

(2019) 11 PAT CK 0068

In the Patna High Court

Case No : Criminal Writ Jurisdiction Case No. 1229 Of 2019

Vikas Kumar @ Vikas Kumar Pandey And Anr

APPELLANT

Vs

State Of Bihar, Principal Secretary And Ors

RESPONDENT

Date of Decision : 06-11-2019

Acts Referred:

Constitution Of India, 1950 — Article 226, 227

Indian Penal Code, 1860 — Section 34, 114, 120B, 379, 382, 387, 406, 420, 467, 504, 506

Code Of Criminal Procedure, 1973 — Section 154, 154(1), 154(3), 156(3), 482

Citation : (2019) 11 PAT CK 0068

Hon'ble Judges : Ashwani Kumar Singh, J

Bench : Single Bench

Advocate : Somali Acharya, Md. Irshad

Final Decision : Allowed

Judgement

1. Heard Ms. Somali Acharya, learned counsel for the petitioner and Mr. Md. Irshad, learned counsel for the State.

2. This application under Articles 226 and 227 of the Constitution of India has been filed by the petitioners for quashing the first information report (for short 'F.I.R.') of Chattauni P. S. Case No.248 of 2019 registered under Sections 406, 420, 467, 387, 382, 504, 506 read with 34 of the Indian Penal Code.

3. Ms. Somali Acharya, leaned counsel appearing for the petitioners submitted that the F.I.R. in question has been instituted without complying to the procedure laid down by the Hon'ble Supreme Court in the case of Mrs. Priyanka Srivastava and another vs. State of U.P. and others, A.I.R. 2015 SC 1758, which is mandatory for referring any complaint case under Section 156 (3) of the Code of Criminal Procedure (for short 'Cr.P.C.'). She has further contended that the prosecution of the petitioners in the present case is bad due to non-impleadment of the Tata Motors Finance Limited (for short 'Company') as a party. According to her, when the company has not been arrayed as a party, the petitioners cannot

be held vicariously liable for the alleged offence committed by the company. She urged that the prosecution of the petitioners is in contravention of the law laid down by the Supreme Court in the case of R. Kalyani vs. Janak C. Mehta and others, (2009) 1 SCC 516. She has further contended that since the petitioners were discharging their obligations as employees of the company, their prosecution in the present case is apparently in contravention of the principles laid down by the Supreme Court in the case of Charanjit Singh Chadha and others vs. Sudhir Mehra, A.I.R. 2001 SC 3721.

4. Ms. Acharya has drawn my attention towards the pleadings made in Paras-5 to 13 and the various documents annexed to the present application in order to show that the vehicle was repossessed due to default in repayment of due instalments by the respondent no.5.

5. Per contra, learned counsel appearing for the State submitted that the F.I.R. has been instituted against the petitioners for embezzlement of amount and wrongful gain for themselves and wrongful loss to the complainant. He contended that the allegations made in the complaint do attract cognizable offence. Hence, the institution of an F.I.R. or investigation by the police into a cognizable offence cannot be held to be bad. He argued that since a complaint was filed, which was referred to the police by the Jurisdictional Magistrate for investigation under Section 156(3) of the Cr.P.C., the institution of the F.I.R. and its investigation cannot be held to be bad in law. However, he submitted that the ratio laid down by the Supreme Court in Priyanka Srivastava and another (Supra), R. Kalyani (Supra) and Charanjit Singh Chadha and others (Supra) still holds the field.

6. At this stage, it would be relevant to note that despite valid service of notice, respondent no.5 has neither appeared in person nor is being represented through any counsel.

7. The prosecution case, in brief, is that the respondent No.5, Arun Kumar Singh, initially filed Complaint Case No.716 of 2019 in the Court of the Chief Judicial Magistrate, Motihari, East Champaran levelling allegations that he had purchased a truck C.P.T. 1109 bearing Registration No.BR-05-GA-4721 after taking loan from the company and repayment of loan was being made from time to time. In the meantime, on 19.12.2018, the officers of the company sent him a document of mutual settlement of account according to which he had to pay Rs.3,89,669/- before 31.01.2019 as full and final payment against the loan amount. While he was pondering over the proposed mutual settlement, on 02.02.2019, his truck was seized by one Priyanshu Kumar without giving any papers to his driver. Thereafter, he paid Rs.45,000/- on 05.02.2019 and a total amount of Rs.4,25,000/- on 16.02.2019 and was assured by the accused persons that after deducting Rs.3,89,669/- a sum of Rs.37,000/- will be returned. Thereafter, when the truck was handed over to him, he found that 6 tyres of the truck were changed and carpet, rope and some other tools were not present in the truck. He has further alleged that there was over 100 litres of diesel in the tank of the

truck, which was also consumed before handing over the truck to the petitioners. When he enquired about the aforesaid missing items of the truck from the accused persons, they threatened him and refused to return Rs.37,000/-.

8. On the basis of the aforesaid complaint, respondent no.5 alleged that the accused persons committed a criminal breach of trust by not returning Rs.37,000/- which was taken from him in excess of the due amount and stealthily removed several articles from his truck.

9. In the complaint, a specific prayer was made to send the same to the Chhattauni Police Station for institution of the F.I.R.

10. After institution of the complaint, on 10.04.2019, at the request of the complainant, the complaint was sent to the Chhattauni Police Station for investigation pursuant to which the F.I.R. was registered on 12.06.2019 and investigation was taken up.

11. It has been pleaded that the petitioner no.1 is working as State Head, Collection, posted in Patna and the petitioner no.2 is working as Team Leader in the company. The company is engaged in business of vehicle finance throughout the country. There is no specific allegation levelled against the petitioners in the entire F.I.R. The informant purchased a truck of make and model Tata LPT 1109 bearing registration no.BR-05-GA-4721 after taking loan amounting to Rs.11,50,000/- from the company vide loan-cum-hypothecation agreement dated 30.04.2015. The informant made serious defaults in repayment of the said loan despite repeated reminders of the company. Thereafter, the informant approached the company and requested for a full and final settlement. The company in accordance with its lending policy entered into a settlement wherein the informant was required to deposit a sum of Rs.3,89,669/- till 31.01.2019 and it was categorically mentioned therein the settlement offer that the same would be valid upto 31.01.2019 and it will lose its force and become null and void upon non-compliance of the terms and conditions of the settlement offer. The informant did not adhere to the settlement offer. Thus, the said settlement offer became void. Resultantly, the informant was liable to make payment of entire loan amount which included the previous outstanding amounting to Rs.3,72,272/- and future instalment for the months of March and April, 2019 amounting to Rs.74,160/- i.e. Rs.37,080/- for each month and till the vehicle was re-possessed on 02.02.2019. Thereafter, the company repossessed the vehicle upon exercising its right vested by the agreement. Subsequently, the informant approached the company and made payment of the outstanding amount on 05.02.2019 and 16.02.2019 which was adjusted in the loan account and contract was terminated and release order on the same day was issued to the parking yard for release of the vehicle, thereby terminating the contractual relation between the company and the informant.

12. The petitioners have further pleaded that the informant was never assured by any employee for return of Rs.37,000/- and the informant has no proof of

said assurance. The entire details of payment made by the informant is duly reflected in the statement of accounts and thus, the allegations levelled by the informant are false. The petitioners have also annexed a copy of the loan-cum-hypothecation agreement dated 30.04.2015 and a copy of statement of accounts as on 02.02.2019 along with the present application. The factual aspects of the case are not controverted. The informant has admitted in the complaint filed by him in the Court of Chief Judicial Magistrate that the vehicle in question was financed by the company. He has also admitted that a settlement offer was sent by the company to him.

13. A perusal of the loan-cum-hypothecation agreement would show that the same contains clause dealing with consequences of event of default. Since the informant defaulted in making payment of instalments. The company had arrived to repossess the vehicle as the informant requested for full and final settlement. The company in accordance with its lending policy entered into a settlement offer, which was valid upto 31.01.2019. As the informant did not adhere to the settlement offer, the same became null and void. Hence, the informant was liable to make payment of entire loan amount. Thus, the company exercising its right vested by the agreement to re-possess the vehicle. The vehicle was subsequently released in favour of the informant after the outstanding amount was paid on 05.02.2019 and 16.02.2019. The aforesaid acts of the company were fully justified.

14. However, the informant has alleged in the complaint that after repayment of the due amount when the truck was handed over to him, he found the six tyres of the truck were changed and carpet, rope and other tools were not present in the truck. He has also alleged that the tank was filled with 100 litres of diesel, but the tank was empty when the truck was handed over to him. These allegations have been made in order to impress that there was an offence of theft, breach of trust, cheating etc. In this regard, it would be relevant to take note of the judgments of the Supreme Court relied upon by the petitioners in Charanjit Singh Chadha and others (Supra), the Supreme Court was dealing with a criminal complaint under Sections 406, 420, 120-B of the Indian Penal Code:-

"2. The appellants are running the non-banking financial institution. The respondent, partner of a partnership firm, entered into a hire purchase agreement with the appellants on 3.5.1994 whereunder a motor vehicle was handed over to the respondent. The total consideration agreed to be paid by the respondent was Rs.3,02,884/- and the respondent made an initial payment of Rs.69,308/-and the balance amount was to be paid in 36 monthly instalments of Rs.8,400/- each starting from 3.06.1994. According to him, he had been paying the instalments regularly. The respondent filed a criminal complaint before the Chief Judicial Magistrate on 3.12.1998, alleging that the motor vehicle in question had developed some trouble and it was entrusted to a motor mechanic on 14.9.1996 for carrying out repairs and that in the night of 16.09.1996, the appellants forcibly took away the vehicle from the motor mechanic and thus,

committed offences under Sections 406, 420 and 120-B of the Indian Penal Code. Pursuant to the complaint, the Magistrate took cognizance of the offences and issued summons to the appellants. Appellants filed a petition under Section 482 of the Code of Criminal Procedure before the High Court to quash the complaint proceedings. In the petition, it was alleged by the appellants that respondent had committed default in paying the instalments and that as on 1.9.1996 an amount of Rs.1,34,887/- was outstanding against the respondent and thereafter, the appellants were constrained to terminate the hire purchase agreement and that the respondent surrendered the motor vehicle to the appellants. The High Court declined to quash the proceedings and held that the allegations in the complaint were capable of making out offences punishable under Section 379 of the Indian Penal Code and, therefore, the petition under Section 482 of the Code of Criminal Code was dismissed. Aggrieved by the same, the appellants have filed the instant appeal."

15. Aggrieved by the dismissal of the petition by the High Court, the appellants filed the appeal before the Supreme Court. The Supreme Court taking into consideration its previous judgments in *Sardar Trilok Singh and others vs. Satya Deo Tripathi*, (1979) 4 SCC 396 and in *K. A. Mathai @ Babu and another vs. Kora Bibbikutty and another*, (1996) 7 SCC 212 and allowed the appeal and set aside the judgment passed by the High Court. The relevant Paras-15 and 16 of the said judgment are re-produced herein under:-

"15. This Court also had occasion to consider this question. One of the earlier decisions is *Sardar Trilok Singh & Ors. vs. Satya Deo Tripathi* (1979) 4 SCC 396. In that case, the parties had entered into a hire purchase agreement. The complainant alleged that the accused, in a high handed manner during his absence came to his house and forcibly removed the truck and thereby committed the offence of dacoity. The police investigated the case and filed a final report. The accused filed his objection before the Magistrate, but the objection was not considered. The accused filed a revision before the session court which was dismissed. Thereafter the accused filed a petition under section 482 Cr.P.C. to quash the proceedings. That was summarily dismissed by the High Court and the matter reached up to this Court at the instance of the accused. In paragraph 5 of the judgment, this Court observed:

"We are clearly of the view that it was not a case where any processes ought to have been directed to be issued against any of the accused. On the well-settled principles of law it was a very suitable case where the criminal proceeding ought to have been quashed by the High Court in exercise of its inherent power. The dispute raised by the respondent was purely of a civil nature even assuming the facts stated by him to be substantially correct. Money must have been advanced to him and his partner by the financier on the basis of some terms settled between the parties.....

.....Even assuming that the appellants either by themselves or in the company of some others went and seized the truck on July 30, 1973 from the

house of the respondent they could and did claim to have done so in exercise of their bona fide right seizing the truck on the respondent's failure to play the third monthly instalment in time. It was, therefore, a bona fide civil dispute which led to the seizure of the truck".

16. In *K.A. Mathai vs. Kora Bibbikutty*, (1996) 7 SCC 212, the bus was obtained by the complainant on a hire purchase agreement. The complainant paid only part of the consideration and defaulted in paying the instalments and the vehicle was taken possession of by the financier and at that time, both the first accused who had derived away the bus from the possession of the complainant and the second accused were present in the bus. They were prosecuted for the offence punishable under Section 379 read with Section 114 IPC. This Court holding that the bus was taken away at the instance of the financier and the accused had not committed any offence observed as under:

"Though we do not have the advantage of reading the hire-purchase agreement, but as normally drawn it would have contained the clause that in the event of the failure to make payment of instalments the financier had the right to resume possession of the vehicle. Since the financier's agreement with A-2 contained that clause of resumption of possession, that has to be read, if not specifically provided in the agreement, as part of the sale agreement between A-2 and the complainant. It is in these circumstances, the financier took possession of the bus from the complainant with the aid of the appellants. It cannot thus be said that the appellants, in any way, had committed the offence of theft and that too, with the requisite mens rea and requisite dishonest intention."

16. In view of the ratio laid down by the Supreme Court, it can be safely said that in case of loan-cum-hypothecation agreement, the purchaser remains merely a trustee on behalf of the financier and the ownership remains with the financier. In case, the vehicle is seized by the financier, no criminal action can be taken against him as he re-possesses the vehicle owned by him. Apart from the aforesaid legal position in the case in hand as far as the petitioners are concerned, the informant has not made any specific allegation against them. They have been implicated in the case only because they happen to be the employees/ officers of the company. The informant has not impleaded the company as an accused. They cannot be prosecuted. In view of the ratio laid down by the Supreme Court in *R. Kalyani* (Supra) wherein the Supreme Court has held that if a person has to be proceeded with as being vicariously liable for the acts of the company, the company must be made an accused.

17. Furthermore, the institution of the F.I.R. itself is bad in view of the law laid down by the Supreme Court in *Mrs. Priyanka Srivastava and another* (Supra). In the said case, the Supreme Court made it clear as to what are the requirements for filing an application under Section 156(3) of the Cr.P.C. before the Magistrate seeking to direct investigation by the police. The mandatory requirements highlighted by the Supreme Court, cannot be marginalized:-

"25. Issuing a direction stating "as per the application" to lodge an FIR creates a very unhealthy situation in the society and also reflects the erroneous approach of the learned Magistrate. It also encourages the unscrupulous and unprincipled litigants, like the respondent no.3, namely, Prakash Kumar Bajaj, to take adventurous steps with courts to bring the financial institutions on their knees. As the factual exposition would reveal, he had prosecuted the earlier authorities and after the matter is dealt with by the High Court in a writ petition recording a settlement, he does not withdraw the criminal case and waits for some kind of situation where he can take vengeance as if he is the emperor of all he surveys. It is interesting to note that during the tenure of the appellant No.1, who is presently occupying the position of Vice-President, neither the loan was taken, nor the default was made, nor any action under the SARFAESI Act was taken. However, the action under the SARFAESI Act was taken on the second time at the instance of the present appellant No.1. We are only stating about the devilish design of the respondent No.3 to harass the appellants with the sole intent to avoid the payment of loan. When a citizen avails a loan from a financial institution, it is his obligation to pay back and not play truant or for that matter play possum. As we have noticed, he has been able to do such adventurous acts as he has the embedded conviction that he will not be taken to task because an application under Section 156(3) Cr.P.C. is a simple application to the court for issue of a direction to the investigating agency. We have been apprised that a carbon copy of a document is filed to show the compliance of Section 154(3), indicating it has been sent to the Superintendent of police concerned.

26. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellows citizens, efforts are to be made to scuttle and curb the same.

27. In our considered opinion, a stage has come in this country where Section 156(3) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores. We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under

Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an the application under Section 156(3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."

18. In the instant case, initially a complaint was filed by the respondent no.5 in the Court of the Chief Judicial Magistrate, Motihari, East Champaran on 10.04.2019. The prayer in the said complaint was to send the same to the police for investigation. The learned Magistrate allowed the prayer of the complainant-respondent no.5 on the date of filing of the complaint itself i.e. on 10.04.2019 and referred the complaint to police for investigation in exercising power conferred under Section 156(3) of the Cr.P.C., pursuant to which Chattauni P. S. Case No.248 of 2019 was registered.

19. On perusal of the complaint, I find that there is no mention of prior applications under Sections 154(1) and 154(3) of the Cr.P.C. while filing the petition under Section 156(3) of the Cr.P.C. There is also no affidavit to the effect that prior applications under Sections 154(1) and 154(3) of the Cr.P.C. were filed by the complainant. Thus, the institution of the F.I.R. itself is in gross violation of the mandate laid down by the Supreme Court in Mrs. Priyanka Srivastava and another (Supra).

20. Apparently, a civil dispute has been given a colour of criminal offence with a motive to put pressure on the company.

21. In M/s Indian Oil Corporation vs. M/s NEPC India Limited and others, A.I.R. 2006 SC 2780, the Supreme Court ruled ".... There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. 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."

(emphasis supplied).

22. In G. Sagar Suri and another vs. State of U.P. and others, (2000) 2 SCC 636, the Supreme Court observed:-

"8.... It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

23. In view of the discussions made above, I am of the considered opinion that criminal prosecution launched in the present case is apparently an abuse of process of the court.

24. In *State of Haryana and others vs. Chaudhary Bhajan Lal and another*, A.I.R. 1993 SC 1348, the Supreme Court held that the power under Article 226 of the Constitution of India could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice and cases where the allegations made in the first information report or complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence to make out a case against the accused, may be quashed.

25. The aforementioned principle laid down by the Supreme Court in *Chaudhary Bhajan Lal Case* (Supra) is squarely applicable in the instant case.

26. Accordingly, the first information report of Chattauni P. S. Case No.248 of 2019 and the entire criminal proceedings arising out there from are hereby quashed. The application stands allowed.