22.3.2023
51
AB
Ct. No.236

CRA 442 of 2017

In the matter of : Honak Das @ Hanak Das

Mr. Subrata Bhattacharya
…. For the appellant

Mr. Smartajit Sarkar
..... For amicus curiae

This appeal challenges the judgment passed by learned 4th Court of Judicial Magistrate, Asansol in C. case No. 81 of 2007 in a proceeding under Section 138 of the N. I. Act. By the impugned judgment learned Trial Court was pleased to record an order of acquittal under Section 255(1) of the Cr.P.C. The complainant Honak Das being aggrieved by and dissatisfied with the judgment impugned preferred this criminal appeal.

Heard Mr. Bhattacharya, the learned counsel for the appellant and Mr. Smartajit Sarkar, learned amicus curiae. From the attending facts of the case I find that the appellant filed an application under Section 138 of the N.I. Act against the respondent Jyotirmoy Shah before the learned Additional Chief Judicial Magistrate which was registered as C. Case No. 81 of 2007. The learned Trial Court having found prima facie case issued process under Section 138 of the N. I. Act upon the accused person who surrendered to the jurisdiction of the learned Trial Court. It is contended that accused was given a friendly loan by the complainant and his mother, since deceased. The accused

paid a sum of Rs.26,500/- by cash on 29th January, 2006 and on that very day the parties entered into an agreement that the borrower agreed to pay balance sum of Rs.1,00,000/- by seventeen (17) monthly installments of Rs.5,000/- each with effect from September 2006 and by January 2008 he promised to liquidate the debt. The accused person also issued five cheques of Rs.20,000/- each drawn on S.B.I. Chittaranjan Branch. One of the five cheques being No. 0894950 was presented by the complainant but was dishonoured by the banker of the accused person due to insufficient fund. Statutory notice was given calling upon the accused person to pay the cheque amount. My attention is drawn to the Exhibit – 1 wherefrom I find clause 7 of the agreement which runs as follows:

"7. That if the first party in any way neglected to pay any of the installments as stated above, the second party is at liberty to get the payment by encashing the cheques issued by the first party as re-payment of the loan amount."

This clause demonstrates that the cheque in question, which was one of the five cheques given by the accused person, was but co-lateral security which was not issued in discharge of any legal debt. Section 138 of the N.I. Act enunciates that:

"Section 138 in The Negotiable Instruments Act, 1881

[18] [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.

Explanation.— For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]"

Therefore for dishonor of the cheque the drawee cannot be held to have committed any offence within the meaning of Section 138 of the N. I. Act. If the complainant wants to realize the money due to him, he is at liberty to take recourse of law as available to him. Section 138 of the N.I. Act in the given facts and circumstances of the case cannot be pressed into service. Therefore, I do not find any infirmity in the judgment passed by the learned Court below.

This criminal appeal thus stands dismissed being bereft of merits, without any order as to costs.

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

(Siddhartha Roy Chowdhury, J.)