

IN THE HIGH COURT OF ORISSA, CUTTACK

CRLP No.12 of 2021

From the judgment and order dated 01.08.2019 passed by the Judicial Magistrate First Class, Jajpur Road in I.C.C. No.331 of 2013 and the judgment and order dated 08.02.2021 passed by the Addl. Sessions Judge, Jajpur Road in Criminal Appeal No.03 of 2019.

Prafulla Kumar Prusty @
Prafulla Chandra Prusty Petitioner

-Versus-

Ramesh Chandra Behera Opp. party

For Petitioner: - Mr. Trilochan Dash

For Opp. party: - None

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of order: 11.02.2022

S. K. Sahoo, J. The petitioner Prafulla Kumar Prusty @ Prafulla Chandra Prusty is the complainant in a case under section 138 of the Negotiable Instruments Act, 1881 (hereinafter 'N.I. Act'). The complaint petition was filed before the learned J.M.F.C., Jajpur Road vide I.C.C. No.331 of 2013 against the opposite party Ramesh Chandra Behera who faced trial in the said Court

and was found guilty under section 138 of the N.I. Act and sentenced to undergo simple imprisonment for a period of six months and was also directed to pay a sum of Rs.5,44,000/- (rupees five lakhs forty four thousand only) to the complainant as compensation under section 357(3) of Cr.P.C., in default of payment of compensation, to undergo simple imprisonment for a further period of one month.

The opposite party Ramesh Chandra Behera preferred an appeal in the Court of Session which was heard by the learned Addl. Sessions Judge, Jajpur Road in Criminal Appeal No.03 of 2019 and the learned Appellate Court vide impugned judgment and order dated 08.02.2021, allowed the appeal and set aside the judgment and order of conviction passed by the learned trial Court.

This leave petition has been filed by the petitioner Prafulla Kumar Prusty @ Prafulla Chandra Prusty challenging the order of acquittal passed by the learned Appellate Court in Criminal Appeal No.03 of 2019 as per the impugned judgment and order dated 08.02.2021.

The prosecution case, in short, is that the petitioner and the opposite party belong to same village. The opposite party had borrowed a hand loan of Rs.4,00,000/- (four lakhs) from the petitioner to purchase a truck with a promise to repay

the same within a month. After several demands, the opposite party issued a cheque bearing no.160643 dated 08.01.2013 in favour of the petitioner to discharge his liability. The petitioner presented the said cheque in the Bank for encashment but it returned back with an endorsement "insufficient funds" on 09.01.2013. A demand notice was issued on behalf of the petitioner to the accused on 18.01.2013, but neither the A.D. returned nor any reply came from the opposite party to such demand notice. The complaint petition was filed on 16.02.2013.

The learned trial Court framed the point for consideration is whether the opposite party had issued the cheque bearing no.160643 on 08.01.2013 for due discharge of his liability and not paid the cheque amount even after receipt of the demand notice and thereby committed an offence punishable under section 138 of the N.I. Act.

The petitioner examined himself as P.W.1 to prove his case. The opposite party whose defence plea is one of denial, examined two witnesses including himself as D.W.1, one Rajkishore Behera was examined as D.W.2.

From the side of the petitioner, five documents were marked as exhibits and from the side of the defence, one vehicle sale agreement was marked as Ext.A.

The learned trial Court after discussing the oral as well as the documentary evidence came to hold that the petitioner as the complainant has successfully established his case beyond all reasonable doubt and accordingly, found the opposite party guilty for commission of offence under section 138 of the N.I. Act.

The opposite party preferred Criminal Appeal challenging the judgment of the learned trial Court and the learned Appellate court has been pleased to hold that the petitioner was required to prove that the opposite party got a clear fifteen days of time from the date of receipt of demand notice before filing the complaint and since the petitioner has failed to prove such aspect, the complaint filed by the petitioner is not a complaint in legal sense and he does not have a cause of action to file such a complaint and the cognizance taken by the learned trial Court is bad in law and the subsequent trial is also vitiated. The learned Appellate Court relied upon the ratio laid down by the Hon'ble Supreme Court in the case of **Yogendra Pratap Singh -Vrs.- Savitri Pandey reported in (2014) 59 Orissa Criminal Reports (SC) 577.**

Mr. Trilochan Das, learned counsel appearing for the petitioner contended that the learned Appellate Court has committed illegality in acquitting the opposite party of the

offence under section 138 of the N.I. Act and there is no flaw in the judgment of the learned trial Court and therefore, the impugned judgment of the Appellate Court should be set aside and the judgment passed by the learned trial Court should be restored.

In this case, there is no dispute that the cheque in question bearing no.160643 dated 08.01.2013 was issued by the opposite party in favour of the petitioner which was presented in the State Bank of India, Panikoili Branch for encashment on the very next day i.e., 09.01.2013 and on the very day, it was also returned back with an endorsement as dishonored on account of "insufficient funds". The demand notice was sent through the Advocate of the petitioner to the opposite party on 18.01.2013. Neither the postal acknowledgement nor the envelop containing the demand notice returned. No response also came from the opposite party relating to such demand notice. The complaint petition was filed on 16.02.2013 before the learned J.M.F.C., Jajpur Road.

The crux for consideration before this Court is whether the complaint petition was filed within the prescribed period or it was not a complaint in the legal sense as it was filed prior to the date on which cause of action arose.

Section 138 of the N.I. Act reads as follows:-

"Section 138 of the N.I. Act 1881: 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.

Explanation. For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

Section 142 of the N.I. Act reads as follows:-

**Section 142 of the N.I. Act 1881:
Cognizance of offences.—**

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

- (a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;
- (b) such complaint is made within one month of the date on which the cause of action

arises under clause (c) of the proviso to section 138:

Provided that the cognizance of a complaint may be taken by the court after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period.

- (c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138.
- (2) The offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—
 - (a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or
 - (b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.—For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered

to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.”

In this case, since neither the postal acknowledgment nor the envelop containing demand notice returned back to the petitioner, what would be the date of deemed service of the notice on the opposite party?

Learned counsel for the petitioner placed reliance in the case of **C.C. Alavi Haji –Vrs.- Palapetty Muhammed and Ors. reported in 2007 (2) Orissa Law Reviews 384**, in which referring to section 27 of the General Clause Act, it is held as follows:

“**13.** Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post.

In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of

notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement refused or not available in the house or house locked or shop closed or addressee not in station, due service has to be presumed. (Vide: **Jagdish Singh -Vrs- Natthu Singh: A.I.R. 1992 S.C. 1604, State of M.P. -Vrs-. Hiralal & Ors: (1996) 7 SCC 523 and V.Raja Kumari -Vrs- P. Subbarama Naidu & Anr. (2004) 8 SCC 774**). It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

14. Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act, in order to enable the Court to draw presumption or inference either under Section 27 of the G.C. Act or Section 114 of the Evidence Act, is concerned, there is no material difference between the two provisions. In our opinion, therefore, 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. It is needless to emphasise that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the Court is required to be prima facie satisfied that a case under the said Section is made out and the aforementioned mandatory statutory procedural requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. In our opinion, this interpretation of the provision would effectuate the object and purpose for which proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to provide him an opportunity to make amends.

15. As noticed above, the entire purpose of requiring a notice is to give an opportunity to the drawer to pay the cheque amount within 15 days of service of notice and thereby free himself from the penal consequences of Section 138. In **D. Vinod Shivappa –Vrs.- Nanda Belliappa: (2006) 6 S.C.C. 456**, this Court observed:

“One can also conceive of cases where a well intentioned drawer may have inadvertently missed to make necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within the prescribed period. It is for this reason that Clause (c) of proviso to section 138 provides that the section shall not apply unless the drawer of the cheque fails to make the payment within 15 days of the receipt of the said notice. To repeat, the proviso is meant to protect honest drawers whose cheques may have been dishonoured for the fault of others, or who may have genuinely wanted to fulfil their promise but on account of

inadvertence or negligence failed to make necessary arrangements for the payment of the cheque. The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their modus operandi to cheat unsuspecting persons."

16. It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. 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. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in K. Bhaskaran -Vrs.- Sankaran Vaidhyan Balan: (1999) 7 S.C.C. 510, if the giving of notice in the context of Clause (b) of the proviso was the same as the receipt of notice a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of section 138 of the Act.

17. In the instant case, the averment made in the complaint in this regard is: Though the complainant issued lawyer's notice intimating the dishonour of cheque and demanded payment on 4.8.2001, the same was returned on 10.8.2001 saying that the accused was out of station. True, there was no averment to the effect that the notice was sent at the correct address of the drawer of the cheque by registered post acknowledgement due. But the returned envelope was annexed to the complaint and it thus, formed a part of the complaint which showed that the notice was sent by registered post acknowledgement due to the correct address and was returned with an endorsement that the addressee was abroad. We are of the view that on facts in hand the requirements of section 138 of the

Act had been sufficiently complied with and the decision of the High Court does not call for interference.”

Learned counsel for the petitioner filed a copy of the complaint petition. In the averments made in the complaint petition, it is simply mentioned that on 18.01.2013, the complainant sent a demand notice regarding dishonour of cheque through the Advocate by registered post with A.D., but neither postal acknowledgement nor envelop has been returned back. There was no averment to the effect that the notice was sent in the correct address of the opposite party who was the drawer of the cheque by registered post with acknowledgment due. Obviously, returned envelop was also not annexed to the complaint petition.

In the case of **Subodh S. Salaskar -Vrs.- Jayprakash M. Shah and others reported in (2008) 13 Supreme Court Cases 689**, interpreting section 27 of the General clauses Act, it was held that a notice must be deemed to have been served in the ordinary course subject to the fulfillment of the conditions laid down therein. Thirty days time ordinarily must be held to be sufficient for service of notice. It was further held as follows:

"23. The complaint petition admittedly was filed on 20.4.2001. The notice having been sent on 17.1.2001, if the presumption of service of notice within a reasonable time is raised, it should be deemed to have been served at best within a period of thirty days from the date of issuance thereof i.e. 16.2.2001. The accused was required to make payment in terms of the said notice within fifteen days thereafter i.e. on or about 2.3.2001. The complaint petition, therefore, should have been filed by 2.4.2001."

Keeping in view the ratio laid down in the case of **Subodh S. Salaskar** (supra), when a demand notice was sent through the Advocate of the petitioner on 18.01.2013 and neither the acknowledgment nor the envelope containing demand notice returned back, then the due service date would be thirty days from the date of issuance of legal notice which falls on 17.02.2013 and as per the clause-(c) of 138 of the N.I. Act, the opposite party was required to make payment in terms of the said notice within fifteen days thereafter i.e. on 04.03.2013. Since the complaint petition was filed on 16.02.2013 and cognizance of offence was taken on such complaint, in view of the ratio laid down in the case of **Yogendra Pratap Singh** (supra), such a complaint is no

complaint in the eyes of law and no cognizance of offence can be taken up on the basis of such complaint. The learned Appellate Court has rightly held that it was the duty of the petitioner to prove that the opposite party got a clear fifteen days of time from the date of receipt of demand notice before filing the complaint petition and the petitioner has failed to prove the same and thus the complaint filed by him is no complaint in the legal sense and as on 16.02.2013 the complainant does not have a cause of action to file the complaint and the cognizance taken by the trial Court is bad in law and therefore, the subsequent trial is vitiated.

After carefully going through the impugned judgment of the learned Appellate Court, I find no perversity or illegality in the same. At this stage, the learned counsel for the petitioner relying on the observation made in the case of **Yogendra Pratap Singh** (supra) contended that the petitioner may be permitted to file a fresh complaint for commission of offence under section 138 of the N.I. Act and to file appropriate application before the concerned Court to condone the delay in filing the complaint which may be considered in accordance with law. Without expressing any opinion, it is observed that in the event, any such fresh complaint with delay condonation application is filed within a period of one month from today, the

learned Magistrate shall keep in view the ratio laid down by the Hon'ble Supreme Court and this Court in different decisions regarding maintainability of second complaint on the same facts and proceed with the same in accordance with law.

In view of the foregoing reasons, I find no reasons to grant leave to the petitioner to prefer an appeal against the order of acquittal passed by the learned Appellate Court as per impugned judgment and order dated 08.02.2021 in Criminal Appeal No.03 of 2019.

Accordingly, the CRLLP petition stands dismissed.

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 11th February, 2022/Pravakar