

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.21171 of 2021

Arising Out of PS. Case No.-219 Year-2016 Thana- BARBIGHA District- Sheikhpura

Shiv Shankar Kumar, Son of Late Basant Prasad Singh, Resident of Village-
Kasar, P.S.- Ariari, District- Sheikhpura, contractor in name of firm named
and styled as Maa Kali Netula Enterprises.

... .. Petitioner/s

Versus

The State of Bihar

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr. D.K. Sinha, Sr. Advocate Mr. Abhinay Raj, Advocate
For the State	:	Mr. Jharkhandi Upadhyay, APP

CORAM: HONOURABLE MR. JUSTICE HARISH KUMAR
ORAL JUDGMENT

Date : 23-08-2024

Heard Mr. D.K. Sinha, learned Senior Advocate for
the petitioner and learned Additional Public Prosecutor for the
State.

2. The instant application has been filed invoking
inherent jurisdiction of this Court under Section 482 of the Code
of Criminal Procedure (for short “the CrPC”), seeking quashing
of the order taking cognizance dated 21.12.2019, whereunder
the learned Chief Judicial Magistrate, Sheikhpura, has taken
cognizance of the offences punishable under Sections 409, 120B
and 420 of the Indian Penal Code in Barbigha P.S. Case No. 219
of 2016/ G.R. No. 649 of 2016.



3. Before advertng to the material facts of the case, learned Senior Advocate for the petitioner contended that earlier the petitioner had preferred Cr.W.J.C. No. 804 of 2016 for quashing of the FIR of Barbigha P.S. Case No. 219 of 2016. The matter was heard and notices were issued but while the matter was in *seisin*, in the meanwhile, the police submitted a final report showing the petitioner as innocent and not up him for trial. However, differing with the final report, the learned Chief Judicial Magistrate, Sheikhpura, took cognizance for the offences punishable under Sections 409, 120B and 420 of the Indian Penal Code and, as such, the petitioner was granted liberty to assail the order taking cognizance.

4. In view of the liberty so granted, the petitioner preferred Cr. Misc. No. 75845 of 2019 assailing the order taking cognizance dated 19.09.2019, wherein cognizance of the offences punishable under Sections 409, 120B and 420 of the Indian Penal Code was taken.

5. This Court having heard the parties vide its order dated 26.11.2019 quashed the impugned order dated 19.09.2019 and remitted the matter back to the learned Chief Judicial Magistrate, Sheikhpura to consider it afresh and pass a reasoned order stating what are the allegations against the petitioner.

6. In compliance with the order of this Court, the



learned Chief Judicial Magistrate, Sheikhpura, considered the order taking cognizance afresh and passed the order taking cognizance dated 21.12.2019, which is impugned herein.

7. The relevant facts which led to the order taking cognizance are that, pursuant to the letter no. 518 dated 12.06.2016 issued by the District Education Officer, Sheikhpura, the District Programme Officer, Sheikhpura instituted an FIR alleging therein that on 01.09.2014, a meeting in relation to District 20 Point Programme Co-ordinate Committee, Sheikhpura, was convened and in the said meeting it was found that with respect to the condition of building of High School Maldah, an inquiry was conducted in the year 2010-11. During the course of inquiry, plaster of the walls and floors of the building were found damage. The windows and the doors of the school were also found broken. Due to dilapidated condition of the school building, teaching work was not possible. The FIR also discloses that in the year 2008-09, an estimated cost of Rs. 21,08,990/- was allotted for the construction of laboratory, library, assembly hall, class room etc. of the High School, Maldah. The afore-noted fund of Rs. 21,08,990/- was transferred to the Executive Engineer, Building Division, Sheikhpura, who in turn issued advertisement and selected 'Maa Kali Netula Enterprises' as a successful



contractor. Accordingly, the work order was issued and the fund was allotted. The construction work was started on 28.02.2009 and the same was completed on 18.08.2009. In the meeting dated 01.09.2014, irregularities in the construction of the school building was raised and thus direction was given by the District Magistrate, Sheikhpura to the District Education Officer, Sheikhpura for institution of the FIR.

8. *Prima facie*, it has been found that irregularities have been committed by the contractor in collusion with the employees of the District Education Office as well as the Building Division. In the aforesaid premise, the FIR has been instituted.

9. This is the fact that the police after investigation submitted final report; being found no material against the petitioner, who happens to be contractor and proprietor of 'Maa Kali Netula Enterprises', he was not sent up for trial. However, differing with the final report, the learned Magistrate took cognizance of the offences punishable under Sections 409, 120B and 420 of the Indian Penal Code against the petitioner.

10. Learned Senior Advocate for the petitioner advertng to the aforesaid fact contended that pursuant to a tender notice, the petitioner had submitted his bid and on being found the quotation of the petitioner at the lowest rate, tender



was allotted to him and accordingly he executed Agreement No. 75/2008-09. As per the agreement, the time scheduled for construction of the building was six month. Admittedly, the work order was issued to the petitioner on 28.02.2009 and he successfully completed the work on 18.08.2009, within the prescribed time. The aforesaid construction work was being carried out under the supervision of the Executive Engineer, Building Division, Sheikhpura and it was also verified by the Quality Control Department. On being found the work thoroughly satisfactory, the Executive Engineer, Building Division, Sheikhpura had put his signature on the measurement book. After completion of the work and on being satisfied, the possession of the building was handed over to the State Government and subsequent thereto, it was handed over to the Headmaster of the school on 07.08.2010, the copy of which has been brought on record by way of Annexure-3 to the instant application.

11. It is also the contention of the learned Senior Advocate for the petitioner that there had never been any complaint with regard to any inferior quality and the irregularities committed in the construction of work and the payment has been accorded to the petitioner only after thorough verification of the quality of construction and on being satisfied



with the work as found to be completed as per the specification. For the first time, the irregularities, if any, were raised in the meeting of the District 20 Point Programme Co-ordinate Committee, Sheikhpura on 01.09.2024. Had there been any infirmity really found in the construction of allotted work, it should have been raised at the time of taking possession of the building in question or just in a year or two as per the terms and conditions of the agreement, but the same has never been done and after five years of completion of the work, the issue of irregularities in the construction work has been agitated. It is also the contention of learned Senior Advocate for the petitioner that the impugned order taking cognizance is nothing but without application of mind and, in fact, repetition of earlier order dated 19.09.2019, which was set aside by this Court and thus the matter was remitted. The learned Chief Judicial Magistrate while taking cognizance of the offences has taken note of paragraphs no. 3, 5, 6, 7 and 8 of the case diary and found that there is ample material to constitute the offences punishable under Sections 409, 120B and 420 of the I.P.C. requiring issuance of summons against the petitioner.

12. While assailing the order taking cognizance, learned Senior Advocate for the petitioner further contended that there is no material available on record or even for the sake of



argument, the allegations are taken to be true, in its entirety do not constitute any offence, much less under Sections 409 and 420 of the Indian Penal Code.

13. On the other hand, learned Additional Public Prosecutor for the State countering the submissions made on behalf of the petitioner vehemently argued that this is the fact that during the course of inquiry, the building was found in dilapidated condition. The plaster of the walls and the floors as well as the windows and the doors of the building of the school were found broken. It is the admitted fact that it is the petitioner who was allotted the work of the building and only after five years, the school was found in dilapidated condition on account of the use of poor quality of construction materials. Thus, the role of the petitioner in the instant case in collusion with the officers/employees of the Building Division and the Education Department cannot be denied. The materials collected during the course of investigation made out specific case under Sections 409 and 420 of the I.P.C. against the petitioner. Needless to observe that whoever, being in any manner entrusted with property or with any dominion over property in his capacity of a public servant commits criminal breach of trust in respect of that property constitute an offence under Section 409 of the I.P.C.

14. This Court has carefully heard learned Advocates



for the respective parties and also perused the materials available on record including the impugned order taking cognizance.

15. It is settled in law that basic ingredients for fastening the accused of his liability to commit offence under Section 409 of the I.P.C., the accused person should have been entrusted with any property in his capacity of public servant.

16. In ***Kailash Kumar Sanwatia Vs. State of Bihar and Anr., (2003) 7 SCC 399***, the Hon'ble Apex Court while considering the applicability of essential requirement for proving criminal breach of trust held in paragraph nos. 7 to 9, as follows:

“7. Section 409 IPC deals with criminal breach of trust by a public servant, or by a banker, merchant or agent. In order to bring in application of the said provision, entrustment has to be proved. In order to sustain conviction under Section 409, two ingredients are to be proved. They are:

(1) the accused, a public servant, or banker or agent was entrusted with property of which he is duty-bound to account for; and

(2) the accused has committed criminal breach of trust.

8. What amounts to criminal breach of trust is provided in Section 405 IPC. Section 409 is in essence criminal breach of trust by a category of persons. The ingredients of the offence of criminal breach of trust are:

(1) Entrusting any person with property,



or with any dominion over property.

(2) The person entrusted (a) dishonestly misappropriating or converting to his own use that property; or (b) dishonestly using or disposing of that property or wilfully suffering any other person so as to do in violation—

(i) of any direction of law prescribing the mode in which such trust is to be discharged; or

(ii) of any legal contract made touching the discharge of trust.

9. The basic requirement to bring home the accusations under Section 405 are the requirements to prove conjointly (1) entrustment, and (2) whether the accused was actuated by the dishonest intention or not; misappropriated it or converted it to his own use to the detriment of the persons who entrusted it. As the question of intention is not a matter of direct proof, certain broad tests are envisaged which would generally afford useful guidance in deciding whether in a particular case the accused had mens rea for the crime.”

17. In case of **Dalip Kaur and Others v. Jagnar Singh and Another [(2009) 14 SCC 696]**, the Hon’ble Apex Court highlighting the ingredients of Section 420 of the Indian Penal Code held that *“an offence of cheating would be constituted when the accused has fraudulent or dishonest intention at the time of making promise or representation. A pure and simple breach of contract does not constitute an offence of cheating.”* It would be apposite to quote paragraphs no. 9 and 10 for appreciation of the matter.

“9. The ingredients of Section 420 of the



Penal Code are:

“(i) Deception of any persons;

(ii) Fraudulently or dishonestly inducing any person to deliver any property; or

(iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.”

10. The High Court, therefore, should have posed a question as to whether any act of inducement on the part of the appellant has been raised by the second respondent and whether the appellant had an intention to cheat him from the very inception. If the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants by non-refunding the amount of advance the same would not constitute an offence of cheating. Similar is the legal position in respect of an offence of criminal breach of trust having regard to its definition contained in Section 405 of the Penal Code.”

18. Admittedly, the petitioner herein is a contractor who entered into an agreement; pursuant to which he completed the construction work and on being found his work satisfactory, he has been paid. Mere breach of trust or agreement will not by itself amount to a criminal offence. The fraudulent or dishonest intention is essential ingredient to constitute any offence under



Section 420 of the I.P.C. Both the fraudulent or dishonest intention must exist at the inception and in absence thereof, the materials could not be suffice enough to constitute any offence much less, under Section 420 of the I.P.C.

19. The facts of the case in hand also demonstrate that the work in question was allotted to the petitioner in the year 2009 and to be more specific on 28.02.2009, which was completed within six months on 08.08.2009 as per the scheduled time. The record also suggests that the work was conducted under the supervision of Executive Engineer of Building Construction Division, Sheikhpura and the Headmaster. At no point of time, any irregularity much less even objection has been raised in the manner and mode of execution of the work. After completion of the work, it was handed over to the Headmaster of the school under the direction of the officers of the Education Department. The possession of the building in question was duly accepted by the then Headmaster of the school even at that point of time, no objection has been raised. The materials collected during the course of investigation as has been pointed out by the learned Judicial Magistrate, reveals that there was no proper maintenance on the part of the Headmaster of the school, who was the ultimate custodian of the building. The FIR also does not disclose that when the inquiry was



conducted by the Three Men Committee in the financial year 2010-11; and if the irregularities were found, then why for the first time this fact has been raised in the meeting of District 20 Point Programme Co-ordinate Committee, Sheikhpura on 01.09.2014 and the FIR has been instituted in the year 2016.

20. In order to fasten liability for criminal prosecution, the ingredients constituting an offence is required to be satisfied. It is true, at the time of cognizance stage, the Court is not concerned as to whether the prosecution would fail or succeed. The Court is to see if there is *prima facie* evidence to proceed with the case; quashing of cognizance on the ground that the prospect of prosecution is bleak is not warranted by law, is the settled law. However, when all the materials on record do not *prima facie* establish the offence in question, the cognizance may be quashed as it would amount to abuse of the process of law. The guidelines in this regard has been enunciated by the Hon'ble Apex Court in a celebrated judgment of **State of Haryana v. Bhajan Lal [1992 Suppl (1) SCC 335]**

21. This Court is not oblivious of the settled law that the power of quashing should be exercised sparingly with circumspection in the rarest of rare case and the Court cannot embark upon an inquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/Complaint.



However, in the case in hand, the materials available on record, in the opinion of this Court, is not sufficient enough to constitute an offence, much less under Sections 409 and 420 of the I.P.C. against the petitioner.

22. In view thereof, this Court finds that continuation of the proceedings of Barbigha P.S. Case No. 219 of 2016/ G.R. No. 649 of 2016 as well as the cognizance order dated 21.12.2019 are the abuse of the process of the Court and thus the same is fit to be quashed. Accordingly, the proceedings of Barbigha P.S. Case No. 219 of 2016/ G.R. No. 649 of 2016 and the cognizance order dated 21.12.2019 are quashed.

23. The quashing application stands allowed.

(Harish Kumar, J)

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AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	02-09-2024
Transmission Date	

