

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 44 of 2010

Sri Sujoy Guchait

Vs.

1. The State of West Bengal.

2. Sri Rebati Ghosh.

For the Appellant : Mr. Mirza Firoz Ahmed Begg.

For the State/Opposite Party : Mr. Ashok Das.

Heard on : 19.07.2022

Judgment on : **26.08.2022**

Shampa Dutt (Paul), J.:

This **appeal** is directed against judgment and order dated 25.04.2006 passed by learned Judicial Magistrate, 4th Court, Hooghly in C.R. Case No. 224

of 1997 **acquitting** the accused/opposite party no. 2, of the offence punishable under Section 138 of the Negotiable Instrument Act (N.I. Act in short).

The case of the complainant in his petition of complaint dated 14.05.1997 in short is that both the complainant and the accused person are potato merchants in their respective locality. As the complainant had sold potato to the accused on credit, the accused issued account payee (admittedly Bearer) cheques, four in number, drawn on the State Bank of India, Tarakeswar Branch, P.O. & P.S. – Tarakeswar, District – Hooghly, bearing cheque nos. 120467 dated 28.12.1996, 120468 dated 28.12.1996, 120465 dated 19.12.1996 and 120466 dated 24.12.1996, respectively, amounting to Rs.25,000/- each to the complainant. The complainant deposited the cheque nos. 120467 and 120468 both dated 28.12.1996 with the State Bank of India, P.O. & P.S. – Tarakeswar, District – Hooghly for clearance but both the cheques were dishonoured by the concerned Bank on 07.03.1997 with the remark 'Refer to Drawer'. Thereafter, the complainant presented remaining two cheques bearing nos. 120465 dated 19.12.1996 and 120466 dated 24.12.1996 to the State Bank of India, Tarakeswar Branch for encashment but the said two cheques also were not honoured on the ground of “payment stopped” by the drawer on 08.04.1997. The complainant then, sent a notice to the accused through his Advocate Shri Probhat Kumar Bag by registered post with A.D., on 15.04.1997 and the accused after receiving that notice dated 15.04. 1997 sent a reply dated 21.04.1997 to the lawyer of the complainant through his Advocate Sri Madan Chandra Saha, denying the material allegations in the

notice. As the accused did not make payment covered by the cheques, the complainant filed the instant complaint in the Court of the learned Chief Judicial Magistrate, Hooghly under Section 138 of the N.I. Act.

The defence of the accused was that of innocence and being falsely implicated and that he has no debt or liability to the complainant (though not rebutted under Section 139 of the N.I. Act, by the accused).

Mr. Mirza Firoz Ahmed Begg, learned Advocate appointed as Amicus Curie to represent the appellant/complainant submits that during trial all relevant documents were duly proved and exhibited and PW 2 (SBI employee) proved the cheques on behalf of the appellant/complainant in Court. It is further submitted that the accused/opposite party no. 2 could not deny the case of the complainant. The Trial Court wrongly dismissed the complaint case on the point of notice without considering the evidence-on-record in the proper perspective. It is also submitted that the notice was in accordance with law and was sent by post with proper address but as the Acknowledgement Due Card (A.D. Card) was not available the Trial Court failed to consider the notice and as such the judgment and order under appeal is liable to be set aside and the accused/opposite party should be convicted accordingly.

Learned Lawyer appointed from the State panel, for the opposite parties, submits that the learned Magistrate rightly considered the evidence-on-record and also correctly held that as it is apparent from the copy of notice that the complainant failed to make any demand of the amount covered by the

dishonoured cheques and the notice has to be read as a whole and in the notice, demand has to be made for the cheque amount and if no demand is made, the notice shall fall short of legal requirements and as such the learned Magistrate rightly acquitted the accused person from the present case.

The specific case of the accused/opposite party no. 2 is that he carries on business in potato and appointed the complainant as his agent for purchasing potato from the cultivators. The accused has further pleaded that the cheques were issued for purchasing potato from the cultivators. But the complainant in stead of purchasing potato, converted those **bearer cheques** in his own name. The accused came to know about the said conduct of the complainant and sent a letter to the concerned Bank with the direction 'stop payment'. The accused/opposite party no. 2 has also taken the plea that no notice was ever served upon him before filing of the present complaint.

Evidence on record

The complainant has examined himself as PW-1. This witness has stated that in the year 1995-1996 he did business of Rs. Sixty Lakhs with the accused but no document to that effect could be filed. The accused admitted the case of the complainant that the cheques in question, four in number, were issued by him in favour of the complainant. The contention of the accused is that he issued the cheques for purchasing potato but no attempt was made on behalf of the accused to prove the said case. It is also stated that all the cheques were deposited for encashment but the payment could not be made by the Bank. In

respect of two cheques, endorsement of the Bank was 'Refer to Drawer' on 07.03.1997 and in respect of other two cheques the endorsement of the Bank was 'Stop Payment' on 08.04.1997. It is further stated that as four cheques were dishonoured, he issued notice by registered post with Acknowledgement Due requiring the accused to make payment on 15.04.1997. The complainant has filed the postal receipt which shows that notice was sent to the accused through registered post but the A.D. Card has not come back to the sender/complainant after service.

Prosecution witness no. 1, Sujoy Guchait, the appellant/complainant has further stated that notice was duly served upon the accused/opposite party no. 2 is proved by the fact that the complainant received a reply dated 21.04.1997 to his notice dated 15.04.1997. As such it can be presumed that the notice was duly served. The complainant in his examination in chief has filed a Xerox copy of the said letter (reply) dated 21.04.1997 which is part of the record.

Prosecution witness no. 2, Srikanta Kumar Das is an employee of State Bank of India, Tarakeswar Branch. This witness has corroborated the evidence of PW 1 in respect of the return of the cheque and has proved the return memos. The return memos are dated 08.04.1997 and 07.03.1997. This witness in his cross examination has stated that from the documents it can be said that Sujoy Guchait had no account. The cheque may have been sent by the account holder.

Defence witness

D.W. 1- Rebati Ghosh. The defence has adduced the accused/opposite party no. 2 as a witness to this case. He has stated on oath that he appointed the complainant as an agent in respect of his potato business. It has been further stated by the accused that the complainant did not purchase any potato in respect of the said cheques in the year 1996. That these cheques were handed over in anticipation of potatoes being delivered on purchase by issuance of challan. It is further stated that in spite of not purchasing potato in the year 1996, the complainant tried to withdraw the amount from the bank by using the said cheques and as such the accused requested the concerned bank not to make any payment. The Trial Court thus rightly came to the conclusion and rightly dismissed the case and acquitted the accused.

Analysis of evidence

Section 138 of the Negotiable Instrument Act:-

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.*

A cheque is commonly used and post-dated cheques are also used in various business transactions. Post-dated cheques are issued to give the cheque drawer some accommodation. It is therefore important to ensure that the cheque drawer does not misuse the accommodation given to it. The Negotiable Instruments Act, 1881 ('Act') deals with negotiable instruments, such as promissory notes, bills of exchange, cheques, etc. Sections 138 to 142 of Chapter XVII were implemented to inculcate trust in the effectiveness of banking operations and give legitimacy to the negotiable instruments used in

business transactions. If a party issues a cheque as a mode of deferred payment and the payee accepts the cheque in the same way that he or she receives his payment on the due date, then he or she should not suffer on account of non-payment.

The penal provisions in Sections 138 to 142 of the Act ensure that obligations in the form of late payments are fulfilled by the issuance of cheques. Section 138 of the Act sets out the conditions under which a cheque case is filed. The components required to comply with Section 138 of N.I. Act are as follows:

- A person must have received a cheque for payment of money to another person for the discharge of any debt or other liability.
- This cheque was sent to the bank within three months.
- The cheque shall be returned to the bank without being paid. This happens because of a lack of funds or because it exceeds the amount which was agreed to be paid out of that account. This can be done through an arrangement reached with the bank.
- The payer demands payment of the money to the drawer from the obtained information within 15 days by sending a written notice.

The Trial Court considering the evidence-on-record being both oral and documentary held that though notice was duly given to the accused requiring payment but the service of notice itself is not sufficient unless it is proved that the notice was given within **15 days** (30 days substituted by Act 55 of 2002,

w.e.f 06.02.2003) **(incident herein is of the year 1997)** from the date of information of the dishonour of cheques. It is further seen that only one notice was given in respect of four cheques dishonoured on different dates. It is seen from the materials-on-record that two cheques bearing numbers 120467 and 120468 both dated 28.12.1996 were dishonoured on 07.03.1997 and as such the notice dated 15.04.1997 was definitely not within the statutory period. Thus the notice is bad in respect of these two cheques. In respect of the cheques which were dishonoured on 08.04.1997. The notice dated 15.04.1997 was sent well within the statutory period. It is also seen from the notice that only a period of seven days was given for making the payment, whereas in a statutory notice as per requirement of Section 138(c) of the N.I. Act, demanding payment of amount, at least 15 days should be given, which was not done in the present case (as seen from the photocopy of reply dated 21.04.1997 and not denied by the complainant) and the Trial Court thus rightly held that the said notice in that respect is against the provision of Section 138(b)(c) of the N.I. Act, though it is seen that the complaint was filed after the period of 15 days but within 30 days.

Section 138(b) of the N.I. Act 1881:-

“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.”

As such it is found that the notice herein has not been issued to the drawer of these two cheques within the mandatory period of fifteen days of the receipt of information on 07.03.1997 by the complainant from the bank regarding the return of the cheque as unpaid and as such the notice is defective in respect of the said two cheques as it is not in accordance with the provision of Section 138(b) of the N.I. Act.

The next point is that the complainant in his evidence has relied upon the photo copy of the reply given by the Advocate of the accused in response to his letter dated 15.04.1997 **which proved the service of the said notice**. It is this document which has been filed and relied upon by the complainant in support of **his due service of notice**. It is seen from the said copy of the letter that the alleged notice dated 15.04.1997 gave a notice to pay the cheque amount **within seven days** from the receipt of letter dated 15.04.1997. And the said statement has not been denied by the complainant. From the copy of the letter that has been relied upon, this court finds that the demand to pay the said amount within seven days is in clear violation of the provision of Section 138(c) of the N.I. Act 1881.

Section 138(c) of the N.I. Act 1881:-

“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.”

Accordingly this court also finds that the notice is in clear violation of the provision of Section 138 (b) & (c) of the N.I. Act 1881 and thus bad in law and the Ld. Magistrate thus came to the right findings.

The power of the court to **condone the delay**, on a prayer under Section 142 (1) (b) is in respect of filing of a complaint under Section 138 of the N.I. Act and not in respect of issuance of notice under Section 138 of the N.I. Act. The present case has been filed on 14.05.1997 and thus within the period of limitation. The complainant has also admitted that the mother of the accused has filed a suit against the complaint's elder brother Nirmal Guchait and the said suit is still pending. This shows that there is an ongoing dispute between the parties.

Conclusion

The present case is under Section 138 of the N.I. Act, wherein the mandatory requirement in a case under this provision, is the notice, which initiates the total process and is the base/foundation of such a case. The notice in this case has to be complete in all respects as required under the said Section. Any defect in the said notice including its service and contents and requirements is vital in a case of this nature. In the present case, the findings of the Trial Court that the notice in this case is insufficient, vague and illegal is found to be correct and this Court also finds that the notice in this case is not in accordance with law being in violation of the provisions under Section 138(b)

and (c) of the N.I. Act and hence the judgment under appeal needs no interference.

The appeal against acquittal being CRA 44 of 2010 thus stands dismissed.

Lower court records along with a copy of this judgment be sent down at once to the learned Trial Court for information and necessary action, if any.

Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Shampa Dutt (Paul), J.)