

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

**CRM(M) 432/2021 CrIM(1428/2021)**

**Gulzar Ahmad Malik**

... Petitioner/Appellant(s)

Through: Mr. Aswad R. Attar, Advocate

V/s

**Tariq Ahmad Parray and another**

... Respondent(s)

Through: Mr. Rizwan ul Zaman, Advocate

**CORAM: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE**

**ORDER**  
**15-07-2024**

**Oral**

1. Through the medium of the instant petition filed under Section 482 Cr.PC, the petitioner herein seeks quashment of complaint titled as "**Tariq Ahmad Parray Vs. Gulzar Ahmad Malik and another**", along with order dated 21.8.2020 passed therein by the court of Judicial Magistrate 1<sup>st</sup> Class, Ashmuqam including order dated 6.10.2021 passed by the court of Principal District & Sessions Judge, Antnang in the revision petition titled as "**Gulzar Ahmad Malik Vs. Tariq Ahmad Parray.**"
2. The facts giving rise to the filing of the instant petition, as stated therein, are that the respondent 1 herein filed a complaint under section 138 of the Negotiable Instruments Act, 1881 against the petitioner herein as also the respondent 2 herein alleging in the complaint that the accused persons were jointly doing business and they purchased walnut trees from the complainant respondent

1 herein for an amount of Rs.4,93,000/- and the accused 2 respondent 2 herein in discharge of the liability thereof issued three cheques at the instance of accused 1 petitioner herein in favour of the complainant respondent 1 herein which cheques got dishonoured whereafter upon service of demand notice for liquidating the said amount covered under the said cheques the accused 2 respondent 2 herein did not pay the said amount covered by the cheques to the complainant respondent 1 herein within the stipulated period resulting into filing of the aforesaid criminal complaint against the accused persons being the petitioner herein and respondent 2 herein and that upon presentation of the complaint before the Magistrate and after recording the statement of the complainant respondent 1 herein, the Magistrate after taking cognizance issued process against the accused persons, however, the cognizance came to be taken by the Magistrate against the accused 1 petitioner herein for commission of offence under Section 420 IPC while as the cognizance was taken against the accused 2 respondent 2 herein for commission of offence under section 138 of Negotiable Instruments Act, 1881.

3. Aggrieved of the said order of cognizance dated 21.8.2020, the petitioner herein being accused 1 in the complaint filed a revision petition before the Principal District and Sessions Judge, Anantnag on 22.10.2020 which revision petition came to be dismissed on 6.10.2021.

4. The petitioner has maintained the instant petition on multiple ground urged in the petition.

**Heard learned counsel for the parties and perused the record**

5. It is pertinent to note here that the respondent 2 herein being co-accused of the petitioner herein in the impugned complaint despite service has neither chosen to appear nor has he filed any response to the petition, so has also the contesting respondent 1 not chosen to file any response to the petition.
6. Learned counsel for the petitioner while making his submissions in line with the contentions raised and grounds urged in the petition would contend that the impugned complaint could not have been filed by the complainant respondent 1 herein against him on the admitted facts detailed out in the complaint under the provisions of Negotiable Instruments Act, 1881 as the petitioner herein had never issued the cheques referred in the impugned complaint in favour of the complainant respondent 1 herein as the said cheques as per the admission of the complainant respondent 1 herein had been issued by the accused 2 respondent 2 herein. Learned counsel would further contend that the Magistrate overlooked the said factual position and yet wrongly proceeded to entertain the complaint and took cognizance thereof under section 420 IPC against the petitioner herein in terms of order dated 21.8.2020 and that the revisional court as well overlooked the said position and erred in dismissing the revision petition filed by

the petitioner herein against the order of the Magistrate dated 21.8.2020.

7. The short question that arises for consideration of this court in the instant petition would be as to whether the Magistrate could have taken cognizance under section 420 IPC against the petitioner herein in the complaint filed by the complainant respondent 1 herein under and in terms of section 138 of the Act of 1881.

Indisputably, the offences under section 420 IPC and Section 138 of the Act of 1881 are distinct and different offences as if a person fraudulently or dishonestly induces another person to deliver any property or to do or omit to do anything which he would not do or omit if he were not deceived and such act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property commits an offence of cheating punishable under Section 420, IPC whereas in a prosecution under Section 138 of the Act of 1881 any inducement so as to make the other person to deliver any property etc. as defined in Section 415, IPC, is not an ingredient. Thus, if a person issues a cheque and subsequently if the cheque was dishonoured by the Bank for want of funds, etc. and thereafter even after issuance of demand notice, the said person fails to pay the amount covered by the cheque within the time stipulated by the Act of 1881 that person commits an offence punishable under Section 138 of the Act of 1881 and the question of inducement to other person to part with any property to do or omit to do

anything does not at all arise in a prosecution under Section 138 of the Act of 1991. Furthermore, in an offence under Section 138 of the Act of 1881 the offence is not committed on the date of issue of the cheque or when the cheque is dishonoured by the Bank for specified reasons but after the demand the person concerned fails to pay the amount covered by the cheque to the holder of the cheque within the stipulated period so much so while in a prosecution under Section 138 of the Act of 1881, fraudulent or dishonest intention at the time of issuance of cheque need not be proved, but under prosecution under section 420 IPC, such intention is an important ingredient to be established at the inception/outset.

8. Having regard to the aforesaid position of law inasmuch as the case set up in the complaint against the petitioner herein, the accused 1 petitioner herein could not have been proceeded against by the Magistrate in the complaint filed by the complainant respondent 1 herein under section 138 of the Act of 1881 for commission of offences under section 420 IPC. The Magistrate seemingly has committed a patent error in this regard so has also the revisional court committed the same dismissing the revision petition filed by the petitioner herein against the order of cognizance and summoning passed by the Magistrate on 21.8.2020.
9. For the aforesaid reasons, the petition succeeds, as a consequence whereof the impugned complaint, order dated 21.8.2020 passed

by the Magistrate therein as also order of the Revisional Court dated 6.10.2021 are quashed insofar as the same relate to the petitioner herein. However, the complainant respondent 1 herein shall be at liberty to proceed against the accused 1 petitioner herein for the alleged commission of offence under section 420 IPC, if so advised and if permissible under law.

**(JAVED IQBAL WANI)**  
**JUDGE**

Srinagar  
15-07-2024  
*N Ahmad*

Whether the order is reportable: Yes/No

Whether the order is speaking: Yes/No

