

HIGH COURT AT CALCUTTA**Bench: Justice Shampa Dutt (Paul)****Date of Decision: 17.01.2024**

CRR 1403 of 2019

CRAN 1 of 2019

(Old No. CRAN 3608 of 2019)

Sri Sarit Kumar Bose @ Sarit Kumar Basu**Vs****Smt. Rita Mallick & Anr.****Legislation:**

Section 138 of the Negotiable Instruments Act (N.I. Act)

Subject:

Criminal revision case against an order in a cheque bounce case under Section 138 of N.I. Act involving the question of service of mandatory notice and its proof.

Headnotes:

Cheque Bounce under Section 138 of N.I. Act – Revision against orders of lower courts in a cheque bounce case – Question of mandatory notice service under Section 138 and its proof – Original case filed for dishonour of cheque worth Rs. 1.5 lacs issued by the petitioner – Lower courts convicted the petitioner based on Section 138 N.I. Act. [Paras 1-6]

Service of Mandatory Notice – Lack of Proof – Crucial issue of whether the mandatory notice under Section 138 was properly served and proven – Trial and Appellate Courts convicted the petitioner despite the absence of

exhibited proof of notice service – Foundation of the case under Section 138 deemed not established. [Paras 7-10, 14-15]

Reliance on Accused's Admission under Section 313 Cr.P.C. – Appellate Court's conviction based on petitioner's admission in examination under Section 313 Cr.P.C. – Supreme Court rulings state that conviction cannot be based solely on Section 313 statement – Accused's statement not sufficient to substitute lack of notice proof. [Paras 11-18]

Judgment and Order Set Aside – High Court set aside the judgment and order of the Additional District & Sessions Judge and the Trial Court due to non-compliance with legal requirements under Section 138 N.I. Act – Petitioner acquitted of charges under Section 138 N.I. Act. [Paras 19-22]

Referred Cases:

NEPC Micon Limited and Ors. vs Magma Leasing Limited, AIR 1999 SC 1952

Premchand vs The State of Maharashtra, Criminal Appeal No. 211 of 2023

Representing Advocates:

For Petitioner: Mr. Debasis Kar, Mr. Husen Mustafi

Shampa Dutt (Paul), J.:

1. The present revision has been preferred against an order and judgment dated 19.02.2019 passed by the Learned Additional District & Sessions Judge, Fast Track, Court No. 3 at Barrackpore in Criminal Appeal No. 34/2015 which modified the judgment dated 07.03.2015 passed by the Learned 5th Court of Judicial Magistrate at Barrackpore in C. Case No. 84/2008 under Section 138 of N.I. Act and thereby directed the present revisionist to pay compensation of Rs. 2,00,000/- instead of Rs. 2,25,000/- to the complainant/respondent within 4

months from the date of this judgment, in default to suffer simple imprisonment for 4 months.

2. In spite of due service there is no representation on behalf of the opposite party no. 1.

3. The case of the Opposite Party no.1/Complainant is that the Opposite Party no.1 after being requested by the present appellant, gave a loan of Rs. 1.5 lacs to him on 18.04.2003 and on 01.08.2007 the petitioner issued a cheque vide no. 484634 dated 01.08.2007 which was deposited by the Opposite Party no.1 and lastly on 04.08.2007 she was informed that it was dishonoured due to insufficient fund.

4. Further case of the Opposite Party no.1 is that she again deposited the said cheque on 02.01.2008 and at that time she was informed that the appellant had already closed his account and on 07/08.01.2008 she sent a legal notice which was sent back on 09.02.2008 and on 13.02.2008 she filed this case. A case under Section 138 N.I. being maintainable when cheque is dishonoured due to amount being closed. (NEPC Micon Limited and Ors. vs Magma Leasing Limited, on 29.04.1999 by the Supreme Court in AIR 1999 SC 1952).

5. On completion of trial, by a judgment and order dated 07.03.2015, the Learned 5th Court of Judicial Magistrate in C. Case no. 84/2008 was pleased to pass an order of conviction under Section 255(2) Cr.P.C. directing payment of compensation of Rs. 2,25,000/- in default to suffer S.I. for six months.

6. On appeal by the Judgment/Order under revision, the Learned Additional Sessions Judge, FTC-3, Barrackpore allowed the Appeal in part and directed as follows:-

Ordered

Criminal Appeal No. 34 of 2015

On 19.02.2019

“.....That the appeal be and the same is allowed in part.

The judgment dated 07.03.2015 passed by Learned Judicial Magistrate, 5th Court, Barrackpore in C. Case no. 84 of 2008 under Section 138 of the Negotiable Instrument Act, by which

the appellant has been convicted under Section 255(2) Cr.P.C. is hereby affirmed.

The sentence of imprisonment for six months passed by Learned Magistrate along with a compensation of Rs. 2,25,000/- awarded by the judgment is modified and convict/appellant is directed to pay compensation of Rs. 2,00,000/- to complainant/respondent within four months from the date of this judgment in default to suffer simple imprisonment for four months.....”

Sd/-

Additional Sessions Judge

FTC-3, Barrackpore

7. The petitioner submits that the notice mandatory under Section 138 N.I. Act has not been proved before the Trial or the Appellate Court, as the said notice or its receipts etc. has not been exhibited before the said Courts.

8. Learned counsel for the petitioner has filed certified copies of relevant

documents in the Trial Court records.

9. From the said certified copies it appears from the deposition of the complainant (P.W.1), that the demand notice as required under Section 138 N.I. Act has not been proved before the Trial Court. There is no such exhibit on record.

10. The defence of the petitioner before the Trial Court is that he did not issue the cheque in question in favour of the complainant. The said cheque was missing. He has deposed as D.W.1 stating further that the account relating to the said cheque was closed in the year 2003-2004, though on being cross examined, he stated that he signed on a blank cheque, Ext-3 is the Bank's Cheque return memo, which shows that the cheque was not returned due to insufficient funds (as stated by the complainant), it was returned as the Account was closed.

11. From the judgment of the Appellate Court, which is under revision, it appears that though the copy of notice, the postal receipt, A/D Card were not proved before the Trial Court, (as the same have not been

produced thus not exhibited) the Courts have relied upon the statement/evidence of the Complainant that notice had been served, as the accused/petitioner had admitted that he had received the notice in his examination under Section 313 Cr.P.C. and thereby the Appellate Court upheld the order of conviction passed by the Learned Magistrate and modified the sentence.

12. Section 138 of the N.I. Act is required to be reproduced to decide the importance/relevance of the service of notice in proceedings under the Act.

13. Section 138 N.I. Act, lays down:- "Section 138. Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to [two] years, or with fine which may extend to twice the amount of the cheque, or with

both:

Provided that nothing contained in this section shall apply

unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in

due course of the cheque within fifteen days of the receipt of the said notice.”

Clause(b) clearly provides that the payee has to make a demand for the payment by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of the information of dishonor of the cheque.

Clause(c) provides that on failure to make payment of the said amount to the payee within fifteen days of receipt of the said notice, the drawer of the cheque shall be deemed to have committed an offence under Section 138 of the N.I. Act.

14. The ‘Notice’ under this Section is the foundation of a case under this Section and a proper notice as provided is a must for maintainability of a case for dishonour of cheque. On completion of the formalities of the service of notice and the period for compliance therein, the cause of action arises, on non-compliance.

15. As such when in a case, the notice itself has not been produced before the Court, thus not proved and marked an exhibit, the very foundation of the case is wrong and thus not maintainable.

16. The next point to be considered is, whether the Courts (Trial and Appellate were right, having based their judgment of conviction entirely on the “admission” of the accused/petitioner in his examination under Section 313 Cr.P.C.

17. In *Premchand vs The State of Maharashtra*, in Criminal Appeal No. 211 of 2023, on 3rd March, 2023, the Supreme Court held:- “13. There is a plethora of judicial pronouncements on consideration of section 313, Cr. P.C., a few of which need to be noted at this stage.

14. A bench of three Hon’ble Judges of this Court in *State of U.P. vs Lakhmi*¹ has extensively dealt with the aspect of value or utility of a statement under section 313, Cr. P.C. The object of section 313, Cr. P.C. was explained by this Court in *Sanatan Naskar vs. State of West Bengal*². The rationale behind the requirement to comply with section 313, Cr. P.C. was adverted to by this Court in *Reena Hazarika vs. State of Assam*³. Close on the heels thereof, in *Parminder Kaur vs. State of*

Punjab⁴, this Court restated the importance of section 313, Cr.P.C. upon noticing the view taken in Reena Hazarika (supra) and M. Abbas vs. State of Kerala⁵.

15. What follows from these authorities may briefly be summarized thus:

a. section 313, Cr. P.C. [clause (b) of sub-section 1] is a valuable safeguard in the trial process for the accused to establish his innocence; b. section 313, which is intended to ensure a direct dialogue between the court and the accused, casts a mandatory duty on the court to question the accused generally on the case for the purpose of enabling him to personally explain any circumstances appearing in the evidence against him;

c. when questioned, the accused may not admit his involvement at all and choose to flatly deny or outrightly repudiate whatever is put to him by the court;

d. the accused may even admit or own incriminating circumstances adduced against him to adopt legally recognized defences;

e. an accused can make a statement without fear of being cross-examined by the prosecution or the latter having any right to cross-examine him;

f. the explanations that an accused may furnish cannot be considered in isolation but has to be considered in conjunction with the evidence adduced by the prosecution and, therefore, no conviction can be premised solely on the basis of the section 313 statement(s);

g. statements of the accused in course of examination under section 313, since not on oath, do not constitute evidence under section 3 of the Evidence Act, yet, the answers given are relevant for finding the truth and examining the veracity of the prosecution case;

h. statement(s) of the accused cannot be dissected to rely on the inculpatory part and ignore the exculpatory part and has/have to be read in the whole, inter alia, to test the authenticity of the exculpatory nature of admission; and i. if the accused takes a defence and proffers any alternate version of events or interpretation, the court has to carefully analyze and consider his statements;

j. any failure to consider the accused's explanation of incriminating circumstances, in a given case, may vitiate the trial and/or endanger the conviction." 18. In the present case, the statement/admission under Section 313 is the (sole) only material upon which the conviction in this case is based, as there is no evidence brought on record by the complainant which proves the service of Notice as per the provision under Section 138 N.I. Act, and therefore, no conviction can be premised solely on the basis of the answers given by the accused during his examination under Section 313 Cr.P.C. (Premchand vs The State of Maharashtra (Supra)).

19. Thus the judgment and order under revision and the judgment of the Trial Court being not in accordance with law are liable to be set aside for ends of justice and to prevent abuse of process of law.

20. CRR 1403 of 2019 is thus allowed.

21. The judgment and order, dated 19.02.2019 passed by the Additional District & Sessions Judge, Fast Track, Court No. 3 at Barrackpore and the judgment of the Trial Court dated 07.03.2015 passed by the Learned Judicial Magistrate, 5th Court, Barrackpore in C. Case No. 84 of 2008 are hereby set aside.

22. The petitioner/accused Sarit Kumar Bose @ Sarit Kumar Basu is acquitted of charge under Section 138 N.I. and discharged from his bail bond.

23. All connected Applications, if any, stand disposed of.

24. Interim order, if any, stands vacated.

25. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

26. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

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