IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

CRR 30 of 2011

Ajoy Banerjee
Vs.
State of West Bengal and anr.

Present:

The Hon'ble Justice Siddhartha Roy Chowdhury

Judgment On: 23rd February, 2023.

None is appearing on behalf of the petitioner. The matter is pending for more than 10 years. Instead of adjourning the matter suo motu I am inclined to dispose of the same based on the materials available with the record.

This criminal revisional application challenges the judgment and order dated 6th December, 2010 passed by the learned Additional Sessions Judge, Durgapur in Criminal Appeal No. 06 of 2010 affirming the judgment and order of conviction passed by the learned Additional Chief Judicial Magistrate, Durgapur on 22nd January, 2010 in a proceeding under Sections 138 of the Negotiable Instruments Act, 1881(for short N.I. Act) being C.R. No. 520 of 2005.

From the attending facts of the case it appears that the opposite party no. 2 Mrinal Kanti Mondal set a criminal proceeding into motion by filing a petition of complaint under Section 138 of the N.I Act before the learned jurisdictional Magistrate stating, inter alia, that Ajoy Banerjee whom he arrayed as an accused was known to him since 1997. He took a large amount of money from the complainant in order to sell a piece of land. As the land could not be transferred, he issued an account payee cheque of Rs. 20,000/- in favour of the complainant being cheque no. 491668 dated 10.11.2005 drawn on ICICI Bank, Durgapur Branch. Cheque was presented but not honoured as the payment was stopped by the drawer.

The banker of the complainant informed him about such development and the complainant issued a notice demanding the aforesaid sum, which was not adhered to by the accused person. The accused person stood trial, claiming to be innocent. The complainant, Ashok Kumar Banerjee, and Suprakash Mondal, these three persons adduced evidence as prosecution witnesses while Joy Banerjee, Ajoy Banerjee, and Gopal Krishna Kundu adduced evidences as DW 1, 2 and 3. The learned trial court after considering the evidence both oral and documentary was pleased to record an order of conviction against Ajoy Banerjee the accused, who made an unsuccessful attempt in criminal Appeal No. 06 of 2010 to get the order of conviction reversed.

From the attending facts of the case, I find that the complainant claimed to have given a sum of Rs. 80,000/- to the accused person in order to acquire a plot of land. But his wife filed a Money Suit against one Mihir Kumar Banerjee, father of the accused person to realise said sum of Rs. 80,000/- together with the interest which Mihir Kumar Banerjee allegedly received on 11th September, 1997.

Learned appellate court while considering the judgment and order passed by the learned ACJM Durgapur who recorded an order of conviction against the accused person under Section 138 of the N.I. Act, held: "Needless to say in order to attract the provision of Section 138 of the N.I. Act a complainant is required to prove by leading evidence as follows:

1. A cheque drawn by a person must have been dishonoured for insufficiency of funds in the account,
2. The cheque must have been presented within a period of six months of the date on which it was drawn or within the period of its validity whichever is earlier,
3. The payee must have made a demand for payment of the amount by giving notice in writing to the drawer of the cheque within 15 days from the date of receipt of information by him with regard to the return of the cheque as unpaid,
4. The drawer of the cheque failed to make payment within 15 days of the above notice,"

But mandate of law is otherwise. "Mere issuance of cheque, sans liability cannot make one culpable for the offence under Section 138 of the N.I. Act which learned appellate court could not appreciate."

Thus, it appears ex facie the learned appellate court passed the impugned judgment upon absolute misreading of the provisions under Sections 138 and 139 of the N.I. Act which envisages as under:

"**138. Dishonour of cheque for insufficency, etc., of funds in the account**.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for (a term which may be extended to two years), or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

a. the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

b. the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, (within thirty days) of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

c. the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation. - For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

"**139. Presumption in favour of holder. -** It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

The complainant in a proceeding under Section 138 of the N.I. Act has the initial burden to prove that the cheque was drawn by its drawer in discharge of liability or in order to pay debt, in part or in full. Therefore, what is imperative upon the complainant is to substantiate the fact that the person issuing cheque had the obligation to repay and in discharge of such obligation the cheque was issued. As I have already pointed out from the attending facts of the case it is admitted that a sum of Rs. 80,000/- was given by the complainant or his wife to Mihir Kumar Banerjee and Ext. A indicates that payment of Rs. 10,000/- was made on 10.11.2005 by said Mihir Kumar Banerjee to the complainant. It is pertinent to note that the cheque in question was also issued on 10th November, 2005 when a sum of Rs. 10,000/- was given and rest of Rs. 10,000/- was paid on 13th December, 2005.

This document Ext. A justifies the instruction given by the drawer of the cheque to his banker not to pay the cheque. Ext. 4 the notice demanding money equivalent to cheque is silent about the reason for which the cheque was issued. This fact indicates that the complainant failed to prove that the cheque was drawn by the accused person in discharge of his liability. Therefore, the learned appellate court in my humble opinion, committed error in affirming the judgment passed by the learned trial court, Durgapur recording an order of conviction.

The judgment impugned warrants interference, which I accordingly do.

The impugned judgment is set aside. Consequently, the order of conviction is also set aside.

The accused person being the petitioner cannot be held guilty of offence committed under Section 138 of the N.I. Act.

The criminal revisional application is, thus, allowed.

Let a copy of this judgment be sent down to the learned trial court along with the lower court records at once for information and necessary action.

Urgent certified photocopy of this order, if applied for, be given to learned advocates for the parties upon compliance of all requisite formalities.

(Siddhartha Roy Chowdhury, J.)