IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.23169 of 2014

Arising Out of PS.Case No. -156 Year- 2007 Thana -ARA NAGAR District- BHOJPUR

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1. Ashwini Kumar Gupta Son of Late Badri Nath Gupta R/o Chitra Toli Road, P.S. Ara Town in the District of Bhojpur. .... Petitioner/s

Versus

1. The State of Bihar
2. Surendra Prasad Son of Sri Triyogi Prasad R/o Village Mirganj, P.S. Ara Town, in the district of Bhojpur. .... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Akhileshwar Pd. Singh, Sr. Advocate
Mr. Prabhu Narayan Sharma, Advocate

For the State : Mr. Ashok Kr.(APP)

For Opposite Party No.2: Mr. Sanjay Kumar, Advocate
Mr. Rahul Nath, Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL ORDER

5 08-09-2016 Heard learned counsel for the petitioner as well as learned Additional Public Prosecutor along with learned counsel for the Opposite Party No.2.

2. Petitioner is aggrieved by an order dated 03.04.2014 passed by Namita Singh, Judicial Magistrate-1st Class, Bhojpur at Ara in connection with Ara Town PS Case No. 156/2007 whereby and whereunder prayer having been made on behalf of petitioner under Section 239 Cr.P.C. has been rejected.

3. It has been submitted on behalf of petitioner that from plain reading of the written report along with statement of the witnesses, it is apparent that there was no negotiation in between the petitioner and prosecution party. In likewise manner, it has also been submitted that money has not been paid either directly to the petitioner nor in his account. Prosecution party, just to coerce and further implicate all the family members, in order to

have wrongful gain, put an allegation against the petitioner that co-accused, Prakash Kumar Gupta who happens to be his full brother, had taken the informant to the place of petitioner where, it has been alleged that petitioner had assured to refund the amount whatever deposited as, they are not inclined to sell the land furthermore. The subsequent event, that informant was thrashed by the petitioner after having been abused, happens to be an after-thought story. Brushing aside the aforesaid allegation, it has been submitted that not even an iota of evidence has been collected by the Investigating Officer during course of investigation with regard to complicity of the petitioner during course of negotiation with regard to sale of the land in question nor his involvement has been exposed and so submitted that it is a fit case wherein petitioner should have been discharged.

4. In order to substantiate his plea that the story of depositing the amount in the account of Savitri Devi, aunt of petitioner is found not at all substantiated in the background of discloser having been under paragraphs-62 as well as 65 of the case diary whereunder the steps having been taken on behalf Investigating Officer to procure statement of the relevant account allegedly belonging to Savitri Devi has been sought for, it has been submitted that it is apparent that Account No. 28777 was not at all in the name of Savitri Devi lying at Punjab National Bank, however, from para-65 of the case diary, it is apparent that the

aforesaid account stood in the name of Savitri Devi at Central Bank of India and as per discloser under para-B thereof, it is evident that 200 Lacs (though appears to suspicious one) was credited in the account on 19.09.2003 through Cheque No. 801808 allegedly issued by the informant and further the aforesaid account was closed on 16.04.2004. Therefore, whatever activities have been alleged at the end of the petitioner nowhere stand in between and on account thereof, it is a fit case whereunder discharge of the petitioner could be ordered by setting aside the order impugned.

5. On the other hand, learned APP assisted by learned counsel for the O.P. No.2 has submitted that, prima facie, the matter in hand happens to be admitted at the end of the accused persons themselves and on account thereof, for the present, they cannot be allowed to raise the plea of discharge.

6. To substantiate such plea learned counsel for O.P. No.2 referred para-37 of the case diary which speaks with regard to filing of Title Suit No. 5/2004 by Sivitri Devi whereunder she had admitted that she had entered into negotiation with informant Surendra Prasad and in token thereof, had received substantial amount as earnest money.

7. Therefore, deception at the end of the prosecution party to squeeze money on false pretext of negotiation to sell the land is found exposed from their own conduct. Because of the fact that deception was in pre-planned manner, on account thereof, at

subsequent stage, Prakash Kumar Gupta, full brother of petitioner took the informant to the place of petitioner where he disclosed that henceforth, petitioner will be liable to return the amount as now the land will not be sold and the amount whatever been paid by him (informant) will be returned back. When the amount was not returned back, then in that event, repeated demand was made and during course thereof, the informant was abused and further was ousted by using criminal force. Therefore, such activities, on account of having been substantiated by the other witnesses as is itself evident from relevant paragraphs of the case diary, suggest that the charge against the petitioner is not at all found to be groundless whereupon, there happens to be non applicability of Section 239 of the Cr.P.C.

8. Considering the relevant judgment of the Hon’ble Apex Court whereunder a privilege has been provided in the background of litigation being under the commercial head, petitioner was requested at an earlier occasion whether he intends to return back the money as prima facie, payment is found duly supported with the statement of the bank incorporated under para 65 of the case diary as well as considering conduct by way of closing the account. Instead of being fair on that very offer, learned counsel for the petitioner insisted that as per allegation he was not at all present during course of negotiation and further, there happens to be no allegation at the end of prosecution that he

had received the amount, on account thereof, he does not want to entertain the privilege rather he should be discharged.

9. Charge is to be framed for an allegation having attracted against the accused attracting his independent activity as well as vicarious activity which may include as well as attract different heads such as abettor, conspirator etc. Furthermore, in terms of Section 223 of the Cr.P.C. joint trial of the accused having their presence during course of commission of the offence even at different stages under common trial is permissible.

10. So far applicability of Section 239 Cr.P.C. is concerned, it is abundantly clear that for the purpose of entertaining prayer of an accused to be discharged, the Court, after going through the material having placed in terms of Section 173 Cr.P.C. will have to form an opinion that those materials suggest the charge to be groundless. Consequent thereupon, the accused is to be discharged. It is needless to assert that while doing exercise on the above score, Court is not to have meticulous consideration of the same rather as held in ***Amit Kapoor v. Ramesh Chander*** as reported in ***(2012)9 SCC 460***, it should be subtrahend to prima facie case.

11. Now coming to the facts of the case, it is evident that there happens to be no discloser against him that he was involved during course of negotiation, receipt of money but, subsequent activity as alleged and having been substantiated by

the other witnesses gives implied presence as he was shown to be the person for return of the earnest money having been received by his brother in his presence, which never been resisted, and further even on repeated demand failed to repay and for that, the prosecution party was manhandled. That being so, submission having been raised on his behalf is found non tenable.

12. Accordingly, the instant petition is rejected.

(Aditya Kumar Trivedi, J)

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