IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.11520 of 2015

Arising Out of PS. Case No.-3041 Year-2013 Thana- PATNA COMPLAINT CASE District-Patna

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Sri Rama Kishore Singh, S/o Kapileshwar Singh, resident of Road No. 23, Rajiv Nagar, District - Patna

... ... Petitioner/s

Versus

1. The State of Bihar
2. Smt. Dhanarajia Devi, wife of Sri Moti Lal Singh, resident of House No. 03, Kailash Enclave, Shivpuri, P.S. Shashtri Nagar, District Patna

... ... Opposite Party/s

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Appearance :

For the Petitioner/s	:	Mr. N.K. Agrawal, Sr. Advocate
For the O.P. No. 2	:	Mr. Binod Kumar Sinha, Advocate Mr. Ajay Kumar Prasad, Advocate Mr. Nagendra Sharma, Advocate
For the State	:	Mr. Shyam Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT
Date : 25-07-2019

Heard learned counsel for the parties.

2. The petitioner is accused in Complaint Case No. 3041(C) of 2013, brought by opposite party no. 2, wherein the learned Judicial Magistrate, 1st Class, Patna, has taken cognizance for offences under Section 420 of the Indian Penal Code and Section 138 of the Negotiable Instrument Act, by the impugned order dated 02.06.2014.

3. The challenge is on the ground that a bare perusal of the complaint petition and material available on the record no offence, under Section 420 of the Indian Penal Code and Section 138 of the Negotiable Instrument Act, is made out.

4. According to complaint petition, the complainant had entered into a written agreement with this petitioner on 31.05.2011 for sale of her 20 Kathas of land pertaining to Khata No. 172, Plot No. 213 in Mauza Saguna, Paragana Phulwari Sharif, District Patna. The total consideration money agreed was rupees forty-eight lacs per Katha and the petitioner had paid part consideration money of rupees eleven lacs. Again, the petitioner paid rupees forty-one lacs on 12.06.2011 and the complainant issued a receipt on the back page of the said agreement. The agreement between the parties was that the complainant would execute the registered sale deed in favour of the petitioner or the person proposed by the petitioner. On 27.08.2012, the complainant executed three sale deeds in favour of co-accused Devendra Kumar against whom the learned court below has not taken cognizance. Devendra Kumar was proposed person by the petitioner. The three deeds were in respect of an area of 2 Kathas, 8 Kathas and 4 Kathas respectively after receipt of consideration money of rupees thirty-seven lacs, thirty-two lacs and thirty-two lacs respectively. On 27.08.2012 itself the petitioner executed an unilateral undertaking in which the petitioner stated that rupees three crore fifty lacs have already been paid to the complainant in pursuance of the above referred agreement dated 31.05.2011 and the remaining rupees two crore ninety-four lacs will be paid as per the different post dated cheques mentioned in the said undertaking. In para 7 of the complaint petition, it is further disclosed that the petitioner and Devendra Kumar jointly paid rupees one crore fifty-three lacs and got the absolute sale deed in respect of 14 Kathas of land meaning thereby that total rupees five crore nineteen lacs were paid and the remaining amount was not paid in spite of different assurances. The post-dated cheques issued by the petitioner in favour of the complainant bounced due to stoppage of payment and for that four criminal cases have been lodged including the present one. Thus, the complainant claims to have been cheated by the petitioner.

5. Learned counsel for the petitioner submits that the petitioner has categorically denied on oath that Devendra Kumar was not the person proposed by the petitioner, rather the complainant in collusion with Devendra Kumar executed three registered sale deeds in favour of Devendra Kumar, though agreement to sale was already there with the petitioner. For the aforesaid act of the complainant, the petitioner has already filed Money Suit No. 73 of 2013 against complainant-opposite party no. 2 as well as a criminal case vide Complaint No. 2893 of 2013 against the opposite party no. 2 and others.

6. Submission is that actual fact is that Devendra Kumar is well known to the complainant because complainant had entered into a development agreement with Devendra Kumar on 03.05.2010. Subsequently, said agreement was cancelled on 27.05.2011. Again in August, 2011, complainant entered into a development agreement with Devendra Kumar. Hence, complainant was already aware as to who was Devendra Kumar and what was relation of the complainant with Devendra Kumar. Opposite party no. 2 has not denied the aforesaid averment of the petitioner on oath.

7. However, even if it is assumed that the three registered sale deeds (Annexure-3) dated 27.08.2012 executed by the complainant in favour of said Devendra Kumar was on the request of the petitioner, all the sale deeds clearly describes that entire consideration money was already received by the complainant. The first sale deed says that rupees forty-one lacs and thirteen thousand was received in cash and the remaining amount through bank draft. Other sale deeds also speak that entire consideration money was already paid.

8. Submission is that even after execution of the three sale deeds in favour of Devendra Kumar, 6 Kathas of land is still with the complainant which has agreed cost of rupees forty-eight lacs X six = rupees two crore eighty-eight lacs. The petitioner had issued four cheques each of rupees fifty lacs + fifty lacs + one crore + ninety-four lacs, total rupees two crore ninety-four lacs and this amount was consideration money for execution of the registered sale deed in respect of the remaining 6 decimals as per agreement to sale between the parties. The unilateral undertaking executed by the petitioner dated 27.08.2012 on which date the complainant executed three sale deeds in favour of Devendra Kumar would show that the petitioner had issued four cheques as payment of part consideration money in pursuance of agreement dated 31.05.2011. A copy of the unilateral undertaking is at Annexure-4 which has been admitted by the complainant herein.

9. Learned counsel has categorically drawn attention of the Court towards the unilateral undertaking of the petitioner at Annexure-4 wherein the petitioner has stated that in pursuance of the above referred agreement dated 31.05.2011, he had already paid rupees three crore fifty lacs to the complainant and he would pay the remaining rupees two crore ninety four lacs through the referred post dated cheques.

10. Submission is that presumption under Section 139 of the Negotiable Instrument Act that the holder of a cheque of the nature referred to in Section 138 of the Negotiable Instrument Act received the cheque for the discharge of whole or in part of any other liability is not attracted for the reason of admission of the complainant and the document available. The complainant has admitted and the unilateral undertaking executed by the petitioner shows that the cheques were issued for payment of consideration money in pursuance of agreement to sale. Unless the complainant executes sale deed in respect of the remaining 6 Kathas of land, it could not have been claimed that the cheques were for payment of outstanding dues.

11. Learned counsel for the complainant submits that once the Magistrate applied its judicial mind and came to the conclusion that prima facie offence, under Section 420 of the Indian Penal Code and Section 138 of the Negotiable Instrument Act, is made out, this Court should not, in exercise of extra ordinary power, interfere with the said order on the basis of probable defence of the accused which shall be considered at the appropriate stage of the trial. Certain facts i.e. the bouncing of the cheque has not been disputed nor there is material to substantiate that the petitioner paid entire consideration money as agreed even after execution of the sale deed by the complainant. Hence, a prima facie case of cheating is made out against the petitioner.

12. The record reveals that after appearance of the opposite party no. 2, the matter was referred to the Patna High Court Mediation Centre for amicable settlement. However, the settlement could not be reached and the matter was again adjourned but no counter affidavit has come from opposite party no. 2. However, learned counsel for the opposite party no. 2 submits that the so-called sale deeds, dated 31.05.2011 said to be executed by the complainant in favour of Devendra Kumar, are not genuine documents, rather the same are forged one. The petitioner should be directed to produce original of the same. If the aforesaid argument of opposite party no. 2 is accepted, the whole prosecution case fails for simple reason that the complainant never transferred her property to any one in pursuance of agreement with the petitioner. Therefore, there is no question of cheating by the petitioner.

13. In the case of **State of Haryana And Others** Versus **Bhajan Lal And Others** reported in 1992 Supp (1) SCC 335, the Hon'ble Supreme Court culled out some flexible guidelines for consideration of exercise of power under Section 482 Cr.P.C. or under Article 226 of the Constitution of India to quash the criminal proceeding. The very first of the seven guidelines is that where the allegation made in the first information report or the complaint, even if they are taken at their face value and accepted in there entirety do not prima facie constitute any offence or make out a case against the accused".

14. What this Court finds in the present case that the cheque issued by the petitioner in favour of the complainant was for payment of consideration money in pursuance to an agreement to sale between the parties. Admittedly, the sale deed of entire 20 Kathas as agreed was not executed. Hence, there was no outstanding due against the petitioner. The three sale deeds in respect of 14 Kathas of the land speaks that entire consideration money of the respective sale deeds was already paid to the complainant. Therefore, admitted documentary evidence is there vide Annexure-4 that the cheques were issued for payment of consideration money against agreement to sale of the remaining 6 Kathas of the land. Hence, it was not against an outstanding dues.

15. Moreover, the contention of the petitioner is that as soon as the petitioner issued four cheques to the complainant for payment of consideration money in pursuance of agreement to sale between the parties on the same day complainant transferred 14 Kathas of the land in favour of her known person Devendra Kumar. As soon as this fact came to the knowledge of the petitioner, the petitioner stopped payment of cheque because transfer in favour of Devendra Kumar came to the knowledge of the petitioner. Therefore, offence under Section 138 of the Negotiable Instrument Act is not made out.

16. So far allegation under Section 420 of the Indian Penal Code is concerned, the perusal of entire complaint petition and the material brought on the record reveals that the petitioner was never fraudulent or having dishonest intention from the date of agreement with the complainant. The execution of the sale deed, in pursuance of the agreement between the parties, would reveal that entire consideration money was already received by the complainant from the vendee. If it is assumed that those sale deeds are forged document, the complainant has admitted receipt of part consideration money and has failed to produce that the complainant executed any sale deed in favour of the petitioner or on the dictate of the petitioner for which consideration money was not paid. Therefore, in my view, the offence of cheating is also prima facie is not made out.

17. In **PEPSI FOODS LTD. AND ANOTHER** versus **SPECIAL JUDICIAL MAGISTRATE AND OTHERS** reported in **1998(5) SCC 749**, the Hon'ble Supreme Court considered the duty of the Magistrate while summoning an accused and in para 28 of the judgment observed as follows:-

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence

is prima facie committed by all or any of the accused".

18. In the case in hand, the learned Magistrate appears to have passed the order of cognizance in casual manner without looking at the admission in complaint petition that the cheques issued by the petitioner were not for payment of any outstanding due of the complainant nor the conduct of the parties reflects that the petitioner cheated to the complainant, inasmuch as the complainant did not execute the sale deed in favour of the petitioner in pursuance of the agreement and if the sale deeds were executed by the complainant in favour of Devendra Kumar at the dictate of the petitioner, the three sale deeds, speaks that entire consideration money was already received by the complainant. Therefore, the most important ingredient of cheating i.e. fraudulent and dishonest inducement of any person to deliver any property to any person is not made out in the present facts and circumstances of this case. If the petitioner would have assured payment of consideration money after execution of the sale deed, it might have been argued that the intention of the petitioner was fraudulent and dishonest. Once the sale deed speaks that entire consideration money was already paid, the ingredients of the aforesaid offence goes away. Hence, criminal prosecution of the petitioner for offence under Section 420 of the Indian Penal Code is also bad in law.

19. This Court cannot allow the abuse of the process of the Court, in exercise of power, under Section 482 Cr.P.C. Hence, the impugned order and entire criminal proceeding arising out of the impugned order against the petitioner stands quashed and this application stands allowed.

(Birendra Kumar, J)

Kundan/-

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