

(2009) 07 JH CK 0040**Jharkhand High Court****Case No:** None

Tarun Kumar Dutta and
Gauranga Dutta

APPELLANT**Vs**

The State of Jharkhand and Md.
Kalam Azad

RESPONDENT**Date of Decision:** July 29, 2009**Acts Referred:**

- Negotiable Instruments Act, 1881 (NI) - Section 138
- Penal Code, 1860 (IPC) - Section 406, 420

Hon'ble Judges: Prashant Kumar, J**Bench:** Single Bench**Final Decision:** Dismissed**Judgement**

Prashant Kumar, J.

This is an application for quashing the entire criminal proceeding in connection with C.P. Case No. 494 of 2006 pending in the court of Sri Ramesh Chandra, Judicial Magistrate, Dhanbad including the order dated 11.8.2006 whereby and whereunder he took cognizance of the offence u/s 406 of the IPC against the petitioners.

2. It appears that O.P. No. 2 filed a complaint alleging therein that in the year 2000, he took a shop on rent from petitioner No. 1 and 2 and executed an agreement with regard to the same. It is further alleged that at that time he paid Rs. 1,20,000/- as advance, with stipulation that petitioner will return the same at the time of termination of tenancy. It is further alleged that on 10.11.2005, the complainant vacated the shop premises and the possession of the same was handed over to petitioner No. 1 and 2. It is further stated that after vacating the shop, complainant requested the petitioners to return the advance money, but they did not return the same taking different plea and assured the complainant that money will be returned in the month of December 2005. It is further alleged that in December 2005 petitioners told the complainant that he should pay Rs. 10,000/- towards the

maintenance of shop and then only advance money will be returned. It is stated that as instructed by the petitioners, the complainant paid Rs. 10,000/- through cheque, but after receiving the said cheque the petitioners started misbehaving with the complainant and they have said that they will not return the money. Thereafter the complainant sent a legal notice for return of the money but in spite of the same they did not give any heed to the petitioner's request. Hence the present complaint has been filed.

3. It is submitted by the learned Counsel for the petitioner that present dispute arose between the parties out of an agreement of tenancy and therefore the same is a civil dispute, which can be adjudicated by the civil court. Hence the order taking cognizance is an abuse of the process of court; therefore, the same cannot be sustained by this Court. It is submitted that the present case has been filed as a counter blast of C.P. Case No. 414 of 2006, filed by the petitioner No. 1 against the O.P. No. 2 u/s 138 of the N.I. Act and u/s 420 of the IPC, alleging therein that the cheque issued by O.P. No. 2 has been dishonored by the bank concerned. Accordingly, it is submitted that the present criminal proceeding has been instituted maliciously with an ulterior motive to put pressure on the petitioners to withdraw the aforesaid complaint petition. It is submitted that on this ground also the present criminal proceeding is liable to be quashed by this Court.

4. On the other hand, learned APP submits that from the perusal of complaint petition, it is clear that the petitioners has taken advance of Rs. 1,20,000/- with a promise to return the same at the time of termination of tenancy. It is stated in the complaint petition that even the complainant vacated the tenanted premises, the petitioners did not return the said money and therefore an offence of criminal breach of trust is made out against the petitioners. Thus the court below had rightly took cognizance of the offence. It is further submitted that it is well settled that existence of an alternative civil remedy would not be a bar in initiation of criminal proceeding. It is stated in the complaint petition that a lawyer's notice served upon the petitioners for return of advance money as well as cheque on 2.1.2006, and the complaint petition was filed by the petitioners on 18.3.2006 i.e. after receipt of lawyer's notice, therefore, it cannot be said that the present complaint petition has been filed as a counter blast to the said complaint petition. On the other hand it appears that the petitioners filed said complaint in retaliation of lawyer's notice.

5. Having heard the submission, I have gone through the records of the case. In the complaint petition, it is categorically mentioned that the O.P. No. 2 paid an advance of Rs. 1,20,000/- to the petitioners at the time of entering into the shop as a tenant. It further appears that on 10.11.2005 the O.P. No. 2 vacated the said tenanted premises and requested the petitioners to return the said advance money. But, in spite of repeated request, the petitioners did not return the same. Thus there is ample material in the complaint petition to show that advance of Rs. 1,20,000/- paid to the petitioners and petitioners refused to return the same even on repeated

demand. Aforesaid averments made in the complaint prima facie shows that petitioners have committed criminal breach of trust. It has been held by their Lordships of Supreme Court in [Ganpat Roy and Others Vs. Additional District Magistrate and Others](#), that if from the allegation made in the complaint, prima facie offence u/s 406 of the IPC is made out then the existence of alternate civil remedy would not bar criminal jurisdiction.

6. As noticed above, in the instant case, there is allegation of entrustment of Rs. 1,20,000/- to the petitioners and the petitioners were refusing to return the same. Thus, in my view, justice demands that the complainant should be given an opportunity to prove his case at the trial and it is not desirable to quash the entire proceeding at the threshold. It is of course open to the petitioners-accused to take defence at the time of trial, but this is not the stage when the same is required to be considered for quashing the entire criminal proceeding.

7. So far the malice is concerned, it appears from the complaint petition itself that the advocate notice served upon the petitioners on 2.1.2006 for returning the advance money as well as the cheque. It appears that petitioner No. 1 filed complaint case bearing C.P. Case No. 414 of 2006 in the month of March 2006. Thus, whose allegation is correct it cannot be decided at this stage without appreciating the evidence adduced by the party during trial. Moreover, I find that contention of petitioner that present complaint has been filed as counter blast of C.P. Case No. 414 of 2006 is in the defence of accused petitioner and thus the same cannot be looked into at this stage.

8. In view of aforesaid discussion, I find no merit in this application, the same is accordingly, dismissed.