(2011) 06 CAL CK 0002

Calcutta High Court

Case No: Criminal R.R. No. 1103 of 2005

Debobrata Poddar		APPELLANT
	Vs	
State of West Bengal and anothers		RESPONDENT

Date of Decision: June 23, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313, 395, 397, 401
- Evidence Act, 1872 - Section 114
- General Clauses Act, 1897 - Section 27
- Negotiable Instruments Act, 1881 (NI) - Section 138, 139, 142

Citation: (2012) 1 CivCC 48 : (2011) 4 RCR(Civil) 849 : (2011) 4 RCR(Civil) 849 : (2011) 4 RCR(Criminal) 765

Hon'ble Judges: Ashim Kumar Roy, J

Bench: Single Bench

Advocate: Dipankar Dhar, for the Appellant; Pratik Bhattacharyya, for the Respondent

Final Decision: Allowed

Judgement

Ashmin Kumar Roy, J.

This criminal revision is directed against an order passed by the learned Metropolitan Magistrate, 11th Court, Calcutta convicting the petitioner u/s 138 of the Negotiable Instruments Act and sentencing him thereunder to suffer simple imprisonment for six months and to pay a sum of Rs. 50,000/- as compensation to the opposite party no. 2 and then affirmed by the appellate Court.

2. The case against the petitioner in a nutshell is as follows;

The petitioner from time to time during the period 1996/1997 obtained supply of different quantity of papers from the complainant on credit and on that count a sum of Rs. 3 7,226/-became due and payable. The petitioner thereafter on discharge of

the said liabilities issued a cheque drawn on Baranagar Co-operative Bank Limited, Cossipore Branch for Rs. 28,369/- in favour of the complainant. The complainant having received the said cheque presented the same to the banker on which the same was drawn for its encashment through his banker. However, the said cheque was returned unpaid with the remarks "stop payment". The complainant having received the intimation about the dishonour of cheque on the instruction of the petitioner to stop payment, issued a demand notice in terms of sub-section (b) of Section 138 of the N.I. Act. However, the said demand notice was returned to the complainant with the postal remarks "refused". The opposite party after expiry of 15 days and within a period of 30 days made a complaint in Court. During the trial the complainant examined as many as three witnesses in support of its case but the defence examined none.

3. This criminal revision is arising out of an appellate order confirming the order of conviction and sentence passed against the petitioner by the Trial Court. It is well settled the scope of High Court in interfering with such an order in exercise of its revisional jurisdiction u/s 401 of the Code is very limited.

Now, before adverting to the rival submissions of the parties it would be appropriate to refer the observations of the Hon''ble Supreme Court in this regard. In the case of State of Kerala v. Puttu Mana Illath Jathabedan Namoodiri, reported in 1999 (1) R.C.R. (Criminal) 808 SC: 1999 SCC (Cri) 275, the Apex Court observed as follows;

In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice.

Similarly, in the case of State of Maharashtra v. Jagdip Singh Kuldip Singh & Ors., reported in 2004 SCC (Cri) 203, the Hon''ble Apex Court further held as follows;

Section 401 Cr.p.c. is a provision enabling the High Court to exercise all powers of an appellate court, if necessary, in aid of power superintendence or supervision as a part of power of revision conferred on the High Court or the Sessions Court. It is for that purpose, as set out in Section 397, if necessary the High Court or the Sessions Court can exercise all appellate powers. Section 401 Cr.p.c. conferred powers of an appellate court on the revisional court with the above limitations. The provisions

contained in Section 395 to Section 401 Cr.p.c. read together do not indicate that the revisional power of the High Court can be exercised as a second appellate power. The High Court is required to exercise self-restrained u/s 397.

4. On the face of the ratio of the aforesaid two decisions, there is no controversy that unless the decision of the Trial Court as well as the Appellate Court suffers from manifest illegality resulting in miscarriage of justice and unless the findings are perverse and suffers from non- consideration of material evidence or unless the findings are vitiated due to error of jurisdiction it would not at all be permitted for the High Court to interfere with such an order. It is also not permissible for the High Court to re-appreciate the evidence and come to its own conclusion, on the selfsame evidence which has already been appreciated by the Trial Court as well as by the Appellate Court. It would also not be proper for the High Court in exercise of its revisional jurisdiction to embark upon roving and fishing enquiry and on an in-depth re-examination of the evidence, coming to a conclusion contrary to the concurrent findings of the two Courts below.

5. The main thrust of argument of the learned Counsel of the petitioner are as follows;

(a) No criminal case relating to the offence punishable u/s 138 of the Negotiable Instruments Act can be instituted on a complaint made to the Court by a power of attorney holder.

(b) In a case relating to the offence punishable u/s 138 of the Negotiable Instruments Act where one of the allegation is the accused/drawer refused to accept the postal notice sent by registered post, without the postal peon, who tendered such notice being examined during the trial, the factum of refusal of notice cannot be taken into consideration by a Trial Court.

(c) The endorsement of "refused" on the envelope has no evidentiary value unless the postal peon, who made such endorsement is examined in Court.

(d) The whole object of examination of an accused u/s 313 of the Code is to en-able the accused to explain the incriminating circumstances appearing in the evidence against him and which the Court is going to rely against him. In the case at hand, the questions put to the petitioner in his examination u/s 313 of the Code were not properly framed.

(e) In order to establish a charge against any person relating to the offence punishable u/s 138 of the Negotiable Instruments Act, it is essential that complaint must prove that the cheque in question allegedly dishonoured was issued in discharge of legally enforceable debt.

(f) Mere admission of handwriting and signature in cheque would not lead to a presumption u/s 139 of the N.I. Act that the cheque was received by the payee for the discharge of any debt or other liability.

(g) The demand notice issued u/s 138 (b) of the N.I. Act is not in accordance with law.

(h) Mere issuance of demand notice does not give rise to cause of action for instituting a prosecution u/s 138 of the Negotiable Instruments Act and only when after receipt of the notice, the drawer of the cheque refused to make payment then only the cause of action arises.

(i) In this case the accused never received the demand notice, therefore, the question of nonpayment of the cheque amount within the stipulated period does not at all arise and thus no cause of action for his prosecution u/s 138 of the Negotiable Instruments Act arose for non-payment of the cheque amount.

(j) The trial Court was lacking of territorial jurisdiction to try the offence.

(k) Awarding of compensation was not in accordance with law.

In support of his contentions the learned Counsel for the petitioner relied as many as on 46 case laws.

(a) On the point of probative value of the evidence of a power of attorney holder total cases were referred, viz., Mr. Roy Joseph Creado, Mr. Anil Parshuram Sawant and Mr. Yogesh Jayantilal Mehata Vs. Sk. Tamisuddin, a Special Power of Attorney of deceased Smt. Sairabee, Mr. K.N. Tungar, IVth Additional Sessions Judge and State of Maharashtra, G.J. Packaging Private Ltd. and Another Vs. S.S. Sales and Another, , Ram Prasad Vs. Hari Narain and Others, reported in 2005 (1) R.C.R. (Civil) 240 SC : 2005 (1) (Suppl) CHN 175 (SC), Syed Abdul Khader Vs. Rami Reddy and Others, , Prasanta Kumar Basu v. Narendra Kumar Anchalia & Anr, reported in AIR 2007 (NOC) 2029 (Cal), Ranjitha Balasubramanian & Anr. v. Shanthi Group & Ors., reported in 2007(5) R.C.R.(Criminal) 861 KARNATAKA : 2007 (2) NIJ 273(Karn): AIR 2007 (NOC) 944 (Karn),, Smt Gurbir Bedi v. Ajay Singh Deol, reported in AIR 2007 (DOC) 200 (M.P.), Maharaja Developers & Anr. v. Udaysingh Pratapsinghrao Bhonsle & Anr., reported in 2007 (4) R.C.R.(Criminal) 1007 BOMBAY: 2007 Cri LJ (Bom) 2207, Dr. Rajan Sanatkumar Joshi Vs. Rajnikant Govindlal Shah and Another,

(b) On the point of examination of the accused u/s 313 of the Code, five cases were referred, viz., Parsuram Pandey and Others Vs. The State of Bihar, Mongol Ram Singh & Anr. v. State of W.B., reported in 2005 (1) CHN 421 (Cal), Kailash Chandra Pandey v. State of W.B. & Anr., 2003 C Cr LR (Cal) 466, Ashok Kapri v. Iswar Chandra Jana & Anr., reported in 2007 (3) R.C.R. (Criminal) 185 SC: 2007 (3) Recent Apex Judgments (R.A.J.) 177 SC: 2003 C Cr LR (Cal) 267, Subhas Chandra Kamilya@Kamila v. S.C. Mukhopadhyay & Anr., reported in 2003 C.Cr.L.R. (Cal) 727.

(c) On the point of service of notice as many as 11 cases were referred, viz., Gobindra Chandra Saha v. Dwarka Nath Palit, reported in 19 CWN 489, Saibalini Saha v. Snehalata Bose, reported in 65 CWN 690, Smt Munni Devi v. Smt Puspalata Mondal & Anr., reported in 71 CWN 282, D. Vinod Shivappa Vs. Nanda Belliappa, Ra-mesh Chand v. Ravinder Singh Chandel, reported in AIR 2007 (NOC) 2035 (H.P.),

Gangadhar v. Raghunathasa, reported in AIR 2008 (NOC) 699 (Kar), Mohammed Faroque Shahdat v. Mrs. Kantaben G. Savalia & Ors., reported in AIR 2007 (NOC) 2408 (Bom) : 2008 (1) NIJ 515 (Born),, P. Jithendranadh v. M/s. Walson Laboratories & Ors., reported in AIR 2007 (DOC) 131 (Ker), Mohan Meakin Ltd. v. M/s. R. Jagavtar & Comp., reported in AIR 2008 (NOC) 431 (H.P.), Ramesh Chand Vs. Ravinder Singh Chandel,), Bhavani Auto Distributors Vs. K. Muraleedharan,

(d) On the point of legally enforceable debt four cases were referred, viz., Sri Murugan Financiers Vs. P.V. Perumal, , Manishbhai Bharatbhai Shah v. State of Gujarat & Ors., reported in AIR 2007 (NOC) 1571 (Guj), LMJ International Limited Vs. State of Karnataka and Shylaja Coffee Curing Works, Exports India & Anr. v. State & Anr., reported in 2007 (4) R.C.R. (Criminal) 300 DELHI: AIR 2007 (DOC) 269 (Del).

(e) On the point of awarding of compensation four cases were referred, viz., Mangilal v. State of Madhya Pradesh, reported in 2004 (1) R.C.R.(Criminal) 791 SC: 2004 (2) AC 394 SC: 2004 C Cr.L.R. 188 (SC), Krishan Gupta & Anr. v. State of West Bengal & Anr., reported in AIR 2007 (NOC) 2021 (Cal.), Rajendra B. Choudhari v. State of Maharashtra & Anr., reported in 2007 (2) R.C.R. (Criminal) 16 Bom : AIR 2007 (NOC) 418 (Bom.), Krishan Gupta and Another Vs. State of West Bengal and Another,

(f) On the point of presumption u/s 139 of the N. I. Act, six cases were referred, viz., M/s. General Auto Sales Vs. Vijalakshmi D., , G. Gopan v. Tonny Varghese & Anr., reported in 2008 (2) R.C.R. (Civil) 271 Kerala : 2008 Cri.L.J. (NOC) 409 (Ker.), V.K. Gemini v. Chandran & Anr., reported in AIR 2007 (NOC) 2036 (Ker.), P.N. Gopinathan v. Sivadasan Kunju & Anr., reported in AIR 2007 (NOC) 2022 (Ker.), Kamalammal Vs. Mohanan,

(g) On the point of validity of notice, three cases were referred, viz., Haryana State Small Industries v. Laxmi Agro Industries, reported in 2006 (4) R.C.R. (Criminal) 999:2006 (4) R.C.R. (Civil) 905: AIR 2007 (DOC) 111 (P & H), Nirmalchand Kothari v. Anil Gaurkhede, reported in AIR 2008 1511 (NOC) (Chh.), Bank of Baroda Vs. Philip Thomas,

(h) On the point of territorial jurisdiction, one case was referred, viz., Ahuja Nandkishore Dongre v. State of Maharashtra & Anr., reported in 2007 (2) R.C.R. (Criminal) 775 Bom: AIR 2007 (NOC) 95 (Bom.).

(i) And finally on the scope of revision u/s 401 Cr.P.C. two cases were referred, viz., Jagtamba Devi v. Hem Ram & Ors., reported in 2008 (1) R. C.R. (Criminal) 965 SC : 2008 (1) R.AJ. 579 SC : 2008 Cri L. J. 1623 (SC), Johar and Others Vs. Mangal Prasad and Another, .

On the other hand, the learned Counsel appearing on behalf of the opposite party no. 2 supports the Judgements of the Courts below and submitted the Judgements are well-considered and well-reasoned and the petitioner has not been able to make out any case to call for interference with the same.

6. I have given my anxious and thoughtful consideration to the rival submissions of the parties.

As stated hereinabove the learned Counsel of the petitioner in his wisdom relied on as many as on 46 cases. It appears most of the cases are on the same point and are not relevant for proper adjudication of this criminal revision and accordingly I do not propose to deal with ail the case laws cited by him unless the same is necessary.

7. So far as the first contention of the learned Advocate of the petitioner that the power of attorney holder is not legally competent to initiate a criminal proceeding relating to the offence punishable u/s 138 of the N.I. Act on 10 behalf of the payee, the principal is without any force. In this connection it would be sufficient to refer the decision of the Hon''ble Supreme Court in the case of M/s. Shankar Finance & Investments v. State of Andhra Pradesh & Ors., reported in 2008 (3) R.C.R. (Criminal) 885 SC : 2008 (4) R.A.J. 630 SC: AIR 2009 SC 422, where it has been categorically held by the Apex Court that once the complaint is in the name of the "payee" and is in writing, the requirements of Section 142 of the N.I. Act are fulfilled. Who should represent the payee, where the payee is a company, or how the payee should be represented where payee is a sole proprietary concern, is not a matter that is governed by Section 142 of the N.I. Act, but by the general law. It was further held the assumption that where the payee is a proprietary concern the complaint can be signed only by the proprietor of the proprietary concern and not by a power of attorney holder of the proprietor, is, therefore, not sound. The Apex Court also held there is nothing irregular in the fact the sole statement made before the Magistrate was of the power of attorney holder of the payee and not by the payee in person.
8. The Second contention of the learned Counsel of the petitioner the factum of refusal of notice by the drawer cannot be admitted into evidence on the basis of endorsement on the envelope "refused" without examining the postal peon is equally unsound and without any force.

It is well-settled that refusal to accept a notice amounts to good service. Furthermore, according to the provisions of Section 27 of the General Clauses Act, 1897 once notice is sent to the addressee at his correct address by a registered post it shall be deemed the service has been properly effected upon the addressee unless contrary is proved. Therefore, once it is proved that the notice was sent to the addressee at his correct address by registered post and same was returned with the postal endorsement "refused" then in that case burden to show that it was not really refused by the addressee and the sender of the notice had managed to get an incorrect postal endorsement without the notice being actually taken to him, is on the accused drawer. On perusal of the evidence on record, I find that in the trial neither the sending of the notice to the correct address nor the factum of refusal was challenged by the accused/petitioner. I have also gone through the returned envelope which is a part of the record and find that the notice was sent by registered post with acknowledgement due to the same ad-dress of the

accused/petitioner which is mentioned as his address in this criminal revisional application.

In the case of C.C. Alavi Haji v. Palapetty Mohammed & Anr., reported in 2007 (3) R.C.R. (Criminal) 185 SC: 2007 (3) RAJ 177 SC: (2007) 3 SCC (Cri) 236, the Apex Court held as follows;

A person who does not pay within 15 days of receipt of summons from the Court along with the copy of the complaint u/s 138 of the Act, cannot obviously contend that there was no proper service of notice as required u/s 138, by ignoring statutory presumption to the contrary u/s 27 of the G.C. Act and Section 114 of the Evidence Act.

9. It is true in order to hold any person guilty for an offence punishable u/s 138 of the Negotiable Instruments Act, it is always necessary to prove that the dishonoured cheque was issued for discharge of some legally enforceable debt or liability. However, at the same time it cannot be overlooked that according to the provisions of Section 139 of the N.I. Act, the Court shall presume the payee received such cheque from the drawer in discharge of a legally enforceable debt and liability. In this case various documents exhibited during the trial by the complainant and from his evidence, I am of the opinion that both the Courts below have very rightly concluded that the "dishonoured cheque" was issued in discharge of legally enforceable debt by the accused/petitioner and in addition to that presumption raised u/s 139 of the N.I. Act has never been discharged by the accused/petitioner in accordance with law.

10. So far as the contention of the learned Advocate of the petitioner that mere issuance of notice does not give rise to cause of action for instituting a prosecution u/s 138 of the Negotiable Instruments Act and only upon receipt of the notice when no payment is made within 15 days thereafter the cause of action arises. I do not find any fault in such submissions and that is the correct position of law. However, in this case admittedly the accused not only refused to accept the notice and even after the receipt of summons from the Court he also made no payment to the accused, therefore in view of the observations of the Hon''ble Supreme Court in the case of C.C. Alavi Haji v. Palapetty Mohammed and Anr. (supra) such stand is not available to the defence,

11. I have gone through the examination of the accused u/s 313 of the Code of Criminal Procedure, I do not find any wrong therein. I am also satisfied all incriminating circumstances on which the Trial Court relied upon against the petitioner to record his conviction have been put to him during his examination u/s 313 of the Cr.P.C. and he was given sufficient opportunity to explain the same.

12. For the reason stated above, the order of conviction of the petitioner u/s 138 of the Negotiable Instruments Act and subsequently affirmed by the Appellate Court does not deserve any interference and is upheld.

13. Now, coming to the question of sentence, I am of the opinion it would be sufficient if the order of sentence of simple imprisonment of six months is reduced to simple imprisonment for two months. Thus the order of sentence of six months passed by the Trial Court and affirmed by the Appellate Court is reduced to a sentence of simple imprisonment for two months.

14. Now, coming to the question of compensation, I find that before awarding compensation the accused was not heard on that point and accordingly the order of payment of compensation is set aside,

15. In the result although the order of conviction is sustained and the sentence of simple imprisonment for six months is reduced to simple imprisonment for two months, the case is now remitted back to the Trial Court for deciding the question of compensation in accordance with law as laid down by the Hon''ble Supreme Court in the case of Mongilal v. State of Madhya Pradesh, reported in 2004 C Cr LR (SC) 188.

16. It goes without saying that this Court has not gone into the merit as regards to the question of compensation and the decision of the Trial Court shall be limited only on the question of quantum of compensation. The petitioner is directed to appear before the Trial Court within three weeks with a prior notice to the opposite party no. 2 and be served upon him at least three in advance. It is further directed the Trial Court must decide the point at once and if not on the same day when the parties shall appear before it positively by the next day. In the event the accused/petitioner failed to appear before the Trial Court for a decision on the point of quantum of compensation within the period stipulated hereinabove and in the manner as aforesaid, the Trial Court shall have the liberty to at once issue non-bailable warrant of arrest to ensure the presence of the accused/petitioner before it for a decision on that point.

The Office is directed to communicate this order to the Court below and to send down the Lower Court Records positively by coming Wednesday.

This criminal revision is allowed in part with the aforesaid observations and accordingly all interim order stands vacated.

The urgent Photostat certified copy of this Judgement be given to the parties, if applied for, within two days from the date of making such application.