

IN THE COURT OF THE JUDICIAL MAGISTRATE, FIRST CLASS,

KAMRUP:: GUWAHATI

Case No- 6417c of 2005

U/S 138 of N.I. Act.

Complainant: R. R. Enterprise.

-Vs-

Accused: Sri Tapan Kumar Dutta.

Present: Sri N. Talukdar,

Judicial Magistrate, First Class,

Kamrup, Guwahati.

For the Complainant: Mr. R. K. Kothari, Advocate.

For the Accused : Mr. J. C. Gaur, Advocate.

Date of recording Evidence for the Complainant: 03-04-07, 05-05-07, 02-07-07,
28-09-07.

Date of recording Evidence for the Accused : 22-10-2009.

Date of Argument : 08-12-10, 22-12-10.

Date of Judgment : 05-01-2011.

JUDGMENT

1. That the facts leading to the filing of this complaint under Section 138 of the Negotiable Instruments Act by the complainant R. R. Enterprise through its Proprietor Sri Sachin Kumar Bairasia as stated in the complaint petition are that in discharge of a legally enforceable debt towards the complainant accused Sri Tapan Kumar Dutta issued a cheque in favour of the complainant bearing No. 239259 dated 03-09-2005 for Rs. 5,00,000/- drawn on ICICI Bank, Ballygunge Branch, Calcutta. It is stated that the proprietor of the complainant deposited the said cheque for collection with his bank namely State Bank of India, Fancy Bazar Branch, Guwahati on 03-

09-2005 but the said cheque was returned unpaid through a return memo dated 06-09-2005 due to insufficient fund in the account of the accused. It is stated further in the complaint petition that thereafter the complainant through its Advocate sent a demand notice to the accused through registered post with A/D on 22-09-2005 intimating him about the dishonour of the cheque and demanding payment of the cheque amount within fifteen days from the date of receipt of the notice but the accused failed to make the payment and hence this case.

2. That on receipt of the case for disposal, my learned Predecessor on perusal of the complaint petition, documents annexed to the complaint petition and the initial deposition of the complainant took cognizance against the accused person U/S 138 of the N.I. Act and process was issued accordingly to the accused person. On appearance of the accused person in the court, copies were furnished to him, particular of accusation punishable U/S 138 of the N.I. Act was read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.
3. That during trial, the complainant side has examined its proprietor as PW-1 and two bank officials as PW-2 and PW-3. At the close of the prosecution evidence, statements of the accused person have been recorded U/S 313 of the Cr.P.C. with reference to the incriminating evidence appearing against him. The plea of the accused is that he did not have any liability towards the complainant to issue the cheque in question and that he did not receive any legal notice demanding payment of the money mentioned in the cheque. In support of the plea accused has examined himself as DW-1.
4. That thereafter on hearing argument of both the sides, this court vide Judgment and Order dated 30-11-2009 held the accused guilty U/S 138 of the N. I. Act and accordingly he stood convicted. Accused was sentenced to suffer Simple Imprisonment for a period of six (6) months and he was also vide Order dated 01-12-2009 directed to pay an amount of Rs. 6,00,000/- as compensation to the complainant.
5. Against the Judgment dated 30-11-2009 and Order of compensation dated 01-12-2009 passed by this court, accused preferred an appeal before the Honourable Court of Sessions, Kamrup, Guwahati being Criminal Appeal No. 90/2009. The Honourable Additional Sessions Judge (FTC) No. 2, Kamrup, Guwahati vide Judgment dated 21-05-2010 disposed of the said appeal by holding that this court while recording the statements of the accused U/S 313 of Cr. P. C. did not put the incriminating materials on which reliance was placed to record the conviction of the accused. The Honorable Court accordingly set aside the Judgment and Order passed by this court with a direction to examine the accused U/S 313 of Cr. P. C. afresh and to give the accused opportunity to adduce evidence if so desired and to deliver judgment after hearing the parties.
6. On receipt of the Case Record back from the Honourable Court of the Additional Sessions Judge (FTC) No. 2, Kamrup, Guwahati, in compliance of the direction of the said Honourable Court accused has been examined U/S 313 of Cr. P. C. afresh by putting all the incriminating circumstances

appearing against him in the prosecution evidence. Accused, however, has chosen not to adduce further evidence.

7. POINTS FOR DETERMINATION: The points for determination in this case are-

(i) Whether the accused Sri Tapan Kumar Dutta had issued the cheque bearing No. 239259 dated 03-09-2005 for Rs. 5,00,000/- drawn on ICICI Bank, Ballygunge Branch, Rishikesh, 1/1 Ashutosh Chaudhury Avenue, Calcutta, in favour of the complainant in discharge of legally enforceable debt and the same was dishonoured on presentation for encashment due to insufficient fund ?

(ii) Whether the accused has failed to make the payment of the cheque amount to the complainant inspite of the demand notice issued to him intimating him about the dishonour of the cheque and demanding the money mentioned in the cheque and thereby he has committed an offence U/S 138 of the N. I. Act ?

8. I have heard arguments of learned counsel for the complainant as well as learned counsel for the accused person.

DISCUSSIONS, DECISION AND REASONS THEREOF:

9. PW-1 Sri Sachin Kumar Bairasia, who is the sole Proprietor of the complainant proprietorship firm has deposed in his evidence that on 01-09-2005 accused Tapan Kumar Dutta in discharge of some lawful dues to him issued one A/C payee cheque in his favour bearing No. 239259 dated 03-09-2005 for Rs. 5,00,000/- drawn on ICICI Bank, Ballygunge Branch, Rishikesh, 1/1 Ashutosh Chaudhury Avenue, Calcutta. He has proved the cheque as Ext-1. He has stated further that accused also gave a letter along with the cheque in the letter pad of his proprietorship concern "Sun International" and this witness has proved the letter as Ext-2 and Ext-2(1) and Ext-2(2) as the signatures of the accused. PW-1 has deposed further that he deposited the Ext-1 cheque in the account of his proprietorship concern maintained at State Bank of India, Fancy Bazar Branch, Guwahati on 03-09-2005 for collection but the banker of the accused returned the cheque unpaid with a dishonour memo dated 06-09-2005 citing the reason as "Fund Insufficient". He has proved the dishonour memo as Ext-3. This witness has stated further that thereafter he through his Advocate sent one written notice by registered post with A/D to the accused at his four addresses on 22-09-2005 intimating him about the dishonour of the cheque and demanding payment of the said cheque amount within fifteen days from the date of receipt of the notice.

10. PW-1 has in his evidence further stated that accused received the notice issued in his address at Fancy Bazar, Guwahati and he has proved the

copies of the notice as Ext-4, Ext-5, Ext-6 and Ext-7 and Ext-8 as the postal receipt. He has proved the returned A/D card as Ext-9. PW-1 has also proved the registered letters received back from two other addresses of the accused with endorsement "Left" and "out of station return to sender" as Ext-10 and

Ext-11 respectively. He has deposed further that accused appeared in the court in connection with this case on receipt of the summons issued to the four addresses as aforesaid and executed one bail bond in which he mentioned his own address as “751, Lake Town, Block-A, Kolkata” and the same is one of the four addresses of the accused. This witness has proved the bail bond as Ext-12 and Ext-12(1) as the signature of the accused. He has stated further that the return copies of demand notices were sent to the accused at his correct addresses but he deliberately with mala-fide intention managed to avoid receiving the notices in order to escape from the liability of the cheque. PW-1 has also proved the complaint petition as Ext-13.

11. PW-1 has in his cross examination denied the suggestion put to him to the effect that he is not the proprietor of R. R. Enterprise. He has stated that he has not submitted any document relating to the existence of the addresses of the accused except the address mentioned in Ext-2. He has also stated that he issued two cheques to the accused for Rs. 5,00,000/- and Rs. 3,00,000/- for preparing A/C payee cheques before 1/1½ years of receiving the Ext-1 cheque from the accused and at the time of giving the cheque for Rs. 5,00,000/- to the accused one agreement was executed with the “Sun International” at Guwahati but he has forgotten the contents of the agreement. He has also in his cross examination stated that accused came to his office and proposed to carry on business of chips, bhujia etc. and thereafter accused sent the aforesaid items and he acted as commission agent and the transactions took place in the name of “Sun International”. This witness has stated further that he has maintained the accounts book and business related documents properly. He has also stated that in the month of July, 2005 the business transactions with the accused came to an end and the accused issued the Ext-1 cheque to him to discharge the outstanding amount owed to him and accused told him that he would pay the remaining amount of Rs. 3,00,000/- lateron. PW-1 has denied the suggestion put to him to the effect that he is not entitled to get any money from the accused.
12. PW-2 Sri Subhas Biswas who is the System Manager of State Bank of India, Fancy Bazar Branch, Guwahati has deposed in his evidence that R. R. Enterprise has got a bank account being No. 30003468246 in the said bank and the same is being operated by its proprietor Sri Sachindra Kumar Bairasia. He has stated that Ext-1 cheque was presented in his bank for encashment and the said cheque was sent to the drawer bank for collection but the cheque was returned unpaid on 06-09-2005 due to insufficient fund in the account of the accused. He has proved the certified copy of the statement of the account of the R. R. Enterprise as Ext-15.
13. In his cross examination PW-2 has stated that he was not in the aforesaid branch at the time of depositing the cheque in question. He has also stated that the validity period of the Ext-1 cheque was upto 03-03-2006 and he does not know if the amount mentioned in Ext-1 was paid by the ICICI bank on 10-09-2005.
14. PW-3 Sri Bhairab Bhuyan, who is an Officer of ICICI bank, Guwahati Bhranch, has stated in his evidence that there is a bank account being No. 003405002552 in the name of “Sun International” maintained in ICICI Bank

at Calcutta Branch and the account is being operated by its proprietor Sri Tapan Kumar Dutta. He has stated that accused issued the Ext-1 cheque from the aforesaid account and Ext-1(1) is the signature of the accused. He has deposed further that the said cheque was received in their bank for collection of Rs. 5,00,000/- mentioned therein but the cheque was returned unpaid with a return memo due to insufficient fund in the account of the accused. He has proved the return memo as Ext-3 and Ext-3(1) as the signature of Sandip Bhattacharjya, the authorized person of their clearing department. He has also proved the certified copy of the statement of account of the accused as Ext-17.

15. DW-1 Sri Tapan Kumar Dutta is the accused himself. He has deposed in his evidence that he did not issue any cheque in favour of the complainant as alleged in the complaint petition. He has also stated that he did not receive any notice from the complainant or from the Advocate of the complainant regarding dishonour of cheque. He has also deposed that he does not have any office at A. K. Azad Road, Rehabari or M. S. Road, Fancy Bazar, Guwahati. This witness has proved an agreement (photocopy) dated 28-07-2004 entered into his firm and the firm as Ext-A and the said agreement was executed to supply snacks, chips, cornflakes items from Delhi manufactured by Sri Gopal Impex Pvt. Ltd. and the complainant was to store the said materials in his go-down and to distribute the same to the distributors. He has stated that the complainant, according to the agreement, was to collect the payment from the distributors and to forward the same to his (accused) firm.
16. DW-1 has deposed further that from time to time he supplied the materials to the complainant and the bills and the other documents were in custody of the complainant and copies thereof were collected by him. He has proved the copies of bills as Ext-C(1) to Ext-C(17) issued by Sri Gopal Impex Pvt. Ltd. He has stated that due to business relationship, his blank signed cheques, letter pads challans, sale tax permits and other relevant documents remained in the custody of the complainant. This witness has stated that the profit and loss of the said business could not be ascertained as the complainant did not furnish the details of the business transactions. He has also stated that he stopped business transactions with the complainant since 2005 and he asked the complainant to return the blank cheques signed by him but the complainant did not return the same and therefore he wrote to his banker to stop payment and he has proved the copy of the said writing as Ext-B. Accused as DW-1 has stated further that he has instituted a civil suit being Title Suit No. 341/2007 for rendition of accounts by the complainant and also for cancellation of Ext-A agreement. He has proved the certified copies of the Plaint and the Written Statements of the said suit as Ext-D and Ext-E respectively.
17. Accused as DW-1 in his cross examination stated inter alia that the address mentioned in Ext-12 is still in existence. He has also stated that he has not submitted any document to show that he has informed the postal authority to the effect that he has changed his address. He has also stated that he has also not informed the complainant about the change of his address. DW-1 has

also admitted in his cross examination admitted his signature appearing in Ext-1 cheque. He has also stated that Ext-B does not disclose that the copy thereof was sent to the complainant. He has denied the suggestion to the effect that he received the legal notice issued to him.

18. This is the evidence adduced by the complainant and the accused in this case. From the evidence on record it is found that PW-1 has deposed that accused issued the Ext-1 to Ext-1 cheque to discharge the liability he had towards the complainant. It has been further deposed by PW-1 that the cheque on being presented for encashment was dishonoured due to insufficient fund in the account of the accused. PW-2 and PW-3 who are bank officials have also testified the fact of dishonour of Ext-1 cheque due to insufficient fund in the account of the accused. The plea of the accused in his evidence as well as in his statements U/S 313 of Cr. P. C. is that he did not issue the cheque in question to discharge any debt or liability. Further, contention of the accused is that he did not receive any legal notice allegedly issued by the complainant through its Advocate.
19. During the course of argument, learned defense counsel Mr. J. C. Gaur submitted that accused had business transactions with the complainant and due to the nature of the business, to meet the urgent necessity, accused had to issue blank cheques and letter pads to be kept in the custody of the complainant and Ext-1 cheque and Ext-2 forwarding letter are the documents misused by the complaint which were kept in the custody of the complainant during the course of business transactions. It has been further submitted by the learned defense counsel that on coming to an end of the business transactions between the complainant and the accused, no settlement of profit or loss arising out of the business transaction was taken place and as such there arose no occasion for the accused to have any liability towards the complainant and for that matter there arose no question of issuing the cheque in question in favour of the complainant. It is argued by the learned counsel for the defense that accused asked for the settlement of the accounts but on failure of the complainant he has instituted the civil suit against the complainant seeking decree for rendition of the accounts. Learned counsel for the defense sums up his argument by submitting that accused did not issue the Ext-1 cheque to discharge any debt or liability and the presumption available U/S 139 of the N. I. act has been stood clearly rebutted in this instant case.
20. On the backdrop of what has been submitted by the learned defense counsel, let me scrutinize the evidence on record so that a decision which is just and proper can be arrived at. It has been already found that PW-1 has deposed that accused forwarded the Ext-1 cheque with the Ext-2 forwarding letter. Accused has adduced evidence in this case but he has not made a single whisper in his evidence that he did not issue the Ext-2. No suggestion has even been given to PW-1 in his cross examination that accused did not write the Ext-2 to the complainant. So, denial of Ext-2 by the accused U/S 313 of Cr. P. C. must be branded as after thought. Thus, Ext-2 has remained to be an undisputed document. The accused having been admitted in Ext-2 to the effect that he issued the Ext-1 cheque to discharge the debt towards the

complainant, now he can not take the plea that he did not issue the same to discharge any liability. Learned counsel Mr. R. K. Kothari appearing for the complainant to bring home his submission that accused issued the cheque in question to discharge the liability he had towards the complainant has placed reliance on a decision reported in **(2009) 6 Gauhati Law Reports page 726 (Ambika Baishya, Accused-petitioner Vs. The State of Assam and another, Respondents)**. The observations made in paragraph-8 of the aforesaid Judgment by the Honourable Gauhati High Court will help in deciding the issue of dispute of this instant case and the said paragraph is as stated herein bellow:

“This apart, the complainant has also proved a forwarding letter issued by the accused. This forwarding letter has been brought on record, as Ext-2 without any objection having been raised by the accused. Ext-2 shows that by this letter, addressed to the complainant, the accused- petitioner had forwarded the cheque (Exhibit-1) to the complainant, where the accused petitioner had admitted the liability towards the complainant and issued the cheque in discharge of such liability. Though the accused petitioner denied that he had drawn the cheque in favour of the complainant, he did not dispute that Ext-1(1) was his signature. This, apart, Exhibit-2 remained an undisputed document, which clearly reflected issuance of the cheque by the accused in favour of the complainant in discharge of the former’s liability.”

In view of the observations of the Honourable Gauhati High Court as aforesaid and the facts and circumstances of this case also being exactly same, I have come to a clear finding that the accused in this instant case issued the Ext-1 cheque to the complainant in discharge of his liability towards the complainant.

21. Now, coming to the next contention of the accused to the effect that as the complainant did not return him the blank cheque issued to the complainant, he wrote a letter to his banker instructing stop payment, photocopy of which has been marked as Ext-B. Perusal of Ext-B reveals that it has been written therein that accused lost three numbers of signed cheques and as such if the same were presented payment should be stopped. Thus, stand taken by the accused in Ext-B regarding Ext-1 cheque is different from the stand taken in his evidence in as much as in his evidence he has admitted that he issued the Ext-1 cheque to the complainant as blank and he instructed stop payment as the accused did not return him the said cheque. Further, accused in his cross examination as DW-1 has admitted that the original of Ext-B may be available with him. If that is so, his contention that he sent his banker instruction might be false.
22. Moreover, the two bank officials examined by the complainant including the official of the banker of the accused have deposed that the Ext-1 cheque could not be honoured due to insufficient fund in the account of the accused. it has been already found that Ext-2 forwarding letter by which the accused forwarded the Ext-1 cheque to the complainant has remained undisputed. Ext-2 is dated 01-09-2005 and by the same the post dated cheque dated 03-09-2005 was forwarded. But Ext-B is dated 17-08-2005. Thus it appears that

accused had instructed his bank to stop payment of the cheque yet to be issued. Therefore, the plea of the accused that he instructed his bank to stop payment of the cheque in question is nothing but false. Here, the case law reported in **1998(1) Crimes 268 (SC) (M/s Modi Cement Ltd., Appellant Vs. Kuchi Kumar Nandi, Respondent)** placed reliance by the learned counsel for the complainant can gainfully be referred to. The Honourable Apex Court in the aforesaid decision held that once the cheque is issued by the drawer a presumption under Section-139 of the N. I. Act must follow and merely because the drawer issues a notice to the drawee or the bank for stoppage of the payment, it will not preclude an action under section 138 of the Act by the drawee, or holder of a cheque in due course. Here in this instant case, the plea of the accused is found to be false but even if his plea is to be believed then also in view of the ratio laid down by the Honourable Supreme Court, accused can not escape the liability of the provision of Section 138 of the N. I. Act in as much as the evidence on record has established that he issued the cheque in question in discharge of liability towards the complainant.

23. Let me now deal with the next contention of the accused to the effect that he did not receive the demand notice issued by the complainant through his lawyer. The plea of the accused is that he does not have any office at Fancy Bazar, Guwahati and his office at “751, Lake Town, Block-A, Kolkata-7000089” always remains closed and therefore he did not receive the demand notice. In his cross examination, accused as DW-1 has, however, stated that the address mentioned in Ext-12 is still exists. Ext-12 is the bail bond executed by the accused in the court after his appearance in the court on receipt of summons issued to him. The address given by the accused in the bail bond is the address at which demand notice was sent to him through registered post which was returned by the Postal Authority with endorsement “Left”. The envelope containing the demand notice marked as Ext-10 was correctly addressed and the same was registered.
24. The Honourable Supreme Court reiterating the ratio laid down in the case law reported in “**Jagdish Sing v. Natthu Sing, (1992) 1 SCC 642**” has **observed in the decision reported in (2007) 6 SCC 555 (C. C. Alavi Hazi, v. Palapetty Muhammad and another)** 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 “addressee is not in station”, due service has to be presumed. The Honourable Apex Court further in the aforesaid Judgment held that course open to the drawer where he claims not to have received the notice sent by post but received complaint with the summons, is that, he can within 15 days of the receipt of the summons make payment of the cheque and on that basis submit to the court that the complaint be rejected. He then can not contend that there was no proper service of notice.
25. In this case in hand, the demand notice having been sent at the correct address of the accused through registered post and the accused having been appeared in the court on receipt of the summons issued to the same address as mentioned in the demand notice, on the basis of the aforesaid ratio of the

Honourable Apex Court, it has been presumed that the demand notice has been duly served on the accused and his plea that he did not receive the demand notice stands rejected.

26. In view of what has been discussed in the foregoing paragraphs, I have come to the conclusion that the accused to discharge his liabilities towards the complainant issued the Ext-1 cheque in favour of the complainant and the said cheque was dishonoured on presentation for encashment by the bank due to "Insufficiency of fund" in the account of the accused and inspite of the complainant's bringing notice to the accused about the fact of dishonour of the cheque in question, the accused has failed to discharge his liability. The complaint is found to have been filed within the period of limitation. Situated thus, I find that the Prosecution has been successfully able to prove its case against the accused of committing the offence U/S 138 Of the N.I. Act beyond reasonable doubt. The accused is held guilty and accordingly he is convicted.
27. Having regard to the nature of the offence that has been proved against the accused person and also considering the fact that the accused is an educated person having capacity to know the implication of his action, I am not inclined to give benefit of the provisions of the Probation of Offenders Act, 1958 to the accused person. Considering all aspects of the case, accused Sri Tapan Kumar Dutta is sentenced to suffer Simple Imprisonment for a period of three (3) months U/S 138 of the N. I. Act.
28. That the accused by not discharging the liability, that is to say, by not paying the amount mentioned in the Ext-1 cheque to the complainant which it was entitled to receive from him, has made its proprietor to sufferer both financially and mentally. As such, in addition to the sentence of imprisonment passed against the accused as aforesaid, I deem it appropriate to award compensation to the complainant to be paid by the accused. The quantum of compensation will be determined on hearing both the parties to the case and the same will be recorded in a separate sheet and the sheet shall be attached to the Judgment so as to form a part of the Judgment.

Furnish a copy of this Judgment to the accused free of cost.

Given under my hand and seal of this court on this the 5th day of January, 2011.

(N. Talukdar)

Judicial Magistrate,

First Class, Kamrup, Guwahati.

Case No. 6417c/2005

Complainant: R. R. Enterprise.

Accused: Sri Tapan Kumar Dutta.

ORDER ON COMPENSATION

05-01-2011.

Vide Judgment and Order dated 05-01-2011 accused person has been held guilty U/S 138 of the N. I. Act and accordingly he has been convicted and sentenced to suffer Simple Imprisonment for three (3) months. I have also decided to direct the accused to pay compensation to the complainant. In view of the ratio laid down by the Honourable Gauhati High court in the case reported in (2009) 6 GLR page 726 (Shri Ambika Baishya, Accused Petitioner Vs. The State of Assam and another), I have heard learned counsel for both the complainant and the accused person on as to what should be the appropriate amount of compensation. So far as the quantum of compensation is concerned, learned counsel for the complainant has submitted that as the guilt of the accused is already found to have been proved in this case and Section 138 of the Act on proving guilt of the offence prescribes punishment of imprisonment as well as fine which may extend to twice the amount of the cheque, compensation should be awarded to the complainant which is the double the amount of the cheque in question. It is submitted further by the learned counsel for the complainant that the case has been pending since the year 2005 and the accused has deprived the complainant of its legitimate due since then and therefore, while passing the order on compensation, this aspect of the matter also needs consideration.

Learned counsel for the accused has on the other hand submitted for liberal and lenient approach while passing the order on compensation. It has been further submitted by the learned counsel for the accused that the accused had to stop business transactions with the complainant and he had suffered loss in his business.

I have considered the rival submissions of the learned counsel of the complainant and the accused person on as to what should be the appropriate amount of compensation keeping in mind the capability aspect of the accused person who is a businessman. As has been found above, accused should have paid the Ext-1 cheque amount of Rs. 5,00,000/- in the year 2005 and since then he has been using the same for his own benefit depriving the person who was entitled to receive the same. Having regard to the submissions of the learned counsel for both the sides and considering the period of pendency of the case, accused is directed to pay an amount of Rs. 6,00,000/- (Rupees six lacs) only to the complainant as compensation within three months from today. Let this order be attached to the Judgment and order dated 05-01-2011 so as to form part of the same.

Copy of this order be furnished to the accused free of cost.

(N. Talukdar),
Judicial Magistrate, First Class,
Kamrup, Guwahati.