

IN THE COURT OF THE 1ST ADDL. SESSIONS JUDGE- CUM-
SPECIAL JUDGE (VIGILANCE) BHUBANESWAR.

Present :

Shri N.Sahu, LL.B.,
1st Addl. Sessions Judge,
Bhubaneswar.

Crl. Appeal No. 13/23 of 2011.

(Arising out of the judgment, dt.25.6.2011 passed
in I.C.C. Case No.4961/2004 by the learned JMFC,
Bhubaneswar).

Sri Pradipta Kumar Das, aged about 51 years,
S/o. Late Ramakanta Das of Plot No.105,
Madhusudan Nagar, Unit-IV, PS-Kharavel Nagar,
Bhubaneswar, Dist. Khurda.

.... Appellant.

-Versus-

Sk. Daud, aged about 40 years,
S/o. Late Sk.Ayub of Azad Nagar,
PS-Airfield, Bhubaneswar, Dist.Khurda.

.... Respondent.

For the Appellant : Sri P.R.Sahoo & Associates.

For the Respondent : Sri S.Das & Associates.

Date of argument : 21.11.2013.

Date of judgment : 29.11.2013.

J U D G M E N T

1. This appeal has been preferred against the judgment, dt.25.6.2011 of the learned JMFC, Bhubaneswar passed in I.C.C. Case No.4961/2004.
2. The appellant was the accused whereas the respondent was the complainant before the lower Court. Briefly stated the case of the complainant is that the accused impersonating himself as Sudipta Kumar Das took advance of Rs.50,000/- from him to sell his mini bus and

executed one money receipt. But he failed to hand over the bus within the stipulated period. Being asked by the complainant to return the money, the accused issued two cheques bearing Nos.680142 and 680143, dt.23.10.02 and 29.10.02 respectively each amounting to Rs.20,000/- and he paid the rest amount of Rs.10,000/- in cash. The complainant deposited the said cheques with his banker, but the same were returned unpaid for "Insufficient funds". The complainant informed this fact to the accused who requested him to wait for some time and again the accused issued two cheques bearing No.741744, dt.5.1.04 for Rs.20,000/- and another cheque bearing No.714747, dt.25.1.04 for Rs.15,000/-drawn on SBI, Old Town Branch, Bhubaneswar and he paid the rest amount of Rs.5,000/- in cash. When the complainant deposited these two cheques for encashment, the same were bounced and returned with endorsement "Insufficient Funds". After that, the complainant issued a demand notice through his advocate on 2.8.04 by registered post with AD which was served on the accused. But he did not pay the amount. Hence, the complainant instituted the case.

3. Plea of the accused is one of complete denial and false implication.

4. Before the lower Court the parties examined themselves only in support of their respective cases. The learned lower Court after considering the materials on record found the appellant-accused guilty for the offence u/s.138 of N.I.Act and convicted him thereunder and sentenced to undergo S.I. for six months and to pay a compensation of Rs.65,000/-to the complainant-victim and in default of payment of compensation to suffer S.I. for one month. The said judgment of conviction and sentence is under challenge in this appeal.

5. The learned counsel for the appellant has challenged the impugned judgment on the following grounds :-

(i) Burden of proof heavily lies on the complainant that there was a transaction between himself and the accused. But the complainant has failed to establish that fact.

(ii) The learned lower Court has not appreciated the evidence in proper perspective in view of the fact that it was impossible on the part of a poor man like the complainant to make any transaction to purchase a bus.

(iii) Though the accused has taken a specific stand that he had not issued the cheques under Exts.1 and 2 and the signatures thereon do not belong to him, but the learned lower Court has not gone through the same.

(iv) The complainant has failed to prove the earlier cheques, dt.23.10.02 and 29.10.02.

(v) He has not examined the banker to prove the genuineness of the cheques.

(vi) The learned lower Court has not considered the fact about service of statutory notice nor the Court has given any definite finding as to when the notice was served on the accused.

As such, the judgment is perverse and against the settled principle of law and is liable to be set aside.

6. The learned counsel for the respondent fully supported the judgment of the learned lower Court.

7. Law is well settled that for creating a criminal liability u/s.138 of N.I.Act the complainant must show that a cheque was issued and the same was presented but it was dishonoured and a notice in terms of Section 138 of N.I.Act was served on the person sought to be made liable and despite service of notice no payment was made within 15 days from the date of receipt of the notice.

8. PW-1 the complainant in his evidence categorically stated that the accused gave him false impression that his name is Sudipta Kumar Das though his actual name is Pradipta Kumar Das. PW-1 has proved one receipt, dt.11.9.02 vide Ext.9 signed by the accused in the name of Sudipta Kumar Das acknowledging receipt of Rs.50,000/- from the complainant towards advance of the bus. PW-1 has also stated that the accused failed to hand over the bus and on his several request the accused gave two nos. of cheques each for Rs.20,000/- dt.23.10.02 & 29.10.02 and gave balance amount of Rs.10,000/- by cash and he deposited the cheques before the Bank of India, Kapil Prasad Market Complex which were returned unpaid with remarks "Insufficient Funds". The complainant also stated that he informed the matter to the accused and requested to pay the cheque amount and the accused asked him to wait for some time and again gave him two nos. of cheques bearing Nos.741744 and 741747 for Rs.20,000/- and Rs.15,000/- respectively drawn on SBI, Old Town Branch, Bhubaneswar and gave balance of Rs.5,000/- in cash. He deposited the same in Bank of India, Kapil Prasad Market Complex which were dishonoured for "Insufficient Fund" vide Bank Memos, Exts.3,4 & 5. Non-proving of the earlier cheques of the year 2002 or absence of evidence regarding the ownership of the bus in question or about its registration number are insignificant.

Law is well settled that as per Section 118 of N.I. Act, it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Section 139 of the N.I. Act stipulates that unless the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque for the discharge of whole or part of any debt or liability. In a trial under Sec. 138 of the N.I. Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of

debt or liability. As per Section 4 of the Evidence Act presumptions to be raised under both the provisions are rebuttable (**M/s.Kumar Exports-Vrs.- M/s.Sharma Carpets, 2009 (I) OLR (SC) 460**).

Here, the complainant has stated that the accused had issued money receipt (Ext.9) acknowledging receipt of Rs.50,000/- towards advance of bus. The complainant has also stated that the accused gave him the impugned cheques. The accused has not adduced any evidence to rebut the presumption provided u/s.139 of N.I. Act.

The learned counsel for the appellant during course of argument contended that no bank official has been examined to prove these memos or to show that the account number mentioned in the cheques belongs to the accused. Exts.3 and 4 show that the cheques in question were returned for reason noted in Col.No.16 i.e. "Insufficient Fund". There is nothing in Exts.3 and 4 that the account number mentioned in the cheques does not belong to Pradipta Kumar Das who had signed on the cheques as the drawer. It would be significant to reproduce Section 146 of N.I. Act which reads as follows :-

"146. Bank's slip *prima facie* evidence of certain facts- The Court shall, in respect of every proceeding under this Chapter, on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved."

9. The complainant in his evidence has stated that after the cheques were bounced, he issued a demand notice by registered post with AD asking the accused to pay the cheque amount. He has proved the postal receipt Ext.7 and postal acknowledgment Ext.8. The accused-appellant in his evidence before the Court has stated that the signature on the acknowledgment vide Ext.8/1 does not belong to him. It is seen that Ext.8 was addressed to Pradipta Kumar Das, Plot No.105, Madhusudan Nagar,

Unit-IV, Bhubaneswar. Ext.6 the copy of the demand notice, dt.2.8.04 was issued through advocate in the same address. Ext.7 shows that it was issued by registered post with AD. Here, there is no dispute to the address of the accused mentioned in the body of the notice and on the acknowledgment. But the accused disputes his signature on the acknowledgment. Much significance cannot be attributed to difference in signatures if any. A person consciously or unconsciously may put different signatures being conscious about anticipatory litigation, might have scribed different signatures in dishonest and deliberate intention of defeating provisions. Law is well settled that when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with, **vide 2007 (II) OLR (SC) – 384, C.C.Alavi Haji-Vrs.-Palapetty Muhammed and another.**

Then, arises question as to the date of receipt of notice. Exts.3 and 4 are the bank memos, dt.2.7.04 of State Bank of India, Old Town Branch containing endorsement of “Insufficient Fund”. Ext.5 is the bank memo, dt.3.7.04 of Bank of India, Kapil Prasad Market Complex. The statutory demand notice was issued on 2.8.04. It is not the case of the accused-appellant that 15 days of grace period was not allowed to him to make the payment as provided u/s.138(c) of N.I. Act. On the other hand, when the notice was received under registered post, the inference would be that the notice must have been served within 2 to 3 days particularly when the letter was posted at Bhubaneswar and the address belongs to the same town. The accused has denied the fact of receipt of demand notice. Barring the plea of complete denial, the accused has not adduced any evidence to rebut the statutory presumptions as discussed hereinbefore.

Law is well settled that a person who does not pay within 15 days

of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act vide **2007(II) OLR (SC) Page-384 (Supra)**. Therefore, on examination of the evidence on record and keeping in view the position of law as cited above, I found that the contentions raised by the learned counsel for the appellant challenging the impugned judgment are devoid of any force.

The learned lower Court after discussing the evidence on record has held that the complainant has proved his case against the accused beyond reasonable doubt and convicted the appellant u/s.138 of N.I. Act. I do not find any illegality or infirmity in the said finding of the learned lower Court. Likewise, I also do not find any justifiable reason to alter or modify the quantum of sentence and compensation awarded against the appellant. Accordingly, I hold that the appeal is devoid of any merit. Hence, it is ordered.

ORDER

The Appeal is dismissed on contest. The judgment of conviction and sentence, dt.25.6.2011 passed in I.C.C.Case No.4961/2004 by the learned JMFC, Bhubaneswar is confirmed.

1st Addl. Sessions Judge,
Bhubaneswar.

The judgment having been typed to my dictation and corrected by me and being sealed and signed by me is pronounced in the open court today this the 29th day of November, 2013.

1st Addl. Sessions Judge,
Bhubaneswar.

