

IN THE COURT OF THE JUDICIAL MAGISTRATE FIRST CLASS AT KAMRUP(M).

Present: ARPITA KAR, A.J.S.

C.R. CASE NO: 2309/13

U/S 138 N.I.Act

Smti. Baby Choudhury

..... Complainant

-Vs-

Smati Kumari @Kumari Rao

..... Accused.

Advocate Appeared:-

For The Complainant: - Sri K.Bhuyan, Sri M. Deka, Sri N. Kumari and Sri N. Islam.

For The Accused :- Sri T. Das, Sri M. Pandit, Sri N. Baishya, Smri. D. Talukdar, Sri S Nath, Sri L. Nath, Smt. B. Devi.

OFFENCE EXPLAINED ON : 8.1.2015

EVIDENCE FILED AND RECORDED ON: 11.08.2015, 9.12.2015, 17.06.2016, 30.07.2016, 02.09.2016.

ARGUMENT HEARD ON: 29.12.2016, 08.03.2017

JUDGMENT DELIVERED ON: 8.03.2017.

JUDGMENT.

1. This is a case instituted under section 138 of the Negotiable Instrument Act, 1881(hereinafter called as N.I. Act) alleging therein that the accused Smati Kumari @ Kumari Rao had issued a cheque in favour of the complainant, which was dishonoured by the drawee bank.

2. The brief facts giving rise to the institution of this complaint case by the complainant, Smti. Baby Choudhury (hereinafter referred to as the complainant) is that the accused, Smati Kumari @ Kumari Rao (hereinafter referred to as the accused) due to sudden financial hardship approached the complainant for help and accordingly in good faith the complainant gave an amount of Rs.3,00,000/- to the accused on 30.12.2012. Thereafter in discharge of his legally enforceable debt and to clear up her liabilities, the accused issued a cheque bearing number 258275 dated 2.05.2013 for an amount of Rs.3,00,000/ in favour of the complainant. The aforesaid cheque was presented for encashment but was dishonoured for "insufficient funds". The complainant thereafter issued legal notice to the accused demanding the amount of cheque within 15 days, but the accused failed and neglected to pay the same even after receipt of the notice; as such the complainant lodged this complaint under section 138 of the Negotiable Instruments Act,1881.

3. The accused was called upon to enter trial and upon her appearance on receiving the summon, the particulars of offence under section 138 of the Negotiable Instruments Act,1881 was explained to her to which she pleaded not guilty and claimed to be tried.

4. Complainant side examined witnesses and also exhibited documents. Then examination of accused was recorded u/s 313 Cr.P.C. Defence also adduce witnesses.

5. The defence plea as revealed from the statement of the accused in his examination U/S 313 Cr.P.C. is that she has never taken any money from the complainant.

6. I heard argument for both sides.

7. Upon hearing and on perusal of the record I have framed the following **points for determination** in order to arrive at a definite finding as regards the dispute in this case :-

i) Whether the accused issued the cheque no.258275 dtd. 02.05.2013 in favour of the complainant for the discharge of a part of any legally enforceable debt or liability?

ii) Whether the cheques were dishonoured for insufficient funds in the account of the accused?

iii) Whether the accused received the demand notice issued by the complainant regarding the dishonour of the cheque?

iv) Whether the accused has failed to repay the cheque amount to the complainant within stipulated period and thereby committed the offence under section 138 of the Negotiable Instruments Act, 1881?

DISCUSSION, DECISION AND REASONS FOR THERE OF:-

Point For Determination No.(i): Whether the accused issued the cheque no.258275 dtd. 02.05.2013 in favour of the complainant for the discharge of a part of any legally enforceable debt or liability?

8. The complainant has alleged that the accused had issued the cheques-in-question for the discharge of legally enforceable liability; whereas the accused has contended that she do not have any existing liability in favour of the complainant.

9. P.W.1, Smti. Baby Choudhury has deposed that the accused was known to her since a long time as they reside in the same locality. At the time of her financial problem she approached the complainant for an amount of Rs.3,00,000/-. Considering the good relationship between the parties, the complainant gave an amount of Rs.3,00,000/- to the accused on 30.12.2012 which the accused promised to return within 3 months. The complainant further deposed that the mode of payment was Bank to Bank transfer in same amounting to Rs.1,30,000/- only and by cash Rs.1,70,000/-. The accused to clear her liabilities issued a cheque bearing no.258275 dtd. 02.05.2013 for an amount of Rs.3,00,000/-. The said cheque was produced and exhibited as Exbt-1.

10. The accused in his evidence as D.W.1 has deposed that the complainant is known to her since the last 10 years. She has never borrowed any money from her. She also has never issued any cheque in her favour. She contended that she gave two cheques and some documents to Mr. Swapan Das for the purpose of a loan. Later Mr. Swapan Das told her that the loan cannot be obtained and hence she asked him to return her cheques and documents but he never responded. She stated that in the month of April,2013 she took a leave of 50 days for the purpose of marriage of her daughter which was solemnised at Vishakhapattanam.

In her cross-examination she deposed that in the year of 2008 she took a loan of Rs.1,27,000/- from the complainant through account transfer. He stated that she has also returned back the said amount to the complainant. She has admitted her signature on the cheque-in-question but denied the fact that she has issued the cheque in discharge of her liability.

11. D.W.2, Sri Swapan Nath deposed that about 2 years back the complainant met him and told him to arrange for a loan at SBI for the salaried person. He had a known person at S.B.I. Gauhati University branch whom he told about the matter and that person asked for some documents about which he informed the complainant. Then one day the accused along with the complainant came to him and handed over two blank cheques, stamp paper, pan card, upto date pass book etc. He handed over those documents to the bank authority but they told him that the loan cannot be processed as the form did not contain the signature of the DDO. He informed the matter to Baby Choudhury and returned the documents belonging to Kumari Rao to her and asked her to give the same back to him after obtaining the signature of the DDO. But Baby choudhury never gave those documents back to him and the cheques were blank signed cheques.

In his cross-examination he deposed that Baby Choudhury once told him that she was entitled to get some amount from Kumari Rao. He deposed that he cannot say if the present cheque-in-question is the same cheque or not that was given to him for the purpose of obtaining the loan. Thus from the discussions made so far it becomes clear that the accused has admitted his cheque but has denied any liability in favour of the complainant.

12. D.W.3, Mr. Sumarki Laloo deposed that during the year 2013 he was working at LGBI airport and he knows the accused. The accused was an employee of airport authority and she applied for leave from the period of 29.04.2013 to 17.06.2013. He was the authority for allowing the leave of the applicant at that period. He deposed that Exbt-B is the leave application with the authority letter of the airport director wherein exbt-B(1) is his signature. The accused joined on 18.06.2013.

In his cross-examination he deposed that he does not have any personal knowledge about the transactions between the accused and the complainant.

13. Now, although the complainant has stated that out of the total amount of Rs.3,00,000/- that she paid to the accused on 30.12.2012,

Rs.1,30,000/- was given in through bank transfer and Rs.1,70,000/- was paid in cash but the accused stated that in the year of 2008 she took an amount of Rs.1,27,000/- from the complainant through bank transfer and the complainant did not produce any document in support of her claim that she has paid an amount o Rs.1,30,000/- to the accused through bank transfer on or after 30.12.2012. The complainant could have very easily produced her bank account statement in support of her claim. The complainant also did not mention anything about the source of her income to lend such a huge amount of money to the accused. Moreover the D.W.2 deposed that the complainant gave him some documents belonging to the accused Viz: blank signed cheques, I-card, Pan card etc. for obtaining a loan but later those documents were returned by him to the complainant as the signature of the D.D.O. of the accused was required and asked the complainant to give him the said documents after obtaining the signature of the D.D.O. of the accused but the complainant never returned him the same. Hence from the deposition of the D.W.2 it becomes clear that the complainant was in possession of the documents of the accused including blank signed cheques. In addition to the above, the complainant has stated that to repay her liabilities, the accused issued the cheque on 02.05.2013 but the accused deposed that in the month of April,2013 she took a leave of 50 days for her daughter's marriage which was solemnised at Vishakhapattanam. The D.W.3 has also corroborated her contention and has stated that the accused was on leave from her office w.e.f. 29.04.2013 to 17.06.2013 and she joined her office at Guwahati on 18.06.2013. He has also produced Exbt-B in support of his deposition. Perusal of Exbt-B shows that the accused applied for the leave for the purpose of her daughter's marriage and she was on leave w.e.f. 29.04.2013 to 17.06.2013. Now, it is highly improbable that a person who is on leave for her daughter's marriage would come in between from a distant place like Vishakhapattanam to issue a cheque to the complainant to repay her liability.

14. Although the presumption u/s 118 and 139 N.I.Act is there in favour of the holder of the cheque that the cheque was issued in discharge of a legally enforceable debt but in a catena of judgment viz: *Krishna*

Janardan Bhat Vs Dattatraya G. Hedge; AIR 2008 SC 1325, Vijay Vs Laxman; (2013)3 SCC 86 the Hon'ble Apex Court has held that the presumption is rebuttable in nature and in *Rangappa Vs Mohan; AIR 2010 SC 1898* it was held by the Hon'ble Apex Court that the accused can rebut the presumption.

15. Turning to the factual aspect of the instant case it is an admitted fact that the complainant has not produced any documents to show that she has ever assisted the accused financially with an amount of RS.3,00,000/-, which is not a small amount. The accused has successfully proved that she was on leave for the purpose of her daughter's marriage solemnised at Vishakhapatnam on the date on which the complainant has alleged that the accused has given her the cheque. The accused has also been able to prove that the complainant was in possession of her documents including signed blank cheques. Thus, from the aforesaid discussions it becomes clear that the accused is able to make a probable defence.

16. In *K. Prakashan Vs P.K.Sundderan; (2008)1SCC 258*, the Hon'ble Supreme Court has held that the standard of proof of the prosecution is beyond reasonable doubt and that of the accused is only preponderance of probability.

17. Hence, the ratio of *K. Prakashan Vs P.K.Sundderan; (2008)1SCC 258*, (Supra) and the discussions made so far is sufficient to hold that in the present case complainant cannot take shelter solely on the presumption u/s 118 and 139 of N I Act as because his very own averments as made in his evidence and the circumstances which has already been discussed above creates a doubt on his capability of giving such a huge amount as financial assistance to a person. Complainant should have adduced further evidence to prove his case beyond reasonable doubt.

18. In view of the above discussion, I am of the considered opinion that although the complainant has proved the fact that the cheque-in-question was signed by the accused but the accused has been able to rebut the presumption U/S 118 and 139 N.I.Act, that the cheque was not issued in

discharge of any legally enforceable debt or liability and thus shifted the burden of prove beyond reasonable doubt on the complainant in which complainant failed to prove his case. The complainant thus failed to prove the fact of giving financial assistance to the accused and receiving the cheque in discharge of the said debt beyond reasonable doubt.

19. **DECISION:** The cheque was not issued by the accused for the discharge of any legally enforceable debt.

Point For Determination No.ii:- Whether the cheque was dishonoured for insufficient funds in the account of the accused?

20. P.W.1, has deposed that the cheques-in-question was presented for encashment, but the same was dishonoured because of "Insufficient funds". P.W.1 has produced the cheque return memo and the same is marked as exhibit-2 which shows that the said cheques were dishonoured for "insufficient fund" on 22.05.2013.

21. The accused has never disputed the factum of dishonour of the cheques.

22. In addition to the above the section 146 of the Negotiable Instruments Act,1881 provides for a statutory presumption as regards the genuineness of the cheque return memo issued by the bank; hence it is held that the said cheque was dishonoured for the reason funds insufficient" when presented for encashment.

23. Decision: The cheque was dishonoured due to funds insufficient.

Point For Determination No.iii:- Whether the accused received the demand notice issued by the complainant regarding the dishonour of the cheque?

24. P.W.1, has deposed that after the dishonour of Exbt-1, demand notice was issued in respect of the dishonour of the said cheque, after the receipt of the dishonoured cheque. The complainant issued the demand notice to the accused by registered post in his correct address. The copy of the said notice along with the postal receipt is produced and marked as exhibit-3 and 4. The complainant failed to produce the original copy of the postal slip and the photocopy of the same was allowed to be produced as secondary evidence vide order dated 01.10.2015. The accused has never challenged the genuineness of the photocopy of the said postal receipt after its production and as such the same is admitted.

25. I have perused the above exhibits and there is nothing on record to doubt or disbelieve the genuineness of the above exhibits. The postal receipt shows that the notice was sent by registered post duly prepaid and addressed to the accused.

26. The perusal of the exhibit-3 and 4 shows that it is demand notice whereby the factum of dishonour of the cheque (exhibit-1) is clearly mentioned and a demand is made to honour the amount of the said cheques.

27. The accused in his examination has contended that he has not received the demand notice. But in C.C. Alavi Haji (2007 CrL. L.J. 3214); Hon'ble Apex Court has laid down that a person who does not pay within 15 days of receipt of the summons from the court along with the copy of the complaint U/S 138 of the Act, cannot obviously contend that there was no proper service of notice as required u/s 138 by ignoring statutory presumption to the contrary under section 27 of the General Clauses Act and Section 114 of the Evidence Act, That any other interpretation of the proviso would defeat the very object of the legislation.

28. In the instant case, the accused did not make any such payment within 15 days from the date of receipt of the summons from the Court and as such, the accused cannot take any advantage of the plea.

29. Thus, in view of the aforesaid discussions and evidences, it is held that the accused received the demand notice issued by the complainant regarding the dishonour of the cheque.

30. ***DECISION:*** The demand notice was duly served upon the accused.

Point For Determination No iv:- Whether the accused has failed to repay the cheque amount to the complainant within stipulated period and thereby committed the offence under section 138 of the Negotiable Instruments Act, 1881?

31. The offence under section 138 of the Negotiable Instruments Act, 1881 is complete on the satisfaction of certain conditions which are: that the cheque has to be issued on the account maintained by the accused and that the cheque has to be issued for the discharge of a debt or liability. It is further provided that the said cheque has to be deposited within three months of its issuance or within its validity and that the notice regarding the dishonour of the cheque for insufficient funds ought to be given within 30 days of the receipt of information regarding the dishonour.

32. In the instant case in hand, it is already held that the cheque was not issued in discharge of any debt or liability. In absence any legally enforceable debt or liability the accused cannot be booked U/S 138 N.I.Act. and hence this point does not merit any further discussions.

33. In view of the aforesaid discussions and the decisions reached in the foregoing points for determinations, it is held that the accused has not committed offence under section 138 of the Negotiable Instruments Act, 1881 and as such the accused is acquitted from the charges of this case under section 138 of the Negotiable Instruments Act,1881.

34. The accused Smati Kumari @Kumari Rao is acquitted from the charges of this case under section 138 of the Negotiable Instruments Act,1881 and set at liberty.

35. The accused is directed to furnish fresh bail bond U/S 437A Cr.P.C. and till then the bail bond executed by the accused and his sureties are extended for the next six months.

36. The case is disposed of on contest.

Given under my hand and the seal of this court on this
the 8th day of March , 2017 at Kamrup(M).

Judicial Magistrate 1st Class, Kamrup(M).

APPENDIX.

1. **Prosecution Witnesses:-**

P.W.1: Smti. Baby Choudhury.

2. **PROSECUTION EXHIBITS:-**

EXHIBIT 1 : Returned Cheque.

EXHIBIT2: Dishonoured memo.

EXHIBIT 3: Demand Notice

EXHIBIT 4: Postal receipt.

3. **DEFENCE WITNESSES:-**

D.W.1: Smti. Kumari Rao

D.W.2: Sri Swapan Nath.

D.W.3:Mr. Sumarki Laloo.

4. **DEFENCE EXHIBITS :-**

Exbt-A: Photocopy of leave certificate.

Exbt-B: Leave application with the authority letter of airport director.

Judicial Magistrate 1st class, Kamrup(M).