

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 220 of 2008

**M/S Vision Cell
-Vs-
M/S Manisha Enterprises**

For the Appellant : Mr. Soham Banerjee
(Amicus Curiae)

For the Opposite Party : Mr. Amal Krishna Samanta
Mr. Aritra Sinha

Heard on : 18.09.2023, 05.04.2024, 16.04.2024,
14.08.2024

Judgment on : 05.12.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against judgment and order of acquittal dated 19.12.2007 passed by the Learned Judicial Magistrate, 3rd Court, Howrah, in Case No. C/386/2006 and acquitting the accused person of the charge under Section 138 of the Negotiable Instrument Act, 1881.
2. Appellant was a partner of a firm namely M/s Vision Cell which was an authorized distributor of NOKIA Cell Phones.

3. The opposite party dealt in the business of cell phones of different companies in the name and style of M/s Manisha Enterprises, a proprietorship firm situated at G.T. Road, Mogra, Hooghly.
4. The opposite party on behalf of his firm placed an order for supply of different models of Nokia Cell Phones which was supplied by the appellant at a credit of Rs.1,21,975/-. The opposite party issued an A/C payee cheque bearing No.004395 dated 6th of February 2006 for Rs.1,21,975/- drawn on Allahabad Bank, Pipul-pati branch, Hooghly, in favour of the appellant firm M/s Vision Cell on receipt of the ordered articles.
5. The appellant deposited the cheque being No.004395 with his banker Corporation Bank, Howrah Branch which was dishonoured due to 'insufficient funds'.
6. On 2nd of March, 2006 the appellant through his Learned Advocate sent a demand notice to the opposite party intimating him to repay the cheque amount of Rs.1,21,975/- within 15 days from the date of receipt of that letter. The opposite party refused to accept the notice and the registered envelope along with A/D card returned as "refused". Subsequently, the appellant filed a case before the Court of Learned Chief Judicial Magistrate, Howrah and subsequently that was transferred to the Learned Judicial Magistrate, 3rd Court, Howrah for final adjudication.
7. Learned Amicus Curiae appearing for the appellant submitted as follows: –
 - i. Orders of the Learned Trial Court reflected the conduct of the parties:-

20.04.2006 – The Learned Court below observed there were sufficient materials against the accused person. Process was issued. Next date for S/R and appearance.

17.05.2006 – Complainant was present.

05.07.2006 – Complainant was absent by petition and the Advocate of the complainant was present. The Advocate for the complainant pointed out that one Advocate filed Vakalatnama for the accused person, but when he saw that there was no S/R, he destroyed the Vakalatnama and went away. Warrant of Arrest was issued against the accused person.

04.09.2006 – Complainant prayed for time. No execution of the Warrant of Arrest against the accused person.

19.09.2006 - Accused person surrendered and bail was granted.

13.11.2006 – Complainant was absent by petition. Accused persons was absent without any step. The Learned Court below observed that it was a delay tactics by the accused person and against a Warrant of Arrest was issued.

27.12.2006 – The accused person surrendered and that time he was granted an interim bail till 10.01.2007.

11.01.2007 – Both the parties were present and examination of the accused person was done under Section 251 of Code of Criminal Procedure.

19.02.2007 – As the interim bail was lapsed, the accused person took bail again. The complainant was absent without step. Show cause against the complainant.

26.03.2007 – Show Cause was filed. Being satisfied the Learned Court below has accepted the same.

18.08.2007 – Complainant was absent by petition and his advocate prayed for time. Accused person was absent against without step. Again, warrant of arrest was issued against the accused person.

17.07.2007 – Complainant was absent by petition. Accused was granted bail.

19.02.2007 – the impugned order of acquittal was passed.

ii. It was further submitted as follows:-

- a) Regarding the allegation of tampering with the date in the order-sheet: A glance at the order dated 17.07.2007, it may seem that the '1' before '9', in the next date portion, was added subsequently, as the spacing between the numbers and the stroke of the pen does not match with the rest portion of the date. However, the amicus curiae was refraining himself from making any assertive submission regarding in that regard, as the same may need expert witness to decide. The amicus curiae further begs to submit, in fairness, that the said allegation did not explain that when the Learned Advocate for the complainant noticed that the case was not in the cause-list of 09.12.2007, as admittedly recorded in his diary, why did not

he take any steps to find out what happened by going through the records of the case.

b) Regarding the impugned dismissal of the case and acquittal:

Section 256 of the Code provides for disposal of a complaint in default, which entails in acquittal. The Section empowers the Magistrate to acquit the accused person if the complainant does not appear.

The legislative aim behind the said provision was to afford some deterrence against dilatory tactics against on the part of a complainant who sets the law in motion through his complaint, but does not appear, thereby harassing the accused person who is per force to attend the Court on all posting days. The Section, therefore, provides protection to an accused person against dilatory tactics of the complainant.

On the other hand, the complainant was absent without explanation on only one occasion, keeping the impugned ate aside.

c) Issuing process in a criminal mater means the court is prima facie satisfied there was enough material against the accused person to proceed. In that particular case, which is under Section 138 of the Negotiable Instrument Act, it means that the Court is satisfied that there is a liability on the part of the accused person to pay the amount of the cheque which was dishonoured. It also reveals that the accused person was

already examined under Section 251 of the Code. At that stage, dismissing the complaint and acquitting the accused person curtails the rights of the complainant, also vitiates the aim and purpose of the Sections 138 to 142 of the Negotiable Instruments Act, 1881 which is to maintain the legitimacy of commercial transactions involving cheques and to penalize the dishonor of any cheque which has been issued in the discharge of the whole or part of any debt or other liability.

8. Considered the rival submission of the Learned Advocate representing the opposite party.

9. Section 256 of the Code of Criminal Procedure states as follows:-

“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.”

10. In ***Associated Cement Co. Ltd. v. Keshvanand***¹, the Hon'ble Supreme Court observed that:-

“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.”

11. The Learned Trial Court should have exercised stringent provisions compelling the complainant to appear before it. In case of failure on the part of the complainant to comply to the same should have acquitted the opposite party/accused.

12. Both the parties on several occasions did not attend the Court indubitably at fault. However, the Learned Trial Court is to continue with the proceedings pending before it without granting an adjournment to either of the parties and dispose of the same. The respective parties must appear before the Learned Trial Court on each and every date fixed by the same or be represented by their respective Learned Advocates, failing which the Learned Trial Court shall be at liberty to pass necessary orders.

13. In view of the above discussions, the instant criminal appeal being CRA 220 of 2008 is allowed.

14. Accordingly, CRA 220 of 2008 is disposed of.

¹ (1998) 1 SCC 687

15. There is no order as to costs.

16. I record my appreciation for the able assistance rendered by Learned Advocate Mr. Soham Banerjee as Amicus Curiae in disposing of the appeal.

17. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

18. 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.)