

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.42515 of 2013

Arising Out of PS.Case No. -15 Year- 2009 Thana -PHENHARA District-
EASTCHAMPARAN(MOTIHARI)

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Manju Devi W/O Bhola Yadav, resident of Village- Jamunia, P.S- Pipara, District-
East Champaran.

.... Petitioner

Versus

1. The State Of Bihar
2. Umakant Tiwari S/O Raghunath Tiwari, resident of Village- Kalupakar, P.S-
Fanhara, District- East Champaran.

.... Opposite Parties.

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Appearance :

For the Petitioner/s : Mr. Sharda Nand Mishra, Advocate
Mr. Deepak Kumar, Advocate
For the State : Dr. Mayanand Jha, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 08-04-2017

Heard Mr. Sharda Nand Mishra, learned advocate for
the petitioner and Dr. Mayanand Jha, learned Additional Public
Prosecutor for the State.

2. This application under Section 482 of the Code
of Criminal Procedure (for short 'Cr.P.C.') has been filed for
quashing the order dated 13.06.2011 passed by the learned Sub-
divisional Judicial Magistrate, Sikrahana at Motihari in Phenara
P.S. Case No. 15 of 2009 whereby the petitioner and two others



have been summoned to face trial for the offences punishable under Sections 406 and 420 of the Indian Penal Code (for short 'IPC').

3. Complaint petition vide Complaint Case No. 140 of 2009 was filed by one Umakant Tiwari in the court of Sub-divisional Judicial Magistrate, Sikrahana which was referred to the police under Section 156(3) of the Cr.P.C. pursuant to which Phenhara P.S. Case No. 15 of 2009 was registered under Sections 406, 409, 420, 504 and 506/34 of the IPC against the petitioner Manju Devi and two others, namely, Kailashi Devi and Kameshwar Hajara and investigation was taken up.

4. Allegation in the FIR is that the daughter of the informant, namely, Kumari Gunja, who was differently abled and was having qualification of B.A.(Hons.) in the subject of Psychology, had applied for appointment on the post of Shiksha Mitra. The accused persons demanded Rs.1,50,000/- for her appointment. The informant agreed to negotiate with them and persuaded them to appoint her daughter on the payment of Rs.1,20,000/-. At the request of the informant, they visited his house on 09.11.2008 and received Rs.1,20,000/- from him but neither the informant's daughter was appointed nor the amount



taken by them was returned to him.

5. The police investigated the case and found no incriminating material against the accused persons. Accordingly, the Investigating Officer submitted his report under Section 173(2) of the Cr.P.C. vide Final Report No. 18 of 2010 dated 24.04.2010 holding the accusation to be false. The Investigating Officer also recommended for initiation of a prosecution against the informant under Sections 182 and 211 of the IPC for launching a malicious prosecution.

6. However, on perusal of the police report and the other materials collected in course of investigation, the learned Magistrate differed with the police report and took cognizance of the offences under Sections 406 and 420 of the IPC against the petitioner and two others and summoned them to face trial.

7. Challenging the aforesaid order dated 13.06.2011, learned counsel for the petitioner submitted that the essential ingredients of the offence punishable under Sections 406 and 420 of the IPC are not attracted in the present case. He submitted that at the relevant time, the petitioner was a Ward Councillor whereas two others co-accused, namely, Kailashi Devi



and Kameshwar Hajara were Mukhiya and Panchayat Sewak respectively. He submitted that the post of Shiksha Mitra was not in existence on or after 01.07.2006 and, hence, there was no scope for the informant's daughter to have applied on the post of Shiksha Mitra. He submitted that finding the entire allegation to be false and baseless, the police had submitted final report holding the accusation to be false but without assigning any reason mechanically the learned Sub-divisional Judicial Magistrate differed with the police report and wrongly summoned the petitioner to face the prosecution for the offences punishable under Sections 406 and 420 of the IPC.

8. On the other hand, learned Additional Public Prosecutor for the State submitted that to hold investigation is the statutory duty of the police, but once the police report is submitted, it is for the Magistrate to appreciate the materials collected during investigation and pass order in accordance with law. He submitted that since the learned Sub-divisional Judicial Magistrate has differed with the police report, the guilt or innocence of the petitioner can be seen only at the stage of trial. He submitted that there is no illegality in the order passed by the learned Magistrate.



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

10. From the order impugned, it would be evident that the learned Judicial Magistrate has found a *prima facie* case to be made out under Sections 406 and 420 of the IPC.

11. Section 406 of the IPC prescribes punishment for the offence of criminal breach of trust whereas Section 420 of the IPC prescribes punishment for the offence of cheating.

12. The gist of the offence under Section 406 IPC is misappropriation done in a dishonest manner. There are two distinct parts of the said offence. The first 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.

13. One of the essential ingredients of the offence of cheating is dishonest inducement to the person to deliver any property or allow any person to retain any property.

14. In the background of the facts stated in the FIR, I am of the view that it is neither a case of misappropriation done in



a dishonest manner contrary to the terms of the obligation which it created nor a case of dishonest inducement to deliver any property or allow any person to retain any property rather it is case where the informant had made an offer to pay illegal gratification for procurement of job which allegedly was accepted by the accused persons pursuant to which certain payment is alleged to have been made.

15. In the opinion of this Court, such a kind of agreement or contract was void and invalid from the moment it was created and neither of the parties was bound by the terms. The term of the agreement was not only illegal but also against public policy to which the informant himself was a party. It is well settled that if a contract is void because it is against the law and does not adhere to valid contract elements, it cannot be enforced.

16. Section 23 of the Indian Contract Act enumerates of three issues, i.e. consideration for the agreement, the object of the agreement and the agreement per se. Section 23 creates a limitation on the freedom of a person in relation to entering into contracts and subjects the rights of such person to the overriding considerations of public policy and others enunciated



under it.

17. Section 24 of the Indian Contract Act prescribes that if considerations and objects of agreement are forbidden by law, the same would be void.

18. In *Chelloor Mankkkal Narayan, Ittirvi Nambudiri vs. State of Travancore-Cochin [AIR 1953 SC 478]*, the Hon'ble Supreme Court in para 21 held as under :

“21. The other point that requires consideration is, whether on the prosecution evidence as it stands, the accused can be held guilty of criminal breach of trust ? As laid down in S. 385, Cochin Penal Code, (corresponding to S. 405. Indian Penal Code) to constitute an offence of criminal breach of trust it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power over it. It has to be established further that in respect of the property so entrusted, there was dishonest misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract, by the accused himself or by someone else which he willingly suffered to do.

It follows almost axiomatically from this definition that the ownership or beneficial interest in the property in respect of which criminal breach



of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit. In the case before us, it is not disputed that if the sum of Rs. 23,100 was paid by P. W: 1 to the appellant by way of illegal gratification to induce the latter to make an allotment of cloth in his favour, there could be no question of entrustment in such payment. The payee would then receive the money on his own behalf and not on behalf of or in trust for anybody else. The criminality of an act of this character would consist in illegal receipt of the money and the question of subsequent misappropriation or conversion of the same would not arise at all.”

19. It is trite law that one who knowingly enters into the contract with improper object cannot enforce his rights in relation to such contract. If the allegations made in the complaint are to be accepted, in the opinion of this Court, the complainant himself is liable to prosecution under the Prevention of Corruption Act for abetting a public servant to receive illegal gratification.

20. In *Vijay Sharma and Anr. vs. State of Bihar* [2011(1) PLJR 780], this Court had held that agreement to secure appointment by unfair means itself being unlawful and prohibited



under the law is *void ab initio*. It further held that there cannot be any entrustment of a property for use and disposal contrary to law. It further held that concept of 'cheating' shall have no application where the act which is stated to constitute 'cheating' was itself an offence.

21. Considering the totality of the facts and circumstances of the case, this Court is of the opinion that allowing the prosecution to continue would be an abuse of the process of the court. Accordingly, impugned order dated 13.06.2011 passed by the learned Sub-Divisional Judicial Magistrate, Sikrahana at Motihari and all the proceedings arising out of Phenara P.S. Case No. 15 of 2009 are hereby quashed.

22. The application stands allowed.

(Ashwani Kumar Singh, J.)

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AFR/NAFR	NAFR
CAV DATE	NA
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