IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.40731 of 2017

Arising Out of PS. Case No.-118 Year-2016 Thana- RAJGIR District- Nalanda

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Nishikant Tiwari S/o Sri Ramballabh Tiwari, Resident of Village- Singahi, P.O.- Mehrauli, P.S.- Doriganj, Distt- Saran at Chapra.

... ... Petitioner/s

Versus

The State of Bihar

... ... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Rajeev Kumar Singh, Advocate
Mr. Gyanendra Kumar Diwakar, Advocate

For the Opposite Party/s : Mr.Yogendra Kr. Singh, APP

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CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA

ORAL ORDER

4 13-02-2024 1. Heard learned counsel appearing on behalf of the parties.

2. The present application has been filed for quashing the order dated 23.01.2017 passed in Rajgir P.S. Case No. 118 of 2016, under Section 409 of the Indian Penal Code (in short 'I.P.C.') by which the learned A.C.J.M. IV, Biharsharif has taken cognizance against the petitioner for offence under Section 409 of the IPC on the basis of materials collected during the investigation.

3. As per the case of prosecution, petitioner who joined Nalanda University, Rajgir as Director (Administration) on 25.05.2015 was supplied one laptop (Make-HP), one Dongle (Make-Micromax), one Pen Drive 32 GB (Make HP) and

University Letter Pads in his officials capacity. Service of petitioner was terminated by university on 20.05.2016 and thereafter, he was asked to return the computer devices and letter pads as mentioned above but same was not returned by petitioner within time and in the background of said allegation, the case was registered as aforesaid under Section 409 of the IPC against petitioner.

4. The learned counsel appearing on behalf of petitioner submitted that this is an admitted position that computer devices as alleged through FIR was given to petitioner in officials capacity. It is submitted that the termination order dated 20.05.2016 was challenged by petitioner before the Hon'ble High Court, where matter is pending as C.W.J.C. No. 14591 of 2016. It is submitted that as per policy of government of Bihar and also as Government of India, an employee can purchase the computer devices as depreciated cost.

5. It is further submitted that petitioner was also desirous to retain said computer devices against depreciation cost and, as such by showing his desire, he wrote a letter to Finance Officer and in-charge Registrar on 12.09.2016 (vide annexure-6). It is further submitted that salary for the month of May, 2016 was not paid to petitioner by university and his

medical bills were also not cleared by university. Petitioner was desirous to deduct depreciated cost of computer devices against said pending salary and bills. Petitioner also reported the matter to Hon'ble Chancellor through annexure-7.

6. While travelling over the argument, learned counsel submitted that having no communication in this regard from university end, to avoid any further complexity regarding issue in question, petitioner deposited laptop, dongle, pen drive 32 GB to authorized officials of Nalanda University in working condition. In support of his submission learned counsel relied upon annexure-9, which is the copy of handing and taking over the items. It is pointed out that in view of aforesaid facts, it cannot be said that offence under Section 409 of IPC is *prima facie* made out against the petitioner rather it is a case of malacious prosecution just to harass the petitioner, who was once the employee of the university. In support of his submission learned counsel relied upon the report of Hon'ble Supreme Court as reported through "***N. Raghwendra Vs. State of Andhra Pradesh, CBI, AIR 2022 SC 826"***, where learned counsel pressed paras 41, 42 and 43 of the report. Same is re-produced below for the sake of better understanding of the legal position in factual scenario as discussed above.

"41. Section 409 IPC pertains to

criminal breach of trust by a public servant or a banker, in respect of the property entrusted to him. The onus is on the prosecution to prove that the accused, a public servant or a banker was entrusted with the property which he is duly bound to account for and that he has committed criminal breach of trust. (See: Sadupati Nageswara Rao v. State of Andhra Pradesh9).

42. The entrustment of public property and dishonest misappropriation or use thereof in the manner illustrated under Section 405 are a sine qua non for making an offence punishable under Section 409 IPC. The expression 'criminal breach of trust' is defined under Section 405 IPC which provides, inter alia, that whoever being in any manner entrusted with property or with any dominion over a property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property contrary to law, or in violation of any law prescribing the mode in which such trust is to be discharged, or contravenes any legal contract, express or implied, etc.shall be held to have committed criminal breach of trust. Hence, to attract Section 405 IPC, the following ingredients must be satisfied: (i) Entrusting any person with property or with any dominion over property; (ii) That person has dishonestly mis-appropriated or converted that property to his own use; (iii) Or that person dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation of any direction of law or a legal contract.

43. It ought to be noted that the crucial word used in Section 405 IPC is 'dishonestly' and therefore, it pre-supposes the existence of mens rea. In other words, mere retention of property entrusted to a person without any misappropriation cannot *fall within the ambit of criminal breach of trust. Unless there is some actual use by the accused in violation of law or contract, coupled with dishonest intention, there is no criminal breach of trust. The second significant expression is 'mis-appropriates' which means improperly setting apart for ones use and to the exclusion of the owner."*

7. It would be further apposite to re-produce para 102 of the ***State of Haryana and Ors. Vs. Bhajan Lal and Ors.,*** reported in ***1992 Supp (1) Supreme Court Cases 335,*** which reads as under:

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first informant report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of nay offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent persons can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior

motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

8. It is submitted by learned APP while going through the contents of counter affidavit that the computer devices in issue was not returned within specified time by petitioner, which was trusted with him in connection with his employment.

9. From the perusal of record, it appears that the computer devices in issue was made available to petitioner out of his employment being Director (Administration) of Nalanda University, Rajgir. It appears from record that petitioner respond the demand to return the computer devices in issue vide his email dated 19.02.2016 and 30.08.2016 sent to Registrar of Nalanda University, where his salary for the month of May 2016 was due alongwith some medical bills, even completion of No Dues formalities was also pending with university. It further appears that petitioner shows his desire to retain computer devices against depreciation cost as per government policy, where he requests to university to deduct the amount from his salary due for month of May 2016. He also reported the entire incident to Hon'ble Chancellor of the University. It further appears that computer devices in issue were returned to university in working condition on 4th of October 2016 i.e. after

about four months of his termination. Case against termination of petitioner is also pending before the High Court as C.W.J.C. No. 14591 of 2016.

10. From the factual discussions of the matter, the crucial word “dishonestly” as used in section 405 of IPC, which pre-supposes to be exist with *mens rea* cannot be gathered in present case. Thus present proceeding appears manifestly attendant with malafide intention and an ulterior motive.

11. In view of aforesaid discussed factual and legal submission and by taking note of the legal guidelines as available under para-102 of ***Bhajan Lal’s*** Case (*supra*), the impugned order dated 23.01.2017 and all consequential proceedings is hereby quashed.

12. Accordingly, this application stands allowed.

13. Let copy of this order be sent to the trial court, without delay.

(Chandra Shekhar Jha, J)

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