

(2015) 06 PAT CK 0044

In the Patna High Court

Case No : Criminal Misc. No. 45151 of 2012

Keshar Sao and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 25-06-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 155(2), 156(1), 202, 204, 482
Penal Code, 1860 (IPC) — Section 120-B, 323, 405, 406, 420

Citation : (2015) 4 PLJR 228

Hon'ble Judges : Ashwani Kumar Singh, J.

Bench : Single Bench

Advocate : Bashishtha Narayan Mishra and S.N. Rai, for the Appellant

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 12.12.2011 passed by the learned Judicial Magistrate-1st Class, Patna City, Patna in Complaint Case No. 779 of 2011 whereby finding a prima facie case to be made out under Sections 406 , 420 , 120-B and 323 of the Indian Penal Code, the petitioners have been summoned under Section 204 of the Code to face trial.

2. The aforesaid complaint case was filed on 12.8.2011 by the opposite party No. 2 Sudhir Kumar stating therein that he was acquainted with the petitioners from before. They were in need of Rs. 1,10,000/- for purchase of a piece of plot. They requested the complainant to give them a friendly loan for the said amount in the year 2006. Because of the acquaintance from before, the complainant advanced the loan to the petitioners in three installments on the understanding that the loan will be repaid within six months. On expiry of six months, the complainant met the petitioners with a request to refund back the said amount but the petitioners refused to repay the loan.

3. While being examined on oath, in reply to the question put by the Court, the

complainant has stated that the relationship of his brother with his wife is cordial. He has also stated that he is not aware of the fact as to whether any criminal case has been instituted by the accused persons against him or his family members. He could not disclose the details of the land which was to be purchased by the accused persons. He conceded that there is no documentary proof with him to support the fact that any amount was ever given to the accused persons as loan.

4. In course of inquiry, three witnesses were examined on behalf of the complainant. After completing the inquiry under Section 202 of the Code of Criminal Procedure, the impugned order dated 12.12.2011 was passed by the learned Magistrate summoning the petitioners.

5. Learned counsel for the petitioners has contended that the allegations made in the complaint are patently absurd. Though the complainant claims to have advanced the friendly loan to the petitioners in 2006 but the complaint has been filed after lapse of more than five years on 12.8.2011. He has submitted that it is an admitted position that there is no documentary proof regarding the fact that any amount was ever advanced as loan by the complainant to the petitioners. He contended that one Sunita Devi lodged Complaint Case No. 875(c) of 2010 before the learned A.C.J.M., Hilsa, Nalanda on 1.10.2010 against her husband Subodh Kumar, his elder brother Sudhir Kumar (complainant), the inquiry witness Nand Lal Sao and others under Section 498-A of the Indian Penal Code (For short "IPC"). In that case, after taking cognizance under Section 498-A IPC on 10.3.2011 against the complainant and his family members, the learned S.D.J.M. summoned the accused persons for trial. It was only after the summoning order was passed in the aforesaid complaint case, the present complaint has been filed. It is submitted that said Sunita Devi is the daughter of petitioner Nos. 1 and 2 of the present case, whereas petitioner No. 2 (sic--3?) is her brother. It is submitted that the instant complaint has been maliciously instituted with ulterior motive.

6. On the other hand, learned counsel for the opposite party No. 2 has submitted that though a complaint was filed by Sunita Devi against the complainant and others, while taking cognizance the complainant was not summoned to face trial. He has submitted that since the accused persons are closely related to the complainant no legal document in respect of advancement of loan was prepared but that would not absolve the petitioners from discharging their liability to repay the loan amount. He contended that the allegations made in the complaint have duly been supported by the complainant and witnesses in course of inquiry and their deposition makes out a prima facie case for an offence under Sections 406 and 420 IPC and as such, the learned Judicial Magistrate rightly took cognizance of the offence and issued process.

7. Learned counsel for the State has adopted the arguments advanced by learned counsel for the opposite party No. 2.

8. I have carefully considered the rival contentions and perused the impugned order and materials available on record.

9. Before proceeding further, it will be apposite to consider whether or not the allegations made in the complaint attract the ingredients of the offences alleged.

10. Section 405 IPC deals with criminal breach of trust which reads as under:--

"405. Criminal breach 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 willfully suffers any other person so to do, commits "criminal breach of trust".

11. 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.

12. Section 406 IPC prescribes punishment for criminal breach of trust as defined in Section 405 IPC. For the offence punishable under Section 406 IPC, prosecution must prove:--

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

(ii) that he (a) misappropriated it, or (b) converted it to his own use, or (c) used it, or (d) disposed of it.

13. The gist of the offence 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.

14. Section 420 IPC deals with cheating which 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."

15. 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.

16. In the present case, looking at the allegations in the complaint from the face of it, I find that no allegations are made attracting the ingredients of Section 405 IPC. Likewise, there are no allegations as to cheating or the 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 return or repay the loan, there is no iota of allegation as to the dishonest intention in misappropriating the loan. There is nothing in the complaint to show that the petitioners had dishonest or fraudulent intention at the time when the complainant parted with the amount of Rs. 1,10,100/- or that the accused person induced the complainant to pay Rs. 1,10,000/- by deceiving him or that a representation was made by the petitioners to him at or before the time the complainant paid the money to them and that at the time the representation was made, the petitioners knew the same to be false.

17. Since the very ingredients of Sections 406 and 420 IPC are not attracted, the prosecution initiated against the petitioners is not tenable in law. The allegations in the complaint clearly disclose a civil dispute pertaining to oral contract between the parties and the complaint seems to have been filed only with an intention to harass and humiliate the petitioners. Further, I am of the opinion that the offences under Sections 323 and 120-B IPC are not attracted in the present case.

18. Coming to the facts of the present case, it is evident that there is no document to support the allegation that any amount was ever paid by the complainant to the accused persons. It is also an admitted fact that prior to institution of the complaint, the daughter of petitioner Nos. 1 and 2 Sunita Devi had instituted a complaint under Section 498-A of the Indian Penal Code against the complainant and others. The brother of the complainant, namely, Sudhir Kumar happens to be the husband of aforesaid Sunita Devi. In the said complaint, finding a prima facie case to be made out under Section 498-A of the Indian Penal Code against the brother, father and other relatives of the complainant, the Magistrate concerned had summoned them to face trial vide order dated 10th March, 2011. The complainant has deliberately tried to conceal

the very fact that he was related to the petitioners in any manner.

19. It would be evident that about five months after the issuance of process in the aforesaid Complaint Case No. 875(C) of 2010, the present complaint case has been filed on 12.8.2011.

20. In view of the facts noted above, I am of the opinion that the complaint in question lacks bona fide. When the daughter of the petitioner Nos. 1 and 2 filed complaint against the complainant and his relatives and when summonses were issued against them, the present complaint has been filed in retaliation.

21. There is yet another surprising aspect in the present complaint. The amount in question was advanced as friendly loan to the petitioners in the year 2006 on the understanding that the loan will be repaid within six months, but despite non-refund of the amount advanced, the complainant waited for about 5 years to institute the complaint. There is no explanation for the inordinate and unexplained delay caused in filing the complaint.

22. After saying so on merits of the complaint, I would like to advert to the principles laid down by the Supreme Court in its various decisions in respect of exercise of jurisdiction under Section 482 of the Code. In Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, , the Supreme Court enumerated the cases where an order of Magistrate issuing process against the accused persons can be quashed or set aside which reads as under:--

"5. Mr. Bhandare laid great stress on the words "the turn or falsehood of the complaint" and contended that in determining whether the complaint is false the court can go into the question of the broad probabilities of the case or intrinsic infirmities appearing in the evidence. It is true that in coming to a decision as to whether a process should be issued the magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a prima facie case against him. The magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the magistrate has exercised his discretion it is not for the High Court, or even this Court, to substitute its own discretion for that of the magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations, in our opinion, are totally foreign to the scope and ambit of an inquiry under Section 202 of the Code of Criminal Procedure which culminates into an order under Section 204 of the Code. Thus it may be safely held that in the following cases an order of the magistrate issuing process against the accused can be quashed or set aside:--

(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the

essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings."

23. In *State of Haryana and others Vs. Ch. Bhajan Lal and others*, , certain parameters have been pointed out in para 102 by the Supreme Court under which a prosecution launched in a complaint or FIR may be quashed in exercise of jurisdiction under Section 482 of the Code. These are as follows:--

"(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. In Indian Oil Corporation Vs. NEPC India Ltd. and Others, , the Supreme Court has summarized the principles relating to exercise of jurisdiction under Section 482 of the Code to quash complaints and criminal proceedings in para 12 which reads as under.

"12. The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few-- Madhavrao Jiwajirao Scindia and Others Vs. Sambhajirao Chandojirao Angre and Others, , State of Haryana vs. Bhajan Lal, 1992 Supp.(1) SCC 335 , Mrs. Rupan Deol Bajaj and another Vs. Kanwar Pal Singh Gill and another, , Central Bureau of Investigation, SPE, SIU (X), New Delhi Vs. Duncans Agro Industries Ltd., Calcutta, , State of Bihar Vs. Rajendra Agrawalla, , Rajesh Bajaj Vs. State NCT of Delhi and Others, , M/s. Medchl Chemicals and Pharma P. Ltd. Vs. M/s. Biological E. Ltd. and Others, , Hridaya Ranjan Prasad Verma vs. State of Bihar, (2004) 4 SCC 168, M. Krishnan Vs. Vijay Singh and Another, and Zandu Pharmaceutical Works Ltd. and Others Vs. Md. Sharaful Haque and Others, . The principles, relevant to our purpose are:--

(i) A complaint can be quashed where the allegations made in 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 the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with the mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely

necessary for making out the offence.

(v) A given set of facts may make out; (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not."

25. Having regard to the facts and circumstances of the case and the law laid down by the Supreme Court in the decisions cited hereinabove, I am of the opinion that the present complaint being an abuse of the process of law deserves to be quashed at the threshold. Accordingly, the impugned order dated 12.12.2011 passed by the learned Judicial Magistrate-1st Class, Patna City, Patna in Complaint Case No. 779 of 2011, and the Complaint Case No. 779 of 2011 pending in the Court of Judicial Magistrate-1st Class, Patna City, are set aside and quashed. The application stands allowed.