IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 121 of 2007

M/s. Sonodyne T.V. Company Ltd.

Vs.

Mr. Rajesh G. Kalra.

For the Appellant : Md. Kutubuddin.

For the State : Ms. Rita Datta.

Heard on : 17.08.2022

Judgment on : **02.09.2022**

Shampa Dutt (Paul), J.:

This appeal is directed against judgment and order dated 27.12.2006 passed by the learned Addition Chief Judicial Magistrate, Alipore, 24-Parganas (South) in T.R. 264 of 2004 arising out of C-3774/2004 acquitting the respondent/accused for offence punishable under Section 138 N.I. Act.

The appeal has been preferred for setting aside the order and judgment of acquittal on the ground that the said judgment under appeal is bad in law and that the same has not been passed by properly considering the evidence-on-record. The learned Magistrate failed to appreciate the evidence-on-record both oral and documentary, came to erroneous findings and held that the cheque was not issued to pay off legally enforceable debt or any liability and as such, the judgment is liable to be set aside. By the said judgment the learned Magistrate has caused serious miscarriage of justice by not holding the respondent/accused person guilty of the offence punishable under Section 138 of the N.I. Act inspite of the complainant proving the case against the accused/respondent.

The complainant's case before the Trial Court was that the complainant has been authorized to file this case on behalf of the complainant company, M/s. Sonodyne T.V. Company Ltd., as per Board of Directors resolution dated 09.08.2004. That the accused in discharge of his existing enforceable liability issued and A/c Payee cheques in favour of the complainant bearing no. 087110 dated 21.07.2004 drawn on United Bank of India, Barakar Branch, Burdwan.

The said cheque was signed by the accused being the proprietor of M/s Gopal Radio Mart. That the complainant presented the said cheque for encashment with the banker, Standard Chartered Bank, Barakar Branch, Burdwan within its validity period but the said cheque was dishonoured and returned back along with a memorandum dated 27.07.2004 with the remark 'No such A/c with us'. That a demand notice dated 09.08.2004 and the same was sent under registered post with A/D on 10.08.2004. That the accused received the said demand notice and despite receipt of the demand notice did not repay the amount, and hence, this case was filed.

Cognizance was taken, process was issued. The accused was examined under Section 251 of the Code of Criminal Procedure. He pleaded not guilty and claimed for trial.

Defence case

The case of the defence is that a false case has been filed by the complainant only to harass him. It is categorically stated by the accused before the Trial Court that his business was closed in the year 1990 and the bank account connected to the said business was closed much earlier (1990). The disputed cheque in this case was kept as security and the complainant taking advantage of that cheque filed the complaint against the accused person after 15 years of closure of the said account. The learned Magistrate considering the materials-on-record was pleased to find that the complainant did not produce any cogent evidence to show as to when the disputed cheque was issued to payoff legally enforceable debt or any other liability and accordingly rightly held that the accused/respondent could not be held liable to have committed the offence punishable under Section 138 of N.I. Act and accordingly acquited the accused of the said charge.

Evidence on record

The appellant/complainant as **Prosecution witness no. 1** (PW-1) has deposed before the Court on oath, that they had business transaction with the respondent/accused. He has stated that they deposited the cheque with their bank on 21.07.2004. On 27.04.2004, it was returned with the comment 'No such A/c is lying with us'. The information was received by them on 02.08.2004. On 10.08.2004, a demand notice was sent which was received by the accused/respondent on 13.08.2004 but the respondent did not make the payment within the statutory period.

The respondent/accused examined himself as **Defence witness no. 1** (DW-1). This witness on oath has stated that his shop 'Gopal Radio Mart' was closed down in the financial year 1990-91. The matter was informed to the Shops and Establishment Department by way of submitting Form-E. The said documents have been marked as Exhibit 'A'. This witness also informed the other authorities about the closure of the said shop. He has admitted on oath that he had business transaction with the complainant's company, Asansol Branch but after 1991 there was no transaction between the accused's business and the complainant's company. He has further stated that the invoice marked as Exhibit 'E' was received from the complainant's company in the year 1990. The receipts issued by the Company have been proved and marked Exhibit 'D' series. This witness has proved the reply from Bank (Exhibit E) and statement of account (Exhibit 'F') received from the Bank on 04.02.2006. This witness has stated that he never had any transaction with the complainant's company, Calcutta Branch. He has denied that he is liable to pay any debt to the complainant's company, Calcutta Branch. It is specifically stated by the accused/respondent that when he started his business with the complainant's company, Asansol Branch, the disputed cheque of this case was taken as security from him before 1990 and was in their custody. The complainant has now misused the said cheque. The business relation with the complainant's company and the accused was from 1984 to 1990 and transaction was usually by cheque and cash. It is further stated that he did not issue the disputed cheque in the year 2004 and has denied the complainant's case.

On cross-examination, the complainant has admitted that they had a branch in Asansol. He could not say that the said branch was closed. The complainant also has a branch at New Alipore, Calcutta. He could not say when the business of the accused was closed and also cannot say when the last order was placed by the accused persons at their Alipore Branch. This witness has proved the signature of the accused marked as Exhibit '1'. He has denied the case of the accused that the shop closed down in the year 1990-91 and that they prepared the cheque subsequently.

From the materials on record, it is seen that the notice under Section 138 of Negotiable Instrument Act is in accordance with law and the said notice has not been denied by the accused respondent.

The only case of the accused respondent is that he conducted business with the complainant's company at Asansol Branch and never with the Branch at Alipore, Kolkata. **The accused company was closed down in the year 1990**. The original **notice of winding up of business** has been proved by the accused before the Trial Court and the said notice has been marked as **Exhibit-A** which shows that the business conducted by the accused was closed down on 13th December, 1990. Exhibit-D series are the payments made by the accused company to the complainant's company and the invoices/challans; all of the year 1990. Exhibit-E is the reply letter annexed with the statement of account (Exhibit F).

From Exhibit-E it is clearly seen that the statement of account provided by the Bank in respect of the accounts maintained by the accused respondent, shop, is for the period from 10th March, 1981 to 21st July, 1990. They have stated that the Branch was mechanized in the year 2001. It has been stated by the Deputy Manager of the Bank in writing that after 21st July 1990 the ledger is not traceable and after computerization it is seen that there was no such account in the system.

From Exhibit-E it is clear that after 21st July, 1990 there is no account of accused respondent with the bank.

It is the case of the accused respondent that the accused had business transaction with the complainant, Asansol branch, till the year 1990 and the disputed cheque in this case was given as a security. The complainant did not use the said cheque till 1990. All on a sudden the complainant has presented the said cheque on 21st July, 2004 and intimation was given by the bank while returning the cheque; it has been clearly noted in point no. 12 therein as "no such account with us". It is clear that after the year 1990 the said account was closed. The complainant has produced the disputed cheque and also seven other cheques, which have been marked as Exhibit 6 series and the disputed cheque is marked as Exhibit 1.

Exhibit 6 series are the cheques issued by the accused respondent in favour of the complainant in the year 1989. These cheques marked as Exhibit 6 series have been produced before the Court by the complainant. Surprisingly the Exhibit 6 series are all of the year 1989, but the disputed cheque is dated 21st July, 2004 and this Court finds after considering the said circumstances and materials on record and the documents in support of the contention of the accused that his business did close down in the year 1990.

The learned Magistrate was right in his finding that it is not believable that the disputed cheque was issued after almost 15 years of closure of the account. The complainant could not produce any documents to show any transaction between the parties from 1990 onwards. There are no documents either invoice or receipts of the business transaction from the year 1990 till 2004. Such contention of the complainant cannot be believed.

It is seen that the case of the accused respondent is prima facie believable as he has filed all the documents relating to his business and also bank account, which supports his statement that his business and the bank account were closed in the year 1990. It is the case of the appellant complainant that as all the ingredients required to prove a case under Section 138 of the Negotiable Instrument Act have been duly proved regarding dishonour of the cheque, the accused should have been convicted.

The contention of the accused respondent is that the cheque was kept as security with the complainant's company and the business of the accused was closed down in the year 1990 as also the bank account was closed in the year 1990 and it is a fact that the appellant could not prove a single document to show that there was a business transaction between the accused and the complainant between the period 1990 to 2004, i.e. the year when the alleged disputed cheque dated 21st July, 2004 was issued.

It is further seen that Exhibit 6/3 is a cheque bearing no. **087106** dated 6.11.**1989**; Exhibit 6/4 is a cheque bearing no. **067107** dated 17.11.**1989**; Exhibit 6/5 is a cheque bearing no. **087108** dated 27.11.**1989** and Exhibit 6/6 is a cheque bearing no. **087109** dated 28.11.**1989**. All these four cheques were issued by the accused in favour of the complainant in the year 1989. Surprisingly the disputed cheque bearing no. **087110** in the next cheque in the cheque book was allegedly issued on **21.07.2004**. **It is thus found that after the cheque being Exhibit 6/6 was issued, the next cheque in the same Cheque Book being disputed cheque marked as Exhibit 1 was issued after fifteen years**. This is totally unbelievable and as such the said fact totally supports the case of the accused respondent and also supports all the contention of the accused respondent that the cheque was handed over to the complainant as a security and was not issued to meet off any legally enforceable debt or any other liability towards the complainant.

Thus, the presumption against the accused in respect of the said cheque could not be proved in view of the evidence as discussed.

Conclusion

Thus, considering the discussion as made above and the materials on record this Court finds that it has been clearly proved before the Court that the accused respondent's bank account was closed in the year 1990 and his business was also closed in the same year. There has been no business transaction between the parties to this case from 1990 to 2004. Exhibit 6/6, is the cheque just prior to the disputed cheque marked as Exhibit 1, the gapping period between the said two cheques is fifteen years. This goes against the case of the complainant and totally supports the defence of the accused respondent. It has been clearly proved that there was absolutely no business transaction between them from the year 1990 and 2004 and the disputed cheque marked as Exhibit 1 had been kept as security and was misused by the complainant to harass the respondent company in the year 2004, after 15 years.

Accordingly this Court finds no reason to interfere with the judgement and order under appeal.

The appeal being CRA 121 of 2007 thus stands dismissed.

Lower court records along with a copy of this judgment be sent down at once to the learned Trial Court for information and necessary action, if any.

Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Shampa Dutt (Paul), J.)