(2011) 02 PAT CK 0056

In the Patna High Court

Case No : Criminal Miscellaneous No. 41820 of 2007

Prabhakar Sinha APPELLANT

Vs

The State of Bihar and Siyaram Sharan Sharma RESPONDENT

Date of Decision : 04-02-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 420

Citation : (2011) 59 BLJR 789 : (2011) 7 RCR(Criminal) 390

Hon'ble Judges : Rakesh Kumar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rakesh Kumar, J.—The sole Petitioner, while invoking inherent jurisdiction of this Court u/s 482 of the Code of Criminal Procedure, has prayed for quashing of an order dated 19.12.2005 passed in Complaint Case No. 2816(c) of 2005, whereby the learned Sub Divisional Judicial Magistrate, Patna has taken cognizance of offence u/s 420 of the Indian Penal Code and Section 138 of the Negotiable Instruments Act. The Petitioner has further prayed for quashing of entire criminal proceeding in Complaint Case No. 2816(c) of 2005, which is pending in the Court of Sub Divisional Judicial Magistrate, Patna.

2. Short fact of the case is that opposite party No. 2 filed a complaint in the court of Chief Judicial Magistrate, Patna vide Complaint Case No. 2816(c) of 2005 against the Petitioner on an accusation of commission of offence u/s 420 of the Indian Penal Code and Section 138 of the Negotiable Instruments Act. It was disclosed in the complaint petition that the Petitioner approached him for a friendly loan of Rs. 50,000/- with regard to his Computer business with an assurance that he will return the same at the earliest. On the request of the Petitioner, the complainant gave Rs. 50,000/- as friendly loan and as such he gave Cheque on 7.9.2004 for an amount of Rs. 20,000/- drawn on ICICI Bank,

Dhanbad Branch and he gave Rs. 30,000/- in cash to the Petitioner. It was further disclosed that the Petitioner subsequently on 4.2.2005 issued a Cheque of Rs. 50,000/- bearing No. 755567 drawn on Bank of Baroda, Patna Branch. However, at the time of handing over the cheque, it was requested by the Petitioner to present the same after fortnight. It further appears from the complaint petition that in the meanwhile the Petitioner was kidnapped and he was released after a week and as such the complainant kept the production of the cheque in abeyance. Subsequently, periodically the Petitioner requested the complainant not to produce the cheque. After confirmation given by the Petitioner that there were sufficient amount in his account, the cheque was presented in Bank. However, on 16.7.2005, the cheque was returned to the complainant un-paid due to the reason of in-sufficient funds in account of the Petitioner. The complainant again contacted the Petitioner, who promised to deposit sufficient amount in his account by 25.7.2005. Accordingly, the complainant again produced the cheque on 26.7.2005 for its encashment, but the same again bounced back. The complainant received such intimation on 6.8.2005. The complainant further disclosed that on 25.8.2005, the Petitioner got a legal notice issued to the Petitioner and despite that the Petitioner did not clear the due amount. After filing the complaint, the complainant was examined on S.A. and also produced witness in support of his complaint. The learned Sub Divisional Judicial Magistrate, Patna, by its order dated 19.12.2005, took cognizance of offence u/s 420 of the Indian Penal Code and Section 138 of the Negotiable Instruments Act and directed for summoning the Petitioner.

3. Aggrieved with the order of cognizance, the Petitioner approached this Court by filing the present petition. On 29.11.2007, the petition was admitted for hearing, notice was directed to be issued to opposite party No. 2 and in the meanwhile, it was directed that further proceedings in respect of Complaint Case No. 2816(c) of 2005 pending in the court of Sub Divisional Judicial Magistrate, Patna shall remain stayed. The order of stay is still continuing. Despite valid service of notice on opposite party, he preferred not to appear before this Court and as such in his absence, the matter was heard.

4. Shri Kamla Kant Tiwary, learned Counsel for the Petitioner, while questioning the order of cognizance and initiation of proceeding on the basis of complaint filed by the opposite party No. 2, has raised several grounds. The court is of the opinion that for the disposal of the present petition, there is no need to go in such detail. One of the ground for challenging the impugned order and entire criminal proceeding is that since the cheque in question was itself presented by the complainant after the expiry of six months, no offence is made out u/s 138 of the Negotiable Instruments Act. It was further submitted that the cheque in question was issued on 4.1.2005. Learned Counsel for the Petitioner has placed Annexure-2 to the petition, which is a photo copy of the said cheque for an amount of Rs. 50,000/- It was pleaded by learned Counsel for the Petitioner that in the business transaction since the complainant was doing the business with him in respect of Software, a cheque was issued by the Petitioner for self.

However, on the request of the complainant, subsequently, it was changed and it was mentioned as payable in the name of the complainant. It was further contended that the Petitioner had never taken any loan from the complainant and as such it cannot be termed that the said cheque was issued for the discharge of any part of any debt or other liability by the Petitioner and as such it has been prayed to quash the entire proceeding.

5. Shri Nirbhya Kumar Singh, learned Additional Public Prosecutor, even in absence of opposite party No. 2, has defended the order of cognizance and he opposed the prayer of the Petitioner.

6. Besides hearing learned Counsel for the parties, I have also perused the materials available on record. From Annexure-2 to the petition i.e. so-called cheque, it appears that cheque is dated 4.1.2005. However, in the complaint petition, the complainant has alleged that cheque was issued on 4.2.2005. It is admission in the complainant that the cheque was firstly produced on 16.7.2005 and same was returned since amount in the account was in-sufficient and subsequently, he presented the cheque on 26.7.2005 and thereafter, he received the intimation from the Bank on 6.8.2005. The first presentation of the cheque was after expiry of six months from the date of issuance of the cheque, even if for the time being, it is accepted to be true that cheque was issued on 4.2.2005. Since, the cheque itself was presented after expiry of six months from the date of issuance, Section 138 of the Negotiable Instruments Act will not attract in the present case in view of Section 138(a) of the Negotiable Instruments Act,1881.

7. After going through the materials available on record and in view of presentation of the cheque after expiry of six months, the court is of the opinion that the learned Sub Divisional Judicial Magistrate has committed an error in passing the impugned order of the cognizance. Moreover, the facts disclosed in the complaint petition further does not make a case for either application of Section 420 of the Indian Penal Code or Section 138 of the Negotiable Instruments Act. The court is of the opinion that allowing prosecution on such allegation will amount to allowing abuse of the process of the court. With a view to prevent the abuse of the process of the court, it is desirable to interfere with the impugned order as well as entire proceeding.

8. Accordingly, the order dated 19.12.2005 passed by learned Sub Divisional Judicial Magistrate, Patna in Complaint Case No. 2816(c) of 2005, whereby cognizance was taken as well as entire criminal proceeding in Complaint Case No. 2816(c) of 2005 are hereby set aside and petition stands allowed.