

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.228 of 2018

Arising Out of PS. Case No.-206 Year-2011 Thana- SHRIKRISHNAPURI District- Patna

1. Darshana Singh daughter of Dr. Rameshwar Prasad Singh and wife of Narendra Prasad Singh,
2. Narendra Prasad Singh son of Deo Prasad Singh, Both Resident of Mohalla- Ashokpuri, Khajpura, P.S. Shastri Nagar, Town and District- Patna.

... .. Petitioner/s

Versus

1. The State Of Bihar
2. Raju Kumar son of Sri Rajendra Singh, Resident of Mohalla- Nehru Nagar, P.O. and P.S. Patliputra, District- Patna.

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr. Rajendra Narayan, Sr. Advocate
		Mr. Vijay Kumar Singh, Advocate
For the Opposite Party/s :		Mr. Jharkhandi Upadhyay, APP
For Opposite Party No.2:		Mr. Vikash Kumar Sharma, Advocate

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
CAV JUDGMENT

Date : 26-09-2019

Heard learned counsel for the parties.

2. In this application, under Section 482 Cr.P.C.,

the petitioners have sought for quashment of the order dated 12.09.2017 passed in connection with Sri Krishnapuri P.S. Case No.206 of 2011 whereby the learned Judicial Magistrate, 1st Class, has refused the prayer of the petitioners to discharge.

3. The challenge is on the ground that the facts



alleged makes out a case of out and out a civil dispute. However, to settle the score Opposite Party No.2 has abused the process of Court by filing a criminal proceeding. Consistent judicial pronouncements are there that civil disputes should not be allowed to be settled through a criminal proceeding. The impugned order has further been challenged on the ground that initially Complaint Case No.2379(C) of 2011 was filed by Opposite Party No.2 without making statement on oath regarding compliance of the requirement of Section 154(3) Cr.P.C. and the learned Magistrate acted in a mechanically way without application of judicial mind; and without going through the complaint petition which discloses a pure civil dispute between the parties, send the matter for police investigation in exercise of power under Section 156(3) Cr.P.C. As such, there is non-compliance of the mandate of law and the guidelines of the Hon'ble Supreme Court in **Priyanka Srivastava and Another Vs. State of Uttar Pradesh and others** reported in (2015) 6 Supreme Court Cases 287.



4. The challenge is on the ground that a bare perusal of the complaint petition does not make out the ingredients of any of the offences for which cognizance has been taken. As such, the criminal proceeding is manifestly attended with mala fide to wreak vengeance.

5. It is worth to mention that after receipt of police report under Section 173(3) Cr.P.C. the learned Magistrate took cognizance for offences under Sections 406, 420, 379 and 120B of the Indian Penal Code by order dated 12.02.2014. The petitioners challenged the order of cognizance before this Court in Cr. Misc. No.45148 of 2015. Since there was no order of stay of the proceeding before the Court-below the stage of hearing on charge came and prayer for discharge was refused and the same is challenged in this application. In the circumstance, Cr. Misc. No.45148 of 2015 was disposed of as withdrawn on 20.09.2019.

6. Undisputed fact of this case is that one Dr. Ragini Singh was owner of Flat No.2 in Apurva Radha Complex



situated in Mohalla Sri Krishnapuri in the town and district of Patna. She gifted the said Flat to her daughter Smt. Shalini Verma and Sri Jay Vishal, the husband of Shalini Verma.

7. According to complaint petition, petitioner Narendra Prasad Singh entered into a written agreement on 22.07.2010 to purchase the said Flat in the name of his wife petitioner Darshana Singh from Shalini Verma and Mr. Jay Vishal. A copy of the written agreement dated 22.07.2010 at Annexure-2 reveals that total consideration money of the Flat was rupees thirty lacs. The entire consideration money was to be paid in different installments mentioned in the agreement latest by 31.12.2010. In the complaint petition it is alleged that the total consideration money of the Flat was rupees fifty lacs, which is contrary to the terms of the agreement. The allegation is that the petitioners did not pay the entire consideration money within time granted. Therefore, the said Shalini and Jay Vishal unilaterally cancelled the agreement and executed a power of attorney on 14.05.2011 in favour of Opposite Party No.2.



8. The claim of the petitioners is that the petitioners had already paid through cheque and bank draft Rs.21,50,000/- and thereafter the vendors started evading receipt of the remaining consideration money and execute the sale deed because Opposite Party No.2 persuaded and induced them that the Flat would be sold on a higher price. Being frustrated with the act of Smt. Shalini and Mr. Jay Vishal, the petitioners filed Title Suit No.458 of 2011 on 01.07.2011 before the learned Sub-Judge, Patna, for a decree of specific performance of contract and in the alternative for refund of consideration money along with interest.

9. In the meantime, with the intervention of the well-wishers the petitioners and Opposite Party No.2 on behalf of the Flat owners sat together and agreed that Flat owner would refund the paid consideration amount of Rs.21,50,000/- along with additional Rs.9,00,000/- (Nine lacs) as compensation for harassment. This agreement was signed on 22.09.2012 vide Annexure-4. However, the Flat owners did not comply with the



aforesaid undertaking. Hence, the petitioners filed criminal Complaint No.1678(C) of 2013. A copy at Annexure-5. The petitioners have stated on oath and has not been controverted by Opposite Party No.2 that Opposite Party No.2 has already sold the said Flat to some other person during pendency of the aforesaid suit. Thus, in fact, the petitioners have been cheated in the transaction and not anyone else especially Opposite Party No.2.

10. Allegation in the complaint petition is that on 31.08.2011, the petitioners forcefully broke open the lock of the said Flat and trespassed into it and ransacked the articles in the room as well as committed theft of household articles kept therein. When Opposite Party No.2 protested, the petitioners threatened him to kill. For the act of 31.08.2011 the complaint petition was filed on 02.09.2011 merely stating the fact that when complaint was made to Sri Krishnapuri Police Station the police did not take any step, hence the complaint case.

11. Mr. Rajendra Narayan, learned Senior Counsel



appearing on behalf of the petitioners, submits that perusal of the entire complaint based FIR would reveal that no offence is prima facie made out whereunder the learned Court-below has taken cognizance or decided to frame charges. There is no case of entrustment of any property to the petitioners by Opposite Party No.2. Hence, allegation of criminal breach of trust as defined under Section 405 of the Indian Penal Code is apparently not made out. Likewise, no ingredient of cheating is fulfilled in this case because dishonest and fraudulent intention of the petitioners at the time of inception of the agreement or even on the date of filing of the criminal complaint is not there. In fact, the petitioners have paid the consideration money for purchase of the Flat and the said Flat was surreptitiously sold away to some other person during pendency of the suit for specific performance of contract. The part consideration money of Rs.21,50,000/- paid by the petitioners has not been refunded as yet. There is no averment in the complaint petition regarding criminal conspiracy between the petitioners nor there is



allegation that anything was done in pursuance of that conspiracy. The allegation of commission of theft is ornamental and just to make out a case of criminal prosecution with malice and ulterior motive, which should not be allowed at the hands of unscrupulous complainant to prevent the miscarriage of justice.

12. Mr. Vikash Kumar Sharma, learned counsel for Opposite Party No.2, contends that the impugned order would reveal that several eyewitnesses had supported the occurrence dated 31.08.2011 wherein the petitioners committed house trespass and theft as well as other offences. Therefore, prima facie offence under Section 379 of the Indian Penal Code is disclosed. In the circumstance, this Court should not interfere with the impugned order in exercise of this extra-ordinary power because the learned Magistrate has exercised discretion vested in it and the exercise is based on the materials on the record. Next contention is that order of the Magistrate passed under Section 156(3) Cr.P.C. is not challenged in this application. Hence, ratio of **Priyanka Srivastava** case is not



application.

13. On careful consideration of the materials on the record, I find that the dispute is, in reality, a pure civil dispute. The petitioners are pursuing civil remedies according to law before the competent civil court from the date prior to the filing of the criminal complaint. The agreement to sale between the petitioner No.1 and the owners of the Flat is not disputed. There is allegation and counter allegation as to who is defaulter in non-performance of his part of the contract. This issue would be decided in the civil suit. Even during pendency of the suit the parties entered into another written agreement whereunder the owners agreed to refund the consideration money advanced by the petitioners along with compensation of Rs.9,00,000/- but the owners did not comply the agreement. Alternative prayer of the petitioners before the Civil Court is refund of consideration money in the event of no decree of specific performance of contract by execution of registered sale deed is feasible. It has not been denied by Opposite Party No.2 that Opposite Party



No.2 on the strength of power of attorney executed by the real owners has already sold the said Flat to some other person.

14. The aforesaid factual matrix clearly reveals that complainant/informant has attempted, by filing of the present criminal prosecution, to settle the score arising out of the civil dispute between the parties, which cannot be allowed to prevent the miscarriage of justice and abuse of the process of law.

15. Secondly, the perusal of the entire complaint petition does not disclose that at any point of time the complainant entrusted anything to the petitioners which was to be returned back to the complainant in future. Hence, no ingredient of offence under Section 406 of the Indian Penal Code is made out. Likewise, the averment does not show fraudulent and dishonest intention of the petitioners from very beginning; rather such intention was there with the real owners while they unilaterally cancelled the agreement between the parties. Even if the petitioners were non-performer of the contract of their part, the legal remedy was there with the Flat



owners but they adopted illegal method of unilateral cancellation of the agreement. Moreover, the petitioners have not gained anything from the transaction; rather they are still loser in the sense that admitted consideration money paid by the petitioners to the Flat owners is still to be realized and the Flat has already been sold by Opposite Party No.2 to some other person.

16. No case of criminal conspiracy and any act committed by the petitioners in pursuance of criminal conspiracy is made out. Hence, cognizance under Section 120B of the Indian Penal Code as well as order of the Court to frame charge for the aforesaid offence is bad in law.

17. The ornamental allegation of commission of house trespass and theft is not believable in the facts and circumstances of this case because the complainant has not stated anywhere as to on which date he got restoration of possession of Flat and sold away the same to some other person. Just with mala fide intention a story of theft has been cooked up



by the complainant to wreak vengeance against the petitioners. Hence, in my view, the criminal prosecution of the petitioners in the facts and circumstances stated above is abuse of the process of the Court.

18. Since order of the Magistrate under Section 156(3) Cr.P.C. is not specifically challenged, it would not denude this Court with power to make such orders which is necessary to prevent the abuse of the process of the Court and to secure the ends of justice.

19. Section 154(3) Cr.P.C. provides that any person aggrieved by a refusal on the part of the Officer-in-Charge of a police station to record information under Sub-section (1) of Section 154 Cr.P.C. may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him. Neither the complainant has stated



in the complaint petition on oath that he had complied the requirement of Section 154(3) Cr.P.C. nor it can be presumed that the said provision was complied in view of filing of the complaint petition within two days of the occurrence. The Hon'ble Supreme Court in **Priyanka Srivastava case** (supra) held that the power under Section 156(3) Cr.P.C. cannot be exercised by the Magistrate in a routine manner; rather it requires application of judicial mind. The Magistrates have been cautioned, while exercising such power, to remain vigilant with regard to the nature of allegation made in the application and not to issue directions without proper application of mind.

20. If the Magistrate would have gone through the averments made in the complaint petition with judicial mind it could not have exercised the power in the manner done.

21. The Hon'ble Supreme Court emphasized that prior applications under Section 154(1) and 154(3) Cr.P.C. have to be in existence while filing a petition or exercising power under Section 156(3) Cr.P.C. In this case the statutory provision



had not been followed while filing the complaint petition without affidavit or in referring the matter for police investigation under Section 156(3) Cr.P.C. Hence, the initiation of the criminal proceeding was itself in violation of the law and if allowed to stand would lead to miscarriage of justice.

22. To conclude the impugned order and entire criminal proceeding stand hereby quashed and this application stands allowed.

(Birendra Kumar, J)

Mkr./-

AFR/NAFR	AFR
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