

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION

Present
Mr. Justice Md. Salim
And
Mr. Justice Shahed Nuruddin

CRIMINAL MISCELLANEOUS CASE NO.37122 OF 2022

Md. Mosharaf Hossain
.....Accused-Petitioner.
- VERSUS-
The State and another
.....Opposite Parties.

Mr. Md. Hafizur Rahman, Advocate
----- For the petitioner.
Mr. S.M. Shahjahan, Senior Advocate with
Mr. Mustasin Tanzir, Advocate
----- For the opposite party No.2.

Mr. B.M. Abdur Rafell, DAG with
Mr. Binoy Kumar Ghosh, A.A.G.
Mr. A.T.M. Aminur Rahman (Milon), AAG
Ms. Lily Rani Saha, AAG
.....For the State.

Heard on 23.11.2023, 29.11.2023 and 10.01.2024.

Judgment on 10.01.2024.

MD. SALIM, J:

By this Rule, the opposite parties were asked to show cause as to why the proceedings of Sessions Case No.1373 of 2021 arising out of C. R. Case No.779 of 2021 under Section 138 of the Negotiable Instrument Act, now pending

before the Joint Sessions Judge, 3rd Court, Narayanganj should not be quashed.

Facts in a nutshell for disposal of this Rule are that in order to discharge the loan liability the accused petitioner gave two cheques to M/S Harun and brothers for repayment of Tk.10,0000/ and Tk. 10,00000/- respectively. The complainant-opposite party No. 2 namely Ismail Hossain deposited both cheques to the bank for encashment and was dishonored on the ground of insufficiency of funds. Thereafter, the complainant served a notice asking the accused petitioner to pay the money but the accused petitioner did not pay the same. Thus the complainant preferred the case under section 138 of the Negotiable Instruments Act, of 1881 against the accused petitioner.

The learned Magistrate took cognizance of the offense and subsequently, the charge was framed against the accused petitioner by the learned Joint Sessions Judge, 3rd Court, Narayanganj.

The accused petitioner after obtaining bail from the court below preferred the instant case before this court and obtained the Rule and an order of stay.

Mr. Md. Hafizur Rahman Khan, the learned counsel appearing on behalf of the accused petitioner submits that the cheque in question was issued in the name of M/S Harun and Brothers where Mr. Md. Rafiqul Islam is the proprietor of the company but the petition of the complaint was filed by one Md. Ismail Hossain, Assistant Manager of M/S Harun and Brothers does not hold any power to be a complainant of the instant case. So, the proceeding of the instant case is liable to be quashed as it is not tenable as per the provision so enumerated in section 141 of the Negotiable Instruments Act, of 1881. In his contention, he referred to the case of Md. Nur Hossain Vs Md. Alamgir Alam reported in 37 BLD (AD) 202.

On the contrary, Mr. S. M. Shahjahan the learned counsel appearing on behalf of the complainant-opposite party opposes the contention so made by the learned counsel for the accused petitioner and submits that the trial of the instant case had already been started and one witness was examined on behalf of the prosecution and as such at this stage there is no provision to quash proceedings of a case. In his contention, he referred to a case of Gulam Sarwar Hero Vs the State reported in 13 MLR (AD) 103.

Mr. B.M. Abdur Rafell, DAG the learned Deputy Attorney General for the state adopted the submission made by Mr. Shahjan the learned counsel for the complainant-opposite party.

We have heard the learned Counsels for both parties and anxiously perused the petition of complaint, related documents, and other materials on the record.

Now in order to appreciate the submission advanced at the bar let us examine the relevant law in the context of the facts of the present case.

Section 9 of the Negotiable Instrument Act provides that –“ Holder in due course” means any person who for consideration becomes the possession of a promissory note, bill of exchange, or cheque if payable to bearer, or the payee, or indorse thereof, if payable to order, before it became overdue, without notice that the title of the person from whom he derived his own title was defective.

Explanation- For the purposes of this section the title of a promissory note, bill of exchange, or cheque is defective when he is not entitled to receive the amount due thereon by reason of provisions in section 58”.

It manifests that a holder in due course is someone who becomes the owner of a cheque, bill of exchange, or

promissory note before it becomes overdue. The holder must have received the note, bill, or cheque for consideration, and without notice that the title of the person they received it from is defective.

In order to appreciate the rival contentions we have to note a few admitted facts. It is an admitted fact that the complaint in question was filed by Mr. Ismail Hossain though the cheques were issued in the name of M/S Harun and brothers. It is also admitted facts that along with the complaint no valid power of attorney or resolution of the company was filed to show that Mr. Ismail Hossain as Assistant Manager of the M/S Harun and Brothers was authorized to file the complaint.

Section 141(a) provides that- “ no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque”.

It manifests that the offense under section 138 is made a non-cognizable offense that can be taken cognizance of only upon a complaint made by the payee or the holder in due course.

Nevertheless, in the present case fulfillment of the requirement of the law, the complaint should have been filed by M/S Harun and Brothers who is a holder in due course of the cheques. The Manager or Assistant who was not duly authorized to file a complaint cannot be construed to be a person holder in due course of the cheques as per the proviso so enumerated in section 9 of the Negotiable Instrument Act. However, a company being a corporate body breathes its life only through an authorized officer/agent, or authorized person. This view gets support from the case of Md. Nur Hossain (supra) wherein our Appellate Division held that-

Admittedly, the 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 offense 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, the petition of complaint has neither been filed by the payee nor by the “holder in due course”. The complainant is an outsider. He had no connection with the instant transaction. He is not the holder of the cheque for consideration and the cheque was

not transferred to him. That is, the statutory requirements as provided in sections 138 and 141 of the Negotiable Instrument Act have not been complied with in respect of this case while filed the same.

We have also examined “Annexure-B” which is simply a “MEMO” without the date and seal of the company. However, for the sake of argument if we consider the same as a letter of authorization and through it the holder of the cheques M/S Harun and Brothers authorized its Assistant Manager Ismail Hossain to file the instant case on behalf of the company. But the law does not allow him to file the instant case as a “complainant” because he is not the holder of the cheque for consideration rather he is an outsider. Therefore, the statutory requirements as provided in sections 138 and 141 of the Negotiable Instrument Act, 1881 have not been complied with in respect of this case while filing the same.

The case of Golam Sarwar Hiru (supra), wherein our Appellate Division observed held that—

“The High Court Division found that the trial of the said case had already started and witnesses were examined on behalf of the prosecution. Having considered this aspect, the High Court Division

refused to quash the proceeding. For this reason, we do not find any legal infirmity for our interference with the High Court Division”.

We fully agreed with the principle of law enunciated in the cited case. Now, the question is how far these are applicable in the facts and circumstances of the present case, Each case has its own merit, and the principle of law should not be applied mechanically, rather it should be applied considering the facts and circumstances and its own merit. In the instant case, we have already stated that in this present case, the petition of complaint was filed by a person who is not a holder of the cheque for consideration and that the cheque was not transferred to him rather he is an outsider. That is, the statutory requirements as provided in sections 138 and 141 of the Negotiable Instrument Act, 1881 have not been complied with in respect of this case while filing the same. Therefore, the proceeding of the instant case can be ruled out in the facts and circumstances of the case. Consequently, the above-cited decision is not applicable in the present case.

In view of the above facts and circumstances, it appears to us that the proceeding of the instant case is a sheer abuse of process of the court. Therefore, the

proceeding of the instant case is liable to be quashed to secure the ends of justice.

Resultantly, the Rule is made absolute.

Let the proceeding of Sessions Case No.1373 of 2021 arising out of C. R. Case No.779 of 2021 under Section 138 of the Negotiable Instrument Act, now pending before the Joint Sessions Judge, 3rd Court, Narayanganj is hereby quashed.

The office is directed to communicate the judgment at once.

SHAHED NURUDDIN, J

I agree