

(2005) 12 CAL CK 0002

Calcutta High Court

Case No: C.R.R. No. 175 of 2005 with C.R.A.N. No. 598 of 2005

Samarendra Nath Das

APPELLANT

Vs

Supriyo Maitra

RESPONDENT

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**Date of Decision:** Dec. 16, 2005**Acts Referred:**

- Bengal Money Lenders Act, 1940 - Section 13, 24, 26, 27, 30
- Contract Act, 1872 - Section 23, 24
- Criminal Procedure Code, 1973 (CrPC) - Section 200, 313
- Negotiable Instruments Act, 1881 (NI) - Section 138, 138

**Citation:** (2006) 3 CHN 518**Hon'ble Judges:** P.N. Sinha, J**Bench:** Single Bench**Advocate:** Sudipto Moitra and Joymalya Bagchi, for the Appellant; Subodh Chandra Ukil, Chander Kumar Ghosal and Indranil Basu, for the Respondent**Final Decision:** Allowed

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**Judgement**

P.N. Sinha, J.

This revisional application is directed against the order dated 18.7.03 passed by the learned Chief Judicial Magistrate (in short C JM), Alipore taking cognizance of offence on the basis of complaint filed by the opposite party (in short O.P.) and the orders dated 14.8.03 and 20.11.04 passed by the learned Judicial Magistrate, 1<sup>st</sup> Court, Alipore issuing process against the petitioner and rejecting the prayer of the petitioner for discharging him in connection with Complaint Case No. C-1808/03 respectively. When the petitioner moved this revisional application in this Court he obtained an interim order of stay of further proceeding of the said complaint case by an order dated 14.1.05. The de facto complainant O.P. has filed one application being C.R.A.N. No. 598/05 praying for vacating the interim order dated 14.1.05 passed by this Court. I intend to dispose of both the revisional applications being

C.R.R No. 175/05 and application being C.R. A.N. No. 598/05 by this common judgment and order.

2. Mr. Subodh Ukil, learned Senior Advocate appearing for the petitioner of the revisional application submitted that the cheque in question bearing No. 143476 drawn on State Bank of India, Taratola Branch was handed over to one Kamal Prasad Basu, along with letter heads which he promised to retain only as security and he had transaction with Kamal Prasad Basu for loan. The said cheque though was signed by the petitioner was blank in respect of amount of the cheque and was undated. When the petitioner demanded return of the signed blank cheque and letter heads said Kamal Prasad Basu did not return the cheque and the blank letter heads. The petitioner, thereafter, informed the matter to the Officer-in-Charge, Beniapukur P.S. through written complaint dated 29.6.01 explaining the conduct of said Kamal Prasad Basu and also the fact of non-return of the signed blank cheque and letter heads by Kamal Prasad Basu to him. There was no money lending or business transaction between petitioner and the O.P. complainant. The petitioner now apprehends that as he lodged the complaint against Kamal Prasad Basu, the said person handed over the cheque to the complainant who on the strength of such cheque inserted inflated amount of Rs. 7,47,500/-only to harass him.

3. To the utter shock of petitioner he received the letter dated 18th June, 2003 from the complainant Samarendra Nath Das who is a third party in the form of a demand notice u/s 138B of the Negotiable Instruments Act (in short NI Act), 1881 as amended. Samarendra Nath Das was not at all known to the petitioner and not even by face nor, there was any transaction of any type with the Samarendra Nath Das including any financial transaction. The petitioner gave a reply by letter dated 9.7.03 against the demand notice sent by Samarendra Nath Das where he disclosed the entire fact and mentioned that the said cheque was handed over to Kamal Prasad Basu which was blank relating to amount and date and also that there was never any type of transaction with him. The said Samarendra Nath Das thereafter lodged the complaint against him u/s 138 of the NI Act. It is totally a false case that has been instituted against him. As a false case has been lodged against him he filed an application before the learned Magistrate for discharging him but the learned Magistrate without considering all aspects and the materials-on-record dismissed his application. The said order was bad in law and a product of non-application of the mind of the learned Magistrate and it should be set aside.

4. Per contra, Mr. Sudipto Moitra, learned Advocate appearing for the complainant O.P. submitted that this is a proceeding u/s 138 of the NI Act. The complainant gave a sum of Rs. 5,00,000/- to the accused petitioner for business purpose and the petitioner agreed to pay interest @18% p.a. until realisation. On 29.5.03 the accused handed over a cheque of Rs. 7,47,500/- in favour of the complainant drawn on State Bank of India, Taratola Branch and the complainant presented the said cheque to his banker Corporation Bank, Rash Behari Avenue on 11.6.03. The said cheque was

dishonoured on 12.6.03 with endorsement "A/c closed" with memo dated 12.6.03. The complainant then sent demand notice u/s 138 of the NI Act to the accused petitioner by registered post with A/D and Anr. notice under certificate of posting asking him to make payment of the amount of cheque within 15 days from the date of receipt of the notice. The accused petitioner received the notice on 19.6.03 and in spite of that the accused petitioner did not pay the amount of cheque to the complainant. Thereafter, within time the complainant lodged the complaint and the said complaint is perfectly maintainable in view of the provisions of Section 138 of the NI Act. The story introduced by the accused person is not believable, and moreover, the said story cannot be considered at this stage when recording of evidence is pending. The accused petitioner at the time of his evidence or at the time of rebutting the presumption under Section 139 of the NI Act would be at liberty to adduce sufficient evidence to make out his case that he did not handover the cheque to complainant and that he handed over one signed but blank undated cheque to one Kamal Prasad Basu. The contentions raised by the accused petitioner are not at all acceptable at this stage and the learned Magistrate rightly rejected the petition of accused petitioner.

5. After hearing the submissions of the learned Advocates of the parties and going through the revisional application and materials-on-record I am unable to accept the submissions made by Mr. Ukil for the petitioner. This is a complaint case u/s 138 of the NI Act. The complaint has been annexed with the revisional application as annexure P-4. It reveals that the complainant being a businessman gave a sum of Rs. 5,00,000/- to accused for his business who agreed to repay the said amount with interest at the rate of 18% p.a. till payment. The accused petitioner received the said amount at 56/1A, Suhasini Ganguly Sarani within P.S. Kalighat on 29.8.2000. On 29.5.03 the accused petitioner gave a cheque of Rs. 7,47,500/- to the complainant drawn on State Bank of India, Taratola Branch and the complainant presented the said cheque to his bank on 11.6.03. The said cheque was dishonoured on 12.6.03 with an endorsement "A/c closed" with bankers memo dated 12.6.03. The complainant thereafter sent demand notice in view of provisions of Section 138 of the NI Act on 18.6.03 by registered post with A/D and under certificate of posting and the petitioner received the demand notice on 19.6.03. It is evident that the petitioner sent a reply to the complainant on 9.7.03 and totally denied the fact of taking loan from complainant and issuing cheque in question in favour of complainant. It is also admitted that the accused petitioner did not pay the amount of the dishonoured cheque to the complainant within 15 days from the date of receipt of notice. The complainant thereafter lodged the complaint against the accused petitioner u/s 138 of the NI Act in the Court of learned CJM at Alipore. and after transfer to the Court of learned Judicial Magistrate, 1M Court, process was issued against this petitioner. The learned Magistrate rejected the prayer of the petitioner for discharging him and being aggrieved by, and dissatisfied with, the said order the petitioner has approached this Court.

6. After considering the entire matter and the ingredients of Sections 138 and 139 of the NI Act I find that the learned Magistrate very rightly rejected the petition filed by the petitioner for discharging him. When a complaint has been presented before a Court, the Court is to consider the contents of the complaint and the evidence transpired during examination u/s 200 of the Criminal Procedure Code (in short Code) and thereafter applying his mind he has to consider whether to issue process or not. In the present matter the learned Magistrate after going through the averments of the complaint, the statement of witnesses recorded u/s 200 of the Code and going through the papers and documents issued the process against the accused petitioner. After appearance, if the accused takes any plea or alibi, the Court is not to consider the same at the very threshold of hearing of the complaint when evidence on behalf of complainant has not been recorded. The defence plea or the defence alibi, if any, is to be considered after closure of evidence of both sides.

7. In the instant matter admittedly there was a cheque in the hand of the complainant and he was holder of the cheque and the said cheque bears the signature of petitioner. The said cheque was presented by complainant to his bank and it was dishonoured. The complainant thereafter sent demand notice to the accused in view of provisions of NI Act and the accused received the notice, but did not make payment of the dishonoured cheque within 15 days from the date of receipt of the notice. Instead he sent a reply denying everything and even denied issue of cheque in favour of complainant and taking loan from him. The facts of denial of the matter and the allegations made by the accused can be considered by the Court of learned Magistrate only after full trial on the basis of both oral and documentary evidence to be adduced by both parties in the trial. After closure of complainant's evidence the accused would be examined u/s 313 of the Code, and thereafter, the accused would lead his evidence in support of his case and would try to rebut the presumption which is in favour of complainant u/s 139 of the NI Act. After considering evidence of both parties at the time of delivery of judgment the learned Magistrate would reflect in his judgment and order whose case is believable, acceptable and has been proved. At this stage, there is no ground at all to quash the complaint case and to discharge the accused petitioner. The order of the learned CJM taking cognizance was perfect, proper and legal and it requires no interference. The order of the learned Judicial Magistrate, Is" Court dated 14.8.03 issuing process against the petitioner also was correct, legal and proper and the said order does not require any interference.

8. Mr. Ukil further submitted that in one day a colossal amount of Rs. 5,00,000/- in cash cannot be paid by complainant to this petitioner on 29.8.2000. The said claim made by the complainant is illegal and the alleged debt or liabilities, if any, of petitioner is not legally enforceable. The transaction of payment of a sum of Rs. 5,00,000/- at one time is prohibited under the provisions of Income Tax Act, 1961. Under the Income Tax Act any transaction exceeding a sum of Rs. 20,000/- on a

single day has to be made only through any bank either by cheque or by draft. The complainant as alleged could not have paid Rs. 5,00,000/- in cash on 29.8.2000 to the petitioner. It is a false and concocted story which the complainant has introduced and it is hit by provisions of Income Tax Act. For this reason alone the complaint is liable to be quashed as it has been filed violating provisions of Income Tax Act.

9. After duly considering the submission made by the learned Senior Advocate for the petitioner I am unable to accept his contention. The Income Tax Act has no role to play at all in the present matter. It is a case u/s 138 of the NI Act and this provision is based on a special statute being the NI Act which deals with negotiable instruments. It is true that according to the provisions of Income Tax Act transaction at a time exceeding Rs. 20,000/- has to be made through bank either by cheque or by draft but, that itself is not a ground to quash the complaint. If any one has violated provisions of Income Tax Act, the Income Tax authorities would take penal action against such person. That a person has allegedly violated provisions of Income Tax Act is not a ground to curtail his right of taking the shelter of Court and law to enforce his remedy for violation of provisions of NI Act. At this stage, prima facie the complainant is the holder of cheque and the presumption u/s 139 of the NI Act is in his favour. The cheque when presented by the complainant to bank was dishonoured and the cheque bears the signature of the accused petitioner. The moment the cheque was dishonoured, it invited elements of offence under the NI Act and the offence u/s 138 of the NI Act completed when after demand notice the petitioner did not make payment of the dishonoured cheque. If it was the intention of the legislature that different persons, companies, bankers, business concerns cannot issue cheque or cannot advance loan exceeding Rs. 20,000/- in a day, the legislature would not have introduced different provisions of NI Act. Alleged non-compliance of provisions of Income Tax Act relating to alleged transaction of payment of loan to petitioner is not at all a ground to quash the present criminal case.

10. Mr. Ukil further submitted that the contractual obligation is prohibited under the Indian Contract Act. Any contract which is against the law of the land is bad in law. The complainant allegedly could not have advanced more than Rs. 20,000/- in cash to the petitioner, even if, his case is considered for the sake of argument, though not admitted by the petitioner. Besides that, the entire transaction is hit by provisions of Bengal Money Lenders Act. Mr. Ukil referred to different Sections of Money Lenders Act namely, Sections 7 8 13 24 26 27 28 and 30 of the said Act and submitted that in evidence the complainant has admitted that he has no money lending licence. Referring to the decision in [Kaloji Talusappa Gangavathi Vs. Khyanagouda and Others](#), he submitted that if the money lender has no licence the suit is liable to be dismissed. Referring to Sections 23 and 24 of the Contract Act it has been contended by him that contract or agreement which is forbidden by law is a consideration which is unlawful. In this respect he placed the decisions in

11. The submissions made by Mr. Ukil is not at all applicable in the present matter. Had it been a money suit instituted by the money lender for the recovery of the loan advanced by him together with interest and for accounting all these submissions would have been relevant. In a criminal proceeding u/s 138 of the NI Act these are not relevant at all. In the instant matter a Magistrate is to consider whether the offence as alleged was committed or not and whether evidence is sufficient to prove complainant's case. Legality or illegality of the contract and existence and non-existence of money lending business by the complainant is not a ground to throw the complainant's case out of Court. If it was a money suit for recovery of the money the accused petitioner would have been definitely in a better position and was entitled to the advantage of violation of Sections 23 and 24 of the Contract Act as well as non-existence of money lending business of the money lender. The accused petitioner has only remedy in the trial to rebut the presumption u/s 139 of the NI Act, and to establish his case by leading evidence when he would be asked to enter into defence after his examination u/s 313 of the Code would be over. When all the prima facie materials of offence u/s 138 of the NI Act is present sufficient to issue process this, Court would not interfere into the order of the learned Magistrate and would not quash the criminal proceeding or set aside the order of the learned Magistrate. The accused petitioner has remedy only to lead evidence by examining witnesses and producing documents to prove that there was no transaction with complainant or that he did not issue any cheque in favour of the complainant and that there was no existing debt or liability at the time of his entering into defence and leading his evidence.

12. The point for consideration before the learned Magistrate would be whether act or omission of the accused petitioner completed offence u/s 138 of the NI Act. It would not be a matter for consideration before the learned Magistrate whether the complainant had money lending licence or not. This is not a suit or proceeding under Money Lenders Act and accordingly provisions of Money Lenders Act are not at all relevant for consideration in the trial before the learned Magistrate.

13. The lodging of complaint by the petitioner to police itself would not establish his case. He has to establish what action was taken by the police on his complaint and whether after investigation it was established that he gave the cheque to Kamal Prasad Basu leaving the amount and date blank and that Kamal Prasad Basu in collusion with complainant handed over the cheque to the complainant for harassing the petitioner.

14. Mr. Ukil further submitted that in the petition of complaint there is no whisper at all that the cheque was issued in discharge of any legally enforceable debt or liability. This is a vital aspect which must be disclosed or stated in the complaint. As the petition of complaint is totally silent regarding this salient feature of the

provisions of Section 138 of the NI Act the complaint is not maintainable. It was also not stated that it was a promissory note. The complaint is patently absurd and inherently improbable and it should be dismissed. In support of his contention he cited the decision in Uplanche Mallikarjun and Ors. v. Rat Kanti Vimala and Anr. reported in 1997 Cri.LJ 4237.

15. After going through the above-mentioned decision I am of opinion that this decision is not applicable in the present case and it does not help the accused petitioner. It is true that in the complaint in specific term it was not mentioned that cheque was issued in the discharge of legally enforceable debt or liability. The defect has been cured in the demand notice. The accused petitioner admitted receipt of the demand notice dated 18.6.03 and in the revisional application he has mentioned that he sent a reply also on 9.7.03. The copy of the demand notice has been annexed with the revisional application as annexure P-2 and his reply as annexure P-3 . In the demand notice in paragraph 2 it was mentioned that, "It is within your knowledge that the aforesaid cheque issued by you admitting your liabilities." The petition of complaint read with demand notice fulfils the essential requirements of mentioning that cheque was issued in discharge of any legal enforceable debt or liability. A mere complaint u/s 138 of the NI Act is not maintainable unless the complainant issued demand notice and after dishonour of the cheque the accused fails to make payment of the dishonoured cheque within 15 days of receipt of demand notice. In the instant case the defect was cured through the averments of demand notice and there is no ground to dismiss the complaint for failure to mention in complaint that cheque was issued for discharge of debt or liability.

16. Mr. Moitra for the complainant O.P. submitted that in the instant matter the essential requirements for fulfilling offence u/s 138 of the NI Act are there and there was sufficient materials to issue process u/s 138 of the NI Act against the petitioner. After trial on the basis of evidence the learned Magistrate would come to a finding whether complainant has been able to establish his case or not or, whether the story which the accused petitioner wants to introduce are reliable and acceptable. All the points raised by the accused petitioner can be considered in the trial and not at this stage. this Court earlier in C.R.R. No. 1612 of 2004 by order dated 8.7.04 directed the learned Magistrate to dispose of the said complaint case being Case No. 1808 of 2003 within a period of 3 months from the date of communication of order without granting unnecessary adjournment to either of the parties. In spite of such direction of this Court in an earlier revisional application, the learned Magistrate could not complete the trial only for the conduct of the accused petitioner. The accused petitioner in spite of such earlier order of this Court in order to delay the matter filed an application praying for discharging him on 19th November, 2004. When the said application was rejected by the learned Magistrate by order dated 20.11.04 he filed the present revisional application and thereby delayed the trial and frustrated the direction of this Court dated 8th July, 2004 passed in C.R.R. No. 1612 of 2004. There is no ground for quashing the criminal

proceeding or setting aside the order passed by the learned Magistrate. There is no merit in the revisional application and it should be dismissed. The interim order passed earlier should be vacated and their application should be allowed and the learned Magistrate should be directed to complete the trial at an early date.

17. After going through the contents of the application being CRAN No. 598/05 filed by the complainant and considering the submission of Mr. Moitra and considering the entire matter including the revisional application and submission of the learned Advocates of both parties and in view of my observations made in the earlier paragraphs, I am of opinion that, there is no ground to accept the submission of accused petitioner. It has already been indicated above that learned Magistrate rightly issued process and rightly rejected prayer of the accused petitioner for discharging him. The alleged violation of provisions of Income Tax Act, Indian Contract Act and Money Lenders Act are not at all a bar for continuation of the present criminal proceeding u/s 138 of the NI Act in view of the materials disclosed in the petition of complaint read with demand notice. Here a cheque was dishonoured when presented by complainant for encashment and it was accompanied subsequently by demand notice to the accused petitioner who issued the cheque asking him to make payment of dishonoured cheque amount. In spite of receipt of demand notice the amount of the bounced cheque was not paid and naturally all the initial ingredients of initiation of a proceeding u/s 138 of the NT Act was complete. this Court in an earlier revisional application by order dated 8th July, 2004 directed the learned Magistrate to dispose of the criminal trial within 3 months from the date of communication of the order. It is evident that in spite of such direction the trial could not be completed and the accused petitioner by different methods is delaying the trial. First, after such order he filed an application for discharge and when it was rejected he moved this Court in this revisional application. Considering the entire matter and the facts and circumstances of the case and the position of law as it stands particularly in view of provisions of NI Act, I find that revisional application has no merit at all and it requires dismissal and it is accordingly dismissed.

18. The learned Judicial Magistrate, 1st Court, Alipore is directed to dispose of the criminal case being Case No. C-1808 of 2003 as expeditiously as possible and preferably within 6 months from the date of communication of this order without granting any undue adjournment to either of the parties.

19. In view of the discussion made above, the application being C.R.A.N. No. 598/05 succeeds and is allowed. All the interim orders passed earlier stand vacated.

20. The observations made by this Court are only tentative for the purpose of this revisional application and the Court has not entered into merit of the main case and the learned Magistrate will arrive at his own decision without being influenced in any way by any observation of this Court.



21. Criminal Section is directed to send a copy of this order to the learned Judicial Magistrate, 1st Court, Alipore for information and necessary action.

Later:

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