

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 248 of 2001

Samir Bera

-Vs-

Shyampari Devi @ Shyamapari Devi & Anr.

For the Appellant : Ms. Rituparna De Ghosh
(Amicus Curiae)

Heard on : 29.11.2023, 19.01.2024

Judgment on : 20.03.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against an order dated 28.03.2001 passed by the Learned Chief Judicial Magistrate, South 24 Parganas in C. Case No. 835 of 1999 acquitting the opposite party no. 1 from the accusation of having committed offence punishable under Section 138 of the Negotiable Instruments Act, 1881.
2. The petitioner had been practising Advocate of Alipore Judges' Court ordinarily dealing motor accident claim cases.
3. The petitioner conducted two motor accident claim cases on behalf of Taraknath Jha, the husband of the opposite party no. 1 herein which were favourably disposed of in favour of the said Taraknath Jha and the amount of compensation was received by the opposite party no. 1 herein.

4. The petitioner stated that the claim cases were registered and numbered as MAC No. 339/97 and 62/98 and in consideration of the said two claim cases, the opposite party no. 1 herein issued two cheques of Rs.60,000/- vide Cheque No. 834913 dated 10.02.1999 for a sum of Rs.1,00,000/- both drawn on Punjab National Bank, Keyatola Branch as Advocate's fees for conducting the said cases.
5. The petitioner deposited the cheque of Rs.60,000/- through his banker United Bank of India, Alipore Branch on 16.02.1999 and the same was returned unpaid on 18.02.1999 by intimation note dated 17.02.1999. The said cheque of Rs.1,00,000/- was deposited which returned unpaid on 17.02.1999 by intimation note dated 15.02.1999. Both the cheques returned unpaid on the ground of insufficiency of funds.
6. After coming to know of such dishonour, the petitioner issued a Lawyer's notice dated 24.02.1999 through his Learned Lawyer, calling upon the opposite party no. 1 to pay the value of the aforesaid cheques within 15 days from receipt of the said notice.
7. Upon receipt of the said notice, the opposite party no. 1 replied by a letter dated 18.03.1999 but did not make payment of the value of the said cheques.
8. As a result, on 26.03.1999, the petitioner filed a complaint against the opposite party no. 1 alleging commission of offence under Section 138 of the Negotiable Instruments Act, 1981 before the Learned Chief Judicial Magistrate, Alipore, South 24 Parganas.

9. The opposite party no. 1 entered appearance in the said case and pleaded not guilty to the accusation levelled against her. In the course of trial, the petitioner examined himself and two others witnesses to prove his case. The opposite party no. 1 examined herself as the sole defence witness.
10. In conclusion of trial in the instant case, the Learned Chief Judicial Magistrate, by the impugned judgment and order dated 28.03.2001 acquitted the opposite party no. 1 from the accusation levelled against her.
11. The Learned Amicus Curiae for the appellant submitted the primary issues for consideration are as follows:-

- i. Whether there was a lawfully enforceable debt or liability?

The claim of the appellant that he, as a practicing advocate, represented the husband of the accused person/opposite party no. 1, in a legal proceeding, is admitted by the opposite party no. 1 in her examination under Section 313 of the Code of Criminal Procedure as well as a defence witness and as such the financial relationship between the parties is undisputed.

From the materials on record and the depositions made during the course of the trial it is also evident that the appellant in discharge of his professional efforts was entitled to receive payment from the opposite party no. 1. However, in absence of a binding contract, the quantum of the payment remains disputed to the effect that the appellant has a claim of 25% of the reward along with other expenses incurred whereas the opposite party states that only 20% of the reward was agreed as payment between the parties.

Thus, from the above it can be safely concluded that a legally enforceable debt on part of the opposite party no. 1 towards the appellant has been established.

- ii. Whether the rigours of the Negotiable Instruments Act have been met?

The opposite party no. 1 has not denied having issued the cheque in question, to the appellant for the discharge of her pending liability towards the appellant. As per Section 118 (g) of the Negotiable Instruments Act, the holder of the cheque is presumed to be holder in due course, hence the accused has to prove that the cheque was not issued to the complainant. Accused had admitted the signature on the cheque, thus presumption under Section 118 (a) of the Negotiable Instruments Act and Section 139 of the Negotiable Instruments Act will be drawn.

Since the fact that the opposite party no. 1 herself gave the appellant the said cheque in question, has never been disputed by the opposite party no. 1, as such Section 58 of the Negotiable Instruments Act is not attracted in the present case.

Demand notice was served to the opposite party no. 1 within 7 days from receiving information of dishonour of the said cheque from the bank of the appellant, which is within the time as prescribed under Section 138(b) of the Negotiable Instruments Act.

Although the opposite party no. 1 replied to the said demand notice of the appellant, the said opposite party failed to make payment of

the dishonored cheque amount within the time as prescribed under Section 138(c) of the Negotiable Instruments Act. Thereafter, the instant case was initiated by the appellant.

Thus, on a careful scrutiny of the depositions of the witnesses and materials on record it can be safely concluded that the checks and balances of Section 138 of the Negotiable Instruments Act are met and as such the instant case does not suffer from any infirmities.

Keeping in mind that the opposite party no. 1 had a legally enforceable debt towards the appellant and that the cheque issued by her in discharge of her liability was dishonoured, it can be concluded that the Learned Magistrate erred in coming to a finding that the opposite party no. 1 is not guilty of the offence punishable under Section 138 of the Negotiable Instruments Act.

12. A circumspection of evidence of the prosecution witnesses revealed as follows:-

- i. PW-1 deposed in his evidence that he was a practicing Advocate of Alipore Judges' Court. He acted as a Lawyer on behalf of Tarakant Jha, the husband of the accused in Motor Accident Claim Case No. 339/97 of the 11th Court of Ld. Additional District Judge, Alipore and MACC No. 62/98 of the 10th Court of Ld. Additional District Judge, Alipore. He acted as a Lawyer in the aforesaid two cases on contract basis. The contract was 25% of the awarded sum plus actual expenses on Court fees and other expenses. The husband of the accused agreed to the said terms in presence of the accused.

Both the cases had been disposed of in favour of the accused's husband. The total sum awarded in both the cases with interest was around Rs.5,34,000/-. The total amount was due to him from the accused's husband was Rs.1,60,000/- as his fee and the actual expenses incurred by him. The accused issued two cheques bearing nos. 834912 dated 12.02.99 for Rs.1,00,000/- and 834913 dated 10.02.99 for Rs.60,000/- both drawn on Punjab National Bank, Keyatala Road Branch, Cal-29 on behalf of her husband.

- ii. During cross-examination, PW-1 stated that it was not a fact that the accused issued the disputed cheques not in discharge of her liability. It was not a fact that the accused issued blank cheques with her signatures. It was not a fact that the dates and the amounts mentioned in the disputed cheques were written by him. The allegations mentioned in the letter in reply to his notice sent by the accused were not rebutted by him. It was not mentioned in his petition of complaint that the accused agreed to pay the dues on behalf of her husband. It was also not mentioned in his petition of complaint regarding the awarded amount nor it was mentioned in his notice. It was not a fact that Tarakant Jha paid Rs.55,000/- to him. PW-1 further deposed that it was not a fact that the liability of the accused for due discharge of debts had not been specified either in the petition of complaint or in the demand notice.

“Q:- I put it to you that Tarakant Jha the awardee has always been ready and willing to pay your legitimate dues and is even at this moment willing to pay the same. Do you agree?”

A:- I am ready to accept the amount mentioned in their cheques.”

- iii. DW-1 deposed in her evidence that she knew Samir Bera. Her husband met with an accident and broke his hand. Thereafter, the complainant went to her house. He wanted to do the accident case on their behalf. Her husband entrusted him with the case. It was settled that the complainant would conduct the case and get 20% of the total award. After the award, she gave Rs.56,000/- in cash to the complainant. She did not know English. She merely signed the cheque and did not fill it in. The cheque was returned as the amount written therein did not lie at her credit.
- iv. During cross-examination, DW-1 stated that after the return of the cheque from the bank, she received a notice. She sent a reply to the said notice. She gave him the cheque as the complainant conducted the case. There was no paper to show that 20% of the award was settled to be given to the advocate. She could not read or understand the contents of Exhibit-6.

13. Considered the submissions of the Learned Amicus Curiae representing the appellant assailed the evidence on record and the impugned judgment.

14. The Learned Trial Court, inter alia, observed in the impugned judgment as follows:-

“The two stands of the complaint – one in the petition and the other in deposition – are mutually irreconcilable. Again, 25% of the amount of the total award comes, on calculation, to Rs.1,33,500/- and not to Rs.1,60,000/-. The complainant-advocate even after the rebuttal letter has not stated in the petition of complaint the break-up of his dues such as advocate’s fee for appearance, for drafting of complaint, costs for payment of court-fees and other court expenses. Nor has the complainant attempted to give the break-up during his evidence. Thus, he has failed to rebut the defence evidence that 20% of the award was to be paid to him by way of cross-examination. PW-1 has not even averred in the petition of complaint that the allegations made in the reply to his demand notice were all false.

In view of the above, a serious question arises, viz., that of extent of liability of the accused for the amount claimed from the cheques. The explanation to Section 138 of the N.I. Act clearly lays down that the debt or other liability would mean for the purpose of Section 138 of N.I. Act a legally enforceable debt or other liability. It may be pointed out that Section 138 of N.I. Act lays down penalty in case of dishonor of certain cheques but not of all cheques. Cheques which are shown to have been issued for the discharge in whole or in part of any debt or other liability are those for which the criminal law is to be set in motion. The Section itself was engrafted into the Negotiable Instruments Act of 1881 in 1988 with the avowed purpose of preventing harassment or inconvenience for which hazardous money

suits were the only remedy. In the instant case enforceability of the debt of Rs.1,60,000/- is a matter to be decided by a competent Court of law. The defence has seriously questioned such legal enforceability. Since Section 138 N.I. Act is a penal provision, the cardinal principle of law that the ingredients of the offence are to be established beyond reasonable doubt has to be followed by the criminal Court. In the instant case, it is patent that the accused challenged the extent of her liability on receipt of the demand notice. The complainant-advocate appears to have failed to prove who filled in the disputed cheques and yet he appears to have avoided the direct offer of the accused to pay his legitimate dues. He appears to have insisted on the amount dues being the central issue, this Court is of firm opinion that Section 138 N.I. Act has no application to this peculiar case, where the terms of the verbal contract remain unpaid between the parties and where the defence took the plea at an early stage of the amount not being due and where indeed the writings in the cheques except the signature remained to be proved.

The above findings lead to the irresistible conclusion that the extent of liability of the accused has not be proved to the point of moral certainty. This being so, the enforceability of the liability does not appear to lie under the criminal proceedings.”

15. The Learned Trial Court has conclusively determined the acquittal of the opposite party meticulously assessing the evidence and justifiably reasoned the same and this Court is not inclined to interfere with the same.

16. In view of the above discussions, the instant criminal appeal is dismissed.

17. There is no order as to costs.

18. I record my appreciation for the able assistance rendered by Ms. Rituparna De Ghose, Learned Advocate as *Amicus Curiae* in disposing of the appeal.

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

20. 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.)