

**HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE**

**BEFORE HON.MR. JUSTICE ALOK VERMA, JUDGE**

**M.Cr.C. No.12058/2016**

**Devchand S/o Gokalchand Ji Jain**

**Vs.**

**S.K. Builder and Colonizers & Others**

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Shri S.S. Garg, learned counsel for the applicant.

Shri Ali Hussain Mansoori, learned counsel for the respondents.

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**ORDER**

**( Passed on this     day of May, 2017 )**

This order shall govern disposal of an application under Section 378(4) of Cr.P.C. for grant of leave to appeal.

2. The relevant facts giving rise to this application is that the applicant before this Court, filed a criminal Court before the Court of Judicial Magistrate First Class, Indore under Section 138 of Negotiable Instrument Act and Section 420 of IPC. The learned Judicial Magistrate sought a report from the Police Station-Chandan Nagar, District-Indore. The report was submitted on 16.04.2014. The case was fixed for order on taking cognizance on 26.04.2014,

however, on that date, the case was adjourned as the complainant sought time to file additional documents. The case was fixed on 02.05.2014. On this date, the complainant was heard by the learned Magistrate and the order was passed. In this order, the learned Magistrate totally disregarded the fact that the complaint was also filed under Section 138 of Negotiable Instrument Act. The Magistrate proceeded to consider the offence under Section 420 of IPC, took cognizance under this provision of law and issued summons.

3. Before proceeding further we may consider facts of the case. The complaint was filed stating therein that respondents purchased agricultural land belonging to the applicant situated at district Sagar by a registered sale deed dated 29.08.2013 total consideration for purchase was Rs.8,59,000/-. A cheque bearing No.913652 was given by the respondent to the applicant. The cheque was signed by Alok Kesarwani, respondent No.2 here. The cheque was presented by the applicant at Indore which was duly dishonored. On the basis of memo of dishonor, the complaint was filed. The Magistrate took cognizance under Section 420 of IPC as stated above.

4. The respondent after obtaining anticipatory bail from this Court, appeared before the learned Judicial Magistrate and also challenged the order of taking cognizance by the Magistrate as aforesaid before this Court by filing an application under Section 482 of Cr.P.C. The application was disposed of in M.Cr.C. No.2953/2015 dated 31.08.2016. This Court in its order dated observed as under:-

“Shri Vikas Choubey, learned counsel for the petitioner.

Shri O.P. Solanki, learned counsel for the respondent.

This is a petition under Section 482 of Cr.P.C. Petitioner feels aggrieved by the order dated 02.05.2014 passed by the learned Judicial Magistrate First Class, Indore, whereby cognizance has been taken against the petitioner for the offence under Section 420 of IPC on the ground that cheque bearing No.913562, for an amount of Rs.8,59,000/- issued by him in favour of the respondent as sale consideration for purchase of agreement dated 18.10.2012, executed at Sagar, was dishonoured by the bank.

Learned trial Court has opined in the impugned order that *prima-facie* it is found that respondent was cheated because the cheque was dishonoured.

Learned counsel for the petitioner has argued before the Court that to constitute an offence of cheating as contemplated under Section 420 of IPC, there must be dishonest intention and intention to deceive at the very inception of the transaction. Subsequent dishonest intention may not be sufficient to constitute an offence under Section 420 of IPC. It is further submitted that the agricultural land, which is the subject matter of sale, is situated in Sagar district and the agreement to sale was also executed at Sagar. Simply because the cheque was dishonoured at Indore, the complaint for offence under Section 420 cannot be entertained at Indore because the Court at Indore has no territorial jurisdiction to entertain the complaint and to take cognizance.

Learned counsel for the respondent has not disputed the legal position that to constitute cheating, the dishonest intention and the intention to deceive must be present at the very inception of the transaction.

In the instant case, if we say that dishonest intention was there at the very inception of the transaction, which was made at Sagar, then Court at Indore shall not be having territorial jurisdiction, because in that case the territorial jurisdiction will lie with Court at Sagar, and if we say there was no dishonest intention at the inception, then offence

under Section of 420 is not made out at all.

Learned trial Court has committed serious error in taking cognizance in the matter for offence under Section 420 of IPC without considering all these relevant aspects of the matter.

In view of the aforesaid, the petition deserves to be allowed. Impugned order passed by the learned JMFC, Indore taking cognizance against the petitioner for offence under Section 420 deserves to be and is hereby quashed.

Certified copy as per rules”.

5. As a result, the impugned order was set aside after passing of the order by this Court. The applicant filed another application praying that the Court should take cognizance under Section 138 of Negotiable Instrument Act and because while passing earlier order, the then Magistrate totally disregarded the fact that the complaint was also filed under Section 138 of Negotiable Instrument Act. The Magistrate after hearing both the counsels observed in the impugned order dated 18.10.2016 that the complaint was filed by the complainant paying the Court fee of Rs.10/-, thereafter, no time was sought by the applicant for payment of deficient court fee. The Court heard both the parties and passed the order on 02.05.2014 taking cognizance only under Section 420 of IPC. The Magistrate observed that as the then Magistrate did not mention anything about Section 138 of Negotiable Instrument Act and it may be presumed that the Court did not find any ground for taking cognizance under Section 138 of Negotiable Instrument Act. It was also presumed by the Magistrate that the complainant wanted to proceed under Section 420 of IPC and not under Section 138 of Negotiable Instrument Act,

therefore the complainant did not file any application for grant of time to pay deficient amount of court fee in respect of his complaint under Section 138 of Negotiable Instrument Act. The Magistrate observed that if cognizance is taken by him, it would amount to review of its own order.

6. Learned counsel appearing for the applicant submits that he may be permitted to pay court fee and prosecute the complaint.

7. Learned counsel for the respondents vehemently opposed the application and submits that he had already forfeited his right to pay court fee as he was under obligation to pay the court fee. While filing the complaint or to seek time from the Court for filing of the court fee, no such application was filed alongwith the complaint, and therefore, now he could not be permitted to file the court fee and prosecute his complaint under Section 138 of Negotiable Instrument Act.

8. I have taken rival contentions of both the counsel into consideration. Section 6 of Courts Fee Act provides that all the documents which are chargeable in first and second schedule to the Act for court fee must not be received by the Court without proper stamps of Court fee affixed on it. Section 149 of Civil Procedure Code empowers the Court to grant time for payment of court fee. Section 28 of Court Fee Act gives discretion to the Court to get the Court fee affixed on the document by mistake or by inadvertence. Such stamps of court fee were not affixed on the complaint.

9. Accordingly as there is no provision in Cr.P.C. regarding grant

of time for payment of court fee analogous to Section 149 of C.P.C., by analogy, we assume that the Court has necessary discretionary power to grant time for payment of court fee required to be paid in criminal proceeding. The Courts are empowered to exercise the discretion as granted to the civil Court under Section 149 of C.P.C. and also taking provisions of Section 6 and Section 28 of Court Fee Act, I find that such power can be exercised in proper case by the criminal Court. In this case, learned Magistrate erred while holding that if he takes cognizance under Section 138, it would amount to review of the order passed by his predecessor. The order was set aside by this Court and now it is open for him to decide all the issues including jurisdiction and ingredient of Section 420 i.e. intention to cheat from very inception etc and pass a valid order therefor and also taken into consideration the provisions of Section 462 of Cr.P.C.

10. Now this application is filed for grant of leave to appeal. Firstly the order by the Magistrate refusing to take cognizance is not an appealable order, a revision lies before the competent revisional Court, however, no such revision was filed, instead this application is filed before the Court, which is not maintainable.

11. Accordingly, after taking all the facts and circumstances of the case into consideration, this application is disposed of with liberty to the applicant to raise all the points as aforesaid before the competent revisional Court. Parties before this Court shall appear before the Sessions Court, Indore on **28.06.2017**.

12. Office is directed to transmit the record to the Court of Session alongwith the copy of order of this Court.

The applicant is directed to file a revision before the Sessions Court on 28.06.2017 or before. The Sessions Judge, Indore is at liberty to hear the revision himself and make it over to some other Sessions Court working in his jurisdiction.

**(Alok Verma)**  
**Judge**

**Ravi**