**IN THE HIGH COURT AT CALCUTTA**
**CRIMINAL REVISIONAL JURISDICTION**
**APPELLATE SIDE**

**Present:**

**The Hon'ble Justice Ananya Bandyopadhyay**

**C.R.R. 1524 of 2011**

**Soumen Das**
**-Vs-**
**Subhojit Ahmed & Anr.**

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| For the Petitioner (Amicus Curiae) | : Mr. Soham Banerjee |
| For the Opposite Party No. 1 (Amicus Curiae) | : Ms. Pallavi Priyadarshee |
| Heard on | : 07.12.2023, 08.02.2024, 08.04.2024 |
| Judgment on | : 18.07.2024 |

**Ananya Bandyopadhyay, J.:-**

1. The instant revisional application has been filed by the petitioner against the judgment and order dated 10.09.2009 passed by the Learned Additional District and Sessions Judge, Fast Track, 5th Court, Calcutta in Criminal Appeal No.30 of 2009 thereby affirming the conviction by the Learned Metropolitan Magistrate, 10th Court, Calcutta on 18.09.2008 in Complaint Case No. C/3833 of 2003 and completion of the trial held the petitioner guilty of committing offence punishable under Section 138 of the Negotiable Instrument Act and sentenced the petitioner to suffer simple imprisonment for 2 years and to pay a fine of Rs.1,50,000/- within

30 days from the date of passing the order in default to suffer simple imprisonment for another 15 days.

2. The facts and circumstances revealed in the complaint stated as follows:

   a. The complainant supplied computer parts to the accused person (1) vide Invoice No. SSI/91, challan dated 25.05.03 of Rs.54,200/- (2) vide Invoice No. SS/94 challan dated 27.05.03 of Rs.25,000/- and also (3) vide Invoice No. SSI/96, challan dated 27.05.03 of Rs.5,800/- which was duly received by the accused person without any dispute.

   b. In discharge of the said liabilities, the accused person issued two A/C Payee cheques in favour of the complainant. The details of the said cheques are replicated as follows:-

| *Cheque No.* | *Date* | *Amount* | *Drawn on* |
|---|---|---|---|
| *684436* | *28.05.03* | *Rs.30,800/-* | *ICICI Bank Limited, Kolkata Branch* |
| *684434* | *27.05.03* | *Rs.54,200/-* | *ICICI Bank Limited, Kolkata Branch* |
| *Total Amount* | | *Rs.85,000/-* | |

   c. The said cheques were presented for encashment through the banker ABN Amro Bank, Kolkata Branch, within its validity period i.e., on 28.05.03. However the said cheques returned to the complainant being dishonouored by the banker of the accused along with cheque return memo dated 31.05.03 with the remark "Fund insufficient on 02.06.03".

d. Thereafter the complainant through his Ld. Advocate issued legal demand notice dated 10.06.03 under registered post with A/d, demanding the payment of amount of Rs.85,000/- only in respect of the dishonoured cheques within 15 days from the date of receipt of notice. The notice was duly served upon the accused person on 11.06.03.

e. In spite of the service of the above mentioned notice upon the accused person, the same failed to pay the amount of Rs.85,000/- to the complainant committing an offence punishable under Section 138 of the Negotiable Instrument Act.

3. The Learned Chief Metropolitan Magistrate took cognizance and issued process against the petitioner.

4. Charge under Section 138 of the Negotiable Instrument Act was framed against the petitioner to which he pleaded not guilty and claimed to be tried.

5. Considered the rival contentions of both the Learned Advocates appearing as Amicus Curiae to represent the petitioner as well as the opposite party.

6. The grievance of the petitioner as cogitated by the Learned Amicus Curiae representing the petitioner involved the legal sanctity of the filing of the complaint by a constituted attorney who had not been the payee or holder of the cheques in question. The power of attorney by dint of which the complainant Subhajit Ahmed was empowered to institute the complaint case against the petitioner was defective for dearth of legal sanction and,

therefore, the complaint should not have been entertained or taken cognizance of by the Trial Court.

7. The Hon'ble Supreme Court in the decision cited in ***A.C. Narayanan v. State of Maharashtra***[1], observed the following:-

> ***"29.*** *From a conjoint reading of Sections 138, 142 and 145 of the NI Act as well as Section 200 of the Code, it is clear that it is open to the Magistrate to issue process on the basis of the contents of the complaint, documents in support thereof and the affidavit submitted by the complainant in support of the complaint. Once the complainant files an affidavit in support of the complaint before issuance of the process under Section 200 of the Code, it is thereafter open to the Magistrate, if he thinks fit, to call upon the complainant to remain present and to examine him as to the facts contained in the affidavit submitted by the complainant in support of his complaint. However, it is a matter of discretion and the Magistrate is not bound to call upon the complainant to remain present before the court and to examine him upon oath for taking decision whether or not to issue process on the complaint under Section 138 of the NI Act. For the purpose of issuing process under Section 200 of the Code, 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 NI Act. It is only if and where the Magistrate, after considering the complaint under Section 138 of the NI Act, documents produced in support thereof and the verification in the form of affidavit of the complainant, is of*

[1] (2014) 11 SCC 790

*the view that examination of the complainant or his witness(s) is required, the Magistrate may call upon the complainant to remain present before the court and examine the complainant and/or his witness upon oath for taking a decision whether or not to issue process on the complaint under Section 138 of the NI Act.*

***30.*** *In the light of the discussion, we are of the view that the power-of-attorney holder may be allowed to file, appear and depose for the purpose of issue of process for the offence punishable under Section 138 of the NI Act. An exception to the above is when the power-of-attorney holder of the complainant does not have a personal knowledge about the transactions then he cannot be examined. However, where the attorney holder of the complainant is in charge of the business of the complainant payee and the attorney holder alone is personally aware of the transactions, there is no reason why the attorney holder cannot depose as a witness. Nevertheless, an explicit assertion as to the knowledge of the power-of-attorney holder about the transaction in question must be specified in the complaint. On this count, the fourth question becomes infructuous.*

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***33.*** *While holding that there is no serious conflict between the decisions in M.M.T.C. [M.M.T.C. Ltd. v. Medchl Chemicals and Pharma (P) Ltd., (2002) 1 SCC 234 : 2002 SCC (Cri) 121] and Janki Vashdeo Bhojwani [Janki Vashdeo Bhojwani v. IndusInd Bank Ltd., (2005) 2 SCC 217] , we clarify the position and answer the questions in the following manner:*

***33.1.*** *Filing of complaint petition under Section 138 of the NI Act through power of attorney is perfectly legal and competent.*

***33.2.*** *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.*

***33.3.*** *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.*

***33.4.*** *In the light of Section 145 of the NI 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 NI 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 NI Act."*

8. The power of attorney holder appeared before the Court and was examined as PW-1 whereby the power of attorney was exhibited as a document. It was apparent from the course of evidence that the power of attorney holder, i.e. PW-1, had the right to institute the complaint and was well aware of the contents thereof as well as had knowledge of the disputed

transaction between the parties. The plea of the petitioner to have forwarded the cheque as an advance payment bereft of liability was not rebutted under Section 139 of the Negotiable Instruments Act. It was an obligation on the part of the petitioner to rebut the presumption under Section 139 of the Negotiable Instruments Act which had not been complied to.

9. The reasoned orders of both the Trial Courts are devoid of irregularity and impropriety and this Court is not inclined to interfere with the same.

10. In view of the above discussions, the instant criminal revisional application being CRR 1524 of 2011 is dismissed.

11. I record my appreciation for the able assistance rendered by Mr. Soham Banerjee, Learned Advocate as Amicus Curiae for the petitioner and Ms. Pallavi Priyadarshee, Learned Advocate as Amicus Curiae for the Opposite Party No.1 in disposing of the criminal revisional application.

12. Let the copy of this judgment be sent to the Learned Trial Court as well as the police station concerned for necessary information and compliance.

13. All parties shall act on the server copy of this judgment duly downloaded from the official website of this court.

**(Ananya Bandyopadhyay, J.)**