

(2019) 05 PAT CK 0051

In the Patna High Court

Case No : Criminal Miscellaneous No. 3396 Of 2015

Shyam Babu Yadav

APPELLANT

Vs

State Of Bihar And Anr

RESPONDENT

Date of Decision : 01-05-2019

Acts Referred:

Constitution Of India, 1950 — Article 226
Code Of Criminal Procedure, 1973 — Section 155(2), 156(1), 482
Indian Penal Code, 1860 — Section 405, 406
Employees' Provident Funds And Miscellaneous Provisions Act, 1952 — Section 17

Citation : (2019) 05 PAT CK 0051

Hon'ble Judges : Ahsanuddin Amanullah, J

Bench : Single Bench

Advocate : Bijendra Prasad Sinha, Anjani Kumar Sinha, Jitendra Prasad Singh, Arvind Kumar Pandey, Jharkhandi Upadhyay

Final Decision : Allowed

Judgement

1. Heard learned counsel for the petitioner; learned APP for the State and learned counsel for the opposite party no. 2.

2. The petitioner has moved the Court under Section 482 of the Code of Criminal Procedure, 1973 for the following relief:

"That this petition is being filed for quashing the order dated 17.11.2012 passed by Sri Asutosh Khetan, the Learned Judicial Magistrate 1st Class, Patna Sadar in complaint case No. 1084 (c)/12 by which he has taken cognizance against the petitioner for the offence under section 406 I.P.C."

3. The allegation against the petitioner in the complaint case filed by the opposite party no. 2 is that despite having agreed to sell the house/land belonging to the petitioner for Rs. 25,00,000/- and on receipt of Rs. 23,50,000/-, neither sale deed was executed, despite the opposite party no. 2 being ready to pay the remaining amount of Rs. 1,50,000/-, nor the money was returned. It

was further alleged that when the opposite party no. 2 went to ask for return of the money, he was abused and the petitioner became ready to assault also.

4. Learned counsel for the petitioner submitted that from the entire complaint case, no criminal offence is made out and, thus, the present case is an abuse of the process of the Court. It was submitted that even if the allegations are accepted at their face value, the grievance of the opposite party no. 2 that despite receiving Rs. 23,50,000/- and he being ready to pay the remaining consideration amount of Rs. 1,50,000/-, the house/land for which there was an agreement for sale not being honoured by the petitioner, the only remedy available to him was to approach the Civil Court of competent jurisdiction for specific performance of the agreement or for return of the money. Learned counsel submitted that even as per the allegation, the so called agreement between the parties is not registered and there is no signature of the petitioner on the pages except for the first two pages and, thus, based on the same, it cannot be said that there was any legal entrustment. Learned counsel submitted that allegation of abuse and planning of assault are only cosmetic for the purposes of giving some criminal colour to the episode.

5. Learned APP submitted that the Court below, based on materials, has taken cognizance. However, he submitted that there is a predominant civil nature in the allegation which indicates that the complaint has been filed for oblique reason.

6. Learned counsel for the opposite party no. 2 submitted that the petitioner has misappropriated Rs. 23,50,000/- given by him for transfer of the property in question and, thus, the cognizance by the Court below under Section 406 of the Indian Penal Code is justified. However, on a query of the Court as to why he did not approach the civil Court of competent jurisdiction for such relief, the answer was that the litigation on the civil side was time taking.

7. Having considered the facts and circumstances of the case and submissions of learned counsel for the parties, the Court finds that a case for interference has been made out.

8. First and foremost, from the entire reading of the complaint, except for the allegation of abuse, and plan to assault, no other element can be said to bring the case under the ambit of a criminal proceeding. In fact, from the complaint itself, the averments being that there was an agreement between the parties and the opposite party no. 2 claims to have substantially complied with the requirements on his part and that the petitioner did not confirm to his obligation under the agreement, clearly shows that it is a dispute relating to enforcement of an agreement and, thus, purely within the jurisdiction and scope of a civil proceeding before the Competent Court. Further, it was open to the opposite party no. 2 both to pray for specific performance of the agreement or in the alternative return of the money paid to the petitioner along with compensation/ interest. However, recourse to criminal proceeding is clearly not permissible. The Court also finds substance in the contention of learned counsel for the petitioner

that the mere vague, general and omnibus reference of the petitioner having abused and also preparing to assault, clearly, is too tenuous a ground to justify continuance of the criminal prosecution. The Court would also note here that from perusal of the so called agreement between the parties, copy of which has been brought on record by the opposite party no. 2 himself, it would be clear that only the first two pages have been signed by the petitioner and the remaining pages do not contain his signature and most importantly, the same is unregistered. Thus, there cannot be any criminal breach of trust, for the definition under Section 405 of the Indian Penal Code stipulates that whoever is 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 to do so, commits "criminal breach of trust". From the above definition, it is clear that such entrustment and misappropriation has to be with regard to any legal contract. In the present case, as has been noted above, the so called agreement is neither registered nor signed by the petitioner on every page, much less, the last page which renders such agreement unenforceable and non-admissible in law.

9. In this connection, the Court would refer to the decision of the Hon'ble Supreme Court in Anand Kumar Mohatta vs. State (Govt. of NCT of Delhi) reported as 2019(1) PLJR (SC) 215, where at paragraphs no. 20 to 23, it has been held as under:

"20. It is necessary to refer to Sections 405 and 406 of the IPC in order to ascertain, whether in the facts and circumstances of the present case, an offence under Section 406 is made out against the Appellants. Section 405 and 406 of the IPC reads as follows: -

"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 wilfully suffers any other person so to do, commits "criminal breach of trust".

[Explanation [1].-A person, being an employer [of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not] who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly

used the amount of the said contribution in violation of a direction of law as aforesaid.]

[Explanation 2.-A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

406. Punishment for criminal breach of trust.- Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

21. The essence of the offence lies in the use of the property entrusted to a person by that person, in violation of any direction of law or any legal contract which he has made during the discharge of such trust. In the present case, the amount of Rs. One crore was paid by the complainant- Respondent to the Appellants as an interest free deposit on the signing of the agreement. It was liable to be refunded to the complainant simultaneously on handing over of possession of the area of the owner's share to the owner in the group housing complex vide Clause 30 (b) of the agreement dated 03.06.1993.

22. Two things are significant in the transaction between the parties. Firstly, that the occasion for returning the amount i.e. the developer handing over the possession of the area of the owner's share to the owner in the group housing complex, has not occurred. According to the Appellants, the contract stands frustrated because no group housing can be legally built on 20 Feroz Shah Road, New Delhi since it falls in the Lutyens Bungalow Zone. Appellant No.1 has therefore, terminated the contract. Further, the amount has been retained by him as a security because not only is there any handing over of constructed portion, the complainant has also got into part possession of the property and has not handed it back. Also, the complainant has failed to get the property vacated from the tenant's possession.

23. We, thus find that it is not possible to hold that the amount of Rs. One crore which was paid along with the development agreement as a deposit can be said to have been entrustment of property which has been dishonestly converted to his own use or disposed of in violation of any direction of law or contract by the Appellant. The Appellants have not used the amount nor misappropriated it contrary to any direction of law or contract which prescribes how the amount has to be dealt with.

Going by the agreement dated 03.06.1993, the amount has to be returned upon the handing over of the constructed area of the owner which admittedly has not

been done. Most significantly the Respondent No.2 has not demanded the return of the amount at any point of time. In fact, it is the specific contention of the Respondent No.2 that he has not demanded the amount because the agreement is still in subsistence.

We do not see how it can be contended by any stretch of imagination that the Appellants have misappropriated the amount or dishonestly used the amount contrary to any law or contract. In any case, we find that the dispute has the contours of a dispute of civil nature and does not constitute a criminal offence."

10. Moreover, the Hon'ble Supreme Court in *Indian Oil Corpn. v. NEPC India Ltd.* reported as (2006) 6 SCC 736, at paragraph no. 13, has held as under:

"13. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged "

11. Likewise, the Hon'ble Supreme Court in *State of Haryana vs. Bhajan Lal* reported as 1992 Supp (1) SCC 335, at paragraph no. 102, has enumerated categories where the Court should exercise its inherent power under Section 482 of the Code. The same 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 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 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."

12. The present case, in the opinion of the Court falls under categories 1, 3 and 7 of the aforesaid judgment in the case of Bhajan Lal (supra) at paragraph no. 102.

13. Similarly, the Court in State of Karnataka v. L. Muniswamy reported as (1977) 2 SCC 699, at paragraph no. 7, has observed as under:

"7.In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice... "

14. In the aforesaid background, the Court finds that the prosecution is mala fide, untenable and clearly with the intention to harass the petitioner.

15. Accordingly, the application is allowed. The entire criminal proceeding arising out of Complaint Case No. 1084(C) of 2012, pending before the Court below at Patna, including the order dated 17.11.2012, by which cognizance has been taken, stands quashed.