

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

C.R.R. 1671 of 2017

With

CRAN 2 of 2017 (Old No. CRAN 2846 of 2017)

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CRAN 3 of 2017 (Old No. CRAN 3524 of 2017)

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CRAN 4 of 2018 (Old No. CRAN 3752 of 2018)

Balai Chandra Mondal

-vs.-

Laxmipriya Dey & Anr.

For the Petitioner : Mr. Debasish Roy,
Mr. Dilip Kumar Maity
Mr. Prasanta Kumar Das

For the Opposite Party no.1 : Mr. Pawan Kumar Gupta
Ms. Sofia Nesar
Mr. Santanu Sett

Heard on : 18.08.2021, 08.09.2021, 16.09.2021,
23.09.2021 & 29.09.2021.

Judgment on : **16.11.2021**

Tirthankar Ghosh, J:-

The present revisional application has been preferred against the judgment and order dated 13th April, 2017 passed by the learned Additional Sessions Judge, 2nd Court, Krishnagar, Nadia, in Criminal Appeal No. 05 of 2017 wherein the learned Appellate Court was pleased to dismiss the appeal and affirmed the judgment and order of conviction and sentence passed by the learned Judicial Magistrate, 2nd Court, Krishnagar, Nadia in connection with Case No. 1133C/14 under Section 138 of Negotiable Instruments Act.

The learned Judicial Magistrate, 2nd Court, Krishnagar by its judgment and order dated 15.02.2017 was pleased to hold the present petitioner guilty of the offence and sentenced him to pay compensation of Rs.11,50,000/- (Rupees eleven lakh fifty thousand) only, within 45 days and in default to suffer simple imprisonment for a period of 2 years.

The genesis of the case was on the basis of a petition of complaint filed by one Laxmipriya Dey against the present petitioner Balai Chandra Mondal under Section 138/142 of the Negotiable Instruments Act. It was alleged in the petition of complaint that the complainant and the accused were known to each other and had a good relation as such the complainant transferred her land in favour of the accused at a considerable price of Rs.10,00,000/- for which the accused issued cheque bearing no.041051 dated 24.02.2014 drawn on IDBI Bank, amounting to Rs.10,00,000/- in her favour. Complainant present the said cheque for encashment on 22.04.2014 with her banker, Bank of Baroda, Krishnagar, Nadia and the same was dishonoured due to insufficiency of fund in the account of the accused

person. The factum of dishonor was intimated by a Bank Memo dated 23.04.2014 and the complainant, thereafter, on 19.05.2014 served a demand notice through her lawyer by registered post with AD, thereby demanding the amount covered by the dishonoured cheque. The complainant alleged that in spite of the receipt of the demand notice the accused through his lawyer took a flimsy ground and failed to make any payment within the statutory period as prescribed under the Act. The complainant, thereafter, proceeded to file the instant case before the learned court which was registered as complaint case no. 1133C/14 (subsequently re-numbered as T.R. No. 522/14).

The learned Magistrate on perusal of the complaint and on examination of the complainant was pleased to issue process against the accused person for commission of offence under Section 138 of the Negotiable Instruments Act. Pursuant to the summons being received the present petitioner/ accused appeared before the Learned Court and was granted bail, thereafter, the substance of the accusation was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon the oral evidence of the complainant and 9 documents while the defence/accused/petitioner in order to rebut the prosecution case examined two witnesses which included the accused himself and one Arun Kumar Khanderwal.

The documents which have been relied upon by the prosecution are:

- (i) Disputed Cheque No. 041051 dated 24.02.14 – Exhibit-1,
- (ii) The deposit slip of Bank of Baroda dt. 22.04.14 – Exhibit-2,
- (iii) Return memo of dated 23.04.14 –Exhibit-3,
- (iv) Copy of demand notice dated 19.05.14-Exhibit-4,
- (v) Postal receipt of notice dated 19.05.14- Exhibit-4/1,
- (vi) Returned A/D card of demand notice –Exhibit-4/2,
- (vii) Reply of demand notice dated 19.06.14 – Exhibit-5,
- (viii) Certified copy of sale deed no.18852/14 – Exhibit-6,
- (ix) Certified copy of sale deed no. 18853/14 – Exhibit-6/1.

The documents which have been relied upon by the accused/defence before the learned trial Court are:

- (i) Deposit slip of Bank of Baroda dated 18.08.14 – Exhibit-A,
- (ii) Copy of Cheque no.000008 dated 18.08.14 – Exhibit-B,
- (iii) Bank transactions of accused dated 18.04.14- Exhibit-Cand C/1.

The complainant in her examination-in-chief before the Court by way of affidavit reiterated her contention as made in the petition of complaint and stated that two properties were sold to the accused for Rs. 10,00,000/- each aggregating to sum of Rs. 20,00,000/-. The dishonored cheque was issued in respect of one of the properties. In cross-examination the same story was reiterated by the complainant and she categorically pointed out on being cross-examined by the defence that the sale deeds have been admitted in evidence by way of Ext.6 and Ext.6/1. The accused/defence on the other hand took a plea that on 18.08.2014 the amount of rupees ten lakhs was

transferred to the account of the complainant, as such there were no dues for which the case has been persuaded by the complainant.

In order to prove such subsequent payment being made the accused also tendered one Arun Kumar Khanderwal as DW2 who was the Chief Manager of Bank of Boroda, Krishnagar, Nadia. The said Bank Manager tendered the deposit slip and a cheque in favour of Laxmipriya Dey dated 18.08.2014 for rupees ten lakhs and the same was marked as Ext.B. The branch manager asserted that the petitioner Balai Chandra Mondal transferred Rs.10,00,000/- in favour of Laxmipriya Dey on 18.08.2014.

On scrutiny of the materials which have been brought on record by way of oral and documentary evidence it reflects that the dispute arose because of transfer of property in respect of sale of land, for which cheque was issued and was subsequently dishonored. The Learned Magistrate has scrupulously considered the statutory compliance required for initiation of a proceeding under Section 138 of the Negotiable Instruments Act and has observed that the time period required for presentation of the cheque, issuance of demand notice and the filing of the complaint was adhered to by the complainant when the complaint was filed on 20th June, 2014 and the Learned CJM, Nadia took cognizance of the same and transferred the case to the Learned Judicial Magistrate, 2nd Court, Krishnagar, Nadia for enquiry, trial and disposal. The petitioner has repeatedly tried to harp on the issue before the Learned Magistrate as well as the Appellate Court as also before this Court that he has repaid the amount of Rs. 10,00,000/- and as such he should be exonerated from the charges. It would be apposite to state that

even if the fact as stated by the accused is correct then also the payment was made on 18.08.2014 which was much beyond the period of 15 days from the date of receipt of the demand notice which was issued by the complainant. It would be pertinent here to rely on Ext.5 which was an Advocate's Letter issued on behalf of the present petitioner and admitted in evidence as Ext. 5. The contents therein categorically states that a cheque amounting to rupees ten lakh was handed over pursuant to registration of the sale deed but the same was not allowed to be en-cashed as it was a condition precedent that the same could be en-cashed only on delivery of the original sale deed, CS Record and RS Record and other documents which the complainant did not deliver to the present petitioner, such letter was dated on 19.06.2014. Therefore, there is no dispute that no payment was made in respect of the dishonoured cheque within the statutory period of time as contemplated under the provisions of Section 138 of the Negotiable Instruments Act.

The evidence further reflects that there were two sale deeds which were marked as Ext.6 and Ext.6/1 in respect of two different properties and the contents of the said deeds reflected that each of the properties were worth Rs.10,00,000/- each, and the accused/petitioner could only adduce evidence for reimbursement of Rs.10,00,000/- and that too much beyond the period i.e., 18.08.2014. It was specifically argued by the complainant that the petitioner was trying to dilute the case for confusing regarding payment in respect of the other property which was not the subject matter of the cheque for which the petitioner was liable to pay.

The fact and circumstances of this case compels this Court to refer to a recent judgment of the Hon'ble Supreme Court in **Sumeti Vij -Vs. - Paramount Tech Fab Industries** reported in **2021 SCC OnLine SC 201** which is as follows:

“13. The object of introducing Section 138 and other provisions of Chapter XVII in the Act appears to be to enhance the acceptability of cheques in the settlement of liabilities. The drawer of the cheque be held liable to prosecution on dishonour of cheque with safeguards provided to prevent harassment of honest drawers. Section 138 primarily relates to a civil wrong and the amendment made in the year 2000 specifically made it compoundable. The burden of proof was on the accused in view of presumption under Section 139 of the Act and the standard of proof was of “preponderance of probabilities”. The N.I. Act including a cheque carrying a presumption of consideration in terms of Sections 118(a) and 139 of the Act which is related to the purpose referred to and reads as under:—

“118 Presumptions as to negotiable instruments. —
Until the contrary is proved, the following presumptions shall be made:—

(a) of consideration —that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

.....

139. Presumption in favour of holder.—*It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.”*

14. *There is a mandate of presumption of consideration in terms of the provisions of the Act and the onus shifts to the accused on proof of issuance of cheque to rebut the presumption that the cheque was issued not for discharge of any debt or liability in terms of Section 138 of the Act, which 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 provisions of this Act, be punished with imprisonment for 8 [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 or other liability” means a legally enforceable debt or other liability.”

15. *The scope of Section 139 of the Act is that when an accused has to rebut the presumption, the standard of proof for doing so is that of “preponderance of probabilities” which has been examined by a three-Judge Bench of this Court in Rangappa v. Sri Mohan , which reads as under:—*

“26. *In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat [(2008) 4 SCC 54 : (2008) 2 SCC (Cri) 166] may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.*

27. *Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence*

made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard or proof.” 16. It is well settled that the proceedings under Section 138 of the Act are quasicriminal in nature, and the principles which apply to acquittal in other criminal cases are not applicable in the cases instituted under the Act.

17. *Likewise, under Section 139 of the Act, a presumption is raised that the holder of a cheque received the cheque for the discharge, in whole or in part, of any debt or other liability. To rebut this presumption, facts must be adduced by the accused which on a preponderance of probability (not beyond reasonable doubt as in the case of criminal offences), must then be proved.”*

I have considered the arguments advanced by both the sides which were in fact reiteration of their pleadings which was taken up before the trial Court as well as the appellate Court and I have also considered the judgments delivered by the trial Court as well as the Appeal Court. I do not differ with the view taken by the Learned Court below so far as the factual appreciation is concerned as the Learned Court below have held that the cheque which is subject matter of the case was issued in respect of only one of the properties which is for the sale deed No. 18852 marked as Ext.6. The transfer of money which had taken place was in respect of the sale deed No. 18853 which was marked as Ext.6/1.

The defence in this case has failed to rebut the prosecution evidence, so far as the quantum of the money which was required to be paid in respect of the two properties which were purchased by him. The plea of the defence that the sum of Rs.10,00,000/- was subsequently paid, falls short of the contention of the prosecution wherein for two of the properties Rs.20,00,000/- (Rs.10,00,000/- each) were to be paid by the accused. It would have been proper if the defence could have shown that the complainant has received a sum of Rs.20,00,000/- in total and thereafter taken up the plea in the instant case. The belated plea which has been taken (which is subsequent to the reply to the demand notice) is insufficient to overcome the prosecution evidence, as such it is held that the prosecution has proved its case by adhering to the provisions and principles of Negotiable Instruments Act.

Having regard to the specific factual finding made by the Learned Courts below, I am of the view that the petitioner have failed to make out any case for interference. Accordingly, the judgment and order of the appeal dated 13.04.2017 passed in Criminal Appeal No. 5/2017 as also the judgment and order of conviction and sentence passed by the Learned Trial Court [(Learned Judicial Magistrate, 2nd Court, Krishnagar, Nadia in Complaint Case No.1133C/2014 (TR 522/2014)] is hereby affirmed.

Thus, CRR 1671 of 2017 is dismissed.

Pending applications, if any, is consequently disposed of.

If the petitioner is on bail his bail bond stands cancelled. He is directed to surrender before the Learned Court below within a period of 7 days in the alternate he should pay the amount of compensation as directed by the Judicial Magistrate, 2nd Court, Krishnagar, Nadia by its judgment and order dated 15.02.2017. The Learned Magistrate on completion of 7 days would execute the sentence as imposed by him on 15.02.2017.

Department is directed to communicate this order to the Ld. Trial Court and send the LCR forthwith to the Court below.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Tirthankar Ghosh, J.)