IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice AnanyaBandyopadhyay

C.R.R. 305 of 2012
Baru Bauri
-Vs-
Santimoy Chandra

For the Petitioner	: Mr. SatadruLahiri Mr. SafdarAzam
For the Opposite Party	: Ms. Chandreyee Alam Ms. Runu Mukherjee
Heard on	: 02.08.2023, 08.09.2023, 15.09.2023.
Judgment on	: 13.12.2023.

AnanyaBandyopadhyay, J.:-

1. The instant revisional application has been filed by petitioneragainst the judgment dated 08.12.2011 passed by the Court of the Learned Additional Sessions Judge, 1st Court, Purulia in Criminal Appeal No. 15/2009 affirming thereby the order and judgment of conviction and sentence dated 05.06.2009 passed by the Court of the Learned Judicial Magistrate, 1st Court, Purulia in Complaint Case No. 184/07 (Trial No. 698/07), whereby the petitioner was sentenced to suffer simple imprisonment for 6 months and also to pay fine of Rs.5,000/- in default to suffer simple imprisonment for 2 months and petitioner was further directed to pay Rs. 1,40,000/- and a cost of Rs. 2,000/- to the opposite party.

2. The contentions of the petitioner narrated in the instant application are stated as follows:

    i. The petitioner stated that the opposite party filed Complaint Case No. 184/07 under Section 138 of the Negotiable Instrument Act against the petitioner before the Court of the Learned Chief Judicial Magistrate, Purulia on the allegation of petitioner having taken a Loan of Rs. 1,40,000/- from the opposite party.

    ii. Petitioner stated that the petitioner allegedly on his failure to return the loan, issued two cheques bearing Numbers 535136 and 535138, dated 09.8.2007 and 02.8.2007 amounting to Rs.75,000/- and Rs.65,000/- respectively.

    iii. Petitioner stated that upon presentation in the U.B.I. Jhalda Branch, the cheques were allegedly dishonoured and upon sending the notice case was allegedly filed.

    iv. Petitioner stated that upon examining three witnesses, viz, the complainant Dipankar Kumar (PW-1), the Bank Manager (PW2) an Subodh Chandra (PW3), the father of the complainant, the Court of the Learned Judicial Magistrate, 1st Court, Purulia in T.R. No. 698/07, by judgment dated 05.6.09 was pleased to convict the petitioner for offence under Section 138 of the Negotiable Instruments Act and sentenced him to suffer simple imprisonment for 6 months and also to pay a fine of rupees 5,000/-, in default to suffer simple imprisonment for 2 months, and also directed him to pay compensation of Rs. 1,40,000/- to the opposite party and further to pay a cost of Rs.2,000/-.

3. Learned Advocate for the petitioner submitted that –

   i. The judgment of the Court of the Learned Additional Sessions Judge, Purulia should be quashed since the Learned Judge failed to observe that none of the ingredients contained in Section 138 of the Negotiable Instruments (N.I.) Act, were satisfied.

   ii. The judgment of the Court of the Learned Additional Sessions Judge, Purulia should be quashed since the Learned Judge did not consider the service of notice to be incomplete.

   iii. The judgment of the Court of the Learned Additional Sessions Judge, Purulia should be quashed since single prosecution was lodged for two cheques which could never be justified under Section 319 of Code of Criminal Procedure, thereby causing serious prejudice to the petitioner.

   iv. No presumption could replace the requirement of proof in case of issuance of cheque was not appreciated and thus the judgment of the Appellate Court should be quashed.

   v. The Learned Additional Sessions Judge having affirmed the Learned Trial Court judgment allowing compensation in addition to provision of fine was illegal.

4. The Ld. Advocate for the opposite party submitted that the petitioner did not dispute his signature on the cheque. The service was proper and complete there was no rebuttal of presumption under Section 139 of the N.I Act and as such the appeal shall be dismissed.

5. The complainant filed this case against the accused person stating that the complainant was the permanent resident of Jhalda within the district of Purulia. The father of the complainant was a retired Railway employee and in the month of June 2007, the accused person also being a Railway employee was posted at Jhalda Railway station. The complainant claimed that the accused person used to visit the complainant and eventually a cordial relation grew up between the complainant and the accused person and in the first week of June, 2007, the accused person visited the house of the complainant and approached the complainant for a loan of Rs 1,50,000/- (one Lakh Fifty Thousand) for the marriage of a close relative of the accused person. Initially the complainant expressed his inability to pay such a large sum of money but upon persuasion by the accused person, agreed to grant the loan to the accused person and accordingly on 8/6/07, the complainant paid a sum of Rs. 1,40,000/- (One lakh Forty Thousand) to the accused person at his house in the presence of Sri Subodh Chandra i.e. father of the complainant. After accepting the loan, the accused person failed to keep up his promise to return the loan amount within 2/3 months though the complainant brought the matter to the notice of the accused person several times. After much persuasion, the accused person issued two cheques bearing numbers 535136 and 535138 dated 9/8/07 and 2/8/07 valued at Rs. 75,000/- and 65,000/- respectively both drawn upon U.B.I Jhalda Branch in discharge of his liabilities in favour of the complainant. The complainant deposited the said cheques for encashment on 10/8/07 in UBI, Jhalda branch but the cheques were dishonoured for the reason

"insufficient fund" and the return memo was issued to the complainant to this effect. Accordingly the complainant issued advocate notice through his Lawyer Sri Kalyan Dutta to the accused person through a registered letter with A/D on 14/8/07. The accused person intentionally avoided receiving the notice and inspite of visiting the quarter of the accused person, who was found absent, the endorsement in the envelope was made by the postal authority that the accused person was absent for long time. The accused person willfully issued the cheque being aware of "insufficient fund" and as such the complainant prayed that the accused person be tried for commission of the offence punishable under section 138 of NI Act.

6. Section 138 of the Negotiable Instruments Act, 1881 reads as follows-

> *"**138.** Dishonour of cheque for insufficiency, 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, [20] [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."

7. Section 139 of the Negotiable Instruments Act, 1881 reads as follows-

> *"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."*

8. Section 142 of the Negotiable Instruments Act, 1881 states as follows:

> *"142. Cognizance of offences.—[(1)] Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—*
>
> *(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;*
>
> *(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:*
>
> *[Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period;]*

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.].

[(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.—For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.]

9. In ***Rangappa vs. Sri Mohan[1],*** the Hon'ble Court held as follows (para 17 and 18)-

"17. In the course of the proceedings before this Court, the contentions related to the proper interpretation of Sections 118(a), 138 and 139 of the Act. Before addressing them, it would be useful to quote the language of the relevant provisions:

"118. Presumptions as to negotiable instruments. - Until the contrary is proved, the following presumptions shall be made:

(a) of consideration: 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; ...

[1] (2010) 11 SCC 441

138. Dishonour of cheque for insufficiency, 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 provision of this Act, be punished with imprisonment for a term which may extend 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."

18. Ordinarily in cheque bouncing cases, what the courts have to consider is whether the ingredients of the offence enumerated in Section 138 of the Act have been met and if so, whether the accused was able to rebut the statutory presumption contemplated by Section 139 of the Act. With respect to the facts of the present case, it must be clarified that contrary to the trial court's finding, Section 138 of the Act can indeed be attracted when a cheque is dishonoured on account of `stop payment' instructions sent by the accused to his bank in respect of a post-dated cheque, irrespective of insufficiency of funds in the account. This position was clarified by this Court in Goa Plast (Pvt.) Ltd. v. Chico Ursula D'Souza, (2003) 3 SCC 232, wherein it was held:

"Chapter XVII containing Sections 138 to 142 was introduced in the Act by Act 66 of 1988 with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. These provisions were intended to discourage people from not honouring their commitments by way of payment through cheques. The court should lean in favour of an interpretation which serves the object of the statute. A post-dated cheque will lose its credibility and acceptability if its payment can be stopped routinely.The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of a post-dated cheque.

In view of Section 139, it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of a post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138. A contrary view would render S. 138 a dead letter and will provide a handle to *persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong."*

10. In ***Joseph Stephen & Ors. Vs. Santhansamy & Ors.*[2]** the Hon'ble Supreme Court held as follows (para 14)-

> *"14.Now so far as the power to be exercised by the High Court under sub-section (5) of Section 401, Cr.P.C., namely, the High Court may treat the application for revision as petition of appeal and deal with the same accordingly is concerned, firstly the High Court has to pass a judicial order to treat the application for revision as petition of appeal. The High Court has to pass a judicial order because sub-section (5) of Section 401 Cr.P.C. provides that if the High Court is satisfied that such revision application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do. While treating with the application for revision as petition of appeal and deal with the same accordingly, the High Court has to record the satisfaction as provided under sub-section (5) of Section 401 Cr.P.C. Therefore, where under the Cr.P.C. an appeal lies, but an application for revision has been made to the High Court by any person, the High Court has jurisdiction to treat the application for revision as a petition of appeal and deal with the same accordingly as per sub-section (5) of Section 401 Cr.P.C., however, subject to the High Court being satisfied that such an application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do and for that purpose the High Court has to pass a judicial order, may be a formal order, to treat the application for revision as a petition of appeal and deal with the same accordingly."*

[2] (2022) 13 SCC 115

11. The complainant had filed his examination in chief by way of affidavit and certain documents were marked as Ext.2 cheque bearing no.535136 dated 9/8/07 valued at Rs.75,000/- and cheque bearing no. 535138 dated 2/8/07 valued at Rs.65,000/- both drawn upon the United Bank of India, Jhalda branch were marked Ext.1 and 2 respectively. Two return memos dated 10/8/07 were marked as Ext.3 and 4 respectively. The postal receipt dated 14/8/07 communicating the demand notice to the petitioner was marked as Ext.5, the returned envelope was marked as Ext.6, the AD card was marked as Ext.7 and the Advocate's notice to the petitioner was marked as Ext.8 and the statement of account of the petitioner was marked Ext.9. The cheque marked as Ext.1 and 2 were signed by the petitioner issuing the same in favour of the opposite party and the same were not disputed. The demand notice marked as Ext.8 was issued within the stipulated period which was dishonored for insufficient funds the service of notice was aply proved by the returned envelope as well the AD card. It was argued by the Learned Advcate for the petitioner that the demand notice was return with the remark 'long time absent' hence return to the sender.

12. The provision under the N.I Act signified under Section 147 of the Act that the dispute between the parties can be compounded at any stage. If the petitioner had the intention to refund the cheque amount, the same could have effectuated at the time he received summons from the Court and under went procedure of trial. The petitioner to have appeared before the court on summons was aware of the complaint lodged against him. Therefore to take

plea at a belated stage of non receipt of the notice will frustrate the object of the said Act.

13. The petitioner being the holder of the cheque did not deny the signature on the cheque and the presumption shall be drawn that the cheque was issued for the discharge on any legally enforceable debt or any other liability. Further the presumption under Section 139 of the N.I Act is not rebutted. A person arraigned in a criminal case is presumed to be innocent till the same is rebutted mainly in a proceeding under the Negotiable Instrument Act production of evidence to disproved his guilt

14. Section 139 of the N.I Act mandated a presumption that the cheque is generally issued to discharge a legally enforceably debt or liability unless and until the said presumption is rebutted. In the instant case the petitioner did not take any steps to rebut such presumption that the cheque was not issued by him or confronted his signature or proved anything contrary with regard to discharge of his legally enforceably debt or liability.

15. Under such circumstances, this Court is not inclined to interfere with the judgment passed by both the Ld. Trial Court which are reasoned both the context of law and facts.

16. In view of the above discussions, the instant criminal revisional application being CRR 305 of 2012 is dismissed.

17. There is no order as to cost.

18. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

19. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)