion with each other did not distribute the received amount in reasonable or appropriate way and under the conspiracy Kumar Shailendra Narain (petitioner no.2), Binod Yadav (petitioner no.3) and Mahendra Yadav (petitioner no.4) respectively have been paid Rs.6,45,774/- vide cheque dated 24.02.2011 and Rs.4,14,441/- vide cheque dated 15.09.2011 respectively through two cheques i.e. a total of Rs.10,60,215/- and Mahendra Yadav (petitioner no.4) has been paid Rs.4,75,297/- vide cheque dated 30.03.2010 and Rs.4,63,101/-

vide cheque dated 16.07.2010 i.e. a total of Rs.9,38,398, whereas Opposite Party No.2 (informant) has been paid Rs.4,85,594/- only vide cheque dated 11.01.2010. It has further been alleged in the FIR by the informant that thus Himadry Dutta (petitioner no.1) and his Manager Basuki Paswan, Kumar Shailendra Narain (petitioner no.2), Binod Yadav and Mahendra Yadav (petitioner nos.3 and 4) have misappropriated the total amount of profit together with the investment cost of the informant and they are not ready to make payment of the same after doing the accounting of the same and whenever the informant demanded , the accused persons threatened to kill and on 27.05.2013 when the informant- Opposite Party No.2 demanded for his share, Kumar Shailendra Narain petitioner no.2) lifted his hand to assault him and Binod Yadav (petitioner no.3) abused him for which he is fearful for his life.

3. On the basis of the aforesaid written report of Opposite Party No.2 Naresh Prasad Sah dated 12.11.2013, East Colony P.S.Case No. 42 of 2013 had been registered by the police for the alleged offences under Sections 406 and 417 of the Indian Penal Code against the petitioners and one Basuki Paswan and thereafter the police started investigation of the case.

4. On completion of investigation of the case, the Police submitted final form in the court of Chief Judicial Magistrate, Munger

on 13.12.2013 vide Final Form Report No.43 of 2013 dated 30.11.2013 on the basis of lack of evidences in the case and thereafter the investigation of the case was closed by the police.

5. While the case was still under investigation, the Opposite Party No.2 had filed a protest petition in the court of Chief Judicial Magistrate, Munger on 28.11.2013 stating therein to keep the protest petition on the record and treat the same as complaint after submission of the police report.

6. Since the case had already been transferred by the learned Chief Judicial Magistrate to the court of learned Judicial Magistrate 1st Class, Munger, the learned Judicial Magistrate 1st Class, Munger accepted the final report submitted by the police in the aforesaid East Colony P.S.Case No. 42 of 2013 vide order dated 07.05.2013 and on the same date the protest petition dated 28.11.2013 filed on behalf of the Opposite Party No.2 in the police case had been converted into Complaint Case No.426-C of 2014. Thereafter, the statement of the complainant was recorded on solemn affirmation by the learned Magistrate under section 200 Cr.P.C. In course of enquiry, one Santosh Kumar has been examined as C.W.1, one Gautam Singh has been examined as C.W.2 and one Sunil Mandal has been examined as C.W.3 on behalf of the complainant-Opposite Party no.2 and thereafter vide impugned order dated 09.07.2014 the learned

Magistrate summoned the petitioners to face trial for the offences punishable under Sections 406 and 417 of the Indian Penal Code.

7. Mr. C.M.Chaurasia, learned counsel for the petitioners has submitted that as a matter of fact petitioner no.1 and his brother, namely, Dev Kumar Dutta are the only partners of M/s A.B. Construction and except them there is no other partner of the said firm and the Opposite Party No.2 is only the supplier of building materials, who supplied materials like cement, sand, bricks etc. to M/s A.B. Construction as asked by petitioner no.1 for supply of the said materials in the construction of the said ten rooms of Yantrik Niwas Hostel of Railway and petitioner no.1 has already paid the due amount of the Opposite Party No.2 with respect to the building materials supplied by him and there is no other dues of the Opposite Party No.2 with respect to the same against petitioner no.1 or against other petitioners of the instant case in any manner.

8. He has submitted that as a matter of fact, petitioner no.2, namely, Kumar Shailendra Narain is a Government employee and he is friend of petitioner no.1 and petitioner no.3, namely, Binod Yadav is the Supervisor of M/s A.B. Construction on monthly basis salary and petitioner no.4, namely, Mahendra Yadav is also a Government employee, who has got friendly relation with petitioner no.1 and all of them have been falsely implicated in this case by the Opposite Party

No.2 only in order to black-mail them on baseless ground, due to local dirty business politics in Jamalpur town. It is further submitted that the Opposite Party No.2 had neither filed any chit of paper or agreement of partnership firm or deed of partnership of M/s A.B. Construction before the Court in order to show that he is/was partner of the firm M/s A.B. Construction in any way.

9. He has contended that even during course of investigation in the police case lodged by the Opposite Party No.2 against the petitioners not a single witness came forward to depose before the police that Opposite Party No.2 was/is the partner of M/s A.B. Construction in any manner. It has further been submitted that from a bare perusal of the statement of Opposite Party No.2 on solemn affirmation and the statements of Complainant Witnesses Nos.1, 2 and 3 examined during enquiry conducted under section 202 Cr.P.C. by the learned Magistrate, it would appear that a general and omnibus allegation has been made against the petitioners and a case of purely civil nature has been maliciously given the colour of criminal case. He has contended that the Opposite Party No.2 himself has admitted in solemn affirmation in paragraphs 3 and 4 that there was no contract done between them and there was no agreement between the Opposite Party No.2 and the accused petitioners nor any document of contract was ever made between them. Similar statements have

been made by other enquiry witnesses examined under section 202 Cr.P.C.

10. Summing up his arguments, learned counsel for the petitioners has submitted that the foundational facts necessary in order to constitute the offences punishable under Sections 406 and 417 of the Indian Penal Code are clearly wanting in the present case and the order of summoning dated 09.07.2014 including the entire criminal proceedings initiated against the petitioners are not only an abuse of the process of the Court but also the same would be wastage of precious time of the Court.

11. On the other hand, Mr. Raj Kumar Chaudhary, learned counsel for the Opposite Party No.2 has submitted that the allegations made in the complaint do attract the ingredients of the offences punishable under Sections 406 and 417 of the Indian Penal Code. Since there was no proper and fair investigation by the Police, a protest petition was filed by the Opposite Party No.2 before the court of Magistrate.

12. He submitted that after the final form was accepted by the learned Magistrate, he separately registered the protest petition as a complaint. The complainant fully supported the allegations made in the complaint in his statement recorded on oath. The witnesses to the complaint duly corroborated the case of the complainant in their

statements recorded in course of enquiry conducted under Section 202 Cr.P.C. The allegations made in the complaint clearly attract the ingredients of the offences punishable under Sections 406 and 417 of the Indian Penal Code.

13. Learned counsel for the State has adopted the arguments advanced by the learned counsel for the Opposite Party No.2.

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

15. In a proceeding instituted with criminal content, exercise of inherent power to quash the proceeding is called for only in case where the complaint does not disclose an offence or is frivolous. It is well settled that the power under Section 482 Cr.P.C. should be sparingly invoked. It should be exercised to see that the process of law is not misused. The settled principle of law is that at the stage of quashing of the complaint, the High Court is not to embark upon an enquiry as to the probability, reliability or genuineness of the allegations made therein.

16. In ***Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi and others [(1976) 3 SCC 736]***, the Supreme Court has enumerated the cases where an order of Magistrate issuing process against the accused persons can be quashed or set aside, which are as under :-

> (1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out

> absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;
>
> (2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;
>
> (3) where the discretion exercised by the magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and
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> (4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

17. The Supreme Court pointed out that the cases mentioned are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings.

18. In ***Indian Oil Corporation v. NEPC India Ltd. and Others [(2006) 6 SCC 736]***, the Supreme Court has summarized the principles relating to exercise of jurisdiction under Section 482 Cr.P.C to quash complaints and criminal proceedings in paragraph 12 as under :-

> "12. The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few-*Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre (1988) 1 SCC 692, State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335, Rupan Deol Bajaj v. Kanwar Pal Singh Gill (1995)*

6 SCC 194, Central Bureau of Investigation v. Duncans Agro Industries Ltd (1996) 5 SCC 591, State of Bihar v. Rajendra Agrawalla (1996) 8 SCC 164, Rajesh Bajaj v. State of NCT of Delhi (1999) 3 SCC 259, Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. (2000) 3 SCC 269, Hridaya Ranjan Prasad Verma v. State of Bihar (2004) 4 SCC 168, M. Krishnan v. Vijay Singh (2001) 8 SCC 645 and Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque (2005) 1 SCC 122. The principles, relevant to our purpose are:

(i) A complaint can be quashed where the allegations made in 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 the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with the *mala fides*/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely

> necessary for making out the offence.
>
> (v) A given set of facts may make out; (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not."

19. Referring to the growing tendency in business circle to convert civil disputes into criminal cases, the Supreme Court in paragraphs 13 and 14 of the Indian Oil Corporation (Supra) held as under :-

> "13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged. In G. Sagar Suri vs. State of UP [2000 (2) SCC 636], this Court observed :
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> > "It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of

> criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."
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> 14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under section 250 Cr.P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may."

20. In ***State of Karnataka Vs. L. Muniswamy & Others [(1977) 2 SCC 699]***, the Supreme Court observed that the wholesome power, under Section 482 Cr.P.C. entitles the High Court to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The High Courts have been vested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into weapon

of harassment or persecution. The Supreme Court observed in this case that the ends of justice are higher than the ends of mere law though justice must be administered according to law made by the legislature. In paragraph 7 of the judgment, the Supreme Court held as under :-

> “7. The second limb of Mr. Mookerjee's argument is that in any event the High Court could not take upon itself the task of assessing or appreciating the weight of material on the record in order to find whether any charges could be legitimately framed against the respondents. So long as there is some material on the record to connect the accused with the crime, says the learned counsel, the case must go on and the High Court has no jurisdiction to put a precipitate or premature end to the proceedings on the belief that the prosecution is not likely to succeed. This, in our opinion, is too broad a proposition to accept. Section 227 of the Code of Criminal Procedure, 2 of 1974, provides that:
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>> If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.
>
> This section is contained in Chapter XVIII called "Trial Before a Court of Sessions". It is clear from the provision that the Sessions Court has the power to discharge an accused if after perusing the record and hearing the parties he comes to the conclusion, for reasons to be recorded, that there is not sufficient ground for proceeding against the accused. The object of the provision which requires the Sessions Judge to record his reasons is to enable the superior court to examine the correctness of the reasons for which the Sessions Judge has held that there is of is not sufficient ground for proceeding

against the accused. The High Court therefore is entitled to go into the reasons given by the Sessions Judge in support of his order and to determine for itself whether the order is justified by the facts and circumstances of the case. Section 482 of the New Code, which corresponds to S. 561-A of the Code of 1898, provides that:

> Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

In the, exercise of this whole some power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction."

21. In ***State of Haryana & Others Vs. Bhajan Lal & Others [1992 Supp(1) SCC 335]***, the Supreme Court in the backdrop of

interpretation of various relevant provisions of the Code of Criminal Procedure under Chapter XIV and of the principles of law enunciated in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 Cr.P.C., gave following categories of cases in paragraph 102 by way illustration wherein such power can be exercised, either to prevent abuse of the process of the Court or otherwise secure the ends of justice :-

> "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 extraordinary 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) xxxx xxxx xxxx
> (2) xxxx xxxx xxxx
> (3) xxxx xxxx xxxx
> (4) xxxx xxxx xxxx
>
> (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;
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> (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."

22. In ***Zandu Pharmaceutical Works Ltd. & Others Vs. Mohd. Sharaqful Haque and Another [(2005) 1 SCC 122]***, the Supreme Court observed in paragraph 8 as under :-

> "8. Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The Section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the

principle "quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest" (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

22. In ***Sagar Suri & Another Vs. State of U.P. & Others [(2000) 2 SCC 636]***, the Supreme Court observed that it is the duty and obligation of the criminal court to exercise great deal of caution in issuing processes particularly when matters are essentially of civil nature.

23. In ***Uma Shankar Gopalika v. State of Bihar [(2005) 10 SCC 336]***, in paragraph 6, the Supreme Court held as under :-

> "6. Now the question to be examined by us is as to whether on the facts disclosed in the petition of complaint any criminal offence whatsoever is made out much less offences under Sections 420/120-B IPC. The only allegation in the complaint petition against the accused persons is that they assured the complainant that when they receive the insurance claim amounting to Rs 4,20,000, they would pay a sum of Rs 2,60,000 to the complainant out of that but the same has never been paid. Apart from that there is no other allegation in the petition of complaint. It was pointed out on behalf of the complainant that the accused fraudulently persuaded the complainant to agree so that the accused persons may take steps for moving the Consumer Forum in relation to the claim of Rs 4,20,000. It is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In the present case it has nowhere been stated that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC."

24. Coming back to the facts of the present case, let it be noted once again that admittedly the complainant is not the partner of M/s A.B. Construction. According to him, petitioner no.1 Himadry Dutta is the owner of M/s A.B. Construction. According to the complainant himself, the contract work in question was allotted to M/s A.B. Construction by the Railways vide tender dated 23rd July,

2008 at the cost of Rs.28,65,105/-. He claims that the aforesaid tender work was done by the petitioners including the Opposite Party No.2 on the basis of 5% licensee commission on equal profits of the cost but after completion of the said tender work, he was paid Rs.4,85,594/- only vide Cheque dated 11.01.2010 and the accused persons did not distribute the amount received in reasonable or appropriate way in conspiracy to each other.

25. The short question which arises for consideration is as to whether or not even if the allegations made in the complaint petition on its face value are taken to be correct in its entirety constitute an offence.

26. In view of the allegations made in the complaint, I find that the dispute is only with respect to improper distribution of amount received from the Railway after completion of the work. Such an allegation may constitute breach of contract but the same would not give rise to an offence of cheating as there is no allegation of any deception played by the petitioners at the very inception. If the intention of cheating has developed later on, the same cannot amount to cheating or even criminal breach of trust.

27. Section 405 of the Indian Penal Code defines criminal breach of trust in the following words :-

> "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".

28. Following ingredients are necessary to attract the offence under section 405 of the Indian Penal Code :-

> (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.

29. A reading of Section 405 suggests that the gist of the offence of criminal breach of trust is dishonest misappropriation or conversion to own use another's property, which is nothing but the offence of criminal misappropriation defined under section 403 of the Indian Penal Code. The only difference between the two is that in respect of criminal breach of trust the accused is entrusted with the property with dominion or control over the property. As the title to the offence would suggest that entrustment of property is essential requirement before any offence undertakes place. The language of the

Section is very wide. In order to constitute legal entrustment, the complainant must be the owner of the property; there must be a transfer of possession; such transfer must be actual transfer and not fictional or notional one; such transfer should be made to some body, and such entrustment must be made to the person and not to a company or a firm. The word dominion connotes control over the property. However, in respect of partnership firms, though every partner has dominion, there should be specific entrustment of dominion which specifies the requirement of section 405 of the Indian Penal Code. Offence under section 405 of the Indian Penal Code can be said to have been committed only when all the essential ingredients have been found to be specified.

30. In the present case, the complainant had neither filed any chit of paper or agreement of partnership or deed of partnership while filing the complaint or being examined on oath or during the course of enquiry conducted under section 202 Cr.P.C. Neither the complainant nor his witnesses could produce any evidence to show that the complainant was in any way associated with M/s A.B. Constructions. The oral allegation that the amount so paid was not sufficient. Excepting the bald allegation that the petitioners did not make full payment to the complainant and that the petitioners conspired together and retained the amounts payable to the

complainant, there is no iota of allegation as to the dishonest intention in misappropriating the property. To make out a case of criminal breach of trust, it is not sufficient to show that the money has been retained by the accused. It must also be shown that the accused dishonestly disposed of the same or dishonestly retained the same. The mere fact that the accused did not pay money to the complainant does not amount to criminal breach of trust.

31. So far as section 417 of the Indian Penal Code is concerned, the same punishes the simplest case of cheating not otherwise provided for. This Section prescribes a penalty for the simple offence of cheating. The offence itself has been defined in Section 415 of the Indian Penal Code, 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**"."

32. To constitute an offence of cheating under section 415 of the Indian Penal Code, there must be (i) deception practiced upon a person; (ii) 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, (iii) 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.

33. A bare reading of Section 415 of the Indian Penal Code will indicate that a person deceives if he intentionally induces some other person to do or omit to do anything which he would not do if he were not so deceived. In such a case, he shall be guilty of the offence provided some damage or harm is caused to that person in body, mind, reputation or property. It would be evident from the reading of the aforesaid provision that it is only where a fraudulent representation leads to delivery of property, which is dishonestly retained, the ingredients of section 415 of the Indian Penal Code are established. The deception may be innocent or fraudulent. In case deception is innocent, it will constitute only civil wrong which may be dealt with by the civil courts. However, if the deception is fraudulent, the same would constitute cheating and can be dealt with by a criminal court.

34 In the present case, there is absolutely no allegation of dishonest inducement or fraudulent deception. The mere fact that the complainant suggests that he has not been paid the proportionate amount by the accused persons, the same would not amount to criminal breach of trust or cheating.

35 Keeping in mind the discussions made hereinabove, even if all the allegations in the complaint are taken at its face value as true, in my view, the basic essential ingredients of dishonest misrepresentation and cheating are completely wanting.

36 It is well settled that the criminal proceedings are not shortcut for other remedies. Since no case of criminal breach of trust or cheating is made out and the essential ingredients of section 405 and 415 of the Indian Penal Code are missing, the prosecution of the petitioners under Sections 406 and 417 of the Indian Penal Code is liable to be quashed.

37. Accordingly, the impugned order dated 09.07.2014 passed by the learned Judicial Magistrate 1st Class, Munger in Complaint Case No. 426-C of 2014 is hereby set aside. The application stands allowed.

(Ashwani Kumar Singh, J)

Pradeep/-

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