



IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-A-997-MA-2017 (O&M)

Reserved on: 10.01.2025

Pronouncement on: 14.01.2025

Vijay

...Applicant-Appellant

Versus

M/s Camy Traders

...Respondent

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR**Present:** Mr. Sumit Sangwan, Advocate
for the applicant.Mr. Balwinder Singh Sudan, Advocate
for the respondent.**HARPREET SINGH BRAR, J.**

1. The present application is preferred under Section 378(4) of the Cr.P.C. against the judgment of acquittal dated 14.03.2017 passed by learned Judicial Magistrate 1st Class, Bhiwani, in a criminal complaint case, bearing no. 637/2016, filed under section 138 of The Negotiable Instruments Act, 1881 (hereinafter 'NI Act' for brevity).

2. Briefly, the facts are that the applicant-complainant claimed to be the proprietor of M/s Baanke Bihari, which is engaged in manufacturing non-woven fabric. The firm supplied the fabric to the respondent-accused vide bill No.358 dated 30.09.2012 for an amount of Rs.3,32,436/-, bill No.389 dated 28.09.2012 for an amount of Rs.2,05,153/- and bill No.561 dated 14.10.2012 for an amount of Rs.3,18,370/- on credit. The respondent-accused, in discharge of his legally enforceable debt, issued three cheques i.e. cheque bearing No. 302989 dated 21.10.2012 for an amount of Rs. 3,32,436/-, cheque bearing No.



302992 dated 28.10.2012 for an amount of Rs. 2,05,153/- and cheque bearing No.104852 dated 30.11.2012 for an amount of Rs. 3,18,370/-, drawn on Indian Overseas Bank, Ludhiana, in favour of M/s Baanke Bihari. Thereafter, the complainant deposited the cheque bearing No.104852 dated 30.11.2012 with his bank for encashment of the same. However, vide memo dated 28.02.2013, the above said cheque was returned unpaid with the remark, "payment stopped by drawer". Subsequently, a legal notice dated 25.03.2013 was served upon the respondent. Despite the legal notice, the respondent failed to pay the cheque amount within the stipulated period of 15 days. Hence, the complaint before the Magistrate.

3. Learned counsel for the applicant *inter alia* contends that the learned trial Court has erroneously adopted a hyper-technical approach in concluding that Vijay Kumar was not competent to file the complaint under Section 138 of the NI Act and therefore, wrongly dismissed the same vide impugned judgment dated 14.03.2017. It is an admitted fact that the respondent had a legal liability to discharge and in lieu of the same, the disputed cheque was issued. On presentation for encashment, the cheque was dishonoured with the remarks- 'payment stopped by drawer,' which clearly depicts the mala fide intention of the respondent. Moreover, the learned trial Court also ignored the fact that the legal notice served by the applicant upon the respondent received no reply. As such, an adverse inference must be drawn against the respondent. The applicant is covered under the definition of 'holder in due course' as mentioned in Section 8 of the NI Act, as well as duly authorised to file the complaint (supra). Reliance in this regard can be placed upon the judgments rendered by the Hon'ble Supreme Court in *M/s MMTC Limited vs. M/s Medchl Chemicals & Pharma (P) Limited 2002(1) R.C.R. (Criminal) 318,*



Allahabad High Court in *Gurcharan Singh vs. State of U.P. and another 2002(4) R.C.R(Crl.) 414* and Karnataka High Court in *C. Prabhu vs. Sangam Corporation (Finance and Investment), Bangalore 2002(3) R.C.R.(Crl.) 23*.

4. *Per contra* learned counsel for the respondent, placing reliance on Section 142 NI Act, averred that the complaint can only be maintainable in the name of the 'payee' which in this case is either the proprietary concern or the proprietor of the said concern. Since the applicant is not the proprietor of M/s Baanke Bihari Textiles, he had no *locus standi* to initiate proceedings under Section 138 NI Act. The applicant did supply any document to connect him to the proprietary concern except an affidavit which too was executed long after the complaint (*supra*) was filed. Reliance was placed on the judgment rendered by the Hon'ble Supreme Court in *Milind Shripad Chandurkar vs. Kalim M. Khan and another 2011(4) SCC 275*.

5. Having heard the learned counsel for the parties and after perusing the record of the case with their able assistance, the following question arises for the consideration of this Court:

Whether the complainant in a complaint under Section 138 of NI Act can authorise the manager of the proprietary concern to pursue the matter during the pendency of the trial?

6 It transpires that the applicant misrepresented himself to be the proprietor of the firm in the name and style of 'Baanke Bihari Textiles'. However, the applicant subsequently tendered an affidavit (Ex.CA) in preliminary evidence on 20.04.2015 wherein he has stated that he is working as a manager in the said firm and has been authorised to file the complaint by one Anand Agarwal who is in fact the proprietor of the said firm. To substantiate this contention, the applicant placed on record special power of attorney (Ex.



C1) which was executed on 13.02.2015. Curiously, however, the complaint, which mentions the applicant as the proprietor of the firm, was filed on 15.04.2013 which was much prior to the execution of the special power of attorney.

7. A two Judge Bench of the Hon'ble Supreme Court in **Milind Shripad Chandurkar(supra)**, speaking through Justice Dr. Justice B.S. Chauhan, made the following observations:

"18. Section 7 of the Act 1881 defines "Payee" as the person named in the instrument, to whom or to whose order the money is by the 8 instrument directed to be paid. Section 8 defines "the holder of the cheque" as any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. Section 9 defines "holder in due course" as any person who for consideration became the possessor of a cheque if payable to a bearer or the payee or endorsee thereof.

Section 138 provides for penalties in case of dishonour of certain cheques for insufficiency of funds in the accounts. However, exception contained in clause (c) thereof reads as under :

*"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."
(Emphasis added)*

19. Section 142 provides for taking cognizance of the offence notwithstanding anything contained in Criminal Procedure Code which reads as under :

"(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." (Emphasis added)

*20. This Court in **Shankar Finance and Investments v. State of Andhra Pradesh & Ors., (2008)8 SCC 536**, dealt with the issue involved herein elaborately and held that where the "payee" is a proprietary concern the complaint can be filed (i) by the proprietor of the proprietary concern describing himself as the sole proprietor of the "payee"; (ii) the proprietary concern describing itself as the sole proprietary concern represented by its proprietor; and (iii) the proprietor or the proprietary concern*



represented by the Attorney Holder under the power of attorney executed by the sole proprietor. However, it shall not be permissible for an Attorney Holder to file the complaint in his own name as if he was the complainant. He can initiate criminal proceedings on behalf of the principal.

In a case of this nature, where the "payee" is a company or a sole proprietary concern, such issue cannot be adjudicated upon taking any guidance from Section 142 of the Act 1881 but the case shall be governed by the general law i.e. the Companies Act 1956 or by civil law where an individual carries on business in the name or style other than his own name. In such a situation, he can sue in his own name and not in trading name, though others can sue him in the trading name. So far as Section 142 is concerned, a complaint shall be maintainable in the name of the "payee", proprietary concern itself or in the name of the proprietor of the said concern.

The Court placing reliance on earlier judgments, particularly, in **Janki Vashdeo Bhojwani v. Indusind Bank Ltd., 2005(1) RCR (Civil) 240 : (2005)2 SCC 217**, held that the general principles of company law or civil law would apply for maintaining the complaint under Section 138 of the Act 1881.

8. Sections 7, 9 and 142 of the NI Act become relevant in the present context because as per Section 142, a complaint is to be submitted in writing for an offence punishable under Section [138](#) of the NI Act by a payee or holder in due course of the cheque that has been dishonoured. "Payee" has been defined in Section 7 of that Act as the person named in the instrument (in this case the cheques in question) and "holder in due course" has been defined in Section 9 of the said Act to mean any person, who for consideration becomes the possessor of a promissory note. In the instant case, a perusal of the cheque reveals that the firm, namely, Baanke Bihari textiles is the payee. In such a scenario, the applicant cannot claim to be the payee of the cheque, nor can he be the holder in due course since the cheque had neither been issued to him or in his favour nor he is the sole proprietor of the concern, which would have empowered him to be the payee himself and thus, make the complaint.



9. Learned counsel for the applicant placed reliance on the judgement of the Hon'ble Supreme Court in *M/s MMTC Limited vs. M/s Medchl Chemicals & Pharma (P) Limited (supra)*, however, such reliance is misplaced since the aforementioned judgement deals with companies registered under the Companies Act. Unlike a company incorporated under the Companies Act, 1956, which is a separate legal entity distinct from its shareholders, a proprietary concern does not have a legal existence independent of its proprietor. The complainant firm in this case is admittedly unregistered and, therefore, not a legal entity or juristic person like a registered company or corporation. In the case of *M/s M.M.T.C. Ltd (supra)*, the complainant was a company, which qualifies as a juristic person. Unlike natural persons, juristic persons cannot act or speak on their own and must be represented by an authorized individual. In that matter, the dishonored cheque was issued in favor of the company, and the complaint under Section 138 of the Negotiable Instruments Act was initially filed by an officer on behalf of the company. Subsequently, with the court's permission, another officer was authorized to represent the company in the proceedings. It was held that a complaint could be validly instituted by an officer acting in the name and on behalf of the company. Furthermore, any lack of authority at the time of filing the complaint could be rectified at a later stage. However, in the case of a proprietary concern similar principles would not be applicable since, essentially, it is an individual conducting business under a trade name. The Hon'ble Apex Court in *Shankar Finance and Investments v. State of Andhra Pradesh & Ors. (supra)* opined as follows:

9. "...Therefore where the payee is a proprietary concern, the complaint can be filed: (i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the 'payee';



(ii) *The proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and (iii) the proprietor or the proprietary concern represented by the attorney-holder under a power of attorney executed by the sole proprietor. It follows that in this case the complaint could have been validly filed by describing the complainant in any one of the following four methods :*

"Atmakuri Shankara Rao, sole proprietor of M/s. Shankar Finance & Investments "

Or

"M/s. Shankar Finance & Investments a sole proprietary concern represented by its proprietor Atmakuri Shankara Rao"

Or

"Atmakuri Shankara Rao, sole proprietor of M/s. Shankar Finance & Investments , represented by his Attorney Holder Thamak Satyanarayana"

Or

"M/s. Shankar Finance & Investments , a proprietary concern of Atmakuri Shankara Rao, represented by his Attorney Holder Thamada Satyanarayana".

What would have been improper is for the Attorney holder Thamada Satyanarayana to file the complaint in his own name as if he was the complainant."

10. Moreover, a three Judge Bench of the Hon'ble Supreme Court ***in A.C. Narayanan vs. State of Maharashtra and another 2014(11) SCC 790***

authoritatively settled the controversy and opined as follows:

"24. In view of the discussion, we are of the opinion that the attorney holder cannot file a complaint in his own name as if he was the complainant, but he can initiate criminal proceedings on behalf of his principal. We also reiterate that where the payee is a proprietary concern, the complaint can be filed (i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the "payee"; (ii) the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and (iii) the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor.

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26. While holding that there is no serious conflict between the decisions in *MMTC (supra)* and *Janki Vashdeo Bhojwani (supra)*, we clarify the position and answer the 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.

Reverting to the facts of the case, the complaint could have been filed (i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the "payee", who is Anand Aggarwal in this case; (ii) the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor i.e. M/s Baanke Bihari Textiles; or (iii) the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor. However, it is apparent that the applicant filed the complaint in his own name as if he was the complainant and not on behalf of his principal. In fact, there is nothing on record to suggest that the applicant was a power of attorney holder at the time of the filing of the complaint. A special power of attorney (Ex. C1) was later put to the fore;



however, a perusal of the same reveals that it was executed on 13.02.2015 i.e. after approximately two years from the filing of the complaint. Even if for the sake of argument it is accepted that the applicant was a power of attorney holder at the time of filing of the complaint, there is neither evidence to the effect that the applicant was a witness to the transaction nor any specific assertion as to the knowledge of the power of attorney holder of the said transaction in the complaint. Lastly, since the applicant had no authority to file the complaint (supra), the demand notice served by him would also be rendered defective and otiose.

11. In view of the facts and circumstances of the case, the question framed above is answered in the negative. Accordingly, this Court finds that learned counsel for the applicant-appellant has failed to point out any perversity or illegality in findings recorded by the learned trial Court which warrants interference by this Court. As such, there is no merit in the present application and hence, the leave to appeal is denied.

12. Pending miscellaneous application(s), if any, shall also stand disposed of.

(HARPREET SINGH BRAR)
JUDGE

14.01.2025

Neha

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No