IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No. 44646 of 2012

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Ranjeet Kumar, Son of Late Nawal Kishore Mishra, Raja Bazar, Jahanabad, District - Jahanabad

.... Petitioner

Versus

1. The State of Bihar
2. Shiv Bilash Yadav, S/o Hira Yadav, Resident of Village – Ibrahimpur, P.S. – Shakurabad, District – Jahanabad

.... Opposite Party

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL ORDER

4 16-04-2015 Heard learned counsel for the petitioner and learned counsel for the State as well as the Opposite Party No. 2.

This petition is directed for quashing the order dated 06.09.2011 passed by the Sub-Divisional Judicial Magistrate, Jehanabad in Tr. No. 1792 of 2011 arising out of Complaint Case No. 362 of 2011 by which cognizance has been taken against the petitioner under Section 406 of the Indian Penal Code as well as Section 138 of the NI Act.

The complainant filed a complaint case bearing Complaint Case No. 362 of 2011, alleging, therein that the complainant is the owner of the truck bearing registration no. BR 25A 4014 and used to give the vehicle to different persons on hire. It is alleged that the petitioner Ranjeet Kumar is a contractor and took the truck on hire from the complainant for carrying articles and assured to pay the amount from time to time. It is further alleged that on 25.01.2011 at about 10:00 A.M. a cheque was issued to the tune of Rs.1,50,000/- for the truck having been hired. It is further alleged that the said cheque issued on 25.01.2011 bearing cheque no. 612825110000240001 bearing Khata No. 0228000100388763 of Punjab National Bank by the petitioner was deposited on 05.02.2011 in the account of the complainant bearing Account No. 1622000100010382 of the Punjab National Bank, Branch Nuaon and it is stated that the alleged Branch Manager on 08.02.2011 rejected the cheque on the ground that in the said account the amount is less than the cheque issued and so it is not possible to make payment of such amount. It is further alleged that the bank cleared this fact on 01.03.2011. It is further alleged that on 23.04.2011 a notice was issued by the complainant but no reply was received and then it is alleged that on 30.05.2011 the complainant went to Raja Bazar at the house of the accused and demanded money but the same was not paid.

On the said complaint, the complainant was examined on oath under Section 200 Cr.P.C. and thereafter the witnesses were examined under Section 202 Cr.P.C. and thereafter being satisfied the process of summon was issued holding that the prima facie case is made out for offence under Section 406 of the Indian Penal Code and 138 of the Negotiable Instrument Act after taking cognizance.

Learned counsel for the petitioner has challenged the order taking cognizance on the ground that the petitioner is not a contractor and the complaint petition is completely frivolous and not sustainable in the eye of law and petitioner lost his cheque book on 07.01.2011 in which five cheques were signed while going to the bank. He immediately informed the same in writing as well as on affidavit to this effect to the concerned police station and also informed the Branch Manager, Punjab National Bank, Jehanabad requesting therein to cancel the same and the petitioner did everything as a law abiding citizen which should have been done in such a situation and after informing the same to the concerned police station and the concerned bank, he was assured that now his cheques will not be used wrongly. The cheque bounced with the remark "insufficient fund". It is submitted that no case is made out either under Section 406 of the Indian Penal Code and Section 138 of the Negotiable Instrument Act. It has further been submitted that the notice issued under Section 138 of the Negotiable Instrument Act is not in accordance with law rather in violation of Section 142 read with Section 138 of the Negotiable Instrument Act as the notice has not been sent within 30 days from the date of the communication made regarding bouncing of the cheque.

Learned counsel for the opposite party no. 2, however, submits that petitioner is disputing the fact whereas while granting anticipatory bail to the petitioner, the petitioner undertook to deposit Rs.1,50,000/- before the learned court below within a period of six months which will be released in favour of the complainant, who undertakes to withdraw the case. However, the petitioner used the order dated 17.04.2012 passed in Cr. Misc. No. 5766 of 2012 and was released on provisional bail. The bail bond of the petitioner has been provisionally accepted till the deposit of the aforesaid amount. However, after release on bail the petitioner filed a petition for modification of the order but since the bail bond was cancelled in view of the order dated 17.04.2012 as the money was not deposited and it was ordered that the learned trial court will consider the submission regarding non-payment before the regular court where the case is pending.

However, having the same matter the cognizance was taken. It is true that the cognizance has been taken under Section 406 of the Indian Penal Code and Section 138 of the Negotiable Instrument Act. It is apparent that the alleged cheque was issued by the petitioner and the said cheque was presented in the bank on 05.02.2011 which was bounced on 08.02.2011 and even admitting the name of the petitioner that the intimation of the same was given on 01.03.2011 even then the notice was issued on 23.04.2001 after thirty days, in violation of Section 138(1)(C) of the Negotiable Instrument Act and hence, technically, the order taking cognizance under Section 138 of the Negotiable Instrument Act is in violation of Section 142 read with Section 138(1)(C) of the Negotiable Instrument Act and is not sustainable.

However, the allegation is that the petitioner took the vehicle on hire and due amount was not paid and the cheque given having been bounced.

Learned counsel for the petitioner disputed the fact that petitioner has taken the truck on hire and has made out a case that his cheque was missing as the cheque has lost which was signed by him and the same has been utilized by the complainant in collusion with the Bank Manager is a defence and is a question of fact to be gone into at trial.

This Court at this stage cannot go into the question about the disputed question of fact as well as defence of the petitioner and that can only be tested in a regular trial.

Hence, having regard to the aforesaid fact the order taking cognizance for offence under Section 406 of the Indian Penal Code is sustained. However, the cognizance taken under Section 138 of the Negotiable Instrument Act has been found in violation of Section 148 read with Section 138(1)(3) of the Negotiable Instrument Act and hence, the order taking cognizance under Section 138 of the Negotiable Instrument Act may not be sustainable but the order taking cognizance under Section 406 of the Indian Penal Code is sustainable.

Hence, once the allegations made make out an offence, the order taking cognizance by mentioning wrong Section does not per se make the order taking cognizance bad in law to interfere with, though it requires to be remanded at the earliest and hence, the petition is disposed off with a direction to raise the issue at the stage of framing of charge and the Court below shall take into consideration the observation at the stage of framing of the charge.

The trial be proceeded expeditiously.

(Gopal Prasad, J.)

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