

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.6009 of 2015

Arising Out of PS.Case No. -4050 Year- 2013 Thana -PATNA COMPLAINT CASE District-
PATNA

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1. Pranesh Kumar @ Pappu Son of Sri Ram Lakhani Singh, Resident of Flat No. 203, Deo Narayan Apartment, Jahaji Kothi, Kadam Kuan, Police Station - kadamKuan in the town and district of Patna.

.... Petitioner/s

Versus

1. The State of Bihar.
2. Sachidanand Kumar Son of Late Surya Narayan Prasad Diwakar,
3. Nitya Nand Kumar Son of Late Surya Narayan Prasad Diwakar, Both residents of village -Kuriyari, Pratappur, Police Station - Halsi in the district of Lakhisarai, presently residing at Flat NO. 406, Raj Villa Apartment, Kanti Factory Road, Police Station - Agam Kuan in the town and district of Patna.

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Akhileshwar Prasad Singh, Sr. Adv.
Mr. Bimal Kumar, Adv.

For the Opposite Party/s : Mrs. Rita Verma, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
ORAL JUDGMENT

Date: 01-09-2017

Heard Mr. Akhileshwar Prasad Singh, learned Senior Advocate for the petitioner and Smt. Rita Verma, learned Additional Public Prosecutor for the State.

2. By way of the present application preferred under Section 482 of the Code of Criminal Procedure (for short 'Cr.P.C.'), the petitioner seeks quashing of the order dated 20.11.2014 passed by the learned Sessions Judge, Patna in Cr. Revision No. 4357 of 2014 by which he has dismissed the revision petition and upheld the order dated 17.04.2014/19.04.2014 passed by the learned Judicial



Magistrate 1st Class, Patna in Complaint Case No. 4050C of 2013 by which processes have been ordered to be issued only against the opposite party no.2 under Section 138 of the Negotiable Instruments Act, 1881 (for short 'N.I. Act').

3. The petitioner is mainly aggrieved by the revisional order as well as the order passed by the learned Magistrate because the opposite party no.3 was not summoned to face trial and also because cognizance of the offences punishable under Sections 406 and 420 of the Indian Penal Code (for short 'IPC') was not taken, while summoning the opposite party no.2 to face trial for the offence under Section 138 of the N.I. Act.

4. The case of the complainant is that he came in contact with the opposite party nos.2 and 3 through a neighbour, namely, Binod Kumar in the year 2003 and cordial relation developed between them. The opposite party nos.2 and 3 assisted him mentally and physically for purchasing Flat No.203 in Deo Narayan Apartment, Jahaji Kothi, Patna. Thereafter, they took loan from him for investing in their firm M/s Readymade Emporium and M/s Sai Industries and they returned the loan amount within the time promised by them with bank interest due to which he developed faith in them. It is further stated that in the month of September, 2013 both the opposite party nos.2 and 3 came to know that he had arranged



some amount to purchase a two BHK flat in Raj Kishore Apartment situated in Mohalla- Chitragupta Nagar, Patna upon which they requested him to advance some loan so that they could get their mortgaged land released from Allahabad Bank, Sheikhpura, Patna Branch, which was mortgaged by the opposite party no.2 for taking loan for development of the firm M/s Sai Industries. It is further stated that they promised that they would sell the mortgaged land after release and would return the amount within 15 days, if request is made by him and, in any case, they would return the amount by 25.09.2013. It is further stated that believing upon the words of the opposite parties, he gave Rs.12 lacs to them and the opposite party no.2 Sachidanand Kumar issued a cheque of ICICI Bank, Patna Branch of the said amount of Rs.12 lacs payable on 25.09.2013. He presented the cheque before the Bank on 25.09.2013. However, a request was made by them to wait for ten days, as the person with whom they negotiated for sale of the land after release from the Bank had undertaken to make payment by 05.10.2013. Thus, believing upon their promise, he presented the cheque before the Bank on 05.10.2013, but the cheque was dishonoured on the ground of the account having been closed and the cheque was returned to the complainant under Memo dated 08.10.2013. After getting intimation from the Bank, he tried to contact the opposite parties, but none of



them responded to his repeated calls. It is alleged that they also switched off their mobile. Thereafter, legal notice was sent to them through registered post, but even after service of legal notice neither any payment was made nor legal notice was replied.

6. After institution of the complaint, the complainant was examined on solemn affirmation and, besides the complainant, two other witnesses were also examined in support of the complaint.

7. In his statement made on oath, the complainant has stated that he instituted the case against Sachidanand Kumar and Nitya Nand Kumar. They had taken Rs.12 lacs as loan from him against which Sachidanand Kumar had issued a cheque amounting to Rs.12 lacs. The cheque could not be encashed as the account was already closed. He has further stated that when he went to demand back the amount, the same was not paid to him. He has further stated that a legal notice was sent, but the same was not replied.

8. The other two witnesses, who were examined in course of inquiry conducted by the learned Magistrate under Section 202 Cr.P.C., have also made their statement in the same manner. None of them has uttered a word against the opposite party Nitya Nand Kumar in their statement made before the court.

9. After holding inquiry under Section 202 of the Cr.P.C., the learned Magistrate did not find any material to summon the



accused Nitya Nand Kumar. The learned Magistrate also found that the case was made out only under Section 138 of the N.I. Act.

10. Mr. Akhileshwar Prasad Singh, learned Senior Advocate, appearing for the petitioner has submitted that there is specific allegation in the complaint against the opposite party no.3 Nitya Nand Kumar, which has been fully supported by the complainant and his witnesses in their statements made before the court, but the learned Magistrate and the revisional court have erred in law in not summoning him to face trial. He has submitted that they have also failed to appreciate that the allegations made clearly attracted ingredients of offences under Sections 406 and 420 of the IPC, but no cognizance has been taken for these offences.

11. Per contra, Smt. Rita Verma, learned Additional Public Prosecutor appearing for the State has submitted that there is no error in the order passed by the revisional court. She has submitted that the opposite party no.3 had not issued the cheque and, thus, he could not have been summoned under Section 138 of the N.I. Act. Similarly, according to her, on the facts and in the circumstances of the case, no case of cheating or criminal breach of trust is made out.

12. Having heard the parties and perused the record, in the opinion of this Court, the learned Magistrate has rightly not summoned the accused Nitya Nand Kumar as there was no material



against him in course of inquiry warranting his summoning. As far as the narration given in the complaint is concerned, it would reflect that the complainant had long standing relationship with the accused persons. He has himself admitted that on several occasions he had given loan to the accused persons and the loan amount was always returned to him with admissible interest by them. This clearly goes to suggest that there was no intention to cheat the complainant right from the beginning. In order to show criminal liability under Section 420 of the IPC, dishonest intention right from the beginning is sine quo non. It is well settled position in law that mere breach of promise made or breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction. It is the intention, which is the gist of the offence. Hence, merely because a promise made could not be kept up subsequently would not attract the ingredients of the offence of cheating. Further, for constituting an offence under Section 406 of the IPC one of the essential ingredients is dishonest misappropriation. From the allegations made, it cannot be said that it is a case of dishonest misappropriation of any amount. The promise to repay the amount of loan was made keeping into mind release of mortgaged property and its sale. It is not alleged in the complaint that the opposite party no.2 got back his mortgaged asset and payment was



received by him after its sell. In the background of the facts alleged, it can easily be inferred that in course of commercial transaction, the complainant was in the habit of advancing loan amount to the opposite party no.2 on interest and the opposite party no.2 repaid the amount with interest on several occasions in past, but failed to repay the amount in question due to some reason. Under such circumstance, in the opinion of this Court, if no cognizance has been taken under Sections 406 and 420 of the IPC by the court of Magistrate, no illegality can be found with the order. Hence, the Sessions Court rightly dismissed the revision petition.

13. So far as Section 138 of the N.I. Act is concerned, it is admitted case of the petitioner that it was the accused Sachidanand Kumar, who had signed and issued the cheque, which got dishonoured on its presentation. It is well settled position in law that a person, who has not signed a cheque, cannot be made vicariously liable for the offence punishable under Section 138 of the N.I. Act.

14. The essential ingredients for constituting an offence under Section 138 of the N.I. Act are as under :-

- “ (i) That the cheque is drawn;
- (ii) That the cheque when presented to the Bank is dishonoured;
- (iii) That such cheque was presented to the Bank within a period of six months from the date it was drawn or within the period of its validity, whichever is earlier;



(iv) That the payee demanded in writing from the drawer of the cheque for payment of the amount of money due under the cheque; and

(v) That such a notice of payment is made within a period of thirty days from the date of receipt of the information by the payee from the Bank regarding return of the cheque as unpaid.

15. Thus, under the scheme of Section 138 of the N.I. Act, the liability is cast upon the drawer of the cheque in case the cheque is dishonoured for various reasons because of which the holder of the cheque may have civil or criminal remedies depending upon the facts of the case. The offence under Section 138 of the N.I. Act cannot be attracted against a person, who is not the drawer of the cheque.

16. Recently, the Supreme Court in N. Harihara Krishnan Vs. J. Thomas (Cr.Appeal No. 1534 of 2017 disposed of on 30th August, 2017) held that the offence under Section 138 of the N.I. Act is person specific. It also clarified that the general concept under the Cr.P.C. that cognizance was taken against the offence and not the offender was not appropriate in prosecution under the N.I. Act. It observed as under :-

“...Unless the complaint contains all the necessary factual allegations constituting each of the ingredients of the offence under Section 138, the Court cannot take cognizance of the offence. Disclosure of the name of the person drawing the cheque is one of the factual allegations which a complaint is required to contain. Otherwise in the absence of any authority of law to investigate the offence under Section 138, there would be no person



against whom a Court can proceed. There cannot be a prosecution without an accused. The offence under Section 138 is person specific. Therefore, the Parliament declared under Section 142 that the provisions dealing with taking cognizance contained in the CrPC should give way to the procedure prescribed under Section 142....”

17. Thus, I see no illegality in the order passed by the learned Magistrate whereby he has summoned the opposite party no.2 only to face trial for the offence punishable under Section 138 of the N.I. Act. Similarly, there is no illegality in the order of the revisional court whereby the revision against the order passed by the learned Magistrate has been dismissed.

18. Apart from the fact that the present application is meritless, I am of also of the opinion that though the petition has been filed under Section 482 of the Cr.P.C., the same is in the nature of second revision, which is barred under Section 397(3) of the Cr.P.C.

19. Accordingly, the application, being devoid of any merit, is dismissed.

(Ashwani Kumar Singh, J)

Pradeep/-

AFR/NAFR	NAFR
CAV DATE	N.A.
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