IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.36142 of 2013

Arising Out of PS.Case No. -124 Year- 2009 Thana -SIWAN COMPLAINT CASE District-SIWAN

==

1. Hiraman Prasad, son of late Tilak Dhari Prasad, R/O Village-Phalpura, P.S.-G. B. Nagar (Tarwara), District-Siwan

.... Petitioner/s

Versus

1. The State of Bihar
2. Abhishek Kumar Gautam, son of Visheshwar Nath Singh, R/O Village-Baliya Patti, P.S.-G.B.Nagar, District-Siwan

.... Opposite Party/s

==

Appearance :

For the Petitioner/s : Mr. Sanjay Kumar Pandey, Advocate

For the Opposite Party/s : Mr. Uday Pratap Singh, APP

==

CORAM: HONOURABLE MR. JUSTICE SANJAY PRIYA

ORAL JUDGMENT

Date: 18-05-2017

1. This application under Section 482 of the Code of Criminal Procedure has been filed for quashing the order dated 15.07.2010 passed by the Judicial Magistrate, 1st class, Siwan, in Complaint Case No.C-124 of 2009 by which the learned Magistrate after holding enquiry has found *prima facie* case against the petitioner under Section(s) 409 and 120-B Indian Penal Code.

2. Opposite Party No.2-complainant filed Complaint Case No.1558 of 2004 against the petitioner and others on 14.10.2004 for the offence under Section(s) 419, 420, 467, 468, 471 Indian Penal Code. It was alleged by the Opposite Party No.2 in the complaint that a society in the name of SAMPOORNA SAKSHARTA AND GRAM SWARAJ SAMITI, SIWAN, was founded in the year 1992, for implementing the literacy schemes funded by the Central Government and the State Government. The aforesaid society has got its own memorandum of association and bye-laws (rules and regulations) for regulating its affairs. The Opposite Party No.2 has stated in the complaint that he has been associated with such society. The petitioner and other accused persons, under a conspiracy, embezzled a huge amount of money from the accounts of the society. It was stated in details as to how the money was illegally/fraudulently withdrawn and misappropriated.

3. The aforesaid complaint was sent under Section 156(3) Cr. P. C. for instituting a regular case, whereafter, Siwan Town P.S. Case No.166 of 2004 was instituted for investigation.

4. The police after investigation submitted final report in the case. A protest petition was filed by the Opposite Party No.2. The said Protest Petition was treated as complaint vide Complaint Case No.124 of 2009.

5. After enquiry under Section 202 Cr. P. C. in which the complainant gave his Solemn Affirmation and offered two witnesses on his behalf, the Court of the learned Judicial Magistrate, 1st class, Siwan, by order dated 15.07.2010 found *prima facie* case against the petitioner and others of the offences under Section(s) 409 and 120-B Indian Penal Code.

6. The aforesaid order dated 15.07.2010 is under challenge in this quashing application.

7. It has been submitted on behalf of the petitioner that the instant case lodged by the Opposite Party No.2 is totally malicious prosecution.

8. In order to appreciate the contention made on behalf of the petitioner, it is necessary to advert to certain facts.

9. For the implementation of national literacy mission, the society aforesaid was acting as "ZILA SAKSHARTA SAMITI" with the District Magistrate of the district as its Ex-officio President and some other officers as its members. One Bisheshwar Nath Singh (witness no. 1 in the protest-cum-complaint petition and father of opposite party no.2) was the officiating Secretary against whom there were charges of misappropriation of huge amount of money from the accounts of the society. Because of such charges, aforesaid Bisheshwar Nath Singh was removed from the post of the Secretary. The audit of the accounts of the committee revealed that money was siphoned off from the society at the instance of the aforesaid Bisheshwar Nath Singh. Several cases were lodged against him. They are being listed below:-

(i) Siwan Town P.S. Case No. 79 of 1999 in which charge sheet has been submitted against Bisheshwar Nath Singh,

(ii) Siwan Town P.S. Case No. 81 of 1999 (charge sheet submitted).

(iii) Siwan Town P.S. Case No. 202/2011 (charge sheet submitted).

(iv) Two certificate case for the recovery of the defalcation amount from Bisheshwar Nath Singh pending in the court of District Certificate Officer, Siwan.

10. It has been submitted that the petitioner is a witness in several cases lodged against father of the complainant, namely, Bisheshwar Nath Singh and, therefore, this complaint was lodged by the son of Bisheshwar Nath Singh as a counter blast. Father of the complainant, Bisheshwar Nath Singh, being Secretary of the aforesaid society was expelled from the society and several criminal cases and certificate cases, as mentioned above, were lodged against him.

11. Wife of Bisheshwar Nath Singh, namely, Smt. Reeta Singh has also lodged two complaint cases against the petitioner under several provisions of Indian Penal Code but those complaints were dismissed by the learned Magistrate.

12. The registered society, namely, "SAMPOORNA SAKCHHARTA EWAM GRAM SWARAJ SAMITI, SIWAN," was acting as the agency for implementation of different Mass Education and Adult Literacy Programs launched by the Directorate of Mass Education, Government of Bihar, Patna. When the SAMPOORNA SAKCHHARTA EWAM GRAM SWARAJ SAMITI, SIWAN, was declared as nodal agency for implementation of the Mass Education and Adult Literacy Programmes, constitution of the society was modified and the Collector of the District of Siwan was made an Ex-Officio President of the Samiti. The society above referred took the shape of

ZILA SAKSHARTA SAMITI, SIWAN.

13. During the period of 1998-99, when Shri Rashid Ahmad Khan was the District Magistrate of Siwan and the President of the Society, proper audit of the society accounts was done and it was found that the said Bisheshwar Nath Singh misappropriated roughly rupees twenty nine lacs prior to 1998.

14. Pursuant to different allegations, several First Information Report were lodged against the said Bisheshwar Nath Singh by Sri Brajesh Kumar Ojha, who was the then District Mass Education Officer-cum-Special Officer on Duty/Secretary to the society described above.

15. As stated above, the police after investigation found Siwan Town P.S. Case No.79 of 1999 instituted for the offence under Section(s) 409 and 420 Indian Penal Code, Siwan Town P.S. Case No.81 of 1999 instituted for the offence under Section(s) 419, 420, 409, 467, 468, 120-B Indian Penal Code, and Siwan Town P.S. Case No.202 of 2001 instituted for the offence under Section(s) 409, 420, 468, 471 and 477 Indian Penal Code true and submitted charge-sheet in those cases against accused Bisheshwar Nath Singh.

16. Bisheshwar Nath Singh, (father of the Opposite Party No.2) was acting as Secretary to society concerned at the material time and was expelled from the post of the Secretary of the society and in his place Sri Brajesh Kumar Ojha, who was its Mass Education Officer, was made Secretary to the society.

17. The petitioner, who is a superannuated Audit Officer of Co-operative Societies, Siwan, was called by the Collector, Siwan, at that time to be appointed as Cashier for smooth handling of the financial and accounting affairs of the society. The appointment of the petitioner was approved by the society and the then District Magistrate-cum-President of the society forwarded the signature of the petitioner to different banks with a remark that in view of Resolution No.6 dated 16.09.1998, it has been resolved that henceforth operation of the accounts of the SAMPOORNA SAKSHARTA EWAM GRAM SAMITI, SIWAN, will be done by the joint signature of the District Magistrate and the petitioner, Hiraman Prasad, in the capacity of Cashier of the society. (Annexure-1).

18. Father of the Opposite Party No.2 at that juncture approached the petitioner and made request to help him to hush up the cases lodged against him by manipulating some documents of the society concerned, which was refused by the petitioner.

19. As the petitioner did not yield to the illegal demand of Bisheshwar Nath Singh and went to the local police and District Court, Siwan, as a formal witness against Bisheshwar Nath Singh, this made Bisheshwar Nath Singh furious and he started harassing the petitioner in several ways.

20. First of all, wife of Bisheshwar Nath Singh, namely, Reeta Singh, filed two complaint cases against the petitioner as well as against the District Magistrate, District Mass Education Officer, Branch Manager of the State Bank of India and Chartered Accountant, who audited the accounts of the society, under different Sections of the Indian Penal Code. The cases filed by Smt. Reeta Singh were Complaint Case No.1712 of 2003 and Complaint Case No.1713 of 2003 before the Chief Judicial Magistrate, Siwan. Both these complaint cases were dismissed by the learned Court below. Thereafter, son of Bisheshwar Nath Singh, namely, Abhishek Kumar Gautam, filed the instant complaint case before the Chief Judicial Magistrate, Siwan, which was forwarded to the Police Station for institution of the First Information Report vide order dated 14.10.2004. On the basis of Complaint Case No.1558 of 2004, filed by the son of Bisheshwar Nath Singh, Siwan Town P.S. Case No.166 of 2004 was instituted and the petitioner was implicated as accused no.1. The police investigated the aforesaid case and found no evidence against the accused persons and submitted final report in the case as mistake of fact vide Annexure-6 and 7. In the meantime, the complainant filed Protest Petition in Siwan Town P.S. Case No.166 of 2004, which was treated as Complaint Case No. C-124 of 2009 after accepting Final Report and the learned

Magistrate proceeded in the aforesaid complaint for enquiry. During enquiry, only two witnesses were examined, namely, Abhishek Kumar Gautam, complainant and Bisheshwar Nath Singh, father of the complainant. Copy of the deposition of both the witnesses have been filed in this petition as Annexure-9 and 10. The Court below after enquiry found *prima facie* case by the impugned order dated 15.07.2010 for the offence under Section(s) 409 and 120-B Indian Penal Code.

21. Counsel for the petitioner has submitted that deposition of enquiry witnesses does not reveal any allegation against the petitioner. Entire case is silent on specific overt act committed by the petitioner, which may constitute offence under Section(s) 409 and 120-B Indian Penal Code. The petitioner has nothing to do with internal affairs of the society. The petitioner was having no decision making powers in the society. He was to maintain the accounts of the society under the orders of the District Magistrate, Siwan, who was the President of the Society and the District Mass Education Officer, Siwan, who was the Secretary of the society.

22. It has been submitted on behalf of the petitioner that earlier criminal prosecution against other co-accused of this case, namely, Jai Chandra Jha and Brajesh Kumar Ojha have already been quashed by a co-ordinate Bench of this Court vide order dated 11.08.2014 passed in Cr. Misc. No.17617 of 2011 and order dated

11.08.2014 passed in Cr. Misc. No.17356 of 2011 respectively.

23. Notice was issued to the Opposite Party No.2, which was duly served on him, but none appeared on his behalf at the time of hearing of this application.

24. Learned counsel for the State has appeared. He has stated that there is no illegality in the impugned order.

25. After considering the facts of the case and the submissions made on behalf of the parties, it appears to be appropriate to consider whether the prosecution against the petitioner is abuse of process of Court and simultaneously whether any offence has been made out against him on the basis of the statement of two witnesses for the offence under Section(s) 409 and 120-B Indian Penal Code.

26. Section 409 Indian Penal Code reads as follows:

> "409. Criminal breach of trust by public servant, or by banker, merchant or agent – Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with (imprisonment for life), or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

27. The essential ingredients of the offence are that the accused must be a public servant; he must have been entrusted in such capacity with property; and that he must have committed breach of trust in respect of that property.

28. The petitioner was appointed as Cashier in the society after he superannuated as Audit Officer of Co-operative Societies, Siwan. Appointment of the petitioner was approved by the Society and the then District Magistrate-cum-President of the society forwarded the signature of the petitioner to different banks with remarks that in view of Resolution No.6 dated 16.09.1998, it has been resolved that "henceforth operation of the accounts of the SAMPOORNA SAKSHARTA EWAM GRAM SWARAJ SAMITI, SIWAN, will be done by the joint signature of the District Magistrate and the petitioner, Hiraman Prasad, in the capacity of Cashier of the society."

29. Xerox copy of the letter dated 12.10.1998 has been annexed as Annexure-1.

30. In this manner, operation of the account of the Society was done by the joint signature of the District Magistrate and this petitioner.

31. From the perusal of statement of the complainant, Abhishek Kumar Gautam, on Solemn Affirmation, and the statement of another witness, Bisheshwar Nath Singh, (father of the complainant), it appears that they have stated that money has been withdrawn by the joint signature of the District Magistrate, Rashid Ahmad Khan, who was Ex-officio President of the Society and the petitioner, who was Cashier of the Society from 22.10.1998 to13.03.2002. Deposition of both the witnesses does not disclose any specific allegation against the petitioner.

32. The Hon'ble Supreme Court in the case of **State of Haryana Vs. Bhajan Lal** reported in **1992 Suppl. (1) SCC 335,** has very categorically defined guidelines for exercise of such powers under Section 482 and gave an exhaustive list of the circumstances where such powers could be used in paragraph 102 of the judgment. Entry – 7 of such list states that where a criminal proceeding is manifestly attended with *mala fide* and/or where the proceedings is maliciously instituted with an ulterior motive for *wreaking vengeance* on the accused with a view to spite him due to private and personal grudge.

33. The learned APP did not controvert the submissions made on behalf of the petitioner.

34. In such circumstances, after taking into consideration the facts and circumstances of the case, it appears to this Court that the instant prosecution has been launched against the petitioner by the complainant only with a motive for *wreaking vengeance* on the accused with a view to spite him due to private and personal grudge.

35. In view of such, this Court is of the view that continuance of the proceeding against the petitioner in the aforesaid facts and circumstances of the case would be abuse of the process of

Court and mere harassment to the petitioner.

36. Accordingly, the order dated 15.07.2010 passed by the Judicial Magistrate, 1st class, Siwan, in Complaint Case No.C-124 of 2009, by which the learned Magistrate after holding enquiry has found *prima facie* case against the petitioner under Section(s) 409 and 120-B Indian Penal Code including its entire criminal prosecution, is hereby quashed.

37. This application is, accordingly, allowed.

(Sanjay Priya, J)

J.Alam/-

AFR/NAFR	**AFR**
CAV DATE	**26-04-2017**
Uploading Date	**27-05-2017**
Transmission Date	**27-05-2017**