

(2005) 02 CAL CK 0017
In the Calcutta High Court
Case No : C.R.R. No. 746 of 2000

Dhrubajyoti Dutta

APPELLANT

Vs

The State of West Bengal and Another

RESPONDENT

Date of Decision : 10-02-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 242, 251, 313, 342, 464
Negotiable Instruments Act, 1881 (NI) — Section 138, 139
Penal Code, 1860 (IPC) — Section 149, 302, 326

Citation : (2006) 1 BC 24 : (2005) 2 CALLT 608 : 110 CWN 301

Hon'ble Judges : Pravendu Narayan Sinha, J

Bench : Single Bench

Advocate : Joymalya Bagchi and S. Banerjee, for the Appellant; S.S. Roy and C.R. Bakshi for the Opposite party No. 2, for the Respondent

Judgement

Pravendu Narayan Sinha, J.—This revisional application is directed against the judgment and order dated 8.2.200 passed by the learned Additional Sessions Judge, 4th Court, Alipore in Criminal Appeal No. 42 of 1999 thereby dismissing the appeal and affirming the judgment and order of conviction and sentence imposed on the petitioner by the learned Additional Chief Judicial Magistrate (in short ACJM), Alipore in T.R. No. 31/97.

2. The aforesaid T.R. No. 31/97 arose out of complaint case No. C-376 of 95 filed by the opposite party No. 2 as complainant against this petitioner u/s 138 of the Negotiable Instruments Act (in short N.I. Act). The facts of the case, in short, as disclosed in complaint is that the complainant company carries on business of manufacturing television sets from its registered office-cum-factory at 106, Narkeldanga Main Road, Calcutta - 54. The accused is proprietor of M/s. Record Mseum, Khagra, Berhampore and the accused used to take television sets from the complainant for business purpose. The accused issued one account payee cheque bearing No. 007979 dated 18.1.95 for Rs. 2,82,982.13 drawn on Bank of Baroda, Beliaghata Branch to the company of petitioner and the said cheque was handed over to complainant at his aforesaid address and accused signed in the

cheque as proprietor of Record Museum. The complainant presented the cheque to its banker Indian Bank, Manicktola Branch on 18.1.95 for encashment but the said cheque was dishonoured and returned with memo dated 19.1.95 bearing note "refer to drawer". Thereafter, the complainant sent demand notice through his lawyer dated 1.2.95 and the said notice was duly received by the accused on 15.2.95. In spite of receipt of the demand notice the accused did not pay the amount of the dishonoured cheque to the complainant, and hence, the complaint. It appears that the learned Magistrate issued process and after appearance of the accused completed the trial and held the accused petitioner guilty u/s 138 of the Negotiable Instruments Act. Learned Magistrate sentenced the accused petitioner to pay fine of Rs. 5,65,964/- in default to suffer simple imprisonment for three months. Challenging the order of conviction and sentence this petitioner as appellant preferred appeal being Criminal Appeal No. 42 of 1999- before the learned Sessions Judge, South 24-Parganas at Alipore and the said appeal was heard by the learned Additional Sessions Judge, 4th Court, Alipore. The learned Additional Sessions Judge by his judgment and order dated 8.2.2000 dismissed the appeal and affirmed the order of conviction and sentence passed by the learned ACJM.

3. Mr. Joymalya Bagchi, learned advocate for the petitioner contended that the learned Magistrate did not follow the legal procedure in the trial and did not examine the accused u/s 251 of Criminal Procedure Code properly. In the examination u/s 251 of Criminal Procedure Code the learned Magistrate did not state to the accused the cheque number and its date and also date of dishonour and date of demand notice. As particulars of alleged offence or substance of accusation was not explained to the accused properly he could not prepare his defence well and was prejudiced. The learned Additional Sessions Judge did not take notice that learned Magistrate did not examine accused u/s 251 of Criminal Procedure Code in accordance with law. Both the learned Magistrate as well as the learned Additional Sessions Judge jumbled up evidence and confused themselves in appreciating evidence. Examination of accused u/s 313 Criminal Procedure Code was not proper. Learned Sessions Judge placed much reliance on exts. 4 and 6 but did not notice that during examination u/s 313 Criminal Procedure Code no question was put to the accused relating to those documents and such documents cannot be used in the judgment to base conviction.

4. Mr. Bagchi contended that there was no averment in the complaint nor there was evidence that cheque was issued during business transaction or that the cheque was issued in the discharge of any enforceable debt or discharge of any existing liability either whole or in part. Presumption u/s 139 of the Negotiable Instruments Act can be drawn no doubt but, the presumption is rebuttable. In the instant case presumption u/s 139 of the Negotiable Instruments Act was rebutted through cross-examination. The learned Additional Sessions Judge made mistake by overruling that ext. 4 proves admission of debt and ext. 4 is not at all a relevant document to establish ingredients of offence u/s 138 of the Negotiable Instruments Act. The order of the learned Additional

Sessions Judge being not in accordance with law and illegal should be set aside. In support of his contention Mr. Bagchi cited the decisions namely Dilip Kr. Das and Anr. v. The State of West Bengal reported in 2000 C Cri LR (Cal) 460, Natendra Nath Giri v. State of West Bengal reported in 2001 C Cri LR (Cal) 32, Ashita Ranjan Bose v. Emperor reported in 29 Cri LJ 1928 Upendra Nath Paul v. Bankim Chatterjee reported in 48 Cri LJ 1947 Bala Seetharamaiah Vs. Perike S. Rao and Others, .

5. Mr. Bagchi further contended that the proceeding commenced in 1997 and more than seven years have lapsed in the meantime. A direction for retrial due to illegality committed by the Trial Court regarding non examination of accused u/s 251 of Criminal Procedure Code after such a long lapse of time would be travesty of justice. Order of retrial in such a case should not be with mandatory direction and if an order of retrial is made it would cause serious prejudice to the accused. In support of his contention he cited the decisions namely Jitendranath Bose v. State reported in 1991 Cr LJ 922. Balakrishna Pillai v. Matha Medicals reported in 1991 Cr LJ 691, Machander Vs. State of Hyderabad, , Municipal Committee v. Amritswar v. Labhu Ram reported in 1970 Cr LJ 553 and Bhaso Singh v. Emperor reported in 19 Cr LJ 77.

6. Mr. S.S. Roy, learned advocate for the complainant opposite party contended that the accused petitioner admitted his debt and the document in which the debt was acknowledged is ext. 4. From the evidence it transpired that during the course of business transaction the accused petitioner issued the cheque in question. The petitioner was not prejudiced at all due to non examination u/s 251 of Criminal Procedure Code properly. The accused faced the trial knowing well what were the allegations against him in respect of offence u/s 138 of the Negotiable Instruments Act and he cross-examined the prosecution witnesses and gave reply to the questions put to him in his examination u/s 313 of Criminal Procedure Code. In examination u/s 313 Criminal Procedure Code the petitioner stated about issue of bank cheques but, did not deny issue of cheque or acknowledgement of debt. In cross-examination it was well established that the petitioner issued the cheque and handed over the cheque to the complainant. The petitioner did not lend any evidence to rebut the presumption u/s 139 of the Negotiable Instruments Act. Learned Additional Sessions Judge made no mistake in Criminal Appeal No. 42/99 in appreciating oral and documentary evidence. The learned Trial Court also made no mistake in appreciating the evidence and considering evidence, circumstances and all other factors learned Trial Court rightly convicted the accused. The learned Sessions Judge discussed everything in the judgment and appreciated the evidence properly and rightly dismissed the appeal. There is no ground at all to interfere with the findings of the learned Courts below.

7. Mr. Roy further submitted that in one unreported decision being CRR No. 1580 of 2002 a learned single Judge of this Court on the point of non examination of accused u/s 251 of Criminal Procedure Code refused to acquit the accused and

set back the matter to the Trial Court to proceed against the petitioner from the stage of examination of accused u/s 251 of Criminal Procedure Code. In support of his contention regarding legal principles in connection with Sections 138 and 139 of the Negotiable Instruments Act Mr. Roy referred to the decisions in *Hiten P. Dalal v. Bratindranath Banerjee* reported in 2001 C Cri LR (SC) 554, *K.N. Beena v. Muniyappan* reported in 2002 C Cri LR (SC) 59 and *Goa Plast (P) Ltd. v. Chico Ursula D'souza* reported in 2004 C Cri LR(SC) 113.

8. I have perused the materials on record including evidence, the revisional application and duly considered the submissions made by the learned advocates to the parties. It is evident that in the trial of T.R. No. 31/97 the complainant examined four witnesses in all namely PW1 Mukesh Arora, complainant and director of M/s. Audio Waves Private Limited, PW2 Punam Chand Mahanot, the accounts manager of company of PW1, PW3 Pradeep Aich, Branch Manager of Manicktola Indian Bank and PW4 Aoy Kumar Basu, Branch Manager of Bank of Baroda, Beliaghata Branch. It further appears from the record of the Trial Court that in the said case six documents were admitted in evidence. Ext. 1 is the cheque No. 007979 dated 18.1.95, alleged to be given by the accused to the complainant. Ext. 2 is the copy of demand notice dated 1.2.95 sent by the complainant through his advocate to the accused asking him to make payment of the dishonoured cheque within seven days of receipt of notice. Ext. 3 to 3/3 are four blank cheques bearing signature of accused which were given to the complainant by the accused. Ext. 2(a) is the postal receipt showing despatch of demand notice by registered post, Ext. 2(b) is the postal acknowledgement card bearing signature of Subir Dutta, brother of accused who received the notice for this accused petitioner on 15.2.95. Ext. 4 is statement of account prepared in the office of complainant which bears endorsement and signature of this petitioner dated 14.6.94. Ext. 5 is the written return memo in respect of cheque No. 007979 issued by Bank of Baroda, Beliaghata Branch dated 19.1.95 with endorsement "refer to drawer". Ext. 6 is statement of account produced by Bank of Baroda, Beliaghata Branch in respect of current account standing in the name of M/s. Record Museum with the name of the petitioner as proprietor which shows that on 2.4.94 the petitioner had balance of Rs. 541.03. The accused petitioner produced in the trial one letter dated 16.9.93 written by complainant to him and it was marked as Ext. A.

9. I am not convinced with the submission of Mr. Bagchi that the petitioner was seriously prejudiced due to non examination of petitioner u/s 251 of Criminal Procedure Code properly as in this case the petitioner faced trial in the Court below and cross-examined the prosecution witnesses knowing fully well what were the allegations against him. In his examination u/s 313 of Criminal Procedure Code he took the defence that complainant obtained from him some blank cheques bearing his signature. Perhaps the petitioner wanted to indicate that one of such cheques was used in this matter after putting the amount and presenting the said cheque to bank. In the examination u/s 313 of Criminal Procedure Code the cheque number and date was mentioned to him and he was

also apprised of the fact of issuing demand notice and receipt of demand notice. In response to question regarding demand notice he only claimed innocence. PW2 stated that during the business transaction between complainant and accused, the accused gave four blank cheques and the said four blank cheques were given earlier than the dishonoured cheque. The said four blank cheques are exhibits 3 to 3/3. Section 464 of Criminal Procedure Code prescribes that no finding, sentence or order by a Court of competent jurisdiction shall be invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge, unless in the opinion of Court of appeal, confirmation or revision a failure of justice has in fact occasioned thereby.

10. The decision in Dilip Kr. Das (supra) cited by the learned advocate for petitioner is not properly applicable as in the said reported case there was defect in all respects namely, in examination u/s 251 of Criminal Procedure Code, in examination u/s 313 of Criminal Procedure Code and in failure of the learned Trial Court to appreciate the evidence including the defence evidence. The decision in Natendranath Giri (supra) is also not properly applicable in this case as in the reported case there was no examination under 251 of Criminal Procedure Code properly and, not only that, there were serious discrepancies in the evidence. In Ashita Ranjan Bose (supra) there was total failure to examine the accused u/s 242, Criminal Procedure Code of 1898 (corresponding to Section 251 of present Code) and for this reason it was held by a learned single Judge of this Court that failure to comply with Section 242 Criminal Procedure Code is a ground for setting aside trial. In Bala Seetharamaiah (supra) there was no charge at all u/s 302/149 of Indian Penal Code and ingredients of offence were not incorporated and the nature of offence was not mentioned and for this reason the Hon''ble Supreme Court observed that after such a long time it is not possible to reverse the conviction of accused u/s 326 of Indian Penal Code and substitute the conviction for offence u/s 302/149 of Indian Penal Code. In my opinion this decision is not at all applicable in the facts and circumstances of the present case. The decision in Upendranath Paul (supra) is also not applicable in this case as in the said reported case there was non compliance of provisions of Section 242 as well as Section 342 of Criminal Procedure Code, 1898 (corresponding to Sections 251 and 313 of Criminal Procedure Code, 1973.)

11. During examination u/s 251 of Criminal Procedure Code the accused petitioner was apprised of the offences u/s 138 of the Negotiable Instruments Act. It appears that only the cheque number and date of the cheque and demand notice were not stated to him. All the said defects were cured during examination of accused u/s 313 Criminal Procedure Code and in examination u/s 313 Criminal Procedure Code the cheque number with its date were mentioned to the accused. He was asked about dishonour of the cheque by his bank and was also asked to answer regarding demand notice to served by the complainant to him through his lawyer. In this case there was no prejudice to the accused at all and failure of examination u/s 251 of Criminal Procedure Code not properly is not a ground for setting aside the conviction. If on consideration of evidence it appears that there

was illegality and failure of the learned Judge to appreciate the evidence properly then only, question of prejudice, if any, would arise, otherwise not and, Section 464 of Criminal Procedure Code would be applicable in the instant case.

12. I am unable to accept another branch of submission of Mr. Bagchi that prosecution case was not established as neither in complaint nor in evidence it was disclosed that cheque was issued in the discharge of any enforceable debt or existing liability either whole or in part. In the petition of Complaint as well as in evidence of PW1 it was disclosed that the complainant carries on business of manufacturing television sets and the accused petitioner runs business under the name and style "M/s. Record Museum" and he used to take television sets from company of complainant and used to sale the said television sets. PW1 in his evidence clearly stated that his company had business transaction with the accused. Here presumption u/s 139 of the Negotiable Instruments Act would come in the aid of complainant and as there was no evidence of rebuttal, the presumption would go against the accused petitioner.

Section 139 of the Negotiable Instruments Act prescribes that the Court can presume that the cheque which has been dishonoured by the bank, was issued for the discharge, in whole or in part, of any debt or other liability. This presumption is undoubtedly rebuttable but, the petitioner while facing the trial as accused in the Trial Court did not adduce any evidence to rebut this presumption.

13. In this connection the decision in K.N. Beena (supra) and Hiten P. Dalal (supra) cited by the learned advocate for opposite party are quite apposite. The Supreme Court in Hiten P. Dalal (supra) clearly observed that, "The appellant's submission that the cheques were not drawn for the "discharge in whole or in part of any debt or other liability" is answered by the third presumption available to the bank u/s 139 of the Negotiable Instruments Act. . . . The effect of these presumption is to place the evidential burden on the appellant of proving that the cheque was not received by the bank towards the discharge of any liability. . . .The burden was on the appellant to disapprove the presumptions under Sections 138 and 139, a burden which he failed to discharge at all. The averment in the written statement of the appellant was not enough. Incidentally, the defence in the written statement that the four cheques were given for intended transactions was not the answer given by the appellant to the notice u/s 138. Then he had said that the cheques were given to assist the bank for restructuring (Ext. 11). It was necessary for the appellant at least to show on the basis of the acceptable evidence either that his explanation in the written statement was so probable that a prudent man ought to accept it or establish that the effect of the material brought on the record, in its totality, rendered the existence of the fact presumed, improbable. (Vide Trilok Chand Jain Vs. State of Delhi, . The appellant has done neither. In the absence of any such proof the presumptions under Sections 138 and 139 must prevail." The Hon"ble Supreme Court in K.N. Beena (supra) observed that, "Under Section 139 the Court has to presume, unless the contrary was proved that holder of the cheque received the

cheque for discharge, in whole or in part, of a debt or liability. ... The 1st respondent not having led any evidence could not be said to have discharged the burden cast on him. The 1st respondent not having discharged the burden of proving that the cheque was not issued for a debt or liability, the conviction as awarded by the Magistrate was correct."

14. PW1 in his evidence stated about business transaction and also stated that in connection of the business transaction the accused has given a cheque of Rs. 2,82,982.13 to him. The presumption u/s 138 as well as 139 of the Negotiable Instruments Act are in favour of the complainant opposite party. The accused petitioner did not lead any evidence to rebut the presumption and to establish that the cheque in question, which was dishonoured by his bank, was not given by him to the complainant in the discharge of any debt or existing liability. The learned Magistrate as well as the learned Judge rightly held that offence u/s 138 of the Negotiable Instruments Act was proved against the petitioner.

15. The next submission of Mr. Bagchi was that after so many years the matter should not be sent back on remand to the learned Magistrate for retrial starting from the stage of examination u/s 251 of Criminal Procedure Code. The decisions cited by him in this respect namely Jitendranath Bose (supra), Balakrishna Pillai (supra), Machander (supra), Municipal Committee, Amritswar (supra) and Bhaso Singh (supra) are not applicable in the instant case. Failure of the learned Magistrate to examine the accused petitioner u/s 251 of Criminal Procedure Code properly did not result into prejudice to him and it was not a ground to set aside the conviction. The defect, if any, was cured and removed in the trial and in examination u/s 313 of Criminal Procedure Code. In Upendranath Paul (supra) it was observed by this Court that non compliance of provisions of Section 242 of Criminal Procedure Code not have been serious if the learned Magistrate examined the accused in accordance with provisions of Section 342 of Criminal Procedure Code. In the instant case in examination u/s 251 of Criminal Procedure Code cheque number, its date, date of dishonour of the cheque and date of demand notice were not stated no doubt but, the accused faced the trial and cross-examined all the witnesses. In examination u/s 313 Criminal Procedure Code he was examined properly when the cheque number, date, fact of dishonour of the cheque as well as fact of sending demand notice by complainant through lawyer were put to him and the accused petitioner took the plea that he issued some blank cheques to the complainant. He wanted to indicate that the complainant converted one of such cheque by putting the amount and presented for encashment though he did not state in verbatim to that effect. He also took the defence that, if accounting is made he will get money from complainant. If the accused petitioner is entitled to get money from the complainant he can take necessary action in accordance with law but, that will not save him from his liability in the instant case. No question of sending back the case to learned Magistrate arises for retrial from the stage of examination u/s 251 of Criminal Procedure Code when the prosecution case has been convincingly proved.

16. Considering all aspects I find that the offence u/s 138 of the Negotiable Instruments Act was well established against this petitioner and evidence of PW1 was well corroborated by PW2 and PW4. PW1 clearly stated that the accused signed in the cheque in question in his presence at his office, and thereafter, handed over the cheque to him on 18.1.95. Receiving demand notice the accused sent a reply to him dated 27.2.95. PW2, the accounts manager of PW1 produced the blank cheques in Court (Ext. 3 series) which were given by this petitioner to the complainant. PW4, the Branch Manager of Beliaghata, Bank of Baroda stated that accused is their client and the cheque which came to their bank was dishonoured as there was no sufficient money in the account of accused. The above evidence as well as the presumptions under Sections 138 and 139 of the Negotiable Instruments Act and failure of accused petitioner to rebut the presumption and discharge the burden cast on him clearly proves that the petitioner is guilty for the offence u/s 138 of the Negotiable Instruments Act.

17. Without placing any reliance to Ext. 4 and Ext. 6 the prosecution has been able to prove its case beyond all reasonable doubts against the petitioner. Non mention of exhibits 4 and 6 to petitioner in his examination u/s 313 of Criminal Procedure Code is not fatal in this case as these two documents are not vital to establish elements of 138 of Negotiable Instruments Act. Even if Exts. 4 and 6 are not used in evidence, the prosecution case cannot be thrown out of Court. There is no ground at all to set aside the conviction. Accordingly, the conviction imposed on this accused petitioner by the learned Magistrate which has been affirmed by the learned Additional Sessions Judge is maintained.

18. I am of opinion that the sentence requires modification as the learned Magistrate blindly imposed amount of fine on the petitioner. It is true that punishment u/s 138 of the Negotiable Instruments Act prescribes that the person who issued the cheque which was dishonoured may be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both. This itself cannot be a ground to impose double of the cheque amount as fine. u/s 29(2) of Criminal Procedure Code a Magistrate of the first Class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding 5000/- rupees or of both. Negotiable Instruments Act is a Special Act no doubt but, it does not prescribe any special power to a learned Magistrate to impose fine beyond limits of his power as provided in Criminal Procedure Code. u/s 29(2) of the Code a Magistrate of the first Class cannot impose a fine exceeding 5000/- rupees. ACJM is a Magistrate of first Class and accordingly learned Trial Court could not have imposed fine on this petitioner exceeding 5000/- rupees. The learned Magistrate as well as the learned Judge who heard the appeal were oblivious of the powers of a Magistrate of first class to impose fine according to provisions of Criminal Procedure Code. In *K. Bhaskaran v. Sankaran Vaidhyan Balan and Anr.* reported in (1997)7 SCC 510 the Supreme Court observed that a Magistrate can award any sum as compensation. Of course, while fixing the quantum of such compensation the Magistrate has to consider what would be the

reasonable amount of compensation payable to the complainant. In the instant case, the learned Magistrate without considering anything simply imposed fine which was the amount twice the amount of dishonoured cheque. It is true that the complainant has suffered some loss particularly the interest as he did not receive the amount of cheque in time. Similarly, failure of the accused to obey or honour the amount of dishonoured cheque should not be a burden on him so as to pay heavy amount to complainant as compensation. Considering that the amount of cheque was Rs. 2,82,982.35 and considering the period spent in the meantime, I am of opinion that, it would meet the ends of justice, if the petitioner is directed to pay a sum of Rs. 3,50,000/- out of which Rs. 5000/- shall be fine and Rs. 3,45,000/- shall be compensation which would be paid to the opposite party complainant.

19. In view of the aforesaid discussion the conviction imposed on the petitioner u/s 138 of Negotiable Instruments Act is maintained/affirmed but, the sentence awarded by the learned Magistrate and affirmed by the learned Additional Sessions Judge is modified and the accused petitioner is sentenced to pay fine of Rs. 5000/- in default to suffer simple imprisonment for three months and to pay Rs. 3,45,000/- as compensation which is payable to complainant. The petitioner is directed to deposit the amount of fine and compensation in the Trial Court within one month from this date. After the aforesaid amount is deposited by the petitioner in the Trial Court learned Magistrate will pass necessary order regarding payment of Rs. 3,45,000/- to the complainant as compensation. The revisional application stands disposed of in the light of the observations made above.

Send down the lower Court records along with copy of orders to the learned Additional Sessions Judge, 4th Court, Alipore and learned ACJM, Alipore for information and necessary action.

Urgent xerox certified copy be given to the parties, if applied for, expeditiously.