

(2006) 11 PAT CK 0102
In the Patna High Court

Bhupen Kshetry and Others

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

Date of Decision : 21-11-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 483
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 34, 406, 420

Citation : (2007) 2 PLJR 280

Hon'ble Judges : Rekha Kumari, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rekha Kumari, J.—This is an application u/s 483 of the Code of Criminal Procedure for quashing the order dated 20.5.2003 passed by Sri H.P. Asthana, Judicial Magistrate, 1st Class, Muzaffarpur in complaint case No. 512/2003 whereunder he has directed to issue summons against the petitioners and other accused persons to face trial under Sections 406, 420/34 of the Indian Penal Code and 138 of the Negotiable Instruments Act.

2. Heard both the parties.

3. The case of the complainant (O.P. No. 2) in nut shell is that he is a business man and the petitioners, and other accused persons are partners of M/s Shyam Talkies, a partnership firm. There appears to be transaction with him and the management of the firm. Petitioner No. 1 who was the Chief Manager and also represents the other partners, on 30.4.2002 took loan of Rs. 50.000/- from him. Again, on 21.7.2002 he requested for Rs. 1 lac. On this he replied that already Rs. 50.000/- was due. However, he paid Rs. 1 lac to him. Petitioner No. 1 gave him two cheques, cheque No. Oo7954I dated 23.8.2002 for Rs. one lac and cheque No. O379840 dated 25.8.2002 for Rs. 50,000/- with an instruction to encash them within four months. On 7.11.2005 he deposited the cheques in his savings account of U.B.I., Muzaffarpur. On 8.1.2003 he got information that the

cheques were dishonoured for insufficient fund", On 1.3.2003 he sent lawyers notice. On 7.3.2003 the petitioners sent reply and instead of making payment threatened him. The complainant, hence, filed the complaint.

4. The complainant was examined on S.A. and he examined two witnesses in enquiry u/s 202 Cr.P.C. to support the allegations. The learned Magistrate after considering the statement of the complainant on S.A. and the statements of the witnesses and the lawyers notice, found a prima facie case under Sections 406, 420/34 of the Indian Penal Code and 138 of N.I. Act, and passed the impugned order.

5. Learned Counsel for the petitioners submitted that the case is false . The petitioners do not reside at Muzaffarpur. Petitioner No. 1 did not issue the cheques to the complainant. The case has been lodged at the Instance of Sudhir Kumar Mehta, who is closely related to the complainant (O.P.No. 2). The said Sudhir Kumar Mehta was working as Manager of Shyam Talkes. He was given some blank cheques signed by petitioner No. 1 for day to day expenses to run the Cinema Hall and the cheques were issued by the said Sudhir Kumar Mehta with a mala fide motive to put petitioner No. 1 and others to wrongful loss for which petitioner No. 1 has already filed a complaint. In the court of the Chief Judicial Magistrate, Jamshedpur.

6. He further submitted that petitioner No. 1 never approached the complainant for loan and never took the loan.

7. Learned Counsel for O.P. defended the order and submitted that this Court at this stage would not consider the truth or falsity of the allegation.

8. It is indeed settled that at this stage the High Court could not examine the truth or falsity of the allegations made in the complaint petition. This Court would only see whether the complaint petition discloses any offence and there is legal evidence in support of it. It is also settled that at this stage this Court would not also consider the defence of the accused, which would be considered only during trial.

9. Therefore, this Court would not embark upon any enquiry as to whether the petitioner No. 1 has taken loan from the complainant or he had issued the cheques. But from the submissions of the learned Counsel it is an admitted position that the cheques were issued by petitioner No. 1. Therefore, there is a prima facie case that they were issued by petitioner No. 1 and from the averment it appears that they were issued for repayment of the loan.

10. It is the defence of the petitioners that those cheques were blank and were given to the Manager of the firm for use of the same in day to day affairs of the business and those cheques at the instance of the said Manager is being used for implicating him in the present case. This defence cannot be judged at this stage.

11. However, though it appears prima facie that petitioner No. 1 had issued the cheques, the cheques were dated 23.8.2002 and 25.8.2002. The case of the

complainant himself in the complaint petition is that petitioner No. 1 had asked him to present the cheques within four months. It may, therefore, be inferred that the period of validity of the cheques was for four months. The complaint petition further shows that they were presented in the Bank on 7.1.03, i.e. after more than four months of the issue of the cheques. But Section 138 as was applicable at the relevant time reads thus:

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 prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, 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, within fifteen 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.

12. Therefore, according to proviso (a) of Section 138 the complainant had to present the cheques within four months of the date of issue. But this has not been done in this case.

13. Hence, it may, however, be stated that though in the complaint petition there is recital that the cheques were handed over to him with the direction to encash them within four months, in the next line i.e. the first line of the next paragraph of the complaint petition it is also mentioned that as per the direction of the accused (petitioner No. 1) he presented the cheques on 7.1.2003 after the above period. Therefore, there is discrepancy in the contents made in the complaint petition as to whether the complainant was asked to present the cheques within four months or after four months and this discrepancy can be removed only during trial when the evidence is led. So, at this stage it would not be proper to

hold that proviso (a) to Section 138 was not complied with by the complainant.

14. But from the complaint petition it further appears that on 8.1.2003 the complainant received information from the Bank regarding return of the cheques as unpaid. Therefore, according to proviso (b) of Section 138 he had to give a notice in writing to petitioner No. 1 within 15 days of the receipt of the information by him. But according to the complaint itself he sent the notice through his Advocate on 1.2.2003 i.e. after more than 15 days of the receipt of the information. Hence, the provision contained in proviso (b) of Section 138 has not been complied with this case and as the complainant failed to comply with proviso (b) of Section 138 no offence u/s 138 N.I. Act is made out against the petitioners.

15. As regards the offence u/s 420 I.P.C., the fact that a cheque issued has been dishonoured by itself does not constitute the offence of cheating. In order to attract the provision of Section 420 I.P.C. it must also be shown that the drawer had guilty intention at the time of issuing the cheque and this intention may also be gathered from the subsequent conduct. In this case, the allegation is that even after dishonour of the cheques on account of insufficiency of fund the complainant sent legal notice to the petitioners for payment instead of making payment of the amounts due, they sent reply threatening the complainant that if he did not withdraw the demand case would be filed against him. This prima facie suggests that the petitioners had no intention to make payment from the very beginning. So, an offence u/s 420 I.P.C. is made out in this case and as the petitioners are partners and the cheques were issued for repayment of the loan taken on behalf of the firm, against all the petitioners.

16. As regards offence u/s 406 I.P.C. as the impugned order is not to be set aside, it would be decided by the trial court at the time of framing of charge whether any offence u/s 406 I.P.C. is made out.

17. In the result, the application is dismissed.

18. It is, however, made clear that no observation, finding made in this order should prejudice the lower court while trying the case.