

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 178 of 2018

CHLORIDE POWER SYSTEMS AND SOLUTIONS LIMITED
VS.
THE STATE OF WEST BENGAL & ANR.

For the Appellant	: Mr. Nigam Ashish Chakraborty, Adv. Mr. Agniva Banerjee, Adv. Mr. Joydeb Ghorai, Adv. Mr. Diptesh Ghorai, Adv. Ms. A. Paul, Adv.
For the State	: Mr. N.P. Agarwal, Adv. Mr. P. Bose, Adv.
For the Respondent No. 2	: Mr. Debasish De, Adv. Ms. Debanjana De, Adv.
Hearing concluded on	: 6 th February, 2023
Judgement on	: 9 th February, 2023

Siddhartha Roy Chowdhury, J.:

1. This criminal appeal challenges the judgement and order dated 11th December, 2017 passed by learned 12th Court of Metropolitan Magistrate in case no. C-21081 of 2011 (T.R. No. 1341 of 2011) recording an order of acquittal against accused person.
2. Briefly stated, Sri Subrata Nag, Senior Manager-Commercial and Legal as well as authorized representative of Chloride Power Systems and Solutions Limited (formerly known as Caldyne Automatics Limited) represented through its employee filed a petition under Section 138 of

the N.I. Act, 1881, against Dharmendra Singh, Proprietor of Venus International contending, *inter alia*, that the accused approached the complainant for procuring renewal energy devices and spare parts (e.g. Solar Battery, solar Module etc.) for his requirement and had placed purchase order dated 5th May, 2011 for Rs. 9,86,136/- and CAL/02/2011-12 dated 9th June, 2011 for Rs. 14,13,422/- respectively. The complainant company duly supplied the required materials in terms of the purchase orders and raised two invoices bearing no. C/00082/2011-12 dated 24th May, 2011 for Rs. 9,86,135/- and C/00124/2011-12 dated 13th June, 2011 for Rs. 14,13,678/- and the same were duly received by the accused without raising any dispute whatsoever regarding quality and quantity of the materials supplied. Thus, the accused incurred the liability to pay a sum of Rs. 24,47,809/- including a sum of Rs. 47,996/- towards Central Sales Tax. The accused person on 6th May, 2011 paid a sum of Rs. 9,66,500/- through Real Time Gross Settlement (RTGS) and on 6th June, paid a sum of Rs. 10,00,000/- in the same fashion. In discharge of his liability to pay rest of the amount a cheque was issued by the accused person bearing no. 788307 dated 14th June, 2011 for a sum of Rs. 4,81,309/- drawn on the IDBI Bank Limited, Siddha Point, Park Street, Kolkata-700016. The cheque was presented by the complainant company on 14th June, 2011 and the same was returned unpaid on 22nd June, 2011 with an endorsement on the cheque return memo "Payment stopped by drawer". By letter bearing no. L-3:VENUS:COM-SN:11-12:0411 dated 7th July, 2011 the drawee duly intimated the

drawer about the dishonour of cheque by the bank with a demand for payment of a sum of Rs. 4,81,309/- within a period of 15 days from the date of receipt. The said letter was received by the accused person on 9th July, 2011 and a reply to that letter was given by the accused person 19th July, 2011.

3. Chloride Power Systems and Solutions Limited filed a petition of complaint under Section 138 of N.I. Act before the jurisdictional Magistrate. Learned Trial Court was pleased to issue process upon the accused person who surrendered to the jurisdiction of learned Trial Court and stood trial of the case. To crown success Subrata Nag, the authorized representative of the complainant company adduced evidence as P.W. 1. The accused person adduced evidence as D.W. 1 and learned Trial Court after considering the evidence on record, both oral and documentary was pleased to pass the judgement and order impugned. According to learned Trial Court there was shortage of supply of materials by the complainant company. Therefore, the accused person successfully rebutted the presumption of law as laid down under Section 139 of the Evidence Act.
4. Assailing the impugned judgement Mr. Nigam Ashish Chakraborty, learned Counsel for the appellant submits that instruction to the banker by the accused person to stop payment itself is sufficient to hold the accused person culpable for committing offence within the meaning of Section 138 of the N.I. Act. The accused person did not deny the fact that the cheque was issued by the accused person in discharge of his liability. The plea taken by the accused person is

nothing but a ploy to deny the obligation to pay the bill amount. It is further contended that even if the issue is considered in the light of Section 56 of the N.I. Act then also the accused-respondent cannot escape the liability. Drawing my attention to paragraphs 32, 33 and 34 of the judgement pronounced in the case of **DASHRATHBHAI TRIKAMBHAI PATEL VS. HITESH MAHENDRABHAI PATEL** reported in **(2023) 1 SCC 578** Hon'ble Apex Court held:-

“32. A Division Bench of the Kerala High Court has held in Joseph Sartho v. Gopinathan¹² that since the representation in the cheque was for a sum higher than the amount that was due on the date that it was presented for encashment, the drawer of the cheque cannot be convicted for the offence under Section 138 of the Act. The High Court of Delhi addressed the same issue in Alliance Infrastructure Project Ltd. v. Vinay Mittal¹³. The High Court observed that when part payment is made after the cheque is drawn, the payee has the option of either taking a new cheque for the reduced amount or by making an endorsement on the cheque acknowledging that a part payment was made according to the provisions of Section 56 of the Act. It was also held that the notice of demand which requires the drawer of the cheque to make payment of the whole amount represented in the cheque despite receiving part repayment against the sum, before the issue of notice, cannot be valid under Section 138(b) of the Act. A similar view was taken by the High Court of Gujarat in Shree Corporation v. Anilbhai Puranbhai Bansal¹⁴.

33. Under Section 56 read with Section 15 of the Act, an endorsement may be made by recording the part-payment of the debt in the cheque or in a note appended to the cheque.

When such an endorsement is made, the instrument could still be used to negotiate the balance amount. If the endorsed cheque when presented for encashment of the balance amount is dishonoured, then the drawee can take recourse to the provisions of [Section 138](#). Thus, when a part- payment of the debt is made after the cheque was drawn but before the cheque is encashed, such payment must be endorsed on the cheque under [Section 56](#) of the Act. The cheque cannot be presented for encashment without recording the part payment. If the unendorsed cheque is dishonoured on presentation, the offence under [Section 138](#) would not be attracted since the cheque does not represent a legally enforceable debt at the time of encashment.

34. In view of the discussion above, we summarise our findings below:

34.1. For the commission of an offence under [Section 138](#), the cheque that is dishonoured must represent a legally enforceable debt on the date of maturity or presentation.

34.2. If the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encashed upon maturity, then the legally enforceable debt on the date of maturity would not be the sum represented on the cheque.

34.3. When a part or whole of the sum represented on the cheque is paid by the drawer of the cheque, it must be endorsed on the cheque as prescribed in [Section 56](#) of the Act. The cheque endorsed with the payment made may be used to negotiate the balance, if any. If the cheque that is endorsed is dishonoured when it is sought to be encashed upon maturity, then the offence under [Section 138](#) will stand attracted.

34.4. The first respondent has made part-payments after the debt was incurred and before the cheque was encashed upon maturity. The sum of rupees twenty lakhs represented on the cheque was not the “legally enforceable debt” on the date of maturity. Thus, the first respondent cannot be deemed to have committed an offence under Section 138 of the Act when the cheque was dishonoured for insufficient funds.

34.5. The notice demanding the payment of the “said amount of money” has been interpreted by judgments of this Court to mean the cheque amount. The conditions stipulated in the provisos to [Section 138](#) need to be fulfilled in addition to the ingredients in the substantive part of Section 138. Since in this case, the first respondent has not committed an offence under Section 138, the validity of the form of the notice need not be decided.”

5. According to Mr. Chakraborty, learned Counsel, the accused person has the liability to pay the amount equivalent to cheque. The issue of mismatch in supply and purchase order cannot be considered to be sufficient to rebut the presumption of Section 139 of N.I. Act. His instruction to stop payment in respect of entire cheque amount is out and out bad and learned Trial Court failed to appreciate this fact while passing the impugned judgement.
6. Refuting such contention, Mr. Debasish De, learned Counsel for the accused person submits that document Exhibit-A is the statement of account filed before the learned Trial Court which would indicate the fact that the accused person had sufficient fund in the account when the cheque was presented and not honoured by the banker of the accused under the specific instruction to stop payment. Therefore, this

case should not be considered as a dishonour of cheque simplicitor. 'Stop payment' instruction was not issued because of insufficient and paucity of fund. There was every reason to give such instruction to the banker inasmuch as the accused person did not receive materials in terms of the purchase order. There was shortage in supply which was indicated on the reverse side of the challan Exhibit-5. To buttress his point learned Counsel relied upon the judgement of Hon'ble Apex Court pronounced in the case of **LAXMI DYECHEN VS. STATE OF GUJARAT & ORS.** reported in **(2012) 13 SCC 375** wherein it is held:-

"4. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. If however, the accused/drawer of a cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under [Section 139](#) of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant.

5. It is no doubt true that the dishonour of cheques in order to qualify for prosecution under [Section 138](#) of the NI Act precedes a statutory notice where the drawer is called upon by allowing him to avail the opportunity to arrange the payment of the amount covered by the cheque and it is only when the drawer despite the receipt of such a notice and despite the opportunity to make the payment within the time

stipulated under the statute does not pay the amount, that the said default would be considered a dishonour constituting an offence, hence punishable. But even in such cases, the question whether or not there was lawfully recoverable debt or liability for discharge whereof the cheque was issued, would be a matter that the trial court will have to examine having regard to the evidence adduced before it keeping in view the statutory presumption that unless rebutted, the cheque is presumed to have been issued for a valid consideration. In view of this the responsibility of the trial judge while issuing summons to conduct the trial in matters where there has been instruction to stop payment despite sufficiency of funds and whether the same would be a sufficient ground to proceed in the matter, would be extremely heavy.”

7. *Dashrathbhai Trikambhai Patel (supra)* dealt with the case where part payment was made after the cheque was issued and Hon’ble Apex Court held if the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encashed upon maturity then the legally enforceable debt would not be the sum represented on the cheque.
8. In this case no payment though was made yet the fact remains that the accused person issued a cheque in order to discharge his obligation to pay against particular number of goods being supplied. Exhibit-5 unerringly indicates supply was not in terms of the purchase order. Therefore, the drawer of the cheque cannot be held liable to pay the cheque amount when there is mismatch between the articles or goods for which the cheque was issued and the goods or articles actually supplied. The accused person in this case has been able to

prove that the cheque amount being a sum of Rs. 4,81,309/- was not the legally enforceable debt when the cheque was presented and the payment was stopped under the instruction of drawer. Therefore, the accused person cannot be said to have committed an offence within the meaning of Section 138 of the N.I. Act. To maintain a proceeding under Section 138 of the N.I. Act it is incumbent upon the complainant to prove that there is a legally enforceable debt and the cheque was drawn for discharge in whole or in part of any debt or liability.

9. Under such circumstances, the impugned judgement, in my humble opinion, does not warrant any interference. The appeal thus cannot be accepted. Consequently, the appeal is dismissed and the impugned judgement passed by learned 12th Court of Metropolitan Magistrate stands affirmed.
10. Let a copy of this judgement be sent down along with lower Court record to the learned Trial Court for information and necessary compliance.
11. Urgent photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)