

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 564 of 2019

MR. BIMAL SINGH SETHIA
VS.
MR. ASHOK BENGANI

For the Appellant : Mr. Debrup Bhattacharyya, Adv.
Mr. Tirthankar Dey, Adv.

For the Respondent : Mr. Uday S. Chatterjee, Adv.

Hearing concluded on : 11th November, 2022

Judgement on : 11th November, 2022

Siddhartha Roy Chowdhury, J.:

1. This is an appeal preferred under Section 378(4) of the Code of Criminal Procedure assailing the judgement and order of acquittal passed by the learned 4th Court of Metropolitan Magistrate in Complaint Case No. 843 of 2013 on 28.4.2017.
2. Briefly stated, one Mr. Bimal Singha Sethia filed a petition of complaint under Section 138 of the N.I. Act through Sri Prosenjit Das, holder of general Power of Attorney executed by the complainant contending inter alia that Mr. Ashok Bengani approached the complainant for a temporary accommodation of loan to the tune of Rs.3 lakhs which was acceded to and the complainant issued an account payee cheque vide No. 010854 dated 17.6.2010 drawn on

Hong King & Shanghai Bank Corporation Ltd., Shakespeare Sarani Branch. The said cheque was duly encashed by the accused person. On 01.6.2013 the accused person in discharge of his obligation to repay the said loan issued an account payee cheque vide no. 000248 dated 01.6.2013 for a sum of Rs.3 lakhs drawn on Bank of India, Burrabazar Branch, Kolkata in favour of Mr. Bimal Singh Sethia with an understanding that the said cheque would be deposited on or after 20.8.2013. Accordingly, the complainant presented the cheque but it was dishonoured for insufficient fund. The intimation in this regard was received by the complainant on 27.8.2013 and on 16.9.2013 the complainant, through his advocate sent a demand notice dated 14.9.2013 through speed post with acknowledgement due, calling upon the drawee of the cheque to pay a sum of Rs. 3 lakhs which is equivalent to the cheque amount. The said notice was received by Mr. Ashok Bengani on 18.9.2013 but it was not complied with. Hence the petition of complaint was filed on 31.10.2013 before the learned Chief Metropolitan Magistrate, Kolkata which was transferred to the learned 4th Court of Metropolitan Magistrate for disposal.

3. After complying with the provision of Section 200 of Code of Criminal Procedure, learned 4th Metropolitan Magistrate was pleased to issue process under Section 138 of the N.I. Act upon the accused person and the accused persons surrendered to the jurisdiction of the learned Trial Court. During trial Sri Prosenjit Das, the general Power of Attorney Holder and the representative of the complainant adduced

evidence as P.W. 1. Thereafter, no other witness was examined and the accused person was examined under Section 313 of the Cr.P.C.

4. Learned Trial Court, however, disposed of the petition of complaint with an order of acquittal holding inter alia that the complainant since did not file the petition of complaint by himself and decided not to appear before the Court to adduce evidence, his representative being the holder of general of Power of Attorney cannot maintain the prosecution under Section 138 of the N.I. Act. According to learned Trial Court the holder of dishonoured cheque himself ought to have appeared before the Court personally to adduce evidence. While passing the impugned judgement, learned Trial Court placed his reliance upon the judgement of a co-ordinate Bench of this Court pronounced in case of *Prasanta Kumar Basu vs. Narandra Kumar Anchalia & Anr.* reported in (2007) 1 C Cr.LR(Cal) 136.
5. Aggrieved by and dissatisfied with such judgment and order of acquittal the complainant has preferred this appeal.
6. Assailing the impugned judgement, learned counsel for the appellant Mr. Debrup Bhattacharyya submits that learned Trial Court adopted a short cut method to dispose of the complaint case without applying the judicial mind. According to Mr. Bhattacharyya a general Power of Attorney holder is competent to maintain the prosecution under Section 138 of the N.I. Act and such right has been recognized by the Hon'ble Apex Court. To buttress his point Mr. Bhattacharyya relied upon the decision of the Hon'ble Supreme Court pronounced in the case of **A.C. NARAYANAN VS. STATE OF MAHARASHTRA &**

ANR. reported in **(2014)11 SCC 790**. It is held by Hon'ble Apex Court at paragraphs 28 and 31 are as under:

“28. The power of attorney holder is the agent of the grantor. When the grantor authorizes the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder and not by the attorney holder in his personal capacity. Therefore, where the payee is a proprietary concern, the complaint can be filed by the proprietor of the proprietary concern, describing himself as the sole proprietor of the payee, the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor, and the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor. However, we make it clear that the power of attorney holder cannot file a complaint in his own name as if he was the complainant. In other words, he can initiate criminal proceedings on behalf of the principal.

31. In view of the discussion, we are of the opinion that the attorney holder cannot file a complaint in his own name as if he was the complainant, but he can initiate criminal proceedings on behalf of his principal. We also reiterate that where the payee is a proprietary concern, the complaint can be filed:

- (i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the “payee”;*
- (ii) the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and*
- (iii) the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor.”*

7. It is further adverted by Mr. Bhattacharyya that the judgement of Prasanta Kr. Basu (supra) was passed taking lumen from a judgement of Andhra Pradesh High Court, in the backdrop of a different factual matrix and learned Trial Court failed to appreciate the judgement of Prasanta Kr. Basu (supra) in its proper perspective.
8. Mr. Uday S. Chatterjee, learned counsel appearing on behalf of the respondent supporting the impugned judgement submits that learned Trial Court was absolutely justified in passing the impugned judgement. It is settled principle of law that when two views are possible the one that tilts in favour of the accused person should be accepted and while sitting on an appeal against an order of acquittal the appellate Court may not overturn the judgement of acquittal unless the judgment impugned appears to be perverse. In support of his argument Mr. Chatterjee placed reliance upon the decision of Hon'ble Apex Court pronounced in the case of *C. Antony vs. K.G. Raghavan Nair* reported in *2003 CRI. L. J. 411*. It is further argued that views of the learned Trial Judge as to the credibility of the witnesses, presumption of innocence in favour of the accused, right of the accused to the benefit of any doubt should always be given due consideration while considering an appeal against the order of acquittal. Mr. Chatterjee relied upon a decision of Hon'ble Supreme Court given in *Ghurey Lal vs. State of Uttar Pradesh* reported in (2008) 10 Supreme Court Cases 450 to buttress his argument.
9. The argument of Mr. Chatterjee on the role of the Appellate Court sitting on appeal against an order of acquittal cannot be ignored

rather Mr. Chatterjee makes this Court revisit the well settled principle of law. But as a matter of fact in the impugned judgement learned Trial Court did not discuss any evidence to record an order of acquittal. On contrary learned Trial Court held that the petition of complaint since was filed by a Power of Attorney holder though in the name of the complainant and the complainant since decided to keep himself away from the witness box the petition of complaint cannot be said to be maintainable. This view of learned Trial Court, in my humble opinion is quite contrary to the view expressed by Hon'ble Supreme Court in the case of A.C. Narayanan (supra).

10. In the case of *Prasanta Kumar Basu vs. Narendra Kumar Anchalia & Anr.* reported in 2006 SCC Cal 622 the petition of complaint was filed not in the name of the complainant but in the name of general Power of Attorney holder who filed the petition of complaint as an authorized agent of the firm L.M. Enterprises where he used to work for gain as manager. In this case at hand the petition of complaint has been filed in the name of complainant by his authorized agent and holder of general Power of Attorney.
11. In my humble opinion the impugned judgement is utterly perverse and should not be allowed remain in force and should be set aside which I accordingly do.
12. It is a fit case to invoke the provision laid down under Section 391 of Cr.P.C. to remit the case to the learned Trial Court with a direction to write judgment afresh taking into consideration the evidence already on record and dispose of the case within six months from the

date of receipt of this order. However, liberty may be given to the parties to adduce evidence if prayer is made therefor.

13. The Criminal Appeal is thus allowed.
14. The impugned judgement passed by the learned Trial Court is set aside.
15. The lower Court record be sent down to the learned Trial Court together with copy of this order for information and necessary action.
16. The parties shall act upon the server copy duly downloaded from the official website of this Court.
17. Urgent Photostat certified copy of this judgement, if applied for, be supplied to the parties, upon completion of requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)