IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.73969 of 2022
Arising Out of PS. Case No.-1118 Year-2021 Thana- EAST CHAMPARAN COMPLAINT
District- East Champaran

==

SUNIL KUMAR SINGH Son of Late Virendra Kumar Singh R/V-Ghorasahan North, Ward No. 7, Ghorasahan Market Road, P.S- Ghorasahan, Dist- East champaran at Motihari

... ... Petitioner/s

Versus

1. The State of Bihar
2. Ankit Singh Son of Rajeshwar Singh Resident of Mohalla Chandmari (Santosh Bhawan) near Rajendra Hostel Chandmari, P.S- Motihari Town, Dis- East Champaran at Motihari

... ... Opposite Party/s

==

Appearance :

For the Petitioner/s :	Mr.Mritunjay Kumar
For the Opposite Party/s :	Mr.Lalan Kumar
	Mr. Krishna Kant Singh

==

CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR

ORAL ORDER

3 08-05-2023 Heard the parties.

2. The present application has been filed for quashing the order dated 29.09.2021 passed by Judicial Magistrate (N.I. Act), East Champaran Motihari in Complaint Case No 1118/2021 whereby learned Magistrate has taken cognizance of offences under Section 406 of the Indian Penal Code and Section 138 of Negotiable Instrument Act, 1881 against the petitioner and directed for issuance of process against him.

3. Learned counsel appearing on behalf of the petitioner submits that the Complainant (O.P. No. 2) has filed a complaint on 15.07.2021 before C.J.M, Motihari which was registered as Complaint Case No 1118/2021 for the offences punishable under Section 138 of Negotiable Instrument Act, 1881 and Sections 406/420 of the Indian Penal Code for the alleged occurrence between 11.2.2021 to 10.03.2021 against the petitioner stating

WEB COPY

therein that:

- The accused petitioner is known to the complainant from before and used to take loan from the petitioner and return the same as per promise.
- In January, 2021, the petitioner orally made the complainant a partner in a small franchise of Vestige Marketing Pvt. Ltd with 50% share and took Rs. 1.5 Lakh from him and subsequently on the pretext of enhancement of business, he gradually took Rs. 12.5 lakh either in his name or in the name of the firm through UPI.
- On repeated requests, the petitioner avoided to prepare partnership deed and on being pressurized to refund the amount, the petitioner closed the business and fled away.
- A Panchayati was held on 11.02.2021 in which the petitioner handed over two cheques of current account of Punjab National Bank, Siripur Branch in the name of Anand Traders, proprietor Sunil Kumar in presence of the witnesses with a promise to pay the rest amount slowly. The

WEB COPY

aforesaid Cheques got dishonoured and returned unpaid on 10.3.2021.

- Cheque No. 329146 given earlier for an amount of Rs. 1 lakh had got dishonoured on 09.06 2020 due to stoppage of payment and on being asked, the petitioner said that the same has been issued under confusion and he will issue fresh cheques after a few days.
- Apprehending cheating, forgery and offences under Section 138 of the N.I. Act, the complainant through his Advocate sent a legal notice dated 22.03.2021 to the petitioner whereas the complainant received the petitioner's reply through his Advocate dated 10.04.2021.
- The Civil Court, Motihari, was closed since 15.3.2021 due to COVID Pandemic and the matter could not be resolved. In the result, the present Complaint Case was filed.

4. Learned counsel for the petitioner further submits that the complainant-opposite party No. 2 being an employee in petitioner's owned franchise of Vestige Marketing Pvt. Ltd. was removed from the job in the year 2019 after he was found

WEB COPY

indulged in misappropriation of Rs. 8 lakhs and subsequently the petitioner having come to know about missing of four cheque leaves Nos. 329143 to 329146 instructed the Bank on 20.02.2020 to stop the payment of aforesaid missing cheques.

5. It is further submitted that on 9.6.2020 and 12.6.2020, the complainant and his associate, namely, Satyavir Singh (Witness No. 4 in the present Complaint Case) presented cheque No. 329146 for amount of Rs 1 lakh and cheque No. 329144 for amount of Rs 1 lakh respectively (both these cheques not the subject matter of present case) before the bank for payment which were returned unpaid by the bank on the same date i.e., on 9.6.2020 and 12.6.2020 in view of petitioner's instruction for stoppage of payment. No complaint/case was lodged for non-payment of these two cheques either by the complainant or his associate Satyavir Singh (Witness No. 4 in the present complaint case).

6. Learned counsel submits that misdeeds of complainant having surfaced, the petitioner asked the complainant to return the misappropriated amount of Rs. 8 lakhs. In retaliation thereof, the complainant presented rest two cheques out of the four missing cheques i.e., Cheque No 329143 for amount of Rs. 50,000/- on 12.02 2021 and Cheque No 329145 for amount of

WEB COPY

Rs 1 lakh on 10.03.2021 which were returned unpaid by the bank in view of the petitioner's instruction to the bank for stoppage of their payment on 20.2.2020 itself which the complainant was well aware of from before. On return of these two cheques, complainant lodged the present false case maliciously as a result of afterthought concocting a false story.

7. Learned counsel appearing on behalf of the petitioner presents summary of the proceedings of the court below which is given below:-

i. On 20.07 2021, Complainant case filed - fixed for hearing on 31.07.2021
ii. On 31.07.2021, learned C.J.M., made over the case u/s 192(3) Cr.PC. to the Court of Judicial Magistrate fixing 13.09.21 for SA
iii. On 13.09.2021, the complainant was absent and the case has been fixed for 29.09.2021 for SA.
iv. On 29.09.2021, without recording statement of complainant on S.A. or the statement of witnesses in support of complaint case on submissions of complainant's counsel placing reliance on the directions of Hon'ble Supreme Court in judgment and order dated 21.04 2014 in the case of ***Indian***

WEB COPY

Bank Association and Ors versus Union of India and Ors in W.P. (C) No. 18/2013 reported in ***2014 (5) SCC 590*** relating exclusively for offence under Section 138 N.I. Act only, the Magistrate vide impugned order dated 29.09.2021, took cognizance of offence under Section 406 of the Indian Penal Code and Section 138 of N.I. Act against the petitioner and directed for issuance of summons against him.

8. It is further submitted that neither the statement of complainant on S.A. nor the statement of any of witnesses in support of complaint case in course of enquiry under section 200 Cr. P.C. having been recorded prior to passing the impugned order. The complainant himself waived off his right by not getting his statement on S.A. and statement of witnesses recorded in course of enquiry.

9. He next submitted that the complainant himself in opening paragraph of complaint case has stated that the petitioner being known to him since before used to take loan from before and return the same as per promise as such there is no criminal breach of trust since inception and non-fulfillment of promise of preparing partnership deed subsequently shall not

WEB COPY

amount to offence for criminal breach of trust as held by Hon'ble Supreme Court in the case of ***Hridaya Ranjan Prasad Verma and Ors versus The State of Bihar and Ors.*** reported in ***(2000) 4 SCC 168.***

10. The aforesaid view was reiterated and emphasized by Hon'ble Supreme Court in the case of ***S.W. Palanitkar and Others vs. State of Bihar & Ors*** reported in ***(2002) 1 SCC 241.***

11. Learned counsel further submits that complainant's legal notice being defective and not being in consonance of provisions of Section 138(b) of N. I Act as through the said legal notice complainant has made a demand of total loan amount of Rs. 12.5 lakhs as against Rs. 50,000/- for the cheque No. 329143 and Rs. 1 lakh for the cheque No. 329145 i.e. total Rs 1.5 lakh concerning the two alleged dishonoured cheques in question in view of law laid down by Hon'ble Apex Court in the case of ***Rahul Builders vs. Arihant Fertilizers and Chemical & Ors.*** reported in ***(2008) 2 SCC 321.***

12. Learned counsel for the petitioner next submits that complainant's averment in complaint petition that cheque No. 329146 (not the subject matter of present case) for amount of Rs. 1 lakh given by accused petitioner got dishonoured on 09.06.2020 due to stoppage of payment by petitioner and when

WEB COPY

the petitioner was confronted, had told it was done under due to confusion and asked to present the rest of cheques after sometime clearly stipulates that two cheques in question in the present case were with the complainant prior to 9.6.2020 which on presentation on 10.32021 got dishonoured on the same day ie on 10.03.2021. As such, this fact is in clear violation of provisions of Section 138(a) of N.I Act because of the fact that the cheques in question were presented beyond six months of handing over of cheques in question.

13. He submits that the specific dates of receiving presentation and amounts of two cheques in question not having been mentioned in the complaint case and same are missing in legal notice of the complainant as such present prosecution for the offence under section 138 N.I. Act is not sustainable in the eyes of law.

14. Learned counsel for the petitioner submits that in the facts and circumstances of the case and the law laid down by Hon'ble Supreme Court as enumerated above, the impugned order dated 29.09.2021 whereby the Judicial Magistrate, (N.I. Act) Motihari has taken cognizance of offences under Section 406 of the Indian Penal Code and Section 138 N.I. Act against the petitioner and directed for issuance of summons in

WEB COPY

connection with Complaint Case No 1118/2021 pending in the Court of Judicial Magistrate, 1st Class, Sadar, Motihari and entire prosecution thereof is not sustainable in the eyes of law and is fit to be quashed and set aside.

15. Learned counsel appearing on behalf of the Complainant /opposite party No. 2 has supported the impugned order of cognizance and has submitted that the contentions raised by the petitioner can be considered at the stage of framing of charge and this Court need not interfere in the case at the stage of cognizance.

16. He has also submitted that a composite notice is permissible in law and since the present case is a case of cheque bounce, the application of the petitioner should not be allowed on technical grounds and all the arguments of the petitioner can be considered at the stage of framing of charge or during trial.

17. I have considered the submissions of the parties .

18. Section 138 of the N.I. Act reads as follows:-

> *"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*

WEB COPY

prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to 2[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, 3[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."

19. In the case ***Rahul Builders vs. Arihant Fertilizers and Chemical & Ors.*** (*supra*). Paragraphs No. 10,11,12 and 13 read as follows:-

"10. Service of a notice, it is trite, is imperative in character for maintaining a complaint. It creates a legal fiction. Operation of Section 138 of the Act is limited by the proviso. When the proviso applies, the main Section would not. Unless a notice is served in conformity with Proviso (b) appended to Section 138 of the Act, the complaint petition would not be maintainable. The Parliament while enacting the said provision consciously imposed certain conditions. One of the conditions was service of a notice making demand of the payment of the amount of cheque as is evident from the use of the phraseology "payment of the said amount of money". Such a notice has to be issued within a period of 30 days from the date of receipt of information from the bank in regard to the return of the cheque as unpaid. The statute envisages application of the penal provisions. A penal provision should be construed strictly; the condition precedent wherefor is service of notice. It is one thing to say that the demand may not only

WEB COPY

represent the unpaid amount under cheque but also other incidental expenses like costs and interests, but the same would not mean that the notice would be vague and capable of two interpretations. An omnibus notice without specifying as to what was the amount due under the dishonoured cheque would not subserve the requirement of law. Respondent No. 1 was not called upon to pay the amount which was payable under the cheque issued by it. The amount which it was called upon to pay was the outstanding amounts of bills, i.e., Rs. 8,72,409/-. The noticee was to respond to the said demand. Pursuant thereto, it was to offer the entire sum of Rs. 8,72,409/-. No demand was made upon it to pay the said sum of Rs. 1,00,000/- which was tendered to the complainant by cheque dated 30.04.2000. What was, therefore, demanded was the entire sum and not a part of it.

11. Mr. Jain relied upon a decision of this Court in Suman Sethi v. Ajay K. Churiwal and Another [(2000) 2 SCC 380] wherein it was stated:

> *"8. It is a well-settled principle of law that the notice has to be read as a whole. In the notice, demand has to be made for the "said amount" i.e. the cheque amount. If no such demand is made the notice no doubt would fall short of its legal requirement. Where in addition to the "said amount" there is also a claim by way of interest, cost etc. whether the notice is bad would depend on the language of the notice. If in a notice while giving the break-up of the claim the cheque amount, interest, damages et c. are separately specified, other such claims for interest, cost etc. would be superfluous and these additional claims would be severable and will not invalidate the notice. If, however, in the notice an omnibus demand is made without specifying what was due under the dishonoured cheque, the notice might well fail to meet the legal requirement and may be regarded as bad.*
>
> *9. This Court had occasion to deal with Section 138 of the Act in Central Bank of India v. Saxons Farms 3 and held that the object of the notice is to give a chance to the drawer of the cheque to rectify his omission. Though in the notice demand for compensation, interest, cost etc. is also made the*

WEB COPY

drawer will be absolved from his liability under Section 138 if he makes the payment of the amount covered by the cheque of which he was aware within 15 days from the date of receipt of the notice or before the complaint is filed."

[Underlining is ours for emphasis] As therein, some other sums were indicated in addition to the amount of cheque, it was, therefore, not held to be a case where the dispute might be existing in respect of the entire outstanding amount.

12. On this aspect of the matter, we may consider K.R. Indira v. Dr. G. Adinarayana [(2003) 8 SCC 300] wherein this Court upon noticing Suman Sethi (supra) stated the law, thus:

"...However, according to the respondent, the notice in question is not separable in that way and that there was no specific demand made for payment of the amount covered by the cheque. We have perused the contents of the notice.

Significantly, not only the cheque amounts were different from the alleged loan amounts but the demand was made not of the cheque amounts but only the loan amount as though it is a demand for the loan amount and not the demand for payment of the cheque amount, nor could it be said that it was a demand for payment of the cheque amount and in addition thereto made further demands as well. What is necessary is making of a demand for the amount covered by the bounced cheque which is conspicuously absent in the notice issued in this case. The notice in question is imperfect in this case not because it had any further or additional claims as well but it did not specifically contain any demand for the payment of the cheque amount, the non-compliance with such a demand only being the incriminating circumstance which exposes the drawer for being proceeded against under Section 138 of the Act"

13. As in the instant case, no demand was made for payment of the cheque amount, we are of the opinion that the impugned judgment cannot be faulted."

20. In the present case also, in the legal notice, the complainant has made a demand of Rs. 12.5 lakhs though the

WEB COPY

cheque amount is Rs. 50, 000/ (Rupees Fifty Thousand) and Rs. 100,000/- (Rupees One Lakh).

21. The two cheques in question were presented by the complainant on 10.03.2021 and got dishonoured on 10.03.2021. The cheques in question were presented beyond six months of the handing over of the cheque and therefore, the provisions of Section 138(a) of the N.I. Act have also been violated. Moreover, the specific dates of receiving, presentation and the amounts of the two cheques in question have not been mentioned in the complaint case and they are also missing in the legal notice of the complainant, therefore, in view of the law laid down in the case of ***Rahul Builders vs. Arihant Fertilizers and Chemical & Ors.*** (*supra*).

22. In my opinion, the notice is omnibus notice without specifying as to what was the amounts due under the disputed cheques and is not as per the requirement of law. The Complainant did not call upon the petitioner to pay the amount to the cheque amount, but the complainant asked to pay the outstanding amount of Rupees Twelve Lakhs. The demand is of the entire amount and not a part of the amounts therefore, their demand was a omnibus demand without specifying the amount as per the dishonoured cheque. The notice fails to meet the legal

WEB COPY

requirement and is bad. The Hon'ble Supreme Court in the case of ***S.W. Palanitkar and Ors. Vs. State of Bihar and Anr.*** reported in ***(2002) 1 SCC 241.*** Paragraphs No. 8 and 9 are given below for ready reference:-

> *"8. Before examining respective contentions on their relative merits, we think it is appropriate to notice the legal position. Every breach of trust may not result in a penal offence of criminal breach of trust unless there is evidence of a mental act of fraudulent misappropriation. An act of breach of trust involves a civil wrong in respect of which the person wronged may seek his redress for damages in a civil court but a breach of trust with mens rea gives rise to a criminal prosecution as well.*
> *9. The ingredients in order to constitute a criminal breach of trust are: (i) entrusting a person with property or with any dominion over property, (ii) that person entrusted (a) dishonestly misappropriating or converting that property to his own use; or (b) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation (i) of any direction of law prescribing the mode in which such trust is to be discharged, (ii) of any legal contract made, touching the discharge of such trust."*

23. From the statements made in the complaint petition, I am of the view that the ingredients for committing criminal breach of trust are missing in the present case and as such, the offences under Section 406 of the Indian Penal Code is also not made out.

24. Moreover, the learned Magistrate has not even examined the complainant and other witnesses before taking cognizance and, therefore, the order taking cognizance under Section 406 of the Indian Penal Code also cannot be sustained

WEB COPY

on this ground.

25. In view of the discussions above, I am of the view that the impugned order dated 29.09.2021 passed by Judicial Magistrate (N.I. Act), East Champaran Motihari in Complaint Case No. 1118/2021 taking cognizance for the offences punishable under Section 406 of the Indian Penal Code and Section 138 of Negotiable Instrument Act, 1881 is illegal and cannot be sustained and therefore, the same is hereby quashed.

Saif/-

(Sandeep Kumar, J)

U		T	

WEB COPY