IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.15177 of 2016

Arising Out of PS. Case No.-202 Year-2013 Thana- PATNA COMPLAINT CASE District- Patna

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1. Balram Tiwary @ Baliram Tiwary, S/o Late Yamuna Tiwary
2. Kumar Shyam Shaishav S/o - Baliram Tiwary

Both residents of Village - Suwahi, P.S. - Siswan, Dist. - Siwan.

... ... **Petitioners**

Versus

1. The State of Bihar
2. Avinash Kumar S/o - Anant Kishore Singh R/muhalla - Golamarket, Shop No. 83, Bazar Samittee, P.S. - Bahadurpur, P.O. - Mahendru, Distt - Patna.

... ... **Opposite Parties**

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Appearance :

For the Petitioners	:	Mr.Anil Kumar Tiwary, Advocate
For the State	:	Mr.Ram Chandra Sahni, APP
For the O.P. No.2	:	Mr.Sunny Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA

ORAL JUDGMENT

Date : 29-03-2024

Heard learned counsel for the petitioners and learned A.P.P. for the State duly assisted by learned counsel for the opposite party no. 2.

2. At the outset, it is submitted that petitioner no. 1 has died during pendency of present application on 05.05.2022, therefore it is prayed that application qua petitioner no. 1 be permitted to be withdrawn as it has become infructuous with respect to petitioner no. 1.

3. Request allowed.

4. Now, the present proceeding is limited with petitioner no. 2 namely, Kumar Shyam Shaishav.

5. This application has been filed for quashing the order dated 02.09.2013 passed by learned Judicial Magistrate, Patna City in C.A. No. 202/2013, whereby and whereunder learned Magistrate has taken cognizance against the petitioners under Section 420 of the Indian Penal Code (in short the 'I.P.C.').

6. The brief facts of the case is that the complainant was willing to purchase the land, for which petitioners approached him for selling their land bearing survey thana no. 14, Tauzi No. 229, Khata No. 248, Khesra No. 1390 and Jamabandi No. 4468/1 having area 2400 Sq. ft. It is further stated that the aforesaid land was in the name of Sumitra Devi which was sold by her on 15.06.2006 by registered sale deed. Thereafter, *bay Beyana Patra* (agreement to advance payment) was prepared between complainant and Sumitra Devi and, in this regard, complainant had paid Rs. 3,00,000/- to Sumitra Devi as advance money and it was agreed between the parties that rest of the amount will be paid at the time of sale deed. The complainant has further alleged that for selling the land in question, accused no. 3 has acted main role. On the *bay Beyana Patra,* Sumitra Devi made her thumb impression which is identified by her. It is stated that when the sale deed was not executed within fixed period by the accused no. 1, the complainant had sent legal notice and when reply of legal notice was not received by the complainant, he reached the house of accused no. 1 with remaining dues of the consideration amount as per sale deed but accused no. 1 told him that when her son will come, she will inform him, but, nothing has happened, therefore, complainant filed the complaint case.

7. It is submitted by learned counsel appearing on behalf of petitioner no. 2 that sale agreement was executed between opposite party no. 2 and co-accused Sumitra Devi, where implication of petitioner no. 2 appears only being son of Sumitra Devi. It is further submitted that as merely consideration amount was paid to Sumitra Devi, in presence of petitioner no. 2, whose presence was very natural being family member, the present implication was made. It is submitted that no specific role attributed to petitioners through complaint proceeding *qua* cheating and, moreover, the present allegation purely arises out of civil dispute, for which a title suit is pending between the parties before Sub-Judge-1, Patna City Civil Court being Title Suit No. 174/2015.

8. In support of submission, learned counsel relied upon the legal reports of Hon'ble Supreme Court as reported in the matter of **Sushil Sethi and Another vs. State of Arunachal Pradesh and Ors. [(2020) 3 SCC 240]** and in the case of **State of Haryana v. Bhajan Lal, [1992 Supp (1) SCC 335].**

9. Learned A.P.P. for the State duly assisted by learned counsel for the opposite party no. 2, while opposing the application, submitted that petitioner no. 2 actively participated in the entire dealing with respect to land with opposite party no. 2, but fairly conceded that the agreement was with the mother of this petitioner for which a Title Suit is pending between the parties.

10. It would be apposite to reproduce Para-7.1, 7.2,7.5, 8.1 and 8.2 of **Sushil Sethi Case** (supra), which runs as under:

> 7.1. In State of ***Haryana v. Bhajan Lal, [1992 Supp (1) SCC 335],*** in para 102, this Court has categorised the cases by way of illustration wherein the powers under Article 226 or the inherent powers under Section 482 CrPC could be exercised either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. In para 102, it is observed and held 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 information 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 any 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 person 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 Act concerned (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 Act concerned, 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."

7.2. In Vesa Holdings (P) Ltd. v. State of Kerala, [(2015) 8 SCC 293] , it is observed and held by this Court 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. It is further observed and held that for the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. It is further observed and held that even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 IPC can be said to have been made out. It is further observed and held that the real test is whether the allegations in the complaint disclose the criminal offence of cheating or not.

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7.5. In **Sharad Kumar Sanghi v. Sangita Rane, [(2015) 12 SCC 781]**, this Court had an occasion to consider the initiation of criminal proceedings against the Managing Director or any officer of a company where company had not been arrayed as a party to the complaint. In the aforesaid decision, it is observed and held by this Court that in the absence of specific allegation against the Managing Director of vicarious liability, in the absence of company being arrayed as a party, no proceedings can be initiated against such Managing Director or any officer of a company. It is further observed and held that when a complainant intends to rope in a Managing Director or any officer of a company, it is essential to make requisite allegation to constitute the vicarious liability.

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8.1. As observed hereinabove, the charge-sheet has been filed against the appellants for the offences under Section 420 read with Section 120-B IPC. However, it is required to be noted that there are no specific allegations and averments in the FIR and/or even in the charge-sheet that fraudulent and dishonest intention of the accused was from the very beginning of the transaction. It is also required to be noted that contract between M/s SPML Infra Limited and the Government was for supply and commissioning of the Nurang Hydel Power Project including three power generating units. The appellants purchased the turbines for the project from another manufacturer. The company used the said turbines in the power project. The contract was in the year 1993. Thereafter in the year 1996 the project was commissioned. In the year 1997, the Department of Power issued a certificate certifying satisfaction over the execution of the project. Even the defect liability period ended/expired in January 1998. In the year 2000, there was some defect found with respect to three turbines. Immediately, the turbines were replaced. The power project started functioning right from the very beginning—1996 onwards. If the intention of the company/appellants was to cheat the Government of Arunachal Pradesh, they would not have replaced the turbines which were found to be defective. In any case, there are no specific allegations and averments in the complaint that the accused had fraudulent or dishonest intention at the time of entering into the contract. Therefore, applying the law laid down by this Court in the aforesaid decisions, it cannot be said that even a prima facie case for

> the offence under Section 420 IPC has been made out.
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> **8.2.** It is also required to be noted that the main allegations can be said to be against the company. The company has not been made a party. The allegations are restricted to the Managing Director and the Director of the company respectively. There are no specific allegations against the Managing Director or even the Director. There are no allegations to constitute the vicarious liability. In **Maksud Saiyed v. State of Gujarat [Maksud Saiyed v. State of Gujarat, (2008) 5 SCC 668 : (2008) 2 SCC (Cri) 692]** , it is observed and held by this Court that the Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the company when the accused is the company. It is further observed and held that the vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. It is further observed that the statute indisputably must contain provision fixing such vicarious liabilities. It is further observed that even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability. In the present case, there are no such specific allegations against the appellants being Managing Director or the Director of the company respectively. Under the circumstances also, the impugned criminal proceedings are required to be quashed and set aside."

11. In view of the aforesaid factual and legal discussions, it appears that the present criminal proceeding was initiated only to create a legal pressure in civil proceeding which is pending between the parties, as Title Suit No. 174/2015 before Patna City Civil Court, moreover, from perusal of complaint petition, it appears *prima-facie* that implication of petitioner no. 2 is only being son of co-accused late Sumitra Devi, and, as such no *prima-facie* case is made out against petitioner no. 2 and the factual narration of complaint suggests that this case was brought with ulterior and oblique motive only being son of co-accused late Sumitra Devi. Hence, same appears covered under the guideline no. 1, 5 and 7 of **Bhajan Lal** case **(supra)** as stated hereinabove.

12. Accordingly, the impugned order dated 02.09.2013 passed by learned Judicial Magistrate, Patna City in C.A. No. 202/2013 by which cognizance has been taken under Section 420 of the I.P.C. is hereby set-aside and quashed qua petitioner no. 2, namely Kumar Shyam Shaishav.

13. This application stands allowed.

14. Let a copy of this judgment be communicated to learned trial court immediately.

(Chandra Shekhar Jha, J.)

Rajeev/-

AFR/NAFR	NAFR
CAV DATE	NA
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