

**(2018) 12 PAT CK 0050**

**In the Patna High Court**

**Case No : Criminal Miscellaneous No. 43396 Of 2016**

Asim Srivastava

APPELLANT

Vs

State Of Bihar And Anr

RESPONDENT

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**Date of Decision : 06-12-2018**

**Acts Referred:**

Code Of Criminal Procedure, 1973 — Section 482

Indian Penal Code, 1860 — Section 420, 422

Negotiable Instruments Act, 1881 Section 138, 138(b), 138(c), 142

**Citation : (2019) 1 PLJR 377**

**Hon'ble Judges : Sanjay Priya, J**

**Bench : Single Bench**

**Advocate : Vinay Mistry, Navin Kumar Pandey, Sunita Kumari**

**Final Decision : Allowed**

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## **Judgement**

1. This application under Section 482 of the Code of Criminal Procedure has been filed for quashing the order dated 16.01.2016 passed by the Chief

Judicial Magistrate, Patna, in Hawaii Adda P.S. Case No.117 of 2014 by which learned Magistrate has taken cognizance against the Petitioner for the

offence under Section(s) 420, 422 Indian Penal Code and Section 138 of the Negotiable Instruments Act.

2. Case of the Informant, in brief, is that unit of the Informant in the name and style of M/s Shiv Shakti Enterprises is situated at Om Market, Jagdeo

Path, Patna. The Informant received rupees sixty five thousand through three cheques from the Petitioner, which was issued by the Petitioner in his

personal capacity, but money was not paid to the Informant.

3. Counsel for the Petitioner submits that Petitioner is proprietor of M/s Green Products, who deals with manufacturing and marketing of various types

of food products like sauces, vegetables, pastes etc. Dealership agreement was executed between the Petitioner and the Informant on 08.04.2013.

The Dealership Agreement further contemplates in paragraph 8(x) that "since the product is food product and consist of before date of expiry,

therefore, dealer should ensure for sale of the product before such date of expiry and any such unsold product shall not be sold to the market and shall

be returned to M/s Green Fields (GP) immediately". Copy of the Dealership Agreement is annexed as Annexure-2. The Petitioner received

information from the Informant all of sudden through e mail on various date(s) that products are damaged amounting to Rs.65,000/-. Copy of the e

mail has been enclosed as Annexure-3. The Petitioner made reply to the aforesaid e mail on 30.03.2014 requesting the Informant to return the

damaged products, but the same were not returned in spite of specific clause of the Dealership Agreement. Copy of the reply though e mail given to

the Informant by the Petitioner on 30.03.2014 is annexed as Annexure-4. The Informant subsequently on 14.05.2014 wrote a letter to the unit of the

Petitioner requesting to return the amount of Rs.65,000/- against the damaged products failing which criminal and civil cases shall be initiated against

the Petitioner after 24.05.2014. Copy of the letter written by the Informant on 14.05.2014 is annexed as Annexure-5. The Petitioner issued three

cheques amounting to Rs.65,000/- under the impression that if the same is not issued by the Petitioner then he shall be implicated in civil and criminal

cases, whereas, damaged products should have been returned by the Informant to the Petitioner.

4. The Petitioner sent legal notice on 22.05.2014 through lawyer to the Informant to return the three cheques since all the cheques have been issued

against the damaged products on the assurance that Informant shall return the damaged products within two days. The Petitioner neither received any

damaged products nor any cheques till date. The Informant was directed to return the aforesaid cheques and to return the damaged products within

seven days. True copy of the legal notice sent by the Petitioner dated 22.05.2014 is enclosed as Annexure-6.

5. The Informant in spite of legal notice neither returned cheques nor the damaged products, rather, he lodged the present First Information Report. It

is further submitted that when damaged products were not returned, then the Petitioner decided to stop payment of two cheques and one cheque was

dishonoured.

6. Counsel for the Petitioner submits that non- return of damaged products by the Informant to the Petitioner suggest that same were not damaged

and were sold by the Informant. Therefore, question of making extra payment against the so called damaged products does not arise at all.

7. Counsel for the Petitioner further submits that from perusal of letter dated 14.05.2014 written by the Informant to the Petitioner and the allegations

made in the First Information Report, it is clear that it is dispute of purely civil nature. It has also been submitted by the counsel for the Petitioner that

Section 142 of the Negotiable Instruments Act contemplates that 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. First Information Report is not

maintainable as it is in violation of Section 142 of the Negotiable Instruments Act. Learned Magistrate has wrongly taken cognizance against the

Petitioner on the basis of First Information Report filed by the Informant.

8. Counsel for the Petitioner has relied on the judgments of Honâ??ble Supreme Court in the case of Central Bank of India and Ors. Vs. Saxons

Farms and Ors. reported in 2000(1) PLJR (SC) 17, Rajneesh Aggarwal Vs. Amit J. Bhalla reported in 2001 (1) PLJR (SC) 177 and Munindra Kumar

Vs. State of Bihar reported in 2018(2) PLJR 296.

9. Counsel for the State submits that there is no illegality in the impugned order.

10. After hearing counsel for the parties and perusing the materials on record, this Court finds that Informant has filed First Information Report

levelling allegation that three cheques issued by the Petitioner in his personal capacity towards dues amount of the unit of the Informant got bounced.

11. The Honâ??ble Supreme Court in the case of Central Bank of India and Ors. Vs. Saxons Farms and Ors. reported in 2000(1) PLJR (SC) 17 has

held that service of notice of demand is a condition precedent for filing a complaint. The object of notice is to give a chance to the drawer of the

cheque to rectify his omission and also to protect honest drawer.

12. Similarly in the case of Rajneesh Aggarwal Vs. Amit J. Bhalla reported in 2001(1) PLJR (SC) 177, the Honâ??ble Supreme Court has held mere

dishonor of a cheque would not raise a cause of action unless the payee makes a demand in writing to the drawer for payment and the drawer fails to

make payment of concerned amount to the payee.

13. In the instant case, from plain reading of the First Information Report filed by the Informant, it appears that no notice was sent by the Informant to the Petitioner about dishonor of cheque.

14. Counter Affidavit has been filed on behalf of the Informant stating in para 3 and 4 that amongst the three cheques, one cheque bearing no.950995

amounting to Rs.20,000/- was returned for reason of stop payment, another cheque bearing No.950996 amounting to Rs.22,500/- was also returned for

reason of stop payment and, third cheque bearing No.950998 amounting to Rs.22,500/- was returned for the reason of insufficient fund. Thereafter,

notice was sent to the Petitioner on 15.05.2014 informing him about the stage of three cheques and endorsement made by the Bank regarding

nonpayment of the amount. The Informant further requested the Petitioner in the aforesaid notice to pay entire amount, otherwise, Opposite Party No.

2 will have opportunity to institute the case against him. Copy of the notice has been enclosed as Annexure- A to the Counter Affidavit.

15. Counsel for the Petitioner has filed rejoinder to the aforesaid Counter Affidavit stating that entire statement made in the Counter Affidavit is

incorrect and baseless.

16. This Court after looking into the First Information Report finds that case has been registered for the offence under Section 138 of the Negotiable

Instruments Act along with other Sections of the Indian Penal Code on the basis of allegation levelled by the Informant in the written report that three

cheques issued by the Petitioner in the name of unit of the Informant got dishonored.

17. The Police after investigation has submitted charge-sheet against the Petitioner for the offence under Section(s) 420, 422 Indian Penal Code and

Section 138 of the Negotiable Instruments Act. The Court below on perusal of charge-sheet took cognizance under the aforesaid sections by the

impugned order.

18. Section 142 of the Negotiable Instruments Act contemplates as follows:

142. Cognizance of offences--[(1)] 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 Section 138.â??

19. Section 142 of the Negotiable Instruments Act clearly speaks that no Court shall take cognizance for the offence punishable under Section 138 of

the Negotiable Instruments 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.

20. In such circumstances from perusal of the aforesaid provision, it is apparent that instant First Information Report filed by the Informant is not

maintainable. Learned Magistrate has taken cognizance on the basis of charge-sheet submitted by the police in the case for the offence under

Section(s) 420, 422 Indian Penal Code and Section 138 of the Negotiable Instruments Act lodged on the basis of the First Information Report before

the police.

21. From the allegations in the First Information Report, it is also apparent that no notice was given to the Petitioner within stipulated period as

required and provided under Section 138(b) of the Negotiable Instruments Act. The Informant has directly lodged First Information Report against the

Petitioner before the police. The police after investigation submitted charge-sheet in the case. The Court below on the basis of charge-sheet in

mechanical manner took cognizance against the Petitioner although no First Information Report was maintainable in terms of Section 142 of

Negotiable Instruments Act.

22. Therefore, impugned order passed by the learned Court below is not in accordance with law.

23. In view of such, impugned order dated 16.01.2016 passed by the Chief Judicial Magistrate, Patna, in Hawai Adda P.S. Case No.117 of 2014 along

with entire criminal proceeding against the Petitioner is hereby quashed.

24. This application is, accordingly, allowed.