

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.18291 of 2013

Arising Out of PS.Case No. -59 Year- 2004 Thana -SARAI District- VAISHALI(HAJIPUR)

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1. Ashok Kumar S/O Ram Karan Sah Resident Of Village- Akbar Malahi, P.S.- Sarai, District- Vaishali
 2. Ravindra Kuer S/O Late Ram Nagina Kuer Resident Of Village- Bhojpatti, P.S.- Sarai, District- Vaishali

.... Petitioner/s

Versus

1. The State Of Bihar
2. Akshaybat Kumar S/O Late Ramdhari Kuer Resident Of Village- Bhojpatti, P.S.- Sarai, District- Vaishali

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. S. Prasad, Adv.

For the Opposite Party/s : Mr. Md.Fahimuddin (App)

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL ORDER

3. 01-03-2016 Heard learned counsel for the petitioner as well as learned Additional Public Prosecutor.

In spite of appearance of opposite party no. 2, he is non-represent.

Petitioners are accused in G.R. case no. 1551/2004 pending before the learned lower Court which has been lodged at the behest of opposite party no. 2 Akshaybat Kumar putting an allegation that 32 decimals of land of R.S.P. no. 266 has been sold away by the petitioner Ravindra Kuer in favour of Ashok Kumar on 02.03.1998 which happens to be the land belonging to him. It has further been submitted that after coming to know about the

aforesaid sale deed, he took out certified copy on 29.09.2003 and have necessitated upon accused Ravindra Kuer to nullify the same which he refused, whereupon filed the case.

It is further evident that after submission of charge-sheet, cognizance was taken and then, the matter has been fixed for framing of charge at which stage the petition under Section 239 of Criminal Procedure Code has been filed at the end of the petitioners which has been rejected by the order impugned.

It has been submitted on behalf of the petitioners that learned lower Court failed to properly exercise the power during the course of appreciation of the plea made on behalf of the petitioners which, in case would have been considered, nullified the whole allegation.

To substantiate the same, it has been submitted that there was partition amongst the family members' whereunder 32 decimals of survey plot no. 266 has been allotted to the petitioner while remaining 32 decimals has been allotted to Nagdeo Kuer. That being so, opposite party no. 2 was not at all competent to make complaint because of the fact that after amicable partition, neither opposite party no. 2 happens to be a member of the joint family nor he has got any interest with regard to aforesaid R.S.P. no. 266.

Furthermore, it has also been submitted that the instant criminal case has purposely been filed in the background of the fact that for cancellation of a document only three years time is prescribed. The document is of the year 1998 and so, a title suit was expected at his end by 2001 wherein he failed and so, purposely filed instant criminal prosecution with ulterior motive.

It has further been submitted that even brushing aside the story of partition, then in that event all the family members should be construed consisting joint family wherein status of petitioner no. 1 happens to be co-sharer like opposite party no. 2 and in the aforesaid background, a co-sharer was entitled to transfer his share.

It has also been submitted taking into account the nature allegation, it gives out an out picturisation of civil dispute whereupon, by series of judicial pronouncement it has been held that whenever there happens to be civil dispute amongst the parties then, in that event, criminal prosecution should not be allowed to proceed. Hence, it has been submitted that learned lower Court was wrong in rejecting the prayer of the petitioner so made under Section 239 of the Criminal Procedure Code. Also relied upon 2009(4) PLJR (SC) page 99, 2011 (2) PLJR page 358.

Section 239 of the Criminal Procedure Code enables the

conditions whereunder accused is entitled to discharge. For better appreciation Section 239 is quoted below:-

239. When accused shall be discharged -
If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

From plain reading of Section 239 of the Cr. P.C. it is evident that at the relevant stage the Court is to consider the police report along with the materials so transmitted in terms of the Section 173 of the Cr. P.C. and further, in case so advisable may examine the accused and, after hearing both the sides whenever the Court finds the charge to be groundless, the accused is to be discharged.

That means to say there should be proper consideration of the materials having placed before the Court in terms of Section 173 of the Cr. P.C. and if the Court so desires, may have an opportunity to examine the accused. That means to say at that stage, even considering examination of the accused as consideration of documents at their end, its meticulous examination is forbidden until the documents happens to be an admitted one.

The aforesaid exercise is to be taken up in a manner as held by the Hon'ble Apex Court in **Sonu Gupta Vs. Deepak Gupta & Ors.** reported in **2015 PLJR (2) page 321 (SC)** relevant para 8.

It is also well settled that cognizance is taken of the offence and not the offender. Hence at the stage of framing of charge an individual accused may seek discharge if he or she can show that the materials are absolutely insufficient for framing of the charge against that particular accused. But such exercise is required only at a later stage, as indicated above and not at the stage of taking cognizance and summoning the accused on the basis of prima facie case. Even at the stage of framing of charge, the sufficiency of materials for the purpose of conviction is not the requirement and a prayer for discharge can be allowed only if the court finds that the materials are wholly insufficient for the purpose of trial. It is also a settled proposition of law that even when there are materials raising strong suspicion against an accused, the court will be justified in rejecting a prayer for discharge and in granting an opportunity to the prosecution to bring on record the entire evidence in accordance with law so that case of both the sides may be considered appropriately on conclusion of trial.

From the order impugned it is evident that learned lower Court had taken into account paragraphs 4, 6, 7, 8, 9, 10, 11 and 51 of the case diary in order to arrive at by creation of document in reference, informant has been put to wrongful loss.

Furthermore, the learned lower Court also observed that the grounds which has been raised at the present moment may be a

good ground in defense was not sufficient in terms of Section 239 of the Cr.P.C. for discharge.

In the background of a principle laid down by the Hon'ble Apex Court, as referred above, I do not see the instant petition to be maintainable and is accordingly rejected. However, this rejection will not cause prejudice to the interest of the petitioner while deciding the case on trial wherein the documents so placed will have a substantial impact.

Furthermore, as the instant case happens to be of the year 2004 on account thereof, the learned lower Court is directed to expedite the trial and conclude the same within nine (09) months from the date of receipt/production of this order. The stay granted by the order dated 07.05.2014 is hereby vacated.

(Aditya Kumar Trivedi, J.)

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