

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION

Before:

The Hon'ble Justice Ananda Kumar Mukherjee

C.R.A. 222 of 2006

M/s Francis Klein & Co Private Ltd.

-Vs-

The State of West Bengal & Ors.

For the Appellant:

Mr. Ayan Bhattacharjee, Adv.
Mr. Meghajit Mukherjee, Adv.
Mr. Aditya Ratan Tiwary, Adv.

For the State:

Mr. Pratick Bose, Adv.
Mr. Pravas Bhattacharya, Adv.

Heard on :

11.03.2022.

Judgment on:

11.05.2022.

Ananda Kumar Mukherjee, J. :-

1. Instant appeal under section 378 (4) of the Code of Criminal Procedure, 1973 has been filed by the appellant against Respondent no. 1 to 5 being aggrieved and dissatisfied with the judgment and order dated 29.08.2005 passed by learned Metropolitan Magistrate, 13th Court Calcutta in Case No. C-5021 of 2000, thereby acquitting the accused/ opposite party no. 2 to 5 of the charges under sections 138/141 of the Negotiable Instrument Act.

2. The appellant preferred an application praying for Special Leave to Appeal against the impugned judgment and order and the same was registered as C.R.M No. 180 of 2006. The same was allowed on 28.02.2006 and Special Leave was granted to the appellant company to file the appeal.

3. In gist, the fact of appellant's case is that the appellant is a company incorporated under the companies Act, 1956 having its place of business at 13A, Government Place East, Kolkata- 700 069. Respondent No 2 is a company incorporated under the companies Act, 1956 having its place of business at 10, Canning Street, Kolkata and Respondents no. 3 to 5 are the Directors of Respondent no. 2 Company.

4. A complaint was lodged on behalf of the appellant company before the court of learned Chief Metropolitan Magistrate, Calcutta disclosing an offence committed by Respondents no. 2 to 5, punishable under section 138/141 of the Negotiable Instrument Act (herein after referred as the N.I. Act).

5. In discharge of their existing liability in respect of the loan taken from the Appellant company, Respondents no. 2 to 5 issued an account payee cheque bearing no. 212779 dated 29.5.2000 for Rs. 5,12,188/- drawn on Bank of India, Calcutta Overseas Branch, in favour of the appellant company.

6. The said cheque was placed for encashment but was returned dishonoured on 24.8.2000 with the remark "Exceeding Arrangement". The appellant company thereafter sent a Notice dated 2.9.2000, addressed to the Respondents no. 2 to 5, informing them that the cheque was dishonoured and

asked them to make payment of the cheque amount within 15 days from the date of receipt of the said notice.

7. The Respondents no. 2 and 4 received the said notice on 6.9.2000 while Respondent no. 3 and 5 received the notice on 15.9.2000 but failed to pay the amount claimed. Under such circumstances Respondents no. 2 to 5 committed an offence punishable under section 138/141 of the Negotiable Instrument Act. On 3.10.2000 learned Chief Metropolitan Magistrate, Kolkata on the basis of complaint was pleased to take cognizance of the offence and after examining the authorized representative of the appellant company was pleased to find that a prima facie case was made out against Respondents no. 2 to 5 under sections 138/141 of the Negotiable Instrument Act and issued process against them.

8. Respondents no. 2 to 5 thereafter appeared before the court and the case was transferred to the court of Learned 13th Metropolitan Magistrate, Kolkata for disposal. On 25.9.2001, Respondents no. 2 to 5 were examined under section 251 of the Code of Criminal Procedure and the substance of the accusation were read over and explained to them to which they pleaded not guilty and claimed to be tried.

9. In order to prove their case appellant/ complainant examined three witnesses namely Abhijit Sarkar, employee of the States Bank of India, the banker of Respondents no. 2 to 5, as PW-1. Chandrasekhar Behara, Manager, Global Trust Bank, Chowringhee Branch, Calcutta, banker of the appellant

company as PW-2 and Amarendra Nath Chatterjee, constituted attorney of the appellant company as PW-3.

10. Respondents no. 2 to 5 were examined under section 313 of the Code of Criminal Procedure and were confronted with incriminating circumstances for their explanation.

11. The Respondents no. 2 to 5 examined one defence witness Dipti Prakash Show as DW-1.

12. After considering the evidence on record learned Metropolitan Magistrate 13th Court, Calcutta was pleased to pass an order on 29.8.2005 wherein he held that the charge under sections 138/141 of the Negotiable Instrument Act has not been proved against Respondents no. 2 to 5 and acquitted them of such charges.

13. Learned Magistrate acquitted Respondents no. 2 to 5 on the sole ground that the copy of the demand notice was not properly proved by prosecution.

14. It is contended by learned Advocate for the appellant that PW-3, stated in his evidence that Exhibit 12, is a true copy of the demand notice sent by the appellant company to the Respondents no. 2 to 5 but Learned Magistrate without appreciating the fact that service of the notice was also admitted during examination under section 313 of Cr. P.C committed grave error in law by not relying on the copy of demand notice (Exhibit 12) which was admitted in evidence without any objection by defence.

15. According to the appellant learned Magistrate failed to appreciate that under sections 138 proviso (b) of the Negotiable Instrument Act it was

necessary to send a notice by the holder of the cheque and receipt of such notice by the drawer of the cheque. In the instant case Respondents no. 2 to 5 have not denied that demand notice was not served upon them. Therefore, learned Magistrate by acquitting the Respondents no. 2 to 5 on a finding that content of notice has not been proved has committed grave error in law and caused prejudice to the petitioner.

16. The appellant has preferred this appeal against the judgment of acquittal on the grounds inter alia, that learned Magistrate passed the impugned judgment without application of judicial mind as such the same is liable to be set aside, that the impugned judgment and order is erroneous and the same is not tenable under the law and that the prosecution has proved the offence against Respondents no. 2 to 5 beyond reasonable doubt and under such circumstances the impugned judgment and order acquitting Respondents no. 2 to 5 is bad in law and is liable to be set aside.

17. It is further contended that the requirements under section 138 of the N.I Act has been complied by the appellant company and Respondents no. 2 to 5 have admitted their failure to pay the amount mentioned in the cheque despite receipt of the said demand notice. In such circumstances learned Magistrate has committed grave error of law by acquitting Respondents no. 2 to 5 for which the impugned judgment order is liable to be set aside.

18. Learned advocate for the appellant company argued that in a case under section 138 of the N.I Act the mandatory requirement of issue of notice to the drawer in terms with section 138 proviso (b) is complete when the notice is sent

in the said manner. The drawer of the cheque can rebut the presumption of service of notice by showing that he had no knowledge that the notice was brought to his address or the address mentioned on the notice was incorrect or the letter was never tendered or the report of postman was incorrect. It is argued on behalf of the appellants that when the payee dispatches a notice under registered post with correct address of the drawer of the cheque, the principle incorporated in section 27 of the General Clauses Act would be attracted and the requirement of clause (b) of the proviso to section 138 of the Act would stand complied with and cause of action to file the complaint would arise on the expiry of the period prescribed in clause (c) of the said proviso for payment by the drawer of the cheque and within one month of the date on which the cause of action arise.

19. It is contended that under section 114 of the Indian Evidence Act, 1872 the court may presume the existence of certain facts which it thinks rightly to have happened, regard being had to the common course of natural events, human conduct and public and private business, in relating to the facts of the particular case. It is submitted by learned advocate for the appellant that in the present case Notice demanding payment of the cheque amount was issued to the Respondents no. 2 to 5 under registered post the said Notice were served upon the respondents and the postal A/D Cards bearing the signatures of the addresses were returned to the appellant/complainant. The original notice was served upon the accused respondents. Therefore, the appellant at the time of adducing evidence has produced a photo copy of the notice, the original of

which had already been dispatched. In support of prove of delivery of the Notice the postal A/D Cards were also produced as Exhibit 10 (collectively) and when the photo copy of the notice was admitted in evidence and marked as Exhibit 12, no objection was raised by the accused respondents. Therefore, the finding of learned Magistrate that the demand notice is not proved and by his not attaching any evidentiary value to it has yielded to an erroneous finding which is not legally tenable.

20. It is argued on behalf of the appellant that the entire purpose of giving a Notice to the drawer is to give an opportunity to him to pay the cheque amount within 15 days of service of notice with copy of complaint and thereby free himself from the penal consequence. In support of his submission learned advocate relied upon the case of **CC Alavi Haji vs. Palapetty Mohummed; 2007(6) supreme court cases 555**, where it was laid down by the Hon'ble Court that, "the requirement to give a notice is a clear departure from the rule of criminal law, where there is no stipulation of giving a notice before filing of a complaint. Any drawer who claims that he did not receives the notice sent by post, can, within 15 days of receipt of the summons from the court in respect of the complaint under Section 138 of the Act, may make payment of the cheque amount and submit to the court that he had made payment within 15 days of receipt of summons (by receiving a copy of the complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the court along with the copy of the complaint under section 138 of the Act, cannot obviously

contend that there was no proper service of notice as require under section 138, by ignoring statutory presumption to the contrary under section 27 of the General Clauses Act and Section 114 of the Evidence Act”. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran case if the “giving of notice “ in the context of clause (b) of the proviso was the same as the “receipt of notice “ a trickster cheque drawer would get the premium to avoid receiving notice by adopting different strategies and escape from legal consequence of Section 138 of the Act”.

21. Learned advocate argued that the offence against Respondents no. 2 to 5 have been well established and that the notice has been served upon them but it is due to the erroneous finding of learned Magistrate, that the contents of exhibit 12 has not been proved, the present case has been dismissed.

22. It is argued on behalf of the appellant that Exhibit 12 should be read in evidence and considering the fact that the receipt of the demand notice has not been denied by the accused respondents, the same should be considered as service of demand notice upon the respondents and on the basis of evidence adduced and the documents produced before the trial court, Respondent no. 2 to 5 should be held guilty of the offence punishable under section 138/141 of the Negotiable Instrument Act and the impugned judgment is liable to be set aside and reversed.

23. To buttress his argument, learned advocate relied upon the decision in the case of **Dayamathi Bai vs. K.M. Shaffi; 2004(7) SCC 107**, wherein it has been

held that where copy of documents are admitted without objection in the trial court, no objection to their admissibility can be taken afterwards, in the court of appeal. The proposition of law set out in the above decision is that, if a document is in itself not inadmissible but that the mode of proof was irregular and insufficient, objection as to the mode of proof falls within procedural law, therefore, such objections could be waived. They have to be taken before the document is marked s admitted to the record.

24. In *Dayamathi Bai* (supra) the principle of law set out and reiterated is that, “Ordinarily, and objection to the admissibility to evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in the evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does to dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to

object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof.”

25. Reliance has also been placed by learned advocate for the appellant on the decision in the case of **Sanjib Kumar Ghosh Vs. Dolon Adhikari & Anr; 2016 ACD 1017 (CAL)**, wherein it was held “this court is of the clear view that the accused appellant duly signed those AD Cards and as such he duly, received the original notice, the photo copies of which have been marked as ‘X’ series for identification. It is true that the photo copies are inadmissible in evidence, unless admitted but in the instant case there was no question of production of the original as those were in possession of the accused respondent.”

26. Respondent No. 2 to 5 did not appear and notices sent at their address under registered post were returned unserved. It is therefore deemed to be good service. Learned advocate for the respondent State/ Respondent No.1 argued that the appellant in course of trial did not adduce any evidence regarding contents of the demand notice as such simply by admitting the document in evidence does not extent any support to the complaint’s case without the contents of the notice being proved. It is argued that in case under section 138 of the Negotiable Instruments Act, the proof of the demand notice is essential and mandatory. In the present case, the appellant has failed to comply the same as such learned Magistrate committed no error by dismissing the case. It is argued that there is nothing to interfere with the impugned judgment and the appeal is liable to be dismissed.

27. I have carefully considered the impugned judgment, the evidence adduced by prosecution witnesses and the defence witnesses as well as the documents exhibited in support of their respective cases. It is undisputed that Respondents No.3 to 5 are the Directors of respondent no. 2 company. The allegation in the complaint is that in discharge of their existing liability in respect of a loan taken by the accused company from the complainant, its three Directors, Dinesh Chandra Meheta, Chaner Pal Meheta and Hiten D Meheta in control of the affairs of the company issued a cheque bearing 212779 dated 29.05.2000 for Rs. 5,12,188/- (Exhibit 1) drawn on Bank of India, Calcutta Overseas Branch, in favour of the complainant. The said cheque was presented to Global Trust Bank Chowringhee Branch, Calcutta within its valid period of for encashment but the same was returned dishonoured on 24.08.2000. Demand notice was issued on 02.09.2000 and sent to the accused persons through the advocate of the complainant under registered post with AD and the same was served upon accused no. 1 and 3 on 06.09.2000 and on accused no. 2 and 4 on 15.09.2000 but the accused persons/ respondents did not make any payment.

28. Prosecution examined three witnesses and produced several documents including the dishonoured cheque which is marked as Exhibit 1, cheque returned memo Exhibit 2 statement of account of the accused company with Bank of India as Exhibit 3 and Exhibit 4, authorization letter from the Bank in favour of witness Abhijit Sarkar to appear as a witness has been produced as Exhibit 5, cheque return memo as Exhibit 6, statement of account of the

complainant bank as Exhibit 7, copy of power of attorney in favour of Amarnath Chatterjee by the complainant company is marked as Exhibit 8, postal receipt as Exhibit 9 series, AD Cards in the name of accused persons as Exhibit 10 series, the petition of complaint under Section 138 N.I Act as Exhibit 11 and the true copy of demand notice as exhibit 12. On reappreciation of evidence on record I find that there is no denial of the fact that the cheque was issued in favour of the complainant company and the same was returned dishonoured. After dishonor of the cheque the complainant issued demand notice dated 02.09.2000 which was duly served upon the accused persons and the AD cards were returned to the advocate of the complainant company. The accused petitioners who are Respondents no. 2 to 5 herein did not make any payment within the statutory period of notice, nor did they make any payment after service of summons along with the copy of complaint on them.

29. The presumption under Section 139 of the Negotiable Instrument Act which arose against the accused respondents have not been rebutted. It is therefore clear that the cheque (Exhibit 1) was issued by one of the Directors of the company for discharge in whole or in part of any debt of other liability.

30. The main contention in this case is that learned Magistrate did not attach any evidentiary value to the demand notice (Exhibit 12) though the same was admitted without any objection raised on behalf of the defence. In view of the principle laid down in the case of **Dayamathi Bai Vs. K.M Shaffi; 2004 (7) SCC 107**, it appears to me that document itself is not inadmissible as the original notice were dispatched and served upon the accused persons. The

complainant therefore had no other alternative but to produce the photo copy of the notice. Once the notice has been admitted in evidence without objection it is not necessary to prove its contents. The accused respondents were fully aware about their liability and drawing of cheque in favour of the complainant company. They were also aware that the cheque was dishonoured and the same may be gathered from the evidence on PW1, 2 and 3 as well as the cheque returned memo.

31. Having considered the argument advanced by the learned advocates for the appellant and respondent state and the materials on record, I hold that learned Magistrate has committed an error in law by not placing reliance upon the demand notice and observing in his judgment that the demand has not been proved. Once a document is admitted in evidence without any objection the legal consequence is that reliance has to be placed upon its content unless the same is disputed. Being fortified with the ratio of decision reported in the case of **Dayamathi Bai Vs. K.M Shaffi; 2004 (7) SCC 107**, I hold that omission to raise objection at the time of admission of Exhibit 12 in evidence is fatal to the defence case and there is no reason to relegate the validity of the document as not proved. The evidence on record is cogent and consistent and the same establishes the offence under Section 138/141 of the Negotiable Instrument Act against Respondents no. 2 to 5 beyond reasonable doubt.

32. I, therefore, hold that the judgment of acquittal passed by learned Magistrate suffers from illegality as it is not based upon the evidence on record. Learned Magistrate has failed to appreciate the case in its proper perspective in

the light of the evidence on record, consistent with object of legislation, as such the same is liable to be set aside and the impugned judgment passed by Learned Metropolitan Magistrate 13th Court, Calcutta in C Case no.5021 of 2000 acquitting the accused persons is therefore set aside and the judgment is reversed.

33. The accused company/ Respondent No.2 and its three directors who are Respondents no. 3 to 5 in this appeal are found guilty of the offence punishable under section 138/141 of that N.I Act they are convicted for the said offence. In view of the outstanding cheque amount of Rs.5,12,188/- which was dishonoured and unpaid since 29.05.2000, I consider it appropriate and reasonable to sentence the accused company and its three directors, Dinesh Chandra Meheta, Chaner Lal Meheta and Hiten Meheta, to a fine of Rs. 8,00,000/- jointly and severally in default accused Directors shall suffer rigorous imprisonment for one year each . Learned Metropolitan Magistrate 13th Court shall accordingly issue a warrant of sentence. The fine of Rs. 8,00,000/- on being realized shall be paid to the complainant as compensation. The appeal is accordingly allowed.

34. Let the LCR along with copy of the judgment be sent to the learned Metropolitan Magistrate 13th Court, Calcutta for execution of the sentence within a period of one month from the date of receipt of the record. The convicted persons are directed to surrender before learned Metropolitan Magistrate 13th Court, Calcutta within a fortnight from date. A true copy of this judgment be supplied to Respondent Nos. 2 to 5 free of cost for intimation.

35. Urgent Photostat certified copy of this judgment, be supplied to the parties if applied for, maintaining all formalities.

(Ananda Kumar Mukherjee, J.)