February 20, 2023
Sl. No. 51
Court No.236
s.biswas

CRA 390 of 2018

Sujit Das
Vs.
Amit Ghosh

Mr. Kishore Mukherjee, Advocate
... for the appellant

This appeal challenges the judgment and order of acquittal passed by the learned Judicial Magistrate, 2nd Court, Barasat, in Complaint Case No. C/1243 of 2012 renumbered as T.R. No.266 of 2012 under Section 138 of the Negotiable Instruments Act. By the impugned judgment learned Trial Court was pleased to record the order of acquittal. Assailing the impugned judgment, Mr. Mukherjee, learned counsel appearing for the appellant submits that the accused persons took money from the complainant with a promise to pay 6% interest per month. He further agreed to pay back the entire sum of Rs.1,00,000/- to the complainant subject to notice of 45 days in advance. Accordingly, on demand as promised, the accused person issued the cheque. It was presented to the bank of the complainant and returned due to insufficient fund. Statutory notice was given to the accused person demanding the payment of money equivalent to the cheque amount, but it was not adhered to, which compelled the drawee of the cheque to take out the application under Section 138 of the N.I. Act.

Drawing my attention to the cross-examination of DW1, who happens to be accused person before the Trial

Court, Mr. Mukherjee, learned counsel for the appellant, submits that though during evidence of DW1, accused denied to have issued any cheque in favour of the complainant, but in course of examination under Section 313 of the Code of Criminal Procedure Code, he admitted to have issued the cheque in question. Therefore presumption of Section 139 of the N.I. Act should have been invoked by learned Trial Court to hold that the accused person issued the cheque in discharge of his liability. Learned Trial Court, according to Mr. Mukherjee, committed error in recording the order of conviction holding, inter alia, that the cheque was issued as security.

Section 138 of the N.I. Act enunciates as follows:

> "**138. Dishonour of cheque for insufficiency, etc., of funds in the account –** Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice

to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless –

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

It goes without saying that the complainant being the appellant files the petition under Section 138 of the N.I. Act with the assertion that the cheque was issued by the accused person in discharge of liability or obligation, incurred by him in part or in full. The onus lies upon the complainant to prove the same. Being cross-examined as PW1, the complainant admitted that he had advanced money to the B.M.A. Wealth Creators Limited and he received a sum of Rs.54,900/- from the said company which was credited to his account. Though the complainant as PW1 thereafter hastened to add that the present transaction had no nexus with the money he gave to B.M.A. Wealth Creators Limited, by no stretch of imagination it can be said that the cheque was issued by the accused person in discharge of his liability for the simple reason that complainant failed to prove that there is any liability or obligation upon the accused person.

Therefore, there hardly remains any room to draw presumption under Section 139 of the N.I. Act.

Under such circumstances, I do not find any reason to interfere with the order impugned. The appeal consequently is not accepted and the same is dismissed, however, without costs.

Let a copy of this order and Lower Court Record be sent to the learned Trial Court for information and necessary action.

(Siddhartha Roy Chowdhury, J.)