

(2010) 11 PAT CK 0135
In the Patna High Court
Case No : Cr. Misc. No. 9428 of 2006

Vijay Sharma and Another

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 04-11-2010

Acts Referred:

Citation : (2010) 11 PAT CK 0135

Judgement

Navin Sinha, J.—Heard learned Counsel for the Petitioners, the State of Bihar and for the Opposite Party No. 2.

2. The Petitioners are aggrieved by the order of cognizance dated 3.2.2004 passed by the Judicial Magistrate, 1st Class at Jehanabad and their entire prosecution in Complaint Case No. 272 of 2002 u/s 406 of the Indian Penal Code (hereinafter referred to as the I.P.C.).

3. Opposite Party No. 2/complainant, in the complaint case stated that his son Kaushlendra Kumar @ Bablu was married to the sister of the Petitioners in 1993. His son was unemployed. Petitioner No. 1 was employed in the Police Force at Jamshedpur. Petitioner No. 2 was his elder brother also employed in the Police Force. The complainant developed confidence in the Petitioners due to the matrimonial relationship. Petitioner No. 1 offered to obtain employment for Kaushlendra Kumar in the Police Force if the complainant was willing to incur expenses. Since his son was unemployed, the complainant agreed to incur expenses. Petitioner No. 1 assured the complainant that recruitment was soon to be made in the Police Force at Jamshedpur and that he would influence the appointing officer by payment of money. This would cost approximately 65,000/- rupees. The complainant arranged the amount. The Petitioners came to his house on 30.4.1999. They brought with them a copy of an affidavit for appointment in Police Force at Jamshedpur and promised that the money would be returned if appointment was not secured. The complainant believed them when the Petitioners further assured that they had talked to the officials and an application had been submitted in the office of the Superintendent of Police at Jamshedpur,

the acknowledgement of which was available with the Petitioners. They also obtained the necessary residence certificate by fraud in the name of Kaushlendra Kumar that he was a resident of Jamshedpur from the Sub-Divisional Officer. When employment was not forthcoming after reasonable time and the Petitioners were dilly dallying, the complainant asked for return of his money. Unfortunately, at this time the daughter-in-law alongwith her two children, wife of Kaushlendra Kumar, died in an accident due to bursting of the gas cylinder pipe. Petitioner No. 1 filed a false and frivolous case to save himself from making payment to the complainant registered as Ghoshi (Hulashganj) P.S. Case No. 278 of 2001 in which the complainant was presently in custody. The delay in filing of the complaint was on account of the death of the daughter-in-law and false implication of the complainant in the police case.

4. Learned Counsel for the Petitioners submits that Ghoshi (Hulashganj) P.S. Case No. 270 of 2001 was registered under Sections 304B, 201, 34 of the I.P.C. on 24.11.2001 against Kaushlendra Kumar, the complainant and his wife. The allegations were found true, charge-sheet was submitted and the complainant and other accused are facing trial. The present complaint filed thereafter on 7.5.2002 was false, frivolous and a measure of vexatious vendetta to divert the attention of the Petitioners and prevent them from effectively pursuing the police case u/s 304B of the I.P.C. The prosecution was therefore mala fide. It was next submitted that on the face of the allegations no offence was made out u/s 405 I.P.C. for punishment u/s 406 I.P.C. There had been no entrustment of money at all even if the allegations were accepted on the face of it. Reliance in support of the propositions was placed on Chelloor Mankkal Narayan Ittiravi Nambudiri Vs. State of Travancore-Cochin, The last submission was that the agreement to procure appointment in the Police Force by payment of bribe money was opposed to public policy and was a void and illegal contract u/s 23 of the Indian Contract Act. No cause of action could therefore be founded on a cause of action whose origin lay in illegality.

5. Opposing the prayer learned Counsel for the Opposite Party No. 2 submitted that from a bare reading of the allegations it was apparent that their had been entrustment of money for a particular purpose to be used in a particular manner. If the purpose was not fulfilled the money was required to be returned. Failure to do so shall attract the provisions of Section 406 of the I.P.C. Even if Section 406 of the I.P.C. was not applicable, the offence of cheating u/s 420 I.P.C. was definitely made out. The form of the order of cognizance was not conclusive and charge could be framed under appropriate sections in accordance with law. The Petitioners had voluntarily entered into the agreement. If it was an illegal agreement, they could not retain the benefit of the illegal agreement. They are bound to return the money u/s 65 of the Indian Contract Act. The moment they took the money for an illegal purpose, the purpose not having been fulfilled, failure to return the money becomes an offence.

6. Section 405 I.P.C. defines criminal breach of trust. The essential ingredients to

be noticed from the Section are as under and if they are fulfilled the punishment follows u/s 406 I.P.C:

- (a) Entrustment with property.
- (b) Dishonest misappropriation, conversion by the person entrusted.
- (c) Dishonest use or disposal of the entrusted property in violation of any direction of law for the mode of discharge of the trust.
- (d) Use or disposal of the entrusted property contrary to legal contract express or implied (emphasis supplied)

7. The question for consideration shall be the meaning and scope of the words "entrustment". Shall it encompass entrustment of property, for an illegal purpose. Would it amount to entrustment in the sense that the owner of the property retained ownership and gave it to the party in crime, in trust? Was such entrustment made for user in accordance with law or a legal contract? Will it contemplate a situation where consciously having entrusted property for a purpose contrary to law and a manner of disposal contrary to law still the person making such illegal entrustment can claim to retain dominion over the property so as to invite the applicability of the Penal Code because the offence agreed to be committed failed. The answer shall undoubtedly be in the negative. There cannot be any entrustment of a property for its use or disposal contrary to the law or an illegal contract with the owner of the property retaining dominion over the property. The moment he parts with the property for an illegal purpose, "entrustment" as defined in the Penal Code has no application.

8. In A.I.R.1953 SC 479 (Chellor Mankkal Narayan Ittiravi Nambudiri v. State of Travancore) the Supreme Court at Paragraph 21 has held as follows:

21. The other point that requires consideration is, whether on the prosecution evidence as it stands, the accused can be held guilty of criminal breach of trust? As laid down in Section 385, Cochin Penal Code, (corresponding to Section 405, Indian Penal Code) to constitute an offence of criminal breach of trust it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power over it. It has to be established further that in respect of the property so entrusted, there was dishonest misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract, by the accused himself or by someone else which he willingly suffered to do. It follows almost axiomatically from this definition that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit. In the case before us, it is not disputed that if the sum of Rs. 23,100/- was paid by P.W. 1 to the Appellant by way of illegal gratification to induce the latter to make an allotment of cloth in his favour, there could be no question of entrustment in such

payment. The payee would then receive the money on his own behalf and not on behalf of or in trust for anybody else. The criminality of an act of this character would consist in illegal receipt of the money and the question of subsequent misappropriation or conversion of the same would not arise at all.

9. That brings to the fore, the submission that nonetheless an offence of cheating u/s 420 I.P.C. was made out. Section 415 defines offence of cheating. The essential ingredients are intention to deceive any person fraudulently, to dishonestly induce the person so deceived to deliver any property which he would not have done if he was aware of the deception. The essential ingredient therefore is a dishonest intention from the very inception. In the present case there is no allegation of a dishonest intention from the inception. On the contrary the complaint states that the parties were related by marriage and the complainant was satisfied of the assurance for Government employment for a money consideration on the promise that in case of failure the money shall be returned. What is then urged is that when the illegal contract fell through, the money was not being returned. In absence of any allegations of a fraudulent and dishonest intention from the very inception or a narration to that effect, this Court is not satisfied to accept the plea that charge could always be framed under the appropriate sections. If the complainant voluntarily parted with money for an illegal purpose of securing appointment in Government service for a money consideration, which itself was an offence, can he urge that he has been cheated. The concept of cheating shall have no application where the act which is stated to constitute cheating was itself an offence. He was aware of the crime and cannot contend that failure to commit the crime amounted to cheating him.

10. A bare perusal of the complaint reveals that even if the allegations are (sic) the parties were in *pari delicto* to commit an offence. Employment in the Government is available on advertisement and selection and not purchased by money. Such appointment is an outright illegal appointment. If two persons agreed to commit an act, which is an offence under the Indian Penal Code and the agreement fails because the crime could not be committed can it be said that it constitutes an offence under the Indian Penal Code when under the Penal Code the agreement itself was an offence.

11. Section 23 of the Indian Contract Act declares void a contract which is contrary to the law or opposed to public policy. Therefore, even under the civil law the agreement between the parties was unlawful in its very inception. Both had agreed to do something which was prohibited in law. The contract *ex facie* being unlawful, both parties can be said to have intended to exploit the law for an illegal purpose. The reliance by the complainant on Section 65 of the Indian Contract Act may create a civil cause of action as a money claim. This is a mere observation and not an affirmative finding for the maintainability of any such claim under an illegal contract which shall have to be decided on its own merits in an appropriate civil proceeding. It can however never constitute a criminal offence.

12. In 1 (2007) BC 218, Spring Field Financial Services Ltd. v. State of A.P. and Anr. a Bench of the Andhra Pradesh High Court was dealing with the dishonour of an instrument made in payment under an illegal contract. It was held at Paragraphs-23, 26 and 28 as follows:

23. The words "any debt or liability" would undoubtedly include a cheque drawn by any person towards a legally enforceable debt or liability of another person. The explanation makes it very clear that the debt or liability towards which the cheque is issued should be a legally enforceable debt or liability. This would have reference to the nature of the debt or liability and not to the person against whom the debt or liability could be enforced.

26. The purchase of shares of the accused-company by the complainant-company is in contravention of the above regulations and, therefore, they are hit by the provisions of Section 23 of the Indian Contract Act and, therefore, the entire transaction is void and the debt is unenforceable.

28. So, I hold that a party to an illegal contract cannot invoke the aid of the Court to have such a contract carried into effect.

13. The principle for invoking the inherent powers of the Court stand well codified and can be summed up 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 u/s 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 u/s 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.

14. The present allegations taken on their face value do not constitute an offence under the Penal Code as the agreement itself was to commit an offence under the Penal Code. Secondly, it is not in controversy that earlier the Petitioners had filed a case u/s 304B of the I.P.C. in which the complainant, his wife and son are facing trial for the death of the daughter of the Petitioners. This Court safely concludes that the present allegations were false, frivolous and vexatious as a vendetta and to divert the attention of the Petitioners to prevent them from actively pursuing the criminal case when they would be more concerned by saving their neck from the loose (sic--noose?) that the complainant was seeking to fasten for that purpose only by the present prosecution.

15. The entire proceedings against the Petitioners in Complaint Case No. 272 of 2002 including the order of cognizance dated 3.2.2004 pending before the Judicial Magistrate, 1st Class, Jehanabad is quashed.

16. The application stands allowed.