

IN THE HIGH COURT AT CALCUTTA

Criminal Revisional Jurisdiction

Present: - Hon'ble Mr. Justice Subhendu Samanta.

C.R.R. No. – 780 of 2018

With

CRAN 2 of 2021

IN THE MATTER OF

Sri. P.S. Mitra alias Partha Sarathi Mitra

Vs.

Manor Travels Private limited & Anr.

With

CRR 782 of 2018

With

CRAN 2 of 2021

IN THE MATTER OF

Sri. P.S. Mitra alias Partha Sarathi Mitra

Vs.

Manor Travels Private limited & Anr.

**For the Petitioner : Mr. Sandipan Ganguly, Sr. Adv.,
Ms. Priyanka Sarkar, Adv.,
Mr. S.N. Arefin, Adv.,
Mr. R. Sing, Adv.
Ms. R. Binayak, Adv.**

**For the Opposite Party : Mr. Apalak Basu, Adv.,
Mr. Cedric Fernandez, Adv.,
Ms. Sanghamitra Mridha, Adv.**

Judgment on : 17.08.2023

Subhendu Samanta, J.

These instant Criminal Revisions are preferred u/s 397/401 read with Section 482 of the Code of Criminal Procedure against order dated 17.11.2017 passed by Learned Additional District and Sessions Judge Fast Track 1st Court Calcutta in Criminal Appeal Nos. 66 of 2017 and 67 of 2017 dismissing the appeals by affirming thereby the orders dated 15th December 2014 passed by the Learned Metropolitan Magistrate 12th Court Calcutta in Case No. C 1866 of 2010 and Case No. C 3897 of 2010 respectively u/s 138 of Negotiable Instrument Act thereby convicting the petitioner to suffer detention till rising of the court (TRC) and to pay compensation of Rs. 4, 00,000/- and Rs. 3, 00,000/- respectively to the complainant within one month in default to suffer simple imprisonment for two years.

The brief fact of the case is that the present petitioner had business transaction with present opposite party No. 1 for purchasing by Railway tickets.

During the said business the present petitioner used to pay money through cheques. The business transaction was continues and the petitioner used to pay on regular basis to the opposite party No. 1 through cheques. Opposite party No. 1

has deposited the some of the cheques with their banker and the said cheques were dishonoured. The opposite party filed the instant complaint case but before the Jurisdictional Magistrate on the alleged acquisition of having commission of offence punishable u/s 138 of Negotiable Instruments Act. The present petitioner contested the complaint case before the Learned Magistrate on conclusion of evidence of witnesses and after examining the accused/petitioner u/s 313 Cr.P.C and on perusal of the materials on record and also after hearing of the respective parties; the Learned Magistrate has passed the Judgment and Order dated 05th December 2014 thereby convicted the present petitioner u/s 138 of Negotiable Instrument Act and passed the impugned order of sentence accordingly.

The present petitioner being aggrieved and dissatisfied with the said order dated 05th December 2014 passed by the Learned Magistrate concern preferred a revision application before the Learned Chief Judge, City Sessions Court, Calcutta. Subsequently the revisional application was converted to an appeal and it was heard by the Learned Additional District and Sessions Judge, Fast Track 1st Court Calcutta. During the continuation of the appeal one application u/s 391 of the Code of Criminal Procedure for adducing additional evidence was

preferred by the present petitioner/accused. Learned Additional Sessions Judge heard the appeal along with the application and by passing the impugned order dated 17th November 2017 affirmed the order of the Learned Magistrate.

Hence this revision.

Learned Advocate for the petitioner submits that the Learned Judge, has failed to appreciate the facts and circumstances of this case and the impugned judgment is palpably improper and illegal in the eye of law. Learned Judge has failed to consider the fact that during the examination of the accused u/s 313 Cr.P.C. Petitioner specifically stated that he has already paid some of the cheque amount and was received by the present opposite party prior for the filing of the complaint. The receipt of the said payments are within the custody of the petitioner. The Trial Magistrate did not integrated into the said fact the Appellate Court also did not allow the present petitioner to adduce further evidence and exhibit the payment receipts. Learned Judge has failed to consider the present case is relates offence u/s 138 of Negotiable Instruments Act and the Learned Judge ought to have allowed the present petitioner to adduce additional evidence. The Order of compensation passed by the Learned Magistrate is not proper in view of the fact that the huge

amount of payment has already been made to the opposite party. Learned Magistrate has also failed to appreciate the fact that the cheques were only handed over to the opposite party as security deposit but not as enforceable debt.

It is further argued that on behalf of the petitioner that the order of conviction passed by the Learned Magistrate and affirmed by the Learned Additional Sessions Judge, is completely improper. The Court of Magistrate may award such term of imprisonment in default of fine as is authorised by law, provided that the term shall not where the imprisonment has been awarded as part of the substantive sentence, exceed one fourth of the term of the imprisonment which is a maximum fixed for the offence. The present case relates to under the provisions of 138 of Negotiable Instrument Act, maximum punishments is two years as such in default the term of imprisonment shall not exceed 06 months. On that score, the impugned order passed by the Learned Additional Sessions Judge, is illegal and admittedly and non-application of mine. Thus, it is liable to be set aside.

Learned Advocate for the opposite party No. 1 submitted before this court that the impugned order passed by the Learned Sessions Judge suffers no illegality. The Learned Sessions Judge, has considered the materials placed before

him and passed the reasoned order. He also submitted before this court that the present opposite party is well reputed in dealing with travelling services from last 30 years. It gives services by arranging or providing Domestic and International air-tickets to its widely spread clients. The present opposite party on the request of the petitioner has provided the Air-tickets and intern the petitioner has handed over duly signed cheques of different amounts. When the cheques were presented for encashment within its validity period they were dishonoured by the banker. The opposite party issued a demand notice which was duly received by the petitioner, but he failed to pay the debt within the stipulated period. Hence the opposite party initiated proceeding u/s 138 of Negotiable Instrument Act before the Learned Metropolitan Magistrate Calcutta. The petitioner being the accused appeared before the Learned Magistrate and had taken part of the proceeding and after hearing the Learned Advocate for both parties the Learned Magistrate has passed the impugned Judgment and Order including the sentence on 05th December 2014.

Thereafter the petitioner preferred a revisional application before the Learned Sessions Judge, which was subsequently converted into the criminal appeal and after hearing the appeal from the both side. Learned Additional and

Sessions Judge has passed the impugned order. The impugned order suffers no illegality. Thus, it cannot be set aside.

During the course of argument Learned Advocate for the petitioner cited a decision of Hon'ble Supreme Court passed in **Dasarathbhai Trikambhai Patel Vs Hitesh Mahendrabhai Patel & Anr. reported in (2023) 1 SCC 578** When a part payment of the debt is made after the cheque was drawn but before the cheque was encashed, such payment, held, must be endorsed on the cheque u/s 56 of the Act and the cheque cannot be presented for encashment without recording part-payment. Therefore, if the endorsed cheque is dishonoured on presentation, the offence u/s 138 of Negotiable Instrument Act would not attract since the cheque does not represent legally enforceable debt at the time of encashment.

Learned Advocate for the appellant on that score submitted before this court that the petitioner has stated during the course of examination u/s 313 Cr.P.C. that he has move some part-payment to the opposite party and he possessed the receipts, but Learned Magistrate has not enquired into the matter, Learned Sessions Judge, should have allowed the petitioner to adduce additional evidences. If the evidence appears the case of the opposite party filed u/s 138 of

Negotiable Instrument Act would not be appeared to be not applicable.

On the other hand Learned Advocate for the opposite party cited a decision of **Sumeti Vij Vs. M/S Paramount Tech Industries [2021 SCC Online SC 201]** wherein the Hon'ble Supreme Court has held the statement of the accused recorded u/s 313 Cr.P.C is not substantive of defence but only an opportunity to the accused to explain the incriminating circumstances appearing in the prosecution case of the accused. Therefore, the there is no evidence to elaborate the prosecution that the cheques were issued for consideration. Learned Advocate for the opposite party cited another decision of Hon'ble Supreme Court passed in **Aps Forex Services Private Limited Vs. Shakti International Fashion Linkers reported in 2020 12 SCC 724** wherein the Hon'ble Supreme Court has held that:

7.2. What is emerging from the material on record is that the issuance of cheque by the accused and the signature of the accused on the said cheque are not disputed by the accused. The accused has also not disputed that there were transactions between the parties. Even as per the statement of the accused, which was recorded at the time of the framing of the charge, he has admitted that some amount was due and payable. However, it was the case on behalf of the accused that the cheque was given by way of security and the same has been misused by the complainant. However, nothing is on record that in the reply to the statutory notice it was the case on behalf of the accused that the cheque was given by

way of security. Be that as it may, however, it is required to be noted that earlier the accused issued cheques which came to be dishonoured on the ground of “insufficient funds” and thereafter a fresh consolidated cheque of Rs. 9,55,574 was given which has been returned unpaid on the ground of “STOP PAYMENT”. Therefore, the cheque in question was issued for the second time. Therefore, once the accused has admitted the issuance of cheque which bears his signature, there is presumption that there exists a legally enforceable debt or liability under Section 139 of the NI Act. However, such a presumption is rebuttable in nature and the accused is required to lead the evidence to rebut such presumption. The accused was required to lead evidence that the entire amount due and payable to the complainant was paid.

Heard the Learned Advocate perused the materials on record it appears that the Learned Magistrate has conducted the proceeding according to the provisions of law and during the course of examination of the accused/ petitioner u/s 313 Cr.P.C. Petitioner stated some of the amount of the cheques has already been paid to the opposite parties and he possessed those receipts. It appears from the LCR that the present petitioner intends to adduce evidences for defence accordingly the date was posted for DWs thereafter the, petitioner was not turned up thus, finding no other alternative Learned Magistrate has closed the DWs. Thereafter the date was fixed for the argument and the petitioner/accused took part of the proceeding and the Learned Advocate for the petitioner argued the matter at length. So it proves that the petitioner was

allowed to adduce DWs but he has not availed the same. Further more, the reply of demand notice by the present petitioner does not disclosed in all such payments. Thus, at this juncture, during the stage of appeal the petitioners plea for adducing additional evidence has rightfully discarded by the Learned Additional Sessions Judge. I have perused the impugned Order passed by the Learned Additional and Sessions Judge I have seen no infirmity in the said judgment. However, it is true that the impugned order of sentence passed by the Learned Magistrate on 05th December, 2014 specifically the term of sentence on default clause for non-payment of compensation is appears to me not justified.

Section 30 of the Code of Criminal Procedure has enumerated the power of Learned Magistrate to award term of imprisonment in default of payment of fine.

Sec- 30. Sentence of imprisonment in default of fine -

-- (1) The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law:

Provided the term—

(a) is not in excess of the powers of the Magistrate under Section 29;

(b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under Section 29.

In the present case the petitioner cannot be awarded to suffer simple Imprisonment for more than 06 months in default of payment of compensation. Consequently the portion of the order of the sentence passed by the Learned Magistrate affirmed by the Learned Additional Sessions Judge is appeared to me improper and illegal.

I further observed that the present petitioner is aged about 80 years; he has already suffered simple imprisonment during the pendency of the instant revision. Some amount has already been deposited by the direction of this court before the Learned Magistrate. Considering the entire facts and circumstances and considering the observation made above the impugned order of default of payment by the

petitioner/accused to suffer simple imprisonment for non-payment of the compensation amount within stipulated period is set aside.

The opposite party is at liberty to recover the compensation amount according to the law.

The OP is also at liberty to receive the amount already deposited by the petitioner before the Learned Magistrate along with accrued interest.

CRRs are disposed of on the above observations.

The connected CRAN if any, are also disposed of.

Any order of stay passed during the pendency of the instant criminal revision is also vacated.

Parties to act upon the server copy and urgent certified copy of the judgment be received from the concerned Dept. on usual terms and conditions.

(Subhendu Samanta, J.)