

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.37503 of 2023

Arising Out of PS. Case No.-137 Year-2018 Thana- SHRIKRISHNAPURI District- Patna

Lalan Kumar, Son of Late Kamleshwari Prasad Yadav, Resident of House No.
239, Hira Lal Lane Lodipur, Chajubagh, P.S. - Gandhi Maidan, Distt. - Patna
... .. Petitioner

Versus

The State of Bihar

... .. Opposite Party

Appearance :

For the Petitioner/s :	Mr. N.K. Agrawal, Sr. Advocate Mr. Md Fazle Karim, Advocate Ms. Diksha Kumari, Advocate Mr. Kumar Rajdeep, Advocate
For the Opposite Party/s :	Mr. Brajendra Nath Pandey, A.P.P.

CORAM: HONOURABLE MR. JUSTICE PURNENDU SINGH
ORAL ORDER

3 15-06-2023 Heard Mr. N.K. Agrawal, learned Senior Counsel,

assisted by Mr. Md. Fazle Karim, learned counsel appearing on

behalf of petitioner and Mr. Brajendra Nath Pandey, learned

A.P.P. for the State.

2. The present application has been filed on behalf
of the petitioner under Section 482 of the Code of Criminal
Procedure, 1973, for quashing of the part order dated
06.04.2021 passed by the learned Sessions Judge, Patna in
Criminal Revision No. 09 of 2021, whereby and whereunder the
learned Sessions Judge has set aside the order taking cognizance
dated 28.09.2020 passed by the learned Court below and
remanded the matter to the learned Court below for passing the
fresh order in accordance with law.



3. The prosecution story in brief is that the informant Dheeraj Kumar, one of the partners of M/s Navratan Jewellers, situated at Bhagwati Sharan enclave near J.P. Hospital, Boring Road, Patna alleged in the FIR that he deals with business of jewellerys i.e., Gold, Silver and Diamond. It has been alleged that the petitioner was a regular customer of the shop and had developed a good relationship with him. Further allegation is that on 07.03.2018, the petitioner along with two other unknown persons purchased the jewellerys worth Rs. 79,51,755/- for which the informant raised Bill No. 354 dated 07.03.2018. Allegation is that payment was made by the petitioner allegedly vide Cheque No. 200170 dated 07.03.2018 with a request to present the cheque for encashment after ten days. After lapse of ten days before presenting the said cheque, the informant consulted the petitioner who told him that he was busy celebrating honeymoon and requested to present the said cheque after 10th April. On 12th April, 2018, the informant informed the petitioner that on the occasion of Akashay Tritiya he had to make payment to the parties with whom he deals to which allegedly the petitioner threatened that he would get his shop closed and would not pay a single farthing. The informant, thereafter, deposited the cheque in his account. On 30.04.2018



vide memo dated 02.05.2018 it was found that the account had already been closed. Thereafter, a legal notice was sent to the petitioner on 10.05.2018 which was not replied to. On the basis of the written statement FIR was registered against the petitioner being S.K. Puri P.S. Case No. 137/2018, U/s 406, 420, 506 of the Indian Penal Code and Section 18 N.I. Act. After completing the investigation, the Investigating Officer submitted a charge-sheet U/S 406, 420, 506 of the Indian Penal Code and 138 N.I. Act against the petitioner and thereafter the learned Court below had taken cognizance vide order dated 28.09.2020.

4. Mr. N.K. Agrawal, learned Senior Counsel appearing on behalf of petitioner submits that it is well settled law that once the order taking cognizance has been quashed by the Revisional Court vide order dated 06.04.2021, there was no question of remanding back the matter to the learned Magistrate, which will eventually lead to taking cognizance on the same set of charge by the learned Magistrate. The second cognizance on the same set of charges is barred and prayer is made for quashing/modification of the order dated 06.04.2021 to the above extent. From the impugned order which is sought to be modified, it appears that the learned Revisional Court has taken into consideration the settled principle of law as on date that the



cognizance of offence under Section 138 of N.I. Act is forbidden under Section 142 of N.I. Act except upon a complaint in writing by the payee or from the holder of the Cheque in due course, within a period of one month from the date. The present case is based on FIR whereas, Section 142 provides that notwithstanding anything contained in the Code of Criminal Procedure, no Court can take cognizance of any offence punishable under Section 138 of N.I. Act except upon a complaint in writing made by the payee or as the case may be, the holder in due course of the cheque.

5. Learned Senior Counsel has taken note of Section 190 of Code of Criminal Procedure, which is reproduced *inter alia* as follows:-

“190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second



class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try.”

6. Learned Senior Counsel further submits that as per the statutory provisions of Section 190 of Cr.P.C. any Magistrate of the first class and any Magistrate of the second class specially empowered can take cognizance of any offence just upon receiving a complaint of facts which constitute such offence, upon a police report of such facts and upon information received from any person other than a police officer or upon his own knowledge that such offence has been committed. Learned counsel, emphatically, submits that once the cognizance taken by the Magistrate has been found to be not in accordance with law and the order taking cognizance has been quashed by the competent Revisional Court, the Magistrate is barred from taking cognizance on the same set of offence. In support of his contention, learned counsel relied upon the Apex Court Judgment in **Jamuna Singh and others v. Bhadai Shah** reported in **1964 (2) Cr.L.J 468** wherein it was held that once cognizance is taken by a Magistrate, second cognizance cannot be allowed to be taken of the same offence. If a Magistrate has taken cognizance of the offence for the second time, it would not only vitiate entire proceeding but the second cognizance would be liable to be quashed and on these grounds, learned



counsel seeks for quashing/modification of order dated 06.04.2021 to above extent that there was no occasion for learned Revisional Court to remand back the matter for taking cognizance on the same set of offence after quashing of the order taking cognizance.

7. Learned Senior Counsel submits that the order dated 06.04.2021 is bad in the eye of law to the extent that the remand will eventually allow the Magistrate to take cognizance on the same set of offence which is bad in the eye of law and requires interference of this Court. The offence alleged against the petitioner is based on the instrument and the N.I. Act bars from proceeding in any manner other than by way of complaint. He further submits that once the learned Magistrate has performed in a judicial manner and had taken cognizance of the offence at the first instance and the same being quashed by the Revisional Court the whole action of the Revisional Court is without jurisdiction in sending back to the Magistrate to again take the cognizance of the same offence.

8. Learned A.P.P. for the State has submitted that on reading of the entire order dated 06.04.2021, it appears that the same is reasoned order and in accordance with law and the Revisional court by setting aside the order of cognizance passed



by the Court below has remanded it back for taking fresh cognizance is in accordance with law.

9. Heard the parties.

10. The petitioner had filed Criminal Revision No. 09 of 2021 before the learned Sessions Judge, Patna against the order taking cognizance dated 28.09.2020 under Section 406, 420, 506 of the Indian Penal Code and Section 138 of the N.I. Act against the petitioner. The Revisional Court after considering the records of the case and after discussing the law settled by the Apex Court and this Hon'ble Court had quashed the order taking cognizance dated 28.09.2020 vide order dated 06.04.2021 and remanded back the matter for fresh order in accordance with law, which *inter alia* is as follows:-

“Having heard the learned counsel for both parties and on perusal of record it appears that learned court-below on the basis of facts and circumstances which are available on the record and on perusal of case diary find prima facie case made out against the accused-petitioner u/s 406,420, 506 of IPC and section 138 of Negotiable Instruments Act. As far as the offence u/s 138 of Negotiable instruments Act is concerned it would be evident that the same mandates for filing a complaint case after issuance of a statutory notice. The Hon'ble Patna



High Court in Criminal Miscellaneous No. 905 of 2018, (Hemant Kumar Das and Ors. vs. The State of Bihar) vide judgment dated 21.08.2018 held in paragraphs nos. 68 and 69 as follows:-

"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 charge sheet 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 payer of a cheque".



In view of the aforesaid decision, it is clear that FIR filed before the police u/s 138 N.I. Act by the informant is not maintainable. The learned court-below on the basis of charge-sheet has taken cognizance also is 138 N.I. Act against the accused which is not in accordance with law. The provision contained in Section 138 N.I. Act is a special penal provision relating to the offence of dishonored cheques and the police are incompetent to register a case u/s 138 N.I. Act and to investigate into the same and file charge sheet for the said offence. Section 142(a) of the N.I. Act creates a bar for the court to take cognizance of any offence punishable u/s 138 N.I. Act except on a complaint in writing made by the payee or the holder in due course of the cheque. Therefore, there is no possibility of the police investigating into both the offences U/s 406, 420 of IPC and Section 138 N.I. Act together even though both the offences arises of the same transaction.

On the facts and circumstances of the case, after hearing to the learned counsels for parties, and on perusal of the FIR, the material collected during investigation and the charge-sheet submitted by the police, it appears that the learned court-below vide order dated 28.09.2020 has taken cognizance of the offences punishable under sections 406, 420, 506 of the IPC and also under Section 138 N.I. Act and ordered to



summon the petitioner, which is in my view is not correct because as discussed above Section 142 of the N.I Act does not provide for filing a complaint by the payee or holder in due course o the police for investigation. Hence no cognizance could have been taken by the Court of Magistrate under section 138 of the N.I Act on the basis of an FIR instituted in police as held in the judgment dated 21.08.20 of Hon'ble Patna High Court in Hemant Kumar Das and ors. vs. The State of Bihar (Criminal Miscellaneous No. 905 of 2018).

For the reasons aforesaid, the impugned order dated 28.09.2020 passed by the learned court below is liable to be set-aside.

It is, therefore, ordered that this Criminal Revision is allowed and accordingly, the impugned order dated 28.09.2020, as passed by the learned Court-below is set-aside and the matter is remanded to the learned Court-below for passing fresh order in accordance with law.”

11. Taking cognizance is covered by Section 190 of the 1973 Code. The Magistrate may take cognizance upon receiving a complaint of facts constituting an offence or upon a police report or upon other information received. Further proceedings taking cognizance are dealt with in the succeeding provisions. Section 193 of the Codes deals with taking of cognizance of offences by Sessions Courts in the same manner.



Except as otherwise exclusively provided by the Code or by any other law, no Sessions Court can take cognizance as a court of original jurisdiction unless the accused has been committed to it by a competent Magistrate.

12. As explained by the Supreme Court in **Ajit Kumar Palit v. State of West Bengal (1963) Supp 1 SCR 953 : 1963(1) Cri LJ 797**, the word "cognizance" has no esoteric or mystic significance in criminal law or procedure. It merely means - become aware of, and when used with reference to a court or Judge, to take notice judicially. The word "cognizance" has been used in the Code to indicate the point when a Magistrate or Judge takes judicial notice of an offence. It does not involve any formal action or indeed action of any kind, but occurs as soon as the court applies its mind to the suspected commission of an offence. As explained by the Supreme Court in **Raghu Bans Dubey v. State of Bihar** reported in **AIR 1967 SC 1167**, cognizance is taken of the offence and not merely of particular persons named in the charge-sheet. The same idea has been carried forward by the Supreme Court in **Joginder Singh and another v. State of Punjab and another** reported in **(1979) 1 SCC 345**, while dealing with the significance of committal of an accused and



committal of a case.

13. The Apex Court in case of dishonor of cheque has laid down the procedure to be followed by the Courts in proceeding with the prosecution and trial in the case of ***Indian Bank Association and Ors. V. Union of India and Ors. (2014) 5 SCC 590***. The procedure has been concluded in paragraph no. 23 of the above judgment.

14. The petitioner has challenged the Revisional order to the extent that remanding the matter back to the learned Court below for passing fresh order would eventually lead to taking cognizance a second time on the basis of same set of facts which is not in accordance with law.

15. Before dealing with the above issue, the jurisdiction of the High Court for exercising its power under Section 482 of the Code has been explained by the Apex Court on more than one occasion. As held in a catena of decisions, inherent jurisdiction under Section 482 CrPC and/or under Article 226 of the Constitution is designed to achieve salutary purpose that criminal proceedings ought not to be permitted to degenerate into weapons of harassment. In the case of ***Mrs. Rupan Deol Bajaj v. Kanwar Pal Singh Gill*** reported in ***(1995) 7 JT (SC) 299 : (1996 Cri LJ 381)*** their Lordships have



observed as follows : It is thus settled law that the exercise of inherent power of the High Court is an exceptional one. Great care should be taken by the High Court before embarking to scrutinize the FIR/charge sheet/complaint. In deciding whether the case is rarest of rare cases, to scuttle the prosecution in its inception, it first has to get into the grip of the matter to ensure whether the allegations constitute an offence. But only in exceptional cases, i.e. in rarest of rare cases of malafide initiation of the proceedings to wreck private vengeance, the process of criminal law is availed of in laying a complaint or FIR which in itself does not disclose any cognizable offence - the Court may embark upon the consideration thereof and exercise the power. When the Court exercises its inherent power under Section 482 the prime consideration should only be whether the exercise of the power would advance the cause of justice or it would be an abuse of the process of the Court. As held by the Apex Court in **Parbatbhai Aahir v. State of Gujarat** reported in **(2017)9 SCC 641**, Section 482 CrPC is prefaced with an overriding provision.

16. The statute thus saves the inherent power of the High Court, as a superior court, to make such orders as are necessary (i) to prevent an abuse of the process of any court; or



(ii) otherwise to secure the ends of justice. Same are the powers of the High Court, when it exercises the powers under Article 226 of the Constitution.

17. In the case under N.I. Act, there is a legal presumption that the cheque had been issued for discharging the antecedent liability and that presumption can be rebutted only by the person who draws the cheque. Such a requirement is not there in offence committed under the Indian Penal Code. In the case under N.I. Act, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability. There cannot be such a requirement in the offence under Indian Penal Code. The case under N.I. Act can only be initiated by filing a complaint. However, in a case under Indian Penal Code, such a condition is not necessary. The Apex Court in case of **Sangeetaben Mahendrabhai Patel v. State of Gujarat, (2012) 7 SCC 621** has elaborated the said view which is reproduced hereinafter:

“35. The learned counsel for the appellant has further placed reliance on the judgment in G. Sagar Suri v. State of U.P. [(2000) 2 SCC 636 : 2000 SCC (Cri) 513] wherein during the pendency of the proceedings under Section 138 of the NI Act, prosecution under Sections 406/420 IPC had been launched. This Court quashed the criminal proceedings under Sections 406/420



IPC, observing that it would amount to the abuse of process of law. In fact, the issue as to whether the ingredients of both the offences were same, had neither been raised nor decided. Therefore, the ratio of that judgment does not have application on the facts of this case.

36. Same remained the position so far as the judgment in Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao [(2011) 2 SCC 703 : (2011) 1 SCC (Cri) 882 : (2011) 1 SCC (Civ) 547] is concerned. It has been held therein that once the conviction under Section 138 of the NI Act has been recorded, the question of trying the same person under Section 420 IPC or any other provisions of IPC or any other statute is not permissible being hit by Article 20(2) of the Constitution and Section 300(1) CrPC.

37. Admittedly, the appellant had been tried earlier for the offences punishable under the provisions of Section 138 of the NI Act and the case is sub judice before the High Court. In the instant case, he is involved under Sections 406/420 read with Section 114 IPC. In the prosecution under Section 138 of the NI Act, the mens rea i.e. fraudulent or dishonest intention at the time of issuance of cheque is not required to be proved. However, in the case under IPC involved herein, the issue of mens rea may be relevant. The offence punishable under Section 420 IPC is a serious one as the sentence of 7



years can be imposed.

38. In the case under the NI Act, there is a legal presumption that the cheque had been issued for discharging the antecedent liability and that presumption can be rebutted only by the person who draws the cheque. Such a requirement is not there in the offences under IPC. In the case under the NI Act, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability. There cannot be such a requirement in the offences under IPC. The case under the NI Act can only be initiated by filing a complaint. However, in a case under IPC such a condition is not necessary.

39. There may be some overlapping of facts in both the cases but the ingredients of the offences are entirely different. Thus, the subsequent case is not barred by any of the aforesaid statutory provisions.

40. The appeal is devoid of any merit and is accordingly dismissed.”

18. The present case is based on an F.I.R. 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 compliant in writing made by the payee or, as the case may be, the holder in due course of the cheque. The learned Magistrate, upon receiving the police report had taken



cognizance of the offence vide order dated 28.09.2020. The order taking cognizance has been quashed by the competent Revisional Court by order dated 06.04.2021 and at the same time the matter has been remanded back to the learned Magistrate for passing fresh order. The remand would eventually lead to taking cognizance on the same set of charges by the learned Magistrate. This principle of law has been cogently elucidated by the Apex Court in ***Jamuna Singh's Case*** (supra) , wherein it has been held that once cognizance is taken by a Magistrate, second cognizance cannot be allowed to be taken for the same set of offences.

19. The learned Revisional Court has erred in not having viewed the consequence of the remand order, accordingly, the order dated 06.04.2021 is required to be set aside to the above extent. However, the other part of the order dated 06.04.2021 shall remain intact. The modification sought for by filing the present application under Section 482 of the Code of Criminal Procedure, 1973 is allowed.

20. With the above observation, the present application filed on behalf of the petitioner stands disposed of.

21. The respective parties, if so advised, may avail appropriate legal remedy in accordance with law before the



Court of competent jurisdiction.

(Purnendu Singh, J)

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