**(2007) 07 PAT CK 0024**

**In the Patna High Court**

**Case No :** Criminal Miscellaneous No. 36012 of 2005

Ashok Nayak @ Ashok D. Naik and Another — APPELLANT

Vs

The State of Bihar and Another — RESPONDENT

**Date of Decision :** 10-07-2007

**Acts Referred:**
Criminal Procedure Code, 1973 (CrPC) — Section 202
Penal Code, 1860 (IPC) — Section 406, 420

**Citation :** (2007) PLJR 373

**Hon'ble Judges :** Abhijit Sinha, J

**Bench :** Single Bench

**Advocate :** Ram Kumar Sharma and Ashutosh Singh for the Petitioners No. 1, for the Appellant; Jharkhandi Upadhaya for the State and Mr. Ranjan Kumar Sinha for O.P. No. 2, for the Respondent

**Final Decision :** Allowed

# Judgement

Abhijit Sinha, J.—Anil Kumar Sinha, the proprietor of British E.V.P. Enterprises with its registered office at Muzaffarpur and :branch office at Patna, O.P. No. 2 in the instant application, filed a complaint petition bearing complaint case No. 1123(C)/ 2004 against 5 employees of Penta Electronic System including the two petitioners herein who happen to be its Directors and after due inquiry u/s 202 Cr.P.C. Sri N.B. Lal, Judicial Magistrate, 1st Class, Patna by his order dated 12.8.2004 took cognizance against alt the accused persons under Sections 406 and 420 I.P.C. This application has been filed for quashing of the said order and further proceedings. According to the complainant in response to his application and a demand draft of Rs. 20,000/- the accused persons authorized the complainant as authorized direct sales stockist to stock and sell "PENTA" make Electric Weighing Scales. It is said that subsequently the complainant remitted another demand draft of Rs. 25,000/- dated 12.10.2002 followed by a second demand draft dated 7.11.2002 for Rs. 55,000/- for supplying 10 numbers of Electronic Weighing Scales for which a total sum of Rs, 1,00,000/- had been paid in advance. According to the complainant as per agreement the aforesaid machines were to be supplied by the accused firm within one month from the date of initial order at his Muzaffapur office. It is said that the accused persons dispatched 5 Electronic weighing scales on 2.11.2002 though Ex. PS Carbo on the address of Muzaffarpur Head office of the complainant with insufficient and improper papers and on that account the Sales Tax Department authorities at Muzaffarpur seized all the 5 machines while in transit of 14.11.2002. The complainant claims to have informed petitioner No. 1 over telephone regarding the seizure and petitioner No. 1 is said to have assured the complainant that the machines would be released soon and the same would be made available to him within one month. It is further said that on 17.11.2002 the complainant sent a registered letter to the accused persons cancelling his order of supplying 10 machines and requested for refund of the amount sent in advance with interest @ 36% per annum as per agreement. It is said that notwithstanding the payment of Rs. 1,00,000/- 4 machines were supplied in the first week of February, 2003 which was received in the complainant''s office at Patna. The complainant is said to have written a letter dated 18.2.2003 regarding the non supply of the remaining 6 machines and requested for the supply thereof or refund of the amount sent in advance. It has been stated that as notwithstanding several reminders and several discussions between the parties neither of the remaining 6- machines has been sent nor the balance of money sent in advance been returned hence a request was made to take action against the accused persons under Sections 406 and 420 I.P.C.

2. It has been submitted on behalf of the petitioners that the learned Magistrate has taken cognizance under Sections 406 and 420 I.P.C. without applying his mind to the facts and circumstances of the case inasmuch as from the very recital in the complaint petition no offence either under Sections 406 and 420 I.P.C. can be said to have been made out against any of the petitioners. In this connection it was sought to be pointed out that as per the assertions in the complaint petition it is clear that initially 5 machines were sent which were allegedly seized by the authorities of the Sales Tax Department. The learned counsel sought to point out that in the case of transit of taxable goods it is the purchaser, in this case the complainant, who was required to produce road permit and C Form before the Sales Tax authorities and if the complainant has not produced the same the petitioners could not be blamed therefore. The learned counsel also pointed out that the complainant has also accepted the fact of having received 4 machines in the month of February and this being the position it could not be said that the petitioners had committed any offence either u/s 406 or 420 I.P.C.

3. To constitute an offence u/s 406 I.P.C. there must be a dishonest misappropriation by a person in whom confidence is placed as to the custody or management of the property in respect of which the breach of trust is charged.

4. The ingredients of the offence of criminal breach of trust are that the accused must have been entrusted with property or dominion over it and the accused

 

must have mis-appropriated the property or disposes of that property in violation of such trust. In the instant case the accused were not entrusted with any property of the complainant nor did they misappropriate or dispossess of any property in violation of such trust.

5. Similarly no offence u/s 420 I.P.C. also appears to have been made out from the allegations in the complaint petition. To make the present guilt of the offence of cheating it has to be shown that the intention was dishonest at the time of making the promise. Such dishonest intention cannot be inferred from the mere fact that he could not subsequently fulfill the promise. Moreover, where there is no allegation of the complainant being put to wrongful loss, there cannot be any cheating.

6. That apart even if the allegation made in the complaint petition are to be accepted at their face value they could not be said to constitute offences of cheating and criminal breach of trust and at best they could be read as creating a civil liability.

7. Having given my anxious thought to the matter and to the facts of the case I am constrained to hold that whatever liability the accused persons had incurred was civil in nature to be enforced in a civil case and the prosecution of the petitioners for the offences of cheating and criminal breach of trust in this connection does not appear to be justified and would amount to an abuse of process of the court.

8. For the reasons stated above this application deserves to be allowed. The impugned order taking cognizance so far as the two petitioners herein are concerned is hereby quashed. Accordingly the application is allowed.