
(2017) 04 PAT CK 0009

In the Patna High Court

Case No : Criminal Miscellaneous No. 30357 Of 2013

Vishwanath Chaudhary and Ors.

APPELLANT

Vs

The State of Bihar and Anr.

RESPONDENT

Date of Decision : 06-04-2017

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 200, 202, 482

Indian Penal Code, 1860 — Section 115, 415, 420

Negotiable Instrument Act, 1881 — Section 138, 138(c), 142

Citation : (2017) 2 PLJR 871

Hon'ble Judges : Ashwani Kumar Singh

Bench : SINGLE BENCH

Advocate : Umesh Lal Verma, Viveka Nand Singh

Final Decision : Allowed

Judgement

1. Despite repeated calls, none appears on behalf of the petitioners. Learned counsel for the State and learned counsel for the opposite party no.2 are present.
2. Heard learned counsel for the opposite parties and perused the record.
3. This application under Section 482 of the Code of Criminal Procedure (for short "Cr.P.C.") has been filed for quashing the order dated 14.03.2012 passed by the learned Chief Judicial Magistrate, Vaishali at Hajipur in Complaint Case No. C1-338 of 2012 whereby, finding a prima facie case to be made out under Section 420 of the Indian Penal Code (for short "IPC") and Section 138 of the Negotiable Instruments Act, 1881 (For short "N.I. Act"), the petitioners have been summoned to face trial.
4. The aforesaid complaint case was filed by the opposite party no.2 Ashok Kumar Jha alleging therein that the accused persons were known to him from much before. In the year 2007 they took a friendly loan of Rs.3,80,000/- from him for purchasing a Bolero vehicle. They returned Rs.1,30,000/- in various instalments and promised to pay the balance amount within one month. After

repeated request, on 25.12.2011, petitioner no.3 Gita Chaudhary handed over a cheque of Rs.2,50,000/-, which was deposited by him in his bank account on 29.12.2011 but the Bank informed on 06.01.2012 that due to insufficiency of fund the cheque could not be honoured. A legal notice was sent to the accused persons on 24.01.2012 but they failed to pay the amount.

5. On the basis of the aforesaid allegation, the complaint under Section 200 of the Cr.P.C. was filed in the court of Chief Judicial Magistrate, Vaishali, Hajipur. The complainant was examined on solemn affirmation and two witnesses, namely, Shatrughan Jha and Vijay Vikram were examined under Section 202 of the Cr.P.C. in course of inquiry where after the petitioners were summoned to face trial for the offences punishable under Section 420 of the IPC and Section 138 of the N.I. Act.

6. On perusal of the record as also on hearing learned counsel for the opposite party no.2, it would be evident that notice regarding dishonor of cheque was sent on 24.01.2012 and the complaint in question was filed on 06.02.2012, which would mean that the complaint was filed only after 12 days of the notices having been sent by the complainant to the accused persons. From perusal of the complaint, it would also be evident that a vague statement has been made that notices were sent to the accused persons.

7. In order to appreciate the legality of the order impugned, at this stage, it would be apposite to refer to Section 138 of the N.I. Act, which reads as under :-
"138. Dishonor of cheque for insufficiency, etc., of funds in the accounts. - 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 honor 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 provisions 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.

Explanation: For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability."

8. The Supreme Court in *Kusum Ingots And Alloys Ltd v. Pennar Peterson Securities Ltd. & Ors.* [(2000) 2 SCC 745], held that the following ingredients are required to be satisfied for making out a case under Section 138 of the N.I. Act :- (i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that 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;

(iii) that cheque is returned by the bank unpaid. either because of the amount of money standing to the credit of the 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 the bank;

(iv) the payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice."

(emphasis mine)

9. The issue that can a cognizance of an offence punishable under Section 138 of the N.I. Act be taken on the basis of a complaint filed before expiry of the period of 15 days stipulated in the notice required to be served upon the drawer of the cheque in terms of Section 138(c) of the N.I. Act was examined by a three-Judge Bench of the Supreme Court in *Yogendra Pratap Singh v. Savitri Pandey & Anr.* [(2014) 10 SCC 713].

10. After elaborate discussion over the issue, the Bench held as under :-
"...Commission of an offence is a sine qua non for filing a complaint and for taking cognizance of such offence. A bare reading of the provision contained in clause (c) of the proviso makes it clear that no complaint can be filed for an offence under Section 138 of the NI Act unless the period of 15 days has elapsed. Any complaint before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint at all in the eye of law. It is not the question of prematurity of the complaint where it is filed before

expiry of 15 days from the date on which notice has been served on him, it is no complaint at all under law. As a matter of fact, Section 142 of the NI Act, inter alia, creates a legal bar on the Court from taking cognizance of an offence under Section 138 except upon a written complaint. Since a complaint filed under Section 138 of the NI Act before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint in the eye of law, obviously, no cognizance of an offence can be taken on the basis of such complaint...."

(emphasis mine)

11. Admitted case of the complainant in the present case is that the complaint was filed on 13th day of issuance of notice to the accused persons. Thus, in view of clause (c) of Section 138 of the N.I. Act and the ratio laid down by the Supreme Court in *Kusum Ingots And Alloys Ltd. (Supra)*, no cognizance could have been taken against the petitioners under Section 138 of the N.I. Act.

12. The only other Section under which cognizance of the offence has been taken is Section 420 of the IPC. Section 420 of the IPC prescribes punishment for the offence of cheating as defined under Section 415 of the IPC.

13. Section 115 of the IPC reads as under :- "415. Cheating - Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"."

14. The necessary ingredients of Section 415 of the IPC are as under :- (1) Deception of any person

(2) Fraudulently or dishonestly or intentionally inducing any person

(a) To deliver any property or allow any person to retain any property; or

(b) Intentional omission to do anything which he ought not have done, if he was not so deceived.

(3) The act or omission likely to cause any damage or harm to the complainant in body, mind, reputation or property.

15. Thus, unless the above ingredients are attracted on the basis of the complaint made a person cannot be prosecuted for the offence of cheating. From a reading of the complaint itself, it would be evident that there is no allegation that the petitioners ever intended to deceive the complainant rather the complainant has admitted in the complaint itself that he was on friendly terms since long and had paid the amount to the petitioners for purchase of a Bolero vehicle on the promise that he would return the amount in due time. The complainant admits to have received back Rs.1,30,000/- from the accused

persons in various instalments but the remaining amount was not paid and the cheque issued by one of the accused Gita Chaudhary got dishonoured due to insufficiency of fund.

16. In the opinion of this Court, such an allegation made in the complaint would not bring the case within the ambit and scope of Section 420 of the IPC as it would be merely a case of breach of contract. Mere breach of contract cannot bring criminal cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction. Therefore, it is the intention which is the gist of the offence. Once the complainant himself admits that part of the amount taken as loan was returned in several instalments, it cannot be inferred from any angle that the petitioners had dishonest intention right from the beginning.

17. In view of the discussions made above, in my considered opinion, the learned Magistrate grossly erred in taking cognizance of the offences against the petitioners and summoning them to face trial under Section 420 of the IPC and Section 138 of the N.I. Act. Accordingly, the impugned order dated 14.03.2012 passed by the learned Chief Judicial Magistrate, Vaishali at Hajipur in Complaint Case No. C1-338 of 2012 is quashed. Consequently, the Complaint Case No. C1-338 of 2012 also stands quashed.

18. The application stands allowed.