

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION**

Present:

The Hon'ble Justice Tirthankar Ghosh

C.R.A. (SB) 26 of 2022

***Dharmendra Kumar Daga @ Dhramendra Kumar Daga*
versus
*Debdutta Sen***

For the Appellant : Mr. Ayan Bhattacharjee
Mr. Suman Majumder

For the Respondent : Mr. K.K. Pathak
Mr. Kaustav Seal
Mr. Souvik Maji

**Heard On : 11.06.2024, 26.06.2024, 18.07.2024,
05.08.2024 & 12.08.2024**

Judgement On : 16. 08.2024

Tirthankar Ghosh, J. :

The present appeal has been preferred against the judgment and order dated 02.07.2019 passed by the learned Metropolitan Magistrate, 18th Court at Calcutta in C.S. No. 32819 of 2015 corresponding to TR No. 7626 of 2015 (CIS No. CS/26252 of 2015) under Section 138 of the Negotiable Instruments Act, 1881, thereby acquitting the accused/respondent from the charges.

The complainant/appellant Dharmendra Kumar Daga alleges that the accused Debdutta Sen was known to him since long as they were involved in the same nature of business. The accused person demanded a sum of Rs. 7.50 Lakhs as accommodation loan for him for a short period of time to overcome his urgent needs and assured the complainant to repay the same within six months with interest. On such representation and assurances, in good faith the complainant arranged and gave a sum of Rs. 7,50,000/- (Rupees Seven Lakh Fifty Thousand only) to the accused person by way of Cheque No. 000008 dated 03.11.2014 drawn on HDFC Bank, Stephan House Branch, Kolkata-700 001. For assuring the complainant of the accommodation loan, the accused person executed an agreement as Deed of Simple Mortgage on 03rd November, 2014, admitting the receipt of the accommodation loan by way of Cheque and also issued a post dated cheque bearing No. 150047 dated 03.11.2014 for Rs. 1,12,500/- as payment of interest and another post dated cheque bearing No. 150048 dated 05.05.2015 for Rs. 7,50,000/- against the payment of the principal amount. Both the cheques were drawn on Axis Bank Ltd, Ganesh Chandra Avenue Branch, Kolkata- 700 013. The amount of cheque of Rs.1,12,500/- issued by the accused towards interest was encashed. However, the cheque for a sum of Rs. 7,50,000/- towards the principal amount on being presented within its validity period was dishonored with the remarks 'insufficient funds' on 07.05.2015. The cheque was again presented on 08.07.2015 when with similar remarks of insufficient funds it was dishonored. The complainant thereafter through his Advocate demanded the amount

covered by the dishonored cheque by a notice dated 20.07.2015. The said notice was sent by Speed Post with A/D and it was stated therein that within a period of 15 days from the date of the receipt of the notice, the accused person should pay the amount covered by the dishonored cheque. On receipt of the demand notice the accused sent a reply letter dated 05.08.2015 wherein the issuance of the cheque was acknowledged but the accused denied his liability and failed/neglected to pay the amount covered by the dishonored cheque within the period specified under the relevant provisions of the Negotiable Instruments Act, 1881. As such the accused was liable to be prosecuted and accordingly the complainant filed the complaint before the learned Magistrate praying for taking cognizance, issuance of process, enquiry, final disposal.

In order to prove its case the complainant examined himself as P.W.1 and also relied upon a series of documents which included the deed of simple mortgage as Exhibit-1; the bank statement Exhibit-2; the cheque bearing No. 150048 dated 05.05.2015 marked as Exhibit-3; the return memo dated 08.07.2015 as Exhibit-4; demand notice dated 20.07.2015 as Exhibit-5; postal receipt dated 20.07.2015 as Exhibit-6; the track report as Exhibit-7; and the reply letter dated 05.08.2015 as Exhibited-8. The accused examined himself as defence witness being D.W.1, and in his examination-in-chief he contended that he was acquainted with the complainant and had given the cheque along with a document of property. According to the defence witness, the cheque was given as security but after some time the complainant deposited the cheque in bank. He further deposed that the deed which was handed over to

the complainant was lying with him and the same was brought to the notice of the complainant by way of reply to the demand notice on 05.08.2015 and it has been marked as Exhibit-8. The witness also stated that he demanded from the complainant to return the deed but the accused/D.W.1 did not give any specific answer in cross-examination and deposed that he failed to recapitulate as to whether the complainant requested him to register the property in his favour. He also replied that he had not sent any letter to the complainant for getting the property registered in his favour. However, in cross-examination he stated that he was ready to register the property in the name of the complainant as he has failed to pay the money.

On an analysis of the evidence of the complainant as well as the accused /respondent it is an admitted position that the complainant provided an accommodation loan to the respondent to the tune of Rs. 7,50,000/- for that the accused reciprocated with an interest of Rs. 1,12,500/- along with a post dated cheque as also mortgaged a property by way of simple mortgage. However, the post dated cheque on presentation got dishonored. Consequently, the present complaint case being CS No. 32819 of 2015 was filed. The learned Metropolitan Magistrate, 18th Court, Calcutta on an appreciation of whole of the evidence was of the view that the post dated cheque was not issued for discharge of either in whole or in part of any debt or other liability, as an alternative remedy was available to the complainant, to that effect the relevant part of the judgment is quoted:

“So, now the vital question before this court is whether the cheque in question issued by the accused person for payment of the loan amount to the complainant. To ascertain this exhibit 1 is a very vital document in this case. It has been clearly stated in exhibit 1 "That in case the said sum of 7,50,000/- is not paid within the time in the manner as aforesaid, it shall be lawful for the mortgagee to enforce this mortgage and to cause the property should be transfer in the name of the mortgagee Mr. Dharmendra Kumar Daga". So. PW. 1 in his cross examination admitted that exhibit 1 is a valid document and in exhibit 1 it is clearly written that in case the accused failed to give 7,50,000/- then it shall be lawful for the mortgagee to enforce this mortgage and the property should be transferred in the name of the complainant. Nowhere it is written in exhibit 1 that in case of failure to pay the money by the accused the complainant will take legal steps to recover the money. It is admitted from the evidence of D.W. 1 that the accused had given the cheque to the complainant but at the same time it is to be considered what is written in exhibit 1. Thus, though the cheque was given by the accused for payment of the loan amount to the complainant but that cheque in question was not issued for discharge, either in whole or in part of any debt or other liability for a consideration when there is alternative remedy available to the complainant from exhibit 1.

Hence, point no. 1 is decided in favour of the complainant but point no. 2 is decided against the complainant.”

I have considered the reasons assigned by the learned Metropolitan Magistrate, and I am of the view that even if a cheque is given as a security cheque the same can also be encashed when there is failure on the part of the accused to repay the loan amount. Only because an alternative remedy is

available the same cannot be a ground for depriving a person of his dues. If there are two Acts under which remedies are available, it is for the complainant to choose the remedy and the procedure he would adopt for recovery of his dues. The Court cannot under such circumstance say that there is no legally enforceable debt or liability. If the loan is accepted then obviously the cheque which was issued as a security towards the loan was solely for the purpose of reimbursing the loan amount, it would be a defence in any other case if the property was attempted to be utilized by the complainant for any other purpose. In a proceeding under Section 138 of the Negotiable Instruments Act, the Court is to see as to whether there was a discharge of liability, which in this case is on the face of it available from the bank statement by way of which the amount of Rs. 7,50,000 was transferred. However, the Court may in the judgment itself record that if any future course of action is taken in respect of the property of the accused by the complainant then in that case the compensation or fine amount should be taken into account in the subsequent proceeding.

Considering the above observations I am unable to agree with the judgment and order of acquittal passed by the learned Trial Court. Consequently, the judgment and order dated 02.07.2019 passed by the learned Metropolitan Magistrate, 18th Court at Calcutta in connection with C.S. No. 32819 of 2015 corresponding to TR No. 7626 of 2015 (CIS No. CS/26252 of 2015) under Section 138 of the Negotiable Instruments Act, is hereby set aside.

The case is remanded to the learned Metropolitan Magistrate, 18th Court, Calcutta for passing judgment afresh with reasons.

Accordingly, CRA (SB) 26 of 2022 is allowed.

The parties are directed to appear before the Leaned Trial Court on 02.09.2024. The Learned Trial Court would fix dates for fresh hearing of arguments granting opportunity to both the parties and deliver the judgment preferably within a period of 3 (three) months from the said date.

Pending connected application(s), if any, are also disposed of.

Department is directed to send back the LCR immediately. A copy of the judgment be forwarded to the ld. Trial court immediately for compliance regarding the directions given above.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Tirthankar Ghosh, J.)