IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

CRR 1227 of 2019

Arijit Dolui
Versus
Bibekananda Dolui & Anr.

For the Petitioner	:	Mr. Rupam Mukherjee Mr. Atanu Chakraborty
For the Opposite Party no.1	:	Mr. Anjan Banerjee
Heard on	:	22.11.2021
Judgment on	:	11.12.2024

<u>Dr. Ajoy Kumar Mukherjee , J.:</u>

1. Being aggrieved by the impugned judgment dated 29th January 2019, passed by Additional Session Judge, Uluberia in Criminal Appeal no. 3 of 2014, Present application has been preferred. By the impugned judgment learned court below affirmed the judgment of conviction passed by the trial court on 20.12.2013, in complain case no. 27C/2006 which was filed with the allegation of committing offence under Section 138 of the Negotiable Instruments Act against the petitioner.

2. Petitioner's contention is that the opposite party herein lodged a complaint before the Trial Magistrate that accused was in need of money and for which he approached complainant for a loan of Rs. 70,000/- and accordingly complainant paid Rs. 70,000/- to the accused towards loan. Further case of the complainant is that accused issued a cheque bearing no. 998622 dated 31.10.2005 towards payment of said loan amount. Complainant thereafter deposited the said cheque to his banker on 07.11.2005. It is his specific case that he came to know from the bank on 29.11.2005 that the cheque was not honourable. Accordingly complainant sent lawyers notice on 21.12.2005 through his advocate, which was posted on 23.12.2005 demanding the said amount of Rs. 70,000/- but the accused/petitioner failed to pay the same. Accordingly the said complaint was filed.

3. During the course of trial the impugned cheque dated 31.10.2005 was marked as Exhibit-1. The information slip of the bank dated 17.11.2005 is marked Exhibit-2. The demand notice sent by the complainant along with postal A/D card are marked as Exhibit-4 and one letter along with endorsement allegedly made by bank on 06.01.2006 is marked as Exhibit-3.

4. The only point raised by the petitioner/accused in the present case is that it is palpably clear from the bank slip, marked Exhibit-2, that it is dated 17.11.2005. The demand notice was supposed to be given by the complainant within 30 days from the said date i.e. by 17.12.2005 but here the demand notice is dated 21.12.2005, which was posted on 23.12.2005 and as such demand notice was not given within the statutory period and as such both the courts below was wrong in relying upon Exhibit-3 where bank has allegedly made an endorsement on complainant's letter which reads as follows:-

> "*cheque in question was received form UCO bank on 29.11.2005 and the same was delivered to Shri Dolui (complainant) on 29.11.2005 against his acknowledgm*ent"

5. Mr. Mukherjee learned counsel appearing on behalf of the petitioner submits that the complainant/opposite party herein neither in the complaint nor in initial deposition has stated anything as to when he was informed by the bank about such dishonour of cheque and as such it can be safely presumed that he came to know about dishonour of cheque on 17.11.2005 itself. He further submits that the complainant did not clarify as to what prevented him to send the demand notice within 30 days from the aforesaid date of intimation which is dated 17.11.2005.

6. He further contended that though complainant opposite party tried to fill up his lacuna by producing Exhibit-3, which states that the bank delivered the cheque to the complainant on 29.11.2005 against his acknowledgement but said letter is clearly an afterthought which was subsequently introduced by the complainant. Infact the complainant nowhere disclosed the name or designation of the particular bank official who allegedly made the endorsement on the complainant's letter. He strenuously argued that in absence of examination of such particular bank official before the court, such information purportedly given by the bank, cannot be treated as admissible evidence. Moreover such endorsement can only be proved by the particular bank official, who allegedly wrote and signed the same and in the absence of bringing such person before the dock, both the courts below ought not to have relied upon said letter marked Exhibit-3. Since P.W-1 never discharged his duty by clarifying the fact as to why said document was not produced at the time of filing complaint or in any earlier available opportunity, credibility of the said document, marked Exhibit-3, cannot be accepted. The court below ought to have considered that the said document marked Exhibit-3 is comprising of two parts and each part is a primary evidence and therefore cannot be proved as a whole by the complainant. Infact complainant did not take any step to summon his banker or to call for records form the bank and therefore the endorsement within Exhibit-3 remains “not proved”.

7. Petitioner further submits that the court below ought to have considered that the complainant/banker did not give reply on a letter head and the fact that it was the regular practice of the bank to give hand to hand information, then why the banker took so much time to inform about dishonour of cheque to the complainant. In that view of the matter the complainant withheld his best witness, regarding the fact of knowledge as endorsed in Exhibit-3 and as such the alleged endorsement should be decided against the complainant.

8. He further argued that under the Evidence Act burden of proof lies on the person who would fail if no evidence at all were given on either side and the burden of proof as to any particular fact lies on that person who asserts it’s existence. In the present context the complainant never discharged his burden to prove the endorsement allegedly made by his banker and the Courts below were wrong in shifting such burden upon the petitioner herein. He also argued that marking of a document as exhibit may not decide the evidentiary value of that document. Marking of a document by giving exhibit number is merely for the identification of the document and it has got no connection with its proof. The courts below relied upon Exhibit-3 without applying judicial mind and the petitioner was under no obligation to disprove Exhibit-3. In such view of the matter petitioner has prayed for setting aside both the judgments dated 20.12.2013 passed by the Trial court and also the judgment dated 29.01.2019 passed by the court below, by allowing the present application.

9. Learned counsel appearing on behalf of the opposite party submits that the judgment passed by the court below is quite justified and based on sound reasoning and as such does not call for interference, invoking jurisdiction under Section 482 of the Code of Criminal Procedure.

10. I have considered submissions made by both the parties.

11. The only point required to be adjudicated in the present context is whether learned Courts below was justified in placing reliance upon the endorsement made on exhibit -3 and thereby came to a finding that the demand notice was sent to the accused person within the statutory period, when the bank slip is dated 17.11.2005 and the notice is dated 21.12.2005. While dealt with the said issue learned Trial court held that the impugned cheque dated 31.10.2005 was presented to the UCO Bank in time that is on 07.11.2005 and the demand notice dated 21st December, 2005 was also sent to the accused within the period of one month w.e.f. 29.11.2005, when the bank authority informed the complainant regarding dishonour.

12. The appellate court answered the said issue by making following observation:-

> *"In this context it appears that the said document i.e. Exhibit-3 had been exhibited by the Ld. Magistrate even without any objection from the side of the accused person. It is being challenged for the first time before the Appellate Court. No endeavour had been taken on the part of the appellant to challenge the genuineness of the contents of the said document. As such, it appears that there is no reason to assume that marking of the said document as exhibit and considering it as an exhibited document by the Ld. Magistrate suffers from any illegality. From the said exhibit, it is crystal clear that the bank of the respondent i.e. SBI, Naul Branch received the cheque after its dishonour by the bank of the appellant on 29.11.2005 and on* the same date the said cheque was returned to the respondent."

13. The letter along with its endorsement bearing seal of the Bank and signature dated 06.01.2006 is marked exhibit-3 without any objection. Infact the appellant for the first time raised the issue regarding genuineness of the endorsement at the appellate stage.

14. Ld. Counsel appearing on behalf of the petitioner, Mr. Mukherjee argued that the courts below erroneously believed exhibit-3 without applying judicial mind and without answering following questions:-

- **(a)** Why the banker did not reply on a letter head .
- **(b)** Whether the service of the said letter upon the banker is satisfactory or not.
- **(c)** If the letter was in custody of the complainant as his receipt copy how the endorsement put on it by the bank.
- **(d)** If hand to hand information is a regular practice in the said bank or in the locality at that time, why the banker took so much time to inform the dishonour of the cheque to the complainant.

(e) If the letter is the original one sent to the banker, what forced the banker to sent back the original copy without keeping for office use.

15. The complainant is not supposed to answer about practice adopted by the bank in respect of the mode of giving reply to the queries to its customer, which exclusively depends upon the practice and rules followed by a particular branch of a bank and the customer may not have any control over the same. In fact at the time of trial appellant/convict has also not put any question regarding genuinity of such endorsement. The endorsement further discloses that the impugned cheque was delivered to the complainant against his acknowledgment, which implies that while the bank returned the cheque to the complainant, complainant bank has duly recorded it in their register of acknowledgment. The appellant as accused got enough opportunity to summon the concerned bank to disprove that no such acknowledgment exists in reality in the bank or that bank official never made any such endorsement on exhibit-3 or that making endorsement on bankers letter is not the regular practice of the said bank. Accordingly even though at the appellate stage, petitioner has for the first time come up with such plea challenging the date of receipt of the cheque by the complainant but the record reveals that the letter along with endorsement is marked as exhibit, as a whole, since petitioner/accused did not challenge the bank's endorsement on exhibit-3 during trial and as the letter along with endorsement marked exhibit as a whole, without objection, before the trial court, it is quite obvious that the complainant did not feel it necessary to summon the concerned bank to prove authenticity of the endorsement. Accordingly even if the document marked exhibit-3 was executed in more than one part and even if both the parts are primary evidence but in the absence of any challenge offered by the other side, there is no bar to mark both parts of the document as exhibit as a whole and to admit it in evidence for taking cognizance.

16. In such view of the matter I do not find any substance in the present application. Both the judgments are well reasoned, observing that the cheque was issued against enforceable debt and thereby convicted the petitioner herein and as such the orders impugned does not suffer from any perversity or impropriety. Moreover, both the orders impugned have not resulted in any gross or manifest failure of justice and as such the orders impugned does not call for interference by this court as possibility of different view is no ground to interfere, exercising jurisdiction under section 482 of the code.

17. Having considered in the facts and circumstances of the case **CRR 1227 of 2019** stands dismissed.

18. Return the court records at once to the relevant 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.)