

Present

Mr. Justice Md. Rezaul Hasan

And

Mrs. Justice Fahmida Quader.

Criminal Misc. Case No. 5474 of 2024.

Md. Khalis Miah.

.....Accused Petitioner.

-Versus-

The State and another.

..... Opposite-Parties.

Mr. Humayun Kabir Bulbul with

Mr. Mahbub Shafique with

Mr. Md. Nizam Khan, Advocates.

.....For the petitioner.

Mrs. Yesmin Begum Bithi, D.A.G. with

Mr. Md. Mujibur Rahman, A.A.G.

Mr. Md. Shahabuddin Ahammad Tipu,

A.A.G. with

... For the O.P. No. 1.

Mr. ZainulAbedin with

Mr. Md. Anisur Rahman with

Mr. Md. Towhidul Islam, Advocates.

.....for the O.P. No. 2.

**Heard on 16.05.2024, 28.05.2024 and
Judgment on 29.05.2024.****Md. Rezaul Hasan, J.**

On an application under section 561A of the Code of Criminal Procedure, 1898, this Rule was issued calling upon the opposite parties to show cause as to why the impugned proceedings of Sessions Case No. 855 of 2023, arising out of C.R. Case No. 113 of 2022 (Osmaninagar) under section 138 of the Negotiable Instruments Act, 1881, pending in the court of Joint Sessions Judge, 3rd

Court, Sylhet, should not be quashed and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. The present opposite party No. 2, the attorney of Md. Kaptan Miah, as complainant, filed C.R. Case No. 113 of 2022, before the Senior Judicial Magistrate, Cognizance Court No. 1, Sylhet, against the accused-petitioner under section 138 of the Negotiable Instruments Act, 1881, since the cheque No. PCD/A No. 6155817 dated 01.02.2022 for Tk. 57,60,365/ drawn on Prime Bank Limited in favour of the opposite party No. 2 in order to repay the debt owed by the accused-petitioner. It has also been alleged that, the said cheque was placed for encashment on 01.02.2022 and the same was dishonoured on 03.02.2022 with a remark “account closed”. Thereafter, the said cheque was again placed for encashment on 07.03.2022, as requested by the accused-petitioner, but it was again dishonoured with the remark “account closed”. Then, the opposite party No. 2 had issued a demand notice on 20.03.2022, giving 30 days time to repay the amount in question as mentioned in the cheque, but the accused-petitioner did not pay the same.

The complainant has complied with the formalities, as stated, and has filed this case.

3. The Senior Judicial Magistrate, Cognizance Court No. 1, Sylhet, has dismissed the case with an observation that the complainant had no authority to file the case, vide its order dated 24.05.2022.
4. Against the said order dated 24.05.2022, the complainant-opposite party No. 2, filed Criminal Revision No. 162 of 2022, before the Sessions Judge, Sylhet, which was allowed, vide its 22.06.2022 by the Senior Sessions Judge, Sylhet.
5. Pursuant to the order of the revisional court, the Senior Judicial Magistrate, took cognizance of the offence and the case, being ready for hearing trial, was transmitted to the Court of Sessions, for trial, where it has been renumbered as Sessions Case No. 807 of 2023 and was sent to the Joint Sessions Judge, 3rd Court, Sylhet, for trial.
6. The case was fixed on 16.10.2023 for framing of charge and, on that day, the accused-petitioner filed an application under section 265C of the Code of Criminal Procedure to discharge him and, after hearing his application, the same was rejected and the trial court has

framed charge against the accused-petitioner under section 138 of the Negotiable Instruments Act, 1881, vide the order dated 16.10.2023.

7. Being aggrieved by and dissatisfied with the said order dated 16.10.2023 of the trial court, the accused-petitioner filed this application under section 561A of the Code of Criminal Procedure and obtained the Rule.
8. Learned Advocate Mr. Mahbub Shafique appeared on behalf of the accused-petitioner. His main contention is that, as per provision of clause (a) of section 141 of the Act, the Magistrate was not authorized to take cognizance of the offence in this case, since the complaint petition was not filed by the payee or the holder in due course, but by Md. Jamil Ahmed, who is his attorney i.e. the attorney is neither the 'payee', nor the holder in due course, so he had no *locus-standi* to file the case. He next submits that, this being a special law, there was no scope of any deviation as has been done in this case. Therefore, the proceeding initiated against this accused-petitioner is unlawful. His next contention is that, no notice was not served by the revisionl court in Criminal Revision No. 162 of 2022 upon the accused-petitioner and the judgment was passed in

absentia and, therefore, the judgment and order passed by the revisional court is not a lawful judgment and the proceedings based on such order is liable to be quashed. In support of his contention, he has relied upon the decision reported in 2017 BLD (AD) 37 between Md. Nur Hussain Vs. Md. Alamgir Alam and another decision reported in 13 BLC (HCD)(2008) 932 between Ruhul Amin Vs. Md. Mofizur Rahman. He concludes that, this Rule has merit and the same may kindly be made absolute by quashing the impugned proceedings.

9. Learned Senior Advocate Mr. Zainal Abedin, on the other hand, submits that, this case under section 138 of the Act can be filed by the attorney of the beneficiary of the cheque and the same has been filed in accordance with law. He next submits that, the cognizance was taken by the Magistrate and that is quite legal and valid as has been held by the Appellate Division in a case reported in 56 DLR (AD)(2004) 16, between Hasibul Bashir Vs. Gulzar Rahman. He proceeds on that, the decision of the Appellate Division was relied upon by the High Court Division in another case reported in 56 DLR 205 wherein it has been held that, the petition filed by the attorney of

the payee was valid and in the later cited case had appeared as lawyer for the payee of the cheque (O.P.No.1). Therefore, the learned Advocate submits that, this is simply dilatory tactics and this petition has been filed only to prolong the disposal of this matter. As regards the judgment of the revisional court, he submits that, notice was served on the accused-opposite party No.2. Besides, he has not been prejudiced in any manner. He concludes that, this Rule has no merit and the same may kindly be discharged.

10. We have heard the learned Advocates for both the parties, perused the application under section 561A of the Code of Criminal Procedure along with the documents annexed thereto and consulted with the provision of law and the decisions referred to by the learned Advocates.

11. Clause (a) of section 141 reads as follows:-

“141. **Cognizance of offences-** Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898)-

(a) 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:

(b)

(c)

(emphasis added).

12. **There is nothing in clause (a) of section 141 of the Negotiable Instruments Act, 1881, requiring that, the ‘payee’ or the ‘holder in due course’ should file the case personally. Hence, clearly, there is no bar in filing a case through attorney and this position of law has been set at rest by the Apex Court in the case cited hereinabove.**
13. Hence, the interpretation of clause (a) of section 141 of the N.I. Act, 1881, as placed by the learned Advocate for the petitioner that the petition must be filed by the ‘payee’ or by the ‘holder in due course’, is clearly misleading and does not fit to the language of clause (a) of section 141 of the Negotiable Instrument Act, 1881.
14. Having read the decision reported in 27 BLD (AD) 37, cited on behalf of the petitioner, we find that, the complainant was neither the payee, nor the ‘holder in due course’, nor he was the attorney of any of them. Therefore, this decision is not applicable to the facts and circumstances of the instant case, where it is not disputed

that the attorney has been constituted, appointed and nominated by the payee of the cheque.

15. As regards the next point, however, we are respectful agreement with the decision reported in 13 BLC 2008, but we are of the view that, the petitioner has not at all been prejudiced by the judgment and order of the revisional court in as much as he has got every opportunity to raise all issues before us. Moreover, the judgment and order of the revisional court is perfectly valid in the light of the judgment and decision passed in 56 BLR(AD)(20024)16, therefore, the objection raised would change nothing.
16. Furthermore, the learned Advocate for the opposite party No.2, points out that, the notice of the revisional application was duly served upon the accused-petitioner.
17. It has also to be mentioned here that, the established cannon of the interpretation of the statute is that, the statute should be interpreted in a manner that must not frustrate the object of a remedial legislation like the Negotiable Instruments Act, 1881.
18. Having considered the submissions and the decisions referred to above, we do not find any merit in this Rule and the same is liable to be discharged.

ORDER

In the result the Rule is discharged.

The order of stay granted earlier by this Court is hereby vacated.

The trial court is directed to proceed with the trial from where it was stayed and to dispose of the case on merit.

Communicate this order at once.

Fahmida Quader.J.

I agree.

Jashim:B.O.