

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.52369 of 2013

Arising Out of PS.Case No. -466 Year- 2013 Thana -PATNA COMPLAINT CASE District-
PATNA

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1. Urmila Devi Sah @ Urmila Devi Wife Of Sri Pawan Kumar Sah Resident Of-
Ground Floor, Arunoday Bhawan, Jagat Narain Road, P.S.-Kadamkuan, District-
Patna

2. Pawan Kumar Sah @ Pawan Kumar Son Of Late Krishna Lal Sah Resident Of-
Ground Floor, Arunoday Bhawan, Jagat Narain Road, P.S.-Kadamkuan, District-
Patna

.... Petitioner/s

Versus

1. The State Of Bihar

2. Kishore Kumar Saraf, Proprietor of M/S Shri Dholi Sati Textile, Resident of
Rambag, P.S.-Chowk, Town & District-Patna

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Imteyaz Ahmad, Adv.

For the Opposite Party/s : Mrs. Nirmala Kumari, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 03-05-2017

This application under Section 482 of the Code of Criminal Procedure (for short 'Cr.P.C.') has been filed by the petitioner for quashing the order dated 03.10.2013 passed by the learned Sub-Divisional Judicial Magistrate, Patna City in Complaint Case No. 466 of 2013 by which, finding a prima facie case to be made out under Sections 406 and 420 of the Indian Penal Code (for short 'IPC') and Section 138 of the Negotiable Instruments Act (for short 'N.I.Act'), the petitioners have been summoned to face trial.

2. It is stated by the complainant in the complaint that the



complainant is engaged in the business of cloths and blankets since long having his place of business at Rambag, Patna City. The accused petitioners also reside in Patna City and belong to same caste and there was cordial relation between them since past several years. It is alleged that in the month of December, 2012 both the petitioners visited the shop of the complainant and stated that they have got a huge order for supply of blankets in the government department. They requested the complainant to give them one thousand blankets on credit on the plea of financial crunch and they promised to return the money positively within one month. Thereafter, the complainant delivered them one thousand blankets at the rate of Rs.600/- each amounting to Rs. 6,00,000/- on 15.12.2012 and they gave six cheques of rupees one lakh each, which was signed by petitioner no.1 Urmila Devi Sah with an instruction to deposit the cheque one by one after one month. On 14.01.2013 when the complainant intimated petitioner no.2 Pawan Kumar Sah that he is going to deposit one out of six cheques given by him, he requested the complainant to wait for few days as sufficient balance was not available in the bank account. The complainant waited for few days more but when the amount was not paid to him, he presented one of the cheques on 25.02.2013 in his account for encashment but the same was returned by the Bank with a return memo dated 07.03.2013 and thereafter, the petitioner no.2



intentionally avoided to talk with him. It is alleged that thereafter the complainant sent a legal notice and after receipt of the notice, the petitioners requested not to file the case. The complainant alleged that the petitioners have committed cheating in a planned manner causing huge financial loss to him.

3. In support of the complaint, the complainant was examined on oath. Apart from the complainant, one Ganesh Sharma was also examined in support of the complaint in course of enquiry conducted under Section 202 of the Cr.P.C. whereafter the learned Magistrate vide impugned order dated 03.10.2013 summoned the petitioner to face prosecution for the offences punishable under Sections 406 and 420 of the IPC and Section 138 of the N.I. Act.

4. Learned counsel for the petitioners submitted that the impugned order dated 03.10.2013 whereby the petitioners have been summoned to face trial is erroneous on law. He contended that the necessary ingredients of the offences punishable under Section 138 of the N.I. Act are completely missing in the present case. He contended that no date of service of notice regarding dishonour of cheque has been mentioned either in the complaint petition or in the statement of the complainant on oath. He contended that even the ingredients of the offence punishable under Sections 406 and 420 of the IPC are not attracted in the present case. According to him, the petitioners have



been made accused in the present case with ulterior motive. He has drawn my attention towards the statement of the complainant recorded on oath wherein he has contended that he had supplied only 600 blankets to the petitioners whereas in the complaint petition he has alleged that one thousand piece of blankets were supplied to the petitioners. He has further pointed out that the statement of the complainant is factually incorrect that the cheque issued by the petitioners was dishonoured due to 'insufficiency of fund'. He contended that from perusal of the cheque return memo, it would be evident that the same got dishonoured for want of signature of the petitioner no.1. He also contended that there is nothing on record to suggest that there was any guilty intention on the part of the petitioners right from the beginning. According to him, mere failure to fulfill any promise at a subsequent stage would not attract the ingredients of the offences punishable under Sections 406 and 420 of the IPC if there was no dishonest intention at the inception of entering into the agreement between the parties.

5. On the other hand, learned counsel for the complainant submitted that the plea of the petitioners can be looked into by the trial Magistrate at the appropriate stage of trial. He contended that this is not the stage to appreciate or give any finding on the defence of the accused persons. He contended that simply because there are



certain omissions on the part of the complainant in his statement made before the court, the entire complaint cannot be disbelieved.

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

7. Section 138 of the N.I. Act reads as under :-

“138 of the N.I. Act. 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.

Explanation.— For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.”

8. From a reading of Section 138 of the N.I. Act, it would be evident that unless the payee or the holder in due course of the cheque makes a demand for the payment of the said 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 the drawer of such cheque fails to make the payment of the said amount to the payee or the holder within fifteen days of the receipt of the said notice, no prosecution under Section 138 of the N.I. Act would lie.

9. In the present case nowhere in the complaint petition or in the statement made on oath, the complainant has stated that the notice regarding dishonour of the cheque was ever served upon the petitioners. In that view of the matter, I am of the considered opinion that there was no justification for taking cognizance of the offence under Section 138 of the N.I. Act.

10. Further, I find that the complainant has admitted in the complaint petition itself that he was having cordial relation with the petitioners since long as they reside in the same locality and belong to



the same caste. He has alleged that the blankets were delivered to the petitioners in good faith. Thus, there is nothing to suggest that there was any intention to cheat the complainant right from the beginning and in that view of the matter one of the essential ingredients of the offence of cheating as defined under Section 415 of the IPC is clearly not attracted in the present case. Hence, the court below was not justified in taking cognizance of the penal offence for cheating under Section 420 of the IPC.

11. I also find that the entire case is based on ocular allegation. There is no chit of paper to support that there was any agreement for supply of blankets between the parties. The complainant has not produced any receipt of sale of blankets in the court below. I further find that the complainant has himself belied the allegation made in the complaint in his statement on oath. In the complaint petition he has alleged that one thousand piece of blankets were supplied to the petitioners at the rate of Rs.600/- each but while being examined on solemn affirmation, he has stated that only 600 piece of blankets were supplied to the petitioners. In the opinion of this Court, the court below ought to have kept these relevant aspects of the matter in mind before issuing summons against the petitioners as summoning of an accused in a criminal case is a serious matter. Such orders should not be passed mechanically on the basis of certain



casual complaint made before the court.

12. In this regard, I may refer to the observations made by the Supreme Court in *Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others [(1998) 5 SCC 749]*, which is as under :-

“28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.”

13. Considering the discussions made above, I am of the opinion that the learned Magistrate has mechanically passed the impugned order summoning the petitioners without judicial application of mind.

14. In the opinion of this Court, allowing such a complaint



would amount to gross abuse of the process of the Court.

15. In that view of the matter, Complaint Case No. 466 of and the entire proceedings arising therefrom including the order dated 03.10.2013 passed by the learned Sub-Divisional Judicial Magistrate, Patna City in Complaint Case No. 466 of 2013 are hereby quashed.

16. The application stands allowed.

(Ashwani Kumar Singh, J)

Pradeep/-

AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	05-05-2017
Transmission Date	05-05-2017

