

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 3089 of 2019

Naba Kumar Das

Vs.

Abdus Sabur & Anr

For the Petitioner : Mr. Ramdulal Manna
: Mr. M. Manna
: Mr. S. Mukherjee

For the Opposites Parties : None

Heard on : 17.11.2022

Judgment on : 28.11.2022

Shampa Dutt (Paul), J.:

The present revisional application has been preferred by the accused/petitioner praying for setting aside and quashing of Order dated 18.06.2019 passed by the learned Additional Sessions Judge, Fast Track Court-1, Kandi, Murshidabad in Criminal Revision No. 28 of 2018 arising out of Orders dated 05.09.2018, 25.09.2018 and 12.11.2018 passed by the learned Judicial Magistrate, Kandi, Murshidabad in C.R No. 192 of 2018.

The accused/petitioner's case before the Court of Sessions was that the proceedings under Section 138 of the Negotiable Instruments Act, 1881 before the Court of the learned Magistrate, Kandi arose when the cheque No. 894158 drawn on State Bank of India, Beherampur Branch was allegedly issued by the petitioner on 10.04.2008 towards repayment of a loan of Rs.4,00,000/- during a business transaction. The said cheque was dishonoured and subsequently on compliance of all formalities as per the Negotiable Instruments Act, the proceedings were initiated under Section 138 of the N.I. Act before the learned magistrate. The specific case of the petitioner/accused is that the disputed cheque (photocopy filed) was admittedly signed by him and was payable to "SELF". It is further submitted that the said cheque got misplaced and the complainant by filling up the cheque illegally, presented the cheque to the bank. The

accused/petitioner on 19.02.2016 made a prayer before the learned Magistrate for sending the disputed cheque to the handwriting expert which was allowed by the learned magistrate by an Order dated 12.05.2016.

Subsequently, after several dates had passed wherein directions were passed by the learned magistrate for depositing the estimates etc, all on a sudden, on 05.09.2018 the learned Magistrate suddenly held that there was no need to send the cheque for comparison by a handwriting expert to avoid unnecessary delay. By relying upon certain rulings of the Hon'ble Court and holding that if the signature on a cheque is admitted the rest of the entries made in the disputed cheque can also be prima facie held to be admitted by the Court. The magistrate then proceeded with the trial.

Being aggrieved by the said orders the accused/petitioner approached the Sessions Court and the learned Additional Sessions Judge, Fast Track Court-I, Kandi, Murshidabad in Criminal Revision 28 of 2018 by his judgment dated 18th June, 2019 affirmed the Orders under revision. One of the findings in the judgment is that the Court under its revisional jurisdiction does not have the power to reassess the evidence. Being aggrieved the accused /petitioner has now approached this Court against the said Order of the learned Additional Sessions Judge, Fast Track Court-I, Kandi, Murshidabad.

Inspite of service none have appeared for the opposite parties.

Mr. Ram Dulal Manna, learned counsel for the petitioner has submitted that there has been serious miscarriage of justice and abuse of process of law in view of the fact that initially when the learned Magistrate passed an Order referring the cheque for opinion of the handwriting expert without recalling the said order all on a sudden came to a completely different findings and proceeded with the trial. Learned Counsel further submits that in the interest of justice the said Order under revision is liable to be set aside in default otherwise the petitioner /accused will suffer irreparable loss and injury.

During the hearing the learned Counsel for the petitioner has placed the copy of the cheque admittedly signed by the petitioner/accused Naba Kumar Das and written to "SELF". On careful perusal of the said document this Court finds that the name of the opposite party No.1 has been written adjacent to the word "SELF". The word "SELF" and the name of the opposite party No.1 are put adjacent to each other in the cheque and is clearly in different handwritings.

Though it is an accepted practice that a signed cheque may be filled up by a payee, the circumstances in the present case is totally different.

On perusal of the Order dated 02.05.2016 passed by the learned Judicial Magistrate, Kandi wherein the learned Magistrate allowed the prayer for referring the cheque to the hand writing expert and the subsequent Orders (six in number) wherein the matter was adjourned for

depositing the estimated cost, when all of a sudden the learned Magistrate vide its Order dated 05.09.2018 relying upon decisions of Hon'ble High Courts came to the finding that as the signature on the cheque has been admitted by the accused/petitioner herein though he has raised objection regarding the filling up of the same, the learned Magistrate was of the view that there is no need to send the cheque for comparison. The said Order was passed in order to avoid the delay in the case. No Order was passed regarding the modification of the Order dated 02.05.2016 or the Order being recalled. The learned Sessions Judge affirmed the said Orders.

Considering the materials on record including the supporting documents, this Court relies upon the following judgments of the Supreme Court:

a) In *Rajeshbhai Muljibhai Patel and Others etc -Vs- State of Gujarat and Another in Criminal Appeal Nos. 251-252 of 2020* the Court on February 10, 2020 held;

“19. It is also to be pointed out that in terms of Section 45 of the Indian Evidence Act, the opinion of handwriting expert is a relevant piece of evidence; but it is not a conclusive evidence. It is always open to the plaintiff-appellant No.3 to adduce appropriate evidence to disprove the opinion of the handwriting expert. That apart, Section 73 of the Indian Evidence Act empowers the Court

to compare the admitted and disputed writings for the purpose of forming its own opinion.....”

Though the Court held that Section 73 of the Indian Evidence Act empowers the Court to compare the admitted and disputed writings for the purpose of forming its own opinion, in the present case the situation is different, in view of the fact that in this case, the word “SELF” and the name of the complainant/opposite party No.1 has been written side by side in the cheque in different handwritings which is prima facie very clear.

On plain and simple perusal of the said disputed cheque, it is absolutely clear that the word “SELF” and the name of the complainant/opposite party No.1 on the same cheque are in two different handwritings and such noting (contradictory) is irregular and against the banking rules.

b) In Criminal Appeal Nos. 230-231 of 2019 (Bir Singh-Vs-Mukesh Kumar) the Supreme Court held;

“37. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the

drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

38. If a signed black cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.”

In the said case, the Court held that if a person signs a cheque and makes it over to the payee he remains liable unless he adduces evidence to rebut the presumption.....in discharge of a liability. The Court further held that it is immaterial if the cheque is filled up by any other person other than the drawer if the cheque is duly signed by the drawer.

A very important observation of the Court was as follows **“if the cheque is otherwise valid”**, the penal provision of Section 138 would be attracted.

In the present case the cheque prima facie appears to be invalid in view of the fact that in the column “pay” two contradictory entries have been made, one is “SELF” and the other is the name of the opposite party/ complainant both adjacent to each other and clearly in two different handwritings. The cheque prima facie thus appears to be invalid but in order to rebut the said presumption and also to decide if the said cheque

has been duly filled in, the matter should have been referred to the hand writing expert as directed on 02.05.2016

The further case of the accused/petitioner is that the said cheque was misplaced and subsequently misused by the complainant/opposite party no.1 and as such prima facie it appears that the cheque was also not voluntarily given to the opposite party no.1/complainant, which if proved by way of evidence, would help in rebutting the presumption under the N.I. Act.

Considering the said provisions of law and the view of the Supreme Court as discussed above, this Court finds that the Order dated 18.06.2019 passed by the learned Additional Sessions Judge, Fast Track Court-I, Kandi, Murshidabad in Criminal Revision No.. of 2018 being not in accordance with law is hereby set aside.

Consequently Orders dated 05.09.2018, 25.09.2018 and 12.11.2018 passed by the learned Judicial Magistrate, Kandi, Murshidabad in C.R. No. 192 of 2018 are also set aside.

The Criminal Revision CRR 3089 of 2019 is hereby allowed.

The learned Judicial Magistrate, Kandi, Murshidabad is directed to act in accordance with his Order dated 02.05.2016 within one month from the date of communication of this Order and make all endeavor to dispose of the case as expeditiously as possible.

There will be no order as to costs.

All connected Applications stand disposed of.

Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

Urgent Photostat Certified copy of this Judgment, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

(Shampa Dutt (Paul), J.)