

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 56 of 2000

Sri Ashis Kumar Roy

-Vs-

Sri Raj Kumar Ghosh

For the Petitioner : Mr. Apalok Basu
(Amicus Curiae)

For the Opposite Party : Mr. Avishek Sinha

Heard on : 21.06.2023

Judgment on : 04.10.2023

Ananya Bandyopadhyay, J. :-

1. This appeal is preferred by the petitioner against the order of acquittal dated 1st July, 1998 passed by Learned Chief Judicial Magistrate, Burdwan, acquitting the opposite party/accused from offences under Section 138 of the Negotiable Instruments Act in C.R. Case No. 389 of 1997.
2. The petitioner is a businessman and during the course of his business the petitioner had acquaintance with the accused/opposite party who was also running electrical business.
3. The accused was in need of some amount of money for his business and taking the advantage of such acquaintance the accused requested the petitioner to lend some money and the petitioner had given a total amount of Rs.46,800/- (Rupees Forty

Six Thousand Eight Hundred) to the opposite party on 22.11.1996 on condition that the opposite party will refund the amount to the petitioner as and when demanded by the petitioner.

4. On the demand of the petitioner the opposite party paid the said amount of Rs.46,800/- by three different cheques on three dates respectively, more precisely on 12.01.1997 an amount of Rs.9,000/- was paid through Cheque No. Y/15 946635 and on further demand a further sum of Rs.16,000/- was paid on 25.02.1997 through Cheque No. Y/15 946636 and lastly an amount of Rs.21,800/- was paid to the petitioner on 20.04.1997 bearing Cheque No. Y/15 946638 and all the three cheques were drawn in favour of the petitioner on Syndicate Bank, Burdwan Branch and all the three cheques were deposited by the petitioner for encashment at his own account at Allahabad Bank, Khosbagan Branch, Burdwan on 30.04.1997.
5. Thereafter, the Syndicate Bank, Burdwan Branch on 02.05.1997 intimated the Banker of the petitioner i.e. Allahabad Bank that all the three cheques presented for encashment have been bounced due to insufficient fund and returned all the three cheques to Allahabad Bank, Khosbagan Branch, Burdwan and on 06.05.1997 the Allahabad Bank, Khosbagan Branch, Burdwan informed the petitioner as to the factum of the said bouncing of cheques and returned the cheques to the petitioner.

6. The petitioner informed the opposite party about the bounce of three cheques by serving a notice dated 17.05.1997 through his Learned Advocate by registered post with acknowledgment due since the opposite party in spite of receiving the said notice did not pay the amount to the petitioner, the petitioner lodged a written complaint under Section 138 of the Negotiable Instruments Act against the opposite party before the Learned Chief Judicial Magistrate, Burdwan.
7. On the basis of the said complaint the Learned Magistrate took cognizance and examined the petitioner under Section 200 of the Code of Criminal Procedure and thereafter the opposite party surrendered before the Court and was enlarged on bail.
8. During the course of trial the opposite party deposed himself as D.W. No. 1 and on behalf of the petitioner, he himself along with one Arun Kumar Saha deposed as PW-1 and PW-2 respectively.
9. The opposite party in his deposition contended that he did not take any loan of Rs.46,800/- from the petitioner and that he only took loan of Rs.21,000/- which he already paid to the petitioner and regarding the issuance of three cheques the opposite party categorically admitted in his examination under Section 313 of the Code of Criminal Procedure that the said three cheques were written by him, but there was an agreement between them that the petitioner would not present the same in the Bank.

10. The petitioner deposed himself as PW-1 in the case has categorically submitted that he gave a loan of Rs. 46,800/- and there was not much intimacy with the opposite party and had no partnership relation with the business of the opposite party and further stated in his cross-examination that the petitioner collected the amount which was given loan to the opposite party from his parents, elder brother etc.
11. The PW-2 also proved the factum of giving the loan to the opposite party and in his oral testimony he categorically stated that during his presence the petitioner on the request made by the opposite party paid the loan of Rs.46,800/- and also proved as to the issuance of three cheques by the accused in favour of the petitioner.
12. The accused/Opposite party in his disposition as D.W.1 stated that during the period of July-August, 1996 he was in need of some money for his business, but he took loan from the petitioner a sum of Rs. 21,000/- only, but most surprisingly he stated that he handed over three cheques to the petitioner of Rs. 46,800/- taking into account the profit of the business and the interest of the amount invested by the complainant. That the said D.W. 1 further stated that although he had paid the said amount of Rs.21,000/- to the petitioner, but he could not pay any profit of his business and in the Cross-examination it is specifically stated by the accused that at any point of time no documents were prepared to

the effect that the cheques were issued in favour of the complainant as Security for the amount of Rs. 21000/-.

13. Apart from oral testimony the petitioner proved the documents of Service of notice as written by the Learned Advocate and the three cheques and the intimation of the concerned Bank as to the insufficiency of fund etc.
14. The petitioner as PW-1 and the another businessman of that locality as PW-2 corroborated each other as to the factum of giving the loan of Rs.46,000/- to the opposite party and also the issuance of the three cheques by the opposite party himself.
15. The Learned Chief Judicial Magistrate, Burdwan by his judgment dated 1st July, 1998 held, inter alia, that the petitioner has not been able to prove the case beyond all reasonable doubt to attract Section 138 of the Negotiable Instruments Act as he failed to establish the liability or debt for Rs.46,800/- against the accused/opposite party and the Learned Chief Judicial Magistrate further held that mere issue of cheque in favour of somebody else and dishonour of the same by the Bank does not attract the provisions of Section 138 of the Negotiable Instruments Act until and unless it is proved that the drawer or the cheque was liable to pay the amount in any way whatsoever as debt or otherwise, accordingly the Learned Magistrate found the opposite party not guilty to the charge, and was acquitted under Section 255(1) of the Code of Criminal Procedure.

16. Learned Advocate for the petitioner submitted that:-

- i. The Learned Chief Judicial Magistrate erred in law by holding that the testimony of the PW-1 and PW-2 have failed to establish the liability or debt of Rs.46,800/- against the accused and brushing aside the said testimony from his consideration whatsoever.
- ii. The Learned Chief Judicial Magistrate having held, inter alia, that the petitioner had not been able to prove the case beyond all reasonable doubt to attract Section 138 of the Negotiable Instruments Act in as much as mere issuance of cheques and dishonour of the same by the Bank does not attract the said provisions of Negotiable Instruments Act, he could not have come to a peculiar finding on a total misconstruction of evidence oral and documentary that the petitioner had proved that there was debt or any other liability to be discharged by the accused, thereby failed to appreciate the admitted fact of taking the loan by the opposite party from the petitioner and the issuance of the three cheques by the opposite party himself towards the payment of the said amount.
- iii. The Learned Chief Judicial Magistrate totally misdirected himself to the conclusion on the basis of an alleged document which never saw the light of the day for consideration by the Learned Court.

- iv. The Learned Chief Judicial Magistrate completely misdirected himself by disbelieving the testimony of PW-1 that he collected the loan amount from his parents and brothers etc. as such the judgment suffer from non-application of mind and liable to be set aside.
- v. In as much as the inference drawn by the Learned Magistrate as to the fact that although the petitioner had been a businessman, but he had no income tax file as such it was not possible to find out how the petitioner managed the said amount, did not find support in the eye of law as such the said inference was unsustainable.
- vi. The Learned Magistrate failed to appreciate the very purpose of enacting the provisions of Section 138 of the Negotiable Instruments Act and the ingredients of the offence as to the debt or other liability for which the cheque was drawn and the same was returned by the Bank unpaid, was sufficient to prove the facts and circumstances of the case so as to warrant a conviction in accordance with law against the opposite party.
- vii. The order of acquittal imposed suffers from misappreciation of evidence in the proper perspective and has caused a serious miscarriage of justice warranting an interference by this Hon'ble Court.

17. The Learned Advocate for the opposite party submitted that the High Court has limited jurisdiction to deal with an order against acquittal passed by the Learned Trial Court in view of the observation of the Hon'ble Apex Court and the appeal shall be dismissed.
18. On perusal of the materials on record and considering the submissions of the Learned Advocates for both the parties, this Court of the opinion that the Learned Magistrate has considered the relevant legal aspects in determining the impugned judgment and order with reasons. This Court is not inclined to interfere with the same as it is against an order of acquittal and in absence of gross illegalities, irregularities, non-appreciation of proper evidence on record it is not prudent to intervene with the same.
19. In view of the above discussions, the appeal is dismissed.
20. I record my appreciation for the able assistance rendered by Mr. Apalok Basu, Learned Advocate, as *Amicus Curiae* and I also record my appreciation for the able assistance rendered by Mr. Avishek Sinha, Learned Advocate, as *Amicus Curiae* in disposing of the appeal.
21. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
22. 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.)