IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.32576 of 2014

Arising Out of PS. Case No.-739 Year-2013 Thana- NALANDA COMPLAINT CASE District- Nalanda

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1. Devendra Kumar S/O Rajnandan Singh
2. Rajnandan Prasad Singh S/O late Rama Mahto Both R/O- Murlabigha, P.S.- Chandi, Distt.- Nalanda.

... ... Petitioner/s

Versus

1. The State of Bihar
2. Brajesh Kumar S/O- Parshuram Prasad Mohalla- Choti Pahari, Near Sahara India Godown, P.S. New Bye Pass Agamkuan, Distt.- Patna.

... ... Opposite Party/s

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Appearance :

For the Petitioner/s	:	Mr. Amresh Kumar Sinha, Adv
For the State	:	Mr. NITYANAND(APP)
For the O.P. No. 2	:	Mr. Sudhir Kumar Tiwary, Adv

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CORAM: HONOURABLE MR. JUSTICE S. KUMAR
ORAL JUDGMENT
Date : 06.12.2017

Heard learned counsel for the petitioner, learned counsel for the State as well as learned counsel for the Opposite Party No. 2.

This petition under section 482 of the Cr.P.C has been filed for quashing the order dated 08.01.2014 taking cognizance, in Complaint case No. 739C of 2013 by learned S.D.J.M. Hilsa, Nalanda for the offences under sections 323, 406, 420 and 504 of IPC and Section 138 of the N.I. Act.

Briefly stated, as per complaint case complainant was in good relation with accused-petitioners. Accused-petitioners demanded money from the complainant to run their business and accordingy complainant gave friendly loan without interest to the tune of Rs. 3,20,000/- to the accused petitioner no. 1 in presence of accused-petitioner no. 2, and it was agreed that the said amount will be repaid within six months. As security for loan accused petitioners gave two cheques of Rs. 1,20,000/- and Rs. 2,00,000/- to the complainant. When the accused-petitioners did not return the said amount within the time as agreed the cheques were presented in the bank which were dishonoured due to insufficiency of fund. Compainant-Opposite party no. 2 met accused-petitioners upon which they denied returning the amount and man-handled him which necessitiated filing of complaint case.

On the basis of complaint case, examination of complainant on S.A, and examination of enquiry witnesses, the trial court found *prima facie* case to be made out against the petitioners and took cognizance of the offence under Sections 323, 406, 420 and 504 of the Indian Penal Code and Section 138 of the N.I. Act and issued summons to the accused-petitioners for their appearance to face the trial.

It has been contened by learned counsel for the petitioner that the mandatory procedural requirement in order to constitute offence under Section 138 of N.I. Act, is not satisfied as according to complaint petition Rs. 3,20,000/- was given as friendly loan on 09.08.2012 in cash. Agreement was executed between the parties regarding said transaction on the same date i.e. 09.08.2012 and in terms of agreement by august 2016 Rs. one lakh was to be repaid and the remaining 2,20,000/- was to be repaid within six months from the date of agreement. As the money advanced as loan to the petitioners were not repaid, the cheques were presented on 12.02.2013 by the complainant-Opposite Party no. 2 and the same were dishonoured and communicated to the complainant-opposite party no. 2 on 26.02.2013 as insufficient amount. The complainant-Opposite Party no. 2 gave a legal notice on 09.07.2013 for repayment of said amount but the said notice was never served upon the petitioners and was returned from the post office as unserved. It has further been contended by complainant-Opposite Party no. 2 that thereafter he went to the petitioners for payment of said amount but no payment was made and thereafter complainant-Opposite Party no. 2 filed this case under above referred sections on 13.08.2013.

The Apex Court in paragraph no. 8 of its judgment in the case of ***D. Vinod Shivappa vs Nanda Belliappa*** reported in ***(2006) 6 SCC 456***, with regard to dishnour of cheque has held as follows:-

> 8. Under Section 138 of the N.I. Act, where a cheque issued by the drawer in the discharge of any debt or any other liability is returned by the bank unpaid, because the amount standing to the credit of that account is insufficient to honour the cheque, the said person is deemed to have committed an offence. This is subject to proviso to Section 138 of the N.I. Act which provides that the cheque should have been presented to the bank within the period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The payee must also make a demand for the payment of the said amount by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of the information by him from the bank regarding the return of the cheque unpaid. If despite this demand, the drawer fails to make the payment within fifteen days of the receipt of the notice, a cause of action arises for prosecuting him for the offence punishable under Section 138 of the N.I. Act. Section 142 provides that the court shall take cognizance of an offence punishable under Section 138 of the N.I. Act upon receipt of a complaint in writing made by the payee or, as the case may be, the holder in due course of the cheque. Such complaint must be made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138. However, discretion is given to the court to take cognizance of the complaint even after the prescribed period, if the complainant satisfies the court that he

> had sufficient cause for not making the complaint within such period."

It has been contended by the counsel for the petitioners that the mandatory provisions was not followed in this case, as such cognizance taken by the court below under section 138 of the N.I. Act is not sustainable in the eye of law.

There is much force in the submission of the learned counsel for the petitioners that the procedural requirement as prescribed under the N.I. Act is mandatory and non compliance of said procedure vitiates the proceeding under Section 138 of the N.I. Act. It is an admitted position that no notice as contemplated under the N.I. Act for payment of dishonoured cheque was given to the petitioners within 30 days from date of intimation of dishonoured cheque by the bank and the same was given much after the intimation of dishonour of cheque. The compliance of the provisions are mandatory and non-compliance vitiates the proceeding under Section 138 of N.I. Act, as such the order of cognizance taken by the trial court under Section 138 of the N.I. Act is not sustainable in the eye of law and as such is quashed.

Records were also called for from the court below and the same was transmitted to this court and from perusal of the said record, it appears that charges has already been framed against the petitioners under section 420 and 406 of IPC and Section 138 of N.I. Act as such this court is not inclined to interefere in the order taking cognizance with respect to cognizance taken under I.P.C and the same requires no intereference by this Court at this stage. However, petitioner is at liberty to challenge framing of charge under sections 406 and 420 of the IPC in accordance with law, if so advised, however, order in respect of framing of charge under section 138 of N.I. Act is quashed.

In the result, the order taking cognizance and framing of charge under Section 138 of N.I. Act is quashed, however, no case for interference is made out against the order taking cognizance under Indian Penal Code against the petitioners.

In the result, this petition is partly allowed.

(S. Kumar, J)

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AFR/NAFR	NAFR
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