

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No. 37 of 2017

Arising out of P.S. Case No. - null Year - null Thana - null District - PATNA

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1. Pankaj Agrawal @ Pankaj Dudhewala
 2. Vinay Dudhewala @ Binay Dudhewala @ Vinjay Kumar Agrawal, Both sons of Bishambhar Prasad Dudhewala, resident of Manjay Sadan, P.O. – G.P.O., P.S. Budha Colony, District Patna

.... Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Home Deptt. Govt. of Bihar, Patna
2. The Registrar, Civil Court, Patna
3. Mr. Rishu Bajaj, S/o Anil Bajaj, Resident of Flat No. 302, Pushpanjali Venktesh Apartment, Budha Marg, P.S. – Kotwali, Dist. - Patna

.... Respondents

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Appearance :

For the Petitioner	: Mr. Sandeep Kumar, Advocate Mr. Avanish Kumar Singh, Advocate Mr. Anand Kumar, Advocate
For the Respondents	: Mr. Ramakant Sharma, Sr. Advocate Md. N.H. Khan, SC-1 Ms. Babita Kumari, AC to SC-1 Mr. Abhishek Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR

CAV JUDGMENT

Date: 07-05-2018

Heard learned counsel for the parties.

2. The order taking cognizance, for offences under Sections 420, 406, 427 and 120B of the Indian Penal Code, as well as issuance of process, under Section 204 of the Code of Criminal Procedure (in short the “Cr.P.C.”), by order dated 04.06.2016, passed in Complaint Case No. 2530(C) of 2015, by the Court of learned Judicial Magistrate, 1st Class, Patna, has been sought to be quashed, in exercise of power under Articles 226 and 227 of the Constitution of India.

3. The petitioners are accused in the above referred



complaint case brought by respondent no. 3 Mr. Rishu Bajaj.

4. The challenge is on the ground that the matter is of pure civil dispute and the allegation disclosed in the complaint petition and statement of the witnesses under Section 202 of the Cr.P.C. does not disclose commission of any offence, especially, the offences for which cognizance has been taken and the prosecution of the petitioners suffers from mala fide.

5. A brief facts leading to the filing of the complaint petition is that petitioner no. 1 Pankaj Agrawal @ Pankaj Dudhewala and respondent no. 3 Rishu Bajaj had entered into a partnership business through a registered deed dated 25.04.2012 at Annexure-5. The complainant had invested Rs.60,00,000/- in the business on the persuasion of the petitioners with understanding that 60 per cent of the profit would go to the complainant and 40 per cent to petitioner no. 1 Pankaj Agrawal. Petitioner no. 2 Vinay Dudhewala @ Binay Dudhewala @ Vinay Kumar Agrawal is a witness on behalf of petitioner no. 1 Pankaj Agrawal and father of the complainant had signed as a witness on behalf of the complainant on the said partnership deed. There was oral understanding that petitioner no. 1 Pankaj Agrawal would return Rs.60,00,000/- within two months. However, in April 2014, the complainant noticed some mismanagement in the business and defalcation of money by petitioner no. 1 Pankaj Agrawal.



On protest of the complainant, petitioner no. 1 Pankaj Agrawal returned Rs.23,00,000/- to the complainant. Further discrepancy was noticed, allegedly, committed by petitioner no. 1 Pankaj Agrawal, to the extent that cheques were issued to fictitious firms, the balance sheet of profit and loss was not being properly maintained etc.

6. For the aforesaid act, initially, Kotwali P.S. Case No. 535 of 2014 was lodged by respondent no. 3 against the petitioners. The petitioners sought for quashment of the FIR in Cr.W.J.C. No. 201 of 2015. During pendency of the aforesaid writ application, the police submitted Final Form No. 22 of 2015 on 20.02.2015 exonerating the petitioners from criminal liability and stating that the matter is of civil dispute. In the circumstances, petitioners withdrew the aforesaid writ application on 03.09.2015. The respondent no. 3 had already filed a protest petition in the aforesaid police case on 29.01.2015. In the circumstances, by order dated 13.07.2015, the learned court below accepted the final form submitted by the police in the aforesaid case and in the same stroke proceeded to treat the protest petition as complaint case. Accordingly, Complaint Case No. 2530(C) of 2015 was registered on 07.08.2015 which was transferred to the Court of M/s. Sangeeta Rani, learned Judicial Magistrate, 1st Class, Patna under Section 192(1) of the Cr.P.C. After inquiry, under Section 202 Cr.P.C., the learned Magistrate issued process to face trial against the



petitioners.

7. Mr. Sandeep Kumar, learned counsel for the petitioners submits that the complaint petition does not constitute an offence and even if some cause of action is there, the dispute is of civil nature. He contends that the petitioner no. 1 as well as the complainant were working partners of the firm and having a definite share, the petitioners cannot be alleged to have misappropriated their own property when the petitioners had also share in the partnership business. At best, the complainant could ask for accounts of the firm from the petitioner no. 1 and the dispute might have been referred to arbitration if the complainant had any grievance against the petitioner no. 1 in view of the terms and conditions of the partnership deed. Learned counsel for the petitioners submits that through supplementary affidavit, the petitioners have brought details of the payment made to the complainant mostly through cheques or account transfer. In the circumstances, it cannot be inferred that the petitioners had any dishonest intention either at the inception of the agreement or at any subsequent stage. This is not a case of entrustment of property in individual capacity to the petitioners, rather the money was invested by the complainant in the business of the firm, wherein the parties have jointness of right and possession.

8. Mr. Ramakant Sharma, learned Senior Counsel for the



complainant-respondent opposed the prayer by filing a detail counter affidavit, especially, on the ground that once the court below has come to the conclusion that prima facie case is made out, this Court should not interfere in the discretion of the Magistrate in exercise of this extraordinary power. The offences alleged are apparently made out for the reason that the complainant was victim of persuasion and allurements of the petitioners which resulted in investment of Rs.60,00,000/- by the complainant and, in fact, the petitioner no. 1 was authorized to operate the account of the firm and work as active and working partner whereas the complainant was a sleeping partner.

9. Before considering the rival contention of the parties, it would be apt to look into the relevant terms and conditions stipulated in the partnership deed vide Annexure-5 as follows:-

“5. It has been agreed amongst parties herein that the parties of the first part and second part are to work to the partnership firm as working partners. It is hereby agreed that in consideration of the parties of the first part and second part devoting their time and attention to the business of the partnership firm and working in the partnership each shall be entitled to remuneration to be calculated in the manner indicated below as a percentage of book profit in lieu of their services rendered towards management. Supervision and conduct of the affairs of the business.

8. Each partner shall be entitled to make withdrawals from time to time for their personal needs and requirements which shall be treated as the drawings and debited to their respective capital accounts.

9. That the parties hereto have agreed to continue to operate



the existing bank account or accounts as before or any other manner as may be mutually decided amongst them from time to time or close down the same as and when considered expedient and desirable and open a fresh bank account or accounts in one or more banks as may be mutually settled. Such accounts will be operated by the parties hereto either singly or jointly or otherwise as may be mutually settled between them from time to time for the benefit of the partners. Any other person may also be authorized to operate such account as may be mutually agreed from time to time.

11. That any of the parties hereto may authorize any person acceptable to all the other parties hereto to look after his/her interest in the partnership business and in such event the other parties hereto will be bound to permit such agreed person to do all such acts and things as he could himself have done as a partner of the firm for such purpose.

19. That on behalf of the firm every partner is entitled to enter into an agreement with third parties to sign on tenders and contracts, to receive payments, to file suits in courts and to do all such other lawful acts as may be necessary in the interest of the firm and not otherwise forbidden by any other partner. Such acts done by him on behalf of the firm will be binding on the firms.

22. That all disputes and differences between the partners in anywise relating to the agreement including the construction or the interpretation of the terms hereof, whether during the continuance of the partnership or after its cessation will be settled by arbitration.”

10. A bare perusal of the aforesaid stipulation and in absence of any other material to the contrary, it is evident that both the partners were working partners of the firm. The investment in the business was made by the complainant with full knowledge of the nature of the



business going to be carried on. The act to be performed by the individual partner in the interest of the firm is stipulated in the agreement itself. The different clauses of the agreement aforesaid indicate that the petitioners were not the sole working partner or they were ever made exclusive in charge of the entire business of the firm including of the stock and the accounts by any subsequent agreement.

11. Section 405 of the Indian Penal Code defines the term criminal breach of trust 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”.

12. In this case, it is evident that in pursuance of the partnership deed, the petitioner no. 1 was a working partner along with the complainant. He was never entrusted with any dominion over the partnership property, rather the entire partnership property and business was in joint possession of the partners.

13. In the case of **Anil Saran vs. State of Bihar and anr.** reported in **(1995)2 BLJR 1383**, the Hon’ble Supreme Court observed as follows:-



“partnership firm is not a legal entity but a legal mode of doing business by all the partners. Until the firm is dissolved as per law and the accounts settled, all the partners have dominion in common over the property and funds of the firm. Only after the settlement of accounts and allotment of respective share, the partner becomes owner of his share. However, criminal breach of trust under Section 409 is not in respect of the property belonging to the partnership firm, but is an offence committed by a person in respect of the property which has been specifically entrusted to such a person under a special contract and he holds that property in fiduciary capacity under special contract. If he misappropriates the same, it is an offence”.

14. In the present case, it is evident from the complaint petition and partnership deed that no property was entrusted to the petitioners in their individual capacity, rather the complainant had invested the money in the business of the partnership firm over which the complainant and the petitioners had dominion in common. Therefore, the petitioners cannot be alleged to have committed criminal breach of trust in respect of their own property.

15. Chapter 3 of the Partnership Act, 1932 provides for relations of the partners to one another. Section 10 stipulates duty to indemnify for loss caused by fraud of one partner to another partner. Apparently, the matter is of civil remedy and no case of criminal breach of trust is made out.

16. To establish the offence under Section 420 of the Indian Penal Code, it must be disclosed that at the time of initial transaction,



the petitioner had dishonest and fraudulent intention.

17. In the case of **Hridaya Ranjan Prasad Verma & Others v. State of Bihar & Others** reported in **2000(3) PLJR (SC) 137**, the Hon'ble Supreme Court highlighted the importance of intention of the accused at the time of inducement, for attracting the offence of cheating and observed as follows:

“In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.”

Again in **Uma Shankar Gopalika vs. State of Bihar & Another** reported in **(2005) 10 SCC 336**, the Hon'ble Supreme Court held as follows:

“It is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to



cheat has developed later no, the same cannot amount to cheating. In the present case it has nowhere been stated that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 of the Indian Penal Code”.

18. The conduct of the petitioners which is admitted in the solemn affirmation of the complainant that soon after some dispute of accounting and non-disclosure of profit, the petitioners returned to the complainant Rs.23,00,000/- out of the aforesaid amount of Rs.60,00,000/- and disclosure of details, in the supplementary affidavit, along with the statement of bank account, the money transferred to the bank account of the complainant on different dates prior to the filing of the complaint petition as well as subsequent to the complaint petition and all the aforesaid material goes to show that the petitioners were not carrying dishonest or fraudulent intention at any point of time. Each and every non-refund of money does not constitute a malicious intention. Therefore, in my view, there is complete lake of ingredient of cheating in the complaint petition.

19. The facts of this case would make it abundantly clear that petitioner no. 2 was not a business partner nor he ever acted as a business partners, therefore, cognizance of the offence under Section 120B of the Indian Penal Code is completely misconceived and suffers from non-consideration of material on the record. There is no averment



in the complaint petition that the two petitioners agreed to do any illegal act or any criminal act was committed in pursuance of such agreement.

20. The complaint petition does not disclose any allegation of commission of mischief by the petitioners, hence, cognizance for the offence under Section 427 of the Indian Penal Code suffers from non-application of mind.

21. As found from the record, no offences for which cognizance has been taken are made out on bare perusal of the complaint petition. Hence, criminal prosecution of the petitioners amounts to abuse of process of the law and violates the fundamental right of the petitioners guaranteed under Article 21 of the Constitution of India.

22. Accordingly, the impugned order stands quashed and this writ application is allowed.

(Birendra Kumar, J)

Kundan Sharma

AFR/NAFR	AFR
CAV DATE	04.12.2017
Uploading Date	08.05.2018
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