

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.44307 of 2013

Arising Out of PS.Case No. -null Year- null Thana -null District- BHABHUA (KAIMUR)

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Mahesh Kumar Dubey, Son of Sri Ram Pyare Dubey, Resident of 83 St. Jauns Colony Madauli, P.S. Mandubadih, P.O. Bhullanpur, Distt. Varanasi (U.P.)

.... Petitioner

Versus

1. The State of Bihar

2. Upendra Prasad Singh, Son of Shiv Shankar Singh, Resident of Village-Kandai, P.S.-Kudra, Distt.- Kaimoor, at present Anamika Hotel, G.T. Road, Kudra, P.S.- Kudra, District-Kaimoor.

.... Opposite Parties

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Appearance :

For the Petitioner/s : Mr. Ajay Kumar Thakur, Advocate
Mr. Ravi Ranjan, Advocate

For the State : Mr. Gulnar Begum, APP

For the Opposite Party No.2 : Mr. Manendra Kumar Sinha, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 24-04-2017

This application under Section 482 of the Code of Criminal Procedure has been filed for quashing of the order dated 14.02.2013 passed by the learned Chief Judicial Magistrate, Bhabhua in Complaint Case No. 1300(c) of 2012 by which process has been issued against the petitioner for facing trial for the offences punishable under Section 138 of the Negotiable Instruments Act (for short 'N.I. Act') and Sections 406 and 420 of



the Indian Penal Code (for short 'I.P.C.').

2. In the complaint, the complainant has stated that he is he is running a Hotel namely, Anamika at Kudra on G.T. Road and he also used to lend heavy machine like, J.C.B., Dumper, Hydrolic tractor and Tanker etc. on rent. He has stated that he has house at Lanka in Varanasi and the house of witness Pawan Kumar Singh is near his house, who used to come to house along with accused-petitioner Mahesh Kumar Dubey. In the month of November, 2011, the petitioner along with Pawan Kumar Singh came to his hotel at G.T. Road, Kudra and asked him to give J.C.B. machine on rent at the rate of Rs. 90,000/-. The petitioner accused kept the said J.C.B. machine for about eight months and did his work with assurance to give the money at one instance and accordingly, he kept the said J.C.B. machine for about eight months on rent and on being asked he gave him cheque of State Bank of India worth Rs. 5 lacs being cheque no.050939 dated 23.07.2012 and Rs. 1,50,000/- being Cheque No.050938 dated 23.07.2012 and a Cheque of Rs. 50,000/- vide Cheque No.050937 dated 05.08.2012 at Kudra. He deposited the said cheque in Punjab Nation Bank, Kudra. However, on 28.08.2012 the bank intimated him that the payment was stopped by the drawer.

3. On the basis of the aforesaid allegation, the



complainant alleged that the cheques of 7 lacs which was given in lieu of due amount were dishonoured and thus, the accused had committed breach of trust and cheating. The complainant has alleged that he requested the accused to pay back his money, but since no heed was paid to his request, finally a legal notice was sent to him on 12.11.2012 and finally a complaint was filed on 27.11.2012.

4. The complainant was examined on solemn affirmation and apart from him, two other witnesses, namely, Pawan Kumar Singh and Rajiv Kumar Singh were examined in course of inquiry conducted under Section 202 of the Code of Criminal Procedure whereafter, the summoning order has been passed after finding a prima facie case to be made out for the offences punishable under Section 138 of the N.I. Act and Sections 406 and 120 of the I.P.C.

5. Assailing the summoning order dated 14.02.2013, learned counsel for the petitioner submitted that so far as Section 138 of the N.I. Act is concerned, the same will not be made out in the present case because as per the complaint petition, on 28.02.2012 the complainant got information from Punjab National Bank, Kudra that the cheques were not encashed as payments were stopped by the petitioner and, thereafter, no legal notice was sent as



per the mandatory requirements of Section 138 of the N.I. Act. He contended that the complainant has admitted in the complaint itself that for the first time legal notice was sent on 12.11.2012, i.e., after more than 2 months of the knowledge of the dishonour of cheques.

6. Learned counsel for the petitioner further contended that the claim of the complainant would at best make out a case of civil breach of contract for which the prosecution could not lie under Section 406 and 420 of the I.P.C.

7. *Per contra*, learned counsel for the complainant-opposite party no.2 fairly conceded that in view of the fact that legal notice was sent after more than two months from the date of knowledge of dishonour of cheques, the ingredients of offence under Section 138 of the N.I. Act are not attracted in the present case. However, he contended that it is a case in which the ingredients of the offences under Sections 406 and 420 of the I.P.C. are clearly attracted. He contended that the complainant had handed over the J.C.B. machine to the petitioner on assurance of payment of Rs.90,000/- per month. The petitioner, however, dishonestly misappropriated the entire due amount by issuing three cheques after about eight months. He contended that the intention to cheat was there right from the beginning can also be handed over from the fact that he first started visiting the house of the petitioner and after



having friendly relation, he took away the J.C.B. machine in good faith, but, subsequently, after issuance of the cheques, he dishonestly instructed the bank to stop the payment.

8. I have heard learned counsel for the parties and perused the record.

9. It is well settled that in order to constitute the offence under Section 138 of the N.I. Act, the following ingredients are required to be satisfied:-

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that 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;

(iii) that cheque is returned by the bank unpaid either because of the amount of money standing to the credit of the 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 the bank;

(iv) the payee or the holder in due course of the cheque 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 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

10. Here, in the present case, admittedly the complainant made a demand for payment of the amount of cheques after more than two months from the intimation by the bank regarding the return of the cheques as unpaid.

11. In that view of the matter, the order taking cognizance of the offence under Section 138 of the N.I. Act cannot be sustained. However, since there is no dispute to the fact that the petitioner had issued three cheques in favour of the complainant and all the three cheques were dishonoured on the instruction of the petitioner, the complainant has alleged that three cheques were issued in discharge of liability which is being contested by the complainant.

12. In the opinion of this Court, the disputed questions of fact cannot be a ground for quashing a summoning



order. It is well settled that the disputed question of fact can be looked into by the trial Magistrate at the appropriate stage of the case.

13. In that view of the matter, I am not inclined to accede to the prayer of the petitioner to quash the prosecution for the offences punishable under Sections 406 and 420 of the I.P.C.

14. Accordingly, the application is partly allowed.

15. The learned Judicial Magistrate, Bhabhua, before whom the matter is pending, is directed to drop the proceeding against the petitioner for the offence under Section 138 of the N.I. Act. So far as the offence under Sections 406 and 420 of the I.P.C. are concerned, the same would continue.

(Ashwani Kumar Singh, J.)

Sanjeet/-

AFR/NAFR	NAFR
CAV DATE	NA
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