

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 2121 OF 2010
ARISING OUT OF SLP (CRL.) NO. 7520 OF 2009**

P. UDAY KUMAR

.....

APPELLANT

VERSUS

STATE OF JHARKHAND & ANR.

.....

RESPONDENTS

O R D E R

1. Accused, aggrieved by the order dated 27th March, 2009, passed by the Jharkhand High Court in Criminal Revision No. 634 of 2008 refusing to set aside the order dated 29th July, 2008, passed by the Judicial Magistrate, First Class, Bermo at Tenughat in G.R. No. 441 of 2007 whereby the application filed for discharge had been rejected, has preferred this petition for granting leave..

2. Leave granted.

3. Short facts giving rise to the present appeal are that the complainant who is respondent No. 2 herein filed a petition of complaint in the Court of Additional Chief Judicial Magistrate, Bermo, Tenughat, inter alia, alleging that the complainant is the Project Director of Power Mech Project Private Limited and Managing Director of Manne Project Private Limited. A contract for

construction of work of second unit of D.V.C. at Chandrapura was allotted to BHEL Company, which in turn assigned the work to the aforesaid Power Mech Project Private Limited as petty contractor. According to the complainant he had appointed the appellant as its petty contractor. Appellant commenced his work but disclosed to the complainant that he is facing problem in executing the work due to insufficiency of funds and, therefore, demanded money from him with the promise that the amount will be adjusted at the time of settlement of the account. Accordingly, complainant gave a total sum of Rs. 11,45,714/- on different dates as loan through cheques so that the work is expeditiously completed. The appellant after receipt of the amount proceeded to execute the work and when the required progress was not made the complainant asked the appellant to return the amount, in case he is not interested in executing the work. Despite promise, the appellant did not return the amount.

4. On the basis of the complaint laid, the learned Magistrate took cognizance of offence under Section 406 of the Indian Penal Code. The complaint was referred to the police for investigating under Section 156(3) of the Code of Criminal Procedure and on that basis FIR No. 26 of 2007 was lodged under Section 420 and 406 of the

Indian Penal Code. Police after investigation submitted charge sheet under Sections 406 and 420 of the Indian Penal Code and the appellant was summoned to face the trial.

5. During the trial appellant filed an application for discharge under Section 239 of the Code of Criminal Procedure and the learned Magistrate by order dated 29th July, 2008, directed for framing of the charge under Section 406 of the Indian Penal Code and while doing so, it was observed that no offence under Section 420 of the Indian Penal Code is made out. Appellant herein aggrieved by the same, preferred revision application before the High Court which has been dismissed by the impugned order.

6. Mr. Shree Prakash Sinha, learned Counsel appearing on behalf of the appellant submits that according to the complainant itself, the amount was given to the appellant as loan for executing the contract work and, therefore, the ingredients of Section 405 of the Indian Penal Code so as to make the offence punishable under Section 406 of the Indian Penal Code is not made out.

6. Mr. Sanjeev Kumar, learned Counsel appearing on behalf of the complainant - respondent No. 2, however, submits that it is a triable issue and the High Court rightly dismissed the revision application observing so.

7. We have appreciated the rival submissions and we find substance in the submission of the learned Counsel for the appellant. According to the complainant itself the amount was given as loan and as such the amount given cannot be said to have been entrusted to the accused and, therefore, the allegation made does not constitute the offence punishable under Section 406 of the Indian Penal Code.

8. We are of the opinion that prosecution of the appellant is an abuse of the process of the Court. However, this shall have no bearing on any civil proceeding pending or to be instituted in future between the parties.

9. In the result, the appeal is allowed, impugned orders are set aside and the appellant is discharged from the case.

J

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[HARJIT SINGH BEDI]

J

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[CHANDRAMAULI KR. PRASAD]

NEW DELHI
OCTOBER 25, 2010.

