

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

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

CRA (SB) 42 of 2024

Sri Dipankar Chattopadhyay

Versus

Sri Dibyendu Bikash Saha

For the Appellant	:	Mr. Krishnendu Bhattacharya Ms. Priyanka Ganguly Ms. Shalini Bairagi Ms. Rounak Majumdar
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For the Respondent	:	Mr. Sourav Mondal Mr. Arijit Bhuiya Mr. Rony Mondal
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Heard on	:	19.11.2024
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Judgment on	:	11.12.2024
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Dr. Ajoy Kumar Mukherjee , J.:

1. Present application has been directed against judgment and order passed by the court below dated 22nd December, 2023 in criminal appeal No $\frac{2 \text{ of } 2023}{87 \text{ of } 2022}$. The petitioners case in brief is that accused/respondent herein, in discharge of his liability to pay a some of Rs. 10,68,000/- with interest in terms of agreement, issued an account payee cheque for Rs. 9

lakhs bearing no. 263307 dated 21.12.2014 to the petitioner, who duly presented said cheque to his banker, but it got dishonored on the ground of insufficient fund. Petitioner's further case is that despite service of notice dated 16th January 2015, the respondent herein having failed to pay the cheque amount, the petitioners/complainant initiated a criminal proceeding before learned Magistrate. Learned Trial Court after conclusion of trial convicted the respondent herein and sentenced to pay fine of Rs. 9 lakhs in default simple imprisonment for a period of six months.

2. Being aggrieved by the said order of conviction accused/respondent preferred the aforesaid criminal appeal under section 372 of Cr.P.C. before the Appellate Court. Learned Appellate Court observed that the instant case record should be remanded to the Trial Court for conducting re examination of the accused under section 313 Cr.P.C. in view of the observation made in the body of the judgment and the Trial Court was further directed to grant fair opportunity to the accused to produce the defence witness, if he expresses his willingness to adduce defence witness, after his examination under section 313 Cr.P.C. along with a further direction to write a judgment afresh. However, while passing the aforesaid order the accused was acquitted from the case and was discharged from his bail bond.

3. Being aggrieved by that order of acquittal, petitioner/complainant preferred the present, appeal contending that the order of acquittal passed by the court below is absolutely bad in law and is not at all maintainable either in facts or in law. He further contended that the court below failed to appreciate the prosecution case in its proper perspective and accepted the

defence case arbitrarily with pre-conceived notion and thereby caused failure of justice. In fact the court below erroneously acquitted the respondent on the score of non convincing agreement containing some over writing and for not providing sufficient opportunity to accused to adduce defence witness and also for non compliance of section 313 Cr.P.C. The court below fallaciously opined that the Trial Court did not allow accused person to adduce defence witness, without considering that the accused took multiple adjournments. The court below thereby misconstrued the principle of presumption under section 118 read with section 139 of the N.I. Act. He further submits that the court below has failed to comprehend that despite pretty discrepancy, the complainant evidently discloses a prima facie existence of legally enforceable debt and the accused/respondent never denied his signature on the cheque in question before the learned trial magistrate. He also failed to consider that the respondent never denied the issuance of cheque in question and therefore, burden straightway shifted to the respondents to prove the contrary but the respondent herein has miserably failed to rebut the statutory presumption. Accordingly, the evidence adduced, examination of accused person under section 313 Cr.P.C. read with Trial Court's finding make the impugned order of acquittal wholly perverse, arbitrary and contrary to the evidence on record, which ultimately caused mis carriage of justice and accordingly, he prayed for setting aside the order impugned and to affirm the judgment passed by the trial court.

4. Mr. Mondal learned counsel appearing on behalf of the respondent submits that the Trial court did not put the question in a proper manner

while the accused was examined under section 313 Cr.P.C and for which his client got seriously prejudiced. Moreover, in reply to the courts query the accused expressed his willingness to adduce evidence in order to rebut the presumption. Accordingly the court below was quite justified in remanding the matter before the trial court, which does not call for interference by this court.

5. Learned Court below while passed the impugned judgment in criminal appeal no. 87 of 2022 had made clear observation that the right of the accused to adduce defence witness got curtailed as the trial court became too much hyper technical while rejecting the adjournment petition on the ground of filing Photostat copy of the medical documents and also because accused addressed the Trial Court as “Dear Sir”. He further observed that there are certain irregularity committed by learned trial court during examination of the accused under section 313 Cr.P.C.

6. Now let me consider whether the court below was justified in remanding the case before the trial court to make fresh trial from the stage of examination of the accused under section 313 Cr.P.C.

7. Before going to further details, it needs to be pointed out that the only relevant question which was put to the accused during cross examination is as follows:-

3.Q : PW1 of this case has stated that as per agreement between the parties of this case that the complainant invested Rs. 12,00,000/- by cheque to the accused with a promise to get return of the said amount with 14% interest per annum. Thereafter, another agreement was entered into in between the parties of this case. Thereafter, you to discharge you liabilities issued a cheque amounting Rs.9,00,000/- being no. 263307 dated 31.12.14 in favour of the complainant of this case. After getting the said cheque in question, the complainant presented it to his banker Axis Bank Limited, Salt Lake City Branch, Kol-64 for encasement. But the said cheque was dishonoured due to insufficiency of fund. Thereafter, the complainant sent a notice dated 16.01.15 to you for payment of the said cheque amount with 14% interest per annum

within fifteen days from the date of receipt of the said notice. You received the said notice but did not pay the alleged cheque amount. Whether you have anything to say?

Ans. I have nothing to say.

8. This court and the Apex Court on numerous occasion emphasised that section 313 of code of criminal procedure is misapplied or abused, if the questions put to the accused are of omnibus character. Infact the words “*to explain any circumstances appearing in the evidence against him*” in section 313(1) of the Code means each and every incriminating circumstances appearing in the evidence and therefore it is not enough to read the entire evidence to the accused and to ask whether he has anything to say about them. It is needless to say that questioning of the accused after the evidence of complainant is recorded, is not an empty formality but a mandatory requirement of the law to be complied with strictly, true to the letter and spirit of section 313(1) (b) of the Code. The main object underlying section 313 of the Code is to enable the accused the explain each and every circumstances appearing in the evidence against him, so that there may not be failure of justice leaving ambiguity in the statement of witnesses examined by the other side. In a documentary offence under Negotiable Instrument Act, every piece of documentary evidence in tending to incriminate accused should be brought to his notice.

9. In such view of the matter the aforesaid examination of the accused under section 313 of Cr.P.C. by putting an omnibus question is clearly against the mandate laid down in section 313 of the Cr.P.C., specially when the conviction was awarded to the accused on the basis of the incriminating materials proved by the complainant during examination. Opportunity also should have been afforded to the accused to explain the

incriminating evidences appearing against him in the trial as part of fair play.

10. Now so far as the observation made by the court below that the right of the accused to adduce defence witness got curtailed, it appears from record that on 28th March, 2022 the accused was examined under section 313 Cr.P.C. as above and on the same date the accused prayed for giving him opportunity to adduce evidence and accordingly Trial Court fixed 20th May, 2022 for defence witness. However, learned Trial Court turned down the defendant's prayer for adjournment on that day by making following observation:-

20.05.22

"Today is fixed for evidence of DW. The complainant is present and files hazira along with his I.d. Advocate. Ld. Advocate for the accused is present and files an adjournment petition, one Photostat copy of letter in a letter head addressing the ld. Court as, "Dear Sir" and two Photostat copies of medical treatment. No medical certificate is filed. Ld. Advocate for the complainant raises objection the attitude of accused towards the court is very disgraceful. The complainant is a senior citizen. This case is running for more than five years. it is very clear before this court hat with an ulterior motive the accused has filed this petition and Photostat copies of letter and medical treatment to delay the proceedings of this case.

Considered the prayer and rejected.

Fix 17.06.22 for hearing argument".

11. From the aforesaid finding of the trial court it is quite clear that the decision of the Trial Court to that aspect was a hasty one and the court below has not committed any mistake in observing that sufficient opportunity was not granted to the accused to adduce defence witness, since accused did not take multiple adjournment in order to adduce defence evidence.

12. In view of the aforesaid discussion it can be safely concluded that the order of remand passed by the court below in his judgment dated 22.12.2023 does not call for interference. However, the court below

erroneously held while passing the remand order that the accused be acquitted from this case. Such observation of the court below that the accused is acquitted from the case and released from his bail bond is only set aside in this appeal. Since the order of remand is affirmed by this court, Criminal Appeal no. 2 of 2023 became redundant.

13. CRA (SB) 42 of 2024 is accordingly disposed of.

14. Records of the concerned Appellate Court & concerned Trial Court be returned at once to the respective courts.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Dr. AJOY KUMAR MUKHERJEE, J.)