

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRR 1036 of 2022

Sunil Chandra

-Vs-

M/s Aparna Jewellers

For the Petitioner:	Mr. Sabyasachi Banerjee, Adv., Mr. Anirban Dutta, Adv., Mr. Sayantan Sinha, Adv.
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For the Opposite Party:	Mr. Ayan Bhattacharya, Adv., Mr. Arijeet Doss Mullick, Adv., Mr. Subhasis Pyne, Adv.
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Heard on: 15 September, 2022.

Judgment on: 27 September, 2022.

BIBEK CHAUDHURI, J. : –

1. The accused of case No. C/7703 of 2010 being a proceeding of criminal complaint under Section 138 of the Negotiable Instruments Act (hereinafter described as the said act) is the petitioner before this Court assailing the order dated 27th September, 2021 passed by the learned Metropolitan Magistrate, 5th Court at Calcutta rejecting the petitioner's application praying for examination of a "questioned document" (Exhibit-2) by the handwriting expert with admitted signature of the accused/petitioner on the documents, marked as Exhibit-7/1, Exhibit-8 and 8/1, Exhibit-9 and 9/1.

2. Shorn of unnecessary details, the fact relevant for the disposal of the instant criminal revision is as follows:-

3. The opposite party filed a complaint under Section 138 of the Negotiable Instrument Act against the petitioner in the year 2010 before the learned Metropolitan Magistrate at Calcutta alleging, inter alia, that the complainant deals with a wholesale and retail business of gold jewellery. The accused is also engaged in the same business. The complainant sold and supplied gold jewellery to the accused amounting to Rs.60,59,387/- through their invoice No.4136 dated 19th January, 2010. In discharge of his existing liability, the accused issued one account payee cheque in favour of the complainant/company on 19th January, 2010 drawn on Bank of India Bidhannagar Branch for sum of Rs.60,59,387/-. The complainant duly presented the said cheque for encashment but it was dishonoured vide Memorandum of dishonor dated No.22nd January, 2010. After the said cheque being dishonoured complainant issued legal notice to the petitioner requiring him to pay the said amount in discharge of his debt or existing liability however, the said demand notice was returned with postal endorsement "not claimed". Subsequently, the complainant filed the complaint under Section 138 of the Negotiable Instrument Act before the learned Chief Metropolitan Magistrate at Calcutta which was registered as C-7703 of 2010. It is pertinent to mention that the aforesaid case is pending for trial before the learned Metropolitan Magistrate, 5th Court at Calcutta.

4. During trial one Dipak Dey as power of attorney holder of the complainant deposed as PW1. During his examination in chief PW1 filed a bill being No.4136 dated 19th January, 2010 for the amount of Rs.60,59,387/-. The said bill was marked as Exhibit-2 during trial of the case.

5. Exhibit-2 was filed in order to prove the existing debt or liability of the accused/petitioner. PW1 also stated in oath that the accused/petitioner issued the cheque in question for the discharge of the existing debt or liability.

6. Veracity of Exhibit-2 was challenged by the accused in course of cross examination of PW1. It was denied emphatically by the accused/petitioner that the accused purchase any gold ornament from the complainant amounting to Rs.60,59,387/- and the said bill was forged and fabricated for the purpose of this case in order to manufacture a case of existing liability against the petitioner.

7. It is the defence of the accused that the complainant and the accused had business relationship and prior to the present dispute having been cropped up, the petitioner purchased gold ornaments from the complainant against bills and vouchers. The petitioner authenticated the said bills by putting his signature thereon. However, Exhibit-2 does not bear the signature of the petitioner. Therefore, the petitioner denied purchasing any gold ornaments amount to Rs. 60,59,387/- against the disputed bill (Exhibit-2). Thus, the petitioner has no debt or liability to the opposite party. Further case of the petitioner is that as per the existing

custom prevalent in gold ornament business, a cheque is required to be deposited by the prosecutor to the seller. Accordingly the petitioner at the time of inception of commercial relationship handed over a blank signed cheque to the opposite party/complainant. The opposite party with some ulterior motive converted the said cheque to a negotiable instrument in order to put the petitioner with liability.

8. It is submitted by Mr. Banerjee on behalf of the petitioner referring to the relevant portions of cross examination of PW1 that Exhibit-2 was issued in the name of M/s Chandra Jewellers c/o Soumen. It is not in dispute that petitioner Sunil Chandra is the proprietor of M/s Chandra Gold. PW1 specifically stated that Soumen is not related to Chandra Gold. Mr. Banerjee also refers to the relevant portions of cross examination of PW1 where he stated that the signature of accused person appears in left side of Exhibit-2. It is also submitted by him that the petitioner deposed before the trial court as DW1. During his cross examination as many as three bills issued by the complainant was confronted with the petitioner. The petitioner admitted his signature on the said bills. The said bills were marked Exhibit-7/1, 8/1 and 9/1. Learned Advocate for the petitioner invites this court to compare the signatures appearing on Exhibit-7, 8 and 9 with the signature appearing on Exhibit-2. It is clearly found on comparison in bare eyes with the signatures on Exhibit-7, 8 and 9 are not by the same person who signed Exhibit-2. Therefore, the petitioner prayed for examination of the signature appearing on Exhibit-2 with the admitted signature of the petitioner appearing on Exhibit-7, 8 and 9.

9. Mr. Bhattacharya, learned Advocate for the opposite party, on the other hand submits that the petitioner filed the said application for examination of the signature appearing on Exhibit-2 and Exhibit-7, 8 and 9 by the handwriting expert only to drag the trial. It is submitted by Mr. Bhattacharjee that Section 139 of the Negotiable Instrument Act raises a presumption of law that cheque duly drawn was in discharge of debt or liability. The petitioner did not deny his signature on the cheque in question. On the other hand, it was stated by the petitioner that a blank cheque was issued in favour of the complainant as a security in relation to business transaction between the petitioner and the opposite party. However, in view of the provision contained in Section 20 of the Negotiable Instrument Act, the petitioner shall be liable by such instrument, in the capacity in which he signed the same, to any holder in due course for such amount. Section 20 of the Negotiable Instrument Act runs thus:-

20. Inchoate stamped instruments.—Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in [India], and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount;

Provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder.

10. Thus, even if the defence of the petitioner is taken into consideration, the petitioner cannot be discharged from his liability. The defence that the complainant subsequently fell in the said cheque for some ulterior purpose does not have any leg to stand.

11. Having heard the learned Counsels for the parties I like to record at the outset that Section 139 of the Negotiable Instrument Act raises a rebuttable presumption that the holder of a cheque received the cheque for the discharge of any debt or other liability. Section 139 speaks of presumption of law. It is needless to say that such presumption is rebuttable and onus lies on the drawer to rebut it by adducing cogent evidence to the contrary. It is held by the Hon'ble Supreme Court in **Bir Singh vs. Mukesh Kumar** reported in **(2019) 4 SCC 197** that the presumption under Section 139 of the Negotiable Instruments Act is not in conflict with human right of presumption of innocence of accused which prosecution is required to dislodge by proving its case against the accused beyond reasonable doubt.

12. Thus primary burden is on the prosecution to prove the ingredients of offence under Section 138 of the Negotiable Instrument Act beyond reasonable doubt. Only when the complainant discharges his/her burden, onus shifts upon the accused to rebut the presumption available in favour

of the complainant under Section 138 of the Negotiable Instruments Act. Let me state the factual background relevant for the disposal of the instant revision. It is pertinent to note that the complainant in order to discharge his/her initial burden produce bill No.4136 dated 19th January, 2010 and claimed that in discharge of his existing debt or liability, the petitioner had issued the said cheque for an amount of Rs.60,59,387/-. The said bill has been exhibited during trial.

13. The petitioner disputed the authenticity of the said cheque on the grounds that firstly, the said bill was issued in the name of Chandra Jewellers c/o Soumen. The complainant does not know Soumen. PW1 does not know whether Soumen is an employee of Chandra Jewellers. From the petition of complaint it is found that one Sunil Chandra is the proprietor of Chandra Jewellers. The witness on behalf of the complainant unequivocally stated that the said name of Soumen is appearing in Exhibit-2 which was issued is not related to Chandra Gold. At the same time, PW1 stated in his cross examination that the signature of the accused/petitioner appears on the left side bottom of Exhibit-2. During cross examination of the accused three numbers of bills were confronted on behalf of the complainant with whom he admitted the signature on the said bills. At this stage examination of the signature appearing on the left side bottom of Exhibit-2 and admitted signature of the petitioner on Exhibit-8 and 9 came up for considering. At the risk of repetition it is recorded that the complainant wanted to place reliance on Exhibit-2 to invite the court to raise presumption under Section 139 of the said Act

that the petitioner issued the cheque in question in discharge of his existing debt as against Exhibit-2.

14. Ordinarily, signature and handwriting of a person on a document in question can be proved (a) by calling a witness who wrote the document, (b) by admission of a person against whom the document is tendered and (c) by calling a person as witness who saw the document being written or signed. When the petitioner denied the signature on Exhibit-2, the same cannot be proved by adopting two methods. The complainant failed to produce a person as witness who saw the petitioner signing Exhibit-2. Therefore, the signature on Exhibit-2 can only be proved by Sections 45/47/67 and 73 of the Evidence Act.

15. Section 45 of the Evidence Act runs thus:-

“45. Opinions of experts.—When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting³⁵ [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art,³⁶ [or in questions as to identity of handwriting]³⁵ [or finger impressions] are relevant facts. Such persons are called experts.

Illustrations

(a) The question is, whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the Act, or that he was doing what was either wrong or contrary to law. The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant..”

16. Section 47 of the Indian Evidence Act states that opinion of a handwriting expert or any person who is acquainted with the handwriting of the person by whom it is supposed to be written or signed are admissible.

17. According to Section 67 of the Evidence Act, if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting as alleged to be in that person's handwriting must be proved to be in his handwriting. Recourse to Section 73 can only be taken when handwriting has not been proved by any independent evidence or other evidence. It is important to note that Section 73 does not specify by whom the comparison shall be made. However, looking to the other provisions of the Act it is clear that it can be made by handwriting expert under Section 45 or by anyone familiar with the handwriting under Section 47 or by the court itself.

18. In **State (Delhi Administration) vs. Pali Ram reported in (1979) 2 SCC 158**, the Hon'ble Supreme Court raised a word of caution that it is not advisable that a judge should take upon himself the task of comparing the admitted writing with the disputed one. The prudent course is to obtain opinion and assistance of an expert. The issue under what circumstances the court should send a disputed signature of a party

to a proceeding for comparison, examination and expert opinion with the admitted signature or handwriting by the same party has been succinctly dealt with by the Punjab and Haryana High Court in **Chamkaur Singh vs. Mithu Singh** reported in **(2013) SCC OnLine P & H 22840**. This Court follows the above mentioned judgment with approval on the point of law and on factual background when it is necessary for the court to direct examination of a disputed document for handwriting expert.

19. This Court is not unmindful to note the provision contained in Section 20 of the Negotiable Instruments Act. However, when the complainant himself comes up with a document to establish the existing debt or liability, the question of raising presumption under Section 139 does not arise because in such a case the complainant does not depend upon the statutory presumption. On the contrary, the complainant comes up to prove existing debt or liability, which the accused was under obligation to discharge, on production of a bill/invoice allegedly acknowledged by the petitioner by putting his signature thereon. Now, when the petitioner denies his signature thereon, and admitted signature of the petitioner is available in some other documents (Exhibit-7, 8 and 9), the Court must send the disputed signature on a disputed document for comparison and expert opinion with the documents admittedly signed by the petitioner. In **M.S Narayana Menon @ Mani vs. State of Kerala & Anr.** reported in **(2006) 6 SCC 39**, the issue of presumption under Sections 118(a), 138 and 139 of the Negotiable Instruments were drawn for consideration came up before the Hon'ble Supreme Court for

adjudication. The Hon'ble Supreme Court was pleased to hold that the court has to presume a negotiable instrument put for consideration unless the existence of consideration is disproved. It is further held by the Hon'ble Supreme Court that in view of Section 118(a) and Section 139, the initial burden of proof is on the accused to rebut the presumption of law by raising a probable defence. If he discharges the said burden, the onus thereafter shifts on to the complainant to prove his case. The ratio laid down in Narayana (Supra) is where the case of the complainant is based on statutory presumption under Section 139 of the Negotiable Instruments Act. However, where the complainant comes up with a document claiming to be executed by the accused confirming his existing debt or liability, complainant is under obligation to prove the said document beyond any reasonable doubt. When execution of the said document is disputed by the accused and the accused admitted his signature on some other documents produced by the complainant during his cross examination, court is required to obtain expert opinion comparing the said two documents for just decision of the case. The complaint cannot raise any objection pleading, that statutory presumption under Section 139 is available in favour of the holder of the cheque.

20. Under the piquant factual background and in view of the discussion made hereinabove, I have no other alternative but to hold that the impugned order dated 27th September, 2021 suffers from inherent

illegality and material irregularity and the said order is liable to be set aside.

21. Accordingly, the instant revision is allowed.

22. The impugned order dated 27th September, 2021 passed by the learned Metropolitan Magistrate, 5th Court at Calcutta in case No. C-7703 of 2010 is set aside.

23. The learned Magistrate is directed to send Exhibit-2 and Exhibit-7, 8 and 9 to the handwriting expert for comparison of signatures appearing on the left side bottom of the above mentioned exhibits and decide the case on the basis of the opinion of the handwriting expert.

24. Parties are at liberty to act on the server copy of the order.

(Bibek Chaudhuri, J.)