

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 545 of 2009

With

C.R.A. 546 of 2009

With

C.R.A. 547 of 2009

With

C.R.A. 548 of 2009

Allahabad Bank

-Vs-

Amit Kumar Bagla and Anr.

For the Appellant : Mr. Arvind Gupta

For the O.P. No. 1 : Mr. Manjit Singh
Mr. Abhishek Bagal

Heard on : 08.02.2024, 25.04.2024

Judgment on : 11.07.2024

Ananya Bandyopadhyay, J.:-

1. The instant four appeals are preferred against an order of acquittal dated 4th December, 2008 in Complaint Case No. 172 of 2006, passed by the Learned Judicial Magistrate, 5th Court at Alipore, District – South 24-Parganas acquitting/discharging the accused person under Section 138 of the Negotiable Instruments Act, 1881 (as amended upto date), and orders of acquittal dated 27th October, 2008 in Complaint Case No. 174 of 2006, Complaint Case No. 175 of 2006, passed by the Learned Judicial Magistrate,

5th Court at Alipore, District- South 24-Parganas under Section 138 of the Negotiable Instruments Act, 1881 (as amended upto date), and an order of acquittal dated 04th December, 2008 in Complaint Case No. 173 of 2006, passed by the Learned Judicial Magistrate, 5th Court at Alipore, District- South 24-Parganas under Section 138 of the Negotiable Instruments Act, 1881 (as amended upto date).

2. The appellant herein was a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, having one of its Branch Office and place of business at 51/D, Gariahat Road, Police Station – Gariahat, Calcutta – 700019, represented by its Manager, Retail Banking Boutique, viz. Tapas Kumar Das, who was an authorized representative of the said bank, well acquainted with the facts and circumstances of the instant cases.
3. The accused/respondent no. 1 filed an application to obtain housing loan on 9th March, 2004 from the appellant bank, which was sanctioned to the tune of Rs.11,90,000/- on 10th March, 2004, vide Loan Account No. LM40941 in favour of the accused/respondent no. 1.
4. In order to discharge of the liabilities arising out of the aforesaid loan, the respondent no. 1 issued four cheques, bearing No. 798129 dated 11th December, 2005, No. 798130 dated 11th January, 2006, No. 798131 dated 11th February, 2006, and No. 798132 dated 11th March, 2006, in favour of the appellant bank herein drawn on the Punjab & Sind Bank, having one of its Branch Office at Khalsa Model Senior School at 135, G.T. Road, Dunlop Bridge, Calcutta – 700108 for a sum of Rs. 11,200/-. On presentation of the

said cheques, the same were dishonoured by the accused's banker on 8th June, 2006 with an endorsement 'Fund Insufficient' and on 8th June, 2006, the appellant bank learnt the same.

5. On 17th June, 2006, the appellant bank issued a notice through its Learned Advocate under Section 138 of the Negotiable Instruments Act, 1881 by registered post with A/D at the office address as well as residential address of the accused person demanding to pay the said sum of Rs.11,200/- in lieu of the dishonoured cheque within a period of fifteen days from the date of receipt of the said notice.
6. On 29th June, 2006, the said notice dated 17th June, 2006 returned "undelivered" to the Learned Advocate of the appellant-bank with the postal endorsement "not claimed" and "N/C", which meant "good" service of notice and valid as per statue. The accused failed to comply the aforesaid notice to pay the said sum of Rs.11,200/- in lieu of the dishonoured cheque. Subsequently, the four abovementioned Complaint Cases had been filed against the accused person.
7. The cognizance of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (as amended upto-date) had been taken up by the concerned Learned Magistrate.
8. The accused person was thereafter released on bail by the Learned Trial Court.
9. On 4th December, 2008, the Learned Trial Court fixed the next date for show-cause, but nobody appeared before it at the time of call and, subsequently, the same matter was dismissed for default and thereafter, the

accused/respondent no.1 herein was discharged/acquitted from the said case.

10. Thereafter, the present appellant-bank wrongly approached in the Court of the Learned Sessions Judge at Alipore, District South 24-Parganas under the revisional jurisdiction for setting aside the order dated 4th December, 2008 passed by the Learned Judicial Magistrate, 5th Court at Alipore, District South 24- Parganas. However, on 28th January, 2009, the Court of the Learned Sessions Judge at Alipore, District South 24-Parganas dismissed the criminal revisional application on maintainability ground and also made an observation that no revision lies against the said order dated 27th October, 2008 and it was a case of Section 378(4) of the Code of Criminal Procedure, 1973.
11. In the month of April, 2009, the present appellant-bank filed four applications under Section 378 (4) of the Code of Criminal Procedure, 1973 before the Hon'ble High Court, Calcutta for obtaining Special Leave to Appeal in the instant cases, being CRM No.5482 of 2009, CRM No.5486 of 2009, CRM No. 5485 of 2009, CRM No. 5484 of 2009 and on 14th July, 2009, had granted the special leave to the present appellant-bank to file the instant appeals.
12. Heard submissions of Learned Advocates for both the parties.
13. The Learned Trial Court in C. Case No. 172 of 2006 passed the following orders:-

"14.08.2008 –

Accused is present.

On prayer of complainant, the case is adjourned.

Fix 04.12.2008 for S/C.”

“04.12.2008 –

Today is fixed for S/C.

The accused is present.

The complainant is absent.

Considering the past approach of the complainant, the case is liable to be dismissed.

Hence, it is

ORDERED

that the case be and the same is dismissed for default.

The accused is discharged.”

14. The Learned Trial Court in C. Case No. 174 of 2006 passed the following orders:-

“18.06.2008 –

Accused on bail is present.

It is 12:05 P.M.

Complainant takes no step.

Complainant is to show cause on 27.10.2008 as to why the case shall not be dismissed.”

27.10.2008 –

Today is fixed for showing cause by the complainant.

No show-cause has been filed.

Hence, it is

ORDERED

that the instant case be and the same is hereby dismissed for default.”

15. The Learned Trial Court in C. Case No. 175 of 2006 passed the following orders:-

“18.06.2008 –

Accused on bail is present.

It is 12:07 P.M.

Complainant takes no step.

Complainant is to show cause on 27.10.08 as to why the case shall not be dismissed”

27.10.2008 –

Today is fixed for filing show-cause by the complainant.

No show-cause has been filed.

Hence, it is

ORDERED

That the instant case be and the same is hereby dismissed for default.”

16. The Learned Trial Court in C. Case No. 173 of 2006 of passed the following orders:-

“14.08.2008 –

Accused is present.

On prayer of complainant, adjourn till 04.12.2008 for evidence.”

04.12.2008 –

Today is fixed for evidence.

The accused is present.

It is 11:40 A.M.

The complainant is absent.

Hence, it is

ORDERED

That the case be and the same is dismissed for default.

The accused is discharged.”

17. The Learned Trial Court had ordered the O.P. No.2 to have been discharged and the complaint cases were dismissed for default. The Trial Court committed an error in its order to have discharged the O.P. No.2 under Section 256 of the Code of Criminal Procedure. The said order of dismissal of the complaint operated as the acquittal of the accused.

18. 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.”

19. 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.”

20. In **S. Anand v. Vasumathi Chandrasekar**², the Hon’ble Supreme Court observed that:-

“12. Section 256 of the Code provides for disposal of a complaint in default. It entails in acquittal. But, the question which arises for consideration is as to whether the said provision could have been resorted to in the facts of the case as the witnesses on behalf of the complainant have already been examined.

13. The date was fixed for examining the defence witnesses. The appellant could have examined witnesses, if he wanted to do the same. In that case, the appearance of the complainant was not necessary. It was for her to cross-examine the witnesses examined on behalf of the defence.

15. Presence of the complainant or her lawyer would have been necessary, as indicated hereinbefore, only for the purpose of cross-

¹ (1998) 1 SCC 687

² (2008) 4 SCC 67

examination of the witnesses examined on behalf of the defence. If she did not intend to do so, she would do so at her peril but it cannot be said that her presence was absolutely necessary. Furthermore, when the prosecution has closed its case and the accused has been examined under Section 311 of the Code of Criminal Procedure, the court was required to pass a judgment on merit of the matter.”

21. In **James A.C. v. K.A. Sakthidharan and Another**³, the Hon’ble Supreme Court observed that:-

“10. It is far too well settled that the power of the Magistrate under Sec. 256 Cr. P.C. to acquit an accused should be exercised judicially, based on a definite conclusion that the complainant no longer desires to prosecute the complaint. The power is not to be indiscriminately exercised whimsically and mechanically for the statistical purposes of removing a docket from its rack as it undermines the cause of justice. Instead, the judicious course would be to direct the complaint to appear for the hearing, if it is imperative, and decide whether the drastic step of acquittal is to be passed in case he fails to appear.”

22. It further appears from the Lower Court record next date prior to the acquittal of the O.P. No.2 was fixed for recording of evidence.

23. The Learned Trial Court should have opted for stringent procedure to ensure the appearance of the parties before the Court rather than pass an order of acquittal under Section 256 of the Code of Criminal Procedure.

24. In view of the above discussions, the order of acquittal dated 4th December, 2008 in Complaint Case No. 172 of 2006, passed by the Learned Judicial Magistrate, 5th Court at Alipore, District – South 24-Parganas acquitting/discharging the accused person under Section 138 of the

³ 2023 SCC OnLine Ker 9030

Negotiable Instruments Act, 1881 (as amended upto date), and orders of acquittal dated 27th October, 2008 in Complaint Case No. 174 of 2006, Complaint Case No. 175 of 2006, passed by the Learned Judicial Magistrate, 5th Court at Alipore, District- South 24-Parganas under Section 138 of the Negotiable Instruments Act, 1881 (as amended upto date), and an order of acquittal dated 04th December, 2008 in Complaint Case No. 173 of 2006, passed by the Learned Judicial Magistrate, 5th Court at Alipore, District- South 24-Parganas under Section 138 of the Negotiable Instruments Act, 1881 (as amended upto date) are set aside.

25. Accordingly, C.R.A. 545 of 2009, C.R.A. 546 of 2009, C.R.A. 547 of 2009 and C.R.A. 548 of 2009 are disposed of.
26. There is no order as to costs.
27. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
28. 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.)