IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 224 of 2008

Dr. Sukumar Nandy
-Vs-
Tushar Kanti Jana

For the Appellant	: Mr. Prabir Mitra Ms. Ariba Shabab
For the Opposite Party	: Mr. Amitabha Karmakar Mr. Arup Kumar Bhowmick
Heard on	: 28.03.2023, 11.04.2023, 22.09.2023
Judgment on	: 28.11.2023

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order of acquittal dated 27.02.2008 passed by Learned Judicial Magistrate, 5th Court, Alipore, South 24 Parganas in Complaint Case No. 2519/2001 under Section 138 of the Negotiable Instruments Act,1881.

2. The accused/opposite party no. 2 dealt in production of Films. In order to materialize the allied works of a Bengali Movie "Shesh Ashray", the opposite party no. 2 approached the petitioner for financial assistance.

The complainant provided financial loan and the opposite party no. 2 issued receipts while taking the loan.

3. The petitioner and the opposite party no. 2 had entered into an agreement dated 1st of January, 2001 and thereby the opposite party no. 2 took a Loan of Rs. 3,00,000/- and thereafter in continuation of the agreement further agreed for a Loan of Rs. 2,00,000/- on 17.03.2001 and in continuation of the agreement, further agreed for a Loan of Rs. 1,50,000/- on 23.04.2001 and in all the opposite party took a Loan of Rs. 3,25,000/-.
4. The aforesaid cheques were deposited with the banker of the petitioner i.e. Allahabad Bank, Kasba Branch and the said cheques were dishonored with the remark “payment stopped by the drawer”.
5. Thereafter the petitioner sent demand notice through his Learned Counsel for the repayment of the amount and the opposite party no. 2 failing to make such payment, the petitioner filed the instant complaint.
6. The said complaint was tried by the 5th Court of the Learned Judicial Magistrate who failed in assessing the case of the prosecution and thereby acquitted the opposite party no. 2.
7. The petitioner had entered into an agreement which was crystal clear and was written in express words in the agreement dated 01.01.01 that the opposite party no. 2 had taken a Loan of Rupees 3 lakhs from the petitioner for releasing of the Bengali Movie “Shesh Ashray” and the petitioner was to receive a commission of 6 % for one and a half year which the opposite party no. 2 agreed to pay and the opposite party no. 2

from billing recovery and should pay the principle amount within four months from the date of release of the movie.

8. Thereafter there were two continuing agreements wherein the quantum of commission was increased from time to time upon the profit of sales offer release of the movie that was billing recovery but nowhere in the four corners of the agreement it was mentioned that the accused persons were invested with the liberty to do away with the Principal Amount of Loan. On the contrary the procedure in which the accused persons would return the Principal Amount was written in express words.

9. By a Judgment and Order dated 27.02.2008 passed by the Learned Judicial Magistrate, 5th Court, Alipore, South 24 Parganas acquitted the opposite party no. 2.

10. The appellant being the complainant had filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 as amended up to date before the Learned Chief Judicial Magistrate at Alipore inter alia stating that –

    i. The complainant being a Doctor was carrying on private practice from his residence and also from other chambers situated in the North Kolkata.

    ii. The complainant at the insistence of the accused provided loan to release one motion picture through a written agreement and accordingly to meet up his liability of loan the accused issued seven cheques in favour of the complainant, the details whereof were given as follows-

Sl. No.	Cheque No.	Date	Drawn On	Amount
01.	172733	25.06.01	Punjab National Bank, New Market Branch, Cal - 87	Rs. 50,000/-
02.	172734	06.07.01	Punjab National Bank, New Market Branch, Cal - 87	Rs. 25,000/-
03.	375346	21.08.01	Punjab National Bank, New Market Branch, Cal – 87	Rs. 50,000/-
04.	375347	26.08.01	Punjab National Bank, New Market Branch, Cal – 87	Rs. 50,000/-
05.	375342	28.08.01	Punjab National Bank, New Market Branch, Cal – 87	Rs. 25,000/-
06.	172740	27.09.01	Punjab National Bank, New Market Branch, Cal – 87	Rs. 50,000/-
07.	375353	28.09.01	Punjab National Bank, New Market Branch, Cal - 87	Rs. 75,000/-
Total				Rs.3,25,000/-

iii. The aforesaid cheques were deposited by the complainant in his Bank Account at Allahabad Bank, Kasba Branch for encashment. However, the said cheques returned unpaid on account of 'payment stopped by the drawer', as per Memos given by the Bank, which were received by the complainant on 28.10.2001.

iv. Within a period of 15 days of the receipt of the said information from the Bank relating to the bounce of the said cheques, the complainant through his Ld. Advocate served notice dated

05.11.2001 upon the accused both under registered post with A/D and under certificate of posting. However though intimation was given by the postal authority on 08.11.01, the accused intentionally did not receive the said notices, which were returned with the remarks 'not claimed', though the accused might have received the notices sent under certificate of posting and thereby through the said notice, the complainant brought to the knowledge of the accused about dishonor of the said cheques and also requested him to make payments with 15 days from the date of receipt of the said notice and further informed that in case payment was not received with the stipulated time, the complainant shall take legal action against the accused under the amended provision of the N.I. Act.

v. The accused in spite of receiving the said notice, failed to pay the loan amount. It was contended that the accused inorder to deliberately evade the aforesaid payment maliciously and intentionally stopped the payment.

11. Learned Advocate for the appellant submitted that –

i. The Learned Magistrate had miserably failed to understand the agreement or had failed to go through the agreement property where nowhere it was stated that the petitioner would pay the contracted sum to meet the expenses by way of investment. It was clearly stated that the accused approached for finance of the sum and that the second part agreed to grant the same. It could be safely construed that it was always Loan that was granted and it could not be by way of investment.

ii. Even if the accused/opposite party no. 2 decided to pay back the Loan Amount by Cheques as they had issued that would not be construed as a violation of contract or gross illegality as long as anything was done not to prejudice the other parts of the contract causing any wrongful loss to the other part.

iii. If the accused had not taken Loan or the Principal Amount if not had not been due to the complainant, the accused would not have issued those Cheques and the accused verily knew that he owed money to the complainant.

iv. The Learned Magistrate failed to apply his judicial mind to uphold the presumption enacted under Section 118 of the Negotiable Instrument Act, 1881.

v. The security in the instant case was not 'collateral security' and the impugned judgment was devoid of merit and bristled with infirmity.

vi. The Learned Judicial Magistrate failed to differentiate at while taking up the question of security deposit the 'reason to make the payment' and the 'mode of payment which is the sine qua non to understand the nature of the security'.

vii. From the recovery of the billing amount the commission as decided in the agreement will be paid and it expressly written in the agreement that the principal amount will have to be paid within 4 months from the date of release of the movie.

viii. It is clear that it is a single transaction and not a continuous one and so the concept of collateral security is imaginary.

ix. It is clear that the principal amount will have to be paid by the accused and from the billing amount, commission will be paid. So, it is essentially clear that the accused owes a legally enforceable debt and liability to discharge upon the complainant.

x. The Learned Judicial Magistrate has made a mistake by observing that the dispute is civil in nature because a Civil Suit is pending but failed to assess that the Civil Suit will not curtail the right of the complainant to approach the criminal court for a speedy remedy of contention of the Civil Suit.

xi. The Learned Judicial Magistrate erred in law and fact by holding that it was agreed between the parties that the money would be paid in cash and that the cheques were given as security but it does not appeal to any prudent mind and by no stretch of imagination, it could be reconciled with the reason for giving those cheques as security if the complainant is barred from depositing them in the bank as held by the Learned Judicial Magistrate.

xii. The gross illegality in the judgment makes the judgment perverse and bad in law and liable to be set aside.

12. The Ld. Advocate for the opposite party submitted that the cheques were issued as co-lateral security after the cash amount was paid to the appellant arising out of a business transaction where the cheques were issued for payment of commission as stipulated in the agreements. A civil case concerning the dispute is pending between the parties and the institution of the instant case under the Negotiable Instruments Act had been a tactic to coerce the opposite party for further compensation and penal action. The learned Trial Court was justified in acquitting the opposite party.

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

i. PW-1 in his deposition stated that PW-1 is the de-facto complainant. He extended a loan of Rs. 3,25,000/- to the appellant for production of a film, formalized through a written agreement, identified as Ext. 1, signed by both parties. Subsequently, the appellant provided PW 1 with a money receipt acknowledging the loan. The appellant issued seven cheques totaling Rs. 325,000/- drawn from P.B.B New Market Branch. The cheque nos. were 172733 dated 25.06.01 for Rs. 50000/-, 172734/- dated 06.07.01 for Rs. 25000/-, 375346/- dated 21.08.01 for Rs. 50000/-, 375347/- dated 26.08.01 for Rs. 50000/-, 375342/- dated 28.08.01 for Rs. 25000/-, 172740/- dated 27.09.01 for Rs. 50000/- and 375353/- dated 28.09.01 for Rs. 75,000/-. These cheques were written by the appellant in the presence of PW-1 and collectively marked as Ext. 2. Subsequently, PW-1 deposited these cheques to Allahabad Bank, Kasba

Branch. On 28.10.2001, PW-1 received bank memos indicating that these cheques were dishonored due to a 'Payment stop by Drawer', documented as Ext. 3. In response, PW-1, through his advocate, issued a demand notice marked as Ext. 4. However, this notice was not claimed, and despite its issuance, the accused did not comply with the payment.

ii. During his cross-examination PW-1 stated that PW-1 recounted meeting Ranjan Kundu through Tripuresh Kr. Dey, who happened to be his sister-in-law's husband. Learning about Ranjan Kundu's office in Film Distribution, PW-1 was approached by the appellant seeking a temporary loan due to a scarcity of funds, as the appellant couldn't release the film 'Shesh Ashray'. This initial loan agreement led to subsequent agreements, marked as Ext. 1/1 dated 17.03.05 and Ext. 1/2 dated 23.04.01.

Considering the film's release in various Cinema Halls in West Bengal, adjustments to the commission percentage was agreed upon based on the business's profits. The film's publicity was handled by the appellant with assistance from Ranjan Kundu. Upon receiving the cheque, PW-1 and Tripuresh Kr. Dey jointly issued four receipts and a letter to the appellant, marked as Ext. A and Ext. B. PW-1 clarified that the cheque amount was not accounted for as a loan in his income tax return; rather, these cheques were delivered to him as security. Notably, the agreement stipulated cash as the mode of payment.

iii. PW-2 in his deposition stated that PW-2, serving as the Deputy Manager at Punjab National Bank's New Market Branch, deposed regarding the appellant's account, specifically identified as account number 22291 of 2001. According to the bank statement presented as Ext. 5, the appellant maintained a balance of Rs. 3460.55/- on 25.06.2001, Rs. 2960.55/- on 06.07.2001, Rs. 560.55/- on 21.08.2001, Rs. 560.55/- on 26.08.2001, Rs. 585.55/- on 28.08.2001, and Rs. 599.55/- on 27.09.2001. These amounts were detailed as the balance available in the appellant's account on those respective dates.

iv. DW-1 in his deposition stated that he had been involved in the production of the film 'Shesh Ashray'. He stated that he faced a financial crisis which led to the film not being released. He asserted encountering financial difficulties, resulting in the film remaining unreleased. Allegedly, Ranjan Kundu, an acquaintance, stipulated a condition requiring the film to be shown to PW-1 and Tripuresh Kumar Dey before its release. Following their viewing, an arrangement was reached wherein they agreed to invest in the film's release under specified terms and conditions. Subsequently, a written agreement, referred to as Ext. 1, 1/1, and 1/2, was formalized between PW-1, Tripuresh Kr. Dey, and the appellant. This agreement outlined a business commission initially set at 6%, which was later amended to 8% and then 10% in subsequent agreements.

Documentation presented in court included Ext. A, a letter dated 31.05.2001 from Tripuresh Kr. Dey and PW-1 to the appellant demanding an account of the business, and Ext. B, another letter from PW-1 and Tripuresh Kr. Dey indicating their intention to return a cheque in accordance with the agreement. Additionally, receipts of cheques marked as Ext. A1, A2, and A3 were submitted, indicating an arrangement for returning the cheques after cash payments aligned with the agreement terms.

DW-1 confirmed that the film had been completed before receiving funds from the complainant but had not been released. He clarified receiving funds based on the agreement terms that obligated him to pay 6%, 8%, and 10% of the profit post-recovery from the exhibitor. Following the film's release in the cinema hall, the complainant was supposed to recover the amount from the exhibitor. Notably, the funds mentioned in the cheque were allegedly unavailable in his bank account.

14. The agreement marked as exbt.-1 executed between the opposite party and the appellant inter alia stated as follows:-

> "*WHERE AS the FIRST PART approach the SECOND PART for finance of Rs. 3,00,000/- (Rupees three lacs only) for meeting the necessary expenses of the said picture. The Second Part hereby agreed to grant the same under the following terms & conditions which are agreed by both the parts.*
>
> i. *That the booking of the said picture will take place from 20, Chandni Chowk Street, 3rd Floor, Calcutta-700072 from the Office of Mr. Ranjan Kumar Kundu.*
>
> ii. *The date of release of the said picture is tentatively within March 2001.*

iii. *The above amount of Rs. 3,00,000/- (Rupees three lacs only) shall be paid by the Second Part to the First Part in the following manner.*

INVESTMENT OF THE SECOND PART (By the way of)

a) *Rs. 1,00,000/- (Rupees one lac only) on the day of signing the agreement.*

b) *Rs. 50,000/- (Rupees fifty thousand only) within 15 days from the date of signing.*

c) *Rs. 1,50,000/- (Rupees one lac fifty thousand only) before 10 days of the release date of the said picture.*

REALISATION OF THE SECOND PART (By the way of)

a) *From the date of release of the said picture the Second Part shall be entitled for the realisation of the invested amount from time to time started from the recovery of our billing amount from the exhibitors.*

b) *The First Part agree to pay the commission @ 6% on business to the Second Part from the release date of the said picture in Cinema Halls upto the period of 1½ (One and half) years.*

c) *The First Part confirm to the Second Part that the Principal Amount of the Second Part will be recovered within 4 months from the date of the release of the said picture in Cinema Halls of West Bengal.*

d) *The First Part agree to pay the commission @ 6% (Six percent) from time to time simultaneously with the realisation from the exhibitors as per books of account of the said picture.*

e) *That the Second Part shall be entitled to visit office of the First Part for the remittance; to inspect the books of accounts and records for the realisation amount and the commission from time to time up to the period of 1½ (One and half) years from the date of release of the said picture within West Bengal.*

f) *This agreement of business commission entitlent of Second Part shall be valid for 1½ (One and half) years only from the date of release of the said picture within West Bengal. A true copy of the monthly business statement will be sent to the Second Part as and when prepared.*

g) *All payment in respect of Second Part to be made in cash to Mr. Tripuresh Kumar Dey and in his absence to Dr. Sukumar Nandy."*

15. The agreement marked as exbt.-1/1 executed between the opposite party and the appellant inter alia stated as follows:-

"In continuation of the first agreement dated 01.01.2001 bettwen Sri Tushar Kanti Jana and Sri Tripuresh Kumar Dey along with Dr. Sukumar Nandy being the first part and second part respectively for release of the picture "SESH ASHRAY", due to shortage of the fund the first part approached the second part for further financial assistant of Rs. 2,00,000/- (Rupees two lakhs only) for meeting necessary expenses of the said picture. The second part hereby agreed to grant the same under the following terms and conditions-

1. *The first part agreed to enhance the commission @ 8% instead of 6% on business to the second part from the release date of the said picture up to the period of one and half years.*
2. *All other terms and conditions will remain as depicted in the first agreement dated 01.01.2001."*

16. The agreement marked as exbt.-1/2 executed between the opposite party and the appellant inter alia stated as follows:-

"In continuation of the first & second agreement dated 01.01.2001 and 17.03.2001 between Sri Tushar Kanti Jana and Sri Tripuresh Kumar Dey along with Dr. Sukumar Nandy being the first part and second part respectively for release of the film, "SESH ASHRAY" on dated 4th or 11th May 2001, latest. Due to shortage of fund the first part approached finally to the second part for further financial assistance of Rs. 1.50 Lakhs (Rupees one lakh fifty thousand only) for meeting the publication and other expenses of the said film. The second part hereby agreed to grant the same under the following terms and conditions.

1. *The first part agreed to enhance the commission @ 10% (Ten percent) instead 8% (Eight percent) on business to the second part from the release date of the said film up to the period of one and half years.*
2. *All other terms and conditions will remain as depicted in the first agreement dated 01.01.2001."*

17. Exhibit-A (Series) herein below:

"Received post dated cheque No. 172734 dated 6.7.2001 Rs. 25,000/- (Rupees Twenty five thousand only) and cheque No. 172735 dated 28.7.2001 for Rupees twenty five thousand only drawn in P.N.B New Market, Calcutta from Tushar Kanti Jana against the agreement executed on the day of 1st January 2001 beteween Tushar Kanti Jana as First Part and Sri Tripuresh Kumar Dey & Dr. Sukumar Nandy as Second Part and the 2nd part shall refunded the above cheques to the first part against cash payment to be made by the first part."

18. Exhibit-A/1 herein below:

"Received cheque No. QFS 172739 dated 15.9.2001 and 172740 dated 27.9.2001 drawn in favour of P.N.B New Market, Calcutta from Tushar Kanti Jana an agreement dated 1.1.2001 and shall refunded the cheque after the cash payment is made."

19. Exhibit-A/2 herein below:

"Received post dated cheques 375345 dated 15.8.2001 for Rs. 50,000/-, cheques No. 375346 dated 21.8.2001 for Rs. 50,000/-, cheques No. 375347 dated 26.8.2001 for Rs. 50,000/- and cheque No. 375348 dated 30.8.2001 for Rs. 50,000/- drawn on P.N.B. New Market, Calcutta from Tushar Kanti Jana against the second agreement executed on the day of 17th March, 2001 between Tushar Kanti Jana as FIRST PART and Sri Tripuresh Kumar Dey along with

Dr. Sukumar Nandy as SECOND PART and the 2nd part shall return the above cheques to the 1stpart against cash payment made by the 1st part."

20. Section 139 of the Negotiable Instrument Act, 1881 state as follows:

> *"**139. Presumption in favour of holder.—**It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.*

21. Once the execution of cheque was admitted, Section 139 created a presumption that the holder of a cheque received the cheque in discharge, in whole or in part, of any debt or other liability. This presumption was no doubt rebuttable at trial but there was no gainsaying that the same favoured the complainant and shifted the burden to the drawer of the instrument (in case the same was dishonoured) to prove that the instrument was without any lawful consideration.

22. The agreement dated January 1, 2001 stated that a sum of Rupees Six Lakhs Fifty Thousand to have been invested by the appellant in terms of the agreement marked as Exhibit 1, Exhibit 1/1 and Exhibit 1/2 as stated above. The realization clause as stated above depicted the manner in which the commission was to be recovered from the opposite party from time to time. The complaint filed by the appellant was devoid of the averment of the nature and condition for which the cheques were

transmitted to the appellant. The entire financial assistance was to the tune of Rupees Six Lakhs Fifty Thousand and the disputed dishonored cheques amounted to Rupees Three Lakhs Twenty Five Thousand. The appellant in the complaint did not stipulate the default on the part of the party contravening the specific conditions of the agreements in question. Moreover, the exhibit marked as A Series, Exhibit A/1 and Exhibit A/2 denoted the refund of cheque after payment in cash. The complainant did not ascribe the role of the opposite party for non-payment of the dues or loans to the extent and the manner in which the legal enforceable debt if at all was not paid. The complainant should have narrated the payment of cheques with regards to specific non-compliance of legally enforceable debt in terms of the agreement to implicate the opposite party.

23. A 'X' amount of rupees if at all be granted as a loan with an interest must be specifically described to ascertain the exact amount and extent to which the loan amount becomes payable. In the instant case, the principal amount adhering to a financial assistance has been categorically specified in the agreements stated above to be investments bearing a profitable commission of 6%, 8% and 10% on the gains of the business conducted through the release of the feature film. The complainant did not allude whether the cheques in question were deposited to recover the principal amount or the amount of the commission.

24. The dispute between the parties is purely civil in nature where the present appellant contested a payment of Rupees Three Lakhs Twenty Five

Thousand out of a sum of Rupees Six Lakhs Fifty Thousand paid by him as an investment which has been writ large and conspicuous in the terms of the agreement as stated above entered into by the parties.

25. The vague assertions on the part of both the parties, the appellant claiming the same to be a legally enforceable debt and the other preferring the payment of cheques to be collateral security being refundable on payment of cash have not been distinctly proved. Whether the cheque amount was paid in cash by the opposite party and or received by the appellant have not been discreetly mentioned by either of the parties. The dispute between the parties is pending before a civil court of competent jurisdiction and the instant criminal case under Section 138 of the NI Act gives rise to a multiplicity of proceedings which involves a punitive action to pressurize the opposite party and creates a burden on the criminal court which is already struggling with humongous pendency of complaint under Section 138 of the Act.

26. The institution of this particular case is an exemplary instance where criminal jurisdiction has been resorted or recoursed to on the basis of vague, indefinite and inconclusive assertions without specific narratives in the complaint of the role of the opposite party in violating the terms and conditions of the agreement, the purpose of payment of cheques to the appellants with regard to the legally enforceable debt creating a maze of compulsion and coercion and such practice has become rampant to institute cases under Section 138 of the NI Act wherein business

transactions have been contravened availing alternative remedy in the civil court. Such measures intending advantageous utilization of quasi-criminal proceedings cannot be encouraged in the facts and circumstances of this particular case.

27. The Trial Court has been justified in acquitting the opposite party and this court is not inclined to interfere.

28. In view of the above discussions, the instant criminal appeal being CRA 224 of 2008 is accordingly dismissed.

29. There is no order as to costs.

30. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

31. 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.)