

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Ajay Kumar Gupta

C.R.R. 2060 of 2018
With
CRAN 1 of 2019 (Old No. CRAN 785 of 2019)

Subir Sarkar
Versus
Miss Bithi Guha & Anr.

For the Petitioner : Mr. Barun Ghosh, Adv.
Mr. Jayanta Mitra, Adv.

Heard on : 13.01.2025

Judgment on : 12.03.2025

Ajay Kumar Gupta, J:

1. By filing this Criminal Revisional application under Section 482 of the Code of Criminal Procedure, 1973, the petitioner assailed the Impugned Judgment dated 25th June, 2018 passed by the Learned Additional District & Sessions Judge, Fast Track Court No.

II, Bichar Bhawan, Calcutta in Criminal Revision No. 14 of 2017 (Subir Sarkar Vs. Bithi Guha).

2. By the said Judgment, the Learned Additional District & Sessions Judge dismissed the Revisional application filed by the petitioner and affirmed the Judgment and Order dated 17.12.2016 passed by the Learned Metropolitan Magistrate, 3rd Court, Calcutta in Complaint Case No. C-16130 of 2017 whereby the Learned Magistrate had convicted the petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'N.I. Act') and sentenced to suffer Imprisonment till the rising of the Court by way of detention inside the Court room and further directed the petitioner to pay compensation of Rs. 60,000/- to the complainant within three months from the date, in default, to suffer Simple Imprisonment for six months.

3. The brief facts are relevant for the disposal of the present application as under: -

3a. The petitioner was carrying on a partnership business of constructing and developing buildings under the name and style of M/s Konark Construction having its office at 24A, Nabalia Para Road, Kolkata-700 008.

3b. The Opposite Party No. 1 purchased a flat from the said M/s Konark Construction upon payment of the consideration amount of the said flat including cost of registration.

3c. Subsequently, it was found that the petitioner had overcharged a sum of Rs. 35,150/- from the Opposite Party No. 1 and after realizing the same, the petitioner was supposed to return the amount back to the Opposite Party No. 1 herein.

3d. On 31st May, 2006, both parties entered into an agreement on a non-judicial stamp paper of Rs. 10/- in presence of two witnesses. The Petitioner assured to return the said amount to the opposite party no. 1 due course.

3e. Subsequently, the petitioner issued a cheque of Rs. 30,000/- in order to pay off the portion/part of the remaining amount of Rs. 35,150/- vide cheque no. 208119 drawn on ICICI Bank, Calcutta Branch.

3f. The Opposite Party No. 1 herein deposited the said cheque with her banker but the said cheque was returned back to her on 30th July, 2007 with the remark "Insufficient Funds". Thereafter, the Opposite Party No. 1 herein demanded the said cheque amount of Rs. 30,000/- by sending a demand notice through her Learned Advocate

addressing the petitioner, through registered post with A/D from GPO, Calcutta.

3g. The said demand notice was returned back with the postal remark "Left" on 11th August, 2007 and finally on 18th August, 2007 with the remark on the envelop "Intimation not issued".

3h. After trial, the Learned Trial Court convicted the petitioner on 17th December, 2016. The petitioner claims that the judgment was passed without proper application of criminal jurisprudence. Hence, the petitioner challenged the judgment by filing Criminal Revision No. 14 of 2017 before the Learned Chief Judge, City Sessions Court, Calcutta which was later transferred to the Learned Additional District and Sessions Judge, Fast Track Court – II, Calcutta for disposal.

3i. After hearing the parties, the Learned Judge upheld the Learned Trial Court's judgment dated 25th June, 2018. Though, according to the petitioner, the presumption under Section 139 of the Act is only a presumption towards the issuance of the cheque and does not extend to presume the liability or the legally enforceable debt and that the complainant failed to prove the debt. Accordingly, the Judgments passed by both the Learned Courts below are contrary to the provisions of law. Hence, this Criminal Revisional application.

4. None appears on behalf of the opposite parties despite service of notice. Accordingly, the matter has been heard ex parte.

SUBMISSION ON BEHALF OF THE PETITIONER:

5. In course of hearing, learned counsel, Mr. Barun Ghosh along with Mr. Mitra, appearing on behalf of the petitioner made three-fold submissions.

5a. **Firstly**, the petitioner argued that no notice was served upon the petitioner prior to initiation of proceeding under Section 138 of the N.I. Act. Remark of postal department "left" or "Intimation not issued" on the envelop does not constitute valid service, making the initiation of the proceedings on the basis of such remarks is illegal and liable to set aside.

5b. **Secondly**, the petitioner had given accommodation loan to the complainant by issuing a cheque of Rs. 30,000/- as a friendly loan with a request not to deposit it due to insufficient funds and same may be deposited as per his instruction. But, the complainant deposited the same without informing the petitioner. Therefore, it does not, in any way, attract the prosecution under Section 138 of the N.I. Act as it was not the liability to discharge by the Petitioner.

5c. Thirdly, the claimant is unable to produce the alleged agreement, which was allegedly executed by the petitioner in favour of the complainant contending therein that the accused person/petitioner had taken an excess amount to the tune of Rs. 35,150/- from the complainant and assumed to pay the same. Accordingly, the complainant failed to prove the debt/liability of the petitioner to discharge.

5d. Finally, the learned counsel prays for setting aside the Judgments passed by both the Learned Courts below.

DISCUSSIONS AND FINDINGS BY THIS COURT:

6. Considering the submissions made by the learned counsel appearing on behalf of the petitioner and on perusal of the record, this Court finds that the claim of the petitioner was that he had issued a cheque of Rs. 30,000/- as an accommodation loan to the complainant/opposite party no. 1 is not substantiated as no reliable evidence was presented. Although, the petitioner had examined himself as D.W. 1, he admitted in his cross-examination that he operates M/s Konark Construction and the complainant, Bithi Guha had purchased a flat from them, involving monetary transaction.

7. The petitioner also acknowledged that he issued a cheque being No. 208119 amounting to Rs. 30,000/- in favour of the complainant, Miss Bithi Guha and the said cheque was duly signed by himself.

8. It was further admitted by the petitioner that the said cheque was dishonoured for insufficient funds but he denied that he had not received any notice. Therefore, from the evidence of D.W. 1 it is crystal clear that he had issued cheque amounting to Rs. 30,000/-. During his examination, he stated he resides at 18/1, Biren Roy Road East, P.S. – Haridevpur, Kolkata – 700 008.

9. From the evidence of P.W. 1, Bithi Guha, it reveals that after the cheque was returned from the petitioner's banker, Punjab National Bank on 30.07.2007 with a remark "Insufficient Funds", a demand notice was sent upon the accused person/petitioner by registered post with A/D on 10.08.2007 from GPO Calcutta. The said registered cover was returned to the learned counsel for the opposite party no. 1 on 22.08.2007 with postal remarks "Left" and "Intimation Not Issued".

10. Now, a question arises whether postal remark "Left" and "Intimation Not Issued" are good service or not?

11. On this issue, the Learned Trial Court has held the address mentioned in the said demand notice mentioned as 204, Bhuban Mohan Roy Road, Kolkata – 700 008. This address was compared with the deed of conveyance dated 24th Day of May, 2006 executed by the vendors and M/s. Konarak Construction, a partnership firm. The deed listed the address of the partners, namely, (1) Sri Subir Sarkar, residing at 204, B.M. Roy Road, Kolkata 700 008 and (2) Sri Prabir Kumar Bairagi, residing at 24/1, Nabalia Para Road, Kolkata 700 008. Therefore, notice was properly deemed to serve at the address mentioned in the deed of conveyance.

12. It is not disputed by the petitioner that the said address was wrongly recorded in the deed of conveyance or he does not reside in the said address. The Learned Trial Court has relied a judgment of Hon'ble Supreme Court passed in the case of **M/s Madan and Co. v. Wazir Jaivir Chand**¹. The Hon'ble Supreme Court held in the judgment as under: -

“The postal service can neither be presumed nor considered to be good service where the letter is returned to the sender due to non availability of the addressee. The court found that an addressee can easily avoid receiving the letter addressed to him

¹ AIR 1989 Supreme Court 630

without specifically refusing to receive it. He can so manipulate the matters that it gets returned to the sender with vague endorsement such as "not found", "not in station", "addressee has left" and so on. It was held that if a registered letter addressed to a person at his residential address does not get served in the normal course and is returned, it can only be attributed to the addressee's own conduct".

- 13.** Another judgment relied by the Learned Trial Court of the Hon'ble Supreme Court passed in the case **D. Vinod Shivappa v. Nanda Belliappa**², where the Hon'ble Supreme Court held as under:

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"In respect of a notice which could not be served on the addressee for one or the other, such as his non-availability at the time of the delivery and premises remaining locked on account of his having gone elsewhere in terms of the requirement of the service of notice under Section 138 of the Negotiable Instruments Act, 1881. The court found that if in such case, the law is understood to mean that there has been no service of notice, it would safely defeat the very purpose of the Act. It was found that a person can dodge the postman for about a month or two, or a person who can get a fake endorsement made

² 2006 (6) Supreme Court Cases 456

regarding his non-availability can successfully avoid his prosecution because the payee is bound to issue notice to him within a period of 30 days from the date of receipt of information from the bank regarding the return of the cheque as unpaid”

14. In view of the aforesaid facts and situation, it can be considered as deemed refusal of the notice. It can safely be stated that the notice was duly served upon the accused person, when the notice was issued on the correct name and address of the addressee. He had full knowledge about the initiation of this case against him.

15. The Court also relies the judgments passed in the cases of ***State of M.P. V. Hira Lal***³ as well as ***Jagdish Singh V. Nathu Singh***⁴, where the Hon’ble Supreme Court held that where the addressee manages to have the notices returned with postal remarks “refused”, “not available in the house”, “house locked” and “Shop or residence closed” respectively, it must be deemed that the notices have been served on the address, if name and address of addressee found correct.

³ (1996) 7 SCC 523

⁴ AIR 1992 SC 1604

16. Even for the sake of argument, the addressee left the place of his residence at that material point of time, he must bring this fact before the Learned Trial Court with reliable evidence while he got opportunity to adduce defence witness that he had left the address at the material point of time of issuance of notice, but he failed to substantiate.

17. Therefore, the submission made by the learned counsel on the issue of non-service of notice is not convincing and acceptable. Therefore, the Learned Trial Court rightly decided the issue in negative in his favour.

18. The complainant has proved his case in positive without any doubt whereas the petitioner fails to rebut the same. It is settled position of law that once the cheque is signed and issued by the drawer as admitted, the same has to be presumed to have been issued in discharge of legally enforceable liability and to prove the contrary that it was not issued against legal liability is that exclusive onus on the accused to prove. The contention of the petitioner is unbelievable that he had issued a cheque for accommodation loan for decoration a flat without sufficient funds manifestly appears only to avoid his legal liability.

19. In the light of above discussions and the facts and circumstance of this case, this Court is of the view that both the Learned Courts below committed no error while deciding the case. Therefore, there is no need to interfere with the concurrent findings of both the Learned Courts below. This Criminal Revisional application is devoid of merits.

20. Accordingly, **CRR No. 2060 of 2018** is **dismissed**. **CRAN 1 of 2019 (Old CRAN 785 of 2019)** is also disposed of.

21. Consequently, the Judgment dated 25th June, 2018 passed by the Learned Additional District & Sessions Judge, Fast Track Court No. II, Bichar Bhawan, Calcutta in Criminal Revision No. 14 of 2017 and Judgment and Order dated 17.12.2016 passed by the Learned Metropolitan Magistrate, 3rd Court, Calcutta in Complaint Case No. C-16130 of 2017 are hereby affirmed. The Petitioner is directed to pay the awarded compensation of Rs. 60,000/= to the complainant within three months from the date, in default, to suffer Simple Imprisonment for six months.

22. Let a copy of this Judgment be sent to the Learned Trial Court for information and taking necessary steps in accordance with law.

23. Interim order, if any, stands vacated.

24. All parties will act on the server copies of this Judgment uploaded from the official website of this Court.

25. Urgent photostat certified copy of this Judgment, if applied for, is to be given as expeditiously to the parties on compliance of all legal formalities.

(Ajay Kumar Gupta, J)

P.A./Shreen