IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.28426 of 2014

Arising Out of PS.Case No. -24397 Year- 2014 Thana -PATNA COMPLAINT CASE District-PATNA

Sairun Nisha wife of Md. Hafeez, resident of Mohalla - Dariyapur, Koeri Tola, P.S. - Pirbahore, Distt. - Patna.

.... Petitioner

Versus

1. The State of Bihar
2. Md. Naseem Son of Late Abdul Shakoor, resident of Mohalla - Dariyapur, Bari Path, P.S. - Pirbahore, Distt. - Patna.

.... Opposite Parties

Appearance :

For the Petitioner/s	:	Mr. Alok Kumar Sinha, Advocate
		Mr. Binod Bihari Sinha, Advocate
		Mr. Indrajeet Bhusan, Advocate
For the State	:	Md. Ansural Haque, APP
For the Opposite Party No.2	:	Mr. Sanjeet Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
ORAL JUDGMENT
Date: 23-08-2017

Heard learned counsel for the petitioner, learned Additional Public Prosecutor for the State and learned counsel for complainant/opposite party no. 2.

2. This application under Section 482 of the Code of Criminal Procedure (for short 'Cr.P.C.') has been filed by the petitioner for quashing the order dated 03.02.2014 passed in Complaint Case No. 24397 (c) of 2014 by the learned Judicial Magistrate, 1st Class, Patna whereby finding a prima facie case to be made out under Sections 406 and 420 of the Indian Penal Code (for short 'IPC') against the petitioner, she has been summoned to face trial.

WEB COPY

3. The complaint case, in short, is that on 08.09.2013, the petitioner had executed an agreement for sale in favour of the complainant and an earnest amount of Rs.5 lakh was received by him on the day of execution of the agreement for sale and total consideration amount was mutually agreed on Rs.33.50 lakh for the piece of land and house measuring about 1.171 decimal constructed over plot no.1244 situated in Mouza-Dariyapur, Kutubuddin Lane, Koiri Tola, P.S.- Pirbahore, District- Patna.

4. As per terms and conditions, as laid down in the said agreement for sale, the complainant had handed over four cheques, each amounting to Rs.2.50 lakh. Thereafter, the complainant requested the petitioner to execute absolute sale deed in his favour, but the petitioner avoided to execute the same on one pretext or other and, lastly, she flatly refused to execute the sale deed. Hence, the present complaint was filed on 17.01.2014.

5. The complainant has been examined on solemn affirmation. In course of inquiry conducted under Section 202 of the Cr.P.C., three witnesses in support of the complainant were examined. After holding inquiry, the learned Judicial Magistrate, vide order dated 03.02.2014, summoned the petitioner to face trial for the offences punishable under Sections 406 and 420 of the Indian Penal Code. The said order is under challenge in the present

WEB COPY

application.

6. It is submitted by the learned counsel for the petitioner that the petitioner has falsely been implicated in this case with an ill motive and *mala fide* intention of the complainant to grab the property of the petitioner illegally. He has submitted that the contention of the complainant that he handed over four cheques amounting to Rs.2.50 lakh each bearing cheque nos. 009966, 009967, 611480 and 611482 to this petitioner on 03.10.2013 is completely false. He has submitted that no cheque was ever handed over to the petitioner nor any amount was ever credited to her account. He has further submitted that the falsity of the claim of the complainant would be manifest from the fact that in the complaint petition, the complainant has not given detail of the bank on which the cheques were drawn. He has further submitted that the complaint is silent about the fact that any amount was ever debited from the account of the complainant and credited to the account of the petitioner. He has submitted that it is true that agreement for sale in favour of the complainant was executed on 08.09.2013 and an earnest amount of Rs.5 lakh was received by the petitioner on the day of execution of the agreement for sale, but the remaining amount out of Rs.33.50 lakh was never paid to her. Thus, there was no question of executing absolute sale deed in favour of the

WEB COPY

complainant.

7. *Per contra*, learned counsel for the complainant has submitted that the evidence in respect of the payment of Rs.10 lakh to the petitioner by way of four cheques would be laid before the court in course of trial. He has submitted that the allegations made in the complaint clearly attract the ingredients of the offences under which cognizance has been taken. He has submitted that there is no illegality in the order passed by the learned Judicial Magistrate whereby the petitioner has been summoned to face trial.

8. Learned Additional Public Prosecutor for the State has adopted the submissions made by the learned counsel for the complainant.

9. I have heard learned counsel for the parties and perused the record.

10. In my opinion, the first and foremost question, which would arise in the present case is that even if the entire allegations made in the FIR are taken at their face value and accepted in their entirety, whether or not the ingredients of the offences punishable under Sections 406 and 420 of the IPC would be attracted.

11. Section 406 of the IPC prescribes punishment for criminal breach of trust. Section 405 of the IPC defines the offence of criminal breach of trust as under :

WEB COPY

> **“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 willfully suffers any other person so to do, commits "criminal breach of trust".”

12. A careful reading of Section 405 of the IPC shows that a criminal breach of trust involves the following ingredients:-

> (a) a person should have been entrusted with property, or entrusted with dominion over property;
> (b) that person dishonestly misappropriated or converted to his own use that property, or dishonestly used or disposed of that property or willfully suffered any other person to do so;
> (c) that such misappropriation, conversion, use or disposal was in violation of any direction of law prescribing the mode in which such trust was discharged.

13. It would, thus, appear that for the offences punishable

WEB COPY

under Section 406 of the IPC, the prosecution must prove :-

> (i) that the accused was entrusted with property or with dominion over it; and
>
> (ii) that he (a) dishonestly misappropriated it, or (b) dishonestly converted it to his own use, or (c) used it, or (d) disposed of it in violation of any direction of law prescribing the mode in which such trust was discharged.

14. The gist of the offence prescribed under Section 406 of the IPC is misappropriation done in a dishonest manner. The first part of the said offence involves the fact of entrustment, wherein an obligation arises in relation to the property over which dominion or control is acquired. The second part deals with misappropriation which should be contrary to the terms of the obligation which is created.

15. The offence punishable under Section 420 of the IPC reads as under :-

> **"420. Cheating and dishonestly inducing delivery of property.-**
>
> Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable

WEB COPY

> of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

16. The offence of cheating is defined under Section 415 of the IPC, which reads as under :-

> **"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"."

17. To hold a person guilty of cheating as defined under Section 415 of the IPC, it is necessary to show that the accused had fraudulent or dishonest intention at the time of making the promise with an intention to retain the property.

18. The question, whether failure to honour agreement to sell without their being any allegation of fraudulent or dishonest inducement having been made by the accused pursuant to which the

WEB COPY

complainant parted with money would constitute offence under Sections 406 and 420 of the IPC, is no more *res integra*.

19. In **Murari Lal Gupta vs. Gopi Nath Singh [(2005) 13 SCC 699]** the Supreme Court observed as under:

> "6. We have perused the pleadings of the parties, the complaint and the orders of the learned Magistrate and the Sessions Judge. Having taken into consideration all the materials made available on record by the parties and after hearing the learned counsel for the parties, we are satisfied that the criminal proceedings initiated by the respondent against the petitioner are wholly unwarranted. The complaint is an abuse of the process of the court and the proceedings are, therefore, liable to be quashed. Even if all the averments made in the complaint are taken to be correct, yet the case for prosecution under Section 420 or Section 406 of the Penal Code is not made out. <u>The complaint does not make any averment so as to infer any fraudulent or dishonest inducement having been made by the petitioner pursuant to which the respondent parted with the money. It is not the case of the respondent that the petitioner does not have the property or that the petitioner was not competent to enter into an agreement to sell or could not have transferred title in the property to the respondent. Merely because an agreement to sell</u>

WEB COPY

> was entered into which agreement the petitioner failed to honour, it cannot be said that the petitioner has cheated the respondent. No case for prosecution under Section 420 or Section 406 IPC is made out even prima facie. The complaint filed by the respondent and that too at Madhepura against the petitioner, who is a resident of Delhi, seems to be an attempt to pressurize the petitioner for coming to terms with the respondent."
>
> (emphasis mine)

20. In **Nageshwar Prasad Singh alias Sinha Vs. Narayan Singh [(1998) 5 SCC 694]**, a similar question fell for consideration before the Supreme Court and a three Judge Bench relying upon illustration (g) of section 415 of the IPC held that the agreement for sale of land and the earnest money paid to the owner as part of consideration and possession of land and the subsequent unwillingness of the owner to complete the same gave rise to a liability of civil nature and the criminal complaint was not competent.

21. In **Dalip Kaur & Ors. Vs. Jagnar Singh [(2009) 14 SCC 696]**, the question for determination before the Supreme Court was whether breach of contract of an agreement for sale would constitute an offence under Sections 406 or section 420 of

WEB COPY

the IPC. After examining the facts of the case and the relevant sections of the IPC, the Supreme Court held that an offence of cheating would be constituted when the accused has fraudulent or dishonest intention at the time of making of promise or representation. A pure and simple breach of contract does not constitute the offence of cheating. It further held that if the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants by non-refunding the amount of advance, the same would not constitute an offence of cheating or criminal breach of trust.

22. Coming back to the facts of the present case, there is no averment in the complaint to infer any fraudulent or dishonest inducement having been made by the petitioner pursuant to which the complainant parted with the money. It is also not the case of the complainant that the petitioner does not have the property or that the petitioner was not competent to enter into an agreement to sell or could not have transferred title in the property to the complainant. Merely because an agreement to sell was entered into, which agreement allegedly the petitioner failed to honour, it cannot be said that the petitioner has cheated the complainant.

23. Thus, in view of the ratio laid down by the Supreme Court in **Dalip Kaur & Ors. vs. Jagnar Singh** (Supra),

WEB COPY

Nageshwar Prasad Singh alias Sinha vs. Narayan Singh (Supra) and **Murari Lal Gupta vs. Gopi Nath Singh** (Supra), I am of the considered opinion that at best, it is a pure and simple case of breach of contract, which would not attract the ingredients of the offences under Sections 406 and 420 of the Indian IPC.

24. In view of the foregoing discussions, the very order of cognizance is bad. Hence, summoning order dated 03.02.2014 passed by the learned Judicial Magistrate, 1^{st} Class, Patna in Complaint Case No. 24397 (c) of 2014 cannot be sustained. Accordingly, the application is allowed. The impugned order dated 03.02.2014 passed in Complaint Case No. 24397 (c) of 2014 by the learned Judicial Magistrate, 1^{st} Class, Patna and the entire subsequent proceedings arising therefrom are set aside.

(Ashwani Kumar Singh, J.)

Kanchan/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	28.08.2017
Transmission Date	NA

WEB COPY