

(2015) 07 PAT CK 0133

In the Patna High Court

Case No : Criminal Misc. No. 47783 of 2012

Annu Sinha and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 03-07-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Criminal Procedure Code, 1973 (CrPC) — Section 155(2), 156(1), 202, 204, 482

Penal Code, 1860 (IPC) — Section 405, 406, 415, 420

Citation : (2015) 3 PLJR 830

Hon'ble Judges : Ashwani Kumar Singh, J.

Bench : Single Bench

Advocate : Bindhyachal Singh, Vipin Kumar Singh and Akhauri Vipin Bihari, for the Appellant; Veena Rani Prasad, for the Respondent

Judgement

Ashwani Kumar Singh, J.—Heard learned counsel for the petitioners, learned counsel for the State and learned counsel for the opposite party No. 2. This application under Section 482 of the Code of Criminal Procedure (for short "the Code") is directed against the order dated 1.11.2010 passed by the learned Judicial Magistrate, 1st Class, Rohtas at Sasaram in Complaint Case No. 1063 of 2009, whereby after taking cognizance of the offences punishable under Sections 406 and 420 of the Indian Penal Code (for short "IPC") process has been issued against the petitioners under Section 204 of the Code.

2. The complainant (opposite party No. 2) filed the aforementioned Complaint in the Court of Chief Judicial Magistrate, Rohtas stating therein that the petitioners own and possess land measuring 50 bighas situated at Village-Bahera, P.S.-Sheosagar, District-Rohtas. The complainant negotiated with them to purchase 2 acres and 6 decimals of land, the detail of which has been given in the complaint, and after negotiation an amount of rupees one lakh was paid as advance to petitioner No. 1 on 15th May, 2008. It was agreed that the balance amount of Rs. 4 lakhs would be paid to the petitioners at the time of registration of sale deed on 30th June, 2008. Thereafter, the petitioners did not turn up for

execution of sale deed on 30th June, 2008. The complainant approached them again and requested to honour the agreement. They assured that the sale deed would be registered within fifteen days but they failed to fulfill their promise even this time and did not turn up at Sasaram to execute the sale deed.. The complainant came to know that the accused persons wanted to sell the property in question to some other persons. When the complainant saw that on 29.1.2008 the petitioners came to Sasaram from Patna to sell the property in question to other persons, he raised protest in this regard. Thereafter, the petitioners promised to execute the sale deed on 30th January, 2008. Even on 30th January, 2008 they did not turn up to execute the sale deed. It has further been alleged that petitioner No. 1 made a further demand of Rs. 2 lakhs as advance so that the sale deed may be executed in favour of the complainant. The complainant paid an amount of Rs. 2 lakhs in cash to petitioner No. 1 on 25.2.2009, who handed it over to her son Santanu Sinha for counting. After counting the amount of Rs. 2 lakhs paid to the petitioners, they assured to execute this sale deed shortly but they failed to fulfill their promise and the sale deed was never executed by them in favour of the complainant. Thereafter, the complainant sent a legal notice through post but the same was returned unserved. Lastly, it has been alleged that the complainant came to know through rumour that the property in question was sold to some other persons by the petitioners. According to the complainant, petitioners have thus cheated him.

3. The complainant was examined on solemn affirmation in support of the complaint. Three witnesses were also examined in course of enquiry conducted under Section 202 of the Code. After conducting the enquiry, the impugned order dated 1.11.2010 was passed by the learned Magistrate, which is under challenge in the present application before this Court.

4. Learned counsel for the petitioners has submitted that the petitioners are being maliciously prosecuted in the present complaint. They never entered into an agreement to sell in favour of the complainant. There was no negotiation at any point of time or the sale of the land in question with the complainant-opposite party No. 2. He has submitted that petitioner No. 1 is a widow lady and petitioner Nos. 2 to 4 are her sons. The complainant has filed the present case just because he has greedy eye over the property of the petitioners and by way of filing the present complaint the complainant wants to illegally grab the property of the petitioners. It has further been contended that the dispute raised by the complainant is purely of civil nature and the ingredients of the offences punishable under Sections 406 and 420 IPC are not attracted to the facts of the present complaint.

5. On the other hand, learned counsel for the opposite party No. 2 has submitted that the complainant had negotiated for purchase of the property in question for a consideration of Rs. 5 lakhs and had paid Rs. 3 lakhs as advance in this regard. After receiving the aforesaid amount, the petitioners failed to execute the sale deed. He has submitted that the allegations made in the complaint have duly

been corroborated by the complainant in his statement recorded on oath. The three enquiry witnesses examined under Section 202 of the Code have also corroborated the allegations made by the complainant in the present case.

6. Learned counsel for the State has submitted that in view of the allegations made in the complaint, the ingredients of the offences punishable under Sections 406 and 420 IPC are clearly attracted. According to him, the impugned order dated 1.11.2010 passed by the learned Magistrate does not suffer from any illegality.

7. I have heard respective counsel for the parties and perused the record.

8. In my view, the first and foremost question, which would arise in the present case, is that even if the entire allegations made in the complaint are taken at their face value and accepted in their entirety, whether or not the ingredients of the offences punishable under Sections 406 and 420 IPC would be attracted.

9. Section 406 IPC prescribes punishment for criminal breach of trust. Section 405 IPC defines the offence of criminal breach of trust, which reads as under:

"Criminal bench of trust.--Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust"."

10. A careful reading of Section 405 IPC shows that a criminal breach of trust involves the following ingredients:--

"(a) a person should have been entrusted with property, or entrusted with dominion over property;

(b) that person dishonestly misappropriated or converted to his own use that property, or dishonestly used or disposed of that property or willfully suffered any other person to do so;

(c) that such misappropriation, conversion, use or disposal was in violation of any direction of law prescribing the mode in which such trust was discharged."

11. It would, thus, appear that for the offences punishable under Section 406 IPC, the prosecution must prove:--

"(i) that the accused was entrusted with property or with dominion over it; and

(ii) that he (a) dishonestly misappropriated it, or (b) dishonestly converted it to his own use, or (c) used it, or (d) disposed of it in violation of any direction of law prescribing the mode in which such trust was discharged."

12. The gist of the offence prescribed under Section 406 IPC is misappropriation

done in a dishonest manner. There are two distinct parts of the said offence. The first involves the fact of entrustment, wherein an obligation arises in relation to the property over which dominion or control is acquired. The second part deals with misappropriation which should be contrary to the terms of the obligation which is created.

13. The offence of cheating is defined under Section 415 IPC, which reads as under:--

"415. Cheating.--Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"."

14. The Section consists of two distinct parts, each part dealing with one way of cheating, (i) the first part contemplates where by deception practiced upon a person the accused dishonestly or fraudulently induces that person to deliver a property to any person or to consent that any person shall retain any property, (ii) the second part envisages where by deception practiced upon a person the accused intentionally induces that person to do or omit to do so, if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

15. The offence punishable under Section 420 IPC reads as under:--

"420. Cheating and dishonestly inducing delivery of property.--Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

16. The essential ingredients of Section 420 IPC are:--

"(i) cheating;

(ii) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security, and

(iii) mens rea of the accused at the time of making the inducement."

17. In the present case, looking at the allegations in the complaint, I find that no allegations are made attracting the ingredients of Section 405 IPC. Likewise, there are no allegations as to cheating or dishonest intention of the petitioners in retaining the money in order to have wrongful gain to themselves or causing

wrongful loss to the complainant. Excepting the bald allegation that the petitioners did not execute the sale deed after receiving Rs. 3 lakhs, there is no iota of allegation as to the dishonest intention in misappropriating the amount in question.

18. In view of the allegations noticed hereinabove, I find that no such dishonest intention can be shown or even inferred that the petitioners had a guilty intention at the time of entering into the agreement for sale with the complainant.

19. In a three-Judge Bench decision of the Supreme court in Nageshwar Prasad Singh alias Sinha Vs. Narayan Singh and Another, , a similar question fell for consideration and relying upon illustration (g) of Section 415 IPC, it was held that the agreement for sale of land and the earnest money paid to the owner as part of consideration and possession of land and the subsequent unwillingness of the owner to complete the same, gave rise to a liability of civil nature and the criminal complaint was, therefore, not competent.

20. In Murari Lal Gupta v. Gopi Singh [, (2005)13 SCC 699] , a three-Judge Bench of the Supreme Court observed in paragraph 6 as under:--

"We have perused the pleadings of the parties, the complainant and the orders of the learned Magistrate and the Sessions Judge. Having taken into consideration all the materials made available on record by the parties and after hearing the learned counsel for the parties, we are satisfied that the criminal proceedings initiated by the respondent against the petitioner are wholly unwarranted. The complaint is an abuse of the process of the court and the proceedings are therefore, liable to be quashed. Even if all the averments made in the complaint are taken to be correct, yet the case for prosecution under Section 420 or Section 406 of the Penal Code is not made out. The complaint does not make any averment so as to infer any fraudulent or dishonest inducement having been made by the petitioner pursuant to which the respondent parted with the money. It is not the case of the respondent that the petitioner does not have the property or that the petitioner was not competent to enter into an agreement to sell or could not have transferred title in the property to the respondent. Merely because an agreement to sell was entered into which agreement the petitioner failed to honour, it cannot be said that the petitioner has cheated the respondent. No case for prosecution under Section 420 or Section 406 IPC is made out even prima facie. The complaint filed by the respondent and that too at Madhepura against the petitioner, who is a resident of Delhi, seems to be an attempt to pressurize the petitioner for coming to terms with the respondent."

21. In Dalip Kaur and Others Vs. Jagnar Singh and Another, , the question for determination before the Supreme Court was whether breach of contract of an agreement for sale would constitute an offence under Section 406 or Section 420 IPC. After examining the fact of the case and the relevant sections of the IPC: the Supreme Court held that an offence of cheating would be constituted when

the accused has fraudulent or dishonest intention at the time of making of promise or representation. A pure and simple breach of contract does not constitute the offence of cheating. It further held that 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 or criminal breach of trust.

22. Coming back to the facts of the present complaint, it is an admitted fact that the petitioners own and possess the property for which negotiation is said to have been held between the parties. There is no written document to show that the petitioners even entered into an agreement to sell in favour of the complainant or received any amount from the complainant in this regard. It is a case of an oral agreement to sell. It is not the case of the complainant that any of the accused tried to deceive him either by making a false or misleading representation or by any other action or omission, nor it is his case that they offered him any fraudulent or dishonest inducement to deliver any property or to consent to the retention thereof by any person or to intentionally induce him to do or omit if he were not so deceived. At best, it is a pure and simple case of oral breach of contract which would not attract the ingredients of the offence under Section 406 or 420 IPC.

23. The principles relating to exercise of jurisdiction under Section 482 of the Code to quash the complaint and criminal proceedings have been considered by the Supreme Court in several decisions. In *State of Haryana and others Vs. Ch. Bhajan Lal and others*, , certain parameters have been pointed out in paragraph.102 by the Supreme. Court under which prosecution launched in a complaint or FIR may be quashed in exercise of jurisdiction under Section 482 of the Code. It 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 Information Report and other materials, if any, accompanying the F.I.R. 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 F.I.R. 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 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."

24. Judged on the touchstone of the principles noted above in *State of Haryana v. Bhajan Lal* (Supra), the present case would fall within the category Nos. (1), (3) and (7). Having regard to the facts and circumstances of the case and taking into consideration the law laid down by the Supreme Court in the decisions quoted hereinabove, the instant application deserves to be allowed. Accordingly, the application is allowed. The impugned order dated 1.11.2010 passed by the learned Judicial Magistrate, 1st Class, Rohtas at Sasaram in Complaint Case No. 1063 of 2009 is set aside. Complaint Case No. 1063 of 2009 and all proceedings emanating therefrom are also quashed.