

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.878 of 2015

Arising out of P.S. Case No. -695 Year- 2013 Thana –Sitamarhi, District- Sitamarhi

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Shiv Kumar Bhagat @ Munna Bhagat son of Late Madhusudan Bhagat,
resident of 23 A, Janki Villa, Basant Vihar Colony, Boring Road, P.S. S.K.
Puri, District Patna

.... Petitioner

Versus

1. The State of Bihar through the Superintendent of Police, Sitamarhi
2. Sanjay Kumar Gupta, Director Ramsati Cold Storage Pvt. Ltd.,
Sitamarhi, P.S. & District Sitamarhi

.... Respondents

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Appearance :

For the Petitioner : Mr. Satyabir Bharti, Advocate
Ms. Aparna Arun, Advocate
Mr. Alok Chandra, Advocate
For the Respondents : Mr. Rakesh Ranjan, A.C. to A.A.G.12

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL JUDGMENT

Date: 27-07-2018

The present writ application has been preferred
for setting aside the order dated 09.07.2013 passed by
learned Chief Judicial Magistrate, Sitamarhi in Complaint Case
No. 1086/2013 by which a direction was given to the Officer-
in-Charge of Sitamarhi Police Station to lodge a First
Information Report. The learned Chief Judicial Magistrate,
Sitamarhi passed the impugned order dated 15.07.2013 in
exercise of his power under Section 156(3) of the Code of
Criminal Procedure (hereinafter referred to as the “Cr.P.C.”).



By virtue of the impugned order the Officer-in-Charge, Sitamarhi Police Station has registered Sitamarhi P.S. Case No. 695/2013 registered under Section 138 of the Negotiable Instruments Act, 1981 and Section 406 & 420 of the Indian Penal Code.

2. Learned counsel for the petitioner at the outset has drawn attention of this court towards order dated 17.02.2016 passed by a learned co-ordinate Bench of this court by which while granting time to the learned counsel representing the State to seek instruction, an interim order directing that further proceedings in connection with Sitamarhi P.S. Case No. 695/2013 shall remain stayed. It has however been made clear that ongoing investigation of the aforesaid case has not been stayed.

3. Learned counsel for the petitioner submits that on a bare perusal of the written complaint submitted by Opposite Party No. No. 2 in the court of learned Chief Judicial Magistrate, Sitamarhi it would appear that no case of cheating or criminal breach of trust is made out against the petitioner. It is submitted that so far as the offences alleged under Section 138 of the Negotiable Instrument Act, 1881 is



concerned, it is a compoundable offence and the petitioner having already paid the entire amount of Rs. 48 Lakhs which was covered under the two cheques in question need not be prosecuted by virtue of the present F.I.R.

4. It is stated that as per the allegations made in the First Information Report the informant has himself stated in his complaint that because his Firm was not fulfilling the conditions of notice inviting tender published by the Registration, Excise and Prohibition Department, Government of Bihar in the year 2012, he had approached the accused and requested him orally to participate in the tender on the basis of the experience certificate of the Firm of the accused and for this purpose the informant agreed that he will pay the entire amount required for this purpose. The allegation is that the informant had paid Rs. 32 Lakhs in cash to the accused in presence of witness Nos. 1, 2 & 3 and had further paid a sum of Rs. 48 Lakhs through account payee cheques but when the tender was opened and the Firm of the accused could not get the work, the informant requested the accused to refund his money, the accused issued two cheques of Rs. 24 Lakhs each in favour of the informant but both the cheques stood



dishonoured on presentation for the reasons “insufficient funds”. It has been alleged that after the dishonour of the two cheques the informant approached the accused many times but the accused kept on delaying the matter, on this the informant sent a legal notice to the accused but despite service of legal notice no reply was sent on behalf of the accused. On these grounds the complaint petition was filed before the learned Chief Judicial Magistrate, Sitamarhi.

5. Learned counsel for the petitioner submits that prior to filing of the application under Section 156(3) Cr.P.C. the complainant did not follow the procedures as envisaged under Section 154(1) and Section 154(3) of the Cr.P.C. It is also submitted that in the complaint petition the complainant neither made any statement with regard to compliances as regards Sections 154(1) and 154(3) Cr.P.C. nor did he submit any affidavit.

6. Learned counsel submits that in the case of **Priyanka Srivastava Vs. State of U.P. and Ors.** reported in **2015(6) SCC 287** the Hon’ble Apex Court has held that while passing order under Section 156(3) the learned Magistrate should show some application of mind. Attention of this court



has been drawn towards paragraph 30 and 31 of the judgment which is quoted hereinbelow for ready reference:

“30. In our considered opinion, a stage has come in this country where Section 156(3) CrPC applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say as to such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

31. We have already indicated that there has to be prior applications under Sections 154(1) and 154(3) while filing a petition under Section 154(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an application under Section 156(3) be supported by an affidavit is so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is



found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in *Lalita Kumari* are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR.”

7. Learned counsel further submits that a case under Section 138 of the N.I. Act has to be pursued by way of a complaint petition and police has no power to investigate in the matter of allegations based on dishonour of a negotiable instrument. It is submitted that the complainant himself claims that he was on friendly terms with the petitioner and it was he who had approached the petitioner and had offered to pay the amount, therefore, by no stretch of imagination it can be alleged that the petitioner has induced him to do certain acts or deeds with an intention to cheat him, at the



same time, it cannot be said that the money paid for participation in tender by the petitioner was in the nature of trust and therefore on both counts neither offence of Section 406 nor Section 420 would be attracted.

8. Even though a counter affidavit has been filed on behalf of the respondent no. 1 stating that the I.O. has found sufficient evidence against the F.I.R. named accused-petitioner for the offence under Section 406/420 of the I.P.C. and Section 1238 of the N.I. Act, learned counsel representing the Opposite Party No. 2 has not denied that the cheque amount of Rs. 48 Lakhs covered under the two cheques have already been refunded to the complainant. According to the stand taken in the counter affidavit of respondent no. 1, payment of Rs. 48 Lakhs paid to the complainant in the year 2014 itself cannot be a mitigating circumstance because the amount was said to have been deposited with the petitioner in the year 2012. The Opposite Party No. 2 has though appeared in this case but no counter affidavit has been filed.

9. Having heard learned counsel for the parties and on perusal of the records, this court is of the considered



opinion that a bare reading of the statements made in the complaint petition giving rise to the F.I.R. shows that the petitioner and the complainant both were friendly to each other and because of that friendly term the opposite party no. 2 himself approached the petitioner and requested him to participate in the tender in question for which he agreed to deposit the entire amount. By accepting the request of the complainant, the petitioner had admittedly participated in the tender but the tender was not awarded in favour of the petitioner's firm. According to the complainant, once the tender was not awarded in favour of the petitioner's firm, the petitioner was obliged to refund the entire amount. In fact the petitioner issued two cheques of Rs. 24 Lakhs each in favour of the complainant but on presentation both the cheques stood dishonoured.

10. To this court, it appears that none of the ingredients of Section 406 and Section 420 of the I.P.C. would be attracted in the facts and circumstances of the present case. Section 405, 406 and Section 420 of the I.P.C. is quoted hereunder for a ready reference:

"405. Criminal breach of trust – Whoever, being in



any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits “criminal breach of trust”.

406. Punishment for criminal breach of trust –

Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

415. Cheating – Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.

Explanation – A dishonest concealment of facts is a deception within the meaning of this section.

420. Cheating and dishonestly inducing delivery of property – whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable



security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

11. Learned counsel for the petitioner has relied upon the judgment of the Hon’ble Supreme Court in the case of **International Advanced Research Centre for Power Metallurgy and new Materials (ARCI) and others Vs. Nirmal Cerglass Technics Private Limited** and another reported in **(2016) 1 SCC 348**; wherein the Hon’ble Supreme Court has held that when the allegations in the complaint is not attracting the case under Section 419 and 420 of the I.P.C. and the dispute is purely of a civil nature, continuance of criminal proceedings would not be just and proper. Paragraph 13 and 16 of the said judgment are quoted hereunder for ready reference: -

“13. The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is, as to whether uncontroverted allegations as made in the complaint establish the offence. The High Court being superior court of the State



should refrain from analyzing the materials which are yet to be adduced and seen in their true perspective. The inherent jurisdiction of the High Court under Section 482 CrPC should not be exercised to stifle a legitimate prosecution. The power under Section 482 CrPC is to be used sparingly only in rare cases. In a catena of cases, this Court reiterated that the powers of quashing criminal proceedings should be exercised very sparingly and quashing a complaint in criminal proceedings would depend upon the facts and circumstances of each case. (Vide *State of Haryana v. Bhajan Lal*, *State of T.N. v. Thirukkural Perumal* and *CBI v. Ravi Shankar Srivastava*.)

16. The distinction between mere breach of contract and the cheating would depend upon the intention of the accused at the time of alleged inducement. If it is established that the intention of the accused was dishonest at the very time when he made a promise and entered into a transaction with the complainant to part with his property or money, then the liability is criminal and the accused is guilty of the offence of cheating. On the other



hand, if all that is established is that a representation made by the accused has subsequently not been kept, criminal liability cannot be foisted on the accused and the only right which the complainant acquires is the remedy for breach of contract in a civil court. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown at the beginning of the transaction. In *S.W. Palanitkar v. State of Bihar*, this court held as under:

“21. In order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating.”

The above view in *Palanitkar case* was referred to and followed in *Rashmi Jain v. State of U.P.*”

12. From the aforesaid judgment it is crystal



clear that in order to attract the offence of cheating, the accused must have induced the victim/complainant to part with the money giving him certain believes and presence of an intention to cheat must be there right from the very beginning. In the present case, admittedly the petitioner had not gone to induce the complainant to part with the money rather it was the complainant who had come himself requesting the petitioner to participate in tender and for which he promised to pay the amount. In this case apparently it was a kind of an arrangement which was agreed upon by the petitioner at the instance of the complainant. By no stretch of imagination it can be said that this petitioner had induced the complainant with any intention to cheat him. Similarly the money paid by the complainant to the petitioner cannot be said to have been deposited in trust as it was the understanding right from beginning that the complainant will deposit the amount which was required in tender process. It was a kind of business arrangement and the complainant cannot be said to have deposited the money in trust, therefore, no question of attracting the ingredients of “criminal breach of trust” would arise in the facts of the case.



13. The petitioner has already refunded the entire amount of Rs. 48 Lakhs which were covered under the two dishonoured cheques. The amount covered under the cheques has already been paid even before issuance of process and therefore a case under Section 138 of the Negotiable Instrument Act cannot be allowed to proceed when the petitioner has paid the amount in question before the issuance of process.

14. So far as the allegation of payment of Rs. 32 Lakhs in cash is concerned, in the nature of the transactions stated by the complainant himself in so many words in his complaint petition, it may at best be a case of civil dispute in form of a money claim. This court as well as the Hon'ble Apex Court has on many occasions held that it will be a total misuse of process of law if a civil dispute is allowed to be given a colour of criminal proceedings. I can profitably refer one of the judgments of the Hon'ble Apex Court in the case of **Inder Mohan Goswami and Anr. Vs. State of Uttaranchal and Ors.** reported in **(2007) 12 SCC 1.**

15. Learned counsel for the petitioner has rightly drawn my attention towards the manner in which the



order under Section 156(3) of the Cr.P.C. has been passed by the learned Chief Judicial Magistrate. There was no averment in the complaint petition that the petitioner had approached the concerned police station for lodging the F.I.R. or he had taken steps in terms of Section 154(3) of the Cr.P.C.

16. From the aforesaid discussions, it appears to this court that the allegations contained in the complaint petition do not disclose any of the ingredients of the offence under Section 406 and 420 of the I.P.C. Prior to passing of the order under Section 156(3) of the Code of Criminal Procedure the learned Chief Judicial Magistrate did not look into the fact as to whether the petitioner had filed application in terms of Section 154(1) and Section 154(3) Cr.P.C. The learned Chief Judicial Magistrate further failed to appreciate that a case under Section 138 of the Negotiable Instrument Act has to be proceeded in form of complaint petition on the basis of the materials which may be brought before the court and in such cases of dishonour of cheques under Section 138 of the Negotiable Instrument Act no police investigation has been envisaged. The learned Chief Judicial Magistrate has therefore clearly erred in sending the complaint petition to the police



station for registration of a First Information Report and investigation thereon. The petitioner has already paid Rs. 48 Lakhs covered under the two cheques which were earlier dishonoured. The case is held to be a purely civil dispute, hence continuation of the same would only be an abuse of the process of law and it would be in the interest of justice to quash the F.I.R.

17. This court therefore set-aside the impugned order dated 09.07.2013 passed by learned Chief Judicial Magistrate, Sitamarhi and quash the First Information Report giving rise to Sitamarhi P.S. Case No. 695/2013.

18. The writ application is allowed.

19. It is made clear that the observations of this court made hereinabove shall not influence the decision in case a civil dispute is pending or is likely to be contested between the parties in this case with regard to the present transactions.

(Rajeev Ranjan Prasad, J.)

Rajeev/-

AFR/NAFR	
CAV DATE	
Uploading Date	31.07.2018
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