

(2016) 08 PAT CK 0112

PATNA HIGH COURT

Case No: Criminal Miscellaneous No. 40149 of 2015.(Arising Out of P.S. Case No. 169 Year 2015 Thana-Sitamarhi Complaint Case District Sitamarhi).

Bala Kant Pathak son of Late
Satya Deo Pathak, R/o:- At and
P.O. Bheja, via Madhepura, P.S.-
Bheja, District - Madhubani.
Presently posted as District
Programme Officer, Darbhanga -
Petitioner @HASH State of Bihar
- Opposite Party

APPELLANT

Vs

RESPONDENT

Date of Decision: Aug. 23, 2016

Acts Referred:

- Penal Code, 1860 (IPC) - Section 34, Section 418, Section 465

Citation: (2019) 2 PLJR 257 : (2016) 167 AIC 624 : (2016) 3 BBCJ 210 : (2017) 1 BLJud 16

Hon'ble Judges: Ashwani Kumar Singh, J.

Bench: Single Bench

Advocate: Mr. Awadhesh Kumar, Advocate, for the Petitioner; Mr. Alok Kumar, and Mr. Birendra Kumar, Advocates, for the Opposite Party No. 2; Smt. Asha Kumari, APP, for the State

Final Decision: Allowed

Judgement

Mr. Ashwani Kumar Singh, J.(Oral) - This application under Section 482 of the Code of Criminal Procedure (for short "Cr.P.C") is directed against the order dated 4th July, 2015 passed by the learned Judicial Magistrate, 1st Class, Sitamarhi in connection with Complaint Case No.169 of 2015 whereby summons have been directed to be issued against the petitioner and two other accused after finding a prima facie case to be made out under Sections 418 and 465/34 of the Indian Penal Code (for short "IPC").

2. The prosecution story, in brief, instituted on the basis of the complaint petition dated 7.2.2015, is to the effect that applications were invited for selection on the post of Anganbari Sewika in the Gram Panchayat Raj Hari Chapra with regard to village Bhavprasad, Ward No.5, wherein besides the Complainant and accused no.3 Usha Kumari, five other candidates had applied. It is alleged that the accused Usha Kumari had submitted her Certificate of having passed the Madhyama examination along with her application, on the basis of which Final Merit List was published. In the Final Merit List, the name of the Complainant figured at serial No.1 and her percentage was 58.57% while the accused Usha Kumari was given 52.57%. It is then alleged that after publication of Final Merit List, all the three accused persons including the petitioner entered into a conspiracy and violated the procedures and rules of selection of Anganbari Sewika and after tampering with the Government documents, the accused Usha Kumari was selected on the post of Anganbari Sewika and this was done by the accused no.2 Bhavani Kumari on the directions of accused no.1 Bala Kant Pathak, District Programme Officer, Sitamarhi and a Second Merit List was published on 4.2.2015, in which name of the accused Usha Kumari figured at serial no.1 and then steps were taken for her appointment.

3. It is further alleged that the accused no.1 and the accused no.2 had demanded illegal gratification of rupees fifty thousand from the Complainant and when the same was not given, the accused no.1 and the accused no.2 misbehaved with the Complainant and used unparliamentary language and behaved in a vulgar manner.

4. On the basis of the aforesaid allegation it was prayed by the Complainant-opposite party no.2 that her complaint petition be forwarded under Section 156(3) of the Cr.P.C. to the officer-in-charge of the Dumra Police Station.

5. It is submitted by Mr. Awadhesh Kumar, learned counsel for the petitioner that on the basis of such complaint and on the basis of three witnesses, out of whom one being husband of the Complainant and the other being a resident of a different village, the jurisdictional Magistrate found a prima facie case to be made out under Sections 418 and 465/34 of the IPC and directed for issuance of summons against the accused persons including the petitioner. He has submitted that the petitioner has been implicated only with malice and vendetta after the Complainant could not be selected for the post in question.

6. It is submitted that the Complainant was a candidate for the post of Anganbari Sewika along with accused No. 3 Usha Kumari. It is true that the said Usha Kumari had failed to submit any certificate with regard to having passed the Intermediate Examination and also could not submit any objection in this regard, due to which marks were not awarded to her initially for having passed Intermediate Examination. However, the said Usha Kumari had submitted one application before the petitioner in this regard and on the application submitted by Usha Kumari, the petitioner, being the Programme Officer, forwarded letter no.243 dated 3.2.2015 to the Child Development Project Officer, Dumra to do the needful and also directed to

add her marks after verifying her Intermediate Examination Certificate. He has submitted that in pursuance to letter No. 243 dated 3.2.2015, the Child Development Project Officer, Dumra issued letter no.105 dated 4.2.2015 to the petitioner and intimated that the Intermediate Examination Marks of Usha Kumari has been added in the Merit List and, accordingly, Merit List was amended and a Fresh Merit List was published on 4.2.2015. He has submitted that a Provisional Merit List was published on 30.12.2014 and objections were invited for the same until 1.1.2015 and in view of letter no.243 dated 3.2.2015 a Final Merit List was published on 4.2.2015 wherein after adding the Intermediate Examination Marks of Usha Kumari, her merit points increased and she had been placed first in the Merit List. It is also urged that the Complainant has preferred an appeal vide Case No.9 of 2015 before the District Programme Officer, Sitamarhi against selection of accused No.3 Usha Kumari which is pending for adjudication.

7. Mr. Awadesh Kumar advancing his arguments has submitted that without considering implication of the guidelines issued in 2011, which was amended from time to time for selection of Anganbari Sewika and Sahayika, the learned Magistrate has summoned the petitioner and two other accused persons to face trial. According to him, the ingredients of the offences punishable under Sections 418 and 465 of the IPC are clearly wanting in the present case.

8. Per contra, Mr. Alok Kumar, learned counsel appearing for the Complainant - opposite party no.2 has submitted that while filling up the application for the post of Anganbari Sewika, the accused Usha Kumari had mentioned in the application form in the qualification column that she is Matriculate and has possessed 57% marks in Matriculation whereas the Complainant - opposite party no.2 had filled up the application form mentioning in qualification column that she is Matriculate, as well as Intermediate passed and, in the Matriculation she has got 57.5% marks and in Intermediate 60.8% marks. The Complainant had also attached the marks-sheet of both the qualifications along with the application form whereas Usha Kumari had attached the marks-sheet of only Matriculation, which she had mentioned in the application form. He has submitted that after filling up application form, Usha Kumari filed the marks-sheet of "Upshashtri" obtained illegally from Kameshwar Singh Darbhanga, Sanskrit University, which is subject to verification and requested to attach the same with her application form so that it may be added in her qualification while preparing Merit List. In this context, the CDPO, Dumra, vide his letter no.75 dated 29.1.2015, sought for guideline from the District Programme Officer, Sitamarhi as to whether the marks of Usha Kumari of "Upshashtri" can be determined for preparation of Merit List, because Usha Kumari had submitted marks-sheet of Intermediate after one and half months from the last date of submission of the application.

9. Mr. Alok Kumar, learned counsel, has submitted that in view of illegal direction given by the petitioner in the capacity of District Programme Officer while

publishing the Merit List on 4.2.2015, Usha Kumari was shown at serial no.1 whereas the Complainant - opposite party no.2 was placed at serial no.2, because Usha Kumari was given weightage of seven marks of her Intermediate Certificate.

10. In the light of the aforesaid allegations, he has submitted that no error can be found with the impugned order dated 4th July, 2015 passed by the learned Judicial Magistrate, 1st Class, Sitamarhi whereby finding a prima facie case to be made out under Sections 418 and 465/34 of the IPC, the petitioner and two others have been summoned to face trial.

11. I have heard learned counsel for the parties and perused the materials available on record.

12. As noted above, the two Sections under which the learned Magistrate has taken cognizance of the offences are Sections 418 and 465 of the IPC.

13. Section 418 of the IPC reads as under:-

"418. Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect. ♦ whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound, either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

14. From perusal of the offence prescribed under Section 418 of the IPC, it would be evident that necessary ingredients to constitute the offence are as under:

- (i) that the accused cheated some person;
- (ii) that he was under a legal obligation to protect the interest of that person;
- (iii) that the cheating had relation thereto;
- (iv) that he knew he was likely to cause wrongful loss to such person.

15. Thus, it would be evident that unless the act of omission and commission comes within the definition of "Cheating" a person cannot be held liable for an offence punishable under Section 418 of the IPC.

16. The offence of "Cheating" has been defined under Section 415 of the IPC, which reads as under:

"415. Cheating.- Whoever, by deceiving any person,-

- (a) fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or
- (b) 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 any person in body, mind, reputation or property or wrongful gain to any person, is said to "cheat".

17. From a reading of the definition of "Cheating", as given under Section 415 of the IPC, it would be evident that essential ingredients required to constitute the offence are as under:

(i). Deception of any person;

(ii) (A) Fraudulently or dishonestly inducing that person;

(i) to deliver any property to any person, or

(ii) to consent that any person shall retain any property; or

(B) intentionally inducing that person 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.

18. Having seen the ingredients of the offence of cheating as noted, herein above, when I look to the facts of the present case, I find that what is alleged is that subsequent submission of Intermediate Marks-Sheet by co-accused Usha Kumari was illegally entertained by the authorities involved in the selection process of Anganbari Sewika. There is no allegation that Usha Kumari's Certificate or Marks-Sheet of Intermediate Examination was forged or fabricated. It is not the case of the Complainant that any of the accused tried to deceive her either by making a false or misleading representation or by any other action or omission, nor is it her case that they offered her any fraudulent or dishonest inducement to deliver any property or to consent to the retention thereof by any person or to intentionally induced her to do or omit to do anything which she would not do or omit if she were not so deceived. The alleged act of omission or commission, in my considered opinion, would not come within the definition of cheating, under Section 415 of the IPC, as the ingredients of cheating are not found. Hence, an offence punishable under Section 418 of the IPC is not made out.

19. The other Section under which the learned Magistrate has taken cognizance of the offence is Section 465 of the IPC, which reads as under:

"465. Punishment for forgery.- Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both."

20. It would be evident from a reading of Section 465 of the IPC that the Section prescribes punishment for forgery. The offence of forgery has been defined under section 463 of the IPC, which reads as under:

"463. Forgery.- Whoever makes any false documents or false electronic record or part 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."

21. From a reading of the definition of forgery as prescribed under Section 463 of the IPC, it would be evident that in order to attract the offence of forgery, the following ingredients would be necessary:

- (i) The document or part of the document must be false;
- (ii) It must have been made dishonestly or fraudulently in one of the three modes specified in section 464; and
- (iii) It must have been made with intent:
 - (a) to cause damage or injury to (i) the public, or any person; or
 - (b) to support any claim or title; or
 - (c) to cause any person to part with property; or
 - (d) to cause any person to enter into an express or implied contract; or
 - (e) to commit fraud or that fraud may be committed.

22. Thus, it would be evident that to constitute the offence of forgery making of a false document is an essential ingredient.

23. Making of a false document has been defined under Section 464 of the IPC, which reads as under:

"464. Making a 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) makes or transmits any electronic record or part of any electronic record;
- (c) affixes any electronic signature on any electronic record;
- (d) makes any mark denoting the execution of a document or the authenticity of the electronic signature, with the intention of causing it to be believed that such document or a part of document, electronic record or electronic signature was made, signed, sealed, executed, transmitted or affixed by or by the authority of a 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 electronic 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 electronic signature on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or electronic record or the nature of the alteration."

24. It would be evident from a reading of Section 464 of the IPC that a person can be charged with the offence of making of false document only under three eventualities:

(i) (a) if he dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or

(b) makes or transmits any electronic record or part of any electronic record, or

(c) affixes any signature on any electronic record; or

(d) makes any mark denoting the execution of a document or the authenticity of the signature,

With intention of causing it to be believed that such document or a part of document, electronic record or signature was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed, or

(ii) if, without any lawful authority, he dishonestly or fraudulently alters a document or an electronic record, or

(iii) if he dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his signature on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document.

25. In short, a person can be alleged to have made a "false document"; if (i) he made or executed a document claiming to be someone else or authorised by someone else; or (ii) he altered or tampered a document; or (iii) he obtained a document by practising deception or from a person not in control of his senses.

26. Here, in the present case none of the aforesaid three grounds is present. There is no allegation that any false document was created either by the petitioner or by

the Child Development Project Officer under whose signature the Merit List was published. There is not even a whisper in the complaint that the Merit List was prepared under the signature of an authority, when the accused persons knew it was not made, signed or sealed rather the case of the Complainant is that in conspiracy with each other the accused persons revised the Merit List.

27. In my opinion, in absence of any of the ingredients of the offences punishable under Sections 418 and 465 of the IPC, the order taking cognizance of the offence and summoning the petitioner or any other accused persons in the present case is nothing, but an abuse of process of the court.

28. Further, there is no dispute to the fact that the petitioner, being a Gazetted Officer under the employment of the State, is protected under Section 197 of the Cr. P.C. The alleged acts had reasonable connection with the official duties performed by the petitioner and the Child Development Project Officer, a co-accused in this case. Whatever recommendation was made by the petitioner being the District Programme Officer while dealing with the representation of co-accused Usha Kumari was certainly in discharge of official duties. Even preparation of First Merit List (Tentative Merit List) and the Second Merit List (Final Merit List) by the Child Development Project Officer had been done in discharge of official duty. Thus, there is reasonable connection between the acts performed by the District Programme Officer and the Child Development Project Officer and the commission of the alleged offence. Since the Complainant had not obtained or produced any sanction order under Section 197 of the CrPC, the impugned order taking cognizance of the offence against the petitioner is bad in the eyes of the law.

29. For the reasons discussed, herein above, the impugned order dated 4.7.2015 passed by the learned Judicial Magistrate, 1st Class, Sitamarhi cannot be sustained even for a moment. The entire prosecution being malicious and vexatious in nature is fit to be quashed.

30. In that view of the matter, the impugned order dated 4.7.2015 as also Complaint Case No. 169 of 2015 (Tr. No. 4780 of 2015) and the entire proceedings arising therefrom, are hereby quashed.

31. The application stands allowed.