

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.4322 of 2015

Arising Out of PS.Case No. -104 Year- 2014 Thana -BAGHA District-
WESTCHAMPARAN(BETTIAH)

=====

Munindra Kumar S/o Sri Krishna Prasad Resident of Village Nawaki Bazar, P.O. +
P.S. Bagaha, District West Champaran. Petitioner

Versus

1. The State of Bihar.
2. Manish Kumar S/o Sri Premchand Prasad Resident of Village Lagunaha, P.S.
Chautarwa, District West Champaran.

.... Opposite Parties.

=====

Appearance :

For the Petitioner/s : Mr. Ujjwal Kumar Sinha, Adv.

For the Opposite Party/s : Mr. P.N. Pandit, A.P.P.

=====

CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL JUDGMENT

Date: 03-01-2018

Heard learned counsel for the petitioner and learned A.P.P.
for the State.

2. This application under Section 482 of the Code of Criminal Procedure has been filed for quashing the cognizance order dated 04.07.2014 passed by the learned ACJM, Bagaha, West Champaran, whereby the learned Magistrate has taken cognizance against the petitioner under Section 138 of the Negotiable Instruments Act (hereinafter in short referred to as 'N.I. Act').

3. It is submitted by learned counsel for the petitioner that preceding to the filing of any complaint petition against the petitioner under Section 138 of the N.I. Act a notice must have been given by the drawee to him within 30 days from the date of dishonor of the cheque and on non-compliance of the notice within 15 days of the



receipt of the same, the complaint ought to have been filed but no notice has been given to him by the drawee of the cheque preceding to filing the case. It is further submitted that under Section 142 of the N.I. Act, it is the complaint which can be filed in case of dishonor of cheque and not the F.I.R. Hence, the cognizance taken by the learned lower court on the basis of the F.I.R. filed against the petitioner by the drawee of the cheque without giving notice to the petitioner is illegal and is liable to be quashed.

4. From perusal of record, it appears that Bagha P.S. Case No.104 of 2014 was instituted under Section 420/406 of the Indian Penal Code against the petitioner on the basis of written report of Manish Kumar with the allegation in succinct that the petitioner took Rs.4,00,000/- from him on 12.12.2013 on the assurance of repayment of the same by the month of February, 2014 venting the dire need of it to save his house from auction and also issued cheque no.313727 dated 05.03.2014 of the State Bank of India for the aforesaid amount in favour of the informant. When the informant presented the said cheque in the bank, it was dishonoured due to insufficiency of fund. Then, he met with the petitioner whereupon he assured him to deposit the sufficient money in his account and asked him to withdraw the money on 12.03.2014, whereupon he again presented the cheque on 13.13.2014 but it was again dishonored for insufficiency of fund.



Then, he approached the petitioner but he refused to pay back the money and roughed him up.

5. After investigation of the case, the I.O. submitted chargesheet and on perusing the chargesheet and the case diary, the learned lower court took cognizance of the offence under Section 138 of the N.I. Act vide impugned order.

6. Being aggrieved and dissatisfied with the impugned order of taking cognizance the petitioner has preferred this application.

7. As per Section 138 (b) and (c) of the N.I. Act, in case of dishonor of the cheque by the bank, 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 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, the complaint petition can be filed under Section 142 of the N.I. Act and as per Section 142 of the N.I. Act no Court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque.



8. From perusal of the F.I.R., it appears that no notice to the petitioner has been given by the informant for the payment of the aforesaid amount within the stipulated period rather he has directly filed the aforesaid F.I.R. against the petitioner. Moreover from perusal of the record, it appears that the said notice was given to the petitioner by the opposite party no.2 (drawee of the cheque) on 01.04.2014 i.e. after filing of the F.I.R. and without giving a notice the F.I.R. has been filed against the petitioner by the opposite party no.2. Giving and service of notice of demand is a condition precedent for filing petition under Section 138 of the N.I. Act. The object of giving notice indicating the factum of dishonor of cheque is to give an opportunity to the drawer to make payment within 15 days to avoid any criminal action despite dishonor of cheque.

9. Hon'ble Apex Court in **Central Bank of India and another Vs. M/s Saxons Farms and others** reported in **2000(1) PLJR (SC) 17** has been pleased to rule that service of notice of demand is a condition precedent for filing a complaint. The object of notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect honest drawer. Hon'ble Apex Court in **Vinod Tanna & another Vs. Zaheer Siddiqui and others** reported in **[2002 (1) East Cr C 184 (SC)]** has been pleased to rule that a plain reading of Section 138 of the Act makes it crystal clear that unless the



conditions precedent mentioned therein are satisfied, the said penal provision cannot be attracted. Hon'ble Apex Court in **Rajnish Agrawal Vs. Amit J. Bhalla** reported in **2001 (1) PLJR (SC) 177** has been pleased to rule that mere dishonor of a cheque would not raise a cause of action unless the payee makes a demand in writing to the drawer for payment and the drawer fails to make payment of concerned amount to the payee. Object of notice indicating the factum of dishonor of the cheque is to give an opportunity to the drawer to make payment within 15 days, to avert any criminal action despite dishonor of cheque. The Bombay High Court in **Mahesh Mehta Huf and another Vs. State of Goa and another** reported in **[2006 (2) East Cr C 490 (Bom)]** has been pleased to rule that it is not the return of the cheque dishonored simpliciter that creates an offence under Section 138 of the Act. The offence gets completed only after the notice is served and the payment as required by the notice is not made.

10. Thus, without giving notice to the petitioner by the drawee of the cheque (opposite party no.2) demanding payment and failure of the petitioner to make payment of concerned amount to the drawee despite receiving of notice, no cause of action for filing the complaint petition has accrued against the petitioner.

11. Moreover, after accruing of the cause of action only the



complaint petition in writing ought to have been filed and not the F.I.R. but instead of filing the complaint petition, opposite party no.2 has filed an F.I.R. regarding the aforesaid dishonor of cheque and non-payment of his due amount and the learned lower court has also taken cognizance under Section 138 of the N.I. Act on the basis of the aforesaid F.I.R. Hence, the impugned order passed by the learned lower court is bad in law and is liable to be quashed.

12. In the facts and circumstances aforesaid, the impugned order dated 04.07.2014 passed by the learned ACJM, Bagha, West Champaran in Bagaha P.S. Case No.104 of 2014 is quashed and this application is allowed.

(Prakash Chandra Jaiswal, J.)

Trivedi/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	08.01.2018
Transmission Date	08.01.2018

