

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.2966 of 2014

Arising Out of PS.Case No. -10 Year- 2012 Thana -PATNA COMPLAINT CASE District- PATNA

=====

1. Dinesh Prasad Verma, Son Of Late Kashi Prasad Verma, Resident Of Mohalla - Kumhrar, P.S. Agamkuan, District - Patna
2. Chandi Verma, Wife of Dinesh Prasad Verma, Resident of Mohalla - Kumhrar, P.S. Agamkuan, District – Patna Petitioners

Versus

1. The State Of Bihar
2. Nagendra Kumar @ Narendra Kumar, S/Olate Ramji Mahto, Resident Of Mohalla - Kumhrar, P.O. Housing Colony Bahadurpur, P.S. Agamkuan, District – Patna Opposite Parties

=====

Appearance :

For the Petitioners : Mr. Rabi Bhushan Prasad No. 1, Adv.

For the State : Mr. Suresh Pd. Singh (App)

For opposite party no.2 : Mr. Vinod Pandey, Adv.

=====

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD
ORAL ORDER

8 18-04-2016 Heard the learned counsel for the petitioners, opposite party no. 2 and the State.

This is a petition for quashing the order, dated 28.09.2013, passed by the Additional Sessions Judge, VI, Patna City, in Criminal Revisional No. 579 of 2012, by which the revisional Court has quashed/set aside the order of Sri R.S. Pandey, Judicial Magistrate, 1st Class, Patna City, by which the complaint was dismissed under Section 203 of the Criminal Procedure Code with a direction to pass order afresh in accordance with law, in consequence the Magistrate has taken cognizance under Sections 406, 420 and 323/34 of the Penal Code, in pursuance of the order passed by the revisional Court.

The prosecution case as alleged in the complaint case that an agreement to sell 3 katha of land bearing khata no. 359, Tauzi no. 436, Thana no. 12, Revenue Survey no. 1419, Part 1420, Jamabandi no. 88/7109 entered into between the parties on a

consideration of Rs.18,25,000/- and rupees three lakhs was paid as part of the consideration amount.

The learned counsel for the petitioners submits that the agreement for sale was executed on 25.05.2011 and as per the agreement, accused persons and the petitioners were to measure the land and boundary and pillars are to be made at the costs of the complainant and it has been agreed to make available all the papers and, further, case is that the agreement was till the consideration is not fulfilled the period of agreement to sale shall continue and the complainant was required to pay the amount within the period agreed upon in the agreement to sale. The, further, case is that during the period specified, as per the agreement, the land was not got measured and pillar was not piled nor the papers regarding khatiyani receipts was made available and even when the complainant made a request, time and again, a notice was given on 04.10.2011 for which a conclusive reply was given. In a conspiracy, again, a notice was issued with regard to the reply, but, no answer was given to the notice, then, again, a notice was given on 17.11.2011, but, the same was returned in collusion with the postman and a reply of notice, dated 17.10.2011, was given that he has already measured the land and has handed the measurement map and receipts, which is wrong, hence, there is a fraud.

The complainant was examined on oath and other witnesses were also examined and, thereafter, a reasoned order was passed for disposal of the complaint under Section 203 of the Criminal Procedure Code.

The said order was challenged before the revisional Court and the revisional Court taking into consideration the fact



that there was agreement to sale and in consequence to the agreement, accused persons took rupees three lakhs towards advance with a certain condition laid down in the agreement which was ought to be performed by the accused persons before the execution of the sale deed. It has, further, been observed that the accused persons, as per the allegation failed to perform the conditions, in spite of repeated request of the complainant. The accused persons denied to return the advance and so there is sufficient prima facie material to perform the criminal intention of the accused persons, hence, the learned Magistrate exceeded jurisdiction to pass order afresh and in compliance of the order passed by revisional Court the impugned order passed by taking cognizance as the learned Magistrate have no alternative than to take cognizance holding the prima facie case.

The learned counsel for the petitioners has challenged the order of revisional Court alleging that there is allegation in the complaint that there was agreement to sell and in the said agreement there was agreement to do certain acts to measure the land and pile the pillar at the boundaries and assuming the same true it is utmost a case of breach of agreement and no criminal offence is made out.

It has been submitted that the allegation, made, does not make out a criminal a criminal case rather abuse of breach of contract and neither an offence under Sections 406 and 420 of the Penal Code is made out.

The learned counsel for opposite party no. 2, however, contends that there is specific allegation that there was breach of contract and the money was paid to the tune of rupees three lakhs, but, neither the content abide by nor money returned

and within the stipulated time of six months the complaint was filed. It has been submitted that the opposite party no. 2 is ready to pay the rest of the consideration money, as per the agreement to sale, the petitioners neither accepted the money to execute the sale deed nor returned the money taken in advance in agreement to sale to the tune of rupees three lakhs, hence, they have at the out set a criminal intention. Reliance has been placed on a decision reported in **2007(4) P.L.J.R., (SC) 148 (N. Devindrappa Vrs. State of Karnataka)**.

However, taking into consideration the allegation the learned counsel for opposite party no. 2 has not denied the fact that the petitioner has land for which he made an agreement to sell, but, the petitioners have not executed the sale deed or performed the act what is agreed upon as per the agreement to sale and to measure the land in presence of the petitioners and to hand over the land by executing a sale deed. However, the allegation is barely a breach of agreement, the allegation, made, neither makes out an offence under Section 406 of the Penal Code nor makes out a case for offence under Section 420 of the Penal Code.

Section 406 of the Penal Code is an offence punishable for criminal breach of trust. However, to make out a case for breach of trust there must be an entrustment of the property and the person holds the property in trust of the person for whom he is holding it any misappropriation of the said property will make out a case. However, it is alleged that rupees three lakhs was paid as a consideration money as per the agreement to sale. Since, the money was paid as a consideration money for agreement to sale it can well be said money given to the vendor was an entrustment rather it was sale proceed which could



have been spent. It can not be said that the property was said as entrustment as the money was paid as an agreement to sale and not entrustment for holding the property for the persons to give the money, then, vendor, the seller, was not keeping the money as an entrustment of the seller or vendee, hence, any use of the money it can not be said to be entrustment or misappropriation, hence, neither it was an entrustment nor a misappropriation as money was paid as a consideration for sale. Since, there was no entrustment as the money was paid as a consideration money, hence, there is no criminal breach of trust to attract Section 406 of the Penal Code, as alleged. So far the offence under Section 420 of the Penal Code is concerned, it is not a case that the petitioners have no land and they misdirected the complainant that the property belong to them and, then, took the money rather it is accepted or it is not disputed before this Court that the petitioners have got the land and they agreed to sell and since they did not execute the sale deed as they did not perform their duty to get the measurement of the land is only a breach of contract and no criminal offence is made out.

The learned counsel for the petitioners has placed reliance on a decision reported in **2007(4) P.L.J.R., (SC) 148** (supra), however, the fact of the case is quite distinguishable. Here under the facts and circumstances of the case it alleged that the appellant cheated the complainant dishonestly inducing him of rupees two thousand in cash to the appellant, assuring the said complainant to allot him a plot though the said property was not even the property of the appellant. Hence, it is apparent that the money was taken by deceiving that the property belongs to the appellant whereas the fact remains that the property did not belong



to the appellant, hence, the fact in the decision reported in **2007(4) P.L.J.R., (SC) 148** (supra) does not attract the facts and circumstances of this case, where the fact remains that the petitioners have the land for which they agreed to sell and the petitioners can get the land by filing the specific performance of contract, more over, the allegation, made that as per the agreement the land measured and got the pillar installed on it, hence, allegation, made, is only the breach of the agreement that the petitioners did not measure the land and did not get the pillar installed on it before the complainant, hence, the allegation, made, even taking it to be true on the face value of the allegation does not make out an offence, but, rather it only makes out a case of breach of contract, hence, no offence is made out either under Section 406 of 420 of the Penal Code in which the cognizance has been taken.

The learned counsel for opposite party no. 2, however, contends that the petitioners have challenged the order of the revisional Court after passing the order by the Magistrate taking cognizance in pursuance of the order passed by the revisional Court and the petitioners are only required to challenge the revisional Court's order before the order is passed by the Magistrate. However, taking into consideration the fact if the allegation, made in the complainant, does not make out an offence, then, allowing the order to taking cognizance continued will be misuse of the process of the Court. It is well settled that a person can be prosecuted only in accordance with law, however, if the allegation, made in the complainant, does not make out an offence, then, allowing the prosecution to be continued is a misuse of the process of the Court and Section 482 of the Criminal Procedure

Code provides that nothing in the Code of Criminal Procedure shall be deemed to prevent or effect the inherent power of the High Court to make such order as may be necessary to give effect to any order of this Court or to prevent the abuse of the process of the Court or otherwise to secure the end of justice, however, allowing the prosecution to continue when no offence is made out is only abuse of the process of the Court, then, in the interest of justice or to secure the end of justice it is prudent to interfere with the order.

Hence, I find and hold that since no offence is made out allowing the proceeding to continue is the abuse of the process of the Court and secure the end of justice, the order, impugned, i.e., the order of the revisional Court as well as the order of the Magistrate and entire proceeding are hereby **quashed** and this petition is **allowed**.

(Gopal Prasad, J)

SA/-

U	√	T	√
---	---	---	---