IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE,
KAMRUP ::: GUWAHATI

(Criminal Appellate Jurisdiction)

CRIMINAL APPEAL NO. 47/2003
Under Section 374 Cr.P.C.

[From the Judgment of conviction and sentence dated 21.07.2003 passed by the Special Judicial Magistrate, Guwahati, in Case No. 34C/1994 under Section 138 of N.I. Act.]

PRESENT : SRI I. HUSSAIN
Addl. Sessions Judge,
Kamrup, Guwahati.

Sri Sampatmal Jain ..... Appellant

-Vs-

Sri Chinmoy Mahanta ..... Respondent.

Appearance :

For the Appellant : Sri R.L. Yadav,

Smt. Kalpana Yadav.

For the Respondent : Sri N. Choudhury,

Sri S. Paul Choudhury,

Sri M. Chanda

Date of Hearing :- 24.08.2011

Date of Judgment :- 07.09.2011

J U D G M E N T

1. The convict herein as appellant has assailed the Judgment of conviction and sentence passed by the learned Special Judicial Magistrate, Kamrup, Guwahati in Case No. 34^{C}/1994 whereby the appellant has been convicted under Section 138 of the Negotiable Instrument Act and sentenced to undergo rigorous imprisonment for 6 (six) months and to pay a fine of Rs. 1,000/-, in default of payment of fine, further rigorous imprisonment of 1 (one) month.

2. Complainant's case as set up during the trial, in brief, is that on 07.01.1994, the respondent Chinmoy Mahanta filed a complaint in the Court of learned Chief Judicial Magistrate, Kamrup, Guwahati, stating inter-alia that he is the Manager of M/S Greaves Ltd. (formerly known as Greaves Cotton & Co. Ltd.) of Guwahati Branch within the meaning of Companies Act, 1956 having its registered office at 1, Dr. V.S. Gandhi Marg, Bombay – 400023 and is carrying on business of merchants, engineers and contractors. Appellant/accused Sampatlal Jain is the proprietor and contractor of M/S North East Corporation, situated at Rukminigaon, Guwahati – 22 and the said firm of the accused is Government contractor and suppliers of the State of Arunachal Pradesh. That the Appellant/accused had placed an order before the respondent/complainant for supplying 1 No. Ruston 6 YDCR MK 11 125 K.V. A. Diesel Generating set on 22.01.1992 at a price of Rs. 3,76,202/ (Rupees Three lakhs Seventy Six thousand two hundred two) for each set inclusive of excise duty at the rate of 15% and special duty at the rate of 10% on excise duty and concessional rate of CST at the rate of 4% subject to submission of CST

declaration from “C” failing which CST at the rate of 10% on Rs. 3,76,202/ to be charted and this CST form “C” has not yet submitted by the appellant/accused to the respondent/complainant. The aforesaid materials were to be supplied to Electrical Department, PWD, Arunachal Pradesh, Pashighat, through their Pashighat office. That the appellant/accused paid a sum of Rs. 50,000/ as advance along with the order and the balance amount of Rs. 3,26,202/ with 10% CST on the said balance amount for the submission of “C” form were to be paid against dispatched documents to the respondent/complainant. The appellant/accused requested to respondent/ complainant through their aforesaid order to dispatched the aforementioned materials through M/S Assam Bengal Carriers or TCA. Respondent/complainant accordingly dispatched all the aforesaid materials vide consignment note No. NW 7145 dated 31.01.1992 of ABC India Ltd. from Pune to Pashighat on freight to pay basis. The appellant/ accused was informed and the bill bearing No. 45/45/ 0112/00089 dated 31.01.1992 along with a photocopy of consignment note and invoice was forwarded to the firm of the accused /appellant

under cover of the complainant's /respondent's letter No. 45/112/242 dated 14.02.1992 which was duly received by the appellant/accused. That even after dispatching the materials to the appellant/ accused through M/S ABC India Ltd. in time, the respondent/complainant has not received the balance amount of Rs. 3,26,202/ and an additional amount of Rs. 37,620/ in lieu of form "C" from the appellant/accused. Hence, the respondent/complainant informed M/S ABC India Ltd. on 14.12.1992 through a letter not to deliver the aforesaid material in the office of Pashighat Branch of the appellant/accused until their next communication and a copy was endorsed to the accused/appellant with a request to make the balance payment. Respondent/ complainant again on 21.02.1992, 19.03.1992 and 25.03.1992 reminded M/S ABC India Ltd by letter not to deliver the consignment without collecting the original consignment note lying with the respondent/complainant for non payment of balance amount by the appellant/ accused. On 03.04.1992, Calcutta office of the respondent/ complainant sent a registered letter to the appellant/ accused on the

same subject which was returned undelivered. On 24.06.1992, the respondent/complainant sent another letter to the appellant/accused at his Guwahati office, which was also returned undelivered as the appellant/accused shifted his office without the knowledge of the respondent/complainant. On 27.07.1992 the respondent/complainant again requested M/S ABC India Ltd. of Pashighat office with a copy to the Joint Managing Director, M/S ABC India Ltd. Guwahati office, not to deliver the consignment and return back the consignment to the respondent/complainant at Guwahati and took the responsibility to pay the freight charges from Pune to Pashighat and and from Pashighat to Guwahati. On 27.07.1992, complainant/respondent sent a letter to the appellant/accused informing him that as the payment was not forthcoming the transporter was advised to rebook the consignment to the respondent/complainant and on 29.04.1992, M/S ABC India Ltd had acknowledged that the consignment was lying with the as unclaimed. The Guwahati and Pashighat office of M/S ABC India Ltd. finally acknowledged vide letter No. ABC/NHI/05/93 dated 13.07.1993 that the consignment was

delivered to the accused/appellant who delivered the same to the Electrical Department of Arunachal Pradesh without paying balance amount of Rs. 3,26,202/ to the respondent/complainant along with Rs. 37,620/ in lieu of CST form “C” till date and this was done without the knowledge of respondent/ complainant. The matter was also brought to the notice of the Joint Managing Director of M/S ABC India Ltd. Guwahati Branch through a letter. That ultimately an agreement was made on 30.10.1993 of complainant / respondent’s Guwahati office in between the appellant/ accused and respondent/complainant for a final settlement of the matter and according to agreement the appellant/accused agreed to make balance payment including 10% CST after adjustment of advance sum of Rs. 50,000/ by demand draft latest by 04.11.1993. Appellant/ accused also agreed to pay lumpsum interest of Rs. 30,000/ by demand draft to the respondent/complainant on the same date and accordingly appellant/accused had issued two cheques on 30.10.1993 bearing Nos. 056317 and 056318 for Rs. 3,63,600/ and Rs. 30,000/ respectively and cheques will be withdrawn by the

appellant/accused on submission of the demand draft mentioned above. The demand draft from the appellant/accused was not received as per stipulation of the agreement, cheques were deposited in the S.B.I. Fancy Bazar Branch by the respondent/complainant on 06.11.1993, which were dishonoured with the remarks payment stopped by the drawer on 08.11.1993. The respondent/complainant then issued registered notice on 15.11.1993 under section 138 of N.I. Act to the appellant/accused to clear outstanding by demand draft within 15 days from the date of receipt of the notice which was sent by registered A/D cover and from the said A/D card, it is observed that the notice was received by the appellant/accused on 23.11.1993 and despite receipt of the notice the appellant/accused did not make any payment and thereby committed the offence under section 138 N.I. Act.

3. On receipt of the complaint, it was registered as C.R. case and the respondent/complainant was examined on oath and finding sufficient material to proceed against the appellant/accused U/S 420 IPC read with Section 138

of the N.I. Act, process was issued to the appellant/accused who entered appearance to face trial. After examination of witnesses before consideration of charge and perusal of materials on record and hearing both sides, charge under section 420 IPC read with section 138 of N.I. Act were formally framed. Contents of charge was read over and explained to the appellant/accused to which he pleaded not guilty and claimed to be tried. In course of trial, complainant examined five witnesses and defence examined none. Appellant/accused was examined under section 313 Cr.P.C. After hearing argument of both sides, judgment delivered on 01.10.199 convicting the accused to pay a fine of Rs. 3,00,000/ U/S 138 of the N.I. Act, in default to suffer S.I. for six months. Fine if realized be paid to the respondent/complainant. Accused was acquitted from the charge of Section 420 IPC.

4. Appellant/accused challenged the above order of conviction and sentence which was registered as Criminal Appeal No. 30/1999 and was disposed vide Judgment and Order dated 24.10.2002 by the then learned Ad-hoc Addl. Sessions Judge, Kamrup, Guwahati. By the said Judgment, sentence

awarded by the learned lower Court was set aside and the case was remanded back with a direction to give a chance to the learned Counsels of both parties to advance argument a fresh and thereafter the learned lower Court shall write a fresh judgment as per provision of law. Accordingly, learned lower Court passed a fresh Judgment on 21.07.2003 convicting the appellant /accused under section 138 of N.I. Act and sentenced to suffer R.I. for six months and to pay a fine of Rs. 1000/ , in default, to suffer R.I. for another one month.

5. Being highly aggrieved, the appellant/accused has preferred this appeal mainly amongst the following grounds:

(i) Learned Judicial Magistrate acted illegally in passing the impugned judgment and order dated 21.07.03;

(ii) Learned Judicial Magistrate failed to consider the provisions of Section 141 of N.I. Act and passed the impugned Judgment;

(iii) Learned Judicial Magistrate failed to consider the evidence on record and wrongly convicted the appellant;

(iv) Learned Judicial Magistrate failed to consider the provisions and status of a company, a firm and proprietorial concern and wrongly held that the proprietorial concern and the proprietor are the same persons relating to the notice under section 138(b) of the N.I. Act;

(v) Learned Judicial Magistrate failed to consider that a proprietorial concern is not a juristic person and legal notice on proprietorial concern is not valid in law and in absence of valid notice under section 138(b) of N.I. Act, conviction is not sustainable;

(vi) Learned Judicial Magistrate has misconceived as regard compliance of the provisions of Section 138(b) of the N.I. Act;

(vii) Complainant admitted in his evidence that no notice under section 138(b) of N.I. Act was sent to the accused;

(viii) It is admitted that A.D. card was signed by one Mr. Das, who is neither the Proprietor nor the employee of the said concern, hence it cannot be said that the provision of section 138(b) of N.I. Act had been complied;

(ix) No demand notice was served on the accused for payment of Rs. 3,93,600/;

(x) Award of conviction and sentence are harsh and severe and bad in law.

6. Under the above facts and circumstances, the appellant has prayed for setting aside the impugned Judgment and sentence of conviction.

7. I have heard the argument put forward by the learned Counsel for both the parties and scrutinized the impugned Judgment and evidence on record. The only point raised by the learned Counsel for the appellant is that the notice under section 138(b) of N.I. Act, which is mandatory in nature, was not at all complied with and hence the offence as per section 138 of the N.I. Act has not completed. As such without completion of the offence, a person cannot be convicted. Learned counsel for the respondent submitted that the complainant had issued notice (Ext. 19) on 15.11.1993 demanding the payment within 15 days of the receipt of the notice. As the accused failed to pay, so the complainant filed C.R. Case No. 34/1994, which was ended in conviction with sentence to pay a fine of Rs. 3,00,000/ , in default to suffer S.I. for six month. In

appeal being numbered as CA 30/1999, the Hon'ble Court vide order dated 20.10.2004 partly allowed the appeal relying on the decision reported in (1999) 7 SCC 510 thereby maintaining the conviction but remand the case to the trial Court for fresh decision on sentence and compensation on the ground that the learned Megistrate had no pecuniary jurisdiction to impose a fine of Rs. 3,00,000/. As such, conviction aspect of the case has attained finality and the appellant is estopped from challenging his conviction under section 138 of the N.I. Act. Now, the learned Magistrate has passed sentence to suffer R.I. for 6 months and to pay a fine of Rs. 1000/ which is well within the pecuniary jurisdiction. So, the appeal has no merit and is liable to be dismissed.

8. Before going to discuss the grounds of appeal, it is relevant to see whether the appellant is estopped from challenging the Judgment and conviction passed by the learned lower Court after remand of the case as submitted by the Ld. Counsel for the respondent. After going through the Judgment and Order dated 24.10.2002 passed in Criminal Appeal No. 30/1999, it appears that the then Ad-hoc Addl. Sessions Judge No. 3, Kamrup,

Guwahati, set aside the sentence awarded by the learned lower Court and remand back the case. For the sake of convenience, the operative portion is quoted below :

"It is a settled proposition of law that the question of sentence and award of compensation must be considered by the trial Court and as such I set aside the sentence awarded by the learned lower Court.

The case is remanded back to the learned lower Court with a direction that the learned lower Court shall give a chance to the learned counsels of both parties to advance a fresh argument and thereafter the learned lower Court shall write a fresh Judgment as per provision of law."

9. It is true that the then learned Appellate Court set aside the sentence awarded by the learned lower Court and remand back the case with a direction to hear argument of both sides and deliver Judgment as per provisions of law. I am not convinced to accept the submission of learned counsel for the respondent. Learned Appellate Court may write to set aside the sentence awarded by the learned lower Court, but in my considered opinion

this cannot mean that the conviction was upheld and the sentence was only set aside. Because, ‘sentence’ passed in a criminal trial always follows the ‘conviction’, without conviction, there cannot be any sentence to suffer by the convict. So, setting aside of sentence means and includes the setting aside of the conviction, unless conviction is not set aside, the sentence cannot be set aside alone. When the conviction is set aside and direction is given to deliver fresh Judgment as per provisions of law after hearing both sides, then the accused shall have every right to challenge the judgment, if it is appellable. Because, the conviction and sentence of a Judgment, in a criminal case, is the main part of the Judgment and setting aside of the conviction and sentence would have no any impact of the Judgment on the accused, and hence this led to setting aside of the Judgment also. And due to these facts and circumstances, learned lower Court was directed to deliver fresh Judgment after hearing argument of both sides. In compliance of the said direction, as soon as the fresh Judgment is delivered, the aggrieved party has accrued a right to challenge the said Judgment before the appropriate Court. It

cannot be said that the accused is estopped from challenging the whole Judgment.

10. In view of the above discussion and reasons stated, I have come to the conclusion that the appellant has right to challenge the impugned Judgment and hence the submission of learned counsel for the respondent is graciously rejected.

11. On perusal of the complaint petition and the evidence led in support of the complaint, it appears that the complainant in paragraph 12 of his complaint petition stated that the demand notice was issued on 15.11.1993 u/s 138 of N.I. Act to the accused to clear their outstanding by demand draft within 15 days from the date of receipt. Notice was sent under A/D cover and the accused received the notice on 23.11.1993. The complaint was filed on 6.1.1994. In his initial deposition, complainant stated that the notice was issued by him to the accused on 15.11.1993 by registered A/D post and the accused received the same on 23.11.1993. In his evidence, the complainant as PW1 has stated that registered A/D notice was issued to accused on 15.11.1993 demanding to pay the amount within 15 days from the date of receipt of the notice. Ext. 19 is

the registered notice dated 15.11.1993 which was duly acknowledged by the accused's firm one Mr. T. Das on 23.11.1993. This fact was under objection by the accused. Ext. 20 is the A/D card dated 15.11.1993. In cross examination PW1 admitted that accused had not received said notice and some Mr. D. Das is seen to be sign in the acknowledgement card Ext. 20. From the above, it appears that the complainant has stated in his complaint petition as well as in his initial deposition that the notice was received by the accused. But, in his examination-in-chief in evidence has stated that the notice was duly acknowledged by the accused's firm one Mr. T. Das, which was clarified in the cross examination that the accused did not receive the notice and the signature of one Mr. D. Das appeared in the acknowledgment card. Ext. 20, the acknowledgement card is not found in the record for perusal. But, from the facts as appeared in the evidence of the complainant, it can be held that the accused/appellant did not receive the notice.

12. After going through the provisions of section 138 of the N.I. Act, it appears that the proviso (a), (b) and (c) to the section must be

complied with to constitute the offence punishable under section 138 of the Act. Proviso (b) to the section 138 relates to service of the notice upon the drawer of the cheque demanding payment of the amount within fifteen days from the date of return of the cheque as unpaid. So, if it appears that the complainant failed to comply this condition, then the offence under section 138 of N.I. Act, cannot be said to be completed. In the instant case, complainant/respondent categorically stated that in the acknowledgement card of the demand notice dated 15.11.1993, signature of one T. Das or D. Das appeared. Complainant failed to state either in his evidence before the learned trial Court or made any averment in the complaint petition that Mr. T. Das or D. Das is responsible for the conduct of business of the firm M/S North East Corporation. Failure to give a satisfactory explanation as regard responsibility of the person in conducting business of the firm, who allegedly received the demand notice issued in the name of the firm, gives rise presumption that the mandatory provision of section 138(b) of the N.I. Act was not complied. As regard the demand notice under section 138(b) of the N.I. Act, learned Counsel

for the appellant relied on *Harman Electronics Pvt. Ltd. And another Vs National Panasonic India Pvt. Ltd. (2009) 1 SCC 720*, wherein the Hon'ble Apex Court has held as follows :

> *"13. It is one thing to say that sending of a notice is one of the ingredisnts for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence under section 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in provisos (a), (b) and (c) appended to section 138 of the Negotiable Instruments Act are intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a*

complaint. As it is only on receipt of the notice that the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would."

In another case, *M/S Dalmia Cement (Bharat) Ltd. Vs M/S Galaxy Traders & Agencies Ltd. & Ors.; AIR 2001 SC 676* Hon'ble the Apex Court has observed as follows :

"*to constitute an offence under section 138 of the Act, the complainant is obliged to prove its ingredients which include the receipt of notice by the accused under clause (b). It is to be kept in mind that it is not the 'giving' of the notice which makes the offence but it is the 'receipt' of the notice by the drawer which gives the cause of action to the complainant to file the complaint within the statutory period. This Court in K. Bhaskaran Vs Sankaran Vaidhyan balan (1999) 7 SCC 510: (1999 AIR SCW 3809 : AIR 1999 SC 3762 : 1999 Cr.L.J.*

4606) considered the difference between 'giving' of a notice and 'receipt' of the notice."

13. Thus from the above observations of the Hon'ble Apex Court that mere issuance of the notice is not enough to constitute the offence under section 138 of the N.I. Act, but receipt of the notice by the drawer of the cheque is must, which would then give rise the cause of action to the complainant to file the complaint. In the case in hand, it appears that the complainant has failed to prove that the appellant had received the demand notice dated 15.11.1993 issued by the complainant under registered A/D post and thereby did not comply the mandatory provision of clause (b) of section 138 of the N.I. Act to constitute the offence.

14. Under the provisions of Section 141 of the N.I. Act, every person, who at the time of committing the offence, was in charge and responsible to the company for conduct of the business shall be liable for committing the offence. But, in case of Proprietorial concern, it will be of single entity, unless the complainant can prove that any other person also responsible in conducting business of the said firm. It is found to be an

admitted fact that M/S North East Corporation is a proprietorial firm of which the appellant is the sole Properitor. Said fact is found to be true as the complainant made correspondences with the appellant through the said firm as appeared from the documents marked as Ext. 1, 2, 3, 9, 10, 12, 15, 16, 17 and 19. Ext. 15, has more clearly shows that the accused Sampatlal Jain is the proprietor of the said firm. Hon'ble the Gauhati High Court in *Roitong Singpho Vs Amit Goel and another; 2006 (Suppl) GLT 771*, held in paragraph 19 that –

> *"in the instance case, the firm in question is a proprietorial firm by which the petitioner is a sole proprietor. The firm has no existence without the petitioner. It is the petitioner who represents the firm. Merely because she has constituted and appointed accused No. 2 as her attorney to look after and manage the affairs of the firm including the task of opening and operating bank account, she cannot escape the liability of the act done by the attorney on the strength of such power of attorney executed in his favour by the petitioner to manage the affairs of the proprietorial firm."*

In the instant case complainant has the burden to prove that the demand notice received by one T. Das or D. Das is the person responsible for conducting business or manage the affairs of the appellant's proprietorial firm. But, on perusal of the evidence, both oral and documentary, it appears that the complainant failed to discharge the said burden. Thus it appears that the learned Special Judicial Magistrate, Kamrup, Guwahati, misconstrued in holding that the demand notice dated 15.11.1993 was received by the accused on 23.11.1993.

15. On overall consideration of the facts and circumstances of the case in its entirety and having careful scrutiny of the deposition of witnesses and the exhibits on record, as discussed above, I have come to the conclusion that the learned trial Court has committed illegality in arriving at the decision that the demand notice issued by the respondent/complainant was duly served upon the appellant and the factual position is that the notice was not served. As such there was no cause of action for the complainant to file the complaint; hence the impugned Judgment and sentence of conviction dated 21.07.2003 passed in case No. 34C/1994

cannot sustain. Consequently, the impugned conviction and sentence is liable to be set aside and quashed.

16. In the result, appeal is allowed. Judgment and sentence of conviction dated 21.07.2003 passed by the Special Judicial Magistrate, Kamrup, Guwahati, in case No. 34C/1994 is hereby set aside and quashed. Send back the L.C.R. immediately.

Judgment prepared and pronounced in the open Court on this 7th day of September, 2011 under my hand and seal.

Dictated and corrected by me

Addl. Sessions Judge

Addl. Sessions Judge Kamrup, Guwahati