

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.18507 of 2016

Arising Out of PS.Case No. -502 Year- 2011 Thana -MUZAFFARPUR TOWN District- MUZAFFARPUR

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SHAKTI VISHAL SON OF HARI SHANKAR PRASAD SINHA, RESIDENT OF
MOHALLA- MOTIJHEEL, P.S.- TOWN, DISTRICT- MUZAFFARPUR

.... PETITIONER/S

VERSUS

1. THE STATE OF BIHAR
2. SANJAY KUMAR LAL, SON OF SATY NARAYAN LAL, RESIDENT OF
VILLAGE- AYODHYA PRASAD LANE, MOTIJHEEL, P.S.- TOWN,
DISTRICT-MUZAFFARPUR

.... OPPOSITE PARTY/S

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Appearance:

For the Petitioner/s : Mr. Nachiketa Jha, Adv.
For the State : Mr. Raj Ballabh Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

CAV ORDER

Date: 20-08-2016

Petitioner who happens to be one of the accused of
Town P.S. Case No.502 of 2011, Trial No.175 of 2016 pending
before Sub-Judge, IXth-cum-A.C.J.M., Muzaffarpur is found
offended on account of refusal of his prayer so made under Section
239 Cr.P.C., vide order dated 22.01.2016, filed instant petition
challenging the same.

2. Sanjay Kumar Lal, O.P. No.2/complainant filed
complaint petition before the learned Chief Judicial Magistrate
alleging inter alia that as he along with his father succeeded in
getting sale deed in their favour relating to land bearing Khata
No.122, Khesra No.614(ka)(kha), Area 7 dhur vide sale deed dated
26.12.2007 as well as 16.01.2008, the accused persons became
aggrieved thereby whereupon entered into criminal conspiracy to

cause injury upon their legal right, got a *Mahadanama* executed by Chameli Devi, wife of Keshavchandra Aadak relating to the aforesaid land in name of Vishwanath Prasad (Father) and on account thereof Town P.S. Case no.450 of 2009 was registered.

Subsequently thereof, proceeding ahead under aforesaid criminal design, the accused persons conspired whereunder accused Harishankar Prasad got sale deed in favour of his daughter-in-law, Sudha Devi, wife of Suraj Kumar (Kaju) on 26.02.2010 from aforesaid Chameli Devi, wife of Keshavchandra Aadak. Then thereafter, status of the parties has been disclosed. Apart from this, the order passed under Cr.W.J.C No.1080 of 2009 had also been referred.

3. The learned Chief Judicial Magistrate sent the aforesaid complaint to the concerned P.S. for registration and investigation according to Section 156(3) of the Cr.P.C. whereupon Town P.S. Case No.502 of 2011 was registered and proceeded with investigation. After completing the investigation, police had submitted charge sheet. Accordingly, cognizance was taken and after supply of police paper in terms of Section 207 Cr.P.C., the proceeding came up for framing of charge and at that very stage, a petition under Section 239 Cr.P.C. was filed on behalf of petitioner which has been rejected by the learned lower court by the order impugned, hence this petition.

4. It has been submitted on behalf of petitioner that even at the stage of framing of charge, the court is duly empowered to see that the litigation having going on amongst the parties primarily happens to be civil in nature, giving a civil cause on



account thereof, instead of rejecting prayer of the petitioner should have dropped the proceeding discharging the accused persons. Furthermore, it has also been submitted that both the parties are close relative and on account of land dispute, the parties developed strain relationship as a result of which series of litigations both under civil suit as well as criminal proceeding are being fought. In the aforesaid background, instant proceeding could also been identified as malicious prosecution whereupon, the learned lower court should have discharged the accused persons.

5. It has further been submitted that so many persons have been arrayed as an accused including the petitioner but, the complainant failed to pinpoint the conduct of the petitioner during commission of the alleged crime and that being so, petitioner should have been discharged. It has also been submitted that there happens to be complete absence of material to suggest that petitioner also actively participated during course of commission of the crime that means to say during course of execution of the sale deed at the end of Chameli Devi in favour of Sudha Devi. In its continuity, it has also been submitted that though petitioner happens to be Debar of Sudha Devi but on account thereof, it could not be said that petitioner by virtue of aforesaid sale deed had wrongful gain rather it happens to be Sudha Devi who could be held accountable for the same.

6. Then it has been submitted that unless and until genuineness of aforesaid sale deed is decided by a competent court, instant proceeding would not survive. The complainant/O.P. No.2 instead of filing instant criminal prosecution would have filed

civil suit for declaration that the aforesaid sale deed happens to be inoperative on account of being forged and fabricated and further, having a decree to defeasance, then in that event only would have a ground to file a criminal case. Because of the fact that criminal court has got no power to annul any document and in likewise manner to decide the status/competency of a vendor on account thereof, criminal prosecution was not at all desirable.

7. In likewise manner, it has also been submitted that the document in question could not be said to be forged and fabricated because of the fact that it was not at all executed by impersonating anybody. Document is found executed by Chameli Devi who shown her status having share in the property, therefore, unless and until there happens to be decree of the civil court regarding her status only then it could be said that the document has been prepared to cast cloud over legal right of the complainant. Therefore, no offence relating to creation of document could survive and that being so, the order impugned happens to be bad in the eye of law as well as on facts.

8. The learned Additional Public Prosecutor opposed the prayer and submitted that whatever grounds have been raised at the present moment needs trial and for that, the learned lower court rightly rejected the prayer of the petitioner for discharge.

9. Wrongful gain is defined under Section 23 of the IPC along with wrongful loss, gaining wrongful, losing wrongful along with other allied section being interconnected are quoted below:

“23. “Wrongful gain”.—“Wrongful gain” is gain by unlawful means of property to which the person gaining is not legally entitled.

“Wrongful loss”.—“Wrongful loss” is the loss by unlawful means of property to which the

person losing it is legally entitled.

Gaining wrongfully, losing wrongfully.—A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

24. “Dishonestly”.—Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing “dishonestly”.

25. “Fraudulently”.—A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

26. “Reason to believe”.—A person is said to have “reason to believe” a thing, if he has sufficient cause to believe that thing but not otherwise.

29. “Document”.—The word “document” denotes any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.”

10. After going through the same, it is evident that if an Act is committed with an intention to have wrongful gain simultaneously putting a person to wrongful loss and further, by an unlawful means the property is gained by a person which, that person happens to be not legally entitled to, attracts the wrongful gain and such wrongful gain happens to be with a fragrance of dishonesty. Furthermore, the act by which a person, knowingly that he is not at all legally entitled to indulge with an act to have wrongful gain and during course thereof, to put the another person, is an activity which is found de-recognizable under eye of law and for that he is to be legally liable.

11. Now, the facts of the case is to be seen. A Mahadanama was brought into existence at the instance of accused persons allegedly at the end of Chameli Devi for which a criminal prosecution was already instituted. Subsequently thereof,

a sale deed followed. Furthermore, Mahadanama was in name of Bishwanath Prasad while the sale deed happens to be in name of Sudha Devi, wife of one of grand son. So, from the activity of the accused persons, as indicated above, suggest creation of sale deed with malafide intention to cast shadow over the right of informant relating to property which they acquired.

12. Every act could be perceived giving rise to civil cause as well as criminal cause. It is not that merely civil cause is made out, therefore, criminal prosecution would to allowed to halt. During course of consideration, the basic feature of the allegation has to be seen whereunder, it happens to be knowledge or intention of the parties which commands the future action as well as which speaks a lot with regard to its appreciation, whether in the facts and circumstances of the case it has got the ingredients of the civil cause or the criminal cause. However, at the present stage the same is not at all warranted. The only requirement happens to be of consideration whether the charge happens to be groundless and for that the court is forbidden to conduct roving enquiry.

13. In ***Ram Prasad Poddar and others v. The State of Maharashtra*** reported in ***A.I.R. 1972 SC 545*** it has been held:-

“Though at the bar of this Court as also in the High Court considerable arguments and discussion centered round this point, in our opinion the construction and meaning of this section so far as relevant for our purpose does not present any difficulty. Under sub-section (2), if upon consideration of all the documents referred to in Section 173, Criminal P.C. and examining the accused, if considered necessary by the Magistrate and also after hearing both sides, the Magistrate considers the charge to be groundless, he must discharge the accused. This sub-section has to be read along with sub-section (3), according to which,



if after considering the documents and hearing the accused, the Magistrate thinks that there is ground for presuming that the accused has committed an offence triable under Chapter XXI of the Code within the Magistrate's competence and for which he can punish adequately, he has to frame in writing a charge against the accused. Reading the two subsection together it clearly means that if there is no ground for presuming that the accused has committed an offence, the charges must be considered to be groundless, which is the same thing as saying that there is no ground for framing the charges. This necessarily depends on the facts and circumstances of each case and the Magistrate is entitled and indeed has a duty to consider the entire material referred to in sub-section (2). On the view that we have taken, we do not consider it necessary to refer to the various decided cases cited at the bar of this Court or discussed in the judgment of the High Court.”

14. In *Onkar Nath Mishra and Ors. v. State (NCT of Delhi) and Anr.* reported in (2008) 2 SCC 561 it has been held:

“11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.” (emphasis supplied)

15. In *State of Maharashtra & Ors. v. Som Nath Thapa and Ors.* reported in 1996 Cri.LJ 2448, it has been held:

“32.....if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge,

though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage.” (emphasis supplied)

16. In *State of Orissa v. Debendra Nath Pandhi*

reported in **(2005) 1 SCC 568** it has been held:-

“18. We are unable to accept the aforesaid contention. The reliance on Articles 14 and 21 is misplaced...Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the Object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police.

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23. As a result of aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused

has no right to produce any material..." (emphasis supplied)

19. Even in *Smt. Rumi Dhar v. State of West Bengal & Anr.* (2009) 6 SCC 364, reliance whereupon was placed by counsel for the appellants the tests to be applied at the stage of discharge of the accused person under Section 239 of the Cr.P.C., were found to be no different. Far from readily encouraging discharge, the Court held that even a strong suspicion in regard to the commission of the offence would be sufficient to justify framing of charges. The Court observed:

"17...While considering an application for discharge filed in terms of Section 239 of the Code, it was for the learned Judge to go into the details of the allegations made against each of the accused persons so as to form an opinion as to whether any case at all has been made out or not as a strong suspicion in regard thereto shall subserve the requirements of law."

17. In ***State of Tamil Nadu by Inspector of Police Vigilance and Anti-corruption v. N. Suresh Rajan and others with State represented by Deputy Superintendent of Police Vigilance and Anti-corruption v. K. Ponmudi and others*** reported in **(2014) 11 SCC 709** :

30. Reference in this connection can be made to a recent decision of this Court in the case of *Sheoraj Singh Ahlawat & Ors. vs. State of Uttar Pradesh & Anr.*, AIR 2013 SC 52, in which, after analyzing various decisions on the point, this Court endorsed the following view taken in *Onkar Nath Mishra v. State (NCT of Delhi)*, (2008) 2 SCC 561: "11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging there from, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that

offence."

18. Considering the nature of allegation, though having absence of individual activity, but conceiving conjoint effort at the end of all the accused whereunder document was prepared at least did not justify the prayer of the petitioner, at least for the present, for discharge in the background of principle so settled by the Hon'ble Apex Court, as referred above, whereupon prayer of the petitioner has rightly been rejected by the learned lower court.

19. That being so, the order impugned needs no interference whereupon, instant petition is rejected.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/ NAFR	AFR
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