21.08.2025
SL No.34-35
Court No.32
S.Gayen

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

CRR 4196 of 2024
with
CRR 4198 of 2024

Bimal Kumar Dutt
Versus
The State of West Bengal & Anr.

Mr. Sabir Ahmed
Mr. Gaurav Purkayastha
Mr. Dhiman Banerjee

...for the Petitioner

Mr. Prasenjit Burman
Mr. Swapnesh Mallik
Ms. Payal Koley

...for the Opposite Party No.2

1. The learned counsel appearing on behalf of the parties in respect of both the revisional applications are present.

2. Both the revisional applications are being taken up together for disposal by this common order because of identical parties and same cause of action, i.e. issuance of separate cheques by the petitioner in favour of the opposite party No.2 being the cheque No. 465079 dated 30th June, 2022 amounting to Rs. 9,50,000/- in connection with CRR 4196 of 2024 and cheque No. 465080 dated 5th May, 2023 amounting to Rs. 9,50,000/- in connection with CRR 4198 of 2024.

3. Briefly stated, the petitioner in connection with both the revisional applications participated in one auction proceeding before the

Hon'ble High Court in response to an advertisement dated 17th September, 2018 published in well circulated newspapers with respect to four cottah ten chittacks forty-three square feet land situated at Premises No. 197, Bipin Behari Ganguly Street, Post Office Bowbazar, Police Station Muchipara, Kolkata 700012 within Ward No. 48 under the Kolkata Municipal Corporation.

4. The petitioner purchased the said property in an auction under the supervision of the Hon'ble High Court in lieu of consideration to the tune of Rs. 92 lakhs in dilapidated condition and occupied by several tenants.

5. The opposite party No.2 approached the petitioner to assist for vacating the occupiers/tenants from the house of the said property. There was also an agreement that the opposite party No.2 would also help him in construction of multistoried building at the said property in future and to add to that he was also to find out prospective purchaser in respect of the said proposed multistoried building in lieu of brokerage to the tune of Rs. 50 lakhs. Accordingly, the agreement dated 18th September, 2019 was executed between the petitioner and the opposite party No.2.

6. In spite of no vacating of tenants/occupiers nor construction of multistoried building, the opposite party No.2 deposited two cheques with his banker for encashment but those cheques were dishonoured with return memo dated 26th July, 2022 with remark 'account closed'. The opposite party No.2 served a demand notice on 10th August, 2022 and ultimately filed one case under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred

to as the NI Act) which was transferred to the learned Judicial Magistrate, Bidhannagar for disposal.

7. Being aggrieved by and dissatisfied with the said action on the part of the opposite party No.2, the petitioner filed the revisional applications being No. CRR 4196 of 2024 involving cheque No. 465079 dated 30th June, 2022, for quashing the proceeding being case No. C-3910 of 2022 particularly the order dated 14th March, 2024 passed by the learned Judicial Magistrate, Bidhannagar and CRR 4198 of 2024 involving cheque No. 465080 dated 5th May, 2023 for quashing the proceeding being case No. C-3367 of 2022 particularly the order dated 16th August, 2024 passed by the learned Additional Chief Judicial Magistrate, Bidhannagar whereby both the applications filed by the petitioner challenging the maintainability of the proceedings were rejected.

8. At the very outset, learned counsel appearing for the petitioner has submitted that the opposite party No.2 simultaneously pried into the track of arbitration as well as the complaint under Section 138 of NI Act. Learned counsel for the peititoner has referred to the arbitral award passed by the Sole Arbitrator regarding identical claim for brokerage. It is also submitted that the Hon'ble High Court invoked the provision of Arbitration and Conciliation Act and on prayer of the opposite party No.2 for appointment of Arbitrator, a Sole Arbitrator was appointed. Learned Arbitrator heard both sides and recorded evidences of the parties and negated the claim of the opposite party No.2.

9. Learned counsel appearing for the petitioner has also submitted that the opposite party No.2 did not provide any assistance to the

petitioner as per agreement, therefore, the question of brokerage does not arise. From that point of view, according to learned counsel for the petitioner, there is no legally enforceable debt in terms of explanation to Section 138 of the NI Act.

10. In support of his contention, he relied on a case of ***Indus Airways Private Limited vs. magnum Aviation Private Limited*** reported in ***(2014) 12 SCC 539***, wherein the Hon'ble Apex Court handed down the following principle which reads as follows:-

> *"The Explanation appended to Section 138 explains the meaning of the expression "debt or other liability" for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The Explanation leaves no manner of doubt that to attract an offence under Section 138, there should be a legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawl of the cheque in discharge of an existing or past adjudicated liability is sine qua non for bringing an offence under Section 138. 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, in our considered view, the cheque cannot be held to have been drawn for an existing debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability."*

11. *Per contra*, learned counsel appearing for the opposite party No.2 has contended that the opposite party No.2 performed his part in terms of agreement executed between the parties, particularly assisting the petitioner to purchase the property in question as well as by finding out prospective purchaser for the building yet to be constructed. It is further submitted that the cheques were

issued against legally enforceable debt and therefore, this Court has no other option but to presume that the cheques were issued against legally enforceable debt in terms of the provision of Section 139 of the NI Act.

12. I have had the opportunity to go through the award passed by the Sole Arbitrator furnished through the supplementary affidavit filed at the behest of the petitioner. On careful scrutiny of the entire award, I find that the same issue of brokerage was preferred before the learned Arbitrator by the claimant/opposite party No.2 herein. The learned Arbitrator examined all evidences even quoting the questions and answers and at the end, learned Arbitrator came to his finding by referring to answers given by the claimant/opposite party No.2 herein to question Nos. 45, 47 and 63 and held that there can be no entitlement to commission/brokerage merely for searching buyers and as in terms of agreement claimant can claim brokerage only after rendering necessary service.

13. On careful perusal of the agreement, it is found that the opposite party No.2 assisted the petitioner for purchasing the said premises and again the opposite party No.2 agreed to take necessary endeavour for booking flats in the proposed multistoried building which was to be constructed on the said premises.

14. Therefore, according to the agreement, the opposite party No.2 assisted in purchase of the premises and he has to find out the prospective purchaser for the flats to be constructed on the said premises.

15. It is not disputed that both the cheques involving the revisional applications *qua* CRR 4196 of 2024 and CRR 4198 of 2024 by the petitioner in favour of the opposite party No.2. It is also not disputed that both cheques were deposited with the bank by the opposite party No.2 and thus the cheques were dishonoured. A demand notice was served and within the statutory period the application under Section 138 of the NI Act was filed. It would be profitable to reproduce the Section 138 of the NI Act at this Stage:

> *"**138. Dishonour of cheque for insufficiency, etc., of funds in the account.—**Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for 4 [a term which may be extended to two years'], or with fine which may extend to twice the amount of the cheque, or with both:*
>
> *Provided that nothing contained in this section shall apply unless—*
>
> *(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*
>
> *(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, 5 [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*
>
> *(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."*

16. Explanation to Section 138 of the NI Act clearly interprets that debt or other liability means a legally enforceable debt or other liability. Therefore, I am to find out whether both the cheques were issued against any legally enforceable debt or not.

17. From the arbitral award it appears that the opposite party No.2 made a claim for brokerage before the learned Arbitrator as well, where the learned Arbitrator discussed the evidences and recorded his finding to the effect that there was no existence of liability. Here in this case, admittedly, the petitioner purchased the premises in question through court sale. Therefore, I can presume that the opposite party No.2 assisted the petitioner in purchasing the premises in question in lieu of brokerage to the tune of Rs. 50 lakhs.

18. So far as the claim of brokerage for assisting the petitioner to sell out the flats of new building to be constructed on the said premises is concerned, it is also not disputed that no construction of multistoried building has yet been started and even the property is still under occupation of tenants.

19. Therefore, on that point of view, it cannot be presumed that the opposite party No.2 assisted the petitioner in selling out the flats in the new constructed building.

20. The application under Section 138 of the NI Act is only maintainable in respect of cheques issued against legally enforceable debt or other liability. In the case at hand, I do not find anything to hold that the cheques in connection with both

the revisional applications where ever issued against any legally enforceable debt or liability.

21. In light of the aforesaid discussion as well as the principle handed down by the Hon'ble Apex Court in ***Indus Airways Private Limited*** (supra), I have no other alternative but to quash the proceeding in connection with case No. C-3910 of 2022 and in connection with case No. C-3910 of 2022 along with all subsequent orders passed by the learned Magistrate.

22. With the above observations, both the revisional applications stand disposed of and connected application, if any, also stands disposed of accordingly.

23. All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

24. Urgent Photostat certified copy, if applied for, be given to the parties upon compliance with all requisite formalities.

(Bibhas Ranjan De, J.)