

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.55143 of 2015

Arising Out of PS. Case No.-43 Year-2015 Thana- HASANPUR District- Samastipur

Rajendra Agrawal Son of Late Ram Niwas Agrawal, resident of Mohalla-
Hasanpur Bazar, P.S.- Hasanpur, District- Samastipur.

... .. Petitioner/s

Versus

1. State Of Bihar
2. Shiv Narayan Anil @ Shiv Kumar Yadav S/o Sri Ram Sagar Yadav, resident of Village- Bambhaura, P.S.- Bithan, District- Samastipur.

... .. Opposite Party/s

with

CRIMINAL MISCELLANEOUS No. 57197 of 2015

Arising Out of PS. Case No.-43 Year-2015 Thana- HASANPUR District- Samastipur

1. Ganga Choudhary
2. Vidya Choudhary
3. Pulindra Choudhary All sons of Sri Nokhe Choudhary, residents of Block Road, P.S.- Hasanpur, District- Samastipur.
4. Pramod Agrawal Son of Late Ram Niwas Agrawal, resident of Mohalla- Hasanpur Bazar, P.S.- Hasanpur, District- Samastipur.

... .. Petitioner/s

Versus

1. State Of Bihar
2. Shiv Narayan Anil @ Shiv Kumar Yadav S/o Sri Ram Sagar Yadav resident of Village- Banbhaura, P.S. Bithan, District- Samastipur.

... .. Opposite Party/s

Appearance :

(In CRIMINAL MISCELLANEOUS No. 55143 of 2015)

For the Petitioner/s	:	Mr. Gautam Kumar Kejriwal, Advocate Mr. Atal Bihari Pandey, Advocate Mr. Alok Kumar Jha, Advocate
For the Opposite Party No.2	:	Mr. Sameer Ranjan, Advocate Mr. Prafulla Chandra Jee, Advocate
For the State	:	Mr. Shyam Kumar Singh, APP

(In CRIMINAL MISCELLANEOUS No. 57197 of 2015)

For the Petitioner/s	:	Mr. Gautam Kumar Kejriwal, Advocate Mr. Atal Bihari Pandey, Advocate Mr. Alok Kumar Jha, Advocate
For the Opposite Party No.2	:	Mr. Sameer Ranjan, Advocate Mr. Prafulla Chandra Jee, Advocate
For the State	:	Mr. Shantanu Kumar, APP



CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT

Date : 18-10-2019

Heard learned counsels for the parties.

2. The petitioners are accused in connection with Hasanpur Police Station Case No.43 of 2015 registered on the direction of learned Judicial Magistrate, under Section 156 (3) of the Code of Criminal Procedure, on the basis of initial complaint filed vide Complaint Case No.1110 of 2014 by opposite party No.2.

3. The petitioners have challenged the order of cognizance dated 02.09.2015 passed by the learned Judicial Magistrate-1st Class, Rosera, whereby cognizance has been taken for the offences under Sections 406 and 120B of the Indian Penal Code.

4. The challenge is on the ground that on bare perusal of the complaint petition, no offence is made out as well as on the ground that the learned Magistrate has passed the order under Section 156 (3) of the Code of Criminal Procedure in a mechanical manner, only mentioning on the top of the complaint petition as follows:-

“थानाध्यक्ष हसनपुर,
प्राथमिकी दर्ज करें। अनुसंधान कर अंतिम प्रतिवेदन
समर्पित करें।”



5. Contention is that if the Magistrate would have applied its mind on the complaint petition, he must not have proceeded with the case and sent the matter for registration of a Police case, as the complaint petition does not disclose any offence said to be committed by any of the petitioners.

6. Learned counsel for the opposite party No.2 submits that after Police investigation, charge sheet was submitted and sufficient material was there against the petitioners for proceeding against them. Hence, cognizance was taken. Therefore, this Court in exercise of extra ordinary power under Section 482 of the Code of Criminal Procedure should not interfere to throttle the trial at the inception.

7. According to complaint petition, the accused persons inducted to the complainant, as working partner, in their business. It was decided that the complainant would get Rs.06 (Rupees Six) per quintal as profit in the business of maize and wheat. The partnership was engaged in the business of supply of grains to other parts of the country. It is further stated that grains were supplied to different businessmen in between 05th May, 2013 to 29th September, 2013 and total 32 racks were supplied. The entire account was with the accused No.1. Total maize of eight lacs quintals were supplied and cost of Rs.48,00,000/-



(Rupees Forty Eight Lacs) was assessed for labour charges. On demand by the complainant rather on putting pressure the accused persons paid Rs.6,00,000/- (Rupees Six Lacs) in May, 2014 to the complainant and issued a cheque of Rs.2,00,000/- (Rupees Two Lacs) on 02.06.2014. However, Rs.40,00,000/- (Rupees Forty Lacs) was still due with the accused persons which they were not paying. It is further alleged that just to put pressure, accused persons have lodged a false case of demand of ransom, vide Hasanpur Police Station Case No.131 of 2014. On that basis, assertion is that accused had dishonest and fraudulent intention in conspiracy with each other from the very beginning and they criminally misappropriated the money of the complainant.

8. Learned counsel for the petitioners submits that in a partnership business each and every partner has joint ownership on the property of the firm and under the law they are only entitled for dissolution of the partnership and for rendition of accounts and in absence of dissolution of partnership and accounting, it cannot be alleged that what amount was due in favour of any partner against the firm. Moreover, unless there is specific agreement between the parties that property of the firm was entrusted to any individual partner, it cannot be alleged that



there was entrustment of property and as such there is no question of misappropriation of property under Section 406 of the Indian Penal Code. Reliance has been placed on the full Bench judgment of the Hon'ble Calcutta High Court in ***Bhuban Mohan Das versus Surendra Mohan Das***, reported in ***A.I.R. (38) 1951 Calcutta 69***.

9. Para 34, 35 and 43 of the judgment which are relevant for the purpose are being reproduced below:-

34. The only remedy of a co-partner is an account & until such an account is taken it cannot be said whether the co-partner has any interest at all in the asset or money. As pointed out in the case of Gopala Chetty versus Vijayaraghavachariar, (1922-1 A. C. 488: A.I.R. (9) 1922 P. C. 115), decided by their Lordships of the P. C., even after dissolution a co-partner has no right to sue for his share of an asset. It appears to me that if a co-partner has no right to sue to recover his share it cannot possibly be said that his co-partner is holding that share in trust for him. If the partner holds partnership property in a fiduciary capacity he would be holding it in trust for his co-partners. & his co-partners could sue. But it has been laid down beyond all question that the co-partners cannot sue & that their only remedy is an account & to recover only what is ultimately found due on taking the account. It appears to me that in those circumstances it cannot be said that a partner who receives or holds property of a partnership is entrusted with the property or dominion over it, & that being so it appears to me that



the answer to question 1 must be in the negative.

35. The answer to question 2 must be that these cases cannot be regarded as correctly decided if they lay down any general rules applicable to prosecutions of partners for offences under Section 406, Penal Code in respect of property received or held by such partners on behalf of the partnership in the ordinary course of partnership dealings. However, the cases may be regarded as rightly decided, if they are confined to cases where under special agreements made between the parties entrustment of the property or dominion over it could be given to any particular partner.

43. This decision was rendered in 1874 & has caused considerable anxiety for more than 70 years. On two main grounds the soundness of this decision has been questioned more than once. First the decision is said to be verbal & academic & its practical import is difficult to find. This decision gives no indication to show how it & under what circumstances a partner can at all be said to be entrusted with partnership property or with dominion over it or to have misappropriated & it is difficult, if not impossible, to conceive how such a situation can arise. This criticism is put on the ground of the law of partnership. In *Piddocke v. Burt*, (1894) 1 Ch. 343: (63 L. J. Ch. 246), it is held that a partner who receives money belonging to the partnership on account of himself & his co-partner does not do so in a fiduciary capacity. At Common Law in England no criminal prosecution can be maintained by one partner against another for stealing or embezzling by false pretexts or misappropriating property of the firm.



Partners are regarded in law as joint owners or co-owners of the partnership property. Secondly, Sections 403 to 409, Penal Code occur under "offences against property" in chap. 17 of that Code, under the sub-heading "Criminal misappropriation of property." This group of sections deals with many classes of persons who are specially & specifically mentioned but they make no reference to a partner. Section 407 Penal Code, deals with criminal breach of trust by carrier wharfinger or warehouse keeper. Section 408, Penal Code, refers to criminal breach of trust by clerk or servant. Section 409, Penal Code, refers to criminal breach of trust by a public servant or by Banker, merchant or agent. The case of a partner is not mentioned in any of these sections or even in the numerous statutory illustrations given thereunder. The statutory illustrations indicate persons entrusted absolutely with the property of another & not property which belongs either partly or wholly to the accused. If illustrations are any indication then these sections of the Penal Code are not intended to be applied to partners. Illustration (c) of Section 403, Penal Code, which refers to joint owners of a horse & says that one of the joint owners can take the horse out of the possession of the other is of no assistance in this case because unlike the illustration the partnership account is a general account & is not confined to a specified item of property as the horse in the illustration. Then again in this connection a reference to Section 424, Penal Code, will show that there can be dishonest or fraudulent removal or concealment of one's own property because of the specific language used in that section namely "property of himself or any other person."



10. Evidently, the dispute is between two partners arising out of the partnership business relating to accounting and sharing of profit. This is not a case of complainant/opposite party No.2 that the property was entrusted in the exclusive dominion of the accused partners. Rather specific case of the complainant is that he was a working partner. Therefore, there is apparent lack of ingredient of entrustment of property as such there is no question of criminal misappropriation of property. Hence, the cognizance of offence under Section 406 of the Indian Penal Code is bad in law. Since substantive offence of the Indian Penal Code is not made out, the allegation of criminal conspiracy would automatically fall on the ground in absence of specific averment otherwise recorded in the complaint petition.

11. The impugned order cannot be sustained for one more reason that initiation of the criminal proceeding was itself bad in law as inasmuch as it suffers from non-application of judicial mind by the Magistrate in sending the complaint, which was not supported on oath, to the Police Station for institution of a Police case and investigation of the same.

12. In *Anil Kumar versus M.K. Aiyappa* reported in **2013(10) SCC 705**, the Hon'ble Supreme Court observed as follows:-



“The scope of Section 156 (3) Cr.P.C. came up for consideration before this Court in several cases. This Court in Maksud Saiyed (2008) 5 SCC 668 examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156 (3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156 (3) or Section 200 Cr.P.C., the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156 (3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156 (3) Cr.P.C., should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation.”



13. In *Priyanka Srivastava and Another versus the State of U.P. & Others* reported in 2015 (3) PLJR (SC) 78, the Hon'ble Supreme Court observed as follows:-

“25. Issuing a direction stating "as per the application" to lodge an FIR creates a very unhealthy situation in the society and also reflects the erroneous approach of the learned Magistrate. It also encourages the unscrupulous and unprincipled litigants, like the respondent no.3, namely, Prakash Kumar Bajaj, to take adventurous steps with courts to bring the financial institutions on their knees. As the factual exposition would reveal, he had prosecuted the earlier authorities and after the matter is dealt with by the High Court in a writ petition recording a settlement, he does not withdraw the criminal case and waits for some kind of situation where he can take vengeance as if he is the emperor of all he surveys. It is interesting to note that during the tenure of the appellant No.1, who is presently occupying the position of Vice-President, neither the loan was taken, nor the default was made, nor any action under the SARFAESI Act was taken. However, the action under the SARFAESI Act was taken on the second time at the instance of the present appellant No.1. We are only stating about the devilish design of the respondent No.3 to harass the appellants with the sole



intent to avoid the payment of loan. When a citizen avails a loan from a financial institution, it is his obligation to pay back and not play truant or for that matter play possum. As we have noticed, he has been able to do such adventurous acts as he has the embedded conviction that he will not be taken to task because an application under Section 156 (3) Cr.P.C. is a simple application to the court for issue of a direction to the investigating agency. We have been apprised that a carbon copy of a document is filed to show the compliance of Section 154 (3), indicating it has been sent to the Superintendent of police concerned.

27. In our considered opinion, a stage has come in this country where Section 156 (3) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people



who are passing orders under a statutory provision which can be challenged under the framework of said Act or under of Article 226 of the Constitution of India. (*emphasis is mine*) But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores. We have already indicated that there has to be prior applications under Sections 154 (1) and 154 (3) while filing a petition under Section 156 (3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an the application under Section 156 (3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156 (3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where



there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR.”

14. It is evident that the complaint petition is not on oath and the order of the learned Magistrate referring the matter for registration of a Police case in exercise of power under Section 156 (3) of the Code of Criminal Procedure reflects non-application of judicial mind inasmuch as the learned Magistrate did not consider the complaint petition which does not disclose ingredients of a criminal offence.

15. For the aforesaid reasons, the the impugned order is not sustainable in law. Accordingly, it is, hereby, *quashed* and both these applications are *allowed*.

(Birendra Kumar, J)

abhishek/-

AFR/NAFR	AFR
CAV DATE	N.A.
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