

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 108 of 2007

**Suresh Chandra Pandey
-Vs-
Dr. Sunil Das**

For the Appellant : Mr. Avishek Sinha
(*Amicus Curiae*)

For the Opposite Party : Ms. Pallavi Priyadarshee
(*Amicus Curiae*)

Heard on : 11.10.2023, 17.01.2024

Judgment on : 15.03.2024

Ananya Bandyopadhyay, J.:-

1. This instant criminal appeal is filed against an order dated 06.04.2006 passed by the Learned 5th Judicial Magistrate at Alipore, South 24 Parganas, acquitting the opposite party as per provision of Section 256 of the Code of Criminal Procedure in connection with C Case No. 104/2023 under Section 138 of the Negotiable Instruments Act.
2. The prosecution case in brief is that the accused took loan of Rs.2,00,000/- only from the complainant on 04.09.2001 and assured him that he would repay the said amount within a month of his demand. On 28.11.2002, the accused has issued one cheque (A/C payee) being No. 550007 dated 28.11.2002 in favour of the complainant amounting to Rs. 2,00,000/- only.

3. The complainant has deposited the said cheque at his banker UTI Bank Ltd., Goal Park, 20, Gariahat Road, Kolkata – 700019 for encashment and the said cheque was returned by the banker of the accused on 29.11.2002 with a remark “insufficient of fund” the petitioner has come to know about the dishonour of the cheque on 03.12.2002 from his banker which was sent to the complainant in writing.
4. Thereafter, the appellant has sent a demand notice through his advocate to the accused on 17.12.2002 by registered post with A/D vide postal receipt no. 1847 dated 17.12.2002 demanding the cheque amount within 15 days from the date of receipt of the demand notice and the accused has received the same demand notice on 18.12.2002 but in spite of receipt of the said notice, the accused did not pay any amount to the complainant.
5. From the materials on record it appeared that:-
 - i. On 16.01.2003, cognizance was taken, complainant was annexed on oath and the summons was issued to the accused fixing 28.02.2003 for S.R. and appearance,
 - ii. On 28.02.2003, complainant was absent by petition. Requisites filed which was issued fixing 03.04.2003 for S/R and appearance,
 - iii. On 03.04.2003, the complainant was present. Accused Dr. Sunil das appeared and was granted bail fixing 17.05.2003 for appearance and placing under Section 251 of the Code of Criminal Procedure,
 - iv. On 17.05.2003, complainant filed a petition praying for time and the accused also filed a petition under Section 317 of the Code of Criminal Procedure and the same was allowed. The case was transferred to the

Court of Judicial Magistrate, 5th Court, Alipore for disposal thereby fixing 25.07.2003 for appearing and plea before the transferee Court.

- v. On 20.05.2003, the record was received and transferred from the Learned C.J.M. at Alipore for disposal fixing the same date, 25.07.2003, for appearance and plea.
- vi. On 25.07.2003, both the parties were present and 20.12.2003 was fixed for plea.
- vii. On 20.12.2003, the complainant was absent without steps and the accused was absent by petition and prayed for adjournment and the prayer was allowed by fixing 12.05.2004 for plea.
- viii. On 12.05.2004, complainant and the accused were present and the P.O. was transferred and thus the case was fixed on 17.07.2004 for plea.
- ix. On 17.07.2004, 20.11.2004, 12.01.2005, the case record could not be taken up for recording plea as the P.O. was transferred.
- x. On 01.04.2005, accused was absent by petition and the complainant took no steps. 30.06.2005 was fixed for plea.
- xi. On 30.06.2005 the accused person was absent by petition and the complainant took no step. Thus, 16.09.2005 was fixed for plea.
- xii. On 16.09.2005, the accused was absent by petition and the complainant took no step and the complainant was directed to show cause on 06.01.2006 as to why the case should not be dismissed for default.

xiii. On 06.01.2006, accused was present and the complainant took no step. The complainant was directed to file show cause on 06.04.2006 as last chance, i.d., the case would be dismissed.

xiv. On 06.04.2006, accused was present by filing hazira and the complainant neither filed any show cause nor took any step. The accused was acquitted.

6. It appears from the record of the case that the accused was absent on 6 occasions and the complainant was also absent on 6 occasions and from 12.05.2004 to 12.01.2005 (9 months), i.e. on the 4 dates, P.O. was transferred.

7. The appellant stated that the accused issued the cheque and the said cheque was dishonoured and the notice as well as the complaint was filed by complying the provision of the law and, therefore, the presumption was that the accused has some liability towards the complainant and as such the burden is upon the accused to rebut the presumption.

8. The appellant further stated that he gave a huge loan of Rs.2,00,000/- and due to misunderstanding between him and the Learned Lawyer conducting the case before the Court below, he could not attend the Court and, therefore, he would be suffered irreparable loss and injury if the case would not be restored.

9. The appellant undertook to attend each and every date before the Learned Court below.

10. The appellant stated that he preferred an application for Special Leave to appeal and the same was allowed by the Hon'ble Court on 16.02.2007 with a liberty to file memorandum of appeal.

11. The Learned Amicus Curiae for the appellant submitted that:-

- i. The appellant gave a huge loan of Rs.2,00,000/- to the accused and due to misunderstanding between him and the Learned Lawyer conducting the case before the Court below, he could not attend the Court and, therefore, he would be suffered irreparable loss and injury if the case would not be restored.
- ii. While dismissing the complaint in the absence of complainant, the Court should not pass the orders of dismissal of complainant and acquit the accused mechanically.
- iii. The order of dismissal of complaint operated as a final order and, therefore, it would be passed after proper application of mind and exercise of judicial discretion.
- iv. In the instant case, the Learned Court below had already taken cognizance in the matter, examined the complainant on oath, issued summons to the accused. The accused appeared and obtained bail and the date was fixed for plea under Section 251 of the Code of Criminal Procedure but, thereafter, nothing has happened as the accused was absent on 6 occasions. The complainant was also absent on 6 occasions and the P.O. was transferred on 4 occasions.

- v. The case was fixed for recording plea of the accused and for that purpose, the presence of the complainant was absolutely not necessary.
- vi. The order of acquittal should not be a matter of routine followed automatically on the absence of the complainant and it should not be used for merely disposing of the case.
- vii. The power of the Magistrate to acquit the accused under this Section was not unlimited but was circumscribed to certain limitations and in the instant case, the personal attendance of the complainant was not necessary and, therefore, he could dispense with his personal appearance.

12. The order dated 06.04.2006 in connection with Complaint Case 104 of 2003 states as follows:-

“Accused person is present by filing hazira. It is now 11:50 A.M. Complainant neither files show-cause nor takes any step. Today the date is fixed as last chance for showing cause. It appears from the record that complainant did not take steps since 01.04.2005. So, it appears from the conduct of the complainant that he is at all not interested to proceed with the case. Hence, the case is dismissed and accused person is acquitted from this case as per provision of Section 256, Cr.P.C.”

13. From the record it appeared that time and again the complainant did not appear before the Court and it was not on a single instance that the complainant did not appear before the Court. Steps were not taken for

replying to the show-cause notice and the Trial Court was justified in acquitting the appellant and this Court is not inclined to interfere with the impugned order passed by the Learned Trial Court.

14. In view of the above discussions, the instant criminal appeal stands dismissed.

15. There is no order as to costs.

16. I record my appreciation for the able assistance rendered by Mr. Avishek Sinha and Ms. Pallavi Priyadarshee, Learned Advocates, as *Amicus Curiae* in disposing of the appeal.

17. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)