IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRA 53 of 2021

Sri Kashinath Shaw

-vs.-

Sri Rupesh Gupta & Anr.

Mr. Debasis Kar,
Mr. Subhajit Chowdhury.

...For the Appellant

Mr. Sourav Chatterjee,
Mrs. Kabita Mukherjee,
Mr. Manas Dasgupta.

... For the Opposite Parties

Md. Anwar Hossain,
Ms. Manisha Sharma

... For the State

Reserved on : 26.04.2023.

Judgment on : 24.07.2023

Tirthankar Ghosh, J:-

The present appeal has been preferred against the judgment and order dated 16.10.2020 passed by the learned Judicial Magistrate, 7th Court, Alipore, South 24 Parganas in Case No. C/5192 of 2010 under Section 138 of the Negotiable Instrument Act, wherein the learned trial Court was pleased to acquit the accused from the charges.

The genesis of the case was a complaint initiated by one Kashinath Shaw (hereinafter referred to as 'the complainant') against Rupesh Gupta (hereinafter referred to as 'the accused/respondent'). It was alleged that the complainant is a businessman and absolute owner of a piece and parcel of land measuring 90.75 decimals which was conveyed to the opposite party and one of his relation for a total consideration of Rs.45,00,000/-. Against the total consideration the accused respondent made payment by cash and a cheque being cheque no.036692 of Rs.10,00,000/- dated 10.04.2010 in favour of the complainant. The said cheque was drawn on Central Bank of India, Ultadanga Branch which was signed by the accused no.1 as the proprietor of Om Kutir Udyog. The said cheque was deposited by the complainant with his banker State Bank of India, Garia Branch on 19.04.2010. However, the same was dishonoured with the remarks "Exceeds arrangement". The accused thereafter requested the complainant to wait for some time and thereafter deposit the cheque. The said cheque was again presented on 08.06.2010 with the complainant's banker but the same was again dishonoured with the endorsement "Exceeds arrangement", the intimation of such dishonour was received by the complainant on or about 17.06.2010. The complainant issued demand notice dated 21.06.2010 which was despatched on the same date, wherein the amount covered by the dishonoured cheque was demanded to be paid within 15 days from the date of receipt of such notice. It has been alleged that in spite of receiving the notice the accused persons failed and neglected to make any payment. The postal endorsement reflected the remarks "left" and the acknowledgement card was received by the complainant on or about 21.07.2010. The complainant thereafter filed the complaint.

On receipt of the complaint the learned Magistrate was pleased to take cognizance of the offence and transfer the case to the Learned Judicial Magistrate, 7th Court, Alipore. Pursuant to issuance of process the accused/ respondent appeared before the learned trial Court and was released on bail. The substance of the accusation was read over and explained to the accused under Section 251 Cr.P.C. to which he pleaded not guilty and claimed to be tried.

In order to prove its case the complainant examined himself as prosecution witness and also relied upon 7 documents which included the cheque, marked as Ext.1; two bank return memo, marked as Ext.2 series; demand notice marked as Ext.3; postal receipt marked as Ext.4; A/D Card marked as Ext.5; undelivered envelope containing demand notice marked as Ext.6 series; the certified copy of the written statement filed by the accused in Title Suit No. 70/2011 before the learned Civil Judge, Junior Division, Barrackpore marked as Ext.7. The accused did not adduce any oral evidence but in course of cross-examination of the prosecution witness relied upon 9 (nine) certified copy of Sale Deed which were marked as Ext.A series (Ext. A – Ext. A/8). The learned trial Court on appreciation of the materials placed by the prosecution and the defence was pleased to observe that the main contention of the complainant relate to nine deeds executed in favour of the accused for which a sum of Rs.35,00,000/- was received by the complainant and a sum of Rs.10,00,000/- was received by cheque. According to the learned Magistrate Ext.A series reflects that a sum of Rs.45,00,000/- was received and the said Ext.A did not reflect that any consideration money was to be received through cheque (Ext.1). Learned Magistrate also observed that complainant during cross-examination voluntarily stated that there was a separate demand of Rs.10,00,000/- through cheque but no such document was produced before the Court. Learned Magistrate further observed that paragraph 11 of Ext.7 refers to the cheque which was used for purchasing remaining land of 3 cottah 7 chittaks by the accused and the complainant did not execute or register the deed for the same. Learned Magistrate was pleased to hold that the complainant was confronted with his own document, as Ext.A series (Sale Deed) to dislodge the prosecution case and which the complainant failed and the accused as such was entitled to be acquitted.

Mr. Debasis Kar, learned Advocate appearing for the appellant submitted that the learned trial Court has mis-read the evidence adduced and ignored both the examination-in-chief and cross-examination of PW1. According to the learned Advocate the appellant stood on dock as PW1 and filed his affidavit-in-chief relying upon the cheque being marked as Ext.1 (objected to); two return memos of SBI (marked as Ext.2 series); notice of learned Advocate Pradip Dutta (marked as Ext.3); two postal receipts (marked as Ext.4 series); Acknowledgement Due card duly received by the respondent Rupesh Gupta under the seal of Om Kutir Udyog (marked as Ext.5); the returned demand notice along with the envelope as well as the A/D Card with the remark I/S & Left the envelope, notice and A/D return card marked as Ext.6 series; demand notice (marked as Ext.7) and the signature of the Advocate was marked as Ext.7/1. Attention of the Court was drawn to the further examination-in-chief on recall of the complainant wherein it was stated *"I had filed a civil suit being no T.S. 70 of 2011 at civil judge, Junior Division, Barrackpore against the accused Rupesh Gupta. In the said case the said accused Rupesh Gupta filed one written statement in connection with the aforesaid case and the said written statement has been marked EXT. 7 in this case. In paragraphs no.11 and 12 of the said W.S. the accused has admitted regarding the payment of the consideration money of the sale deed as well as issuance of the impugned signed cheque which is the subject matter of the present case. The W/S was filed by the defendant/accused herein in connecting with T.S. no 70 of 2011 before Civil Judge, (Jnr. Div.) at Barrackpur against my claim."*

Learned Advocate for the appellant submitted that the nine certified copies of the sale deed were filed by the accused person and which were marked as Ext.A series. It was argued that the liability relating to the amount of Rs.10,00,000/- for the purpose of liquidating the dues arising for payment in respect of the property which was already sold was attempted to be rebutted by the accused by way of relying upon a document. The contents of which had no relation with the subject matter of the cheque. To that effect the examination-in-chief, cross-examination, examination on recall and further cross-examination was relied upon by the learned Advocate. Additionally it was submitted that the plea taken by the accused in respect of the property measuring 3 cottah 7 chittaks for the purpose of which the accused claimed he issued the cheque do not have any foundation, particularly the contents of the documents which have been relied upon which narrates that if the complainant on any future date decides to sell the property and the accused is ready to pay the market price, in that case the complainant would sale the property/land to the accused. There is no reflection in the said agreement as to whether any amount has been paid in advance or kept as security. Further emphasis was laid that if the factual interpretation of the contents of the said document Ext.B is compared with the proximity of the date in respect of which the cheque has been issued it would be transparent that the subject matter of cheque which has been dishonoured had nothing to do with the property wherein the market price of future date is referred and there is no reflection to any advance being paid. Criticising the judgment delivered by the learned trial Court it was submitted on behalf of the appellant that the learned trial Court failed to take into account the totality of the circumstances including the defence taken by the accused and by relying upon a particular paragraph of the written statement in the Civil Suit, the trial Court proceeded to acquit the accused person without appreciating the basics of Section 139 of the N.I. Act. To substantiate his contention learned advocate for the appellant relied upon the following judgments:

Vanaja –Vs. – S. Shankara Narayanan reported in 2019(2) MLJ (Criminal) 309;Uttam Ram –Vs. – Devinder Singh Hudan & Anr. reported in (2019) 10

SCC 287; Sancha Bahadur Subba & Ors. –Vs. – Ramesh Sharma and Ors. reported in 2020 (3) RCR (Criminal) 583; Tedhi Singh –Vs. – Narayan Dass Mahant reported in (2022) 6 SCC 735; P. Rasiya –Vs. – Abdul Nazer & Anr. 2022(3) Crimes 343; T. Vasanthakumar –Vs. – Vijaykumari reported in (2015) 8 SCC 378; Jain P. Jose –Vs. – Santosh & Anr. (@SLP (Crl) No(s). 5241 of 2016); M/s Kalamani Tex & Anr. –Vs. – P. Balasubramanian (2021) 5 SCC 283; Subrata Bose –Vs. – Mithu Ghosh (CRA 685 of 2018); ZNK Traders Pvt. Ltd. –Vs. – Shri Kishore Shankar Signapurkar & Anr. reported in AIR 2022 SC 909 and Siddiqui (D) by Lrs. –Vs. – A. Ramalingam reported in (2011) 4 SCC 240.

Mr. Sourav Chatterjee, learned Advocate appearing for the respondent submitted that the facts on which the present case has been initiated reflects that the appellant/complainant was a businessman and was the sole and absolute owner of a piece of land admeasuring about 90.75 decimals, which he conveyed to the respondent no.1 and one of his relatives for a total consideration of Rs.45 lacs. In order to fulfil the aforesaid total consideration the accused paid cash as well as cheque. The said cheque was signed by the respondent no.1 as sole proprietor of respondent no.2 and the amount of Rs.10 lacs, being the impugned amount was a remaining consideration amount which was deposited by the appellant but the same was dishonoured twice with the bank endorsement "exceeds arrangement", thereafter demand notice was sent but no payments were made and as such the complaint was filed. It was contended that the appellant/complainant relied upon number of documents which also included certified copy of written statement filed by the respondent no.1 in Title Suit being Title Suit no. 70 of 2011. Such certified copy of the written statement was in fact brought in evidence by recalling PW1 under Section 311 of the Code of Criminal Procedure. The defence relied upon the nine registered deed of conveyance which were marked as Ext.A series. However, the defence did not examine any witness on its own and exclusively relied upon the evidence which was placed on record during the evidence of the prosecution as well as the oral evidence which was elicited from the prosecution witness in course of cross-examination. Referring to Ext.A series (Ext. A to Ext.A/8) which are nine registered sale deeds, learned Advocate stressed that there is an admission in the documentary evidence of conveyance itself, wherein it is reflected that the entire consideration amount was paid and received in respect of the said transaction. Thus the question of the impugned cheque being a part of the total consideration of Rs.45 lacs according to him is patently absurd and inherently improbable. Illustrating the contents of the said registered deeds learned Advocate argued that in each of the deed the figure therein have been mentioned, so it is neither acceptable nor believable that the transfer of the property took place on payments remaining due. Such factual foundation is palpably false and cannot be the foundation for an illegal creation of any enforceable debt or liability as is envisaged under the provisions of N.I. Act in respect of a cheque which has been issued. Referring to the cross-examination of the appellant (PW1) on 13.07.2016 learned Advocate emphasized on the following sentences appearing in the deposition which is as follows:

> *"It is true that from the bare reading of the deeds it cannot be revealed that the accused had paid me Rs.10 lacs through the impugned cheque towards the consideration money. Witnesses volunteers that as there was separate receipt in this regard on the stamp paper over which the cheque numbers and draft numbers are mentioned, the particulars of the cheque was not mentioned in the deed."*

It was argued that the complainant did not place any receipt in evidence and withholding such evidence exposes the falsity and frivolity of the claims made by the appellant in support of the impugned cheque. It was further submitted that the version of the appellant is self-contradictory as subsequently he has taken the plea, that accused paid partly in cash and partly in cheque and the impugned cheque is part and parcel of the amount of Rs.45 lacs for which the sale of 90.75 decimals of land took place. Learned Advocate also relied upon Ext.B which was a document marked as an additional evidence under Section 391 of the Code of Criminal Procedure wherein the respondent/accused was allowed to rely upon such document and according to the defence the subject matter of 3 cottah 7 chittaks of land had a direct relation with the impugned cheque which was issued as a security for further transaction and as the said land was not sold to the respondent no.1,so he had no reason to honour the cheque for being encashed. On the question of law it was argued that Section 139 of the N.I. Act raises a presumption but such a presumption can be rebutted by way of adducing evidence which is to be appreciated on the foundation of the principles of preponderance of probability. In this case according to the learned Advocate for the respondent the evidence of the prosecution is self-contradictory and the defence by way of cogent materials have been able to overcome the factual basis which was claimed by the appellant as a legally enforceable debt or liability. Once that has been successfully done, according to him the respondent is entitled to benefit of the same and as such there is no requirement for interfering with the judgment and order of acquittal passed by the learned Judicial Magistrate, 7th Court, Alipore in C Case no. 5192/2010. To substantiate such factual and legal contentions the learned Advocate relied upon the following judgments:

Anns Rajashekhar –Vs. – Augustus Jeba Ananth reported in (2020) 15 SCC 348 (relied upon para 13, 15, 16, 17); M.S. Narayana Menon –Vs. – State of Kerala reported in (2006) 6 SCC 39 (relied upon para 30, 33, 38 and 39) and John K Abraham –Vs. – Simon C Abraham reported in (2014) 2 SCC 236 (relied upon para 9).

In this case number of documents have been exhibited or admitted in evidence. So far as the title deed of the properties in respect of which transaction took place although the same was averred in the petition of complaint but the said documents were not brought in evidence and it was in course of cross-examination of the complainant the documents (title deed relating to the property which were sold) was brought in evidence and marked as Ext. “A” series. A scrutiny of the said title deeds do not reflect that there are any memorandum of consideration which has been enclosed and what is reflected in the contents is the amount of money which has been fixed for the particular property/land and a particular paragraph reflecting that the vendor i.e. complainant has received the amount in full.

The point of conflict which has been raised in this case is that while the complainant claims that the cheque which is the subject matter of the case was issued in discharge of liability towards the sell of the aforesaid property, the respondent/accused on the other hand claims that in respect of 3 cottah 7 chittaks land a separate agreement was there with the complainant for which the cheque was advanced and as the sale did not materialise there is no question of honouring the said cheque. To that effect the notarized document was placed by way of additional evidence being Ext. "B".

Both the parties are silent regarding the mode and manner of payment.

The complainant on recall relied upon the written statement wherein it was contended by the respondent that he has paid Rs.20,00,000/- by A/C payee cheque, Rs.15,00,000/- by demand draft and the balance amount by Rs.10,00,000/- cash.

The date of the cheque which is the subject matter of the present proceeding under Section 138 of N.I. Act is10.04.2010, the date of registration of 90.75 decimals of land is on 13.04.2010 and the notarized document being Ext.B was Signed on 12.04.2010. Para 11 of the Written Statement filed by the accused/respondent in T.S. 70/2011 states as follows:

> ***"11)*** *That the statements made in Paragraphs – 4 of the plaint are distortions of truth and vehemently denied and disputed. It is true to state that the Defendants made payments by paying Rs.20,00,000/- by A/C. Payee cheque, Rs.15,00,000/- by Demand Draft and the Balance amount of Rs.10,00,000/- was paid by Cash. That A/C payee cheque amounting to Rs.10,00,000/-, that the plaint paragraphs refers was the Cheque issued an instrument for securing the Agreement between the Plaintiff and the Defendant No.1 for purchase of the 3 Cottahs 7 Chittaks remaining in possession of the Plaintiff after execution of the 55 Cottahs of land along with 'Atta Kal' (Plaint & Machinery) by 9 Deeds, a copy of the Declaration regarding Sale of the said property measuring 3 cottahs and 7 chittaks shall be relied at the hearing. The Cheque was issued for execution of the aforesaid 3 Cottahs and 7 Chittaks of land, which is failure to execute by the Plaintiff, the Defendant No.1 stopped payment of such cheque as an redundant Agreement.*
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> *The plaintiff, taking advantage of having the cheque in his hand, went on to file Criminal Case for illegal gain which is pending before the 7th Judicial Magistrate at Alipore, despite the request of the Defendant no.1 not to deposit the Cheque."*

The plea relating to the cheque being kept as security for the purposes of the 3 cottah 7 chittaks of land was a verbal defence unsubstantiated and not referred in Ext. B.

No money receipt was submitted by either of the parties, particularly with respect to the cash amount.

Under such circumstances the reverse onus provisions do assume importance as both the parties have claimed that the total amount of consideration was for Rs.45,00,000/-.

So the next issue which assumes importance relate to the relevance of the contents of the documents placed before the court in order to rebut the prosecution case. Firstly, the nine registered title deeds in respect of the property/land which was purchased and in which the complainant stated that he has received the money. Secondly is that written statement wherein the accused/respondent has claimed that he has paid Rs.20 lacs by way of A/C payee cheque, Rs.15 lacs by way of demand draft and Rs.10 lacs by cash. Thirdly, is a document wherein the complainant signed on a stamp paper and the contents of which states that if on a future date he sells the land being 3 cottah 7 chittaks in that case if the accused/respondent is ready and willing to purchase the property at the existing market price, he would sell the property to him.

The nine title deeds in respect of the property was registered on 13.04.2010. The document Ext. “B” was signed on 12.4.2010 and the cheque was issued on 10.04.2010. The absence of the cash receipt in respect of the land relating to 90.75 decimals, do tilt the case in favour of the prosecution as the defence/accused/respondent did not substantiate any cash receipt or any payment which would substantiate that whole of the amount of Rs.45,00,000/- have been paid.

The finding of the trial Court that 'Ext.A series' belies the prosecution case is a superficial appreciation of facts which is not acceptable to this Court while exercising its appellate jurisdiction.

The oral and documentary evidence in this case relied upon by the accused/respondent fails to overcome the evidentiary threshold for rebutting the provisions of Section 139 of the N.I. Act.

Accordingly the judgment and order dated 16.10.2020 passed by the learned Judicial Magistrate, 7th Court, Alipore, South 24 Parganas in Case No. C/5192 of 2010 is hereby set aside.

The appellant and respondent are directed to appear before the jurisdictional Court on 7th August, 2023 when the learned Magistrate would give opportunity to the accused on the issue of sentencing and proceed to impose the sentence under Section 138 of N.I. Act.

Accordingly, CRA 53 of 2021 is allowed.

Pending applications, if any, are consequently disposed of.

Department is directed to send back the Lower Court Records to the Trial Court and communicate this judgment for further reference, if required.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)