## IN THE HIGH COURT OF JUDICATURE AT PATNA

**Criminal Miscellaneous No.29629 of 2016**

Arising Out of PS.Case No. -1106 Year- 2016 Thana -PATNA COMPLAINT CASE District-PATNA

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1. Ms. Asiya Hussain, wife of Syed Arif Hussain, having permanent address at Bank Road, P.S.- Gandhi Maidan, P.O-G.P.O., District- Patna-800001, Bihar, currently residing in 15, Chemin DE Mollies, Bellevue 1293, Geneva, Switzerland.
2. Syed Sayeeduzzama Rizvi, son of late Syed Qamaruzzama Rizvi, residing at F-2601, Palam Vihar, P.S.- Palam Vihar, Gurgaon 122017 (Harynana).
3. Syed Shamshuzzama Rizvi, on of late Syed Qamaruzzama Rizvi, residing at 1750, Benjamin, Franklin Drive Unit 10F Sarasota, P.S.- Sarasota, Florida 34236 USA.
4. Md. Nurul Haque @ Md. Noor son of Md. Quasimuddin.
5. Md. Quasimuddin @ Md. Qasim @ Md. Kashim, son of late Mohammad Mohammuddin

   Both residents of village- Neora, P.S.- Bihta, District- Patna.

.... .... Petitioner/s

Versus

1. The State of Bihar
2. Syed Md. Najmuzzama @ Najamazzam, son of Md. Hashim, resident of C/o Khursheed Ahmad Opposite the House of Md. Musa Quraishi, Janu Gali, P.S.- Pirbahore, District- Patna.
3. Md. Arif Ansari, son of late Gulam Rasool, resident of village- Baro, P.S.- Phulwaria, District- Begusarai.

.... .... Opposite Party/s

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**Appearance :**

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| For the Petitioner/s | : | Mr. Ashish Giri,, Advocate. |
| For the State | : | Mr. Ajay Kumar No. 1, APP |
| For the O.P. No. 2 | : | Mr. Fakhruddin Ali Ahmad, Advocate. |

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**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR**

ORAL JUDGMENT

**Date: 29-11-2017**

Heard learned counsel for the petitioners, learned counsel for the State and learned counsel for the opposite parties.

2. The petitioners seek quashing of the cognizance order dated 10.05.2016 passed by the learned Judicial Magistrate, 1st Class, Patna in Complaint Case No. 1106C of 2016 thereby taking

cognizance of offence against the petitioners under Sections 406, 420 and 120B of the Indian Penal Code.

3. A brief fact giving rise to the case is that complainant-O.P. No. 2 entered into an agreement for sale with the petitioners no. 1 to 3, owners of the land, to purchase 07 acres land after payment of Rs. 16 crores, the consideration money. One of the conditions of the agreement was to make payment of Rs. Three crores to land owners as earnest money in advance by cheque and total consideration money was to be paid within 12 months but the complainant deposited only Rs. 51 lacs in the accounts of the accused persons through cheques received from their customers and gave post dated cheques of three crores. Complainant contacted the Manager of the land owners for measurement and demarcation of the land and also informed the accused no. 3, Asiya Hussain, at that time living in Switzerland to get the measurement work done and she assured to get the work done after her return. However, Rs. 11 lacs was paid to the Manager of the land owners. However, accused No. 3 returned back in the month of January, 2016 from Switzerland, but no information was given to the complainant. Lands were never measured and demarcated. The complainant was threatened on 05.02.2016 with dire consequences for making request for measurement and demarcation of the land. A legal notice was sent by the complainant to the vendors on 19.02.2016 and

also on 07.03.2016 requesting them to get the land measured, demarcated and to execute the sale deed. A vague reply of the notice was received on 06.03.2016 which shows that the vendors, land owners, had fraudulent and dishonest intention right from the inception of the agreement for sale.

4. Learned counsel for the petitioners submits that only Rs. 51 lacs was given to the petitioners no. 1 to 3 by transferring the said amount in their respective bank accounts, except that there was no any transaction made to the land owners moreover that amount was not paid by the complainant rather the same was transmitted from the account of some unknown persons, who were not the parties to the agreement. Petitioner no. 01 used to reside in Switzerland and petitioner no. 2 lives in Gurugram and petitioner no. 3 lives in Florida in USA and petitioners no. 4 and 5 are their relatives and local residents. It is further submitted that never Rs. Three crores was paid by the complainant through cheques, there is no such transaction or any transmission of the said amount in their bank accounts and the complainant never paid any amount after initially making payment of Rs. 51 lacs , out of total consideration amount of Rs. 16 crores. He submits that as per agreement clause, Rs. Three crores was to be paid as an earnest money in advance but no such amount was transmitted to the accounts of the land owners. The agreement for sale in between

the both parties executed on 28.02.2015 and as per Clause 5 of the said Agreement for sale, the vendee was required to pay the entire consideration money within the stipulated period of 12 months from the date its execution, otherwise advance money will be forfeited to the vendors and agreement terminated without giving any notice in that regard unless it is extended in writing.

5. Learned counsel further submits that Rs. 51 crores paid by complainant through his customers was returned back by R.T.G.S. to the respective persons who had transmitted the amount from their bank accounts because money was transmitted to the accounts of the petitioners from the accounts of unknown persons who were not parties to the agreement for sale. Legal notice dated 19.02.2016 sent by the complainant even does not speak about payment of Rs. 03 crores. As the complainant failed to manage the amount within a year, so automatically the agreement for sale terminated on expiry of the stipulated period of 12 months. Moreover, the money transmitted from unknown persons' accounts i.e., Rs. 51 lacs was returned back by the petitioners.

6. Learned counsel further submits that the complainant has also filed a Title Suit No. 138 of 2016 for specific performance of contract and the suit value given in the suit is only Rs. 51 lacs, which also indicates that only that amount was transmitted in the account of

the land owners. So in this backdrop of the fact, even the entire allegation levelled in the complaint is taken as true, no *prima facie* case of cheating and breach of trust is made out, as there was no any fraudulent dishonest intention of the petitioners to induce them to deliver any property or any money neither the same was wrongfully used by the petitioners. It is also not the case of entrustment of any money or giving dominion over the property. It is a purely civil dispute and that is already *sub judice* before the competent court of civil jurisdiction. Learned counsel placed reliance to a judgment passed by a co-ordinate Bench of this Court in Cr. Misc. No. 3122 of 2012 (M/s Super Cassettes Industries Limited) especially to paragraph nos. 16, 17 and 18 of the said judgment and submitted that almost similar is the fact in the present case as the complainant failed to make payment of consideration money within the stipulated period of agreement so the agreement terminated and even Rs. 51 lacs deposited in the account of the petitioners, land owners, that too not by the complainant but by some other unknown persons however that money was returned in their respective bank accounts. Further reliance is placed in the case of ***Medmeme, LLC v. Ihorse BPO Solutions Pvt. Ltd.*** reported in ***2017 SCC OnLine SC 875*** and refers paragraph nos. 14 and 15 of the said judgment.

7. Contrary to that, learned counsel appearing on behalf

of the O.P. No. 2 submits that the land owners had dishonest intention right from the very beginning to cheat the complainant by not executing the sale deed. In fact post dated cheque of Rs. Three crores was given to the land owners as a security money though it was not in cash, only on their demand, Rs. 51 lacs was transmitted in their accounts thereafter Rs. 11 lacs to the Manager of the land owners but the measurement and demarcation of the land was not done in this regard, notice was also sent on 19.02.2016 for the first time. So the land owners had the fraudulent intention to cheat the complainant right from the beginning and the agreement still stands and they are ready to pay the entire consideration money.

8. Having considered the rival submissions and on perusal of record, the Court finds that on 28.02.2015 the complainant entered into a written agreement for sale with the land owners, the petitioners no. 1, 2 and 3, for purchasing 07 acres of land situated in the outskirts of Patna township. One of the terms of the agreement was to make payment of earnest money of Rs. Three crores by the complainant to the land owners. The total consideration money was to be paid within the stipulated period of 12 months, which means by 27.02.2016 after final measurement prior to execution of sale deed. There is no description of cheque given in the complaint or in the statement of the witnesses at the enquiry stage showing who had

issued the cheque. It is apparent from the record that only Rs. 51 lacs in total was transmitted to the bank accounts of the land owners that too from the accounts of unknown persons who were not parties to the agreement for sale. The land owners rightly returned back money to the concerned account by R.T.G.S., moreover there is nothing on the record to show that Rs. Three crores was transmitted in the account of the land owners. The agreement also contains a forfeiture clause incorporated in Para-5 of the agreement, which reads as such:

> "That if the Vendees fail to pay the Balance amount to the Vendors within the stipulated period of 12 months, the earnest money and advance of Rs. 3,00,00,000/- (Rs. Three Crores Only) paid by the Vendees will be forfeited to the Vendors, and this agreement shall come to an end without any notice in that regard unless extended in writing by the Vendors".

9. In view of said Clause, even if Rs. Three crores as earnest money is paid and the complainant fails to pay total consideration money in 12 months, the agreement would be terminated because the time was the essence of the contract. There is no denial by the complainant that only Rs. 51 lacs was transmitted in the accounts and it is also not the case that Rs. Three crores was transmitted in the accounts of the land owners up till now. The complainant has filed a Title Suit No. 138 of 2016 for specific performance of contract to enforce the agreement for sale and the total

suit value indisputably is Rs. 51 lacs.

10. Section 420 of the Indian Penal Code reads as follows:

> "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 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."

11. Section 420 of I.P.C. is the aggravated form of cheating. The essential ingredients to hold a person guilty of cheating, it is necessary to show that he had any fraudulent or dishonest intention at the time of making the inducement while entering into the agreement for sale to deliver any property, but in the present case, no such inducement is found from the facts of the case, as discussed above, only Rs. 51 lacs was deposited in the accounts of the land owners, only Rs. 17 lacs by the complainant and rest amount by two other unknown persons, however the deposited amount was returned back by the land owners in their respective accounts by transferring it through R.T.G.S. due to breach of agreement. The total consideration money which comes to Rs. 16 lacs was not paid by the complainant within 12 months as per the terms of the agreement for sale. Even the

earnest money of Rs. Three crores was not paid. So ingredients of cheating are not attracted in the backdrop of facts of the case.

12. Criminal breach of trust is defined under Section 405 of I.P.C., which reads as follows:

> "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".

13. The essential ingredient to constitute the offence of breach of trust requires entrustment of property or dominion over the property with a person so entrusted, when he dishonestly misappropriates or converts the property for his own use or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which trust is to be discharged the offence is attracted. In the backdrop of facts of the instant case, there is no such entrustment. Instead of Rs. Three crores only Rs. 51 lacs was paid pursuant to an agreement for sale and that too including payment made by other persons not party to the agreement, so that money was returned back by the accused persons,

land owners. So there appears no *prima facie* case of misappropriation of any amount by the accused persons. The instant case appears to be a case of purely civil nature in view of the terms of the agreement for sale dated 28.02.2015 as neither any money has been misappropriated nor any dishonest or fraudulent intention is found at the very inception of the entering into the agreement. Hence, even taking the entire allegations as true, no ingredients of cheating and criminal breach of trust are made out.

14. Therefore, for the aforesaid reasons, the entire criminal proceeding inclusive the cognizance order dated 10.05.2016 passed in Complaint Case No. 1106C of 2006, pending in the court of Judicial Magistrate, 1st Class, Patna, is hereby quashed. The application stands allowed.

**(Arun Kumar, J)**

Sujit/-

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