

**HIGH COURT OF TRIPURA
AGARTALA
CRL.REV. P. NO.52 OF 2023**

Sri Sankar Ghosh,
Son of Late Parimal Ghosh,
Aged about 56 years, a resident of
Ramnagar Road No.11, P.O.-Ramnagar,
P.S. West Agartala, Sub-Division-Agartala,
District-West Tripura.

.....**Petitioner(s)**

Versus

1. Smt. Rikta Pal(Sarkar),
Wife of late Sankar Prasad Sarkar,
A resident of Jail road, P.O.- Belonia,
P.S.- Belonia , Sub-Division, Belonia,
District- South Tripura.

2. The State of Tripura.

.....**Respondent(s)**

For the Petitioner(s) : Mr. S. Majumder, Advocate.

For the Respondent(s) : Mr. D. Bhattacharjee, G.A.
Mr. R. Datta, P.P.
Mr. S. Das, Advocate.

Date of hearing : 16.08.2024

Date of delivery of
Judgment & Order : 21.08.2024.

Whether fit for reporting : YES.

**HON'BLE MR. JUSTICE T. AMARNATH GOUD
J U D G M E N T & O R D E R**

This present criminal revision petition has been filed
under Section 397 read with Section 401 of the Criminal Procedure

Code, 1973 against the impugned Judgment & Order dated 23.08.2023, passed by the learned I/c Sessions Judge, South Tripura, Belonia, in Criminal Appeal No. 25 of 2019, affirming the Judgment of conviction of the petitioner dated 27.08.2019 passed by the learned Chief Judicial Magistrate, South Tripura, Belonia, in case no. N.I. 4 of 2017, for committing offence punishable under Section 138 of the Negotiable Instruments Act, 1881, and modifying the sentence of the appellant from suffering simple imprisonment for 1 (one) year and to pay a fine of Rs. 4,20,000/-, and in default of making the payment of the fine to suffer simple imprisonment for six months.

2. The brief fact of this case is that the petitioner who is a contractor by profession had a good relationship with Sankar Prashad Sarkar (*now deceased*) a fellow contractor and for the purpose of his business, he obtained a loan of Rs. 2,10,000/- on 12.05.2015. After some days the petitioner in discharge of said loan liability issued a post-dated cheque bearing No.927029 drawn at SBI, Kunjaban Branch, Agartala in favour of Sankar Prashad Sarkar. Upon the death of deceased-Sankar Prashad Sarkar, on presentation of the cheque to SBI, Belonia Branch on 02.09.2016 by respondent No. 1, being the widow of Sankar Prashad Sarkar, it was dishonored on 28.11.2016 on the ground of insufficiency of the fund in the account of the petitioner. After such dishonor, the petitioner

though assured to make payment of the cheque amount, but, did not do so. Following such failure, respondent No.1 on 14.12.2016 served statutory notice upon the petitioner through her lawyer. Despite receipt of said notice the petitioner did not comply with the demand as required in the notice. Such non-compliance with the demand was followed by a complaint under Section 138 of the NI Act filed by the complainant respondent before the learned Trial court.

3. On such complaint, cognizance of offence under section 138 of the N.I. Act was taken by the learned Trial court against the petitioner. The learned Chief Judicial Magistrate, South Tripura, Belonia, after taking cognizance proceeded for disposal. To prove the case, from the prosecution side, one witness was examined i.e. respondent no. 1 herself, and also proved some documents. On the other hand, the petitioner also adduced himself as defence witness. Learned Chief Judicial Magistrate, South Tripura, Belonia, after hearing both sides vide judgment dated 27.08.2019 convicted the petitioner for committing offence punishable under Section 138 of the Negotiable Instruments Act.

4. Being aggrieved and dissatisfied with the judgment dated 27.08.2019 passed by the learned Chief Judicial Magistrate, South Tripura, Belonia in N.I. 4 of 2017, the petitioner preferred an appeal before the learned Sessions Judge, South Tripura, Belonia, and the

same was registered and marked as Criminal Appeal 25 of 2019. After hearing the parties, learned I/c Sessions Judge, South Tripura, Belonia vide impugned judgment dated 23.08.2023 partly allowed the appeal. Vide impugned judgment dated 23.08.2023, learned I/c Sessions Judge, South Tripura, Belonia, upheld the conviction of the petitioner for committing offence punishable under Section 138 of the Negotiable Instruments Act, but modified the sentence as stated herein above.

5. Being aggrieved and dissatisfied with the impugned Judgment dated 23.08.2023, passed by the I/c Sessions Judge, South Tripura, Belonia, in Criminal Appeal 25 of 2019, the petitioner has preferred the instant criminal revision petition.

6. Heard Mr. S. Majumder, learned counsel appearing for the petitioner as well as Mr. D. Bhattacharjee, learned Sr. counsel assisted by Mr. S. Das, learned counsel appearing for the complainant respondent, and Mr. R. Datta, learned P.P., appearing for the State-respondent.

7. Mr. S. Majumder, learned counsel appearing for the petitioner submits that the learned Courts below failed to appreciate that the prosecution has failed to bring home the charges against the petitioner. Learned counsel submits that the cheque was purportedly issued by the petitioner in favour of the husband of respondent No.1. On the death of her husband, the complainant-

wife deposited the said cheque in her bank account and the cheque was returned. The respondent No.1 has no right to deposit the cheque in her bank account. For the dishonor of the said cheque, the petitioner cannot be convicted under Section 138 of the Negotiable Instrument Act. In the statement of respondent No.1 there is a huge gap regarding the specifics of the said transacted amount. The learned Courts below failed to consider the cross-examination of P.W.-1 wherein she stated that she does not know how her husband arranged the cash amount of Rs.2,10,000/-. Nor did she submit any document relating to the income tax assessment or payment made by her husband nor did she submit any document relating to the death of her husband. Stating thus, learned counsel urged this Court to allow this revision petition.

8. On the other hand, Mr. D. Bhattacharjee, learned Sr. counsel assisted by Mr. S. Das, learned counsel appearing for respondent No.1 argued that the wife-respondent enters into the shoe of the husband as a legal representative and she is entitled to present the cheque and file the case thereafter.

To support his case learned Sr. counsel relied upon Judgment of the Hon'ble Supreme Court passed in ***Criminal Appeal No.485 of 2002*** titled as ***Shankar Lal Vs. Sanyogita Devi(Dead) Through Lrs.***

9. Learned Sr. counsel appearing for respondent No.1 to support his argument further relied upon the relevant portion of para-3 of the Judgment of this Hon'ble Court passed in **Crl. Rev. P. No.44/2017** dated **21.11.2017**, which is given here-in-under:-

"3. Both Mr. D. Bhattacharjee, the learned counsel for the petitioner, and Mr. P. Sahu, the learned counsel for the respondent, were heard at some length. The question as to whether the legal heir of a payee can file a complaint under Section 138 of the Act is no longer res integra. This Court in Smt. Rikta Pal Sarkar v. Milan Pal (Crl. Rev. P. No. 33 of 2017) vide the judgment dated 9-8-2017 following the decision of the Apex Court in AC Narayanan v. State of Maharashtra & another, (2014) 11 SCC 790, held that the legal heir of the deceased is the "holder in due course" of the cheque and could, therefore, maintain a complaint under Section 138 of the Act. The only rider is that the legal heir should have knowledge about the transaction in question so as to enable him/her to bring on record the truth of his/her grievance. Two more decisions of various High Courts can also be cited in this connection, namely, Ajay Kumar Agarwal and another v. State of Jharkhand and another, 2003 Cri LJ 3088 and Chandra Babu v. Remani, 2003 (2) KLT 750(DB). The learned Chief Judicial Magistrate has overlooked the decision of this Court and has in the process improperly exercised his jurisdiction in dismissing the complaint. The observations of the Division Bench of the Kerala High Court in Chandra Babu (supra), with which I am in respectful agreement, succinctly explained the legal position:

"8. There is no dispute that the proposition that legal representative can file a suit for realising the amount. A Full Bench of the Punjab and Haryana High Court after considering large number of decisions in Padam Parshad v. Lok Nath Ishwar Sarup and Ors., (AIR 1964 P&H 497 FB) held as follows:

"(5)..... It will be apparent from the definition of holder' that it means a person entitled in his own name to the possession of the negotiable instrument and to receive or recover the amount due thereon from the parties thereto. Section 78 provides as to whom payment should be made of the amount due on the promissory note in order that the maker or acceptor thereof is discharged from liability thereon. On the interpretation of the aforesaid two sections, a plethora of case law has grown up, but it appears to us that so far as the case of an heir of a deceased holder is concerned, the rule of law seems to be well settled. The preponderance of judicial opinion is for the view that an heir of a deceased holder can bring a suit on the basis of the promissory note though such an heir cannot be said to be a holder within the meaning of Section 8. The decided cases, which will be noticed hereafter, are almost unanimous that there is no bar created by the aforesaid two sections in the way of such an heir to sue on the

basis of the promissory note and recover the debt due to the deceased holder".....

10. Next contention is that there may be other legal heirs and, therefore, complaint by the one legal heir/representative is not maintainable. That is a matter for evidence. Further, they are all curable defects and that is not a matter to be considered for quashing a complaint at the initial stage. (See: M.M.T.C. Ltd. and Anr. v. Medchil Chemicals & Pharma (P) Ltd. and Anr., MANU/SC/0728/2001 : 2002 (1) SCC 234 = 2001 AIR SCW 4793)."

10. Heard and perused the evidence on record.

11. To properly adjudicate the matter let us examine some important documents and evidence.

12. Let us produce the Advocate notice dated 14.12.2016 made by the lawyer of the complainant respondent to the petitioner herein:-

" NOTICE UNDER SECTION 138 OF NEGOTIABLE ACT

Sir,

I am duly instructed by my client Smt. Rikta Pal (Sarkar) to draw your attention about the bouncing of post paid cheque issued by you in favour of my client's husband Late Sankar Prasad Sarkar.

That my client Smt. Rikta Pal (Sarkar) became the holder of the post paid cheque issued by you on the death of her husband on 10.04.2016.

The date of encashment of this cheque was on 02.09.2016.

So, my client waited up to date, and therefore submitted the cheque before the SBI, Belonia Branch, SBI Belonia Branch transmitted the post paid cheque to the Kunjaban Branch of SBI for encashment as your account is lying there.

But on 28.11.2016 my client received a registered letter from the Kunjaban Branch of SBI. It is inform that the cheque could not be encashed as you had insufficient fund in your account.

Hence the said cheque is bounced.

You promised to pay the amount as you had taken from the husband of my client.

It is a breach of promise to you.

I am therefore, requesting you to pay the cheque amount of Rs. 2,10,000/- to my client within 15 days from the date of receipt of this demand notice. Failing which both Criminal and Civil case as well as u/s 138 of NI Act, case will be instituted against you for fraudulent and cheating as aforesaid amount of Rs.2, 10,000/- with an exemplary cost with interest.

Your co-operation is highly solicited.

Thanking you.

Yours Faithfully

Sd/-

(Goutam Pal)

Advocate Belonia"

13. In the deposition of the complainant respondent, she stated that in her presence, the petitioner requested her husband to help him by making a payment of Rs.2,10,000/-. Her husband agreed to the said request and the petitioner agreed to give him a post-dated cheque as a guarantee. Her husband died on 10.04.2016 and on 02.09.2016, she being the successor of the property of her husband deposited the cheque to SBI Belonia Branch for collection of amount of Rs.2,10,000/- but the cheque was dishonored. She then sent a notice on 14.12.2016 for payment. She also stated that after the death of her husband, she represented all other legal heirs of her husband.

It is not mentioned in her cross-examination or in the complaint, as to how her husband arranged for the cash amount of Rs.2,10,000/- She did not submit any document relating to income

tax assessment or payment made by her husband. She did not submit any document relating to the death of her husband. She did not submit any document relating to any authorization from her children to proceed with this case on their behalf.

14. In the fact of the case, it is pertinent to mention the definitions of "drawer", "drawee" "cheque" and "holder" in terms of the Negotiable instrument Act which are as under:-

"Drawer", "Drawee".- The maker of a bill of exchange or cheque is called the "drawer"; the person thereby directed to pay is called the "drawee".

Cheque.—A "Cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

"Holder".- The "holder" of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

Where the note, bill and cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction."

15. It is seen from the legal notice dated 14.12.2016 that there is no whisper about any transaction between the deceased husband and the accused-person herein. The complainant-wife has no knowledge about the said transaction.

16. In the complaint, there is no specific statement that on which date the deceased husband of the complainant respondent had paid the amount to the accused person herein.

17. In the examination-in-chief of the complainant-respondent, there is no specific statement on which date, her deceased husband has paid the amount to the accused person i.e. the petitioner herein.

18. It is also seen that the cheque in question is a post-dated cheque bearing No.927029. According to the complainant, on 12.05.2015, the accused person, i.e. the petitioner herein requested her husband to help him by making payment of Rs.2,10,000/-. Her husband then agreed to pay the accused person. A few days later, the petitioner herein agreed to give her husband a post-dated cheque as a guarantee. The petitioner herein promised to refund the amount within one year and in case of nonpayment, he asked her husband to deposit the cheque on 02.09.2016. In the meantime, her husband died on 10.04.2016 and she presented the cheque on 02.09.2016. There is a huge gap in between and there is

no explanation from the claimant either in the legal notice, complaint or examination-in-chief. The prima facie document that falls for consideration is the legal notice which does not contain any of the said ingredients and the fact and also the knowledge of the complainant about the said transaction.

19. It is seen that the husband of the complainant died on 10.04.2016 and the cheque was presented on 02.09.2016. It is reasonably presumed that once a person dies, automatically, the Bank account is either frozen or closed and no transaction takes place. It is not made clear and nothing is placed on record to say that the complainant was the holder of the account and has been transacting as per the bank norms.

20. This case is purely technical under the N.I. Act, which involves penal action, and unless the facts and allegations are established against the accused person beyond reasonable doubt, the accused person cannot be punished. The issue under the N.I. Act is purely technical in nature and there is no whisper or averment to say that the complainant has the knowledge and she is the authorized or competent legal representative and there are no other legal heirs to claim this particular cheque. The same is also not indicated in the legal notice which falls as a preliminary requirement under Section 138 proceeding.

21. The Judgments cited by the learned Sr. counsel appearing for the complainant respondent are not applicable to the facts of the case. Hence, the orders passed by the Courts below on 27.08.2019 and 23.08.2023 are set aside and this present revision petition is allowed and accordingly disposed of with the above observation.

22. As a sequel, stay if any stands vacated. Pending application(s), if any also stands closed.

Send down the LCRs.

JUDGE

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