

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
(APPELLATE SIDE)**

Present:

The Hon'ble Justice Rai Chattopadhyay

C.R.A No. 741 of 2012

Sajal Guha

Vs.

Amal Krishna Paul & Anr.

For the petitioner

: Ms. Devipriya Mitra.

For the Respondents

: Mr. Sanjit Kr. Dan,
: Ms. Rajnandini Das.

Hearing concluded on: 03/04/2023

Judgment on: 28/11/2023

Rai Chattopadhyay, J.

1. A judgment dated September 28, 2012, in connection with a case under Section 138 of the Negotiable Instruments Act, 1881, of reversal and acquittal passed by the Additional Sessions Judge, Fast Track, 4th Court, Alipore at South 24-Parganas, in Criminal Appeal No.19 of 2011 is under challenge in this appeal, which the defendants/defence defend and the appellant/complainant has assailed.
2. The first appellate Court has been hearing the Criminal Appeal No. 19 of 2011, in which a judgment dated January 28, 2011, passed by the Judicial Magistrate, 5th Court at Alipore in Complaint Case No.4608 of

2005 for an offence punishable under Section 138 Negotiable Instruments Act, 1881, was challenged.

3. Ms. Mitra, appearing for the appellant has argued that the appellant is specifically aggrieved due to the finding of the first appellate Court in the judgment as above, that the appellant/complainant's allegations are hit by the provisions under the Bengal Money Lenders Act, 1940, and would not be sustainable. She says that the first appellate Court in the said judgment has erred in finding that the appellant was duty bound to produce his money lender's certificate in the Court to substantiate his claim that in pursuance of his business, he has advanced loan to the respondents and a cheque was issued by them to pay back such a legally enforceable debt. Ms. Mitra says that the provisions of Bengal Money Lenders Act, 1940, would not be applicable in a case under Section 138 of the Negotiable Instruments Act, 1881, and the entire proceedings before the Magistrate would be independent and exclusive of any embargo what so ever, under The Bengal Money Lenders Act, 1940. Ms. Mitra says that the merits of the case was required to be considered independently though the first appellate Court has misdirected itself to appreciate this settled legal position, while delivering the judgment impugned.
4. In respect of her contentions Ms. Mitra has relied on the following two judicial pronouncements:-

(i) ***Samarendra Nath Das vs. Supriya Maitra reported in (2006) 3 CHN 518,***

(ii) ***Sajal Guha vs. Maniklal Ghosh reported in 2016 (1) AICLR (Cal) 498.***

5. The following portions in the judgment of **Samarendra Nath Das vs. Supriya Maitra** has been relied on:-

“9. At this stage, prima facie the complainant is the holder of cheque and the presumption under section 139 of the NI Act is in his favour. The cheque when presented by the complainant to bank was dishonoured and the cheque bears the signature of the accused petitioner. The moment the cheque was dishonoured, it invited elements of offence under the NI Act and the offence under section 138 of the NI Act completed when after demand notice the petitioner did not make payment of the dishonoured cheque.

11. Had it been a money suit instituted by the money lender for the recovery of the loan advanced by him together with interest and for accounting all these submissions would have been relevant. In a criminal proceeding under section 138 of the NI Act these are not relevant at all.

.....Legality or illegality of the contract and existence and non-existence of money lending business by the complainant is not a ground to throw the complainant's case out of Court. If it was a money suit for recovery of the money the accused petitioner would have been definitely in a better position and was entitled to the advantage of violation of sections 23 and 24 of the Contract Act as well as non-existence of money lending business of the money lender.

12. It would not be a matter for consideration before the learned Magistrate whether the complainant had money lending licence or not. This is not a suit or proceeding under Money Lenders Act and accordingly provisions of Money Lenders Act are not at all relevant for consideration in the trial before the learned Magistrate.”

6. Similarly the following has been relied in the judgment of **Sajal Guha vs. Maniklal Ghosh:-**

“17. The money lending without licence is not totally barred or prohibited by the said Act. It is one regulatory Act and it regulates the business of money lending. Section 8 of the said Act says that after certain notification in the official gazette no money lender shall carry on the business of money lending unless he holds an effective licence. But the provision is not mandatory if one reads Section 13 of the said Act then he must say in the same tone with me that even if a money lender fail to file a money lending licence before the court while institution the suit for to pay certain penalty and if such penalty is paid the suit instituted for recovery of money cannot be dismissed on the ground that the plaintiff had no money lending licence.

18. In the present case before this Court P.W. 1 claimed that he had money lending licence but could not produce the same. This is not a civil litigation and as such the rigors of Section 13 of the Money Lenders Act cannot be made applicable in this case. Thus, lending of money even without licence has not been specifically barred by the West Bengal Lenders Act and as such the payment made by the complainant to the respondent was perfectly valid by the said Act of 1940. If that be so the argument of the respondent that the complainant appellant had no legally enforceable debt as against the respondent cannot have any leg to stand on. The decision of the learned trial court on this point that there was no legally enforceable debt is not tenable and this Court respectfully differs with that view."

7. Ms. Mitra has urged that the impugned judgment may be set aside in this appeal.
8. Respondent's argument is based on the following two broad aspects. Mr. Dan representing the respondents has submitted firstly that the cheque which is being said to have been dishonoured, was not issued by the respondents against any legally enforceable debt but only as a security against the amount of money borrowed by them from the appellant/complainant, he being a money lender by profession. By referring to the relevant provision of Bengal Money Lenders Act, 1940, Mr. Dan has suggested that though being a money lender and advancing loan to his clients, since the present appellant/complainant have not been able to furnish a statutory licence to that effect, he has to be prevented by the statutory embargo to proceed in accordance with the statutory process of recovery of loan, if any. By referring to a judgment reported in **(2008) 7 SCR 459 (Sudhir Kumar Bhalla vs. Jagdish Chand)**, Mr. Dan has stated that the law settled in this regard is that dishonour of a cheque issued in discharge of a liability or debt is only prosecutable under the provisions of the Negotiable Instruments Act, 1881, and not for dishonour of any cheque issued as a security.

9. The similar point has also been envisaged in the judgment of this Court dated July 20, 2012, **Smt. Subhra Mitra vs. Sri Dipankar saha [(2012) SCC Online (Cal) 7252]**. The Court, held as follows:-

“10. Admittedly from the above evidence and on careful scrutiny of the record it appears to me that cheque was issued as security deposit against the loan and on this score the learned Counsel for the defence submitted a judgment reported in (2008) 2 C Cr LR (SC) 197. According to the said judgment liability of the appellant under Section 138 of the Act are attracted only on account of dishonoured of cheque issued in discharge of liability or debt but not on account of issuance of the security cheque. So far the relevant portion of the N.I Act is concerned. Cheque was issued in discharge of debt and it was more or less accepted that said cheque could not be said to have been issued in discharge of the debt.

14. In view of aforesaid discussion when both the complainant and the witnesses adduced from the defence admitted that the cheque issued as a security and not for the repayment of loan. So in my humble opinion the relevant provision of N.I. Act was not attracted.”

10. The other point envisaged on behalf of the respondents/accused persons is regarding non supply/irregular service of the statutory notice. Mr. Dan has pointed out that none of the respondents/accused persons has received the statutory notice claimed to have been sent by the appellant, before the appellant could lawfully file and proceed a case under Section 138 of the Negotiable Instruments Act, 1881. By referring to the provisions under Section 93 of the said Act, he says that it is mandatory and incumbent upon the complainant to serve demand notice to the accused persons. He has not failed in pointing out that the ‘service of notice’ would denote the notice reaching to the hands of the respondents/accused persons by dint of which the respondents would have gathered direct knowledge about the contentions made therein. It is stated that unless such a statutory notice is furnished, the proceedings under Section 138 of Negotiable Instruments Act, 1881 is only illegal and not maintainable. On this Mr. Dan has relied on the

judgment of **M/s. Harman Electronics (P) Ltd. & Anr. vs. M/s. National Panasonic India Ltd. reported in (2008) 17 S.C.R 487**, to relay on the following paragraph:-

“14. It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence under Section 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in the provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the provision to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would.”

11. Mr. Dan has prayed for dismissal of this appeal.

12. It is necessary that the factual background, as mentioned in the written complaint, may be discussed in a nut shell. The Magistrate registered Complaint Case No. C-4608 of 2005, upon receipt of a complainant by the present appellant on September 3, 2005. In the said complaint, the present appellant/complainant has alleged that he being the ‘licensed money lender’ has advanced loan to the present respondents/accused persons, to the tune of Rs. 3,30,000/-, during the period from January, 2005 till April 20, 2005. He says in this complaint that the said money was advanced both by cash and by issuing cheque. According to the complainant in discharge of their liability to repay the said loan amount,

the respondents/accused persons jointly issued post dated account payee cheque in favour of the appellant on April 20, 2005. The cheque was dated June 30, 2005 and for an amount of Rs. 3,30,000/- (Cheque No.432045, drawn on HDFC Bank Limited, Raghunathpur, Kolkata-59).

- 13.** On the same date of issuance of cheque, i.e, on April 20, 2005, a document was executed by the present respondents jointly, to acknowledge the loan and the fact of issuance of the cheque, by them, with an undertaking to repay the loan with 2% monthly interest.
- 14.** The cheque was presented for encashment on July 1, 2005, however was dishonoured. On July 7, 2005, the appellant was informed by the bank regarding the dishonour of the cheque due to insufficiency of fund.
- 15.** Immediately thereafter the appellant/complainant took steps as per law by sending a demand notice dated July 25, 2005, under register post with acknowledgement due, asking the present respondents to repay the loan amount of Rs. 3,30,000/-, within a period of fifteen days from the date of receipt of the said notice. Two separate demand notices were sent to the two accused persons individually. Amongst the same one that was addressed to accused Tapati Paul/respondent no. 2, was received by one Amulya Mondol on July 28, 2005. The notice issued to the respondent no. 1 was also served upon him on July 27, 2005. Even thereafter the accused persons had not repaid the loan amount. Hence, the appellant/complainant lodged the said complaint before the Magistrate.
- 16.** The trial proceeded. The appellant/complainant examined himself as prosecution witness No. 1. Both the accused persons were examined under Section 313 Cr.P.C, 1973.

17. Certain documents have been marked as exhibits and proved in the trial.

Exhibit 1 is an acknowledgement and undertaking endorsed over a non-judicial stamp paper. Exhibit 2 is the cheque dated June 30, 2005. Exhibit 3 is the bank endorsement regarding insufficiency of fund and dishonour of cheque. Exhibit 4 is the demand notice dated July 25, 2005. Exhibit 5 is the registration slip regarding the demand notice and Exhibit 6 is the acknowledgement card of the same.

18. On the basis of the oral and documentary evidence as mentioned above the Magistrate at the first instance decided the complaint case being C-4608 of 2005 in favour of the present appellant. The Magistrate firstly held that according to the scheme of the Negotiable Instruments Act, 1881, the cheque dated June 30, 2005 was held by the present appellant/complainant presumably (and that is a statutory presumption) in due discharge of a legally enforceable debt. The Magistrate has found that the accused persons were to rebut this presumption by adducing sufficient evidence, which they had failed. So far as the applicability of the provisions of Bengal Money Lenders Act, 1940 is concerned, by referring on the decision of this Court in **Samarandra Nath Das's** case (supra), he has held that the provisions of Bengal Money Lenders Act, 1940, have no manner of application in the present case, which is under Section 138 of the Negotiable Instruments Act, 1881, a special statute to proof a fiscal offence through the particular procedure as envisaged under the same. The Magistrate has found the respondents/accused persons guilty of the offence under Section 138 of the Negotiable Instruments Act, 1881 and declared sentence.

19. The first appellate Court in the impugned judgment has not however placed reliance as to the consideration of the Magistrate regarding the evidence on record and also the way it has interpreted the law. Though, so far as the presumption of law as above operating in favour of the

present appellant is concerned and the fact that the respondents having been failed in rebutting the same, the Court in the impugned judgment has held in affirmity as to the same. The Court had further proceeded to record its finding that it was incumbent upon the complainant to prove that there was a legally enforceable debt of the accused persons, in existence. According to the first appellate Court, a lawful business of money lending of the complainant would have been a connected relevant fact in issue for the present appellant to prove along with the fact that there existed between the parties a legally enforceable debt, before the statutory presumption could have been invoked in his favour. The Court held that, however, the appellant could not produce his licence for the business, in Court. This omission of the appellant, according to the first appellate Court has constituted adverse inference against him that there existed any legally enforceable debt. Thus, the first appellate Court has opined that the accusation against the present respondents were not proved and reversed the judgment of the Magistrate, of conviction, to a judgment of acquittal.

20. Section 138 of the Negotiable Instruments Act, 1881, has provided for punishment regarding an offence of dishonour of cheque which was delivered in discharge in whole or in part of any debt or other liability and for the reasons of insufficiency etc. of the funds in the account of the drawer. The statutory presumption as enumerated under Section 139 of the said Act in favour of the holder of the cheque is that the holder has received the same in due discharge of the whole or part of any debt or other liability.

21. The Supreme Court in the case of ***Bir Singh Vs. Mukesh Kumar*** (Criminal Appeal Nos. 230-231 of 2019 decided on 06.02.2019) has held that presumption is a rule of evidence and do not conflict with the presumption of innocence which requires the prosecution to prove it

beyond reasonable doubt. It has been held in a catena of judgment of various constitutional Courts including the Apex Court that the presumption under Section 139 of the Act is 'rebuttable presumption' in nature, since the accused issuing the cheque is at liberty to prove to the contrary.

22. As it is discussed the presumption of law pursuant to the provisions under Section 139 of the Negotiable Instruments Act, 1881, would not release the prosecution from burden of proving the fact that the relevant point of time there existed a legally enforceable debt as against the accused persons, in this case also the Court has to ascertain if such a initial burden is discharged by the prosecution appropriately or not. Only then the Court should apply the presumption as above against the accused persons to expose them for rebuttal of the same.

23. The appellant/complainant says that he has advanced an amount of Rs. 3,30,000/- to the accused persons on June 30, 2005, to that effect however excepting 'exhibit 1', there is no other document showing transaction of money. 'Exhibit 1' is a declaration by the respondents on a non-judicial stamp paper of receipt of Rs. 3,30,000/-, from the appellant and an undertaking that the same would be returned along with 2% interest, by dint of the account payee post dated cheque, the dishonour of which is in issue in the present case.

24. Following two things are notably evident from the said documents. Firstly, the concerned cheque was handed over to the appellant by the respondent on the same date of disbursement of the money towards the respondents. Secondly, the cheque did not incorporate the interest portion, i.e, 2% though the document reads that the interest shall be paid to the appellant monthly. It is further noted that in 'exhibit 1', the appellant has not mentioned that in the event of failure on the part of the

accused persons/borrowers to repay the loan amount on or before a specified date, the lender, i.e, appellant here would be entitled to present the said cheque to the bank for its encashment. In fact in 'exhibit 1', if it can at all be taken to be an agreement in accordance with law, has not mentioned any unanimously accepted date as the outer limit for repayment of the loan amount.

- 25.** Considering the nature of transaction as shown by the 'exhibit 1', I find that the decision of the first appellate Court that money if at all changed hands, was pursuant to the business undertaken by the present appellant and the cheque was handed over as a security in lieu of obtaining the amount. This is more so, when there is no doubt in view of 'exhibit 1' that the parties have agreed for paying interest over the amount, for over a considerable period of time. Therefore in my considered opinion the prosecution in this case has not been successful in discharging its initial burden that the cheque was issued by the present respondents in discharge of their legally enforceable debt towards the appellant. Having said so it becomes virtually unnecessary to mention that the presumption under Section 139 of the Negotiable Instruments Act, 1881, would have no manner of application in case of the respondents in this case, as envisaged on behalf of the appellant. Ms. Mitra has tried to impress upon the Court, the fact that the appellant would not have any money lending business and there would be no question for his client to show any licence for any such business which her client had never pursued. This Court finds that the issue really lies with the question as to whether the respondents had any legally enforceable debt repayable to the appellant or not, and not on the fact as to whether the appellant had a money lending business or not or whether he had any licence for the same or not. This Court finds that actually there was no necessity for the Court to go into the question

whether the appellant had any money lending business or not etc. Even if taken as accepted the fact of advancement of an amount of money by the appellant to the respondents, the moot question before the Court would have been whether the same was a legally enforceable debt advanced to the respondents by the appellant or not. As we have discussed earlier, the initial burden of prove lied on the appellant himself to come up with the adequate material before the Court to show that on the particular date he had a legally enforceable debt recoverable from the respondents. As elaborately discussed above, the appellant had failed in discharging his such burden. The rest of the questions raised in this appeal would only be unnecessary for discussion any further.

- 26.** On the discussion as above, this Court finds no irregularity or illegality in the impugned judgment of the first appellate Court dated September 28, 2012, in Criminal Appeal No. 741 of 2012. Hence, this appeal should fail.
- 27.** CRA 741 of 2012 is dismissed, along with pending application, if any, however, without any order as to costs. Judgment of the Additional Sessions Judge, Fast Track, 4th Court, Alipore, South 24 Parganas dated September 28, 2012 is upheld.
- 28.** Urgent photostat certified copy of this judgment, if applied for, be given to the parties, upon compliance of requisite formalities.

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(Rai Chattopadhyay, J.)