

(2008) 04 PAT CK 0064

In the Patna High Court

Case No : Criminal Miscellaneous No. 40048 of 2007

Ashok Kumar Choudhary @ Chulhai Choudhary and Others

APPELLANT

Vs

State of Bihar and Another

RESPONDENT

Date of Decision : 15-04-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 192, 202
Penal Code, 1860 (IPC) — Section 406

Citation : (2008) 3 PLJR 624

Hon'ble Judges : Abhijit Sinha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Abhijit Sinha, J.—Heard M/s N.K. Agrawal, Sr. Advocate and D.N. Tiwari, Advocate, for the petitioners and Sri Jharkhandi Upadhaya, the learned A.P.P. for the State. Although notice was duly served on O.P. No. 2 and he appeared through Vakalatnama yet at the time of hearing at the admission matter neither O.P. No. 2 nor his accredited counsel were present. The four petitioners who have been impleaded as accused in Complaint Case No. 1382 of 2004 are aggrieved by order dated 6.9.2004 passed by the learned Sub-Divisional Judicial Magistrate (East), Muzaffarpur, whereby he has taken cognizance u/s 406 I.P.C, and have prayed for quashing of the same including the order dated 20.7.2007 passed by the learned 4th Additional Sessions Judge, Muzaffarpur, in Criminal Revision No. 180 of 2004, whereunder the revision application against the order dated 6.9.2004 has been rejected.

2. According to the prosecution case based on complaint petition filed by one Ganesh Choudhary, impleaded herein as O.P. No. 2, that petitioner no. 1 allegedly took loan of Rs. 36,000/- for constructing house for which he executed an agreement dated 23.2.2003 wherein it was specifically mentioned that petitioner no. 1 would repay the loan amount w.e.f. April 2003 to March 2005 in instalments of Rs. 1500/- per month and notwithstanding the same the

petitioner had failed to pay any instalment after the initial payment of Rs. 500/- on 6.9.2003. It is said that a legal notice was sent on 24.11.2003 and thereafter a Panchayati was held on 8.12.2003, wherein it was agreed upon that accused no. 1 would pay the loan amount every month to the complainant and if not paid by him then petitioner no. 2 Madan Choudhary would be liable for the payment. It is alleged that in spite of the agreement at the Panchayati the accused persons did not pay any of the amount for which legal notices were sent to petitioner no. 1 which has not evinced any response. Hence the complaint petition.

3. The said complaint petition was in due course transferred u/s 192 Cr.P.C. to the learned Sub-Divisional Judicial Magistrate, (East), Muzaffarpur, who having held an inquiry u/s 202 Cr.P.C. took cognizance u/s 406 I.P.C. against all the accused persons. A revision being Cr. Revision No. 180 of 2004 was preferred before the Sessions Judge, Muzaffarpur, which was dismissed by order dated 20.7.2007 passed by learned 4th Additional Sessions Judge, Muzaffarpur.

4. It has been submitted on behalf of the petitioners that they are innocent and have committed no offence and have been falsely implicated in this case. It has also been submitted that petitioner no. 2 is the own brother of petitioner no. 1 and petitioner nos. 3 and 4 are the sons of petitioner no. 1. It has also been submitted with reference to the agreement that the time fixed for repayment of the loan was till March 2005 but without waiting till such date the compliant case had been filed by O.P. No. 2 in June 2004 which in fact is premature as per the agreement. It was also submitted that even if the allegations as made out in the complaint petition is accepted at its face value to be true they merely would amount to a breach of contract for which a criminal proceeding is neither sustainable nor warranted. It is also submitted that even otherwise there is no allegation whatsoever against petitioner nos. 3 and 4 of having committed any overt act and when in fact there was a written agreement the question of holding a Panchayati does not arise and in that view of the matter the alleged holding of the Panchayati appears to be false and concocted for creating a cause of action.

5. It is by now well settled that the mere fact that if the accused did not fulfill the terms of the agreement that by itself does not constitute any criminal liability. A criminal breach of trust involves following ingredients:-

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

(b) That person should dishonestly misappropriate or convert to his own use that property or dishonestly uses or disposes of that property or willfully suffers any person to do so; and

(c) Such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which person has made, touching the discharge of such trust.

6. In the instant case as per allegation certain sum of money had been taken on loan under an agreement. Admittedly according to the agreement instalment had not been paid but at the same time the period of agreement had also not lapsed. The mere fact that the instalments had not been paid cannot be said to be a criminal offence or an overt act inviting criminal prosecution. At best it would amount to a situation where the money loaned out was to be recovered and for the same, being a civil dispute, the remedy lay before a Civil Court of competent jurisdiction. That apart the term of agreement as stated above had not expired by efflux of time and in that sense it cannot be said with certainty that the petitioner brooked mens rea of cheating the complainant. The test is whether the allegations in the complaint discloses a criminal offence or not. In the instant case it does not and for the same a civil remedy is available. Due regard being had to the facts and circumstances of the case the impugned orders is hereby quashed and the application is allowed.