CALCUTTA HIGH COURT

IN THE CIRCUIT BENCH AT JALPAIGURI

CRIMINAL REVISIONAL JURISDICTION

PRESENT:

THE HON'BLE JUSTICE BIVAS PATTANAYAK

CRR 123 of 2019

Sumati Kumar Sethia
versus
Bajla Motors Pvt. Ltd.

For the petitioner: **Mr. Arijit Ghosh, Advocate.**

For the Opposite party: **Mr Arnab Sengupta, Advocate.**

Mr. Deborshi Dhar, Advocate.

Mr. S.Saha, Advocate.

Heard on: 4th August, 2022.

Judgment on: 11th August, 2022.

JUDGMENT

Bivas Pattanayak, J :-

1.The present revisional application has been filed by the petitioner under Sections 397/401 read with Section 482 of the Code of Criminal Procedure challenging judgement and order dated 23.07.2019, passed by learned Additional District & Sessions Judge, Fast Track Court, Cooch Behar, in connection with Criminal Appeal No.23 of 2015 affirming the judgement and order dated 08.10.2015 of the learned Judicial Magistrate, 1st Court, Cooch

Behar, passed in CR No. 118 of 2011 under Section 138 of the Negotiable Instruments Act.

2. The brief fact of the case is that:-

i. The petitioner purchased one car of model Indica Vista Terra TDI III at a consideration price of Rs.3,97,797/- and on payment of token money of Rs. 34,001/- vide cheque no.014188 dated 03.11.2010 the vehicle was delivered to the petitioner.

ii. The petitioner issued another cheque bearing no.014189 dated 14.01.2011 amounting to Rs.3,50,000/- drawn on SBI, Dinhata Branch as part payment of the balance amount.

iii. The opposite party-complainant presented the said cheque in its bank at SBI Sadar Branch, Cooch Behar on 24.03.2011, however, the said cheque was returned dishonoured on the ground of *'payment stopped by the drawer'*

iv. The opposite party-complainant sent a notice dated 09.04.2011 demanding payment of the amount of the dishonoured cheque. In spite of receipt of the aforesaid notice the petitioner failed to make payment and on the basis of the same the complaint petition was filed and proceeding was initiated before the concerned Magistrate.

3.Upon considering the materials and evidence on record the learned Judicial Magistrate, 1st Court, Sadar Cooch Behar, convicted the petitioner and sentenced him to pay a fine of Rs.7,00,000/-, in default, to suffer simple imprisonment for six months alongwith simple imprisonment for one year and if the fine is paid, then Rs 5,00,000/- will go to the opposite party-complainant, Rs. 1,00,000/- to the State and Rs. 1,00,000/- to D.L.S.A, Cooch Behar.

4. Being aggrieved by and dissatisfied with the aforesaid judgment and order the petitioner preferred an appeal before the learned Sessions Judge, Cooch Behar being Criminal Appeal No. 23 of 2015 which was finally disposed of by the learned Additional District & Sessions Judge, Fast Track Court, Cooch Behar by judgement dated 23.07.2019 affirming the judgement and order of the learned Magistrate.

5. Challenging the aforesaid judgment/order passed by the Appellate Court the petitioner has preferred the present revisional application.

6. Mr. Arijit Ghosh, learned advocate for the petitioner submits that although the petitioner approached the opposite party-complainant for purchase of vehicle (car) and made payment of Rs.34,001/- but no such vehicle was ever delivered to the petitioner. The cheque in question amounting to Rs. 3,50,000/- was handed over to the opposite party-complainant as a security deposit, nothing more nothing less. He further draws the attention of the Court to the fact that the petitioner has issued several letters to the opposite party-complainant stating to deliver the vehicle and subsequent thereto after the vehicle was not delivered he issued letter intimating the opposite party-complainant of stopping payment in respect of the cheque in question. There is no such legally enforceable debt as far as the petitioner is concerned as no vehicle, which is the root of such alleged debt, has been delivered to the petitioner. However, both the courts below failed to appreciate the aforesaid facts. In the light of his submission he prayed for setting aside the judgement and order passed by both the courts below.

7. In reply to the contention raised on behalf of the petitioner Mr. Arnab Sengupta, learned advocate for the opposite party-complainant submitted that the petitioner although confronted the delivery of the vehicle but failed to rebut the statutory presumption under Section 139 of the Negotiable Instruments Act. The petitioner has not led cogent evidence to establish that the cheque in question was not issued in discharge of legally enforceable debt. In view of his aforesaid submissions he prayed that the judgement and order passed by the courts below should be affirmed in the interest of justice.

8. Having heard the learned advocates of both the sides the only question that has fallen for consideration is whether the cheque in question was issued for discharge of legally enforceable debt or not. The petitioner has thrown challenge to the contention of the complainant precisely on two fold grounds; *firstly,* that the cheque in question was handed over to the complainant as security for loan in relation to purchase of a vehicle and *secondly,* as no vehicle was ever delivered to the petitioner hence the question of legally enforceable debt of the petitioner towards the complainant does not arise at all.

8.1. As far as the first aspect is concerned it is found from the materials on record that the petitioner has not produced any documents namely loan agreement or receipt of the opposite party-complainant during trial showing the cheque in question to have been delivered to the complainant as security. The petitioner in his letters dated 06.02.2011, 23.01.2011 marked **Exhibit D, Exhibit D1** respectively and in reply to the demand notice **(Exhibit 3/1)** has stated that certain documents were handed over to the complainant and finance agreement was signed by him. In his cross-examination he admitted that he did not file any finance agreement in court. It is not the case of the petitioner that copy of the finance agreement was not delivered to him. In all his communications with the complainant such as letters dated 06.02.2011, 23.01.2011 marked **Exhibit D** and **Exhibit D1** respectively and in reply to the demand notice dated 15.04.2011 **(Exhibit 3/1)** the petitioner has not raised the issue that copy of finance agreement was not given to him. During the course of trial the petitioner also failed to make any endeavour calling for records from the office of the complainant-company to probabilise that the cheque was issued as security against loan. In the absence of cogent documents it cannot be said that the cheque amounting to Rs. 3,50,000/- was given to the complainant as security. It is also highly improbable as to why a prudent man would hand over high value cheque without any purpose or reason and that too without any receipt or document. Therefore the above ground pressed into service on behalf of the petitioner fall short of merit.

8.2. With regard to the second aspect learned advocate for the petitioner has referred to the letters issued to the opposite party-complainant intimating the fact of non-delivery of the vehicle. On going through the letters dated 06.02.2011 and 23.01.2011 marked **Exhibit D** and **Exhibit D1** respectively it appears that the fact of non-delivery of the vehicle was intimated to the opposite party-complainant. Be that as it may, save and except such intimation, there are no coercive measures undertaken by the petitioner against the complainant-company for alleged non-delivery of the vehicle and instead retaining such high value cheque which as per him was issued as security. The petitioner has also not initiated any criminal proceeding or civil litigation against the opposite party-complainant for their alleged illegal activities if any. The opposite party-complainant after such dishonour of cheque sent a demand notice on 09.04.2011 **(Exhibit 2)** and in the said notice it specified the Chassis no. and Engine no. of the said vehicle. The petitioner has not disputed the specification of the vehicle provided in the demand notice. In order to probabilise that the vehicle was not delivered to him the petitioner could have called for the records and documents from the respective Regional Transport Office in relation to the vehicle whose Chassis no. and Engine no. is specified in the notice to clarify the situation. But no such endeavour was taken by the petitioner during trial. On meticulously going through the reply dated 15.04.2011**(Exhibit 3/1)** of the petitioner against the demand notice, it is found that although the ground has been raised that the terms and conditions of delivery of vehicle and process of finance has not been complied with yet there is no such explicit and distinct statement in clear terms that the vehicle in question was not delivered to the petitioner. Hence the petitioner failed to improbabilise that the vehicle was not delivered to him.

8.3. It is admitted position that the cheque in question was issued by the petitioner and once it is so, the statutory presumption under section 139 of the Act would arise. The accused can, in contrary, prove non-existence of enforceable debt by raising probable defence. The burden upon the accused of proving the non-existence of enforceable debt can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. Bare denial of the debt apparently does not appear to be any defence. Something which is probable has to be brought on record for getting benefit of shifting the onus of proving upon the complainant. In order to disprove the presumption the accused is to bring on record such facts and circumstances which the court may either believe that the debt did not exist or its non-existence was so probable that a prudent man would under the circumstances of the case, shall act upon the plea that it did not exist. As per Section 139 of the Act there is statutory presumption that the holder of a cheque received the cheque for the discharge in whole or in part of any debt or other liability. The presumption mandated by Section 139 of the Act includes a presumption that there existed a legally enforceable debt or liability. It is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Therefore, as soon as the complainant discharges the burden to prove that the instrument was executed by the accused, rules of presumptions under Sections 118 and 139 of the Act helps him shift his burden on the accused. The presumption will live, exist and survive and shall end only if the contrary is proved by the accused that is the cheque was not issued for consideration in discharge of any debt or liability.

8.4. Now reverting back to the fact of the case as it is found that neither any such material, cogent evidence has been adduced on behalf of the petitioner nor he has brought on record the preponderance of probabilities by referring to the circumstances from the evidence raising a probable defence of non-existence of debt, to rebut the statutory presumption, hence the findings of the courts below cannot be held to be infirm in the eye of law.

9. In view of the aforesaid discussion the judgement and order passed by the learned Additional District & Sessions Judge, Fast Track Court, Cooch Behar in Criminal Appeal no.23 of 2015, confirming the conviction and sentence passed by the learned trial Magistrate in CR case no.118 of 2011 under Section 138 of the Negotiable Instruments Act, is hereby affirmed. Bail bonds furnished by the petitioner stands cancelled. The petitioner is directed to surrender before the learned Judicial Magistrate, 1st Court, Cooch Behar, within a period of seven days from date to serve out the sentence. Learned Magistrate is directed to execute the sentence in accordance with law. Failing compliance as above the learned Magistrate shall take all appropriate measures for execution of the sentence.

10. Accordingly, the present revisional application being **CRR no.123 of 2019** stands dismissed on contest.

11. All connected applications, if any, stand disposed of.

12. Interim orders, if any, stand vacated.

13. Urgent Photostat Certified copy of this judgment, if applied for, be supplied to the parties expeditiously after complying with all necessary legal formalities.

14. Let a copy of this judgment alongwith lower court records of the respective courts be sent to the learned trial court for information and necessary action as well as to the Appellate court for information.

(Bivas Pattanayak, J.)