

(2022) 12 PAT CK 0078

Patna High Court**Case No:** Criminal Revision No. 601 Of 2019 In Criminal Appeal (SJ) No. 732 Of 2019

Amit Kumar

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision: Dec. 22, 2022**Acts Referred:**

- Negotiable Instruments Act, 1881 - Section 138, 141
- Indian Penal Code, 1860 - Section 406

Hon'ble Judges: Rajeev Ranjan Prasad, J**Bench:** Single Bench**Advocate:** Ajay Kumar Thakur, Rajeev Kumar Singh, Zeyaul Hoda, Krishnakant Singh**Final Decision:** Dismissed

Judgement

1. This revision application has been preferred for setting aside the judgment and order dated 19.11.2018 passed by learned First Additional Sessions

Judge, Muzaffarpur in Criminal Appeal No. 95 of 2017 whereby and whereunder the learned Appellate Court has been pleased to hold that the

accused of this case (O.P. No.2) cannot be held guilty under Section 138 of Negotiable Instruments Act (hereinafter referred to as the "N.I.

Act") and accordingly the judgment of conviction and sentence passed by learned Additional Chief Judicial Magistrate-XIII, Muzaffarpur has been set aside.

Brief Facts of the Case

2. The complaint case was filed by this petitioner on 07.08.2012 in the court of Chief Judicial Magistrate, Muzaffarpur. He claims himself a contractor

who was appointed and was given a power of attorney by one M/s Umbrey Trade Agency (hereinafter referred to as "Firm" or

"Agency") on 29.01.2010 for two years. It was his case that he had done the work of road construction on behalf of the Agency by making

investment in his own capacity. On 17.11.2010 he was allegedly removed as power of attorney holder of the agency and the agency appointed one

Mr. Deepak Kumar as new power of attorney holder in his place. The appellant claimed that he had by that time already invested approximately a

sum of Rupees Three Crores which had not been paid to him. For this reason, he filed a writ petition in this Court giving rise to C.W.J.C. no. 20175 of

2010 which was disposed of on 21.07.2011 with a direction to the newly appointed power of attorney holder namely Mr. Deepak Kumar to

compensate the loss of the petitioner. Copy of the order passed by this Court in the writ petition has been placed before this Court to submit that the

Honorable Court had been pleased to issue certain directions. This Court will deal with the same at appropriate place in this judgment.

3. It is alleged that the new power attorney holder Mr. Deepak Kumar deposited Rs. 20,69,971/- in the account of the petitioner but in the mean time

the agency removed him also and appointed one Mr. Sudhir Kumar (O.P. No. 2) as new power of attorney holder in January, 2012. The petitioner

alleged that in this manner the liability fell upon Mr. Sudhir Kumar (O.P. No. 2) to discharge the above referred liability. It is stated that the O.P. no. 2

issued a multi-city cheque bearing no. 014968 on 27.02.2012 of Rs. 2,05,00,000/- from the account of the agency. But on deposit, the said cheque

stood dishonoured in want of sufficient funds in the account of the agency. The petitioner sent legal notice to O.P. no. 2 on 25.06.2012 but the O.P.

no. 2 did not pay the cheque amount whereafter the petitioner filed the complaint case giving rise to Complaint Case no. 2237 of 2012.

4. The said complaint case was taken up for consideration. The learned Magistrate held an inquiry and found a prima-facie case under Section 138 of

the N.I. Act and Section 406 of the IPC. After recording evidence before charge, the charges were framed against the O.P. no. 2. The complainant-

petitioner examined five witnesses and produced six exhibits. Exhibit "1" is the signature of the complaint petitioner. Exhibit "2" is the

deposit slip, Exhibit 2/1 is the bank memo, Exhibit 3 is the cheque number whereas Exhibit 4 is the legal notice. Exhibit

5 is said to be the registered slip and Exhibit 6 is the copy of the acknowledgment. It is stated that the accused O.P. no. 2 was also

examined and a sanha regarding missing of the cheque was exhibited as Exhibit A.

Judgment of the Trial Court

5. Learned Additional Chief Judicial Magistrate-XIII, Muzaffarpur examined the evidences on the record and came to a conclusion that the

prosecution has been able to prove the charges against the accused persons. The learned Trial Court held that as per order of the Honable High

Court, the Power of Attorney Holder Mr. Deepak Kumar was under obligation to pay the amount, therefore, ordinarily whosoever will be the power

of attorney holder, he will have to discharge the liability. The trial court held that because the O. P. No. 2 was appointed as power of attorney holder,

he will be liable to pay the amount. Learned trial court held that in the present case the liability of O. P. No. 2 will be deemed to be the personal

liability and at the same time the Agency will also be liable for the same.

6. Ultimately, the learned Trial Court held the O. P. No. 2 guilty under Section 138 of N. I. Act and passed the order of sentence whereunder the O.

P. No. 2 was directed to undergo two years of imprisonment and pay a sum of Rs. 4,10,00,000/- (Rupees Four Crores Ten Lakhs only) which is

double of the cheque amount together with Rs. 5000/- as monetary loss. In case of non-payment of the monetary loss, the O. P. No. 2 would be liable

to undergo an additional period of three months of simple imprisonment.

Judgment of the Appellate Court

7. The O. P. No. 2 preferred appeal against the judgment of the learned Additional Chief Judicial Magistrate-XIII, Muzaffarpur. The submission of O.

P. No. 2 as appellant in the appellate court was that the trial court did not apply his judicious mind. It was submitted that the O. P. No. 2 was acting on

behalf of a company or firm, therefore, the liability of the firm cannot be said to be an individual liability of O. P. No. 2 and under these circumstances

a power of attorney holder cannot be prosecuted. The appeal was contested by the complainant-petitioner. The learned appellate court recorded

admitted findings that the O. P. No. 2 was appointed as a new power of attorney holder in 2012 and in that capacity he had issued a cheque bearing no. 014968 on 27.02.2012 of Rs. 2,00,00,000/- in favour of the complainant which has stood dishonoured on presentation.

8. Learned trial court considered Section 141 of the N. I. Act which deal with the offences by the companies. The court thereafter went through the

judgment of the Honâ€™ble Supreme Court in the case of Aneeta hada vs. M. S. Godfather Travel and Tours Private Limited reported in (2012) 5

SC 661 and also the judgment of the Honâ€™ble Supreme Court in the case of S M S Pharmaceuticals Ltd. Vs. neeta Bhalla and Anr. reported in

(2005) 8 SCC 89 and N. Harihara Krishnan Vs. J. Thomas reported in (2018) 13 SCC 663.

The appellate court held that the O. P. No. 2 being an authorized signatory of the agency / company cannot be said to be in charge of and responsible

for the conduct of the agency and further held that the provisions as contained under Section 141 of the N. I. Act was not followed, hence the

conviction of the O. P. No. 2 and sentence imposed upon him were set aside.

Submissions on behalf of the petitioner

9. In this Court Mr. Ajay Kumar Thakur, learned counsel assisted by Mr. Rajeev Kumar Singh, learned Advocate has assailed the judgment of the

appellate court on the following grounds:-

(i) That after the order dated 21.07.2011 passed in C.W.J.C. No. 20175 of 2010, as and when O. P. No. 2 was appointed as power of attorney holder

of the firm/agency , he would step into the shoes of the earlier power of attorney holder namely, Mr. Deepak Kumar and as such he would be liable

for all deeds and misdeeds of said Deepak Kumar.

(ii) The bank account of which the cheque was issued by the O. P. No. 2 was being managed by O. P. No. 2 in all respects, therefore, he was fully

aware of the fact that the account did not have sufficient money.

It is submitted that the power of attorney holder, namely Deepak Kumar was examined as a witness in this case and in his deposition he has

categorically stated that when he was having the power of attorney, he had made payment of Rs. 20,69,971/- to the petitioner. When O. P. No. 2

became the power of attorney holder he had also paid Rs. 10,00,000/- to the petitioner. It is thus, one of the grounds of the petitioner that O. P. No. 2 was solely responsible for making payment to the petitioner and he had issued the cheque towards discharge of the said liability.

10. Learned counsel further submits that the appellate court has wrongly assumed that Md. Umbrey Trade Agency is a company. The fact is that it is a proprietorship firm and not a company. Learned counsel has relied upon a judgment of the Honâ€™ble Gujarat High Court in Cr. Misc. Application No. 12365 of 2015 to submit that the O. P. NO. 2 who was empowered to sign the cheque by the agency cannot escape his liability.

Submission on behalf of O. P. No. 2

11. Learned counsel for the O. P. No. 2 has opposed this application. It is submitted that the complainant claims that he had worked in NHPC Ltd., a Government of India Enterprises, for the agency and the amount in question was for the work done by him for and on behalf of agency, for which he had moved the Honâ€™ble High Court in C.W.J.C. No. 20175 of 2010 and the agency had also filed one writ application being C.W.J.C. No. 4027 of 2011. It is stated that a compromise was entered between the petitioner and the said agency and the same was filed. As per the said compromise the NHPC (employer) will release the payment in favour of the agency for the work already done and the agency would release the admitted payment in favour of Mr. Amit Kumar on receiving the funds from NHPC. It is submitted that in terms of the compromise both the writ applications were disposed of.

12. Learned counsel submits that the complainant himself has admitted in course of cross-examination that the amount claimed by him was due against the agency. In paragraph 4 and 5 of his cross-examination he has admitted that the cheque is of M/s Umbrey Trade Agency, but the agency or its contractor has not been made party.

13. Learned counsel further submits that in paragraph 9 of his evidence the complainant-petitioner has accepted that O. P. No. 2 here was not a party in writ proceeding brought by him before the Honâ€™ble High Court. In paragraph 11 of his deposition he has admitted that now Sudhir

Kumar i.e. O. P. No. 2 is not the power of attorney holder of the agency and has also admitted that the amount claimed is of the work done for

Umbrey Trade Agency under NHPC. He has admitted that O. P. No. 2 had neither taken any loan nor he had filed any money suit for recovery of

the amount. He further admitted that he had filled up the cheque in his own hand writing. On the other hand, O. P. No. 2 examined himself and proved

Ext. â€” i.e. the intimation of loss of cheque prior to presentation of the cheque and the same has been admitted.

14. Learned counsel relied upon a judgment of the Honâ€™le Supreme Court in the case of Kasthuri Radhakrishnana and others vs. M. Chinniyar

and Others reported in (2016) 3 SCC 296 to submit that a power of attorney holder always acts on behalf of principal and exercises only those powers

which are given to him in the power of attorney by the principal. It is his submission that any act or thing done by the power of attorney holder can

never be construed or may be treated to have been done by the power of attorney holder in his personal capacity so as to create any right in his

favour, such acts are always construed as having been done by the principal himself.

15. Learned counsel submits that the account holder in this case was the agency and the cheque was issued for and on behalf of the agency but the

agency was not made a party, no notice was served upon the agency which will prove fatal to the case of the complainant-petitioner. The judgment of

the learned appellate court has been defended by the O. P. No. 2.

Consideration

16. Having heard learned counsel for the parties and on perusal of the records, this Court finds that admittedly in the writ petition the opposite party

no. 2 was not a party, therefore, even as the agency in this case had entered into a compromise based on which this Court had passed an order, the

said order cannot be held binding on O. P. No. 2 in his personal capacity. For a ready reference the operative part of the order passed in C.W.J.c.

No. 20175 of 2010 and analogous case is being reproduced hereunder for a ready reference:-

â€”7. In the said circumstances, both the writ petitions are disposed of in terms of the said compromise as well as in view of the statements made in

the counter-affidavit filed by respondent-Corporation.â€ œ8. it is clear that the work is continuing and hence any demand for payment, if required,

can be made by M/s Umbrey Trade Agency through its Attorney Deepak Kumar before the Corporation, which will consider the same and decide it

in accordance with law. If M/s Umbrey Trade Agency claims any dues, it must file an application before the Chief Engineer of the Corporation within

four weeks from today along with a copy of this order giving details of its claims in the said application. If such an application is filed within the

aforesaid time, the said authority shall decide the same by a speaking order in accordance with law within four months thereafter and shall pay all the

admitted and payable dues to M/s Umbrey Trade Agency immediately thereafter. If any amount claimed is not found admitted and payable by the said

authority in the said order, petitioner-M/s Umbrey Trade Agency will be entitled to challenge the same before an appropriate forum.â€

17. It is also not in dispute that the O. P. No. 2 was given power of attorney to manage the business and all lawful acts and deeds that may be

necessary for smooth running of the firm. He was empowered to issue cheques in the name of the firm and to withdraw the amount which may be

necessary to do so but the power of attorney clearly provides that the agency was a proprietorship firm, the firm was not in ultimate control of the O.

P. No. 2. The cheque was issued by him because he was empowered to operate the account but the power of attorney does not show that he was in

complete control of the finances of the firm/agency. Under these circumstances, if the O. P. No. 2 issued a cheque as a power of attorney holder in

the name of the complainant, by no stretch of imagination it may be held that it was towards discharge of a personal liability of power of attorney

holder- O. P. No. 2.

18. This Court, therefore, finds that the learned trial court has completely erred in taking a view that the O. P. No. 2 who was appointed as a new

power of attorney holder after Mr. Deepak Kumar, he will be personally liable towards the liability to pay the petitioner in terms of the compromise or

order of the Honâ€™ble High Court. The finding of the learned trial court is that it will be the personal liability of the O. P. NO. 2 and at the same

time it will be the liability of the agency. The finding is completely vague and contrary to the materials available on the record.

19. This Court also finds force in the submission of learned counsel for the opposite party no.2 that under Section 141 of the N.I. Act, in the case of

offences by the company, the company would be a necessary party. Here it is important to note that the explanation to Section 141 of the N.I. Act

clearly provides that "company means anybody corroborate and includes a firm or other association of individuals." In this case, therefore, Section

141 of the N.I. Act would be attracted.

20. Section 138 of the N.I. Act reads as under:-

"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 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, 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.

Explanation " For the purposes of this section, "debt of other liability" means a legally enforceable debt or other liability."

21. On a bare reading of the aforementioned provisions, it would appear that Section 138 N.I. Act gets attracted where any cheque issued by a person

on account maintained by him towards discharge of his liability either in whole or in part is dishonoured due to insufficient fund.

22. In this case admittedly the cheque has been drawn for and on behalf of the agency and the cheque is of the account maintained by the agency,

therefore as per mandate of law, the agency whose cheque stood dishonoured on presentation was necessary party and in absence of agency, the

opposite party no.2 could not have been prosecuted. In this case, no notice was issued to the agency and the complaint was filed only against opposite

party no.2. The learned trial court has rightly relied upon the judgment of the Hon^{ble} Supreme Court in the case of Aneeta Hadda (supra) and N.

Hariharan (supra) to take a view that every person signing a cheque on behalf of the company on whose account is issued does not become the

drawer of the cheque and as such a signatory is only a person duly authorised to sign the cheque on behalf of the company/drawer of the cheque.

23. This Court, therefore, finds no error in the impugned judgment. This revision fails and it is dismissed accordingly.