IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.43001 of 2012

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Chetan Sinha @ Chetan Kumar Sinha, S/O Late Balram Prasad Sinha, resident of Sinha Niwas, Church Road, Chandwara, P.S.- Chandwara, District- Muzaffarpur

.... Petitioner/s

Versus

1. The State of Bihar
2. Shambhu Kumar Dahlan, S/O Late Kedar Nath Dahlan, Proprietor, Rahul Trade Concern Dahlan Chowk, Saharsa, P.S.- Saharsa, District- Saharsa

.... Opposite Party/s

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Appearance :
For the Petitioner/s : Mr. Satyavrat Verma -Advocate
For the Opposite Party/s : Mr. Parmeshwar Mehta- (A.P.P.)

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL ORDER

03 03-10-2016 Supplementary affidavit has been filed on behalf of petitioner, taken on record.

2. Heard learned counsel for the petitioner as well as learned Additional Public Prosecutor.

3. Petitioner is aggrieved by an order dated 06.01.2010 passed by the S.D.J.M., Saharsa in Complaint Case No.1257C of 2006 whereby and whereunder he along with others has been summoned to face trial for an offence punishable under Section 138 of the N.I. Act as well as under Section 420/34 and 406/34 of the I.P.C.

4. It has been contended on behalf of petitioner that his case along with case of co-accused Shivesh Kumar are similar in nature and because of the fact that order of cognizance against

Shivesh Kumar stood quashed under Cr. Misc. No.38594 of 2010, on account thereof, same treatment be also given to the petitioner.

5. Further elaborating his submission, the learned counsel for the petitioner has submitted that no offence under Section 138 of the N. I. Act is made out against the petitioner, because of the fact that cheque has not been issued by the petitioner rather it was issued by the Managing Director of the concerned firm. Apart from this, it has also been submitted that during course of such activity, petitioner's involvement was nowhere. Consequent thereupon, petitioner could not be held responsible with regard to issuance of cheque nor could be attracted under theme of vicarious liability and further, having been dishonoured to be prosecuted in terms of Section 138 of the N. I. Act.

6. Now, coming to Section 406 of the I.P.C., it has been submitted that being an employee of Jayanti Agro Foods (Pvt.) Limited, Delhi, he had simply approached the complainant in order to permit business of his company flourished and further, being convinced with the facts having been divulged at the end of the petitioner along with Shivesh Kumar, complainant entered into an agreement whereunder he was appointed as Stockiest and for that, the complainant had issued Bank Draft of Rs.4,00,000/- as well as cheque of Rs.2,00,000/-. It has also been submitted that

those documents were not in his individual name rather it was in favour of company that means to say, Jayanti Agro Foods (Pvt.) Limited, which as is evident from subsequent averments, never been retained by the petitioner rather same was handed over to company. Because of the fact that cheque was not encashed, therefore, the aforesaid cheque was returned back while the Bank Draft was deposited and credited to the account of the company for which, cheques were issued by the company on account thereof, no entrustment was there rather entrustment was in favour of the company and petitioner only happens to the carrier. Therefore, in worst case, considering that there was case of entrustment, it was against the company and not against the petitioner.

7. It has further been submitted that in likewise manner, no offence under Section 420 of the I.P.C. is made out because of the fact that petitioner had not misrepresented with deceptive way in order to cheat the complainant. He had, as being engaged by the Jayanti Agro Foods (Pvt.) Limited as Sales Officer, visited the place of complainant, disclosed terms and conditions of the company and further, in business term, requested to become Stockiest which, complainant agreed. Consequent thereupon, the event having been narrated at the end of the complainant would not attract complicity of petitioner in the

background of the fact that neither petitioner had any sort of illegal gain nor, as is evident from the complaint petition, made or represented himself in deceptive manner. Furthermore, the complaint petition itself discloses that petitioner had handed over cheque, which was not encashed.

8. So, it has been submitted that as the petitioner has been identified as an accused only being an employee of Jayanti Agro Foods (Pvt.) Limited and on that very basis, the prosecution against the petitioner would not survive. Moreover, it has also been submitted that from the plain narration of the complaint petition, it is evident that whatever dispute still persists that happens to be in between the parties having fragrance of civil wrong whereupon civil suit would lie. It has also been submitted that petitioner had already left the company in the Year 2006 itself. That being so, the order of cognizance is fit to be set aside and for that, he relied upon ***2016 (3) P.L.J.R. 949***.

9. Learned Additional Public Prosecutor opposed the prayer and submitted that for the purpose of taking cognizance, the Court has to see only prima facie material which, the learned lower Court had perceived during course of taking cognizance of offence. Therefore, the order impugned needs no interference.

10. In order to properly appreciate the submission having been made on behalf of rival parties, first of all, factual

matrix of the case is to be taken cared of. Opposite Party No.2 had filed complaint petition stating therein that he happens to be proprietor of Rahul Trade Concern where accused Shivesh Kumar and Chetan Sinha @ Chetan Kumar Sinha accused no. 4-5 came on 06.02.2006 and represented themselves to be representative of Jayanti Agro Foods (Pvt.) Limited and giving details of activities of their company, requested him to become Stockiest of company product "Royal Gold Kacchi Dhani Mustard Oil "for the Koshi range. Putting belief upon the offer having been made on their behalf, complainant had applied for becoming Stockiest and for that, issued Bank Draft of Rs.4,00,000/- as well as cheque of Rs.2,00,000/-. Subsequently thereof, he has been appointed as Stockiest and for that, relevant letters were issued. It has further been alleged that in spite of repeated request, the company had not supplied "Royal Gold Kacchi Dhani Mustard Oil" and from the conduct of the company, complainant had alleged that he was deceived as well as company had also indulged in criminal breach of trust. Subsequently thereof, it has also been disclosed that the cheque, which was issued to the accused, Shivesh Kumar and petitioner Chetan Sinha returned back to him after two months. Subsequently thereof, vide letter JAF/O0112/2006-07 dated 14.04.2006, four cheques each containing denomination of Rs.1,00,000/- issued by the company, was received with full assurance on presentation, it will be honoured which, in spite of presentation before the Bank twice, were dishonoured on account of insufficient fund whereupon lastly prosecution has been launched.

11. Relevant order relating to co-accused Shivesh Kumar passed in Cr. Misc. No.38594 of 2010 has been gone through. The grounds over which cognizance relating to Shivesh Kumar was quashed looks pertinent to be quoted below:-

> *"It has been submitted on behalf of the Petitioner that admitted position is that the Petitioner had not issued those cheques but was issued by the Managing Director, who is also an accused in the present Complaint.*
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> *Having considered the aforesaid, the application is allowed"*

12. The learned counsel for the petitioner has submitted that the matter was elaborately argued, but what was incorporated in the order, that depends upon the wisdom of the Court. I do not wish to give any kind of opinion on that very score. Save and except that the facts of the case has not properly been dealt with at that very moment and so, with great respect, I differ myself with the aforesaid reasoning.

13. In ***Vijayander Kumar & others vs. State of Rajasthan & another reported in (2014) 3 SCC 389***, it has been

held:-

> ***"12****. Learned counsel for the respondents is correct in contending that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may also be available to the informant/complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint discloses a criminal offence or not. This proposition is supported by several judgments of this Court as noted in paragraph 16 of judgment in the case of Ravindra Kumar Madhanlal Goenka and Another vs. Rugmini Ram Raghav Spinners Private Limited (2009)11 SCC 529."*

14. Admittedly, petitioner had not issued cheque, which was dishonoured nor his involvement during course thereof, has been identified. That being so, Section 138 of the N.I. Act could not specifically attract against him.

15. With regard to Section 406 of the I.P.C., petitioner himself along with Shivesh Kumar to be Representative of Jayanti Agro Foods (Pvt.) Limited presented and on behalf of Jayanti Agro Foods (Pvt.) Limited received the Bank Draft as well

as cheque after having induced the complainant to part with the same under guise of being appointed as Stockiest for carrying out business relating to "Royal Gold Kacchi Dhani Mustard Oil." That means to say, the entrustment was for the purpose of supply of "Royal Gold Kacchi Dhani Mustard Oil." When the aforesaid item was not supplied, then in that event, whether it could be considered as breach of trust, and for that, let the definition prescribed under Section 405 of I.P.C. be seen:-

> *"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 wilfully suffers any other person so to do, commits "criminal breach of trust". 1[Explanation 2[1].—A person, being an employer 3[of an establishment whether exempted under section 17 of the Employees' Provident Funds and*

Miscellaneous Provisions Act, 1952 (19 of 1952), or not] who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.] 4[Explanation 2.—A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of *the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.*

16. From plain reading of Section 405 of I.P.C., different mode of entrustment is found duly identifiable out of which, one of them happens to be in any manner entrusted with property. The 2nd leg of ingredient happens to be with regard to have dishonestly misappropriated the property or converted to his own use the property which was so entrusted or the same was in violation of any direction of law prescribing the mode in which such trust was to be discharged.

17. When it comes to the turn of Section 406 I.P.C. for that, it would be seen whether there was entrustment or dominion over the property and secondly either the same has been misappropriated or dishonestly converted to its own use, or disposed of contrary to direction having prescribed under law.

18. In ***Ram Narayan Popli vs. Central Bureau of Investigation reported in (2003) 3 SCC 641***, it has been held:-

"363. *The term "entrustment" is not necessarily a term of law. It may have different implications in different contexts. In its most general signification all it imports is the handing over* *possession for some purpose, which may not imply the conferring of any proprietary right at all."*

19. Now, coming to facts of the case, it is apparent that on the pretext of being appointed as Stockiest relating to carry on business "Kachi Ghani Mustard Oil" entrusted the petitioner and Sarvesh Kumar Bank Draft of Rs.4 lacs as well as cheque of Rs.2 lacs, which was subsequently returned. Being appointed as Stockiest, it was expected at the end of accused to have delivered the goods for being marketed through the petitioner which never occurred. That being so, the entrustment having been made for the aforesaid purpose was not at all performed in such manner rather converted it to its own use contrary to mode of entrustment and that being so, would come within the purview of Section 406 of I.P.C.

20. Then, coming to Section 420 of the I.P.C. As per Section 415 of the I.P.C. whereunder cheating has been defined, the same has to be taken note of and for that, same is quoted below:-

*"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". Explanation.— A dishonest concealment of facts is a deception within the meaning of this section.

21. Therefore, to attract the ingredients of Section 415 I.P.C., it is evident that by an act of deception, the accused dishonestly or fraudulently induces that person to deliver property or to consent, or by such practice, the accused induces to do or omit to do, and by such activity, sustained or likely to sustain damage or harm in body, mind, reputation or property.

22. Cheating is punishable in terms of Section 417 I.P.C. Section 420 I.P.C. is basically based upon aforesaid theorem with an expansion requiring, there should be cheating and during such exercise, there should be dishonest inducement and lastly, the activity of accused should be with definite mens rea.

23. In ***Smt. Annu Sinha and others vs. the State of Bihar and another reported in 2016(3) P.L.J.R. 949***, relied upon by the learned counsel for the petitioner do carry the aforesaid

legal requirements for applicability of Section 406 I.P.C. as well as under Section 420 of the I.P.C. But, subsequently, it delve into the issue relating to facts of the case which happens to be with regard to Specific Performance of Contract relating to sell of the land for which parties have entered into an agreement after having part performance and then thereafter, resiled.

24. Now the facts of the case is to be perceived and further, it should be seen whether the ingredients thereof, for the purpose of tracing out prima facie case is made out or not? It is uncontroverted fact that petitioner along with Sarvesh Kumar represented themselves before the complainant as Representative of Jayanti Agro Foods (Pvt.) Limited. It is also uncontroverted that they persuaded the complainant to become Stockiest and succeeded to induce on that score whereunder complainant become Stockiest whereupon he handed over Bank Draft of Rs.4 lacs as well as cheque of Rs.2 lacs which was subsequently returned to them under allurement that being Stockiest, he will be in a position to earn a lot, which they (petitioner and Sarvesh Kumar) were knowing being employee of the firm, would not materialize. It is nowhere pleaded that there was breach of contract, rather the agreement was never relied upon. That means to say, on false pretext of agreement, petitioner and Sarvesh Kumar got bank draft as well as cheque knowing full well that

aforesaid agreement was only for deception whereunder they succeeded to induce the complainant to handover bank draft as well as cheque. So from their conduct, it is apparent that even during course of conversation, they were carrying mens rea to deceive the complainant whereunder they succeeded to procure Bank draft as well as cheque on account of inducement which they placed with pre-deceptive mind and the aforesaid event is found further fortified when cheque was issued which the company knew that it will never be honoured.

25. In ***Ganga Dhar Kalita vs. State of Assam and others reported in (2015) 9 SCC 647***, it has been held:-

> ***"9.*** *In Arun Bhandari v. State of Uttar Pradesh and others (2013)2 SCC 801, this Court has held that if the allegations in the First Information Report are not frivolous, mala fide or vexatious, it cannot be simply quashed for the reason that civil suit is also pending in the matter. Paragraphs 2, 3 and 33 of said case are reproduced below: - (SCC pp. 804-805 & 816)*
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> *"2. The factual score as depicted is that the appellant is a non-resident Indian (NRI) living in Germany and while*

looking for a property in Greater Noida, he came in contact with Respondent 2 and her husband, Raghuvendra Singh, who claimed to be the owner of the property in question and offered to sell the same. On 24-3-2008, as alleged, both the husband and wife agreed to sell the residential plot bearing No. 131, Block Cassia Fistula Estate, Sector Chi-4, Greater Noida, U.P. for a consideration of Rs 2,43,97,880 and an agreement to that effect was executed by Respondent 3, both the husband and wife jointly received a sum of Rs 1,05,00,000 from the appellant towards part-payment of the sale consideration. It was further agreed that Respondents 2 and 3 would obtain permission from the Greater Noida Authority to transfer the property in his favour and execute the deed of transfer within 45 days from the grant of such permission.

3. As the factual antecedents would further reveal, the said agreement was executed on the basis of a registered agreement executed in favour of Respondent 3 by the original allottee, Smt

Vandana Bhardwaj to sell the said plot. After expiry of a month or so, the appellant enquired from Respondent 3 about the progress of delivery of possession from the original allottee, but he received conflicting and contradictory replies which created doubt in his mind and impelled him to rush to Noida and find out the real facts from the Greater Noida Authority. On due enquiry, he came to know that there was a registered agreement in favour of the third respondent by Smt Vandana Bhardwaj; that a power of attorney had been executed by the original allottee in favour of Respondent 2, the wife of Respondent 3; that the original allottee, to avoid any kind of litigation, had also executed a will in favour of Respondent 3; and that Respondent 2 by virtue of the power of attorney, executed in her favour by the original allottee, had transferred the said property in favour of one Monika Goel who had got her name mutated in the record of the Greater Noida Authority. Coming to know about the aforesaid *factual score, he demanded refund of the money from the respondents, but a total indifferent attitude was exhibited, which compelled him to lodge an FIR at Police Station Kasna, which gave rise to Criminal Case No. 563 of 2009.*

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33. Applying the aforesaid parameters we have no hesitation in coming to hold that neither the FIR nor the protest petition was mala fide, frivolous or vexatious. It is also not a case where there is no substance in the complaint. The manner in which the investigation was conducted by the officer who eventually filed the final report and the transfer of the investigation earlier to another officer who had almost completed the investigation and the entire case diary which has been adverted to in detail in the protest petition prima facie makes out a case against the husband and the wife regarding collusion and the intention to cheat from the very beginning, inducing the appellant to hand over a huge sum of money to both of them. Their conduct of *not stating so many aspects, namely, the power of attorney executed by the original owner, the will and also the sale effected by the wife in the name of Monika Singh on 28-7-2008 cannot be brushed aside at this stage."*

10. *No doubt, where the criminal complaints are filed in respect of property disputes of civil in nature only to harass the accused, and to pressurize him in the civil litigation pending, and there is prima facie abuse of process of law, it is well within the jurisdiction of the High Court to exercise its powers under Section 482 of the Code to quash the criminal proceedings. However, the powers under the section are required to be exercised sparingly. In Kamaladevi Agarwal v. State of W.B. and others (2002) 1 SCC 555, this Court has observed as under: -(SCC pp. 559-60, para 7)*

"7. This Court has consistently held that the revisional or inherent powers of quashing the proceedings at the initial stage should be exercised sparingly and

> *only where the allegations made in the complaint or the FIR, even if taken at their face value and accepted in entirety, do not prima facie disclose the commission of an offence. Disputed and controversial facts cannot be made the basis for the exercise of the jurisdiction."*

26. Analyzing the facts of the case in consonance with the legal requirement coupled with the fact that for the present only prima facie material is to be seen, it is apparent that the order impugned needs no interference. Consequent thereupon, instant petition sans merit and is accordingly, rejected.

(Aditya Kumar Trivedi, J)

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