
(2010) 03 PAT CK 0030
In the Patna High Court

Kanhaiya Singh

APPELLANT

Vs

The State of Bihar and Bharat Kumar Sinha

RESPONDENT

Date of Decision : 17-03-2010

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 142
Penal Code, 1860 (IPC) — Section 405, 406, 409, 415, 417

Citation : (2011) 6 RCR(Criminal) 1427

Hon'ble Judges : Sheema Ali Khan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sheema Ali Khan, J.—Heard the parties.

2. Cr. Misc. No. 50181 of 2008 has been filed against the order dated 31.1.2007, passed in Complaint Case No. 2449 (C) of 2006 by Sri Umesh Kumar, the Judicial Magistrate, Patna by which cognizance was taken against the petitioner and he was summoned to face trial for offences under Sections 406 and 418 of the Indian Penal Code and Section 138 of the Negotiable Instrument Act, whereas Cr. Misc. No. 32288 of 2008 has been filed against the order dated 13.9.2006, passed by the Judicial Magistrate, 1st Class, Patna in Complaint Case No. 1070(C) of 2006 by which the petitioner has been summoned to face trial u/s 420 of the Indian Penal Code and Section 138 of the Negotiable Instrument Act.

3. These two cases have been filed separately as two cheques were issued by the co-accused Arun Kumar. Cheque No. "834811" for a sum of Rs. 49,000/- was issued on 10.9.2005 whereas Cheque No. "834812" for a sum of Rs. 49,000/- was issued on 10.11.2005. Both cheques were dishonoured on 3.3.2006 and 4.5.2006 respectively. Complaint Case No. 1070 (C) of 2006 was filed on 24.4.2006 whereas Complaint Case No. 2449 (C) of 2006 was filed on 28.8.2006.

4. The allegations in the complaint case are that one Arun Kumar along with his relation Kanhaiya Singh approached the complainant Bharat Kumar Sinha for a

loan of Rs. 98,000/- for the purposes of starting a business, and the said amount was paid in cash by the complainant in July, 2005 to Arun Kumar in the presence of this petitioner. It has been alleged in the complaint petition that both the accused persons had approached the complainant. In lieu of the cash amount paid to the petitioner, it is said that a cheque of Rs. 49,000/- each was issued on 10.9.2005 and 10.11.2005 by Arun Kumar, the co-accused in this case. The allegation is that the cheques were presented for payment and were dishonoured on 3.3.2006 and 4.5.2006 respectively. The complainant is said to have approached Arun Kumar for payment of the said loan however, Arun Kumar did not pay the said loan and as such the complaint petitions were filed in the year 2006. I may refer to the statement on oath of the complainant. In the statement dated 12.9.2006 Bharat Kumar Sinha had stated that Arun Kumar and Kanhaiya Singh who is the uncle (Fufa) of Arun Kumar had approached him for a loan to open a Television shop. The complainant paid Rs. 98,000/- and was issued cheques worth Rs. 49,000/- each by Arun Kumar. This cheque was presented at the Bank of Maharashtra on 10.9.2005 and 1.3.2006. The cheque of Arun Kumar was dishonoured because there was insufficient sum in his account. The complainant gave information to Arun Kumar with respect to this fact on 15th and 16th of March. Even after giving information the amount was not returned.

5. Learned Counsel for the petitioner has raised two contentions in this case. It is firstly contended that from the plain reading of the complaint petition as well as the examination on S.A., it would be apparent that the requirements u/s 138 of the Negotiable Instrument Act has not been followed and as such the Court would not have taken cognizance of the offence u/s 138 of the Negotiable Instrument Act. Proviso to Section 138 of the N.I. Act reads as follows:

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 thirty 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.

6. Explanation--For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

7. It is apparent that no notice was given to the petitioner as required under Sub-section "b" of the proviso and as such it cannot be held that the complainant has

fulfill the requirements u/s 138 of the Negotiable Instrument Act and as such this Court finds that the complaint petition itself is not maintainable as it not fulfill the conditions to constitute an offence u/s 138 of the Negotiable Instrument Act. In this context, it is also important to examine the provisions of Section 142 of the Negotiable Instrument Act, as well, wherein it is said that.

8. 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 u/s 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 (c) of the proviso to Section 138.

9. Clause (c) as quoted above requires that if 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, he would be liable for an offence u/s 138 of the Negotiable Instrument Act.

10. As stated above the averments in the complaint petition and examination on S.A. indicate that in fact no notice was ever issued to the petitioner and as such there is obvious violation of Sub-section (b) of Section 142 of the Negotiable Instrument Act.

11. Counsel for the opposite party No. 2 submits that even if it is presumed that no cognizance can be taken u/s 138 of the Negotiable Instrument Act, the petitioner would be liable to be punished under Sections 406 and 420 of the Indian Penal Code. Counsel for the petitioner on the other hand relies on two decisions of the Apex Court to support the fact that in the case of this nature as defined no offence u/s 406 or 420 of the Indian Penal Code be made out. Referring to the ease of Dalip Kumar and Ors. v. Jagnar Singh and Anr. reported in 2009 (4) PLJR (SC) 26 wherein this Court has held that offence of cheating would be constituted when accused has fraudulent or dishonest intention at the time of making promise or representation, a pure and simple breach of contract does not constitute an offence of cheating. There must be "(i) Deception of any person (ii) Fraudulently or dishonestly inducing any person to deliver any property; or (iii) To consent that any person shall retain any property and finally intentionally inducing that person to do anything which he would not do or omit." In this case there is no question of inducement or deception which is essential to constitute an offence of cheating or for that matter offence under the criminal breach of trust. Similar is the decision in a case reported in (2007) 7 SCC 373 (Vir Prakash Sharma v. Anil Kumar Agarwal and Anr.) wherein the offences alleged were under Sections 405, 406, 409, 415, 420 and 417 of the Indian Penal Code as well as Section 138 of the Negotiable Instrument Act. The Supreme Court in the facts of that case also has held that no offence would be

made out u/s 415 or 406 of the Indian Penal Code as the element of inducement, deception and fraud are missing in the entire prosecution which is of a contractual nature.

12. Considering the aforesaid decisions and the fact the provisions of Section 138(a) of the Negotiable Instrument Act had not been complied with, I find that the order issuing summons and taking cognizance dated 31.1.2007 and 13.9.2006 in Complaint Case No. 2449 (C) of 2006 and Complaint Case No. 1070(C) of 2006 are hereby quashed as far as it concerns the petitioner.

13. These applications are allowed.