

JAGDISH BAGRI

v.

RAJENDRA KUMAR LUHARIWALA AND ANR.  
(Criminal Appeal No.116 of 2009)

JANUARY 21, 2009

**[DR. ARIJIT PASAYAT AND ASOK KUMAR  
GANGULY, JJ.]**

*NEGOTIABLE INSTRUMENTS ACT, 1881:*

*S.138 – Conviction by CJM – Affirmed by Addl. Sessions Judge – High Court dismissing application under s. 401 r/w s.482 – On appeal, Held: Lawyer could not appear due to several difficulties – Lawyers are expected to be vigilant once they accept a brief – In view of the peculiar facts of the case, impugned order set aside – Matter remitted to High court for fresh consideration on merits – S.401 r/w s/482 Cr.P.C. – Advocate's duty towards client.*

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal  
No. 116 of 2009.

From the Judgment and Order dated 18.3.2008 of the High Court of Calcutta at Calcutta in C.R.R. No. 727 of 2005.

Pramit Saxena, Yashpal Dhingra and Sarad Kumar Singhania for the Appellant.

The Judgment of the Court was delivered by

**DR. ARIJIT PASAYAT, J.1.** Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Calcutta High Court dismissing the application filed under Section 401 read with Section 482 of the Code of Criminal Procedure, 1973 (in short the 'Code').

A Challenge in the Criminal Revision Petition was to the order passed in Criminal Appeal No.2 of 2004 by learned Additional Sessions Judge, Asansol confirming the judgment and order of conviction and sentence dated 22.4.2004 passed by learned Additional Chief Judicial Magistrate, Asansol.

B 3. Since the appellant did not appear when the matter was called, the matter was taken ex-parte. The High Court noted that a sum of Rs.2,30,000/- was payable to the complainant-respondent No.1 herein by the present appellant -accused and since the payment was not made there was an agreement between the parties to stipulate the mode of payment. A sum of Rs.2,30,000/- was to be paid in 8 instalments and the first instalment was of a sum of Rs.50,000/- payable by 22.6.2002 and the 8th instalment of Rs.10,000/- was payable by 28.2.2003. As a security for the payment, the appellant issued three cheques. One of the cheques was of Rs.1 lakh and that is the subject matter of present controversy. Stand was taken that since the cheque was issued as a security, the provisions of Section 138 of the Negotiable Instruments Act, 1881 (in short the 'Act') had no application. The High Court noticed that the appellant failed to pay Rs.2,30,000/- in instalments as agreed to and therefore because of default of payment cheque of Rupees one lakh was presented. In that sense there is no question of any security.

F 4. Learned counsel for the appellant submitted that because of unavoidable difficulties there was no appearance when the matter was called. It was submitted that the matter was suddenly appeared in the list and due to some unavoidable difficulties, the appellant's advocate could not appear at the time of hearing before learned Single Judge.

G 5. Learned counsel for the respondents on the other hand submitted that on two dates the appellant did not appear and, therefore, the Court had no option but to dismiss the revision petition on merits. It appears from the records that case was H filed in 2005 and was listed on 17.3.2008 for the first time and

on the next day it was dismissed for non prosecution.

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6. Learned counsel for the appellant highlighted several difficulties which stood on the way of learned counsel for the appellant to appear before the Court when the matter was taken up. It is true that the lawyers are expected to be vigilant once they accept a brief. But on the peculiar facts of the case we set aside the impugned order and remit the matter to the High Court for a fresh consideration on merits. To avoid unnecessary delay the parties are directed to appear before the concerned Court on 28.1.2009. The learned Chief Justice of the High Court is requested to assign the case to an appropriate Bench.

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7. The appeal is disposed of accordingly.

G.N.

Appeal disposed of.

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