Malay Chatterji and Others Vs. the State of Bihar and Another

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Court : Patna

Decided On : Apr-05-2012

Reported in : 2012CrLJ2240

Judge : Aditya Kumar Trivedi

Appeal No. : CRIMINAL WRIT NO.793 OF 2009

Appellant : Malay Chatterji and Others

Respondent : The State of Bihar and Another

Judgement :

CAV JUDGMENT

1. Petitioners/accused have filed instant writ with a prayer to quash order of cognizance dated 25.08.2008 passed by Sri Ramayan Ram, Judicial Magistrate, 1st Class, Patna whereby and whereunder petitioners have been summoned to face trial for an offence punishable under Sections 120B, 406, 420, 467, 468 IPC in connection with Complaint Case No. 1848C of 2008 along with entire prosecution so launched on the basis of Complaint Case No. 1848C of 2008.

2. Briefly stated, the prosecution was launched by filing a Complaint Case No. 1848 of 2008 before the learned Chief Judicial Magistrate, Patna at the behest of O.P. No.2, Pratibha Prasad against Dr. Prasoon Kumar Banerjee (since deceased), Dr. Praveer Kumar Banerjee, Archana Mukherjee, Chandana

Chatterjee, Maloy Kumar Chatterjee for an occurrence alleged to have committed on 16.11.1998 and onwards disclosing therein that husband of complainant Late Ramesh Prasad along with Vijay Prakash were builders and for that purpose they used to purchase lands from the land holders. In the aforesaid event, they came across the news that the accused persons have got substantial land at Mohalla-Shashtrinagar measuring 4.35 Acres and accordingly they contacted, negotiated and then the deal was finalized. However, during course thereof it was disclosed at the end of accused persons that land fell under Urban Ceiling Proceeding. So, it was disclosed by the accused persons that the case be looked after by them and after conclusion of the Ceiling case, the land will be transferred in their favour. In token thereof, the accused persons after receiving part payment; 10 Lacs by Dr. Prasoon Kumar Banerjee, 2.50 Lacs each by Archana Mukherjee and Chandana Chetterjee, executed deed of agreement on 16.11.1998, 23.12.1998 and 03.01.1999 respectively with regard to different area of different plot number. Complainant‘s husband contested Ceiling case along with his partner, Vijay Prakash and as, subsequently, Urban Ceiling Law was repealed therefore proceeding terminated. Then thereafter the husband of complainant along with his partner made persisting request including she herself after demise of her husband to execute sale deed because of the fact that apart from Rs.15 Lacs paid at the time of execution of agreement, Rs.17.50 Lacs was paid to the accused at different occasion through the bank draft. But the accused persons through their conduct have shown carrying an intention to deceive and cheat, negotiated, received payment and finally sold away the concerned plots to third person. By such action accused persons have illegally digested Rs.32.50 Lacs.

3. The learned Chief Judicial Magistrate transferred the complaint petition to the court of Magistrate for holding an inquiry under Section 202 of the Cr.P.C. during course of which complainant was examined on S.A. Apart from examination of three witnesses on her behalf certain documents have also been furnished and then by the order impugned the learned Magistrate summoned the petitioners as a result of which petitioners became aggrieved and have filed the instant petition.

4. It has been submitted on behalf of the petitioners that whatever narration has been made in the complaint petition gives a clear-cut impression that it does not

happen to be justifying the criminal prosecution rather attracts civil cause on account of non honouring the terms of agreement even in worst case accepting the prosecution version in its entirety for an argument sake. It has further been submitted that complainant was very much apprehensive with regard to fate of the criminal prosecution and so had launched three Title Suits bearing numbers 118/2008, 119/2008, 120/2008 before the competent civil court. Then submitted that it is wrong to say that petitioners have violated any terms of contract rather it happens to be the complainant herself at fault. Also submitted that actually the complainant has become annoyed with partner Vijay Prakash who had finally negotiated with the petitioners and got the fruit. The complainant neither continued her joint effort with Vijay Prakash with whom husband of complainant had jointly negotiated with the petitioners and on account thereof, Vijay Prakash separately negotiated and got the deal finalized. After death of complainant‘s husband, her Bhainsur and son had negotiated separately and independently with the petitioners on new terms and conditions but could not be able to arrange the considerations amount within the stipulated period therefore as per terms of agreement, the negotiation became inoperative and non executable. Not only this, although the terms of agreement did not put any obligation upon petitioners to return back the amount so paid to the petitioners as an earnest money, in case there happens to be default on the part of otherside, even then petitioners felt pity on account of complainant becoming a widow and so returned back all the amount whatever they received at their end (after bifurcating half as well as having separate payment relating to Vijay Kumar) but to utter surprise, the complainant herself returned back the bank draft with a note of caution that now the matter will be decided through litigation. Also submitted that even today the petitioners felt pity upon her and are ready to return back the amount whatever stands to her share.

5. It has further been submitted that although the cognizance has been taken under Sections 406,420, 467, 468 of the IPC as a major Sections but none of the Sections is applicable in light of the fact that petitioners are the land holders and further they have not deceived the complainant in such a way to part with her belongings nor had created any false document on this score.

6. Learned counsel for the petitioners has referred the following decisions:-

1. AIR 2000 SC 2341, 2. AIR 2000 SC 754, 3. (2005) 10 SCC 228, 4. (2005) 13 SCC 699, 5. (2007) 12 SCC 1, 6. (2009) 3 SCC 78, 7. (2009) 9 SCC 682, 8. (2010) 10 SCC 361, 9. 2003(4) PLJR 208 (SC). 10. AIR 2011 SC 1090.

7. On the other hand, learned counsel for O.P No.2 submitted that intention is the mental state of the accused which could not be perceived at the time of negotiation. The subsequent conduct of the parties is the theme which suggests the action of the accused and further, whether the action attracts criminal prosecution. If the conduct of the accused suggests that negotiation was taken up with mala fide intention to put the complainant to wrongful loss to have themselves under wrongful gain and for materializing the same, when any document is created to inspire confidence and relying thereupon when the accused succeeded to get the valuable part with from the end of victim which, if would have been known to victim, could not be parted with, certainly attracts criminal prosecution and so the learned lower court had summoned the petitioners rightly. Then submitted that any cause may give and attract the criminal cause as well as civil cause. Mere having a colour of civil dispute will not discard the criminal prosecution unless and until it is conclusively found and held that in the facts and circumstances of the case criminal prosecution is unwarranted as mens rea is absent.

8. So far present case is concerned, admittedly, Vijay Prakash was subsequently gained over by the petitioners by this way or that way on account thereof he deflected. But the fact remains that negotiation was finalized, the deed of agreement was executed and under the aforesaid event, the complainant has been deprived of Rs.32 Lacs and odd illegally by the petitioners who have retained it andfurther by such action, complainant has been put to wrongful loss. Therefore, the order impugned is legal, just and proper and does not warrant interference. Also referred the following decisions:-

1. 2000(3) PLJR 56(SC), 2. AIR 1989 SC 885, 3. 2006(1) PLJR 600, 4. (2007) 4 BBCJ 128, 5. (2009) IV PLJR 991.

9. Also submitted that whatever factual aspect has been raised on behalf of petitioners is a matter of trial and on the basis thereof the order impugned cannot be struck down.

10. Learned AC to GA-1 submitted that for the purpose of taking cognizance and summoning the accused under Section 204 of the Cr.P.C., only prima facie material has to be seen. It is evident from the order impugned that the learned lower court had found the same. So far other parts are concerned, has followed the argument raised on behalf of O.P. No.2

11. Section 406 is a penal provision for criminal breach of trust which has been defined under Section 405 of the IPC. For better appreciation the same is incorporated which is 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 of 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 Provision Act, 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 employee's contribution from the wages payable to the employee for credit to the Employees' State Insurance Act, 1948, shall be deemed to have been entrusted with the amount of 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 deduction of law as aforesaid.”

(12)-To attract application of Section 406, the following ingredients are absolutely necessary to be proved:-

(a) The accused must be entrusted with property or dominion over property

(b) The person so entrusted

(i) dishonestly misappropriated or converted to his own use that property

(ii) dishonestly used or disposed of that property or willfully suffer and any other person to do so, in violation of

(A) any direction of Law, prescribing the mode in which such trust is to be discharged

(B)Any legal contract made touching the discharge of such trust.

13. In likewise manner Section 420 is a penal provision and the definition Clause, may be taken with aid of Section 415 of the IPC as Section 420 IPC may be identified with its aggravated form.

“415. - Whoever, by deceiving any person fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to ‘cheat‘.”

Explanation- A dishonest concealment of facts is a deception within the meaning of this section.

14. Section 420 IPC deals with that species of cheating which involves delivery of property or destruction of valuable security. So far ingredient of Section 415 IPC is concerned, deception is the first and foremost element.

15. Sections 467 and 468 happen to be penal provisions and is found guided by Section 463 as well as 464 of the IPC.

Section 463:- Whoever make any false documents or false electronic record of a document or electronic record with intent to cause damage or injury to the public or to any person or to support any claim or title or to cause any person to part with property or to enter into any express or implied contract or with intent to commit fraud or that fraud may be committed, commits forgery.

“464. Making of false document.- A person is said to make a false document or false electronic record. First- Who dishonestly or fraudulently-

(a) makes, signs, seals or executes a document or part of a document;

(b) make or transmits any electronic record on part of any electronic record;

(c) affixes any digital signatures on any electronic record;

(d) makes any mark denoting the execution of a document or the authenticity of the digital signature, with the intention of causing it to be believed that such document or part, of document, electronic record or digital signature was made, signed, sealed, executed, transmitted or affixed by or by the authority of person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed; or

Secondly- Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with digital signature either by himself or by any other person, whether such person be living or dead at the time of such alteration, or

Thirdly- Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his digital signature on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot or that by reason of deception practiced upon him, he does not know the contents of the document or electronic record or the nature of the alteration."

Explanation 1:- A man's signature of his own name may amount to forgery.

Explanation 2:- The making of false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

Explanation 3:- For the purpose of this section, the expression "affixing digital signature" shall have the meaning assigned to it in clause (d) of sub-section (1) of Section 2 of the Information Technology Act, 2000.

16. After conjoint reading of both the Sections it is evident that Section 463 IPC attracts wherever fake document or fake electronic record is made/prepared in order that it may be used as genuine prejudicial to other valuable right while Section 464 IPC deals with process of the construction of fake document in following way:-

(a) by making, signing, sealing or executing a document

(b) by alteration of a document

(c) by causing a person, who is innocent at the contents or nature at the alteration, of a document, to sign it.

17. Now coming to the material record, from cursory perusal as well as having minute observation thereof clearly indicates that there is no allegation with regard to preparation of any false, forged document nay there happens to be any sort of allegation that petitioners were not at all competent to execute the document having no title, possession with regard to land covered under deed of agreement. Both the parties have entered into an agreement at different stage in different way by executing deed of agreement containing different terms. The claim of the

petitioners happens to be that as the complainant failed to honour the terms of agreement by tendering remaining consideration amount within the stipulated period therefore as per terms of the agreement, the agreement became nonest in the eye of law while, on the other hand, it is version of the complainant (respondent 2nd party) that she is ready to perform her part and as the petitioners escaped themselves from performing and discharging their obligation as such three Title Suits bearing no. 118/2008, 119/2008 and 120/2008 have been filed and the same are still pending. The process of escapement has been overtly identified as criminal act for which instant case has been filed. However, admitted facts remain over subsistence of deed of agreement. Whatever controversy arose happens to be over its enforcement. So creation of the false document or cheating/deception by way of creation of false document appears to be misconceived and on account thereof, prima facie application of 467, 468 is not attracted. In likewise manner carrying of dishonest intention since the beginning of negotiation is also of no worth in the background of the fact that the negotiation was not at all materialized with the O.P. No.2 at an earliest round rather it was in between her husband and Vijay Prakash at one side and petitioners at other. Vijay Prakash neither happens to be a party of Title Suit Nos 118/2008, 119/2008 and 120/2008 nor he supported the plea of O.P. No.2 by having his presence at the side of O.P. No.2 rather O.P. No.2 herself outcast him. Furthermore, from the counter affidavit filed on behalf of O.P. No.2, it is evident that there is no explanation relating to annexure-12, letter dated 19.07.2008 sent by O.P. No.2 returning back the cheques of Rs.13,50,000 issued by petitioners in her favour after deducting the amount to the extent of falling under share of Vijay Prakash.

18. The methodology for identifying and justifying application of the relevant Sections has properly been discussed in 2011(7) SCC 59 wherein at para-15, it has been held as such:-

“15. Criminal breach of trust is defined under Section 405 IPC and Section 406 thereof deals with punishment to be awarded to the accused, if found guilty for commission of the said offence i.e. with imprisonment for a term which may extend to three years, or with fine, or with both. Section 420 IPC deals with cheating and dishonestly inducing delivery of property. Cheating has been defined under

Section 415 IPC to constitute an offence. Under the aforesaid section, it is inbuilt that there has to be a dishonest intention from the very beginning, which is sine qua non to hold the accused guilty for commission of the said offence. Categorical and microscopic examination of the FIR certainly does not reflect any such dishonest intention ab initio on the part of the appellant. Section 506 IPC deals with punishment for criminal intimidation. Criminal intimidation, insult and annoyance have been defined in Section 503 IPC but the FIR lodged by the complainant does not show or reflect that any such threat to cause injury to person or of property was ever given by the appellant to the complainant."

19. It is needless to remind that pendency of civil suit will debar prosecution for criminal offence however with exception when both have got independent identity. Thus for that purpose allegation as a whole should be taken into consideration to search out whether both have properly been demarcated or are intermingle with each other. So far present controversy is concerned, taking into account the averments as well as statement of the witnesses now remains no room of controversy that instead of attracting the penal provisions as disclosed above the dispute happens to be purely civil in nature and when there happens to be background of civil dispute, then the criminal proceeding is unwarranted and for that para-17 of the above referred decision is quoted below which goes as follows:-

"17. In our opinion, the matter appears to be purely civil in nature. There appears to be no cheating or a dishonest inducement for the delivery of property or breach of trust by the appellant. The present FIR is an abuse of process of law. The purely civil dispute, is sought to be given a colour of a criminal offence to wreak vengeance against the appellant. It does not meet the strict standard of proof required to sustain a criminal accusation. In such type of cases, it is necessary to draw a distinction between civil wrong and criminal wrong as has been succinctly held by this Court in Devendra v. State of U.P., relevant part thereof is reproduced hereinbelow: ((2009 7 SCC 495, SCC p.505, para 27)

"27. ... A distinction must be made between a civil wrong and a criminal wrong. When dispute between the parties constitute only a civil wrong and not a criminal wrong, the courts would not permit a person to be harassed although no case for taking cognizance of the offence has been made out.”

20. In a leading decision AIR 1992 SC 604 State of Hariyana and Ors. Versus Bhajan Lal and Ors. The Hon‘ble Apex Court has identified following categories including others wherein prosecution can be quashed and those are :-

“(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 uncontroveretd 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, on 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 grounds for proceedings 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 proceedings 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 malafide 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."

21. The facts of the case having under criteria no.1,3, 7 as a result of which, the instant criminal proceeding appears to be unwarranted.

22. Thus, looking into the matter from all angles, the prosecution of the petitioners for commission of the alleged offence would be clear abuse of the process of law. Accordingly, order dated 25.08.2008 passed by Sri Ramayan Ram, Judicial Magistrate, 1st Class, Patna in connection with Complaint Case No. 1848C of 2008 summoning the petitioners to face trial stands quashed.

23. Consequent thereupon, petition is allowed.

24. Parties will bear their own costs.