IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

CRA 285 of 2019
Shika Bhattacharjee
Vs.
Sanjib Das @ Bholau

For the Appellant	:	Mr. Subhanwita Ghosh
For the respondent	:	Mr. Vivek Kumar Tripathi
	:	Mr. Partha Pratim Mukhopadhyay
Heard on	:	25.03.2025
Judgment on	:	17.06.2025

Dr. Ajoy Kumar Mukherjee, J.

1. The instant appeal has arisen against judgment and order dated 19th November 2018 passed in complaint case no. 348C of 2015 by the learned judicial magistrate 6th court Howrah. The trial court by the said impugned judgement acquitted the accused in a proceeding under section 138 of the Negotiable Instrument Act (in short N.I Act).

2. The complainant/appellant herein had preferred a complaint before the trial court contending that the accused was milk man in the complainant's house. Due to urgent need of his business, the complainant and her husband gave Rs. 2,30,000/- to the accused on different occasion between June 2005 to December 2005 on the assurance of the accused that the same shall be returned within short span of time. The complainant's further case is that the said amount was given to the accused on good faith and she noted all the dates on which she had paid the amount to said accused in her daily note book, which has been marked as exhibit 9 in the present case.

3. In discharge of his existing legal debts and/or liability, the accused in the first week of 2007 issued two account payee post-dated cheques being no 055459 dated 21.12.2007 for Rs. 1,50,000/- which is marked exhibit-1 and another cheque being no. 055460 dated 8.2.2008 for Rs. 80,000/- which is marked as exhibit 2 in favour of the complaint. Thereafter the complainant deposited the said account payee cheques with her banker but both the cheques were dishonoured with the endorsement "account number closed" and said cheque return memo dated 14.02.2008 and 16.02.2008 are marked as exhibit 3 and 4. The complainant/appellant herein sent demand notice under registered post with A/D card on 10.03.2008 and it was received on behalf of the accused on 24.03.2008 and copy of said notice and postal acknowledgment are marked exhibit 5, 5/1, 5/2. The allegation of the complainant is that despite receipt of the legal notice, the accused failed to pay the amount within the stipulated period and as such above mentioned complaint case was initiated by the complainant on 30th April 2008. During the course of trial, complainant examined herself as PW-1 and her husband deposed as PW-3 and one dealing assistant of Kashundia Co. Operative Bank has deposed has P.W-2. The accused/respondent was examined under section 313 Cr.P.C, where his only plea is that he is innocent. However the accused did not adduce any evidence on his behalf.

4. By the impugned judgment and order dated 19.11.2018 the court below acquitted the accused person mainly on the following grounds:-

i) Demand notice was not properly addressed and served upon the addressee/Respondent since PW-1 also admitted that she does not know the persons who received the demand notice.

ii) Exhibit 9 (Note Book of the complainant) bears lot of overwritings which does not inspire confidence

iii) Exhibit 7 reflects that two different cheques were dishonoured earlier before issuance of instant cheques in question

iv) Bank account of the accused became inoperative since 31.03.2006 while the cheque was allegedly issued on 21.12.2007 and 08.02.2008.

v) P.W-2, who is one of the dealing assistant of the Bank has not filed any authorization certificate and as such his evidence cannot be taken into consideration

vi) The complainant stated that the accused was a milk man but she could not show any paper as to how she used to pay the cost of milk every month and it has not been explained how the complainant, who got married on 8.3.2005 had given loan to the accused within a span of 3 months

vii) The trial court disbelieved exhibit 9 on various grounds out of which one ground is that it is reflective from the Exercise Book that the accused was paid only Rs. 8/- for the cost of milk on

01.02.2005 but suddenly on and from 10.06.2005, the complainant started giving hefty amount to the accused

viii) The complainant could not deposit the income tax return or passbook showing that she had the available balance of Rs.2,30,000/- for giving said amount to the accused towards loan

5. Being aggrieved by the aforesaid judgment of acquittal, Ms. Ghosh, learned counsel appearing on behalf of the appellant argued that the court below failed to understand that the presumption under sections 118 and 139 of the N.I Act clearly attracts in the present case and the court below ought to have drawn the presumption that the cheques were issued for consideration and until contrary is proved, such presumption would remain. In the instant case except mere denial during cross examination of complainant's witness, nothing was brought on record by the accused to dislodge the proof adduced by the complainant/appellant.

6. He further argued that the allegation of not showing the transaction in question in the income tax return of the appellant concerned or not producing the tax return, does not in any way rebut the presumption of the existence of legally enforceable debt. He further contended that the court below has refused to accept the evidentiary value of the testimony of P.W.-2 in the absence of authorization letter, but it appears that the court below has passed the order of acquittal based on the documents and evidence adduced by PW 2. He further contended that the accused despite receipt of the legal notice, has intentionally chosen not to reply to the said legal notice which makes it abundantly clear that the accused from the very inception had no intention to clear his legally enforceable debt. He further contended that the accused has failed to bring on record any relevant material to rebut the presumption or to show that the preponderance of such probabilities are in favour of the accused. Infact the accused has miserably failed to raise any probable defence which may create doubt about the existence of a legally enforceable debt.

7. She further contended that the impugned order of acquittal of the accused /respondent is a product of non application of judicial mind and as such is liable to be set aside. The court below failed to appreciate and consider the evidence adduced by the complainant and her witnesses in its proper perspective and by acquitting the accused has committed grave error in law. The court while passed the impugned judgment did not consider the fact that the burden of proving non existence of legally enforceable debts always lies on the accused/respondent herein. Therefore, mere inability on the part of the complainant/appellant to produce any explicit loan document cannot discharge the accused/respondent from his liability to repay his debt, specially when complainant has proved the transaction through exhibit-9. Accordingly complainant/appellant has prayed for setting aside the order impugned and to convict the respondent and to award sentence against him.

8. Mr. Tripathi learned Counsel appearing on behalf of the respondent argued that the averments made in the complaint is the very foundation of the instant case, which states that the appellant/PW-1 and her husband/PW3 advanced the friendly loan to the accused opposite party but said PW-3/husband of complainant in his deposition during the cross examination clearly stated that the accused Sanjib Das @ Bholau is not his friend and thereby contradicted the case of the appellant. He further argued that service of demand notice at the correct address of the accused is sine qua non but in the instant case the notice under section 138 was not sent to the correct address of the accused person. The appellant in her deposition stated about her unawareness as to whether any notice under section 138 of N.I. Act was served upon the accused.

9. Mr. Tripathy further argued that the appellant/complainant did not have the financial capacity to advance the loan to the tune of Rs. 2,30,000/- as she herself in her deposition stated that she earns only Rs. 20,000/- per month. Therefore, the appellant did not show her capacity to give the said amount to the accused and therefore, the appellant failed to make out the existence of any legally enforceable debt which is quintessential for the initiation of proceeding under section 138 of N.I. Act. The appellant during her cross examination admitted that she does not know Ani Das in one hand and on the other hand in para 6 of the complaint she stated that the wife of the accused received the demand notice on 24.03.2018 and therefore, the appellant failed to prove who has received the demand notice. He further contended that the note book marked exhibit 9, allegedly written and maintained by the appellant but it was not produced by the appellant herself but by the husband of the appellant. In this context he further argued that relevancy of a hand written note book can arise only in cases of civil in nature but not in the criminal proceeding initiated under section 138 of the N.I. Act, where the complainant/ appellant has to discharge the burden to show the existence of legally enforceable debt which the complainant has failed to prove in the instant case, beyond reasonable doubt and in support of his argument he placed reliance upon ***M.D. Thomas Vs. P.S. Jalil and another*** reported in **(2009) 14 SCC 398** and ***Shibu Chakraborty Vs. Smt. Arati Podder and another*** reported in **1995 0 supreme Cal 330**

Decision

10. The record reveals that in the instant proceeding the complainant in support of the advancement of amount of Rs. 2,30,000/- to the accused has filed and proved the entry in the Exercise Book which is marked exhibit-9 in the present case. PW-1/complainant has also stated during cross examination that she does not maintain any balance sheet but she used to maintain khata (Exercise Book). The trial court while passed the judgment of acquittal disbelieved the entries in the said Exercise Book (marked exhibit-9) on the ground that PW-1 in her evidence stated that she cannot show any paper as to how she used to pay the cost of milk every month but surprisingly the husband of the complainant in his examination in chief has stated that complainant used to note down the amount giving as loan to the accused in her copy, which strikes the mind of the trial court and prompted him to disbelieve what is reflected in exhibit-9. He also failed to understand in this context as to why the complainant suddenly started giving loan of such huge amount to the accused, since the accused is neither the friend nor colleague of her husband and specially when the amount was allegedly advanced only three months after her marriage.

11. Needless to mention in this context that in the case of ***Kumar Exports Vs. Sharma Carpets*** reported in **(2009) 2 SCC 513,** the supreme

Court has made it clear that the accused in a trial under section 138 of the Act has two options. He can either show that consideration or debt did not exist or that under the particular circumstances of the case, the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. In such view of the matter when the complainant has stated in her evidence during cross examination that she does not maintain any balance sheet but she maintain khata (Exercise Book) and when no cross examination has been offered on that point by the accused and thereafter when PW3 who is the husband of the complainant, has deposed on behalf of the complainant and had filed and proved exhibit-9 i.e. the said Exercise Book, the accused had the only option to prove the non-existence of such consideration or debt and/ or to prove that under the particular circumstances of the case, the non-existence of the consideration and debt is so probable that a prudent man ought not to suppose that no consideration or debt existed.

12. Learned court below while passed the impugned judgment unnecessarily laid emphasis on certain irrelevant considerations without considering the fact that no challenge was offered regarding the entry or the hand writing note in the Exercise Book, marked exhibit 9, except raising objection at the time of marking said document as exhibit. However, accused did not make minimum effort to substantiate as to why he raised objection, while the said Exercise Book was admitted in evidence. Even while the accused was examined under section 313 Cr.P.C. he has only taken the plea of innocence and nothing further. In fact the court below failed to consider that the question is whether or not the amount given to the accused was stated in the note book and that no challenge was offered on behalf of the accused in noting the entry regarding the advancement of said amount to the accused and that her version has been supported by PW-3. Even it is not under challenge that the accused is a milk man by profession and he had a transaction of selling milk at the house of the complainant. There appears to be no challenge that the entries in exhibit-9 was not made on behalf of the complainant or that said entries are not reflected true state of affair. In such circumstances there is no reason why trial court laid much emphasis on over writing, if any, in the Exercise Book. This finding about not placing reliance upon exhibit-9 is perverse, specially when accused neither adduced evidence nor proved any document to rebut the presumption raised by the complainant, in compliance with section 139 of the N.I. Act. Even the plea taken by the accused by way of putting suggestion to PW-1 during cross examination that he used to visit husband of complainant for writing of letters and filling of forms regarding hire purchase of Maruti Car from City Corp. Finance, when some blank cheques of the accused was stolen by the husband of the complainant, remained not proved. Accused even failed to show that he had lodged any complaint anywhere alleging that the complainant's husband has stolen some blank cheques from his cheque books.

13. The trial court on the basis of some irrelevant considerations like non filing of income tax return by the complainant and the complainants alleged inability to show that she had the means to advance the said amount and that complainant herself had not proved the Exercise Book (marked exhibit 9) has just tried to create doubts about the authenticity of exhibit 9.

Needless to say that mere creation of doubt by the court below regarding the entry made in exhibit-9 is not sufficient to rebut the presumption as envisaged under section 138 of the N.I. Act. The trial court by mere creation of doubt about authenticity of exhibit-9 have proceeded on misplaced assumption that by mere denial made by the accused during cross examination of complainants witnesses or mere creation of doubt in the mind of court, accused has sufficiently rebutted the presumption. In this context the observation made by the supreme Court in ***Rohit bhai Jivan lal Patel Vs. The State of Gujarat*** reported in **(2019) 18 SCC 106,** two paragraphs can be profitable referred in order to come to a conclusion.

> ***"21.*** *On perusing the order of the trial court, it is noticed that the trial court proceeded to pass the order of acquittal on the mere ground of "creation of doubt". We are of the considered view that the trial court appears to have proceeded on a misplaced assumption that by mere denial or mere creation of doubt, the appellant had successfully rebutted the presumption as envisaged by Section 139 of the NI Act. In the scheme of the NI Act, mere creation of doubt is not sufficient.*
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> ***22.*** *The result of discussion in the foregoing paragraphs is that the major considerations on which the trial court chose to proceed clearly show its fundamental error of approach where, even after drawing the presumption, it had proceeded as if the complainant was to prove his case beyond reasonable doubt. Such being the fundamental flaw on the part of the trial court, the High Court cannot be said to have acted illegally or having exceeded its jurisdiction in reversing the judgment of acquittal. As noticed hereinabove, in the present matter, the High Court has conscientiously and carefully taken into consideration the views of the trial court and after examining the evidence on record as a whole, found that the findings of the trial court are vitiated by perversity. Hence, interference by the High Court was inevitable; rather had to be made for just and proper decision of the matter."*

14. In view of above it is clear that so far as the finding of the trial court regarding the non-existence of legally enforceable debt, is perverse and is not sustainable in the eye of law.

15. The other most important ground relied by the court below in support of acquittal is that demand notice which is a pre-condition for invoking a proceeding under section 138 (b), was sent in the address of ***'19/2, Baisnab***

Para lane P.O. & P.S. Shibpur, Dist:- Howrah'. But the accused does not reside at the address mentioned in the demand notice but he resides at ***'19, Baisnab Para Lane, P.O. & P.S. Shibpur, Dist-Howrah'*** as appearing in some of his documents. Complainant during her evidence has filed and proved the A/D card bearing signature of Ani Das dated 24.03.2008 marked exhibit 5/1 and also one certificate of posting mentioning address ***'19/2, Baisnab Para Lane*** which is marked exhibit-6. In the complaint the complainant has specifically stated that Ani Das is the wife of accused Sanjib das @ Bholau and the accused no where denied that the name of her wife is Ani Das. Even accused did not specifically denied that he does not reside in the address where the demand notice was sent. I have gone through the trial court record and it appears that accused filed Vokalatnama on 29.03.2010 where he mentioned his address as ***'19/2 Baisnab para lane, P.O. & P.S. Shibpur, Dist-Howrah'.*** It further appears that the same accused filed bail bond for attendance on 02.02.2013 wherein also he has mentioned his address as follows:-

> ***"Sanjib Das @ Bholau Son of Late of Biswanath Das 19/2 Baisnab Para Lane, P.O. & P.S. Shibpur, Dist-Howrah"***

Said bail bond was filed for attendance before officer in charge of police station or court.

16. Most importantly summon of the instant complaint case was sent in the same abovementioned address of 19/2 Baisnab Para Lane and it was received by Ani Das, who after putting her signature had written the word 'wife' within bracket in the back side of the summon. Needless to say, after receipt of such summon accused/respondent herein Sanjib Das @ Bholau appeared in the criminal proceeding and obtained bail. All the above-mentioned documents which are available in the record are self explanatory and there is no room to say by the accused or by the court below that demand notice was sent on a wrong address or it was never served upon the accused. In the above backdrop the finding of court below that complainant failed to establish that demand notice was served upon the accused, as it was sent in a wrong address, is clearly perverse and not based on the materials available in record. On the contrary knowing fully well that his account became inoperative on and from 31.03.2006, accused had issued the cheque in favour of the complainant which conduct and motive of the accused shows the *malafide* intention of the accused to cheat the complainant from the very inception.

17. In such view of the matter and on the basis of materials available in the case record and even keeping in mind the limited scope of High Courts interference in an appeal against acquittal, I have no other option but to say that the judgment impugned is illegal and affected by not only error of law but also error of fact and the view taken by the trial court is not a fairly possible view on the basis of materials available on record and thereby suffers from illegality and perversity.

18. In such view of the matter the Criminal Appel being **CRA 285 of 2019** is allowed. Accused **Sanjib Das @ Bholau** is accordingly convicted for committing offence punishable under section 138 of the N.I. Act and he is sentenced to pay fine of Rs. 4,50,000/- within a period of 60 days from the date of the order failing which the convict shall suffer simple imprisonment for 6 (six) months. If the fine amount is paid by the convict as above, the said amount would be given to the complainant by way of compensation. However, if the fine amount is not paid by the convict within the stipulated period, the Trial Court shall take all steps including issuance of warrant of arrest to ensure the attendance of convict before the court below to serve out the sentence as awarded by this Court.

19. Return the trial court record at once to the court wherefrom it was called for.

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.)