

IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 452 of 2017

West Bengal Financial Corporation

Vs.

The State of West Bengal & Ors.

For the Appellant : Ms. Jharna Biswas.

For the State : Mr. Madhusudan Sur, Id. APP
Mr. Manoranjan Mahata.

For the Respondents : Mr. Santanu Talukdar.

Hearing concluded on : 11.08.2023

Judgment on : 06.09.2023

Shampa Dutt (Paul), J.:

1. THE APPEAL:-

The present appeal has been preferred against an order dated 06.08.2016 passed by the Learned Metropolitan Magistrate, 15th Court at Calcutta in Complaint Case No. 28228 of 2008 (W.B.F.C. vs. Visual Graph and Ors.) whereby the learned Magistrate was pleased to dismiss the case under Section 256 Cr.P.C. and acquit the accused.

2. APPELLANT/COMPLAINANT'S CASE:-

The present appeal against acquittal has been preferred on being granted special leave to appeal on 18.07.2017.

The appellant's case is that the appellant West Bengal Financial Corporation is a public organization dealing with public fund.

The respondent nos. 3 to 5 are the partners and responsible for day to day administration of the partnership firm Visual Graph respondent no. 2.

It is stated that **West Bengal Financial Corporation** (appellant) is carrying on the activities to support the smooth and efficient running of the industrial activities and for the development of industries in the State by way of granting loan out of the public fund.

That the appellant sanctioned and disbursed loan to the respondents vide loanee code no. LVI 60 amounting to Rs.32,72,000.00/- sanctioned on 23.09.2005 and first disbursement was made on 06.03.2006 and another loan was sanctioned on 23.09.2005 amounting to Rs.27,28,000.00/- vide loanee code no. LVI 64 where first disbursement was made on 06.03.2006 amounting to Rs.26,17,000.00/- but as on 20.05.2008 total outstanding was 65,93,240.32/-. And in part discharge of the existing legal debts and/or liabilities arising out of the aforesaid loan agreement the respondent nos. 2 to 5 issued one account payee cheque in favour of the appellant organization.

Details of said cheque is given below:-

<u>Cheque No.</u>	<u>Date</u>	<u>Drawn on</u>	<u>Amount (Rs.)</u>
518903	31.07.2008	United Bank of India	1,00,000/-
		Sovabazar Branch 43, Arvind Sarani Kolkata – 700 005	
		Total	1,00,000/-

That upon presentation of the said cheque within the validity period the same was dishonoured by the drawee bank and returned unpaid along with a Memorandum of Dishonour dated 08.08.2008 bearing the endorsement 'INSUFFICIENT FUNDS' which was intimated to the petitioner subsequently.

The fact of such dishonour of cheque had been communicated to the respondent nos. 3 to 5 by a legal notice under Section 138(b) of the Negotiable Instrument Act, 1881 as amended up to date, issued by the appellant which were dispatched by registered post with A/D vide legal notice dated 12.08.2008 demanding the payment of amount of cheque i.e. total Rs.1,00,000/- (Rupees one lakh) only within 15 days from the date of the said notice.

In the aforesaid notice it was categorically stated that in case of failure to make payment as demanded therein, legal action would be taken against the respondents without any further reference thereto, under Section 138 of Negotiable Instrument Act as amended up to date.

The said notice sent to the respondent nos. 2 to 5 by the appellant was received by the respondent nos. 2 to 5 on 16.08.2008 and the A/D Card was received by the organization on 22.08.2008.

The respondent nos. 2 to 5 have thus committed an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 as amended up-to-date and thus one complaint case was filed against the respondent nos. 2 to 5 being complaint case no. 28228 of 2008 before the Learned Chief Metropolitan Magistrate, Calcutta.

The respondent nos. 2 to 5 duly appeared in the matter and were granted bail. Thereafter evidence commenced and cross-examination of the representative of the appellant was going on till 11.04.2016.

06.08.2016 was fixed for filing show cause by the appellant but the appellant was absent on call and matter was dismissed under Section 256 of the Criminal Procedure Code by the Learned Metropolitan Magistrate, 15th Court at Calcutta.

The appellant states that the learned advocate for the appellant was not able to appear in the instant proceeding due to his personal difficulty **as his father was seriously ill at that time, who later expired last on 27.08.2016.**

That the learned Advocate for the appellant suffered from dengue on and from 01.11.2016 and therefore was not able to communicate with the appellant organization and therefore no step was taken for restoration of the instant complainant case.

That inadvertently the appellant filed a revisional application against the order dated 06.08.2016 passed by the learned Metropolitan Magistrate, 15th Court, Calcutta before the Hon'ble High Court at Calcutta being C.R.R. No. 1385 of 2017 but vide an order dated 12.05.2017, the Hon'ble Court was pleased to dismiss the same as not maintainable.

It is thus submitted that the complaint case being no. 28228 of 2008 which was dismissed vide order dated 06.08.2016 passed by the learned Metropolitan Magistrate, 15th Court, Calcutta may be restored in its usual form and stage of cross-examination of appellant company for the ends of justice or else the appellant/complainant shall suffer irreparable loss and injury.

Ms. Jharna Biswas, learned counsel for the appellant has submitted that the Learned Trial Judge erred in law in not deciding the core issue involved in the instant case and passed an order arbitrarily and mechanically against the interest of justice and the accused was erroneously acquitted from the said case.

That the Learned Trial Judge committed gross error of law by acquitting the accused without giving fair opportunity to the appellant when the cross-examination of the complainant was going on in the instant matter.

It is further stated that the impugned judgment and order of the Learned Trial Judge is otherwise bad in law and the same is liable to be set aside.

3. RESPONDENT'S CASE:-

The State is represented by Mr. Madhusudan Sur, learned counsel and has effected service upon the accuseds/respondents through the local Police Station.

As in spite of service, the private respondents/accuseds have failed to appear, Sri Santanu Talukdar, learned legal aid counsel in

the panel of the High Court legal services authority was appointed to appear on behalf of the private respondents/accuseds.

Mr. Talukdar has submitted that the learned Magistrate has rightly passed the order under appeal and acquitted the accuseds. He has prayed for dismissal of the appeal.

4. ANALYSIS:-

On perusal of the materials on record, it appears that:-

- i) The complaint case was filed on 28.09.2008.
- ii) On 19.09.2009, the complainant filed his evidence on affidavit along with documents. The same was considered by the learned Magistrate and on finding a prima facie case, process was issued.
- iii) **The complainant was present and also represented on almost every date before the Trial Court barring a few.**
- iv) **This continued till 04.07.2016 (8 long years).**
- v) On 09.02.2016, both sides were absent.
- vi) On 11.04.2016, the complainant by petition prayed for an adjournment, but as the petition was not moved, the complainant was asked to show cause.
- vii) On 16.07.2016 the complainant was absent and finally on 06.08.2016, the case was dismissed and the accused acquitted.

Section 256 of Cr.P.C. lays down:-

“256. Non- appearance or death of complainant.-

(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may

be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub- section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.”

The Supreme Court in ***M/S. Bls Infrastructure Ltd. vs. M/S. Rajwant Singh, Criminal Appeal Nos.657-664 of 2023 (arising out of SLP (Criminal) Nos.867-874 of 2020) on 1 March, 2023***, held:-

“10. Having noticed the rival submissions, before we proceed further, it would be useful to notice the provisions of Section 256 of the Code, which are reproduced below:

“256. Non-appearance or death of complainant.—(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day.

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.” A plain reading of the proviso to sub-section (1) of Section 256 would indicate that where the Magistrate is satisfied that the personal

attendance of the complainant is not necessary, he can dispense with the attendance of the complainant and proceed with the case. Such a situation may arise where complainant's/prosecution's evidence has been recorded and to decide the case on merits, complainant's presence is not necessary.

11. *In the case of S. Anand (supra), addressing a situation where the complainant was absent but had already examined his witnesses, this Court observed as follows:*

"12. Section 256 of the Code provides for disposal of a complaint in default. It entails in acquittal. But, the question which arises for consideration is as to whether the said provision could have been resorted to in the facts of the case as the witnesses on behalf of the complainant have already been examined.

13. The date was fixed for examining the defence witnesses. The appellant could have examined witnesses, if he wanted to do the same. In that case, the appearance of the complainant was not necessary. It was for her to cross-examine the witnesses examined on behalf of the defence." After observing as above, in paragraph 15, it was held thus:

"15. ... when the prosecution has closed its case and the accused has been examined under Section 311 of the Code of Criminal Procedure, the Court was required to pass a judgment on merit of the matter."

12. *In Associated Cement Co. Ltd. (supra), the purpose of inserting a provision like Section 256 of the Code was discussed and in light thereof, in paragraph 16, it was observed as under:*

"16. What was the purpose of including a provision like Section 247 in the old Code (or Section 256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complainant if he does not turn up to the court on occasions when his presence is necessary.

The section, therefore, affords protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, the court has a duty to acquit the accused in invitum." After observing as above, it was held that where the complainant had already been examined as a witness in the case, it would not be

appropriate for the Court to pass an order of acquittal merely on non-appearance of the complainant. Thus, the order of acquittal was set-aside and it was directed that the prosecution would proceed from the stage where it reached before the order of acquittal was passed.”

In the present case also the complainant had been examined.

The major delay in the proceedings was for the reason that the accuseds/respondents were not available.

5. CONCLUSION:-

Considering all these facts on record, it appears that there has been **serious miscarriage of justice.**

In view of the observation of the Hon’ble Supreme Court in ***M/S. BIs Infrastructure Ltd. vs. M/S. Rajwant Singh (supra)***, the order dated 06.08.2016 passed by the Learned Metropolitan Magistrate, 15th Court at Calcutta in Complaint Case No. 28228 of 2008 (W.B.F.C. vs. Visual Graph and Ors.) whereby the learned Magistrate was pleased to dismiss the case under Section 256 Cr.P.C. and acquit the accused is hereby set aside.

The complaint case no. 28228 of 2008 is restored to its own file.

The Trial Court will proceed against accused from the stage before the dismissal (xxxn) and dispose of the case positively within 6 (six) months, in accordance with law, without being influenced by the observation in this revision.

The appeal being CRA 452 of 2017 is allowed.

Copy of this judgment be sent to the learned Trial Court for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)