

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.45444 of 2016

Arising Out of PS. Case No.-236 Year-2015 Thana- BETTIAH CITY District- West
Champaran

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Sonu Kumar

... .. Petitioner/s

Versus

1. State Of Bihar

2. Sanjay Kumar Pandey @ Pandey Sanjay Kumar, S/O Shri Shiv Pujan Pandey @ Ram Narayan Singh, Resident of Village + P.O.- Rulahi, P.S.- Majhauria, District – West Champaran.

... .. Opposite Party/s

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Appearance :

For the Petitioner/s : Mr.Bijay Prakash Singh, Advocate
For the Opposite Party/s : Mr.Anil Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI
ORAL ORDER

2 18-09-2024 This is an application under Section 482 of the Cr.P.C. filed by the petitioner praying for setting aside of the impugned order, dated 17th of March, 2016, passed by the learned Sessions Judge, West Champaran, Bettiah in Cr. Revision No. 25 of 2016, upholding the order, dated 7th of November, 2015, passed by learned CJM, Bettiah, West Champaran whereby and whereunder, the order of taking cognizance by the learned CJM, Bettiah, West Champaran under Sections 406 and 420 of the Indian Penal Code and Section 138 of the Negotiable Instruments Act, 1881 was taken against the petitioner.

2. The grounds set forth in the instant application are two folds:-



(i) The compliant does not disclose any criminal liability attributable to the petitioner. The dispute is absolutely civil in nature. Therefore, cognizance under Sections 406 and 420 of the IPC was wrongly taken.

(ii) In view of Section 142 (i) (a) 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.

3. Therefore, police case for the offence under Section 138 of the N.I. Act cannot lie against the petitioner.

4. I fully concur with the learned Advocate on behalf of the petitioner with regard to his submission made in respect of the illegality of the order in taking cognizance under Section 138 of the N.I. Act. Police had no authority to register a case under Section 138 of the N.I. Act against the petitioner being Bettiah Town P.S Case No. 236 of 2015. Since no complaint was made by the petitioner, assailing dishonor of cheque within the stipulated period of time, the order of cognizance under Section 138 of the N.I. Act against the petitioner on the basis of police report is bad in law.

5. It is unfortunate to note that the learned Sessions



Judge, West Champaran, Bettiah does not know the above provision contained in Section 142 of the N.I. Act regarding the procedure of taking cognizance of an offence under Section 138 of the N.I. Act.

6. Therefore, the order of taking cognizance under Section 138 of the N.I. Act on the basis of the police report is liable to be quashed and set aside.

7. With regard to the offence under Sections 406 and 420 of the IPC, the case of the petitioner is that in the year 2011, the informant had kept 800 quintals of potatoes, worth Rs. 6,90,000/- in the cold storage of the petitioner. In return the petitioner issued two cheques drawn on Account No. 21194244007 of Allahabad Bank, Bettiah Branch, worth Rs. 3,40,000/- and Rs. 3,50,000/- respectively. However, the petitioner ensured that he would return the said amount by cash and subsequently he paid a sum of Rs. 35,000/- to the informant and assured him to pay the rest of the amount in cash. Therefore, the petitioner did not deposit the aforesaid two cheques in his bank for realisation. However, the petitioner as per his assurance did not pay the rest amount. He again issued two cheques, dated 30th of December, 2014 and 20th of February, 2015, each, amounting to Rs. 3,00,000/-, drawn on Allahabad



Bank Branch. The informant deposited the cheque, dated 20th of February, 2015 for its encashment but the said cheque was dishonored. The informant informed the petitioner about dishonor of the said cheque and the petitioner assured him to make payment within one or two days. However, the petitioner never paid the said amount and amount was misappropriated by him and thereby the informant was cheated.

8. It is submitted by the learned Advocate for the petitioner that the entire transaction between the informant and the petitioner was a business transaction. The petitioner was supposed to pay a sum of Rs. 6,90,000/- to the informant towards the price of 800 quintals of potatoes. It was alleged that the said price was not paid. Therefore, the dispute is absolutely civil in nature.

9. In support of his contention, he refers to a decision of the Hon'ble Supreme Court in the case of *ARCI v. Nimra Cerglass Technics (P) Ltd.*, reported in *(2016) 1 SCC 348*. It is held by the Hon'ble Supreme Court in the said report that 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.

10. The Hon'ble Supreme Court has relied on a previous decision in the case of *S.W. Palanitkar v. State of Bihar* reported in *(2002) 1 SCC 241* wherein it is 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.”

11. Relying on the said principle, let us now



considered the prosecution case.

12. The informant had kept 800 quintals of potatoes, worth Rs. 6,90,000/- in the cold storage of the petitioner in the year 2011. Simultaneously, with the said transaction, the petitioner issued two cheques for Rs. 3,40,000/- and Rs. 3,50,000/- respectively. While issuing the said cheques, the petitioner said not to deposit the said cheques for encashment in the bank and he would repay the amount by cash. In order to earn confidence of the informant, he paid a sum of Rs. 35,000/- in cash to the petitioner. Subsequently, he again issued two cheques on 30th of December, 2014 and 2nd of February, 2015, amounting to Rs. 3,00,000/- each. The said cheque was dishonored. Thus, from the very beginning, the petitioner issued the cheques with dishonest intention, knowing fully well that the cheques would be dishonored and for this reason in order to earn confidence of the informant, he paid a sum of Rs. 35,000/- in cash. Subsequent cheques were also dishonored. Again, the petitioner promised to pay the said money in cash. However, it was not paid.

13. Therefore, the principle which differentiates a contractual obligation and an offence of cheating is not present in the instant case. It is *prima facie* found that from the very



beginning the petitioner had an intention to deceive the informant dishonestly and being induced by dishonest deception, the informant had kept 800 quintals of potatoes in the cold storage of the petitioner and the petitioner did not pay any money for the said potatoes.

14. Thus, I hold that there is ample material to proceed with the Criminal Case under Sections 406 and 420 of the IPC against the petitioner.

15. However, the order of taking cognizance under Section 138 of the N.I. Act is quashed and set aside.

16. The Trial Court is directed to proceed with the case for the offence under Sections 406 and 420 of the IPC.

17. With the above order, the instant Criminal Miscellaneous Case is disposed of.

(Bibek Chaudhuri, J)

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