

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.245 of 2015

Arising Out of PS.Case No. -1106 Year- 2011 Thana -WEST CHAMPARAN COMPLAINT

District- WESTCHAMPARAN (BETTIAH)

Vivek Pandey, son of Dr. Ajay Pandey, resident of village - Ramouli, Police Station- Lauriya, District - West Champaran.

.... Petitioner

Versus

1. The State of Bihar.

2. Mukhtar Khan @ Mukhtar Ansari, son of late Feku Ansari, resident of village - Sugauli, Police Station - Lauriya, District - West Champaran.

.... Opposite Parties

Appearance :

For the Petitioner/s : Mr. Basisth Mishra, Advocate
Mr. B.K. Mishra, Advocate
Mr. S.N. Rai, Advocate

For the State : Dr. Mayanand Jha, APP

For the O.P. No. 2 : Mr. Sanjay Kumar No.7, Advocate

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 30-11-2015

Heard learned counsel for the petitioner, learned counsel for the State and learned counsel for opposite party no.2.

2. By way of an application under Section 482 of the Code of Criminal Procedure (For short "Cr. P.C."), the petitioner seeks quashing of the order dated 18.09.2012 passed by the learned Judicial Magistrate, 1st Class, Bettiah, West Champaran in Complaint Case No. 1106-C of 2011, whereby and whereunder finding a prima facie case to be made under Section 138 of

Negotiable Instruments Act, 1881 (For short "N.I. Act"), the petitioner has been summoned to face trial.

3. The case is based on a complaint. The complainant has alleged that he intended to buy a Bolero vehicle from the petitioner, the price of which was fixed to be Rs. 2,25,000/-, out of which, Rs. 1,49,000/- was paid by the complainant to the petitioner. After receiving the aforesaid amount, the petitioner neither handed over the vehicle to the complainant nor he returned the amount. On repeated demands, he issued a cheque in the name of the complainant on 02.07.2010, in order to discharge his liability. On presentation before the bank, the cheque was dishonoured due to insufficiency of fund. Thereafter, a demand was made from the petitioner, but he failed to pay back the amount to the complainant.

4. The complainant was examined on solemn affirmation under Section 200 of the Cr. P.C. and on his behalf altogether three witnesses were examined during enquiry under Section 202 of the Cr. P.C. They all have supported the allegations made in the complaint.

5. Learned counsel for the petitioner has submitted that the impugned order dated 18.09.2012 summoning the petitioner after taking cognizance of the offence under Section 138 of the N.I. Act is vitiated in law. He has submitted that neither in the complaint



petition nor during examination on oath the complainant has stated the amount for which the cheque was issued in his favour. He has further contended that the mandatory requirements of Sections 138 and 142 of the N.I. Act were not complied with as there is no allegation in the complaint that any demand for the payment of the amount of money was ever made from the petitioner by giving a notice in writing.

6. On the other hand, learned counsel for the Opposite Party No.2 has submitted that though there are certain technical lacunae in filing the complaint, but the same would not vitiate either the order of cognizance or the order by which the petitioner has been summoned to face trial. He has submitted that the evidence relating to issuance of notice and failure to make payment after receipt of notice, may be adduced before the Jurisdictional Magistrate after the petitioner appears before the court.

7. I have heard respective counsel for the parties and perused the record.

8. I find substance in the arguments advanced on behalf of the petitioner. It is incumbent upon the Magistrate while taking cognizance of the offence punishable under Section 138 of the N. I. Act to look into the question whether the ingredients of the

offence has been made out or not.

9. The provisions prescribed under sections 138 and 142 of the N. I. Act are as under:-

“138. Dishonour of cheque for insufficiency, etc., of funds in the account- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for (a term which may be extended to two years), or with fine which may extend to twice the amount of the cheque, or with both :

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the

cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, (within thirty days) of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

142. Cognizance of offences – Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138 :

[Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.]

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first

class shall try any offence punishable under section 138)".

10. From a bare perusal of the Section 138 of N. I. Act, it would appear that the complaint made under this Section must contain the following ingredients:- (i) that there is a legally enforceable debt; (ii) that the cheque was drawn from account of bank for discharge in whole or in part of any debt or other liability which pre-supposes a legally enforceable debt; (iii) cheque so issued had been returned due to insufficiency of funds; (iv) the payee or the holder in due course of the cheque makes a demand for the payment of the amount of money mentioned in the cheque by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and (v) that the drawer of the cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

11. Apparently, in the present case, the complainant has not disclosed the amount for which the cheque was issued in his favour by the petitioner. There is no averment that any demand for the payment of the amount of the cheque was ever made by the complainant by giving a notice in writing to the petitioner of the



present case the petitioner failed to make the payment of the amount of money to the complainant within fifteen days of receipt of the notice. In absence of the aforesaid essential ingredients of Section 138 of the N.I. Act, the cause of action for taking cognizance of the offence had not arisen. Furthermore, in view of clause (b) of Section 142 of the N.I. Act, the court could have taken cognizance of the offence only if complaint would have been filed within one month of the date on which cause of action arose or after the said prescribed period upon satisfaction that the complainant had sufficient cause for not making the complaint within such period. In absence of giving a notice to the petitioner in writing within 30 days of the receipt of information by the complainant from the bank regarding return of the cheque, no cause of action had arisen in the present case and, hence, the learned Magistrate has erred in law in taking cognizance of the offence under Section 138 of the N.I. Act and summoning the petitioner to face trial for the said offence.

12. In view of the aforesaid lacunae, the Magistrate could not have taken cognizance of the offence under Section 138 of the N.I. Act.

13. In view of the discussions made, hereinabove, the impugned order dated 18.09.2012, passed by the learned Judicial Magistrate-1st Class, Bettiah, West Champaran in Complaint Case

No. 1106-C of 2011, and the entire proceeding emanating from the aforesaid complaint are hereby quashed.

14. The application stands allowed.

(Ashwani Kumar Singh, J.)

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