

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
(APPELLATE SIDE)**

Present:

The Hon'ble Justice Rai Chattopadhyay

C.R.A No. 27 of 2011

**Asok Kumar De
Vs.
Lakshman Chandra De**

Amicus Curiae

: Mr. Aniket Mitra.

For the State

: Mr. Pravas Bhattacharya,
: Mr. M.F.A. Begg.

Hearing concluded on: 27/04/2023

Judgment on: 29/11/2023

Rai Chattopadhyay, J.

1. The appellant/complainant, in this appeal has challenged the judgment of acquittal dated February 10, 2010, passed by the Judicial Magistrate, 1st Court at Garbeta in C.R Case No. 02/2009.
2. C.R. Case No. 02 of 2009 has emanated from the written complaint filed by the present appellant under Section 138 of the Negotiable Instruments Act, 1881, against the present respondent/accused person. The date of the complaint was September 3, 2009. The allegation made therein in a nut shell would be that the appellant/complainant sold potato was Rs. 41,000/-, to the respondent/accused person on April 10, 2008. The transaction was done on credit with the understanding

between the parties that the cost of the material would be paid by the respondent/accused person on or before December, 2008. However when the appellant/complainant visited the respondent/accused person on December 2, 2008, he was paid instead of cash, a cheque of Rs. 41,000/, drawn on Punjab National Bank, Kamalapur Branch. The same was deposited by the appellant/complainant on December 2, 2008, though was dishonoured due to insufficiency of fund. The cheque was returned by the banker to the appellant/complainant.

3. The complainant thereafter issued notice to the respondent/accused person calling him to make payment of the said amount of money and allegedly the accused person has defaulted to respond to the notice also in spite of due service of the same upon the accused person. This has prompted present appellant/complainant to file the case as mentioned above before the Magistrate.
4. The trial proceeded and witnesses were examined. Documentary evidence has also been produced. The accused person/respondent was examined under Section 313 Cr.P.C and finally the Magistrate has delivered the impugned judgment dated February 10, 2010, to find that the complaint case has not be proved beyond reasonable doubt and thus acquitted the present respondent/accused person, by dint of the said judgment.
5. Appellant is not represented. Hence the Court appointed Mr. Aniket Mitra as Amicus Cuirae to assist the Court in disposing of this appeal.
6. Respondent/accused person has represented by Mr. Debabrata Acharyya and Mr.Sital Samanta.
7. As suggested by the Learned Amicus Curiae the impugned judgment dated February 10, 2010, suffers from illegality and impropriety in view

of erroneous consideration by the Court of the legal principles as well as non-consideration of the basic factual aspect of the case. It has been suggested that as the 'statutory notice' was duly served upon the accused person and received by his son, the knowledge as to the same by the accused person/respondent could not have been denied. That the trial Court has erred in considering that the notice has never been served upon the drawer of the cheque and also in applying the proposition of if the drawer of the cheque is served with the 'statutory notice' no cause of action arises in a case under Section 138 of the Negotiable Instruments Act, 1881.

8. Also that the accused person/respondent has not been able to bring on record any tangible or sufficient material to show that the concerned cheque was held by the complainant not in due discharge of any liability but for any other considerations. Accordingly, it is suggested that the Magistrate dwelled on the erroneous perspective as regards the facts of the case as well as legal points involved and thus has come to an erroneous finding in the impugned judgment. Hence, the same may not be sustained in further by this Court.
9. On the other hand the respondent/accused person has came up with the argument, firstly, that it was incumbent upon the complainant/appellant to discharge the initial burden of proof of the facts alleged which the complainant has failed to discharge. By referring to the fact that the original copy of the notice has not been produced in Court and proved but only a photocopy, which is not acceptable as a viable evidence, has been produced. It has submitted that service of notice upon dishonour of the cheque is a mandatory provision of law which is to be duly complied with in terms of the statutory provisions. It is also for the complainant to prove in the Court such due service of notice and in this case the complainant has failed to do so. It is stated that since the initial

burden of proof has not been discharge by the complainant/appellant, there would not be any question for the respondent/accused person to rebate the statutory presumption as in that case the statutory presumption does not apply to the accused person at all.

10. To substantiate this argument the respondent has relied on the judgment reported in **(2008) 4 SCC 54 (Krishna Janardhan Bhat vs. Dattatraya G. Hegde)**. The respondent has prayed for dismissal of the appeal.

11. The procedural requirement of Section 138 of the Negotiable Instruments Act, 1881 are:-

- (i) There is a legally enforceable debt.
- (ii) The drawer of the cheque issued the cheque to satisfy part or whole of the debt.
- (iii) The cheque so issued has been returned due to insufficiency of fund.

12. The Supreme Court in the judgment as referred above has held that Section 139 of the Negotiable Instruments Act, 1881, raises presumption in regard to the second requirement of Section 138 of the Negotiable Instrument Act, 1881, as mentioned above. It has been held that the presumption would be that the cheque was drawn from the account of the bank for discharge in whole or in part of any debt or other liability. This, though pre-supposes legal enforceable debt, existence of such a legal enforceable debt has to be proved by adducing sufficient evidence. As it has been held in the case of **Krishna Jannardhan Bhat** “existence of legally recoverable debt is not a matter of presumption under Section 139 of the said Act. It merely raises a presumption in favour of a holder

of the cheque that the same has been issued for discharge of any debt or other liability.”

13. On perusal of the entire evidence on record it appears that the complainant accepting submitting orally of supply of goods to the accused person, has not by any sufficient corroborating documentary evidence has substantiated the said fact. On the contrary the accused person in his statement under Section 313 Cr.P.C has denied any such supply of goods on credit by the complainant to him. Evidence of P.W. 2 that is the brother of the complainant too suffers from the same lacuna as regards the foundational facts of the case.

14. So far as the service of notice is concerned it has been rightly argue on behalf of the respondent that by submitting the photocopy of the notice, the appellant/complainant has not been able to prove the same in a manner as is required under the law. Service of ‘statutory notice’ is an important step in proceeding under Section 138 of the Negotiable Instruments Act, 1881, in so far as only the due service to the drawer of the cheque of the notice sent by the complainant sets in motion the entire action to prosecute the offence of dishonour of a cheque. Hence, unless and until the complainant could show due service of notice upon the accused person was done in terms of the provisions within the four corners of the statute, it cannot be held that the complainant has been able to discharge his initial burden in the case.

15. The judgment relied on by the respondent is aptly supporting his case in so far as the Supreme Court there has dwelled on the well settled legal proposition that even for application of presumption under Section 139 of the Negotiable Instruments Act, 1881, the complainant has to discharge his initial burden of proof and has relied on a previous judgment of the same Court (**Hiten P. Dalal vs. Bratindranath Banerjee**

reported in **2001 6 SCC 16**) for the proposition that presumption are rolls of evidence and does not conflict with the presumption of innocent, because by the later, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt.

- 16.** On the discussion as above this Court can hardly find any illegality or impropriety in the impugned judgment of the trial Court dated February 10, 2010, in C.R Case No. 02/2009. Hence, the appeal merits no success.
- 17.** Criminal appeal being C.R.A 27 of 2011 is dismissed.
- 18.** Before parting, the Court appreciates the able assistance put in by the Ld. Amicus Curie in this case. Let the High Court Legal Services Committee take necessary steps to pay fees to the learned Amicus Curiae in accordance with the scale applicable to “Category-A” lawyer in its panel. The same may be paid within a period of one month from the date. A copy of this order be immediately forwarded to the Secretary, High Court Legal Services Committee, for doing the needful.
- 19.** Urgent photostat certified copy of this judgment, if applied for, be given to the parties, upon compliance of requisite formalities.

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(Rai Chattopadhyay, J.)