IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.21466 of 2016

Arising Out of P.S. Case No. -173 Year- 2014 Thana -PATNA COMPLAINT CASE District- PATNA

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1. Shyam Kishore Sharma, son of Triveni Sharma, resident of Village/Mohalla - A.G. Colony, House No. A - 385, Police Station - Shastri Nagar, District - Patna.

.... Petitioner/s

Versus

1. The State of Bihar.
2. Dr. Kaushal Kishore Singh, son of Ramanuj Singh, resident of Mohalla - Mauar Lane, Police Station - Sultanganj, District - Patna.

.... Opposite Party/s

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Appearance :
For the Petitioner/s : Mr. Abhijeet Gautam -Advocate
For the Opposite Party/s : Mr. Chandra Bhushan Pd.-(A.P.P.)

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL ORDER

03 16-09-2016 Heard learned counsel for the petitioner as well as learned Additional Public Prosecutor.

2. Petitioner is aggrieved by an order dated 11.04.2014 passed by the learned S.D.J.M., Patna City, Patna in Complaint Case No.173 of 2014 whereby and whereunder the learned lower Court took cognizance of an offence punishable under Sections 406, 420 of the I.P.C. and Section 138 of the N.I. Act and further, summoned the petitioner to face trial.

3. Learned counsel for the petitioner has submitted that whole prosecution happens to be misconceived in the background of the fact that earlier petitioner had negotiated with Manoj Kumar and in token thereof, had executed the deed of

agreement (Annexure-2). It has also been submitted that from Annexure-2, it is evident that Rs.4,49,000/- was received by him through cheque while Rs.51,000/- was received by him in cash on 28.10.2011. It has further been submitted that there was negotiation in between Manoj Kumar with the wife of complainant along with one Susma Kumari with regard to the same land and for that, after receiving Rs.10,00,000/- as an earnest money, the document was executed (Annexure-3). Subsequently thereof, as has been submitted, complainant and petitioner entered into an agreement and after receiving Rs.5,00,000/- in cash, the deed of agreement was executed (Annexure-4).

4. In the aforesaid background, it has been submitted that though document speaks otherwise but the amount appertaining to Rs.4,49,000/- was to be received by the petitioner from Manoj Kumar and for that, when Manoj Kumar had issued cheque, the same was not presented before the Bank as per request of Manoj Kumar, which happens to be annexed with the instant petition. In the aforesaid background, it is submitted that the manner of transaction having effected amongst the parties speak about theme of civil cause on account of violation of terms and conditions of the contract and on account thereof, no criminal prosecution is permissible.

5. Furthermore, it has also been submitted that no offence under Section 406 of the I.P.C. is made out in the background of the fact that no amount has been entrusted to the petitioner by the complainant and so, in absence of entrustment, there could not be misappropriation.

6. With regard to Section 420 of the I.P.C., it has been submitted that unless and until, at the time of initial stage of negotiation having amongst the parties, if the complainant fails to substantiate that with criminal intention, to deceive the complainant and further, under such deception had succeeded to procure money from the complainant, there would not be applicability of Section 420 of the I.P.C. The complainant, as is evident from narration of the complaint petition had not disclosed that while entering into negotiation with the petitioner, petitioner projected himself in deceptive manner whereunder she part with money. Even developing subsequently would not attract Section 420 of the I.P.C. Therefore, for want of aforesaid ingredients for constituting an offence punishable under Section 420 of the I.P.C., the order of cognizance would not survive.

7. In likewise manner, it has also been pleaded that applicability of Section 138 of the N.I. Act is also not attracted. In order to challenge the same, it has been submitted that

complainant is not at all confident as well as had made positive assertion that which, either of two cheques having been issued by the petitioner and having been dishonoured by the Bank on presentation, prosecution under Section 138 of the N.I. Act has been launched. To support the same, the learned counsel for the petitioner drew attention towards Paragraph-7 of the complaint petition wherein it has been incorporated that first cheque was dishonoured on 28.05.2013 and for that, Advocate Notice was served on 17.07.2013. Furthermore, also drew attention towards Paragraph-9 of the complaint petition wherein there happens to be disclosure that a second cheque was issued on 27.12.2013, which was dishonoured on 02.01.2014 and for that, advocate notice was served on 17.01.2014. Instant complaint has been filed on 12.02.2014.

8. Furthermore, it has been submitted that according to N. I. Act, there should be a legal dues which, in the facts and circumstances of the case, does not survive and that being so, the prosecution under N. I. Act is not at all permissible. So, cumulative effect as is found duly exposed from the complaint petition along with different Annexures, the order of the cognizance is found non-sustainable in the eye of law and is accordingly, fit to be rejected.

9. Though not at all substantiated by any Annexure, but during course of argument, the learned counsel for the petitioner has submitted that while praying for anticipatory bail before the learned Sessions Judge, cheque was filed at the end of the petitioner, which was taken away by the complainant from the Court itself. The documents are being filed with the list of document before the learned lower Court and the learned counsel in whose pen the list of document is being filed, are found only competent to withdraw the document and so, aforesaid assertion of the petitioner is not at all found convincible.

10. With regard to receipt of the money having under Annexure-4, an agreement executed by the petitioner in favour of wife of complainant, endorsement having been made by the petitioner himself is to be taken note of :-

> *"Sahi Shyam Kishore Sharma Pita Sri Triveni Singh, A.G. Colony-A 385 Ashiyana Patna 25 Din Raviwar 07/10/2012 Panch Lakh Manoj Ko So Mina Kiye Ek Lakh Nagad Paya."*

Though, the aforesaid endorsement is not happily worded, but it suggests that Rs.5,00,000/- was set off against Manoj Kumar. In the aforesaid background, the matter has gone in between Manoj Kumar and Shyam Kishore Sharma, the petitioner.

11. At the present moment, the contention of the

petitioner that payment was made by the wife of the complainant to Manoj and the same was adjusted and for that, Manoj had issued cheque for Rs.5,00,000/- is found non-tenable in the background of recital of the Annexure-4 wherein no such kind of averment has been made nor the petitioner during course of endorsement having made by him had incorporated the same giving a pause at the present moment, to see authenticity over plea of petitioner, at one occasion, it has been pleaded that Rs.5,00,000/- was adjusted towards Manoj, at the other end, it has been pleaded that Manoj had issued cheque of Rs.4,49,000/- (Annexed) which he did not present before Bank, as instructed by Manoj. Therefore, the dishonouring of cheque as Annexures at Page No.39 issued by Manoj Kumar in favour of Shyam Kishore Sharma, the complainant dated 10.11.2011 is not at all found to be relevant for the present purpose. Not only this, the Annexure-4 is of dated 07.10.2012 while the aforesaid cheque happens to be dated 10.11.2011 that means to say, about eleven months prior to inception of Annexure-4. Therefore, issuance of aforesaid cheque in favour of petitioner before execution of Annexure-4, which the petitioner claims to be issued for set off against complainant, became falsified. Apart from this, after going through the aforesaid Annexures, it is evident that Anneuxre-2 which happens to be the photo copy of agreement having executed by the petitioner in favour of Manoj Kumar relates with Survey Plot Nos.50, 51 comprising total area 23 ½ decimals having boundary North-Mahavir Mandir, South-Manorma Devi & others, East-Road, West-Kishori Singh as well as 20’ wide road, Annexure-3, which happens to be dated 28.10.2011, the deed of agreement having executed by Manoj Kumar in favour of wife of complainant as well as one Susma Kumari relates with 05 kattha, 02 Dhoor, 16 Dhoorki concerning part of survey plot nos.50, 51 having boundary North-Mahavir Mandir, South-Manorma Devi and others, East-Road and West-Kishori Singh and 20’ passage. Annexure-4 having executed by the petitioner in favour of wife of complainant dated 07.10.2012 comprising 01 kattha of survey plot no.51 part having boundary North-Khesra No.52 (Mahavir Mandir), South-Niz Khesra No.50, East-Niz Road, West-Niz. After parallel scrutiny of the aforesaid documents, it is crystal clear that there happens to be apparent visibility of inconsistency in survey plot number, and on account thereof, the conduct of the petitioner became suspicious one. Petitioner has not denied receipt of money. In likewise manner, has not denied regarding issuance of both cheques at different occasions. Petitioner has not denied that money is still along with him. The amount whatever may be, were paid to the petitioner for particular purpose, which has purposely been frustrated at the end of the petitioner, clearly attracts application of Section 406 of I.P.C. In likewise manner, the conduct of the parties clearly suggest that they have, since beginning acted knavishly by way of false representation and induced the complainant to part with money, and under such design, issued cheque twice one by one, for the same amount, having both dishonoured.

12. Now, coming to Section 138 of the N.I. Act, in terms of Section 138 (B) of the N.I. Act, the notice has to be served within 30 days from the date of receipt of information from the Bank regarding dishonour of the cheque. From Para-9, it is evident that subsequent cheque was issued on 27.12.2013, which was reported by the Bank 02.01.2014 that it has been dishonoured on account of insufficient fund and for that, notice was served on 17.01.2014. In terms of Section 138(C) of the N. I. Act, the complaint was to be filed after 15 days from receipt of the notice. The aforesaid statement of the complaint having made under Para-9 of the complaint petition has not been controverted though the relevant Paragraph of the petition Para-7, 8 is with regard to the earlier event having incorporated under Paragraphs-7 and 8 of the complaint petition.

13. In ***International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI) and others v. Nimra Cerglass Technics Private Limited and another reported in (2016) 1 SCC 348,*** the Hon'ble Apex Court has held:-

> *"**15.** The essential ingredients to attract Section 420 IPC are: (i) cheating; (ii) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security; and (iii) mens rea of the accused at the time of making the inducement. The making of a false representation is one of the essential ingredients to constitute the offence of cheating under Section 420 IPC. In order to bring a case for the offence of cheating, it is not merely sufficient to prove that a false representation had been made, but, it is further necessary to prove that the representation was false to the knowledge of the accused and was made in order to deceive the complainant.*
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> ***16.** The distinction between mere breach of contract and the cheating would depend upon the intention of the accused at the time of alleged inducement. If it is established that the intention of the accused was dishonest at the very time*

when he made a promise and entered into a transaction with the complainant to part with his property or money, then the liability is criminal and the accused is guilty of the offence of cheating. On the other hand, if all that is established is that a representation made by the accused has subsequently not been kept, criminal liability cannot be foisted on the accused and the only right which the complainant acquires is the remedy for breach of contract in a civil court. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown at the beginning of the transaction. In S.W. Palanitkar & Ors. vs. State of Bihar & Anr. (2002) 1 SCC 241, this Court held as under (SCC p. 250, para 21)

"21 ……In order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating."

The above view in Palanitkar’s case(2002) 1 SCC 241 was referred to and followed in Rashmi Jain vs. State of Uttar Pradesh & Anr. (2014) 13 SCC 553.”

14. After careful consideration of factual as well as legal aspect, as discussed above, I do not see any cogent reason to interfere with the order impugned. Consequent thereupon, instant petition is found devoid of merit and is accordingly, rejected.

(Aditya Kumar Trivedi, J)

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