

IN THE SUPREME COURT OF BANGLADESH
Appellate Division

PRESENT

Mr. Justice Hasan Foez Siddique, C. J.

Mr. Justice M. Enayetur Rahim

Mr. Justice Jahangir Hossain

CRIMINAL PETITION FOR LEAVE TO APPEAL NO.798 OF 2018

(From the judgment and order dated the 6th day of May, 2018 passed by the High Court Division in Criminal Revision No.645 of 2017).

Kabir Reza : . . . Petitioner

-Versus-

Shah Mohammad Ashraf Islam : . . . Respondents
and others

For the Petitioner : Mr. Balayat Hussain, Advocate,
instructed by Mr. Zainul Abedin,
Advocate-on-Record

For Respondent No. 1 : Mr. M. Ali Murtaja, Advocate,
instructed by Ms. Mahmuda Begum
Advocate-on-Record

Date of hearing and judgment : The 30th day of July, 2023

JUDGMENT

M. Enayetur Rahim, J: This criminal petition for leave to appeal is directed against the judgement and order dated 06.05.2018 passed by a Division Bench of the High Court Division in Criminal Revision No.645 of 2017 discharging the Rule.

The facts relevant for filing this criminal petition, in short, are that the present opposite party No. 1 as complainant through his attorney filed a petition of complaint before the Metropolitan Magistrate Court No.1, Sylhet against the present accused petitioner for allegedly committed offence under section 138 of the Negotiable Instruments Act, 1881.

In the petition of complaint it is alleged that the

accused petitioner issued two cheques vide cheque No. SIBL No. MSD 4383624 amounting Tk. 3,00,00,000/- (three crore) and cheque No. SIBL No.4383625 amounting Tk. 3,00,00,000/- (three crore) on MSD his account, vide account No. 400812100020030 with the Shahjalal Islami Bank Ltd. Uttara, Dhaka. The complainant on 31.03.2014, 02.04.2014 and lastly 09.06.2014 presented the said cheques to the concerned bank for encashment. However, those cheques were dishonored due to payment stop by the accused. The complainant served legal notice. However, the accused did not pay the same amount. Since at the relevant time the complainant was in jail hajat in connection with a criminal case, he was compelled to file the petition of complaint through his attorney.

The concerned Magistrate after observing all legal formalities took cognizance of the offence under section 138 of the Negotiable Instruments Act, 1881 against the accused petitioner and the case was registered as C.R. Case No. 768 of 2014. Eventually the case record was transmitted to the Court of Metropolitan Sessions Judge, Sylhet for trial. On 11.01.2017 the accused petitioner filed an application under section 265 (C) of the Code of Criminal Procedure for discharging him from the charge brought against him.

However, the trial Court by its order dated 06.02.2017 framed charge against the accused petitioner under 138 of the Negotiable Instruments Act. Challenging the said order the accused petitioner moved before the High Court Division by filing an application under section 439 read with section 435 of the Code of Criminal Procedure. A Division Bench of the High Court Division after hearing the Rule by the impugned

judgment and order dated 06.05.2018 discharged the same.

Feeling aggrieved by the said judgment and order the accused has filed the present criminal petition for leave to appeal before this Division.

Mr. Balayat Hussain, learned Advocate, appearing for the accused petitioner submits that in the instant case the complaint was filed through the attorney of the complainant and the said attorney is not a 'payee' or 'holder in due course of the cheque' and in view of the proposition of law settled in the case of **Md. Nur Hussain v. Md. Alamgir Alam**, reported in **37 BLD (AD) 202** the proceeding against the petitioner is barred under provision of section 138 and 141 of the Negotiable Instruments Act, 1881.

Refuting the submission of the learned Advocate for the petitioner Mr. Ali Murtaja, learned Advocate, appearing for the complainant-respondent having referred to the case of **Hasibul Bashir vs Gulzar Rahman and another**, reported in **56 DLR (AD)17** submits that taking cognizance upon the petition of complaint filed by the attorney upon due examination under section 200 of the Code of Criminal Procedure is perfectly valid and appropriate.

We have considered the submissions of the learned Advocates appearing for the respective parties, perused the petition of complaint, the impugned judgement and other materials as placed before us.

In the instant case the learned Advocate for the petitioner has tried to impress us that the attorney being not a 'payee' or 'holder in due course of the cheque' had no authority to file the petition of

complaint in the Court and as such, the proceeding is illegal and without jurisdiction.

In the case of **Hashibul Bashar vs Gulzar Rahman and another**, reported in **56 DLR(AD) (2004)17** this Division relied on the case of **Tamizul Haque Vs. Anisul Haque**, reported in **16 BLD (AD) (1996)206** has observed that:

“In other words, it is the contention of the petitioner that cognizance against him under section 138 of the Negotiable Instruments Act has been taken on a petition of complaint, which is legally barred. This contention of the petitioner has been addressed by the High Court Division. The learned Advocate-on-Record could not place any material to persuade us to take view different from the ratio of the case reported in 1996 BLD (AD)206. In the reported case it has been held that taking of cognizance upon the petition of complaint filed by the Attorney upon due examination under section 200 of the Code of Criminal Procedure is “perfectly valid and appropriate”. In the instant case, since cognizance has been taken upon examination of the Attorney of Anwarul Islam in whose favour cheques were issued but finally dishonoured and that in spite of serving of notice the accused petitioner did not pay the cheque-amount and thereby is said to have committed offence under section 138 of the Negotiable Instruments Act.”

In the case of **Md. Nur Hussain v. Md. Alamgir Alam**, reported in **37 BLD (AD) 202** this Division held:

“In the instant case admittedly impugned cheque was issued in the name of Abu Khair Md. Shakhawat Ullah and the petition of complaint was filed by Md. Alamgir Alam. Section 141(a) provides that the Court shall take cognizance of the offence punishable under section

138 upon a complaint, in writing, made by the “payee” or, as the case may be, “the holder in due course of the cheque”. Here, petition of complaint has neither been filed by the “payee” nor by the “holder in due course”. Complainant is an outsider. He had no connection with the instant transaction. He is not holder of the cheque for consideration and that the cheque was not transferred to him. That is the statutory requirements as provided in section 138 and 141 of the Negotiable Instruments Act have not been complied with in respect of this case while filing the same.” (under line supplied).

In the above case, complaint was filed by an outsider who is not the ‘payee’ or ‘the holder in due course of the cheque’ or the attorney of the complainant. But in this particulate case the complainant presented the petition of complaint before the concerned Court of Magistrate through his attorney and in the petition of complaint it has been categorically stated that since the complainant was in jail hayat he was compelled to file the petition of complaint through his attorney to avoid the period of limitation.

In the case of **A.C. Narayanan v. State of Maharashtra and Anr. with G. Kamalakar v. M/s Surana Securities Ltd. & Another**, reported in **Air 2014 (S.C.) 630** the Supreme Court of India has dealt the similar issue on the following manner:

“In terms of the reference order, the following questions have to be decided by the Bench:

- (i) Whether a Power of attorney holder can sign a file a complaint petition on behalf of the complainant?/Whether the eligibility criteria*

prescribed by Section 142 (a) of NI Act would stand satisfied if the complaint petition itself is filed in the name of the payee of the holder in due course of the cheque?

(ii) Whether a Power of Attorney holder can be verified on oath under section 200 of the Code?

(iii) Whether specific averments as to the knowledge of the Power of Attorney holder in the impugned transaction must be explicitly asserted in the complaint?

(iv) If the Power of Attorney holder fails to assert explicitly his knowledge in the complaint then can the Power of Attorney holder verify the complaint on oath on such presumption of knowledge?

(v) Whether the proceedings contemplated under Section 200 of the Code can be dispensed with in the light of Section 145 of the N.I. Act which was introduced by an amendment in the year 2002?"

And, finally the Supreme Court of India has settled the above issues in following manner:

(i) Filing of complaint petition under Section 138 of N.I Act through power of attorney is perfectly legal and competent.

(ii) The power of Attorney holder can depose and verify on oath before the Court in order to prove the contents of the complaint. However, the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.

(iii) It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of

attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

- (iv) *In the light of section 145 of N.I Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the N.I Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant of his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the N.I Act.*
- (v) *The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person.”*

In the case of **Vishwa Mitter v. O.P.Poddar**, reported in **MANU/SC/0378/1983:1984 CriLJ1**, the Supreme Court of India observed as under:

“It is clear that anyone can set the criminal law in motion by filing a complaint of facts constituting an offence before a Magistrate entitled to take cognizance. It has been held that no court can decline to take cognizance on the sole ground that the complainant was not competent to file the complaint. It has been held that if any special statute prescribes offences and makes any special provision for taking cognizance of such offences under the statute, then the complainant requesting the Magistrate to take cognizance of the offence must satisfy the eligibility criterion prescribed by the statute. In the present case,

the only eligibility criteria prescribed by Section 142 is that the complaint must be by the payee or the holder in due course. This criteria is satisfied as the complaint is in the name and on behalf of the appellant Company.”

In the case of **Associated Cement Co. Ltd. v. Keshvanand**, reported in **MANU/SC/0894/1998: 1998 CriLJ 856**, it has been held by the Supreme Court of India that:

“The complainant has to be a corporeal person who is capable of making a physical appearance in the court. It has been held that if a complaint is made in the name of an incorporeal person (like a company or corporation) it is necessary that a natural person represents such juristic person in the court. It is held that the Court looks upon the natural person to be complainant for all practical purposes. It is held that when the complainant is a body corporate it is the de jure complainant, and it must necessary associate a human being as de facto complaint to represent the former in court proceedings. It has further been held that no Magistrate shall insist that the particular person whose statement was taken on oath at the first instance, alone can continue to represent the company till the end of the proceedings. It has been held that there may be occasions when different persons can represent the company. It has been held that it is open to the de jure complainant company to seek permission of the court for sending any other person to represent the company in the court. Thus, even presuming, that initially there was no authority, still the Company can at any stage rectify that defect. At a subsequent stage the Company can send a person who is competent to represent the company. The complaints could thus nor have been quashed on this ground.”

We have already noticed that the complainant while in jail hayat, filed the complaint before the concerned Court of Magistrate through his attorney to avoid the limitation and satisfactory explanation has been furnished to that effect and as such we cannot ignore this compelling circumstance in filing the complaint by the attorney. In the instant case, '**the holder in due course of the cheque**' himself is the complainant and same was presented before the Court through the attorney.

If we consider the above propositions of law in regard to the filing of petition of complaint through an attorney and the attending facts and circumstances of the present case, then we have no hesitation to hold that in filing the complaint by the attorney no illegality has been committed and the learned Magistrate rightly took cognizance into the case against the accused petitioner having complied with the relevant provision of law.

Having discussed and considered as above, we find no merit in the instant criminal petition for leave to appeal. Accordingly, the same is dismissed.

C. J.

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