

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

Reserved on: 11.10.2022
Pronounced on: 21.10.2022

CRM(M) No.88/2020

AB. RASHEED BHAT

... PETITIONER(S)

Through: - Mr. Aftab Ahmad, Advocate

Vs.

HDFC BANK LTD

...RESPONDENT(S)

Through: - Mr. Shahbaz Sikandar, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has challenged complaint filed by respondent against him for offence under Section 138/142 of Negotiable Instruments Act (for short NI Act), which is pending before the Court of Chief Judicial Magistrate, Pulwama. Challenge has also been thrown to the order of the learned Magistrate whereby process has been issued against the petitioner as also to order dated 01.08.2018 passed by learned Additional Sessions Judge, Pulwama, whereby a revision petition against the aforesaid order of the learned Magistrate has been dismissed.

2) It appears that the respondent has filed a complaint against the petitioner alleging commission of offence under

Section 138 of NI Act, which is pending before the learned trial Magistrate. In the said complaint it is alleged that the petitioner has availed credit facility to the tune of Rs.2.75 crores from the respondent Bank. It is further alleged that the petitioner failed to regularize/liquidate the loan amount and the loan account shows an outstanding amount of Rs.3.50 crores. It has been submitted that the petitioner/accused issued post dated cheques for outstanding liability in favour of the respondent Bank vide cheque bearing No.021598 dated 19.05.2017 drawn on HDFC Bank, Pulwama, for an amount of Rs.2.75 crores. It has been alleged that when the said cheque was presented before the Bank on 25th May, 2017, the same was dishonoured for insufficiency of funds in terms of memo dated 25th May, 2017. It is further averred in the impugned complaint that a legal notice of demand dated 5th June, 2017 was sent through registered post to the petitioner which was received by him on 16.06.2017 but he failed to pay the cheque amount within the stipulated period which compelled the respondent to file the impugned complaint.

3) It appears that the learned Magistrate, after recording the preliminary evidence of the respondent/complainant, issued process against the petitioner in terms of order dated

20.07.2017. It also appears that the petitioner moved an application for dropping of proceedings before the learned trial Magistrate but the same was dismissed in terms of order dated 02.03.2020. A revision petition came to be filed by the petitioner before the Court of learned Additional Sessions Judge, Pulwama, but the same was also dismissed in terms of order dated 01.08.2018.

3) The petitioner has challenged the impugned complaint and the impugned orders, primarily, on the ground that the complaint has not been filed through a competent person, inasmuch as original Power of Attorney in favour of Shri Basharat Gul, through whom the complaint has been filed, has not been placed on record of the trial court. It has been contended that only a Xerox copy of the Power of Attorney has been produced before the trial court which is not the requirement of law. It is further contended that the impugned complaint does not contain an averment that Shri Basharat Gul, the Attorney Holder, is conversant with the facts of the case, which, according to the petitioner, is a mandatory condition. In this regard the petitioner has relied upon the judgment of Delhi High Court in the case of **Taruna Batra vs. Shikha Batra**, 2008 (147) DLT 257. Reliance has also been placed on another judgment of the Madras High

Court titled **Mr. R. Shekar vs. Professional Circuit Boards Ltd. and another**, 2007(1) DCR 487. The petitioner has further contended that the statement of the Attorney of the complainant has not been recorded on oath which is a requirement under Section 200 of Cr. P. C, as such, the same could not have been taken into consideration by the learned trial court while issuing process against the petitioner.

4) I have heard learned counsel for the parties and perused the record of the case including the trial court record.

5) A perusal of the trial court record shows that the respondent Bank has filed the impugned complaint through Mr. Basharat Gul. In the complaint it is mentioned that Shri Basharat Gul is its authorized Attorney Holder. It is also averred in the complaint that Shri Basharat Gul, being the Attorney Holder of respondent Bank, is competent to sign and verify the pleadings, file and prosecute the same and to do all acts, deeds in general for due prosecution of the complaint. A copy of the Power of Attorney executed by duly authorized person of the respondent Bank in faovur of Shri Basharat Gul has been annexed to the impugned complaint.

6) According to learned counsel for the petitioner, it was incumbent upon the respondent/complainant to place on record original Power of Attorney or at least produce the same for examination by the Court at the time of filing of the complaint. In this regard, learned counsel for the petitioner has mainly relied upon the ratio laid down by Delhi High Court in **Taruna Batra's** case (supra) and the ratio laid down by Madras High Court in **Mr. R. Shekar's** case (supra). In both these cases, the Courts have emphasized that before issuing process against the accused, the Magistrate has to satisfy himself as to the validity of the Power of Attorney and for this purpose, production of original Power of Attorney has to be insisted upon.

7) The question, whether a complaint can be filed through a Power of Attorney Holder, came up for consideration before the Supreme Court in the case of **A. C. Narayanan vs. State of Maharashtra and another**, (2014) 11 SCC 790. In the said case, the Supreme Court framed five questions for its consideration, which are reproduced as under:

- (i) *Whether a Power of Attorney Holder can sign and file a complaint petition on behalf of the complainant?/ Whether the eligibility criteria prescribed by Section 142(a) of NI Act would stand satisfied if the complaint petition itself is filed in the name of the payee or the holder in due course of the cheque?*

- (ii) *Whether a power-of-attorney holder can be verified on oath under Section 200 of the Code?*
- (iii) *Whether specific averments as to the knowledge of the power-of-attorney holder in the impugned transaction must be explicitly asserted in the complaint?*
- (iv) *If the power-of-attorney holder fails to assert explicitly his knowledge in the complaint then can the power-of-attorney holder verify the complaint on oath on such presumption of knowledge?*
- (v) *Whether the proceedings contemplated under Section 200 of the Code can be dispensed with in the light of Section 145 of the NI Act which was introduced by an amendment in the year 2002?*

8) After discussing the law on the subject, the Supreme Court answered the afore-quoted questions in the following manner:

(i) Filing of complaint petition under Section 138 of N.I Act through power of attorney is perfectly legal and competent.

(ii) 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.

(iii) 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.

(iv) In the light of section 145 of N.I 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 N.I Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant or his witness.

upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the N.I. Act.

(v) The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person.

9) In the aforesaid case, the matter was considered in the perspective of the fact that the complainant in the said case was an individual and the complaint had been filed by the Power of Attorney Holder of the payee who was an individual. However, position would be slightly different in a case where the complainant is a company or a corporate entity. This question, in the background of the case where the complainant was a company, has been considered by the Supreme Court in the case of **Samrat Shipping Co. Pvt. Ltd. vs. Dolly George**, (2002) 9 SCC 455. In the said case, the Supreme Court has, while disapproving the dismissal of the complaint at threshold by refusing cognizance, observed as under:

“3. Having heard both sides we find it difficult to support the orders challenged before us. A Company can file a complaint only through human agency. The person who presented the complaint on behalf of the Company claimed that he is the authorised representative of the company. Prima facie, the trial court should have accepted it at the time when a complaint was presented. If it is a matter of evidence when the accused disputed the authority of the said individual to present the complaint, opportunity should have been given to the complainant

to prove the same, but that opportunity need be given only when the trial commences. The dismissal of the complaint at the threshold on the premise that the individual has not produced certified copy of the resolution appears to be too hasty an action. We, therefore, set aside the impugned orders and direct the trial court to proceed with the trial and dispose it off in accordance with law. Parties are directed to appear before the trial court on 31.01.2000."

10) Again, in **National Small Industries Corporation Ltd. vs. State (NCT of Delhi) and Ors.** (2009) 1 SCC 407, the Supreme Court has held as under:

14. The term "complainant" is not defined under the Code. Section 142 of the NI Act requires a complaint under Section 138 of that Act to be made by the payee (or by the holder in due course). It is thus evident that in a complaint relating to dishonour of a cheque (which has not been endorsed by the payee in favour of anyone), it is the payee alone who can be the complainant. The NI Act only provides that dishonour of a cheque would be an offence and the manner of taking cognizance of offences punishable under Section 138 of that Act. However, the procedure relating to initiation of proceedings, trial and disposal of such complaints, is governed by the Code. Section 200 of the Code requires that the Magistrate, on taking cognizance of an offence on complaint, shall examine upon oath the complainant and the witnesses present and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses. The requirement of Section 142 of the NI Act that the payee should be the complainant, is met if the complaint is in the name of the payee. If the payee is a company, necessarily the complaint should be filed in the name of the company. Section 142 of the NI Act does not specify who should represent the company, if a company is the complainant. A company can be represented by an employee or even by a non-employee authorised and empowered to represent the company either by a resolution or by a power of attorney.

16. Section 142 only requires that the complaint should be in the name of the payee. Where the complainant is a company, who will represent the company and how the company will be represented in such proceedings, is not

governed by the Code but by the relevant law relating to companies. Section 200 of the Code mandatorily requires an examination of the complainant; and where the complainant is an incorporeal body, evidently only an employee or representative can be examined on its behalf. As a result, the company becomes a de jure complainant and its employee or other representative, representing it in the criminal proceedings, becomes the de facto complainant. Thus, in every complaint, where the complainant is an incorporeal body, there is a complainant—de jure, and a complainant—de facto. Clause (a) of the proviso to Section 200 provides that where the complainant is a public servant, it will not be necessary to examine the complainant and his witnesses. Where the complainant is an incorporeal body represented by one of its employees, the employee who is a public servant is the de facto complainant and in signing and presenting the complaint, he acts in the discharge of his official duties. Therefore, it follows that in such cases, the exemption under clause (a) of the first proviso to Section 200 of the Code will be available.

19. Resultantly, when in a complaint in regard to dishonour of a cheque issued in favour of a company or corporation, for the purpose of Section 142 of the NI Act, the company will be the complainant, and for purposes of Section 200 of the Code, its employee who represents the company or corporation, will be the de facto complainant. In such a complaint, the de jure complainant, namely, the company or corporation will remain the same but the de facto complainant (employee) representing such de jure complainant can change, from time to time. And if the de facto complainant is a public servant, the benefit of exemption under clause (a) of the proviso to Section 200 of the Code will be available, even though the complaint is made in the name of a company or corporation.”

11) All the aforesaid three judgments were considered by the Supreme Court in a recent case titled **M/S TRL Krosaki Refractories Ltd. vs. M/S SMS Asia Private Limited & anr**, (2022) 7 SCC 612. After discussing these judgments, the Supreme Court went on to observe as under:

“In that view, the position that would emerge is that when a company is the payee of the cheque based on which a complaint is filed under Section 138 of the NI Act, the complainant necessarily should be the company which would be represented by an employee who is authorised. Prima facie, in such a situation the indication in the complaint and the sworn statement (either orally or by affidavit) to the effect that the complainant (Company) is represented by an authorised person who has knowledge, would be sufficient. The employment of the terms “specific assertion as to the knowledge of the power-of-attorney holder” and such assertion about knowledge should be “said explicitly” as stated in A.C. Narayanan (supra) cannot be understood to mean that the assertion should be in any particular manner, much less only in the manner understood by the accused in the case. All that is necessary is to demonstrate before the learned Magistrate that the complaint filed is in the name of the “payee” and if the person who is prosecuting the complaint is different from the payee, the authorisation therefor and that the contents of the complaint are within his knowledge. When, the complainant/payee is a company, an authorised employee can represent the company. Such averment and prima facie material is sufficient for the learned Magistrate to take cognizance and issue process. If at all, there is any serious dispute with regard to the person prosecuting the complaint not being authorised or if it is to be demonstrated that the person who filed the complaint has no knowledge of the transaction and, as such that person could not have instituted and prosecuted the complaint, it would be open for the accused to dispute the position and establish the same during the course of the trial. As noted in Samrat Shipping Co. Pvt. Ltd (supra) , dismissal of a complaint at the threshold by the Magistrate on the question of authorisation, would not be justified. Similarly, we are of the view that in such circumstances entertaining a petition under Section 482 to quash the order taking cognizance by the Magistrate would be unjustified when the issue of proper authorisation and knowledge can only be an issue for trial.”

12) From the aforesaid analysis of law on the subject, it is clear that in a case where the complainant is a company, an authorized employee can represent the said company. Once an averment to this effect is made in the complaint, it is sufficient for the Magistrate to take cognizance and issue

process. It also emerges that in case authority of a person filing complaint on behalf of the company is disputed by the accused, the same would be a matter of trial to be decided during the course of trial and it would not be a ground to dismiss the complaint at the threshold itself. The ratio laid down in these judgments has not been taken note of either by Delhi High Court or by Madras High Court in the judgments relied upon by the petitioner. Thus, the ratio laid down in these judgments to the effect that production of original Power of Attorney is necessary at the time of taking cognizance of the complaint under Section 138 of NI Act, is not the correct position of law.

13) In the instant case, the respondent/complainant has specifically pleaded that Shri Basharat Gul is the duly constituted Attorney of the Bank who is authorized to institute the complaint and verify the pleadings. A copy of the Power of Attorney has been annexed to the complaint. Therefore, the learned Magistrate was justified in taking cognizance of the complaint and issuing process against the petitioner on the basis of the impugned complaint.

14) It has been next contended by learned counsel for the petitioner that the statement of the Attorney of the complainant has not been recorded on oath, as is required

under Section 200 of the Cr. P. C and, as such, the same could not have been taken into consideration by the learned Magistrate.

15) It is true that in the instant case the statement of the Attorney of the respondent has not been recorded on oath as contemplated by Section 200 of the Cr. P. C but then the same is only an irregularity which would not vitiate the proceedings. In my aforesaid view I am supported by the judgment of this Court in the case of **Rahul Kanwal vs Brig P.K.Tikoo and Anr.** (561-A No.227/2010 decided on 08.02.2013). In the said case, this Court has held that failure on the part of the Magistrate to examine the complainant and his witnesses on oath would not go to the root of the matter and the lapse in this regard would be an irregularity not vitiating the proceedings.

16) Apart from the above, even if we take the statement of the Attorney Holder of the complainant out of consideration, still then there is enough material on record of the trial court that would be sufficient for issuing process against the petitioner. Besides the averments made in the complaint, the complainant has placed on record the cheque in question, the memo of dishonour, demand notice and the receipt depicting the issuance of notice. When this material is

considered, even in the absence of the statement of the Attorney Holder of the complainant, a case for issuance of process against the petitioner is made out. Therefore, the mere fact that the statement of the Attorney Holder of the complainant in this case has not been recorded in accordance with the provisions contained in Section 200 of the Cr. P. C would not vitiate the whole proceedings. The argument of learned counsel for the petitioner in this regard is without any merit.

17) For the foregoing reasons, I do not find any merit in this petition. The same is, accordingly, dismissed.

18) A copy of the order be sent to the learned Magistrate for information.

(SANJAY DHAR)
JUDGE

Srinagar,
21.10.2022
"Bhat Altaf, PS"

Whether the order is speaking: Yes/No

Whether the order is reportable: Yes/No