

Arun Kumar Singh Vs. the State of Bihar and ors.

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Court : Patna

Decided On : May-19-2006

Judge : Rekha Kumari, J.

Acts : Companies Act; Indian Penal Code (IPC) - Sections 21, 425, 426 and 504; Negotiable Instruments Act - Sections 138, 141 and 141(1); Code of Criminal Procedure (CrPC) - Sections 197, 202 and 482; Patna Municipal Corporation Act - Sections 5 and 50

Appeal No. : Cr. Misc. No. 7268 of 2005

Appellant : Arun Kumar Singh

Respondent : The State of Bihar and ors.

Advocate for Def. : D.K. Sinha, Adv. for O.P. No. 2

Advocate for Pet/Ap. : Kanhaiya Pd. Singh and Sudhir Kr. Singh, Advs.

Disposition : Application allowed

Judgement :

Rekha Kumari, J.

1. This is an application under Section 482 of the Code of Criminal Procedure for quashing the order dated 30.6.2004 passed by the Judicial Magistrate, Ist Class,

Patna in Complaint Case No. 955 (C) of 2004 by which he has directed to issue summons against the petitioner for facing trial for the offence under Sections 426, 504 of the Indian Penal Code and Section 138 of the Negotiable Instruments Act.

2. Heard both the sides.

3. O.P.No. 2, Bhagwan Singh, filed a complaint on 23.4.2004 in the court of the Chief Judicial Magistrate, Patna against the petitioner Arun Kumar Singh, Chief Executive Officer, Patna, Municipal Corporation, alleging there in that He was an Assistant in Patna Municipal Corporation and retired on 1.11.1997. He was, however, not paid the retiral benefits by the then chief Executive Officer. Ultimately he had to file a writ application (C.W.J.C.No. 3505/2000) in the High Court. On 15.1.2004 the writ petition was allowed. On that very date in the court the petitioner was handed over a cheque of Rs. 2, 89,523/- issued in favour of O.P.No. 2 and drawn on the State Bank of India, Patna Secretariat O.P. No. 2 deposited the cheque in his account standing in the Main Branch of Bank of Baroda, Patna. On 5.3.2004 the cheque was dishonoured for 'insufficiency of fund'. O.P.No. 2 then contacted the petitioner and on 12.3.2004 gave a written information about the dishonour of the cheque. In reply to this information, the petitioner on 13.3.2004 sent a regret letter and gave assurance of availability of fund and requested him to deposit the cheque again. O.P.No. 2, on that assurance deposited the cheque in his account for crediting the amount but again on 18.3.2004 he was informed that for insufficiency of fund, the amount could not be credited in his account. O.P.No. 2 hence personally met the petitioner, but he did not give any satisfactory reply. So, on 10.4.2004 he gave a written notice to the petitioner and demanded payment of the amount. The petitioner got annoyed and rebuked him by saying that he might go to the High Court or the supreme Court or anywhere he liked and turned him out.

4. After filing of the complaint, the complainant was examined on S.A. and two witnesses were examined in enquiry under Section 202 Cr.P.C. The learned Judicial Magistrate on perusal of the complaint petition, statement, of the complainant on S.A. and the statements of the witnesses examined in enquiry found a prima facie case under Sections 426, 504 I.P.C. and Section 138 of the

N.I. Act and passed the impugned order.

5. Learned Counsel for the petitioner submitted that no offence under Section 426 or 504 I.P.C. is made out on the basis of the allegations. As regards Section 138 of the N.I. Act he inter alia, submitted that according to Explanation (a) of Section 141 N.I. Act , Patna Municipal Corporation is a Company and therefore, as provided under Section 141(1) of the N.I. Act it was necessary for the complainant to implead Patna Municipal Corporation also as accused, but as this has not been done, the complaint is not maintainable. In support of his submissions he relied on the decision of the Supreme Court in the case of Anil Hada v. Indian Acrylic Limited : 2000 CriLJ373 . He further submitted that according to the complaint petition itself whatever the petitioner did he did it in his official capacity as Chief Executive Officer, Patna Municipal Corporation. He is also a public servant and not removable from the office save by or with the sanction of the State Government. Therefore, prior sanction under Section 197 Cr.P.C. was required for prosecuting the petitioner and as the sanction had not been obtained the cognizance is bad in law.

6. Learned Counsel for O.P. No. 2 defended order. He further submitted that Patna Municipal Corporation though is a corporate body is not a Company and therefore, it was not necessary to implead the Corporation for the offences under Section 138 of the N.I. Act. He further submitted that the petitioner is not a public servant and that sanction for prosecution is also not necessary at the time of taking cognizance and can be obtained subsequently.

7. As regards the first submission of the learned Counsel for the petitioner, for the commission of offence under Section 426 I.P.C. the act, must be covered by the definition of mischief as provided under Section 425 I.P.C.

8. The relevant part of Section 425 I.P.C. reads thus:

Section 425. Mischief- Whoever with intent to cause, on knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects its injuriously

commits 'mischief'.

9. Thus, from the definition of 'mischief' it is clear that one of the ingredients of this offence is that the perpetrator must cause the destruction of property or such damage in it as destroys or diminishes its value or its utility. The change contemplated by Section 425 is some physical change in the property but there is no such allegation in the complaint. Hence, even if it be assumed that the petitioner knew that there was no sufficient money in the account and in spite of that he issued the cheque in favour of O.P.No. 2, which was eventually dishonoured causing loss to O.P.No. 2, that would not constitute the offence of 'mischief' punishable under Section 426 I.P.C.

10. Then so far as offence under Section 504 I.P.C. to constitute an offence under this section the abusive language must be of such a nature as would in normal, course of events provoke the person insulted to break the peace or to commit an offence, but in this case, even if the allegation in this regard made in the complaint petition is accepted, the alleged insult was not such as to provoke a person to break a public peace or to commit an offence.

11. Therefore, I agree with the learned Counsel that no offence under Section 426 or 504 I.P.C. is made out against the petitioner on the allegations made in the complaint petition.

12. Then so far offence under Section 138 of N.I. Act, it is apt to refer, at first, the provisions of Section 141. Section 141 of the Act reads as follows:

141. Offences by companies.

(1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge,

or that he had exercised all due diligence to prevent the commission of such offence;

Provided further that where a person is nominated as a Director of a Company by virtue of his holding any office or employment in the Central Government or State Government or a financial Corporation owned or controlled by the Central Govt. or the State Govt., as the case may be, he shall not be liable for prosecution under this Chapter.

(2) ...

Explanation: For the purpose of this section.

(a) 'Company' means any body corporate and includes a firm or other association of individuals; and

(b) 'director', in relating to a firm, means a partner in the firm.

13. The Explanation (a) of the above section, therefore, is clear that the definition of Company as given therein is wider than the definition of Company in the Companies Act and it includes any body corporate. Section 5 of the Patna Municipal Corporation Act also shows that the Company is a body corporate. Therefore, there cannot be any doubt that Patna Municipal Corporation is a Company under the N.I. Act.

14. Now, though it is recited in Section 141(1) of the N.I. Act that if any person committing an offence under Section 138 is a company, every person who at the time the offence was committed, was in-charge of and was responsible to the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly, the matter as to whether it is mandatory to array the company also, as accused, alongwith the others, has been decided by the Supreme Court in the case of Anil Hada (supra). It was held therein-' the provisions do not contain a condition that a prosecution of the company is sine qua non for prosecution of the other persons who fall within the second and third categories mentioned above. No doubt, a finding that the offence was committed

by the company is sine qua non for convicting those other persons, but if a company is not prosecuted due to any legal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged in Section 141 of the Act.' The view laid down in this case was reiterated by the Supreme Court in the case of R. Rajgopal v. S.S. Venkat : 2001 CriLJ4936 .

15. Therefore, in view of the above decisions of the Apex Court if the company i.e. Patna Municipal Corporation on whose behalf the cheque was issued has not been made an accused in the complaint, the prosecution of the petitioner would not be non-maintainable.

16. But, so far as sanction for prosecuting the petitioner, it is clear from Clause 12(b) of Section 21 I.P.C. that every person in the service or pay of a local authority, is a public servant. The illustration given under this clause also shows that a Municipal Commissioner is a public servant. Therefore, there cannot be any doubt also that the Chief Executive Officer of Patna Municipal Corporation, which is a local authority, is a public servant.

17. Section 50 of Patna Municipal Corporation Act also shows that the Chief Executive Officer of the Corporation is appointed and removed by the State Government.

18. So, it is evident that the petitioner is a public servant not removable from the office save by or with the sanction of the State Government.

19. The complaint petition also shows that the complainant (O.P.No. 2) was an employee of the Corporation and as his retiral benefits were due he had filed a writ petition in the High Court which was allowed and in compliance with the order of the Court, his cheque issued by the petitioner was handed over to O.P.No. 2. So, it is manifest that whatever the petitioner did, he did the same in discharge of his official duty.

20. Therefore, when the petitioner was a public servant and could be removed from the office only by the State Government and there was a nexus between the act

done by him and discharge of official duty, it is clear that Section 197 Cr.P.C. is attracted in this case.

21. Of course, it is not always necessary that need for sanction under Section 197 be considered at the stage of taking cognizance. If the complaint does not disclose that the act constituting the offence was done or purported to have been done in discharge of official duty, the necessity of sanction may arise later on, when after some progress in the case, the same comes to light. But where from the allegations made in the complaint petition itself, it appears that the act constituting the offence was done in discharge of official duty, the language of Section 197 is clear that the sanction has to be obtained before cognizance is taken.

22. As already shown, it is clear from the allegations made in the complaint that there is connection between the act done and discharge of official duty. Therefore, it was necessary for the prosecution to obtain sanction against before the petitioner cognizance under Section 138 of the N.I. Act was taken, and as this has not been done, the cognizance is bad in law and accordingly, the impugned order is also vitiated.

23. I, thus, find merit in the application. The same is allowed and the impugned order is set aside.