IN THE HIGH COURT AT CALCUTTA
(Criminal Appellate Jurisdiction)
Appellate Side

Present:

The Hon'ble Justice Bibhas Ranjan De

CRA 20 of 2021

Sanjoy Agarwala

Vs.

Ajoy Sarkar

For the Appellant :Mr. Kusal Kumar Mukherjee, Adv.

For the Opposite Party Mr. Arnab Chatterjee, Adv.
Mr. Amanul Islam, Adv.
Mr. Sourav Mukherjee, Adv.
Ms. Poulami Bose, Adv.

Heard on : 09.06.2023, 14.08.2023.
22.11.2023, 30.11.2023

Judgment on : 19th December, 2023

Bibhas Ranjan De, J.

1. This appeal has been preferred against the Judgment and order dated 27.12.2019 passed by Ld. Additional Chief

Judicial Magistrate (for short A.C.J.M) Krishnanagar, Nadia in connection with Criminal Case No. 306/2018 under Section 138 of the Negotiable Instrument Act (for short N.I Act), 1881 whereby Ld. Magistrate acquitted the accused.

Brief Facts:-

2. The appellant filed a complaint being no. 306/2018 against the accused/ Ajoy Sarkar before the Ld. Chief Judicial Magistrate (for short C.J.M), Krishnanagar, Nadia alleging, *inter alia*, that the accused took a loan amounting to Rs. 60,000/- from the petitioner and thereafter again took a loan of Rs. 30,000/- . The accused promised to repay the aforesaid loan amount by and between 27.03.2018 and agreement was entered into by the parties to that effect. Then the accused issued an account payee cheque bearing no. 226809 dated 10.04.2018 drawn on Radhanagar ADS Branch of State Bank of India (for short S.B.I) amounting to Rs. 90,000/- in discharge of his existing debt/ liability. On presentation of the said cheque to the bank it was returned unpaid and dishonoured due to “insufficient fund”. After receipt of the information from the said bank relating to return of the unpaid cheque, on 20.04.2018 the petitioner issued a demand notice upon the accused through his advocate via a registered post with A/D. The said notice has duly been served upon the accused on 23.04.2018 but no payment of the said cheque amount was made by the accused within the stipulated period from the date of knowledge of the notice and by the virtue of this malafide, intentional and deliberate act of the accused has become liable to be prosecuted under the appropriate Provision of Section 138 of the N.I. Act.

3. After receiving the aforesaid complaint, the Ld. C.J.M, Nadia was pleased to take cognizance of the complaint and after requisite compliance the case was transferred to the Ld. A.C.J.M, Krishnanagar for enquiry and trial. During the course of the trial, the Ld. Magistrate issued summons under Section 138 of the N.I. Act against the accused. In the trial, the petitioner himself deposed as PW1 and one Sri. Tarit Kumar Dutta deposed as PW2 and a good number of documents were admitted in evidence as exhibit 1 to 6. After completion of evidence on behalf of the complainant accused was examined under Section 313 CrPC and in course of examination money lending licence was admitted in evidence as exhibit A.

4. Based on the evidence led, the accused was acquitted by the Court of Ld. A.C.J.M.

5. Ld. Counsel, Mr. Kusal Kumar Mukherjee, appearing on behalf of the appellant has contended that the complainant has succeeded to prove the all ingredients within the meaning of Section 138 of the N.I Act by adducing oral evidence duly substantiated by documents particularly the money receipts bearing signature (exhibit 5 and 5/1) of the accused and also the cheque bearing signature of the accused. With regard to money lending licence, Mr. Mukherjee has submitted that money receipt (exhibit 5) was executed on 27.03.2016 i.e. before expiry of the money lending licence (exhibit A) but subsequent money receipt (exhibit 5/1) was executed on 29.10.2017 after the date of expiry of money lending licence. Therefore, according to Mr. Mukherjee, complainant is not entitled to interest on the amount given loan on 29.10.2017 after date of expiry of the money lending licence.

6. Mr. Mukherjee has further argued that accused failed to rebut the presumption regarding enforceable debt within the meaning of Section 139 of the N.I Act, either by denying the execution of money receipts (exhibit 5 & 5/1) or the issuance of impugned cheque (exhibit 1).

7. In support of his contention, Mr. Mukherjee relied on a case of ***Hiten P. Dalal Vs. Bratindranath Banerjee*** reported in ***AIR 2001 Supreme Court 3897*** wherein Hon'ble Court held as follows:-

> *" **20.** That the four cheques were executed by the appellant in favour of Standard Chartered Bank (hereafter referred to as "the Bank") has not been denied nor was it in dispute that the cheques were dishonoured because of insufficient funds in the appellant's account with the drawee viz. Andhra Bank. Because of the admitted execution of the four cheques by the appellant, the Bank was entitled to and did in fact rely upon three presumptions in support of its case, namely, under Sections 118, 138 and 139 of the Negotiable Instruments Act. Section 118 provides, inter alia, that until the contrary is proved it shall be presumed that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration. The presumption which arises under Section 138 provides more specifically that where any cheque drawn by a person on an account for payment of any amount of money for the discharge in whole or in part of any debt or*

other liability, is returned by the drawee bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque, such persons shall be deemed to have committed an offence and shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both. The nature of the presumption under Section 138 is subject to the three conditions specified relating to presentation, giving of the notice and the non-payment after receipt of notice by the drawer of the cheque. All three conditions have not been denied in this case.

22. *Because both Sections 138 and 139 require that the court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras v. A. Vaidyanatha Iyer [AIR 1958 SC 61 : 1958 Cri LJ 232] it is obligatory on the court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused." (Ibid. at p. 65, para 14.) Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.*

33. *As far as the appellant's defence was concerned, he did not enter the witness box to support his case that the four cheques in particular had been given in respect of any arrangement or in respect of any transactions which did not materialise. The four witnesses called by the appellant apart from those subpoenaed to produce documents, were Mr Ramesh Laxman Kamat (DW 1), Mr S.R.A. Rao (DW 2), Mr G.D. Bhalla (DW 3) and Mr G.C.K.C. Talukdar (DW 4). The Special Court found that the evidence of DW 1 was not creditworthy and that "almost all points including inconsequential points and points which could not be denied, (he) prevaricated … (and) … sought to deny the truth until truth could no longer be denied". DW 1 was then a Deputy General Manager of State Bank of India (referred to as "SBI"). He had sought to contend that a number of transactions mentioned in the four statements viz. Exts. O, P and Q were ready-forward transactions between the Bank and SBI, and did not reflect the sale and purchase of securities. It was a case which he was unable to substantiate with reference to the documents already on record or produced from the custody of CBI. The documents produced by the witness himself were found by the Special Court to be suspect.*

38. *The burden was on the appellant to disapprove (sic disprove) the presumptions under Sections 138 and 139, a burden which he failed to discharge at all. The averment in the written statement of the appellant was not enough. Incidentally, the defence in the written statement that the four cheques were given for intended transactions was not the answer given by the appellant to the notice under Section 138. Then he had said that the cheques were given to assist the Bank for restructuring (Ext. H). It was necessary for the appellant at least to show on the basis of acceptable evidence either that his explanation in the written statement* *was so probable that a prudent man ought to accept it or to establish that the effect of the material brought on the record, in its totality, rendered the existence of the fact presumed, improbable. (Vide Trilok Chand Jain v. State of Delhi [(1975) 4 SCC 761 : 1975 SCC (Cri) 725] .) The appellant has done neither. In the absence of any such proof the presumptions under Sections 138 and 139 must prevail."*

8. In opposition, Ld. Counsel, Mr. Arnab Chatterjee, appearing on behalf of the opposite party has disputed that accused issued a blank cheque and without any amount putting therein by the accused. It is further submitted that in course of examination under Section 313 CrPC accused admitted the loan of Rs. 20,000/- not 90,000/- . Before parting with his argument, Mr. Chatterjee submitted that there is no evidence on record that accused paid interest on the loan amount to the complainant and there was no non-judicial stamp paper filed along with exhibit 5/1.

9. Before handling with the facts of the present case it would be apposite to focus on the legal standards to constitute an offence under Section 138 of the NI Act. The prosecution must fulfill all the essential ingredients for offence;

- the cheque was drawn by a person on an account maintain by him for payment of money and same is presented for payment within a period of three months from the date on which it is drawn or within the period of its validity, whichever is earlier;

- The cheque was drawn by the drawer for discharge of any legally enforceable debt or other liability;
- The cheque was returned unpaid by the bank due to either insufficiency of funds in the account to honor the cheque or that it exceeds the amount arranged to be paid from the account on an agreement made with that bank;
- A demand of the said amount has been made by the payee or holder in due course of the cheque by a notice in writing given to the drawer within 30 days of the receipt of the information of the dishonor of cheque from the bank;
- The drawer fails to make payment of the said amount of money within 15 days from the date receipt of the notice.

10. Appellant/complainant being authorize money lender advanced Rs. 60,000/- on 27.03.2016 to the opposite party in lieu of money receipt and subsequently on 29.10.2017 he further advanced Rs. 30,000/-. To liquidate the loan opposite party issued a blank cheque with his endorsement. In cross-examination of PW1 (complainant) the signature of the opposite party on the cheque was not denied specifically. Rather during examination under Section 313 CrPC opposite party replied to the question no. 4 that he issued a blank cheque with his signature only to the appellant for security purpose. It is needless to mention that opposite party did not adduce any evidence to prove that cheque was issued for the security purpose.

11. Mr. Chatterjee appearing on behalf of the opposite party has made an argument that appellant/ complainant is not authorized to give any loan without valid licence under the Bengal Money Lenders Act. Admittedly the second phase of loan of Rs. 30,000/- was given to the opposite party after expiry (03.06.2017) of the money lending licence.

12. It is acceptable proposition of law that provisions of Bengal Money Lender Act do not limit operation of 138 of the N.I. Act and those are independent and mutually exclusive to each other. Therefore, if a person advances a loan even without a valid money lending licence he can institute and prosecute complaint under Section 138 of the N.I. Act on the basis of cheque and he has to satisfy only the mandatory requirements of Section 138 of the N.I. Act.

13. I am not agreeable with the argument advanced on behalf of the opposite party with regard to blank cheque. It is trite law that presumption of cheque, duly signed and voluntarily made over to payee, was in discharge of debt or liability arises irrespective of whether cheque was post dated or blank cheque for filling by payer or any other person, in absence of evidence of undue influence or coercion.

14. Aforesaid discussion shows that opposite party issued a cheque (exhibit 1) to pay off the loan and this fact leads to a presumption in favour of the appellant that he received the cheque for the discharge, in whole or in part, of any debt or other liability, within the meaning of Section 118/139 of the N.I. Act. I have already discussed above that the debt/ loan was enforceable within the meaning of explanation to Section 138 of the N.I. Act.

15. PW1 in his evidence specifically stated that opposite party took a loan of Rs. 90,000/- in lieu of money receipts (exhibit 5 and 5/1). During examination under Section 313 of CrPC opposite party pleaded that he took loan of Rs. 20,000/- only which was not substantiated either by oral evidence or any document. Therefore, I find no reason to disbelieve the evidence of PW1 regarding loan of Rs. 90,000/-.

16. Thus, it appears from the evidence that opposite party issued the impugned cheque (exhibit 1) to the appellant to pay off the loan. The cheque was presented to the bank on 13.04.2018 within the period of validity, which was dishonored by the bank on 17.04.2018 by issuing an intimation letter (exhibit 2). Thereafter, within the statutory period, demand notice (exhibit 3) was communicated to the opposite party who failed to pay the amount of the impugned cheque.

17. I am sorry to endorse the view taken by the Ld. Trial Court that in absence of valid money lending licence the loan alleged in this case is not enforceable debt. On attentive analysis of the evidence on record, I am of the view that Ld. Trial Court erred in acquitting the accused/opposite party in respect of the charge for the offence punishable under Section 138 of the N.I. Act. As a sequel, the impugned judgment and order of acquital passed in Criminal Case No. 306/2018 by the Ld. A.C.J.M, Krishnanagar, Nadia, is hereby set aside.

18. As the case is triable under the summons procedure (chapter XX), I find no reason to here the accused/respondent on the point of sentence to be imposed on him. Given facts and circumstances particularly the amount of cheque the accused/respondent is sentence to pay a fine of Rs. 1,80,000/- (one lakh eighty thousand) for the offence punishable under Section 138 of the N.I. Act and in default of payment of fine the accused/respondent would have to undergo simple imprisonment for 1 (one) year. Fine amount, if realized, the amount of Rs. 1,30,000/- shall have to be paid to the appellant/respondent as compensation under Section 357 of CrPC.

19. The appeal being no. CRA 20 of 2021 is thus disposed of on contest without costs.

20. Trial Court Record be transmitted back at once for taking necessary action.

21. If the order of this Court is not carried out within 2 (two) months from this date, the Trial Court will be at liberty to issue warrant of arrest against the convict/ respondent without any further reference.

22. Pending applications, if there be any, stand disposed of accordingly.

23. Trial Court Record be transmitted back immediately.

24. All parties shall act in terms of the copy of this order downloaded from the official website of High Court, Calcutta.

25. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]