

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Miscellaneous No.50126 of 2013**

Arising Out of PS.Case No. -156 Year- 2012 Thana -POTHIYA District- KISANGANJ

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Shahid Perwez son of Late Quayamuddin, resident of Churipatti, Pilkhana Road,  
P.S. and District-Kishanganj

.... .... Petitioner/s

Versus

The State of Bihar

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

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**Appearance :**

For the Petitioner/s : Mr. Dilip Kumar Singh, Advocate  
For the Informant : Mr. Sunil Kumar, Advocate  
For the State : Mr. Jharkhandi Upadhyay, A.P.P.

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**CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH**

**ORAL JUDGMENT**

**Date: 29-06-2017**

Heard Mr. Dilip Kumar Singh, learned counsel for the petitioner, Mr. Sunil Kumar, learned counsel for the informant, Mr. Jharkhandi Upadhyay, Additional Public Prosecutor for the State and perused the record.

2. This application under Section 482 of the Code of Criminal Procedure (for short 'CrPC') has been filed by the petitioner seeking quashing of the order dated 14.08.2013 passed in connection with Pothia (Paharkatta) P.S. Case No.156 of 2012 whereby cognizance has been taken for the offences under Sections 406, 420, 465 and 467 of the Indian Penal Code (for short 'Penal Code').

3. It is submitted by the learned counsel for the petitioner that the entire allegations made in the First Information Report (for



short 'FIR') are false and fabricated. He submitted that whatever amount was advanced to the petitioner in terms of the agreement has already been returned to the informant of the case. He contended that even if the entire allegations made in the FIR are taken at their face value and accepted in their entirety, the ingredients of the offences alleged would not be attracted.

4. On the other hand, learned counsel for the State submitted that the allegations made in the FIR do attract the ingredients of the offences alleged. The police investigated the case and found the allegations made to be true in course of investigation and, thus, charge-sheet was submitted against the petitioner. It is submitted that after considering the materials collected during investigation, the learned Magistrate found prima facie case to be made out against the petitioner and, thus, summoned him to face prosecution. It is contended that it is not the stage when defence of the petitioner can be looked into.

5. Learned counsel for the informant while adopting the contentions advanced by the learned counsel for the State, submitted that reply to the legal notice submitted by the petitioner whereby he has taken a plea that the entire money advanced to the petitioner has been returned clearly demonstrates culpable intention of the petitioner. He submitted that though the present case has been filed



for quashing of the order taking cognizance, the stage of the case has changed and charges have already been framed. According to him, once charges are framed, the case would either end in conviction or acquittal of the accused based on the evidences adduced during trial.

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

**7.** The gist of the allegation in the FIR is that there was negotiation between the informant and the petitioner for purchase of ten dhurs of land situated at Old Ward No.28, New Ward No.03, under Thana No.132, Tauzi No.1242, Khesra No.148, Khata No.71 in village- Mohiuddinpur in the district of Kishanganj. The total cost of the land was fixed at rupees twelve lacs fifty one thousand. Though, under the agreement for sale, the informant had advanced a sum of rupees eight lacs and eighty thousand and was ready to pay the balance amount, the petitioner failed to execute the sale deed on one pretext or the other. Ultimately, looking at the attitude of the petitioner, the informant asked for return of his money, whereafter the petitioner paid rupees eighty thousand on 08.04.2012, but the balance amount was not returned to the informant. The informant sent a legal notice to the petitioner which was replied through lawyer, wherein defence was taken that the entire amount of rupees eight lacs and eighty thousand has been paid back to the informant on 08.04.2012.



8. It would be relevant to note that the informant of the case had initially instituted a complaint in the court of Chief Judicial Magistrate, Kishanganj, which was referred to the police for investigation under Section 156(3) of the CrPC. After investigation of the case, the police submitted charge-sheet for the offences punishable under Sections 406, 420, 465 and 467 of the Penal Code and, on perusal of the police report submitted under Section 173(2) of the CrPC, the learned Magistrate took cognizance of the offences by the impugned order dated 14.08.2013.

9. 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 Penal Code would be attracted.

10. Section 406 of the Penal Code prescribes punishment for criminal breach of trust. Section 405 of the Penal Code defines the offence of criminal breach of trust as under :

**“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".”

**11.** A careful reading of Section 405 of the Penal Code 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.

**12.** It would, thus, appear that for the offences punishable under Section 406 of the Penal Code, 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.



**13.** The gist of the offence prescribed under Section 406 of the Penal Code 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.

**14.** The offence punishable under Section 420 of the Penal Code 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 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.”

**15.** The offence of cheating is defined under Section 415 of the Penal Code, 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".”

**16.** To hold a person guilty of cheating as defined under Section 415 of the Penal Code, 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.

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

**18. 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. 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 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)

**19. 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 Penal Code 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.

**20. 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 section 406 or section 420 of the Penal Code. After examining the fact of the case and the relevant sections of the Penal Code, 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.

**21. In the present case, the complainant does not make any**



avermment 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 was entered into, which agreement the petitioner failed to honour, it cannot be said that the petitioner has cheated the respondent.

22. As far as Sections 406 and 420 of the Penal Code are concerned, it is an admitted fact in the present case that the petitioner owns and possesses the property for which negotiation is said to have been held between the parties. It is also not the case of the informant that the petitioner was not competent to enter into an agreement of transfer of land for which negotiation was made. Thus, in view of the ratio laid down by the Supreme Court in **Dalip Kaur & Ors. vs. Jagnar Singh, Nageshwar Prasad Singh alias Sinha vs. Narayan Singh and Murari Lal Gupta vs. Gopi Nath Singh** (supra), since it is not the case of the informant that the petitioner tried to deceive him either by making a false or misleading representation or by any other action or omission nor it is a case that he ever made any fraudulent or dishonest inducement to deliver the property, no case of prosecution



under Sections 406 and 420 of the Penal Code is made out. At best, it is a pure and simple case of breach of contract, which would not attract ingredients of the offences under Sections 420 and 406 of the Penal Code.

23. So far as Section 465 of the Penal Code is concerned, the same relates to punishment for forgery, which is defined under Section 463 of the Penal Code.

24. Section 467 of the Penal Code relates to forgery of valuable security, will etc.

25. In the present case, apparently there is no allegation of commission of forgery or valuable security, will etc. In that view of the matter, apparently ingredients of Sections 465 and 467 of the Penal Code are not attracted.

26. In view of the foregoing discussions, the very order of cognizance is bad. Hence, I am of the opinion that even if subsequently charges have been framed, the same would be of no consequence, as allowing the prosecution to continue any further in a case in which the ingredients of offences are not attracted would simply amount to encouraging an abuse of the process of the court.

27. Accordingly, the application is allowed. The impugned order dated 14.08.2013 passed in connection with Pothia (Paharkatta) P.S. Case No.156 of 2012 (G.R. No.1172 of 2012) and the entire



subsequent proceedings in the aforementioned case are hereby  
quashed.

**(Ashwani Kumar Singh, J)**

Md.S./-

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