

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 77 of 2009

Tapas Kumar Dutta

-Vs-

The State of West Bengal & Anr.

For the Amicus Curiae : Mr. Amarta Ghosh

For the State : Mr. Faria Hossain
Mr. Anand Keshari

Heard on : 08.06.2023, 21.09.2023, 12.12.2023

Judgment on : 15.12.2023

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order of acquittal dated 31.07.2008 passed by the Learned Judicial Magistrate, 3rd Court, Alipore, South 24 Parganas in C-Case No. 1765 of 2003 in CRM No. 10475 of 2008 under Section 138 of the Negotiable Instruments Act whereby acquitted the Respondent No. 2 under Section 256 of the Code of Criminal Procedure.
2. The appellant contended that the appellant had been the complainant of the present case which was instituted against the Respondent No. 2 inter alia alleging commission of an offence punishable under Section 138 of the Negotiable Instruments Act before the Learned Chief Judicial Magistrate, Alipore, South 24 Parganas. The case was numbered as C-Case Number 1765 of 2003.

3. It was further stated that the Learned Chief Judicial Magistrate, Alipore, South 24 Parganas took cognizance of the offence punishable under section 138 of the Negotiable Instrument Act against the Respondent No.2 and transferred the case to the Court of the Learned Judicial Magistrate, 8th Court, Alipore, South 24 Parganas for disposal.
4. Subsequently on the basis of a petition under section 410 of the Code of Criminal Procedure filed by the Respondent No.2, the Learned Chief Judicial Magistrate, Alipore, South 24 Parganas recalled the case from the Court of the Learned Judicial Magistrate, 8th Court, Alipore, South 24 Parganas and referred it for inquiry and trial to the Court of the Learned Judicial Magistrate, 3rd Court, Alipore, South 24 Parganas.
5. On 22.1.2008 when both sides were present, a prayer for adjournment was filed by the Respondent No.2. By order dated 22.1.2008 the Learned Magistrate allowed such prayer and fixed 28.3.2008 for evidence of the PW-1.
6. On 28.3.2008 the appellant was absent and 28.6.2008 was fixed as the next date for "Show Cause" by the appellant.
7. 28.6.2008 being a 4th Saturday was a holiday and the matter was taken up for hearing on 30.6.2008. On that date too, the appellant was absent without steps. The Learned Magistrate fixed 31.7.2008 as the next date for filing of "Show Cause" by the appellant.
8. The clerk of Sri Manas Mukherjee, the Learned Advocate of the appellant at the Learned Court below inadvertently forgot to inform the appellant about the next date being 31.7.2008. Therefore, on 30.7.2008 the appellant went to New Delhi via Rajdhani Express in order to attend the

hearing of a case being Case No. CC/08/88 before the Hon'ble National Consumer Disputes Redressal Commission, New Delhi which was fixed for hearing on 1.8.2008 at 10:30 a.m.

9. Sri Manas Mukherjee, the Learned Advocate of the appellant appearing before the Learned Trial Court fell seriously ill on 30.7.2008 and was suffering from gastroenteritis, loose motions, dehydration and fever and was advised rest for two days. Being so advised, Sri Mukherjee did not attend Court on 31.7.2008 and the impugned order was passed in absence of both the appellant as well as his pleader.
10. By the impugned order dated 31.7.2008 the Learned Judicial Magistrate, 3rd Court, Alipore, South 24 Parganas in C-Case Number 1765 of 2003 which was pending before the Learned Judicial Magistrate, 3rd Court, Alipore, South 24 Parganas under section 138 of the Negotiable Instruments Act acquitted the Respondent No.2 herein under section 256 of the Code of Criminal Procedure.
11. Learned Advocate for the petitioner submitted that –
 - i. The impugned order dated 31.07.2008 is violative of the principles of natural justice and fair play and has occasioned a travesty of justice.
 - ii. The Learned Magistrate while passing the impugned order dated 31.07.2008 ought to have appreciated that the case was filed as early as in 2003 and as such the same had already reached the ripe stage of recording of evidence and 28.03.2008 was the date fixed for recording of the evidence of the PW – 1 in the midst of the trial, the Learned Magistrate ought to have afforded another

opportunity to the appellant instead of hastily and arbitrarily acquitting the Respondent No. 2 under Section 256 of the Code of Criminal Procedure.

- iii. The Learned Magistrate failed to appreciate that the powers under Section 256 of the Code of Criminal Procedure are discretionary and the Learned Magistrate ought to have exercised such discretion with caution and circumspection.
- iv. The Learned Magistrate relied on irrelevant and extraneous facts to come to a finding of acquittal in favour of the Respondent No. 2 herein.
- v. The Learned Magistrate failed to appreciate the quantum of money involved in the instant proceedings and as such mechanically passed the impugned order of acquittal in an arbitrary and impatient manner.
- vi. The clerk of Sri Manas Mukherjee, the Learned Advocate of the appellant at the Learned Court below inadvertently forgot to inform the appellant about the next date being 31.07.2008. Therefore, on 30.07.2008 the appellant went to New Delhi via Rajdhani Express in order to attend the hearing of a case being Case No. CC/08/88 before the Hon'ble National Consumer Disputes Redressal Commission, New Delhi which was fixed for hearing on 1.8.2008 at 10:30 hours. To add to the bad luck of the appellant, Sri Manas Mukherjee, the Learned Advocate of the appellant at the Learned Court below fell seriously ill on 30.07.2008 and was suffering from gastroenteritis, loose motions, dehydration and fever and was

advised rest for two days. Being so advised, Sri Mukherjee did not attend Court on 31.07.2008 and the impugned order was passed in absence of both the appellant as well as his pleader.

- vii. The impugned order dated 31.07.2008 is otherwise bad in law and is liable to be set aside and/or quashed.

12. Heard the submissions of the Learned Advocate for the State.

13. A circumspection of the prosecution witness revealed as follows:-

- (i) PW-1 deposed that the accused, on 18.2.2001, advertised in the Statesman seeking a business partner. Following initial contact between him and the accused, wherein the latter indicated having secured a partner, on 3.3.2001, the accused presented a computer generated proposal to PW-1. Unfeasible to his judgment, the proposal was declined. Subsequently, the accused requested a loan of Rs. 3 lakh for accommodation, which he agreed to. An agreement was formalized on 13.3.2001 at the office of Chartered Accountant A.R. Basu, wherein PW-1 issued two cheques to the accused: one of Rs. 1 lakh dated 15.3.2001, and another of Rs. 2 lakh dated 1.4.2001, both drawn from Allahabad Bank, Mukul Bose Road Branch. The cheque numbers were 119075 and 119076 respectively. In return, the accused provided two receipts and issued two post-dated cheques of Rs. 1 lakh dated 15.3.03 and Rs. 2 lakh dated 31.3.07, both drawn from Bank of Baroda, Sadananda Road Branch. The cheque numbers were 532245 and 532246 respectively. The said cheques were 'account payee cheques'.

- (ii) PW-1 deposited both cheques from the accused into his Savings Bank Account no. 105931 at Allahabad Bank, Mukul Bose Road Branch on 17.5.2003. The agreement between PW-1 and the accused was marked as Ext. 1 and their signatures were marked as Ext. 1/2, 1/7 and 1/4. The receipts issued by the accused were marked as Ext. 2 and his signature on the cheques were marked as Ext. 2/1, 3, 3/1. The cheque no. 532245 dated 15.3.03 of Rs. 1 lakh was marked as Ext. 4. The signature of the accused on the said cheque was marked as Ext. 4/1. The cheque no. 532246 dated 31.3.03 of Rs. 2 lakh was marked as Ext. 5. The signature of the accused on the said cheque was marked as Ext. 5/1. PW-1 deposited both the cheques in his Saving Bank Account, Allahabad Bank after maturity on 17.5.2003. The deposit slips of the Allahabad Bank were marked as Ext. 6 and 7.
- (iii) Both cheques issued by the accused were dishonored and returned unpaid, accompanied by a cheque return memo from Bank of Baroda, Sadananda Road Branch, Kolkata-26, dated 19.5.2003, with the remark "Not arranged for." The memo was marked as Ext. 8. Subsequently, PW-1 sent a demand notice to the accused on 28.5.03, dispatched via Registered Post with A/D, and received confirmation of delivery by the accused on 3.6.2003. The copy of the bank notice was marked as Ext. 9 and the signature of PW-1 was marked as Ext. 9/1. The registration receipt of the demand notice was marked as Ext. 10. The acceptance letter of the demand notice by the accused was marked as Ext. 11 and the signature of the

accused was marked as Ext. 11/1. Despite the lapse of the statutory period and subsequent to filing a case under the Negotiable Instruments Act, the accused failed to refund the money to PW-1.

- (iv) During cross-examination, PW-1 affirmed lacking a license to lend under the Bengal Money Lending Act.

14. Section 256 of the Code of Criminal Procedure states as follows:-

“Non-appearance or death of complainant - (1) *If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:*

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may, dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.”

14. In **Associated Cement Co. Ltd. v. Keshvanand**¹, the Hon’ble Supreme Court observed that:-

“16. What was the purpose of including a provision like Section 247 in the old Code (or Section 256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complainant if he does not turn up to the court on occasions when his presence is necessary. The section, therefore, affords protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, the court has a duty to acquit the accused in invitum.”

¹ (1998) 1 SCC 687

15. In **S. Anand v. Vasumathi Chandrasekar**², the Hon'ble Supreme Court observed that:-

“12. Section 256 of the Code provides for disposal of a complaint in default. It entails in acquittal. But, the question which arises for consideration is as to whether the said provision could have been resorted to in the facts of the case as the witnesses on behalf of the complainant have already been examined.

13. The date was fixed for examining the defence witnesses. The appellant could have examined witnesses, if he wanted to do the same. In that case, the appearance of the complainant was not necessary. It was for her to cross-examine the witnesses examined on behalf of the defence.

15. Presence of the complainant or her lawyer would have been necessary, as indicated hereinbefore, only for the purpose of cross-examination of the witnesses examined on behalf of the defence. If she did not intend to do so, she would do so at her peril but it cannot be said that her presence was absolutely necessary. Furthermore, when the prosecution has closed its case and the accused has been examined under Section 311 of the Code of Criminal Procedure, the court was required to pass a judgment on merit of the matter.”

16. In **James A.C. v. K.A. Sakthidharan and Another**³, the Hon'ble Supreme Court observed that:-

“10. It is far too well settled that the power of the Magistrate under Sec. 256 Cr. P.C. to acquit an accused should be exercised judicially, based on a definite conclusion that the complainant no longer desires to prosecute the complaint. The power is not to be indiscriminately exercised whimsically and mechanically for the statistical purposes of removing a docket from its rack as it undermines the cause of justice. Instead, the judicious course would be to direct the complaint to appear for the hearing, if it is imperative, and decide whether the drastic step of acquittal is to be passed in case he fails to appear.”

17. At a stage where a petition under Section 410 of the Code of Criminal Procedure was pending the Learned Trial Court should have opted for stringent procedure to ensure the appearance of the parties before the

² (2008) 4 SCC 67

³ 2023 SCC OnLine Ker 9030

Court rather than pass an order of acquittal under Section 256 of the Code of Criminal Procedure.

18. In view of the above discussions the impugned judgement and order is set aside.
19. The Learned Trial Court is to dispose of the proceedings before it within 6 months from the date of communication of this Order without giving any adjournment to either of the parties.
20. Accordingly, the judgment and order of acquittal dated 31.07.2008 passed by the Learned Judicial Magistrate, 3rd Court, Alipore, South 24 Parganas in C. Case No. 1765 of 2003 in CRM No. 10475 of 2008 under Section 138 of the Negotiable Instruments Act whereby acquitted the Respondent No. 2 under Section 256 of the Code of Criminal Procedure is set aside.
21. The instant criminal appeal being CRA 77 of 2009 stands disposed of.
22. There is no order as to cost.
23. I record my appreciation for the able assistance rendered by Mr. Amarta Ghosh, Learned Advocate, as Amicus Curiae in disposing of the appeal.
24. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
25. 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.)