

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 613 of 2017

RAMKRIT JADAV
VS.
SAMIR KUMAR DAS & ORS.

For the Appellant : Mr. Ayan Bhattacharjee, Adv.
Mr. Prattoy Khan, Adv.
Mr. Suman Majumder, Adv.

For the Respondent : Mr. Swapan Kumar Mallick, Adv.
Mr. Sandip Kundu, Adv.
Ms. Sudeshna Das, Adv.

Hearing concluded on : 18th January, 2023

Judgement on : 2nd February, 2023

Siddhartha Roy Chowdhury, J.:

1. This appeal assails the judgement passed by learned Sessions Judge, Hooghly on 26th July, 2016 in Criminal Appeal No. 13 of 2016 recording an order of acquittal and thereby setting aside the judgement and order of conviction passed by learned Judicial Magistrate, 3rd Court, Hooghly at Chinsurah on 17th May, 2016 in case no. CR 128/2011 under Section 138 of the N.I. Act.
2. Briefly stated, Ramkrit Jadav entered into an agreement with accused Samir Kumar Das to purchase a flat and paid a sum of Rs. 4,97,376/- towards consideration money. However, the proposed vender failed to deliver possession of the same and agreed to refund

the amount received as part of consideration, in advance. Samir Kumar Das paid a sum of Rs. 1,60,000/- by cash and issued a cheque of Rs. 3,37,376/- on 31st January, 2011 in favour of the complainant Ramkrit Jadav. The cheque was drawn on Bank of India, Chinsurah Branch. The drawee presented the cheque and it was not honoured by bank due to insufficient fund. The drawee, thereafter, sent a legal notice through his lawyer to the drawer of the cheque within the statutory period. However, by giving the reply to the said notice the drawer of the cheque, who stood trial as accused person, denied his liability of repay any amount to the drawee complainant on the plea that though he issued a cheque, but he made the payment by cash before presentation of cheque.

3. The trial of the case being C.R. 128 of 2013 commenced on 13th June, 2014 when the accused person on being examined under Section 251 of the Code of Criminal Procedure, pleaded his innocence and claimed to be tried. In this case the complainant adduced evidence as P.W. 1 and he was the sole witness. The cheque in question was admitted as Exhibit-1 while Return memo is admitted as Exhibit-2. Notice was issued by the Complainant through his advocate, was admitted as Exhibit-3. Reply to the said notice by the drawer of cheque, received by the complainant was admitted as Exhibit-4.
4. Learned Trial Court after considering the evidence on record both oral and documentary, was pleased to hold accused Samir Kumar Das guilty of offence, punishable under Section 138 of the N.I. Act, recorded an order of conviction and sentenced him to suffer imprisonment till

rising of the Court and directed the accused person to pay a sum of Rs. 4,50,000/- towards fine, in default to suffer imprisonment for six months, and on recovery of the fine amount a sum of Rs. 4,40,000/- was directed to be given to the complainant. This order of conviction was considered by learned Appellate Court in the Criminal Appeal No. 13 of 2016 and the order passed by learned Trial Court was reversed. Hence the appeal.

5. Assailing the impugned judgement Mr. Ayan Bhattacharjee, learned Counsel representing the appellant submits that learned Appellate Court, to his wisdom did not find the notice Exhibit-3, as sufficient as there was no express demand for the payment of the cheque amount. According to learned Appellate Court notice Exhibit-3 sans demand of money, as laid down under Proviso (b) to Section 138 cannot be held to be sufficient to maintain the proceeding under Section 138 of the N.I. Act and on that sole ground the order of conviction was reversed.
6. Drawing my attention to Exhibit-4 Mr. Bhattacharjee submits that the notice, Exhibit-3 conveyed a message to the drawer of the cheque in no uncertain term about his obligation to pay the cheque amount. In response to such notice, Exhibit-3, the drawer of the cheque sent a reply to the complainant claiming inter alia, though the cheque was issued to his client, the complainant dated 31st May, 2010 worth of Rs. 3,37,376/-, yet it was not presented to the bank within the stipulated period of time. Thereafter, being requested by the complainant on 4th January, 2011 the drawer of the cheque paid a sum of Rs. 3,37,376/-

in cash in presence of local respectables. The drawee of the cheque committed breach of trust in not handing over the cheque issued by the drawer, despite several reminders.

7. Mr. Ayan Bhattacharjee, learned Counsel for the appellant draws my attention to the meaning of notice as it appears in Black's Law Dictionary (Eighth Edition) as under:-

“A person has notice of a fact or condition if that person (1) has actual knowledge of it; (2) has received information about it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording. [Cases: Constitutional Law 251.6, 309; Notice 1. C.J.S. Constitutional Law §§ 968, 1154, 1165-1166, 1168-1169; Notice §§ 2-3, 9.] 2. The condition of being so notified, whether or not actual awareness exists <all prospective buyers were on notice of the judgment lien> Cf. KNOWLEDGE. 3. A written or printed announcement <the notice of sale was posted on the court-house bulletin board>. [Cases: Sales 235; Vendor and Purchaser 225. C.J.S. Sales § 233; Vendor and Purchaser §§486-487, 491.]”

8. ‘Demand’ according to Black’s Law Dictionary is defined as the assertion of legal or procedural right and the ‘demand letter’ denotes a letter by which one party explains its legal position in a dispute and requests the recipient to take some action or else risk being sued.
9. Notice denotes, according to Mr. Bhattacharjee, merely intimation to the party concerned of a particular fact. It may take several forms. It must be in writing and must intimate quite clearly the message it is supposed to convey. A notice is to be judged in the light of well

recognized principle of interpretation. It must be construed not with a desire to find faults in it, which would render it defective but it should not be construed in hypercritical manner with pedagogic pendantism as well, but it must be construed in a common sense way.

10. To buttress his point Mr. Bhattacharjee placed his reliance upon the judgement of Hon'ble Supreme Court in the case of ***Parasramka Commercial Company vs. Union of India*** reported in **(1969) 2 SCC 694**, and judgement of the Coordinate Bench of this Court pronounced in the case of ***Barendra Kumar Bera vs. Santanu @ Chottan Mukherjee*** reported in **(2009) 2 C Cr LR (Cal) 634**. It is further contended by Mr. Bhattacharjee that the object of Clause (b) of Proviso to Section 138 of the N.I. Act is to give a chance to the drawer of the cheque to rectify his omission and also protect an honest drawer. Service of notice of demand in Clause (b) of the Proviso to Section 138 is the condition precedent for filing a complaint under Section 138 of the N.I. Act. Learned Appellate Court had no reason to take a pedantic view to reverse the order of conviction which means refusal on the part of the learned Appellate Court to protect the honest drawee of the cheque, from being deprived of, what is due to him.

11. Refuting such contention Mr. Swapan Kumar Mallik, learned Counsel representing the opposite party submits that a notice according to Clause (b) of Proviso to Section 138 of the N.I. Act must contain, apart from information regarding return of the cheque as unpaid, a demand for payment of amount of the cheque. It is mandatory and in absence of such demand of the cheque amount, the

notice is liable to be held as imperfect. To buttress his issue Mr. Mallik relied upon the judgement in ***Rahul Builders vs. Arihant Fertilizers & Chemicals & Anr.*** reported in **(2008) 2 SCC 321**. It is further contended that parties to the proceeding entered into an agreement regarding refund of sum of Rs. 4,97,376/-. In case of breach of such agreement the accused respondent may be roped in a civil proceeding but he cannot be saddled with criminal liability.

12. Since the ultimate issue, Court is to address, is the issue relating to validity of notice, Exhibit-3 which is pore-condition to maintain a proceeding under Section 138 of the N.I. Act. I have perused notice Exhibit-3 which carries with it the information that a cheque that was drawn on UCO Bank by the accused person, was presented and dishonoured for want of sufficient fund. The complainant being the holder of the cheque through his advocate sent a notice well within time to the drawer, subsequently arrayed as accused person, disclosing all necessary details but instead of demanding the cheque amount simplicitor, opinion of the drawer of the cheque was invited in writing, within a specific period of time, failing which, it is made out in the notice, the drawer would expose himself to legal proceeding before the Court of law.
13. Notice was duly received by the accused person and a reply was given as well.
14. It goes without saying that service of notice in a proceeding under Section 138 of the N.I. Act is imperative in character. It is a condition precedent for maintaining a complaint under Section 138 of the N.I.

Act. Clause (b) of Proviso appended to Section 138 of the Act is explicit enough that unless a notice is given in writing within 15 days of receipt of information from bank regarding return of cheque as unpaid, coupled with demand the petition of complaint would not have been maintainable. It is trite to say no form of notice is prescribed.

15. Here in this case notice Exhibit 3 was served upon the drawer of the cheque after the cheque was dishonoured by the bank. The notice contains the required information indicating that (i) the cheque was issued, (ii) amount of cheque, (iii) it was presented to the bank and (iv) it was dishonoured for insufficient fund. Within 15 days thereof a notice was given and there was no explicit demand for the payment of cheque amount. Instead of demanding the cheque amount in clear terms, learned Advocate representing the drawee requested the drawer to give his opinion over the incident within 15 days failing which, he would expose to legal consequences, a threat to sue was given.
16. The question that calls for consideration is whether the language used in purported notice of the case, Exhibit 3, is indicating the intention of the drawee to demand the cheque amount or not. Therefore, the only question remains to be examined is whether there was a demand for payment.
17. In this regard we can rely upon the judgement of Hon'ble Supreme Court pronounced in the case of **Central Bank of India & Anr. vs. Saxon Farms & Ors.** reported in **(1999) 8 SCC 221**, Mr. Bhattacharya submits in the said case instead of explicit demand it was written that "Kindly arrange to make the payment to avoid the

unpleasant action of my client” and Hon’ble Supreme Court was pleased to hold after perusal of the said notice that it was a clear demand to satisfy the requirement of proviso B appended to Section 138.

18. The object of issuing a notice indicating the factum of dishonour of cheque is to give the honest drawer of the cheque to rectify his fault by making payment within 15 days so that the holder of the cheque need not have to initiate any criminal action despite the fact that cheque was dishonoured. The notice does not require any prescribe form. In **RAJNEEH AGGARWAL VS. AMIT J. BHALLA** reported in **(2001) 1 SCC 613** Hon’ble Supreme Court held:-

“Bearing in mind the object of issuance of such notice, it must be held that the notices cannot be construed in a narrow technical way without examining the substance of the matter.”

19. Section 138 of the N.I. Act has created a contractual breach as an offence and the legislative purpose is to promote the efficacy of banking and to ensure that in commercial or contractual transactions, cheques are not dishonoured and credibility in transacting business through cheque is maintained. In **KANWAR SINGH VS. DELHI ADMINISTRATION** reported in **(1965) 1 SCR 7** while construing Section 418 (i) of the Delhi Municipal Corporation Act Hon’ble Supreme Court held:-

“It is the duty of the court in construing a statute to give effect to the intention of the legislature. If, therefore, giving a literal meaning to a word used by the draftsman, particularly in a penal statute, would defeat the object of the legislature, which

is to suppress a mischief, the court can depart from the dictionary meaning or even the popular meaning of the word and instead give it a meaning which will 'advance the remedy and suppress the mischief.'

20. Hon'ble Apex Court in *Swantraj & Ors. vs. State of Maharashtra* reported in (1975) 3 SCC 322 held that:

"Every legislation is a social document and judicial construction seeks to decipher the statutory mission, language permitting, making the one from the rule I Heydons case of suppressing the evil and advancing the remedy. Court held that what must tilt the balance is the purpose of the statute, its potential frustration and judicial avoidance of the mischief by a construction whereby the means of licensing meet the ends of ensuring pure and potent remedies for the people. Court observed that this liberty with language is sanctified by great judges and textbooks. Maxwell instructs as in these words:

There is no doubt that the office of the Judge is, to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief. To carry out effectively the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, to an indirect or circuitous manner that which it has prohibited or enjoyed: quando aliquid prohibetur, prohibetur et omne pe quod devenitur ad illud.

The manner of construction has two aspects. One is that the Courts, mindful of the mischief rule, will not be astute to narrow the language of a statute so as to allow persons within its purview to escape its net. The other is that the statute may be applied to the substance rather than the mere form of transactions, thus defeating any shifts and

contrivances which parties may have devised in the hope of thereby falling outside the Act. When the Courts find an attempt at concealment, they will, in the words of Wilmut, C.J. brush away the cobweb varnish, and shew the transactions in their true light.”

21. In the case of **NEPC MICON LIMITED & ORS. VS. MAGMA LEASING LIMITED** reported in **(1999) 4 SCC 253** Hon'ble Apex Court relying upon the decision pronounced in **STATE OF TAMIL NADU VS. M.K. KANDASWAMI & ORS.** reported in **(1974) 4 SCC 745** observed:-

“That in interpreting a penal provision which is also remedial in nature, a construction that would defeat its purpose or have the effect of obliterating it from the statute book should be eschewed and that if more than one construction are possible the Court ought to chose a construction that would preserve the workability and efficacy of the statute rather than an interpretation that would render the law Otis Sterile.

In the case of M/s. International Ore and Fertilizers (India) Pvt. Ltd. Vs. Employees State Insurance Corporation AIR (1988) S.C. 79, this Court referred to often quoted passage from the decision in the case of Seaford Court Estates ltd. Vs. Asher (1949) 2 All ER 155 wherein Lord Denning, L.J. observed: The English language is not an instrument of mathematical precision. Our literature would be much poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if the Acts of Parliament wee drafted with divine pre-science and perfect clarity. In the absence of it, when a defect appears, a judge cannot simply fold his hands and blame the

draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give force and life to the intention of legislature. A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do so as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases.”
(Emphasis supplied)

22. In ***Harihar Banerji vs. Ramsashi Roy*** reported in (1919) 21 **BOMLR 522** it was held that what that notice must have conveyed to an ordinary reader is the key factor to decide its validity.
23. Here in this case upon receipt of the said notice the drawer of the cheque, responded by giving a reply through his lawyer and the said letter has been admitted as Exhibit-4.
24. In the said letter written under the instruction of the drawer it was stated that cheque was issued on 19th March, 2010 dated 31st March, 2010 worth Rs. 3,37,376/- drawn on UCO Bank, Bandel Branch. As the cheque was not presented within the stipulated period of time on 4th January, 2011 the drawer of the cheque paid a sum of Rs. 3,37,376/- only in cash in presence of local respectables, reposing faith upon the drawee that on the next morning he would come and hand over the cheque no. 945741 along with receipt acknowledging the payment he received in cash.

25. This response clearly shows that the drawer of the cheque understood the purport of notice, he received. In reply he disowned not only his liability to pay the cheque amount, he asserted that cheque amount was paid in cash on 4th January, 2021.
26. Therefore, in my humble opinion, by seeking response from the drawer in the purported notice the drawee actually wanted to draw the attention of the drawer of the cheque to the fact that the cheque was dishonoured and thereby to give an opportunity to him to rectify his omission and to have the cheque amount being paid by the drawer. There is a clear demand in the notice with a threat of legal proceeding.
27. The object of Section 138 of the N.I. Act is not only to protect the honest drawer of the cheque but also to protect the innocent drawee from being deprived of his otherwise legitimate claim. Keeping in mind that provision of Section 138 of N.I. Act is a penal provision and remedial in nature as held by Hon'ble Apex Court in the case of *M.K. Kandaswami (supra)* and it should be construed strictly, I am of the view that the purported notice was sufficient to draw the attention of the drawee to the fact that the cheque was issued for a specific sum, it was presented to bank within the prescribed time limit, the instrument was returned. Bank dishonoured the cheque for want of sufficient fund in the account. By conveying all these information the drawee through his lawyer invited the drawer to react.

Clause (b) to Proviso appended to Section 138 of the N.I. Act has the laudable object to give an opportunity to the drawer of the cheque to rectify his mistake. Therefore, the drawer had option to

acknowledge the action on his part and to pay money or to deny his obligation to pay. Here in this case the drawer took a plea of making payment of the cheque amount prior to the date of notice, issued on behalf of the drawee. This plea, however, was not taken before the learned Trial Court. The accused being the drawer of the cheque had the obligation to rebut the presumption of Section 139 of the N.I. Act but he did not discharge his onus by adducing evidence. With the risk of repetition, I would reiterate that the notice Exhibit-3 contains a clear demand but in a soft and unconventional language which is in conformity with the object of statute to provide an opportunity to the drawer to rectify the mistake caused by omission on his part. Notice Exhibit-3 is eloquent on demand of cheque amount and same was realized by the accused person, the drawer of the cheque.

28. Learned Appellate Court in the impugned judgement held that there was no clear, specific and unambiguous demand of payment of dishonoured amount, made by the complainant through his learned advocate.

29. It is rightly argued by Mr. Bhattacharya placing his reliance upon the judgement of Privy Council pronounced in the case of **Smt. Renula Bose vs. Rai Manmatha Nath Bose & Ors.** reported in **AIR (32) 1945 Privy Council 108**, that statute does not indicate 'clear', 'specific' and 'unambiguous' demand of payment of dishonoured cheque. Learned Appellate Court had taken the pains of rewriting a statute by importing the words like 'clear', 'specific' and 'unambiguous' demand which is

contrary to all rules of construction to read words into an act which are not there unless it is absolutely necessary.

30. Learned Appellate Court committed error in taking a pedantic view having found no word like 'demand' in the notice. The impugned judgement passed by learned Appellate Court therefore, warrants interference and in my humble opinion should be reversed and judgement passed by learned Trial Court should be revived, which I accordingly do.
31. The respondent convict is directed to comply with the judgement and order of learned Trial Court within four weeks from date in default learned Trial Court will be at liberty to take steps according to law to ensure compliance of the direction given in the judgement impugned.
32. Let a copy of this judgement be sent down along with lower Court record to the learned Trial Court for information and necessary compliance.
33. 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.)