

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.29458 of 2013

Arising Out of PS.Case No. -90 Year- 1997 Thana -MOHAMMADPUR District- GOPALGANJ

1. Govind Prasad Jaiswal Son Of Late Raghav Choudhary Resident Of Polat Office & P.S. - Paroo, District - Muzaffarpur, Bihar - 843112

.... .... Petitioner/s

Versus

1. The State Of Bihar

.... .... Opposite Party/s

With

Criminal Miscellaneous No. 44222 of 2013

Arising Out of PS.Case No. -90 Year- 1997 Thana -MOHAMMADPUR District- GOPALGANJ

1. Md. Taufique Son Of Jamil Ahmad Resident Of Village- Jalalpur, P.S.- Basantpur, District- Siwan, At Present Posted As Block Development Officer, Sidhwalia Block, P.S.- Mohammadpur, District- Gopalganj

.... .... Petitioner/s

Versus

1. The State Of Bihar  
2. Ganesh Prasad, the then Sub-Divisional Officer, Gopalganj

.... .... Opposite Party/s

With

Criminal Miscellaneous No. 30755 of 2013

Arising Out of PS.Case No. -90 Year- 1997 Thana -MOHAMMADPUR District- GOPALGANJ

1. Anil Kumar @ Anil Prasad Son Of Sri Shiojee Prasad R/O Village-Mushehari, P.S. Jamo Bazar, District-Siwan The Then Posted As Junior Engineer, Barauli Block At & P.O.-&P.S.-Barauli, District Gopalganj, Presently Posted As Junior Engineer, Rwd, Works Division, Mohania, Distt-Kaimur At Bhabhua

.... .... Petitioner/s

Versus

1. The State Of Bihar

.... .... Opposite Party/s

Appearance :

(In Cr.Misc. No.29458 of 2013)

For the Petitioner/s : Mr. Dhananjay Kumar, Adv.  
: Mr. Chandra Shekhar Singh, Adv.

For the Opposite Party/s : Mr. Jharkhandi Upadhyay, (App)

(In Cr.Misc. No.44222 of 2013)

For the Petitioner/s : Mr. Ashish Giri, Adv.  
For the Opposite Party/s : Mr. Jharkhandi Upadhyay (App)

(In Cr.Misc. No.30755 of 2013)

For the Petitioner/s : Mr. Hemant Kumar, Adv.

: Mr. Anil Kumar, Adv.

For the Opposite Party/s : Mr. Jharkhandi Upadhyay (App)

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

ORAL JUDGMENT

**Date: 29-11-2016**

These applications have been filed under Section 482 of the Code of Criminal Procedure (for short 'Cr.P.C.') for quashing the order dated 24<sup>th</sup> May, 2013 passed by the learned Judicial Magistrate 1<sup>st</sup> Class, Gopalganj in G.R. No. 2098 of 1997/ Trial No. 712 of 2013 arising out of Mohammadpur P.S.Case No. 90 of 1997 by which the petitions for discharge filed by the petitioners under Section 239 of the Cr.P.C. have been dismissed.

2. The aforesaid case was instituted on the basis of the written report of Sub Divisional Officer, Gopalganj dated 27<sup>th</sup> November, 1997 addressed to the Officer-in-Charge, Sidhwalia Police Station, Gopalganj. It has been alleged in the written report that on 28<sup>th</sup> October, 1997 the lintel of the partially constructed building of Primary School, Sidhwalia, Karimpur fell down as a result of which one child, namely, Dinesh Patel died. On the direction of the Deputy Development Commissioner, Gopalganj, the informant Sub Divisional Officer, Gopalganj made inspection of the said building on 8<sup>th</sup> November, 1997. He learnt from the villagers that in the partially constructed building of the school the children including



Dinesh Patel had gone to play in the evening at the time of sunset. While he was playing in the school building, the lintel over the window fell down as a result of which Dinesh Patel died. It further transpired during inspection that the building was being constructed under Scheme No.5 of 1996-97. The estimated money to be spent for the said construction was Rs.75,000/- out of which the agent Bhagya Narayan Ram was granted Rs.7,500/- by way of first installment of advance. Subsequently, he was paid Rs.15,000/- as second installment of advance. It is also stated in the FIR that in another Scheme being Scheme No. 6 of 1996-97, another room was being constructed by another agent Nand Kumar Singh for the estimated cost of Rs. 69,800/- and the said agent was also paid Rs.22,500/- by way of advance in two installments like the agent Bhagya Narayan Ram. Both the Schemes, i.e. Scheme No.5 of 1996-97 and Scheme No.6 of 1996-97 were under the Jawahar Rojgar Yojna. It also transpired that one wall was common of the ongoing two rooms under construction and the room, which was being constructed by the agent Bhagya Narayan Ram, fell down as a result of which Dinesh Patel, the boy, died.

3. It has been further alleged that during the course of spot inspection of the room constructed under the first Scheme, it was found that Bhagya Narain Ram had not put the lintel on the entire



wall and it was done only above the door and window and above that no wall was constructed. It is further alleged that had the wall been constructed and lintel was constructed throughout the wall, the incident could have been avoided. Lastly, it has been alleged that the said Scheme has not been supervised by the Junior Engineer, Assistant Engineer and the Block Development Officer otherwise the accident would not have occurred.

4. On the basis of the aforesaid written statement after institution of FIR, investigation was conducted and on completion of investigation, a report under Section 173(2) of the Cr.P.C. vide Charge-sheet No. 64 of 2005 dated 28<sup>th</sup> June, 2005 was filed before the Magistrate whereby the petitioners were sent up for trial. Thereafter, the learned Magistrate took cognizance of the offences and proceeded for framing of charges.

5. At the stage of framing of charge, the petitioners filed their respective applications under Section 239 of the Cr.P.C. for discharge but all the three applications were dismissed by a composite order on 24<sup>th</sup> May, 2013. The said order dated 24<sup>th</sup> May, 2013 is under challenge in the present application.

6. At the relevant time, the petitioner Govind Prasad Jaiswal (Cr.Misc. No. 29458 of 2013) was posted as an Assistant Engineer in the National Rural Employment Programme (NREP),

Gopalganj, the petitioner Md. Taufique (Cr.Misc. No. 44222 of 2013) was posted as Block Development Officer, Gopalganj and the petitioner Anil Kumar @ Anil Prasad (Cr.Misc. No. 30755 of 2013) was posted as Junior Engineer in Sidhwalia Block, Gopalganj.

7. I have heard Mr. Dhananjay Kumar, learned counsel for the petitioner Govind Prasad Jaiswal, Mr. Ashish Giri, learned counsel for the petitioner Md. Taufique, Mr. Hemant Kumar, learned counsel for the petitioner Anil Kumar @ Anil Prasad and Mr. Jharkhandi Upadhyay, learned counsel for the State.

8. It has been contended on behalf of the petitioners that even if all the allegations made in the FIR and the materials collected during investigation submitted along with the charge-sheet are taken to be true, on the face of the record, no offence as alleged under Sections 409, 304-A and 288 of the Indian Penal Code (for short 'IPC') would be made out against the petitioners.

9. It has been contended that there is no allegation in the entire case diary regarding dishonest, misappropriation or conversion to their own use the amount advanced to the two agents under the two Schemes narrated in the FIR. It is further contended that admittedly the child Dinesh Patel died on 28<sup>th</sup> October, 1997, but no FIR was lodged in respect of his death either by his parents or family members or any villagers. The body was not even sent for post-mortem



examination and after more than a month of the alleged incident an FIR has been instituted on 29<sup>th</sup> November, 1997 wherein an allegation has been made that the death of the child was caused due to negligence of the agents, who were constructing the building, and the petitioners being the officers failed to properly supervise the alleged construction of the building under the Scheme.

10. It is contended that the offence under Section 304-A of the IPC would not be made out for the simple reason that there is no nexus between the death of the boy and the alleged negligent act of the petitioners. It is further contended that the offence under Section 288 of the IPC is also not attracted as there is no allegation in the FIR that there was any negligent act with respect to pulling down or repairing of any building.

11. Lastly, it has been contended that the petitioners being Government servant and the allegations so made related with discharge of official duties were protected under Section 197(1) of the Cr.P.C. as in a case like this a prior sanction was a condition precedent for prosecuting the petitioners and the same was not obtained.

12. Per contra, learned counsel for the State has submitted that at the stage of framing of charge, the court is not required to look into the defence of the accused. A threadbare analysis of facts is also



not required at this stage. The only requirement in law is that if upon consideration of the record of the case and the documents submitted therewith and after submission of the accused and the prosecution the court considers that there is sufficient ground for proceeding against the accused, it shall not discharge the accused. He has contended that there is definite allegation against the petitioners that they failed to supervise the execution of the work being conducted by the two agents and one Dinesh Patel died in an accident due to fall of *chhajja*. He has contended that it is the case of the prosecution that the construction being made by the agent Bhagya Narayan Ram was of inferior quality and because of that the *chhajja* collapsed. He has submitted that by now it is well settled that the question of sanction can be raised at the stage of final arguments as at that stage the court would be in a better position to adjudicate whether or not the act alleged to have been done by the accused persons were in discharge of official duty.

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

14. I find substance in the arguments advanced by the learned counsel for the petitioners. Admittedly, the construction work was going on. The incident took place when some children were playing in the building which was under construction. It was none of



the duty of the petitioners to prohibit the children from going inside the building, which was under construction. At best, the duty of the petitioners was related to technical supervision of the work. There is no material on record to suggest that any report of any technical expert was obtained by the investigating agency during investigation. There is also no report from any laboratory to show that the quality of the work was inferior. On query made by the Court, learned counsel for the State, after going through the case diary, has admitted that the investigating agency had not collected the sample of material and sent it to the government laboratory or any private laboratory to ascertain the proportion of material and also the quality of material used in the alleged construction work. Thus, the entire prosecution case is based on assumption and presumption of investigating agency that the work was not done properly or the work was not supervised properly. It is also pertinent to note here that out of a total amount of Rs.75,000/- for construction of a room, only Rs.22,500/- was advanced to the agent Bhagya Narayan Ram. The rest of the amount was yet to be paid and further construction was yet to be made and, at this stage, if some one has interfered with the construction as a result of which there has been collapse of *chhajja*, the blame cannot be fastened upon the officers, who were entrusted with the work of supervision. No where in the case diary it has been alleged that it was the duty of the

petitioners to pass order to guard against the probable danger to human life through fall of the building or any part thereof.

15. I also find substance in the argument of the petitioners that there is no material to attract the ingredients of the offences alleged.

16. In order to take cognizance of the offence punishable under Section 409 of the IPC, the following ingredients must be proved :-

- (1) The accused, a public servant or a banker or agent, was entrusted with the property of which he is duty bound to account for; and
- (2) The accused must commit criminal breach of trust in respect of the property entrusted.

17. What amounts to criminal breach of trust is provided in Section 405 of the IPC. The ingredients in order to constitute criminal breach of trust are,

- (1) Entrusting any person with property or with any dominion over the property;
- (2) That person entrusted (a) dishonestly misappropriating or converting to his own use that property, or (b) dishonestly using or disposing of that property or wilfully suffering any other person so to

do in violation-

- (i) of any direction of law prescribing the mode in which such trust is to be discharged, or
- (ii) of any legal contract made touching the discharge of such trust.

18. Similarly, there is no allegation that the petitioners in any way being entrusted with the property misused the same or defalcated the same for their own personal use. The only allegation against the petitioners is that they failed in their duty to supervise the ongoing construction of the rooms.

19. In my opinion, such an allegation would not attract the ingredients of the offence punishable under Section 409 of the IPC, which has been discussed in detail hereinabove.

20. In order to frame charge under Section 288 of the IPC, the essential ingredients are :-

- (1) The accused was pulling down or repairing any building; and
- (2) The accused omitted to take sufficient precaution to guard against the probably danger to human life from the fall of that building or any part thereof.

21. In the present case, admittedly, it was not the case where

the building was being pulled down or repairing was being done. It was a case where a room was to be constructed and hence there is no application of penal provision under Section 288 of the IPC.

22. Once this Court has expressed its opinion that in the given facts and circumstances of the case the ingredients of the offences punishable under Sections 409 and 288 of the IPC are not made out against the petitioners, the order taking cognizance of the offence punishable under Section 304-A of the IPC by the learned Magistrate cannot be sustained for the simple reason that there is no direct nexus between the alleged death of the boy and the alleged negligent act of the petitioners.

23. Since the only allegation against the petitioners is that they failed to supervise the work properly, the said inaction on the part of the petitioners was “while acting or purporting to act in the discharge of official duty”. It would certainly attract the provision of Section 197(1) of the Cr.P.C. requiring prior sanction. The petitioners have been made accused because they were posted in different capacity while doing their official duty. Under such circumstance, proper sanction for prosecution was a condition precedent for prosecuting the petitioners. Admittedly, no sanction has been obtained by the prosecution against the petitioners and, on that ground also, the very order of cognizance against them was bad in

law.

24. I find no substance in the submission of learned counsel for the State that the plea of lack of sanction can only be raised at the final stage of argument. Such a plea is available to the petitioners from stage to stage. If the court has not considered the question of want of sanction at the stage of taking cognizance, the petitioners would not be precluded from taking this point at the stage of framing of charge.

25. I also find substance in the argument of the petitioners that the entire case is based on hypothetical assumptions and presumptions. The death of Dinesh Patel took place on 28<sup>th</sup> October, 1997. No report in this regard was made to the police immediately after the occurrence either by the parents or by any resident of the locality. Even the police did not institute any case in this regard. The body of the deceased was disposed of even without any post-mortem examination. The FIR has been instituted after a lapse of more than one month on 29<sup>th</sup> November, 1997 by the Sub-Divisional Officer, who was neither present when the occurrence took place nor saw the body of the deceased.

26. In the opinion of this Court, it would be an abuse of the process of the Court to allow the prosecution to continue as against the petitioners where not only the allegations made do not constitute

the offences alleged against them, but the order of cognizance is also bad for want of necessary sanction.

27. In that view of the matter, the impugned order dated 24<sup>th</sup> May, 2013 passed by the learned Judicial Magistrate 1<sup>st</sup> Class, Gopalganj in G.R. No. 2098 of 1997/ Trial No. 712 of 2013 arising out of Mohammadpur P.S.Case No. 90 of 1997, as far as the petitioners are concerned, is set aside. The petitioners are discharged from prosecution in connection with G.R. No. 2098 of 1997/ Trial No. 712 of 2013 arising out of Mohammadpur P.S.Case No. 90 of 1997.

28. These applications stand allowed to the extent indicated above.

**(Ashwani Kumar Singh, J)**

Pradeep/-

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