IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Ajay Kumar Gupta

C.R.R. 1825 of 2018
Sandip Kumar Gupta
Versus
The State of West Bengal & Anr.

For the Petitioner	:	Mr. Abhijit Chowdhury, Adv.
Heard on	:	04.04.2025
Judgment on	:	11.06.2025

Ajay Kumar Gupta, J:

1. By filing this Criminal Revisional application under Section 482 read with Sections 397/401 of the Code of Criminal Procedure, 1973, the petitioner/convict challenges the Impugned Judgment and Order dated 16th April, 2018 passed by the Learned Additional District & Sessions Judge, Bench - II, City Sessions Court, Bichar Bhawan, Calcutta in Criminal Appeal No. 20 of 2017 thereby affirming the Judgment and Order dated 29th September, 2016 passed by the Learned Metropolitan Magistrate, 20th Court, Calcutta in Complaint Case No. C/875/2013 under Section 138 of the Negotiable Instruments Act, 1881 (as amended upto date) [hereinafter referred to as 'N.I. Act'].

2. By the said Judgment and Order, the Learned Metropolitan Magistrate convicted the petitioner/accused and sentenced to suffer Simple Imprisonment for one year and also sentenced to pay a fine of Rs. 6,60,000/- (Rupees Six Lakh Sixty Thousand) only, in default, to suffer Simple Imprisonment for another six months. If the fine amount is paid, then out of the same, Rs. 6,00,000/- (Rupees Six Lakh) only be given to the complainant as compensation within a period of 90 days from the date of delivery of the said Judgment and Order.

3. The brief facts are relevant for the purpose of disposal of the present application as under: -

3a. The opposite party no. 2/complainant had alleged, *inter alia,* that an agreement dated 26.06.2013 was entered into between the complainant and the petitioner. In terms of the said agreement, the petitioner was required to pay a sum of Rs. 4,40,000/- as part of the second instalment to the opposite party no. 2 for which an account payee cheque being No. 299019 dated 29.06.2013 was issued in favour of the opposite party no. 2. However, upon presentation, the said cheque was dishonoured with the remarks “Insufficient Funds”. It was intimated to the opposite party no. 2 by the bank on 04.09.2013 and in view of the provisions of the Act, a demand notice was issued vide Letter dated 3rd October, 2013 but no payment was made by the petitioner/convict.

3b. In view of the above, petitioner has committed an offence under Section 138 of the N.I. Act and, for that, an application under Section 200 of the CrPC was filed by the complainant/opposite party no. 2 against the petitioner. In the said proceeding, the Learned Chief Metropolitan Magistrate, Calcutta took cognizance of the offence under Section 138 of the N.I. Act and transferred the case before the Learned Metropolitan Magistrate, 20th Court, Calcutta for its trial and disposal.

3c. Upon completion of evidence, the petitioner was examined under Section 313 of the CrPC. After hearing the parties and assessment of the oral and documentary evidence, the Learned Trial Court finally came to a finding that the petitioner is guilty of offence punishable under Section 138 of the N.I. Act and as such convicted the petitioner and sentenced him as aforesaid.

3d. Being aggrieved by and dissatisfied with the judgment and order dated 29th September, 2016 passed by the Learned Trial Court, the petitioner preferred an appeal before the Learned Sessions Judge and the same was taken up for hearing by the Learned Additional District and Sessions Judge, Bench – II, City Sessions Court, Bichar Bhawan, Calcutta and finally dismissed the appeal affirming the judgment and order passed by the Learned Trial Court and further directed the appellant/petitioner herein to appear before the Learned Trial Court within one month from the date of the order, in default, the Learned Trial Court is at liberty to take steps for execution of sentence.

3e. Feeling aggrieved with the said judgment and order of the Learned Judge, petitioner filed this Criminal Revisional application with a contention that: -

> "i. *M/s. Aryavarat Mercentile Pvt. Ltd. deals in the business of Developer and the aforesaid company entered into an agreement with the Petitioner herein for dismantle and clearance of the debris coming out of the premises no. 5A, Jagan Nath Sur Lane, Police Station-Burtolla, Kolkata-700006 and will sell and take possession of all materials, Fixtures and fittings whatever comes out from the two storied building situated at the above stated premises.*

ii. The petitioner signed the said agreement at a consideration of Rs. 8,75,000/- (Rupees Eight Lakh Seventy-Five Thousand) payable in two parts viz an amount of Rs. 5,00,000/- (Rupees Five Lakhs only) at the time of signing of the aforesaid agreement and balance Rs. 3,75,000/- (Rupees Three Lakh Seventy-Five Thousand only) before 50% completion of the entire work.

iii. That the petitioner deposed as D.W. 1 that the petitioner had entered into an agreement with M/s. Aryavarat Mercentile Private Limited being a company duly registered under the relevant provisions of the Companies Act, 1956 as amended up to date and not with the Opposite Party No. 2/Complainant in his personal capacity.

iv. That the said agreement dated 26.03.2013 (Ext. 1) was signed by the opposite party no. 2 in the capacity of a director of the company being M/s. Aryavarat Mercentile Private Limited whom he was representing and not in his personal capacity.

v. That there was no personal agreement with the said opposite party no.2/complainant, hence the question of any legally enforceable debt towards him in discharge of which the security cheque was given does not arise. Hence the allegation of the petitioner issuing the said cheque in valid discharge of his legal debt is vague and for reasons best known to him.

vi. That in the aforesaid agreement certain alternations had been made of which the petitioner had no knowledge and the petitioner did not receive any work order in connection with the said agreement. The petitioner further stated that the petitioner paid Rs.5,00,000/- (Rupees Five Lakh Only) in cash and handed over a signed blank security cheque to the company.

vii. That the aforesaid contract was not executed and the said M/s. Aryavarat Mercentile Private Limited and its directors assured to compensate the advance received by the company with some other site as the petitioner works on different projects within the West Bengal.

viii. That surprisingly the said cheque body was filled up by the opposite party no. 2/complainant in his personal name and presented the same for encashment, without any previous intimation to the petitioner, that too in his personal capacity.

ix. That the petitioner paid Rs. 5,00,000/- as advance at the time of signing of the agreement could not be disproved by the complainant hence it could be concluded that initially there was a payment of Rs. 5,00,000/- at the time of signing of the agreement with the company. In the aforesaid circumstance the amount of figure entered into the said cheque has not been sustained and could be clearly an indication to the foul played by the opposite party no.2/complainant. As the *entire contract was of Rs. 8,75,000/- and if the petitioner paid an amount of Rs. 5,00,000/- as advance then the remaining due amount would be only Rs. 3,75,000/-. Hence, the question of issuing a cheque of Rs. 4,40,000/- does not arise. Further in the agreement the said opposite party no.2/ complainant had by his own whims changed the figures to match the cheque amount and claimed the changes were duly informed to the petitioner which is baseless and without any cogent proof.*

x. The prima-facie fact should be considered in a proceeding under section 138 of the Negotiable Instruments Act if there is any genuine liability/debt against which the cheque was issued or not. In the present case the opposite party no.2 has no direct business relation with the petitioner, and taking the allegation to be gospel truth but not admitting then also the legal debt if any would be of M/s. Aryavarat Mercentile Private Limited and not the Opposite Party no. 2 / Complainant.

xi. The Opposite Party No. 2 had failed to prove any liability of the Petitioner against him at the time of issuing of cheque. There was no liability towards the Opposite Party No. 2 at any point of time, hence the basic ingredient to initiate a proceeding under section 138 of the Negotiable Instruments Act is that cheque is to be issued for a debt which is missing in the present case."

Hence, this application.

4. None appears on behalf of the opposite parties despite general notice published in local newspaper. Accordingly, the matter has been heard *ex parte*.

SUBMISSION ON BEHALF OF THE PETITIONER:

5. Learned counsel appearing on behalf of the petitioner submitted that in fact, the liability was against the company. However, the complainant has only made the petitioner as an accused. The alleged agreement was executed between two companies. However, subsequently, the de-facto complainant himself has made some modification/alteration in the payment schedule by overwriting certain terms without any consent and/or prior communication to the petitioner. Furthermore, the opposite party no. 2 had filed the complaint under Section 200 of the CrPC on his own personal capacity without showing any authority to file complaint on behalf of the company. Furthermore, the complainant also failed to substantiate the facts that the cheque was issued in his favour in discharge of legally enforceable debt or liability. The said vital fact was not considered either by the Learned Trial Court or by the Learned Appellate Court while deciding the case.

5a. The learned counsel further submitted that being a director himself cannot file complaint under Section 200 of the CrPC in individual capacity unless duly authorized by a resolution passed by the Board of Directors. Therefore, the proceeding is liable to be vitiated. Learned counsel has placed reliance of judgments to bolster of his submissions as under: -

> *i. John K. Abraham Vs. Simon C. Abraham and Another[1] particularly paragraphs 6 and 7;*
>
> *ii. Indus Airways Private Limited and Others Vs. Magnum Aviation Private Limited and Another[2] particularly paragraph 15;*
>
> *iii. A.C. Narayanan Vs. State of Maharashtra and Another WITH G. Kamalakar Vs. Surana Securities Limited and Another[3] particularly paragraph 28.*

5b. In ***John K. Abraham v. Simon C. Abraham and Another***, the Hon'ble Supreme Court held in paragraph nos. 6 and 7 as under:-

> *"**6.** When we examine the case of the respondent complainant as projected before the learned Chief Judicial Magistrate and the material evidence placed*

[1] (2014) 2 SCC 236;
[2] (2014) 12 SCC 539;
[3] (2014) 11 SCC 790.

before the trial court, we find that the trial court had noted certain vital defects in the case of the respondent complainant. Such defects noted by the learned Chief Judicial Magistrate were as under:

> ***6.1.*** *Though the respondent as PW 1 deposed that the accused received the money at his house also stated that he did not remember the date when the said sum of Rs 1,50,000 was paid to him.*
>
> ***6.2.*** *As regards the source for advancing the sum of Rs 1,50,000, the respondent claimed that the same was from and out of the sale consideration of his share in the family property, apart from a sum of Rs 50,000, which he availed by way of loan from the co-operative society of the college where he was employed. Though the respondent stated before the court below that he would be in a position to produce the documents in support of the said stand, it was noted that no documents were placed before the court below.*
>
> ***6.3.*** *In the course of cross-examination, the respondent stated that the cheque was signed on the date when the payment was made, nevertheless he stated that he was not aware of the date when he paid the sum of Rs 1,50,000.*
>
> ***6.4.*** *According to the respondent, the cheque was in the handwriting of the accused himself and the very next moment he made a contradictory statement that the cheque was not in the handwriting of the appellant and that he (complainant) wrote the same.*
>
> ***6.5.*** *The respondent also stated that the amount in words was written by him.*

> ***6.6.*** *The trial court has also noted that it was not the case of the respondent that the writing in the cheque and filling up of the figures were with the consent of the appellant-accused.*

> ***7.*** *In the light of the above evidence, which was lacking in very many material particulars, apart from the contradictions therein, the trial court held that the appellant was not guilty of the offence alleged against under Section 138 of the Negotiable Instruments Act and acquitted him."*

5c. In ***Indus Airways (P) Ltd. and Ors. v. Magnum Aviation (P) Ltd. and Anr.***, the Hon'ble Supreme Court held in paragraph no. 15 as under:-

> *"**15.** The above reasoning of the Delhi High Court is clearly flawed inasmuch as it failed to keep in mind the fine distinction between civil liability and criminal liability under Section 138 of the NI Act. If at the time of entering into a contract, it is one of the conditions of the contract that the purchaser has to pay the amount in advance and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Section 138. For a criminal liability to be made out under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. We*

are unable to accept the view of the Delhi High Court that the issuance of cheque towards advance payment at the time of signing such contract has to be considered as subsisting liability and dishonour of such cheque amounts to an offence under Section 138 of the NI Act. The Delhi High Court has travelled beyond the scope of Section 138 of the NI Act by holding that the purpose of enacting Section 138 of the NI Act would stand defeated if after placing orders and giving advance payments, the instructions for stop payments are issued and orders are cancelled. In what we have discussed above, if a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise and material or goods for which purchase order was placed is not supplied by the supplier, in our considered view, the cheque cannot be said to have been drawn for an existing debt or liability."

5d. In ***A.C. Narayanan v. State of Maharashtra and Anr. WITH G. Kamalakar Vs. Surana Securities Limited and Another***, the Hon'ble Supreme Court held in paragraph no. 28 as under:-

*"**28.** The power-of-attorney holder is the agent of the grantor. When the grantor authorises the attorney holder to initiate legal proceedings and the attorney*

holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder and not by the attorney holder in his personal capacity. Therefore, where the payee is a proprietary concern, the complaint can be filed by the proprietor of the proprietary concern, describing himself as the sole proprietor of the payee, the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor, and the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor. However, we make it clear that the power-of-attorney holder cannot file a complaint in his own name as if he was the complainant. In other words, he can initiate criminal proceedings on behalf of the principal."

DISCUSSIONS AND FINDINGS BY THIS COURT:

6. Considering the submissions made by the learned counsel appearing on behalf of the petitioner, judgment relied upon by the petitioner and on perusal of the record, this Court finds M/s. Aryavarat Mercentile Pvt. Ltd deals in the business of real estate development. The said company had entered into an agreement with the Petitioner's company herein for dismantling and removal of the debris arising out of the premises no. 5A, Jagan Nath Sur Lane, Police Station- Burtolla, Kolkata-700006. In terms of the agreement, the petitioner will sell and take possession of all materials, Fixtures and fittings from the two storied building situated at the above stated premises.

7. The petitioner signed the said agreement at a consideration amount of Rs.8,75,000/-(Rupees Eight Lakh Seventy-Five Thousand) which was payable in two parts viz an amount of Rs.5,00,000/-(Rupees Five Lakhs only) at the time of signing of the aforesaid agreement and balance Rs.3,75,000/-(Rupees Three Lakh Seventy-Five Thousand only) before 50% completion of the entire work.

8. According the Petitioner no formal work order was issued by the Company for execution of the work as such contract was never performed and, thus, there is no question to pay the debt or liability as no legally enforceable debt or liability existed between the petitioner and complainant personally.

9. The Petitioner contended that he had paid a sum of Rs. 5,00,000/- on the date of execution of the agreement while the remaining amount of Rs. 3,75,000/- was to be paid by the petitioner in second instalment. For this purpose, a blank cheque was issued in favour of the company as security, the same was misused by the complainant himself by inserting his own name as payee and presenting it for encashment, despite the absence of any authority conferred upon him by a resolution of company's Board of Directors.

10. The complainant also filed complaint case under Section 138 of the N.I. Act in his individual name without any authority either by way of authorisation of Board of Directors or by power of attorney, as such complaint is not maintainable. However, both the trial court as well as appellate court did not consider the legal provision while disposing the case in hand and convicted the Petitioner and sentenced him as aforesaid.

11. From the copy of agreement (Ext.1) it is revealed that the same was executed on 26.06.2013 and two corrections are found in the page no.2 with regard to payment of Rs.4,35,000/- in place of Rs.5,00,000/- and at the same time Rs.4,40,000/- in place of Rs.3,75,000/- to be paid before 50% completion of the entire work. These corrections bear only the initial of the director, Bimal Dey. The agreement, therefore, was marked as exhibit subject to objection.

12. Even if such facts of correction are accepted as genuine then how could the petitioner issue cheque within three days of execution of agreement i.e. on 29.06.2013 even though the condition of payment of 2nd instalment was before 50% completion of the entire work? This defies logic and casts serious doubt on the genuineness of the transaction.

13. From the evidence of P.W.1, Bimal Dey, it appears he failed to establish when a formal work order was issued by the company to the petitioner and when work was completed. During cross examination he narrated 90% job completed by the petitioner/accused and took away the entire valuable and went away after giving the cheque to him. He further stated he cannot say when, on which date he received the cheque. The accused had given him the cheque after demolishing the building. If that be so then how can a prudent man accept, that the demolition work of a two storied building has been done within three days of execution of the agreement and all valuables were taken away because the cheque reflected the date of issue as on 29.06.2013, just three days from the execution of the agreement.

14. Furthermore, it is not disputed that the agreement was between the two companies. Bimal Dey was one of the directors of M/s. Aryavarat Mercentile Pvt. Ltd. During deposition he also admits there were two other directors, namely Nirmal Dey and Rajib Kumar Saha, excluding him in the company. He further admits he did not file any resolution of Board of directors to show authorisation to file or initiate proceeding under Section 138 of the N.I.Act. In addition, name of the payee in the cheque reflected Bimal Dey though the agreement was made between the two companies. There was no direct dealing with Bimal Dey. He was only one of the directors of the company so how could the cheque be issued in his personal name and how could he file a case against the Petitioner without authorisation or power of attorney are questions that arise from such facts.

15. It is an admitted fact that the complainant/Bimal Dey had filed complaint against the petitioner without any authorisation or power of attorney. Being a director of the company, he needs authorisation or power of attorney to file or to initiate the proceeding under Section 138 of the N.I. Act as the agreement was executed between the petitioner's company and the company, namely, *M/s. Aryavarat Mercentile Pvt. Ltd.* In this regard, the judgment relied upon by the petitioner passed in the case of ***A.C. Narayanan Vs. State of Maharashtra and Another WITH G. Kamalakar Vs. Surana Securities Limited and Another*** is squarely applicable. In this case, the Hon'ble Supreme Court makes it clear that power of attorney holder cannot file a complaint in his own name as if he was the complainant. In other words, he can initiate criminal proceeding on behalf of the principal. But, in the present case, neither authorisation nor power of attorney was granted by the concerned company. He himself initiated a proceeding under Section 138 of the N.I. Act in his own name claiming that he is the payee and holder of the cheque though he was not the direct party involved in the agreement. There was no liability towards Bimal Dey at any point of time. Therefore, basic ingredient of issuing cheque in discharge of legally enforceable debt or other liability is missing.

16. This Court is conscious of the fact that lack of authorisation is a curable defect in view of the decisions passed in ***M.M.T.C. Ltd. Vs. Medchl Chemicals and Pharma (P) Ltd.***[4] where the Hon'ble Supreme Court held that the only eligibility criteria prescribed by Section 142 of N.I. Act for maintaining a complaint under Section 138 of N.I. Act is that the complainant must be the payee or the holder in due course. However, in the case of a company, if the de-facto complainant did not have authority in the initial stage, still the company can, at any stage, rectify the defect at a subsequent stage and the company can send a person who is competent to represent it. However, in the present case, no such steps were taken by the company/complainant to cure the defect.

---

[4] (2002) 1 SCC 234

17. Even a power of attorney holder or authorised person can file and pursue a complaint on behalf of the principal and in the name of actual owner or person they represent and not in their personal name but here the complainant filed case in his individual capacity, which is not permissible in law.

18. In the light of above discussions and the facts and circumstance of this case, this Court is of the view that both the Learned Courts below committed serious error while deciding the case. Therefore, there is need to interfere with the concurrent findings of both the Learned Courts below.

19. Accordingly, **CRR No. 1825 of 2018** is **allowed**. Connected applications, if any, are also, thus, disposed of.

20. Consequently, the Judgment and Order dated 16th April, 2018 passed by the Learned Additional District & Sessions Judge, Bench - II, City Sessions Court, Bichar Bhawan, Calcutta in Criminal Appeal No. 20 of 2017 whereby confirming the Judgment and Order dated 29th September, 2016 passed by the Learned Metropolitan Magistrate, 20th Court, Calcutta in Complaint Case No. C/875/2013 is hereby set aside.

21. Let a copy of this Judgment be sent to the Learned Trial Court for information and taking necessary steps in accordance with law.

22. Interim order, if any, stands vacated.

23. All parties will act on the server copies of this Judgment uploaded from the official website of this Court.

24. Urgent photostat certified copy of this Judgment, if applied for, is to be given as expeditiously to the parties on compliance of all legal formalities.

(Ajay Kumar Gupta, J)

P.A.