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CRR 1376 of 2017

Vivek Kanoi & Anr.
Vs.
The State of West Bengal & Anr.

Mr. Pinak Kr. Mitra
Mr. Neelesh Choudhury
...for the Petitioners

Ms. Faria Hossain, Ld. APP
Ms. Suparna Chatterjee ...for the State

This is an application wherein the petitioners have prayed for quashing of the proceeding being Madarihat Police Station being no. 50 of 2002 corresponding to G.R. case no. 473 of 2002. The said proceeding was initiated under Section 138/141 of the Negotiable Instrument Act, 1881 along with Section 406/420/109/120B of the Indian Penal Code against the petitioners along with other accused persons.

In the petition of complaint, it has been stated that the complainant's company is a reputed Automobile Engineers and repairs machineries and deals with repairing works. It is alleged that the petitioners' company were in business transaction for a long time which resulted in huge dues due to non-payment by the petitioner' company to the tune of Rs. 6,72,330/-.

It is further alleged that the petitioners' company issues three cheques in favour of the complainant's company and the cheques were duly presented to the banker which got dishonoured due to "insufficient fund" and for which it could not be encashed.

It is further alleged that the complainant was being deprived of his lawful right and for which the complaint was lodged under Section 156(3) of the Code of Criminal Procedure before the Jurisdictional Magistrate, who directed investigation and accordingly, the aforesaid proceeding was initiated.

After completion of investigation, police has submitted charge-sheet under Section 406/420/120B/109 of the Indian Penal Code along with Section 138/141 of the Negotiable Instrument Act, 1881. Learned court below by an order dated 10th June, 2023, had taken cognizance for the offence under Section 138/141 of the Negotiable Instrument Act, 1881 along with Section 406/420/120B/109 of the Indian Penal Code against all the accused persons including the present two petitioners.

Opposite party is not represented.

Needless to say that taking cognizance under Section 138/141 of the Negotiable Instrument Act in the said proceeding is barred by law in view of Section 142 of the Negotiable Instrument Act which reads as follows:

> ***"142. Cognizance of offences-*** *Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)*
>
> *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;*
>
> *b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:*
> *Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.)*
>
> *c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138".*

In such view of the matter, it is quite clear that the court cannot take cognizance of any offence punishable under Section

138 of the Negotiable Instrument Act except a written complaint made by the payee. The term "complaint" has been defined in Section 2(d) of the Code of Criminal Procedure which does not include a police report. It means that the payee has to file a private complaint under Section 200 of the Code of Criminal Procedure before the competent Magistrate and the police are not empowered to act upon a private complaint with the allegation that the accused has committee offence under Section 138/141 of the N.I. Act.

Now so far as, the allegation under Section 406/420/120B/109 of the IPC is concerned, it appears that the present two petitioners namely Vivek Kanoi and Deepak Kanoi have been cited as accused nos. 9 and 10 in the written complaint. In the written complaint, no specific allegation has been attributed against the present two petitioners. It has only been stated in paragraph 2 that

"*non payment and bouncing of cheques is an act of conspiracy, breach of trust & cheating on the part of accused company and Management of Mujnal Tea Estate and all are jointly and severally liable to be prosecuted*"

and in paragraph 3, *"all the accused from the very beginning has the intention to deceive the complainant, all the accused have acted in collusion with each other, in furtherance of their common intention which is a deep-rooted conspiracy and as such they failed to prevent bouncing of the cheques or to make payment subsequently."*

I have also perused the submissions made in the case diary wherein no specific allegation also has been attributed against the two petitioners. In the petition of complaint, the petitioners herein have been described as *"Management Personnel"* of the company. It is also submitted that they are neither signatories of the cheques nor the Managing Director of the company.

In **Delhi Race Club Ltd. and others Vs. State of Uttar Pradesh and another** reported in **2024 SCC Online SC 2248**, the Apex court has clearly laid down that penal code does not contain any provision for attaching vicarious liability on the part of the employee who are none other than office bearers of the company. It is alleged that the company has committed offence then there is no question of attributing vicarious liability to the office bearers of the company so far as the offence of cheating or criminal breach of trust is concerned. It is further been held that in the said judgment, the office bearers should be arrayed as accused only if direct allegations are leveled against them. In other words, the complainant has to demonstrate that he has been cheated on account of criminal breach of trust or cheating or deception practiced by the office bearers. In the present context, no such allegations has been leveled against the two petitioners either in the petition of complaint or in the materials available in the case diary. It has also been held that in the said judgment, if a case has been lodged by the complainant alleging that commission of offence of criminal breach of trust as defined under Section 405 of the IPC, punishable under Section 406 of the IPC, is committed by the accused, then in the same breath it cannot be said that the accused has also committed the offence of cheating as defined and explained in Section 415 of the IPC, punishable under Section 420 of the IPC.

Since in the present context, the complainant/opposite party has miserably failed to make out any case under Section 420/406 of the Indian Penal Code nor there is any iota of allegation regarding criminal conspiracy or abatement, I find that the continuance of present proceeding any further will be an abuse of the process of the court so far as the present petitioners are concerned.

In such view of the matter, the present proceeding being G.R. case no. 473 of 2002 presently pending before the learned Chief Judicial Magistrate, Alipurduar is quashed as against the petitioners namely, Vivek Kanoi and Deepak Kanoi being accused nos. 9 and 10 of the original written complaint.

CRR 1376 of 2017 is accordingly allowed.

Urgent Photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

(Dr. Ajoy Kumar Mukherjee, J.)