

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.9326 of 2011

Arising Out of PS.Case No. -0 Year- null Thana -null District- GAYA

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Ajoy Shankar Daftuar @ Munna son of Late Dudheshwar Prasad, resident of
Nadragan, Shahi Maszid Gali, P.S.-Civil Lines, District- Gaya

.... Petitioner/s

Versus

- 1.The State of Bihar
2. Panchu Singh son of Kamala Singh, resident of Kirani Ghat, P.S.-Kotwali,
District-Gaya

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Akhileshwar Prasad Singh, Sr. Advocate
: Mr. Rabindra Priyadarshi, Advocate

For the State : Mr. Jharkhandi Upadhyay, APP

For the Opposite Party No.2 : None

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 12-10-2017

Heard Mr. Akhileshwar Prasad Singh, learned counsel for
the petitioner and Mr. Jharkhandi Upadhyay, learned Additional Public
Prosecutor for the State.

2. Despite valid service of notice neither the complainant
opposite party no.2 has appeared in person nor any lawyer
representing him has turned up to argue the matter.

3. This application under Section 482 of the Code of



Criminal Procedure (for short 'the CrPC') has been filed for quashing the order dated 22.12.2009 passed in Complaint Case No.1616 of 2009 whereby the learned Judicial Magistrate summoned the petitioner after taking cognizance of the offences punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short N.I.Act) and Section 406 of the Indian Penal Code (for short 'the IPC').

4. The complainant has alleged that the petitioner entered into an agreement with him and in pursuance thereof a Tata Sumo Victa LX vehicle was purchased in the name of the petitioner. It was agreed between the parties that they will share profit and loss in equal proportion as fifty per cent of the price of the Tata Sumo Victa LX vehicle was paid by him. His case is that a sum of rupees one lac forty five thousand was given by him to the petitioner at the time of purchase of the vehicle, which was subsequently returned by him through cheque amounting to rupees one lac forty five thousand. The cheque issued by the petitioner was first presented before the bank on 10.07.2009, but the same got dishonoured due to insufficiency of fund on 11.07.2009. When he informed the petitioner about the dishonour of the cheque, he requested him to present the cheque once again. Pursuant to his request he again presented the cheque on an account maintained by him with the banker for payment on 03.08.2009, but



again the said cheque was not honoured due to insufficiency of fund and an intimation was given to him by the banker in this regard on 04.08.2009. He has further stated in the complaint that he sent a legal notice to the petitioner on 11.08.2009, which was received by him and after receiving the same, he threatened him with dire consequences.

5. On these allegations, a written complaint was filed in the Court of Magistrate on 18.08.2009. The learned Magistrate, after holding enquiry under Section 202 of the CrPC, summoned the petitioner in exercise of power conferred under Section 204 of the CrPC vide order dated 12.12.2009 after taking cognizance of the offences punishable under Section 406 of the IPC and 138 of the N.I.Act.

6. It is submitted by Mr. Akhileshwar Prasad Singh, learned counsel appearing for the petitioner that none of the ingredients of Section 406 of the IPC are attracted in the present case. He submitted that there was no legal liability against the petitioner as the complainant had never ever advanced any amount to the petitioner for purchase of the vehicle in question. He contended that no written agreement has been produced by the complainant in this regard. According to him, the complainant had misused the signed cheque of the petitioner and presented the same after concocting a false story. He further contended that even otherwise the summoning order is bad



in view of the fact that the ingredients of the offence punishable under Section 138 of the N.I.Act are not attracted.

7. On the other hand, Mr. Jharkhandi Upadhyay, learned Additional Public Prosecutor appearing for State, submitted that even though it may not be a case under Section 406 of the IPC at least ingredients of the offence punishable under Section 138 of the N.I.Act are clearly attracted. He contended that the complainant had categorically stated in the complaint that the cheque was issued in discharge of legal liability and on presentation before the bank by the complainant the cheque was got dishonoured twice due to insufficiency of fund.

8. I have heard learned counsel for the petitioner and learned counsel for the State and carefully perused the record.

9. Apparently, there is no material on record on the basis of which cognizance could have been taken for the offences punishable under Section 406 of the IPC. So far as Section 138 of the N.I.Act is concerned, the same could have been taken only after the offence was complete and cause of action had arisen. Section 138 of the N.I.Act reads as under:-

“138 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 purpose of this section, “debt or other liability” means a legally enforceable debt or other liability. ”

10. From reading of proviso (b) and (c) to Section 138 of the N.I.Act, it would be manifest that cause of action would arise only after payee or the holder in due course of the cheque, as the case may be, makes a demand for payment of money by giving a notice in writing to the drawer of the cheque and within thirty days of 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 of money to the payee within fifteen days of receipt of such notice.

11. Thus, after receipt of notice, fifteen days clear time has to be given to the drawer of the cheque to make payment of the cheque amount to the payee and only on such failure a cause of action for taking any action under Section 138 of the N.I.Act would arise. Here, in the present case, as noticed hereinabove, a legal notice was sent by the complainant on 11.08.2009 and only seven days thereafter the complaint was filed on 18.08.2009.

12. Apparently, filing of the complaint was premature, as no



cause of action had arisen. Hence, the order of cognizance is unsustainable and for the same reason even the summoning order cannot be justified.

13. Accordingly, the impugned order dated 22.12.2009 whereby the petitioner has been summoned to face trial is hereby quashed.

14. The application stands allowed.

(Ashwani Kumar Singh, J)

Md.S./-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	16.10.2017
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