

**IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS,
B H U B A N E S W A R .**

Present :

Shri Bishes. Kumar. Sahu, LL.M.
J.M.F.C., Bhubaneswar.

1cc case. No. – **3027/2009**
Trial No. – 1748/2013

Date of Conclusion of Argument : 24.04.2014
Date of Judgment : 29.04.2014

M/s Reliance Electronics Corporation
(Master Franchisee) represented by its
Managing Partner Sri Jayanta Kumar Pany,
Aged about 47yrs, S/o- Late Dukhabandhu
Pany, Resident of Plot No.131, Mancheswar
Industrial Estate, Bhubaneswar-10, Dist- Khurda.

.....Complainant

Vrs

Sri Sanjib Goswami, Aged about 36 yrs,
S/O- Gopal Goswami, Proprietor of Business
Development & Recruitment Center having
Its Office at 10/25 Bengal Ambuja, City
Center, Durgapur, West Bengal. At present
residing at 6/52, Jayadev Avenue, Zone-B,
Durgapur, West Bengal, Pin-713205

.....Accused

Offence under Section 138 of Negotiable Instruments Act.

Counsel for the complainant : Shri J.Raheman
And associates

Counsel for the defense :Shri S.S.Satapathy and
associates.

J U D G M E N T

1. The accused person stood prosecuted for commission of offence U/s.-138 of Negotiable Instruments Act.

2. The brief facts of the case is that the accused Sri Sanjib Goswami is the proprietor of Business Development and Recruitment Center having its Office at 10/25 Bengal Ambuja, City Center, Durgapur, West Bengal. The accused firm appointed M/s Reliance Electronics Corporation as a Master Franchise for Orissa Zone on Dtd 27.02.2009 as yearly for a period of 12 months where in Jayanta Kumar Pany is the Managing Partner. The complainant is appointed as Master Franchise holder for the online job of ad-posting for the accused firm. The complainant firm has done their job as per the agreed terms & conditions to the best satisfaction of accused firm, but the accused intentionally delayed payments and subsequently the accused avoided to make any contact with the complainant in order to grab the legitimate dues of the complainant. While Sri Jayant Kumar Pany, the managing partner of the Complainant firm and the associates met the accused on dtd.31.05.2009 while he was a visit to Bhubaneswar to his new business plan. As the complainant asked him to pay his legitimate dues, he accepted the liability and issued a post dated cheque bearing No. 900390, dtd.15.06.2009 for Rs.2,56,000/-(Rupees Two Lakhs Fifty-six thousands only) drawn on ICICI Bank, Durgapur Branch, West Bengal to the Complainant. The complainant presented the cheque for collection to his Banker on 23.06.2009. But the said cheque was dishonoured on 25.06.2009 for the reason of "Payment stopped by the Drawer". The Complainant's bank returned the cheque unpaid along with the cheque return memo dated 25.06.2009 of the ICICI Bank, Bhubaneswar Branch, Bhubaneswar. When the accused avoided keeping any contact finding no other alternative the complainant issued a Demand notice dtd 08.07.2009 through his advocate on 09.07.2009 by Regd. Post with A/D which was duly received by the accused. After receipt of notice dtd 08.07.2009, the

accused replied to the Complainant's notice through his advocate on dtd.16.07.2009, where he denied all the averments made in the notice dtd.08.07.2009 of the complainant. Hence the complainant filed this case against the accused u/s 138 of N.I.Act.

3. The plea of the accused is of complete denial and of false implication.

4. Taking into account the facts and circumstances of the case and ingredients of Section 138, N.I. Act, the points which arise for determination in this case are as follows:-

(i) Whether the accused has issued a post dated cheque bearing No. 900390, dtd.15.06.2009 for Rs.2,56,000/-(Rupees Two Lakhs Fifty-six thousands only) drawn on ICICI Bank, Durgapur Branch, West Bengal in favour of the Complainant?

(ii) Whether the said Cheques were issued by the accused to the complainant towards discharge in whole or in part of any debt or other liability?

(iii) Whether the complainant presented the said Cheques before his banker within a period of 6 months (Now 3 Months) from the date of which it was drawn or within the period of its validity (whichever was earlier)?

(iv) Whether the said Cheques were returned as unpaid due to reason of "Payment stopped by the Drawer"?

(v) Whether the complainant sent a legal notice in writing to the accused demanding payment of the Cheque amount within 30 days of the receipt of information by him from the bank regarding the return of the Cheque as unpaid?

(vi) Whether the accused has failed to make payment of the Cheque amount to the complainant within 15 days of receipt of notice?

5. To prove this case during trial, complainant has been examined as C.W.1 and Exhibits 1 to 12 have been marked on the side of the complainant. On the other hand, accused has been examined as D.W.1 in his behalf and Exhibit A to B are marked on his behalf.

.6. It is the settled principles of law that whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability. It is also the settled law that presumption of innocence as human rights and the doctrine of reverse burden introduced by Section-139 of N.I.Act should be delicately balanced which would largely depend upon the factual matrix of each case, the materials brought on the records and having regard to the legal principles governing the same. It is also the settled law that the presumptions will live, exit and survive and shall end only when the contrary is proved by the accused, i.e; the cheque was not issued for consideration and discharge of any debt or liability and a presumption is not in itself evidence, but only make a prima facie case for a party for whose benefit it exists.

7. The complainant has duly filed his examination-in-chief vide his affidavit on dtd 15.02.2010. In the said affidavit he has narrated on solemn affirmation about the prosecution story and during his examination-in-chief exhibited certain documents. *The original copy of Partnership Deed dtd 28.02.2002 of M/s Reliance Electronic Corporation marked as Ext-1. The cheque bearing No.- bearing No. 900390, dtd.15.06.2009 for Rs.2,56,000/-(Rupees Two Lakhs Fifty-six thousands only) drawn on ICICI Bank, Durgapur Branch, West Bengal has been marked as exhibit-2 and Ext-2/1 is the signature of the accused on it. The deposit slip dtd 23.06.2009 issued by the Central Bank of India with respect to Ext-2 marked as Ext-3. The Cheque Return Memo dtd. 25.06.2009 with regard to Ext-2 marked as Exhibit-4. The office copy of the pleaders notice dtd 08.07.2009*

marked as Ext-5. The Postal Receipt No. 5826 dtd 09.07.2009 corresponding to Exhibit-5 marked as Exhibit-6. The complaint settled reply from the Dept of Post dtd 18.09.2009 marked as Exhibit-7. The reply letter of the accused advocate dtd 16.07.2009 with respect to the demand notice dtd 08.07.2009 marked as Ext-8. Information under RTI Act dtd 30.11.2009 marked as Ext-9. Ext-10 is the Xerox copy of agreement dtd 31.05.2009 supplied by Public Information Officer cum Deputy Commissioner of Police, Bhubaneswar. The original Master franchise agreement dtd 27.02.2009 marked as Ext-11. The extract mail of Payment Claim Settlement of dtd 17.06.2009 sent to BDRC marked as Ext-12 respectively.

8. The learned Advocate for the complainant examined the complainant, cross examined the Defence witness successfully and submitted that in the present case the evidence adduced by the complainant is well conforming with the essential ingredients of the offense under Section -138 of NI Act. Accordingly, he prays to convict the accused in accordance with law.

9. The learned defence counsel examined the Defence Witness and cross examined the complainant in full which has been minutely observed by the court.

10. Now, it is to be seen whether on the evidence available on record, the offense u/s.-138 of NI Act is proved or not. For creating a criminal liability in terms of the section -138 of NI Act, the complainant must show:

- (i) that the Cheque was issued in discharge of whole or part of a debt or other liability;
- (ii) the same was presented for payment within six month (now three month) or its specific validity period, whichever is earlier;
- (iii) but, it was dishonoured;
- (iv) a notice in terms of said provision, was served on the person sought to be made liable within thirty days of receiving information of dishonour, and;

- (v) Despite the service of notice, neither any payment was made nor any other obligations, if any, were complied with within 15 days from the date of receipt of the notice.

11. (i) As far as the question of issuance of Cheques by the accused in favour of the complainant's Company is concerned, the same facts are cogently proved by taking into consideration the evidence adduced by the complainant along with exhibit-2, exhibit-2/1. The DW-1 who is the accused of this case clearly admitted in para-09 of cross-examination of DW-1 that he had issued the cheque marked as Ext-2 i.e. the Cheque bearing No. 900390 of dtd 15.06.2009 for an amount of Rs.2,56,000/- drawn on ICICI Bank, Durgapur Branch, West Bengal in favour of the complainant's Company, and 2/1 is his signature thereon. The issuance of the said cheque marked as exhibit-2 and signature of accused marked as exhibit-2/1 has not been disputed, only defense contended that the cheque has been issued upon a void agreement i.e. Ext-10. But defense has not produced any evidence to support its contention. Rather DW-1 nowhere deposed anything about taking any step against the complainant for misutilising the cheque not issued by him. It is well settled that a simple denial without any proper justification will not be accepted adversely the version of the complainant. Therefore the fact that the accused issued a cheque in favour of the complainant is correctly proved by the complainant.

(ii) The fact that the said Cheques were duly presented by the complainant before Central Bank of India, Rasulgarh Branch, Bhubaneswar on 23.06.2009 vide Ext-3 and that was dishonored due to 'Payment stopped by drawer' is proved by Exhibit-4. Exhibit-4 is the Cheque Return Memo dtd. 25.06.2009 with regard to Ext-2 furnished by ICICI Bank, Bhubaneswar branch. It is thus clear that the Cheque-in-question was returned unpaid due the payment stopped by the drawer. Therefore, it is consequently proved that the presentment of the Cheque by the complainant was within 6 months of the drawl of the alleged Cheques.

(iii) Exhibit-5 is the Office copy of the pleader notice dtd. 08.07.2009 issued by the complainant through his advocate to the accused demanding him to pay the dishonored Cheque amount within 15 days of receipt of notice. Exhibit-6 is the Postal Receipt No. 5826 dtd 09.07.2009 corresponding to Exhibit-5. The complaint settled reply from the Dept of Post dtd 18.09.2009 marked as Exhibit-7 reveals that the demand notice has been duly served. Therefore, it is proved that the complainant has sent the pleader notice well within the statutory period of 30 days from the date of receipt of intimation of dishonor.

(iv) The DW-1 in his para-P of his written argument stated that though the accused working under BDRC (Business Development and Recruitment Centre) i.e. the firm of the accused but as no demand notice was served upon the firm of the accused i.e. BDRC hence the proceeding should not be entertained. On clear reading of Sec 141(1) of The Negotiable Instruments Act, 1881, it speaks as follows:- *“ If the person committing an offence under Sec 138 is a Company(Company means any body corporate and includes a firm or other association of individuals), every person who, at the time of the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.”* Hence it is the own admission of the accused during his cross-examination in para-4 that he is the proprietor of BDRC. And thus issuance of demand notice to the proprietor of the BDRC sufficiently construe the proceeding of this case.

12. The accused of this case both of his examination u/s 313 of CrPC as well as during his evidence stated before the court that the complainant forcefully took away the alleged cheque from him so that he stopped the payment. It has been held in ***M/s M.M.T.C. Ltd Vs M/s Medchi Chemicals & Pharma (P) Ltd [AIR***

2002 SC 182] that, *“Even when the cheque is dishonoured by reason of stop payment instructions by virtue of S.139, the court has to presume that the cheque was received by the holder for the discharge, in whole or in part of any debt or liability. If the accused shows that in his account there was sufficient funds to clear the amount of cheque at the time of the presentation of the cheque for encashment at the drawer bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under S. 138 would not be made out.”* Hence if at all Ext-2 & Ext-10 taken forcibly by complainant then he should have filed the Complaint or FIR against Complainant at Bhubaneswar, but accused in cross-examination dated 09.10.12, para-2 has stated that- *“I have not filed any FIR against the Complainant. I have made stop payment for the cheque issued in favour of Complainant.”* So, regarding issuance of cheque towards legal dues cannot be denied. The burden of proof lies with the accused to show stop payment is not due to insufficient or paucity of funds, but due to other valid causes including that there was no existing debt or liability at the time of the presentation of cheque so as to attract under S. 138 NI Act. In this regard the accused produce Ext-A i.e. Information under RTI Act from Commissionerate Police and Ext-B i.e. Postal Counterfoil. Ext-A simply speaks about an amicable settlement between both the parties through execution of an agreement through affidavit before Notary Public of Orissa. Nowhere Ext-A speaks about any force or undue influence imposed upon the accused. Further, accused did not produce his bank account statement to show that by the date of presentation of the alleged cheque he had sufficient money to honour the cheque.

12. At this juncture, it is pertinent to mention that by virtue of section -139 of NI Act, a presumption is drawn that the said Cheque was issued in discharge, in whole, or in part of, any debt or other liability.

It has been held in ***State of Madras Vs. Vaidyanath Iyer, AIR-1983, SC-61*** that “It is obligatory on the part of the court to raise this presumption in every case where the factual basis for raising presumption had been established. Since the complainant has already discharged his burden of proving, the factual basis for rising of presumption under Section-139 of N.I. Act which has already been established. It is now up to the accused to rebut the said presumption by proving that the cheques-in-question was not issued towards the legally enforceable existing debt or other liability.

This court has also perused minutely the written argument filed by the learned defense counsel but, the only written submission to this effect is not sufficient as defence has not adduced any valuable evidence on his behalf. It is settled principle of Law that the proviso to Section -138 of NI Act is meant to protect honest drawer whose Cheque may have been dishonored for the fault of others, or who may have generally wanted to fulfill their promise but on account of inadvertence or negligence failed to make necessary arrangement for the payment of the Cheque. The proviso is not meant to protect unscrupulous drawers to never intend to honour the cheque issued by them, it being a part of their modus operandi to cheat unsuspecting persons, *AIR-2006, SC-2179*. The object of the proviso is to avoid unnecessary hardship to an honest drawer. Therefore, giving a notice to a drawer before filing complainant under Section-138 of NI Act is a mandatory requirement.

Therefore, it is clear that prosecution has established his case by conforming all ingredients under Section-138 of NI Act. The defense has no sufficient evidence to discard or disbelieve the prosecution case.

13. Considering the evidence on record, the documents exhibited by the complainant and upon the result of discussion by this court in the foregoing paragraphs, this court is of the considered view that the complainant could able to prove/establish its case against the accused beyond all probabilities and all

reasonable doubt. Accordingly, the accused is held guilty for the offence U/s-138 of N.I.Act and he is convicted there under.

Judicial Magistrate First class,
Bhubaneswar.

Taking into the account of the conduct of the convict and the trivial nature and gravity of the offence and extenuating facts and mitigating circumstances of the case under which the offence was committed by the convict and the impact of commission of such offence on the present commercial world, this court is not inclined to extend any benefit of the Probation of Offenders Act to the convict because the offence, committed by the convict bears, economic character, this kind of offences are rampantly prevailing in the society and the justice delivery system needs to be checked and preventing steps be taken being alert towards this offence and not by extending any liberal approach to this kind of the offender.

S E N T E N C E

Taking into account of all relevant facts, this court feels that a lenient punishment to be imposed on the convict in the instant case which will meet the ends of justice. But at the same time, in order to secure justice to the complainant, it would be just and proper if compensation will be awarded to him from the convict towards the cheque amount for the interest of the said cheque amount and expenditure incurred during the pendency of the case.

Hence, this court sentences the convict to undergo simple imprisonment (S.I.) for six months (06 months) towards the conviction for the commission of the offence u/s-138 of N.I.Act and this court also further directs the convict to pay a sum of Rs.5,00,000.00/-(Rupees Five Lakhs

only) as compensation u/s-357 (3) Cr.P.C. which shall be realized from the convict like criminal fines and in default of such payment of compensation, he shall, further undergo Simple Imprisonment (S.I.) for five months (05 months). In this context, in ***K.A. Abbas H.S.A. Vs. Sabu Joseph & Another, 2010 (46) OCR (SC) - 548, (Para-27)***, the Hon'ble Supreme Court held that-

“A sentence of imprisonment can be granted for default in payment of compensation awarded under section-357(3) of Cr.PC. The whole purpose of the provision is to accommodate the interests of the victims in the criminal justice system. Sometimes, the situation becomes such that there is no purpose is served by keeping a person behind bars. Instead directing the accused to pay an amount of compensation to the victim or affected party can ensure delivery of total justice. Therefore, this grant of compensation is sometimes in lieu of sending a person behind bars or in addition to a very light sentence of imprisonment. Hence, on default of payment of this compensation, there must be a just recourse. Not imposing a sentence of imprisonment would mean allowing the accused to get away without paying the compensation and imposing another fine would be impractical as it would mean imposing a fine upon another fine and therefore would not ensure proper enforcement of the order of compensation.”

Judicial Magistrate First class,
Bhubaneswar.

O R D E R

Accordingly, the convict is directed to pay a compensation of Rs.5,00,000.00/- (Rupees Five Lakhs only) to the complainant which shall be realized as criminal fines.

Grant free and corrected copy of this judgment to the convict under due acknowledgement.

Judicial Magistrate First class,
Bhubaneswar.

The judgment is typed and corrected by me & pronounced in the open court today on the 29th day of April 2014 under my hand and seal of this court.

Judicial Magistrate First class,
Bhubaneswar.

List of witnesses examined by the Complainant

P.W-1 : Jayanta Kumar Pany.

List of witnesses examined by the Accused

D.W.-1 : Sanjib Goswami

List of Exhibits proved by the Complainant

- Ext-1 : original copy of Partnership deed dtd 28.02.2002
 Ext-2 : Cheque bearing No. 900390 of dated 15.06.2009 amounting Rs.2,56,000/- drawn on ICICI Bank.
 Ext-2/1 : Signature of the accused on Ext-2
 Ext-3 : Deposit Slip dtd 23.06.2009.
 Ext-4 : Cheque Return Memo dtd 25.06.2009 with regard to Ext-2
 Ext-5 : Lawyer/advocate/demand notice on dtd.08.07.2009.
 Ext-6 : Postal Receipt with regard to Ext-5 dated 09.07.2009
 Ext-7 : Complaint settled reply dtd 18.09.2009
 Ext-8 : Reply letter dtd 16.07.2009 by advocate of the accused.
 Ext-9 : Information under RTI Act dtd 30.11.2009
 Ext-10 : Xerox Copy of agreement dtd 31.05.2009

- Ext-11 : Original Master Franchise Agreement dtd 27.02.2009
Ext-12 : Extract mail of Payment claim settlement dtd 17.06.2009

List of Exhibits proved by the Accused

- Ext-A : *Information under RTI Act from Commissionerate Police*
Ext-B : Postal Counterfoil with respect to Ext-A

Judicial Magistrate First class,
Bhubaneswar