

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.15395 of 2021

Arising Out of PS. Case No.-528 Year-2017 Thana- BANKA District- Banka

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RAJIV KUMAR SINGH SON OF KISHOR PRASAD SINGH Resident of
Village - Vijay Nagar, Ward No.22, P.S.- Banka, Distt.- Banka.

... .. Petitioner/s

Versus

1. THE STATE OF BIHAR
2. Rakesh Kumar Yadav S/O Anuplal Yadav aged about- 42 years, Gender- Male, Resident of Village- Aliganj, P.S. and District- Banka

... .. Opposite Party/s

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Appearance :

For the Petitioner/s	:	Mr. N.K. Agarwal, Sr. Advocate
	:	Mr. Vijay Anand, Advocate
For the Informant/O.P. No.2	:	Mr. Ranjan Kumar Jha, Advocate
For the Opposite Party/s	:	Mr. Choubey Jawahar, APP

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CORAM: HONOURABLE MR. JUSTICE SATYAVRAT VERMA
ORAL ORDER

4 14-07-2022 Heard learned senior counsel for the petitioner,

learned counsel for the Informant/Opposite Party No.2 and

learned A.P.P. for the State.

Learned senior counsel for the petitioner, at the outset,

seeks permission to withdraw the present quashing application

in so far as the allegation with respect to Sections 406 and 420

of the I.P.C. is concerned and seeks to confine the present

quashing application only with respect to Section 138 of the N.I.

Act.

In view of the submissions made by the learned senior

counsel for the petitioner, the present quashing application is

confined with respect to the order taking cognizance under



Section 138 of the N.I. Act.

Learned senior counsel for the petitioner submits that Opposite Party No.2 (Rakesh Kumar Yadav) instituted the aforesaid F.I.R. alleging that he is engaged in a business in the District of Banka and due to business transaction, he is known to the petitioner. It is further alleged that petitioner took loan from the Opposite Party No.2 for business purpose and also took cement, iron rod and sand from his shop for construction of complex/buildings in Vijay Nagar area. The petitioner also took some cash from him and lastly, final bill was raised of Rs. Sixteen Lacs. It is next alleged that on 21.07.2017, the petitioner called the Opposite Party No.2 to his house and in presence of one Vijay Yadav handed over a cheque bearing cheque No. 000043 dated 21.07.2017 for an amount of Rs.16,00,000/-. The Opposite Party No.2 on 26.07.2017 deposited the aforesaid cheque in his current account with Bank of India, but the cheque bounced on account of insufficient fund. Accordingly, a legal notice was sent by the Opposite Party No.2 to the petitioner, but the same was not replied.

The learned senior counsel for the petitioner submits that it is a well settled principle of law that for bouncing of cheque, an F.I.R. is not maintainable as Section 2(d) of the



Cr.P.C. defines complaint and Section 142 (a) of the N. I. Act incorporates that no Court shall take cognizance under the Act:-

(a) 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;

The learned senior counsel thus submits that when for bouncing of a cheque, only a complaint is maintainable, then how come the police investigated and submitted a charge-sheet under Section 138 of the N. I. Act and at the same time, the learned Court below also took cognizance, it is thus submitted that the learned court below acted in a mechanical manner and without applying proper judicial mind, took cognizance under Section 138 of the N.I. Act also. Learned senior counsel submits that taking cognizance by the learned Magistrate under Section 138 of the N.I. Act is prima-facie bad and as such the order taking cognizance to the extent it takes cognizance under Section 138 of the N.I. Act be quashed. Learned senior counsel for the petitioner relies on a judgment of this Court reported in **2018 (4) PLJR 725 (Hemant Kumar Das Vs. The State of Bihar)** and relies on paragraphs 65 to 70 of the Judgment in the case of Hemant Kumar Das (Supra):-



65. The present case is based on an FIR whereas Section 142(a) provides that notwithstanding anything contained in the Code of Criminal Procedure, 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.

66. Though, the word “complaint” has not been defined under the NI Act, the NI Act states that after dishonour of cheque a notice within thirty days of information received from the banker complaint be instituted before Magistrate of the First Class having jurisdiction to try the case.

67. However, Section 2(d) of the CrPC defines “complaint” as under:-“2(d) “Complaint” means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.”

Explanation—A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant.”

68. From the definition of the term “complaint”, as noted above, it would be apparent that it does not include a police report. As per



explanation to Section 2(d) of the CrPC report of police officer after investigation disclosing commission of non-cognizable offence shall be deemed to be a complaint. Clause (a) of Section 142 of the NI Act contemplates filing of a complaint only. Section 142 of the NI Act does not provide for filing a complaint by the payee or holder in due course to the police for investigation under Section 156 of the CrPC. Hence, no cognizance could have been taken by the court of Magistrate under Section 138 of the NI Act on the basis of an FIR instituted in the police station which culminated in filing of a chargesheet under Sections 406 and 420 of the IPC and Section 138 of the NI Act.

69. In **N. Harihara v. J. Thomas** (*supra*), the Supreme Court has held that the scheme of the prosecution under Section 138 of the NI Act is different from the scheme of the CrPC. Section 138 of the NI Act creates an offence and prescribes punishment. No procedure for investigation is contemplated. The prosecution is initiated on the basis of complaint made by the payee of a cheque.

70. In view of the foregoing discussion, this Court is of the opinion that the criminal proceedings initiated against the petitioners in the present case, is an abuse of the process of law and, as such, the criminal proceedings as well as the impugned order cannot be sustained. The Court is



also of the opinion that the learned Judicial Magistrate-1st Class, Patna without appreciating the facts and considering the settled provisions of law rejected the application filed by the petitioners under Section 239 of the CrPC in the most mechanical manner.

Learned A.P.P. for the State and the learned counsel for the Opposite Party No.2 very fairly submits and concedes that for bouncing of a cheque a complaint has to be filed and F.I.R. is not maintainable.

Considering the submissions made by the learned senior counsel for the petitioner, the cognizance order dated 21.04.2020 passed by the learned C.J.M., Banka in Trial No.1706 of 2020 arising out of Banka P. S. Case No.528 of 2017 whereby the learned C.J.M., Banka was pleased to take cognizance under Section 138 of the N.I. Act is hereby quashed.

(Satyavrat Verma, J)

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