Form No. J(2)

IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction
Appellate Side

Present:
The Hon'ble Justice Siddhartha Roy Chowdhury

CRA 464 of 2018

Ajay Kumar De
Vs.
Prabir Kumar Datta

For the Appellant	:	Mr. Sabyasachi Chatterjee Mr. Sandipan Das Mr. Ankur Sharma Mr. Indranil Roy
For the respondent	:	Ms. Nasreen Islam
Heard on	:	17th February 2023
Judgment on :	:	17th February 2023

The Court:

This criminal appeal challenges the order passed by the learned Judicial Magistrate, 3rd Court, Howrah in Complaint Case No. 885C of 2012 under Section 138 of the Negotiable Instruments Act thereby recording an order of acquittal against the accused persons.

Briefly stated the appellant Mr. Ajay Kumar De, filed a petition of complaint before the learned Chief Judicial Magistrate, Howrah, under Section 138 of the N.I. Act 1981 stating inter alia that he opened a Demat with Bonanza Portfolio Limited, a registered stock broking house having client ID Z1R002. The accused person is the person authorized by the broking house to attend the complainant. The accused person took in phased manner from 01.3.2011 and 09.11.2011 a sum of Rs.3,54,891 by ten account payee cheques from the complainant under his instruction. In the month of March 2012 the accused person issued a cheque of Rs.50,000/-, drawn on UCO Bank, Srirampore Branch bearing No. 005138 as the first periodic return to the complainant on the investments he made through the accused person, who was authorized representative of Bonanza Portfolio Limited. According to the complainant the accused person was lawfully bound to pay to complainant the dues on investment. The Cheque was issued on 30.6.2012. Thereafter, being requested by the accused person it was withheld by the complainant, and ultimately on 18.9.2012 the cheque was presented and dishonoured by the banker of the accused person with the endorsement insufficient fund. This fact was brought to the notice of the accused person by a statutory notice dated 29.9.2012 calling upon the accused person to pay the amount equivalent to cheque which was not adhered to.

Learned Chief Judicial Magistrate, after taking cognizance transferred the case to the learned Judicial Magistrate, 3rd Court, Howrah for disposal and the learned Trial Court after considering the testimony of sole witness and also taking into consideration the documents admitted into evidence was pleased to dismiss the petition of complaint recording an order of acquittal.

Mr. Das, learned counsel appearing on behalf of the appellant drawing my attention to the provision of Section 30 of the N.I. Act submits that Section 30 of the N.I. Act speaks of liability of drawer of a cheque who, in case of dishonor by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonor has been given to or received by the drawer.

I am afraid the said provision is of no relevance in view of Chapter XVII of the N.I. Act that deals with penalty in case of dishonour of certain cheques for insufficiency of funds in the accounts.

Section 138 of the N.I. Act reads 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 provisions of this Act, be punished with imprisonment for*[19] *[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,[20] *[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."

Section 139 reads as follows;-

"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."

Upon plain reading of the statutory provision it appears that in order to invoke the provision of Sections 138 and 139 of N.I. Act the complainant is under obligation to prove that the drawer of the cheque issued the same for discharge, in whole or in part of any debt or other liability.

According to Mr. Das, the accused person being the authorized representative of the company, Bonanza Portfolio Limited collected the cheques, therefore, liability rests with the accused person to pay the amount and in discharge of such liability the accused person issued the cheques.

From the attending facts of this case, I find that the accused person was an employee of Bonanza Portfolio Limited. He collected cheques on behalf of the company and the cheques were all deposited in the account of the company as the statement of account (Exhibited -2) indicates that the cheques were encashed in favour of Bonanza Portfolio Limited. This document indicates that the accused person did not incur any liability or debt by receiving the cheques from the complainant on behalf of the company.

My attention is drawn to the answer given by the accused person in course of his examination under Section 313 of the Cr.P.C. with reference to question No. 4. It is stated that the complainant borrowed some money initially and he agreed to pay the said sum, and for that issued cheques which was eventually dishonoured and it has no nexus with the present transaction. This explanation of accused person squarely answers the averment made by the complainant in paragraph 5 of the petition of complaint. As the complainant failed to prove that the accused really incurred any liability and in discharge of such liability the cheque was issued by him, the presumption of Section 139 of the N.I. Act cannot be pressed into service.

Learned counsel representing the respondent submits that though the respondent has been arraigned as an accused being the employee of Bonanza Portfolio Limited, no document has been filed by the complainant to substantiate such claim. That apart the bank statement unerringly indicates that the money was credited in the account of Bonanza Portfolio Limited and it was received by the respondent. Bonanza Portfolio Limited has not been arraigned as an accused. Bonanza Portfolio Limited since received the money from the complainant has been liable to pay the same, by no stretch of imagination the respondent could be saddled with criminal liability of committing offence within the meaning of Section 138 of N.I. Act. There is no room to differ with the submission made by Ms. Islam learned counsel representing the respondent.

As I have already pointed out that the appellant as complainant since failed to prove that the cheque was issued in discharge of any liability by the drawer of the cheque, learned Trial Court was absolutely justified in recording an order of acquittal.

Since money was invested in the share market through Bonanza Portfolio Limited, the complainant ought to have approached either Security Exchange Board of India (SEBI), National Stock Exchange (NSE) for proper redressal.

Liberty is given to the complainant to approach the aforesaid authorities if he wishes to do so. This judgement will not preclude him from approaching the aforesaid authority and in that event question of limitation will not cause any impediment as well.

The appeal is bereft of any merit and is thus dismissed without any order as to costs.

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

Urgent Photostat certified copy of this order, if applied for, be supplied to the parties, upon completion of requisite formalities.

(Siddhartha Roy Chowdhury,J)

SB
Item No. 7