

IN THE COURT OF THE ADDL. SESSIONS JUDGE: BHUBANESWAR.

PRESENT:-

Sri I.K. Das LLB,
Addl. Sessions Judge, Bhubaneswar.

Crl. Appeal No. 1/45 of 2013-12

(Arising out of judgment dtd. 16.7.12 in ICC case No. 5007 of 2008 passed by learned Judicial Magistrate First Class, Bhubaneswar)

Jyotsna Rani Mohapatra, aged about 38 years
D/o: Late Jagannath Mohapatra, Erstwhile M.D. 3M Business Solution Pvt. Ltd.
Plot No. 533/1333, Nayapalli, Near BDA Nicco Park
PS: Sahid Nagar, Opp. Sunadei Temple
Bhubaneswar, Dist: Khurda

... Appellant

Vrs.

Nabaghana Sahoo, aged about 41 years
S/o: Late Dhundi Sahoo, Plot No. 313, Nayapalli
Near Kalinga Stadium, Bhubaneswar, Dist: Khurda

... Respondent.

Advocate for the appellant:- Sri C. Mohanty & Associates
Advocate for the Respondent- Sri N.R. Ray & Associates

Date of argument- Dt.16.12.13Date of judgment- Dt.28.12.13JUDGMENT

This appeal is directed against the judgment of conviction and sentence passed by learned Judicial Magistrate First Class, Bhubaneswar vide his judgment dtd. 27.4.12 in ICC case No.5007/08.

2. The case of the complainant(respondent in the appeal) in the lower Court in nutshell is that he advanced Rs.1,33,000/- to the accused-appellant to invest in her business due to her urgent necessity. But the accused did not return the money and after two months the accused gave an account payee cheque dtd. 18.10.08 bearing No. 641357 to be drawn on ICICI Bank, Nayapalli Branch. The cheque having been deposited by the complainant with his banker it was

dishonoured on 22.10.08 and it was intimated to him that payment was stopped by the drawer. Accordingly, a pleader notice was issued on 23.10.08 with Registered Post asking the accused to repay the money which was received by him on 6.11.08. In spite of the fact, the accused did not pay the amount for which a proceeding u/s 138 Negotiable Instruments Act was initiated against him.

3. During the course of trial, the complainant examined himself and filed the cheque, bank information slip, copy of pleader notice and intimation of customer care confirming that the notice was served on the accused.

4. On the other hand, the accused-appellant took the plea that neither she borrowed the money from the complainant nor any pleader notice has been received by her. But, while adducing evidence, the accused herself deposed that the cheque was signed by her and was kept in custody of the account section of her company which has been misused by one Manas Pattnaik who was the HR of her company. The Branch Manager, ICICI, Nayapalli has been examined by the accused and some other documents have also been exhibited from the side of the accused.

5. During the course of hearing of the appeal, learned counsel for the appellant argued that the learned trial Court fell in error while appreciating the evidence of witnesses. In the complaint petition, the complainant stated that the cheque amount was invested by the complainant in the business of the accused. Accused was the Managing Director in a company namely, 3M Business Solutions Pvt. Ltd. Therefore, even admitting the case of the complainant returning back the said money from the company is not possible. But, learned counsel for the respondent has categorically stated that nowhere in the complaint petition or in the evidence it has been admitted by the complainant that the money was handed over to the accused in order to invest in the company, rather it was given for her personal business. But, on perusal of the documents i.e. the cheque and pleader notice it appears that the cheque was issued by the appellant as authorized signatory on behalf of the company. Notice was also issued to her by the complainant describing her as the Managing Director of the company with the address of the company. In support of his contention, the respondent relied on a

decision reported in **2013 (1) OLR 320 in the case of Lalit Beriwal v. State of Orissa and others**. Hon'ble Court held that the Director of a company can be prosecuted being vicariously liable for the offence committed by the company. It is necessary that there must be clear averments and proof that the company committed the offence otherwise the individuals issuing the cheques can be personally held liable u/s 138 of NI Act. Respondent relied on another decision of Hon'ble Supreme Court of India reported in **1999 Cr.L.J. 3498 Supreme Court in the case of M/s Bilanchand Gyanchand Co. v. V.A. Chinnaswami** in respect of such principle of law.

On the other hand, learned counsel for the appellant relied on a decision reported in **CLT (2012) Supp. Cr. 1243 (SC) in the case of Aneeta Hada v. M/s Godfather Travels & Tours Pvt. Ltd.** Hon'ble Apex Court of India in the said decision held that in a case where company is the accused u/s 138 of NI Act, the Directors could have been prosecuted under the Act only when company is arrayed as accused. After examining the evidence on record, I find the accused during his examination in the Court completely denied about receiving money from the complainant. On the other hand, the complainant said it was a personal loan to the accused. Therefore, I am to hold that although notice was issued to the accused as Managing Director of the company it was her personal liability to discharge herself from the loan advanced by the complainant.

6. It is argued by the appellant that the appellant is not liable as she has not issued the cheque. Admittedly, she has put her signature on the cheque, but the amount and the date as mentioned in the cheque are written with another pen and by some other. By adducing evidence, the appellant showed accusing finger towards one Manas Patnaik who was working as HR in her company. But, said Manas Patnaik has not been examined by the accused in the trial Court.

Under Sec. 139 of NI Act, it is mandated that it shall be presumed that the holder of the cheque unless contrary is proved through substantive rebuttal evidence is entitled to get the money. In a decision reported in **(2010) 46 OCR (SC), 562 in the case of Rangappa v. Sri Mohan**, Hon'ble Apex Court held that since the accused admitted that the signature on the cheque belongs to him on

his cheque, statutory presumption goes in favour of the person in whose favour the cheque has been issued in absence of any rebuttal evidence. Therefore, the appellant cannot take such advantage that the cheque has been misused by somebody and she is not liable to pay the amount to the complainant. It has been argued before me that said Manas Patnaik after taking back the signed cheque from the accounts section filled up the cheque and handed over to the complainant and when it was detected in the office regarding misuse of cheque by him, he requested the accounts manager to issue stop payment direction to the bank. The said letter has been marked as Ext.C. By virtue of the said letter, the accused issued letter to the bank on 25.7.08 for stop payment. A doubt arises in the mind that dtd. 18.10.08 has been mentioned in the cheque, but said Manas Patnaik through his letter dtd. 24.7.08 intimated the office to stop payment. On perusal of Ext.C it appears the letter does not contain the logo of the company. It has been argued by the complainant that the said letter has been manufactured by fabricating the document by the accused to escape from her liability. However, in view of observation of Hon'ble Court as above, once appellant admits that the signature on cheque belongs to him, it will be presumed that she issued the cheque to the respondent and he is liable to discharge her debt.

7. Learned counsel for the appellant has argued that even if conceding to the case of complainant that the appellant borrowed the money from him and she did not pay the amount and the cheque having been bounced due to stop payment, yet no fault can be found against the appellant. He relied on a decision reported in **(2009) 44 OCR (SC) 31 in the case of Jugesh Sehgal vrs. Shamsher Singh Gogi**. Hon'ble Court held that in order to prove a case u/s 138 of NI Act, in addition to other ingredients of the offence, the most important ingredient is that the person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account. Unless the accused is the holder of the account in the bank from which he issued the cheque, he cannot be held responsible for the offence. In the instant case, I find even if the appellant borrowed the amount from the complainant with her personal capacity as her personal loan, she issued the cheque of the company

namely, “3 M Business Solutions Pvt. Ltd” as M.D. Of the company. The Branch Manager of ICICI Bank, Nayapalli has been examined as D.W.2 and in his evidence he said that the company has the account bearing No. 028405002721. The cheque issued by the appellant also belongs to the company, but not in the name of the accused. Therefore, it cannot be said that the cheque issued in favour of the complainant by the accused in order to discharge herself from the liability is in accordance with law. The most essential ingredient of Sec. 138 of the Act is not satisfied in the case as the Bank Account is not maintained by the accused but by the company. Accordingly, the accused could not have been found guilty on the same score and would have been convicted thereunder.

8. In the result, the appeal is allowed on contest. The judgment of conviction u/s 138 of NI Act and sentence passed thereunder by the lower Court against the appellant is set aside.

Pronounced in the open Court today this the 28th day of December, 2013.

Dictated and Corrected by me.

Addl. Sessions Judge, Bhubaneswar

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