

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 312 of 2019

Sk. Abdul Sattar

Vs

Smt. Mukti Pal & Anr.

For the Petitioner : Mr. Himangsu De,
Mr. Amal Kr. Samanta,
Mr. Arun Kr. Das,
Mr. Monami Mukherjee.

For the Opposite Party : None.

For the State : Mr. Anwar Hossain,
Mr. M.F. Ahmed Begg.

Heard on : 15.12.2022

Judgment on : 18.01.2023

Shampa Dutt (Paul), J.:

The present revision is against an order dated 24.12.2018 passed by the Learned Additional District and Session Judge, Fast Track 2nd Court, Contai dismissing thereby Criminal Appeal No. 12/2018 and affirming the judgment and order dated 05.09.2018 passed by the Learned Judicial Magistrate, 1st Court, Contai, in C.R. Case No. 513/2007 convicting the petitioner for the offence punishable under Sections 420/406 of the Indian Penal Code and sentencing him to suffer simple imprisonment for six months and to pay a fine of Rs. 10,000/- to the complainant as per Section 357 of the Code of Criminal Procedure, in default to undergo further simple imprisonment for further two months for committing offence under Section 420 of the Indian Penal Code and further sentencing the petitioner to suffer simple imprisonment for three months for the offence under Section 406 of the Indian Penal Code and both the sentences were to run concurrently.

The complainant's case in brief is that the **Opposite Party No. 1 being the Complainant** alleged in her petition of complaint that she was acquainted with the petitioner and the petitioner needed Rs. 70,000/- (Rupees Seventy Thousand) from her for his business and for this on 04.12.2003 the Opposite Party No. 1 herein, gave loan of Rs. 70,000/- (Rupees Seventy Thousand) to the Petitioner in presence of witnesses No. 2 and 3 as per list of the witnesses in the petition of

complaint without interest with the condition, that the petitioner would repay the same amount on or before 03.06.2006.

She further alleged that all the conditions were written on a non-judicial stamp paper of Rs. 10/- signed by the Petitioner and the witnesses no. 2 and 3 in the petition of complaint signed on the said stamp paper as witnesses.

She further alleged that again and again she demanded the said amount and on 17.08.2007 she had been to the house of the Petitioner along with witness no. 3, Sanjit Bhowmik but the Petitioner refused to repay the same. As such the opposite party no. 1 had been to Contai Police Station and some police personnel of the Contai Police Station advised her to take shelter of the Court.

The Opposite Party No. 1 then filed one petition of complaint before the Learned Additional Chief Judicial Magistrate at Contai with the prayer for treating the same as F.I.R against the Petitioner under Sections 420/406 I.P.C. and the Learned Additional Chief Judicial Magistrate, Contai was pleased to transfer the case to the Learned Judicial Magistrate Court, 1st Court, Contai for trial by refusing to send the same to the Police Station for treating it as F.I.R.

The Opposite Party No. 1 was examined as P.W. 1 and one Sanjit Bhoumik was examined as P.W.-2 and one Dipak Maity was examined

as P.W.-3 and the husband of the Opposite Party No. 1 Bimal Pal was examined as P.W.-4 before charge.

P.W. – 2 was not tendered for cross examination and due to the death of P.W. – 4, he could not be cross examined by the defence.

Vide Judgment and order dated 05.09.2018 the Learned Judicial Magistrate, 1st Court, Contai was pleased to convict the Petitioner as above.

Criminal Appeal No. 12/2018 was filed against the said order of conviction.

Vide judgment and order dated 24.12.2018 the learned Additional Sessions Judge cum Fast Track 2nd Court, Contai was pleased to affirm the order passed by the learned Judicial Magistrate 1st Court, Contai.

Mr. Himangshu De, Learned Senior Counsel for the petitioner has submitted that the evidence on record do not justify the conviction of the appellant under Sections 406/420 Indian Penal Code and as such the impugned order of conviction and sentence is liable to be set aside.

It is further submitted that the Learned Session Judge by upholding the conviction and sentence of the petitioner on the basis of sketchy evidence adduced by the prosecution has committed grave

prejudice to the Petitioner for which the impugned judgment and order of conviction and sentence is liable to be set aside.

Admittedly, the agreement of receipt of Rs. 70,000/- (Rupees Seventy Thousand) by the petitioner putting his signature on a stamp paper of Rs. 10/- has not been produced before the Trial Court at the time of trial by the Complainant/P.W. - 1/opposite party no. 1 herein and it was noted in the complaint that the Xerox copy of the same was filed with complaint.

It is further submitted that in the complaint, the Opposite Party No. 1 stated that the Petitioner took loan of Rs.70,000/- (Rupees Seventy Thousand) without interest in presence of Dipak Maity and Sanjit Bhounik and put his signature on a stamp paper of Rs. 10/- and acknowledged the said receipt of Rs. 70,000/-. Sanjit Bhounik and Dipak Maity also signed on the said stamp paper as witnesses. But Dipak Maity P.W. -3 in his cross-examination clearly stated that he was not present in all the transactions made by Mukti Pal, the Opposite Party No. 1 throughout her life.

The Learned Judge Fast Track 2nd Court though observed that the oral evidence of P.W. -3 Dipak Maity implies that he was not present in all the transactions yet the Learned Trial court wrongly observed that P.W. - 3 did not state that he was not at all present during the transaction.

That the Learned Session Judge was quite wrong in looking into the **original agreement of loan produced** by the Complainant **at the time of hearing of the appeal**, as the original document was not produced before the Trial Court (Judicial Magistrate's Court) and the defence could not cross-examine the witnesses in respect of the said document (agreement) and about their alleged signatures in the alleged agreement.

It is further submitted that the genuineness of the original agreement produced before the appellate Court is disputed and as such Section 294(3) Code of Criminal Procedure is not attracted in this case regarding the admissibility of the agreement in question and the impugned judgment and order of the Session Judge affirming the order of conviction is otherwise bad in law and hence the same is liable to be set aside.

Mr. Anwar Hossain, Learned Counsel for the State has submitted that the judgment against which the revision has been filed and the Judgment of the Learned Magistrate are both in accordance with law and as such the revision is liable to be dismissed.

Heard both sides at length. Perused the judgment under revision and the judgment of the Learned Magistrate and also the materials on record including the evidence before the trial Court. Considered.

The Written Complaint (Ext 1) is on the basis of an agreement (written) executed between the parties regarding a loan allegedly given by the complainant to the petitioner, which he has allegedly refused to return.

Admittedly the original agreement was not produced nor proved (as secondary evidence) before the trial Court (Court of the Learned Magistrate).

But the agreement (original) was produced for the first time before the Session Judge who took cognizance (?) of the same (As stated in the Judgment).

In Jagmail Singh & Anr. VS Karamjit Singh & Ors. (Civil Appeal No. 1889 of 2020), the Supreme Court on 13th May, 2020 held:-

*“14. It is trite that under the Evidence Act, 1872 facts have to be established by primary evidence and secondary evidence is only an exception to the 2rule for which foundational facts have to be established to account for the existence of the primary evidence. In the case of **H. Siddiqui (dead) by LRs Vs. A. Ramalingam , (2011 (4) SCC 240)** this Court reiterated that where original documents are not produced without a plausible reason and factual foundation for laying secondary evidence not established it is not permissible for the court to allow a party to adduce secondary evidence.*

17. Needless to observe that merely the admission in evidence and making exhibit of a document does

not prove it automatically unless the same has been proved in accordance with the law.

19. *The appellants would be entitled to lead secondary evidence in respect of the Will in question. It is, however, clarified that such admission of secondary evidence automatically does not attest to its authenticity, truthfulness or genuineness which will have to be established during the course of trial in accordance with law."*

The Petitioner has been convicted for offences punishable under Sections 420/406 IPC. The essential ingredients required to constitute the said offences is to be proved beyond reasonable doubt by way of documentary and oral evidence. Here is a case of a loan allegedly given on the basis of a written agreement which admittedly was not produced before the trial court, but was produced before the appellate Court, **but admittedly not proved in accordance with law.**

The Learned Magistrate held in this case that though the said stamp paper on which the agreement of the money transaction has been drafted had not been brought on record, but the factum of loan, date of return and the refusal of the accused had been corroborated by PW 1 as mentioned in Exhibit-1 (petition of complaint) and also the names of the witnesses who were present at the time of the transaction.

Admittedly the Learned Magistrate convicted the petitioner only on the basis of certain oral evidence, even though P.W. 3 did not support the complainant's case.

The Learned Session Judge has stated in his Judgment while affirming the Learned Magistrate's Judgment that **in course of appeal the original document (agreement) was produced.**

The session Judge held:-

*"In such an imbroglio this Court finds it best to take recourse of the prevailing the legal position on the basis of the opinion of Hon'ble Apex Court reported in **2009 (2) Crimes 192 (SC)** in which it was ruled that the well settled principle is that if the genuineness of any document filed by a party is not disputed (?) by the opposite party it can be read as substantive evidence. So that document may be considered by this Court U/Sec. 294(3) Cr.P.C."*

The said findings of the Session Judge is totally erroneous and bad in law as the **genuineness of the agreement has been categorically disputed by the accused/petitioner** and the agreement has admittedly not be proved in accordance with law and the total case rests on this document.

Inspite of such objection, admitting a document under Section 294(3) CrPC is not only bad in law but has also caused serious miscarriage of justice. It is an abuse of process of Court and law and thus against the interest of justice.

The duty of the Court is to have the document proved in accordance with law more so in a case when the prosecution

witness (P.W.-3) has not supported the prosecution case and P.W.-1 the complainant in her cross examination has stated that the said stamp paper was blank and the accused/petitioner put his signature on blank paper.

All these are of course subject to proper appreciation of evidence by the concerned court. But the main document on which the whole case rests has to be proved in accordance with law.

In spite of the disputed agreement (document) not being proved, the session judge relied upon the same and held that it strengthened and corroborated the case of the complaint which is clearly, not in accordance with law.

Accordingly in view of the observations above, the judgment dated 24.12.2018 passed by the Learned Additional District and Session Judge, Fast Track 2nd Court, Contai in Criminal Appeal 12/2018 and the Judgment dated 05.09.2018 passed by the Learned Judicial Magistrate, 1st court, in CR Case No. 513/2007 are hereby set aside.

The case is remanded back to the court of the Learned Magistrate, who will have the original agreement (filed before the Session Court) proved in accordance with law by giving opportunity to both sides and will permit further evidence if relevant and connected to the said document. And finally considering the materials and evidence

on record write a fresh judgment. The Learned Magistrate will make all endeavour to dispose of the case **within three months** from the date of communication of this order /judgment.

CRR 312 of 2019 in accordingly **disposed of**.

There will be no order as to costs.

All connected Application stand disposed of.

Interim order if any stands vacated.

Let a Copy of this Judgment to Additional District & Session Judge and along with the LCR to the 1st Court of Judicial Magistrate, Contai, be sent to the learned Trial Court forthwith for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)