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

C.R. Case No: 2740^{c} of 2014

u/s 138, Negotiable Instruments Act

M/S Srinath Builders and Housing Co. Pvt. Ltd
(Represented by
Sri Niranjan Thakuria) …… Complainant

versus

Sri Pranab Sarma …… Accused

Present: Sri Sarfraz Nawaz, A.J.S.

Evidence recorded on : 05.11.15
21.07.16
01.12.16
05.01.17

Arguments heard on : 09.02.17
20.02.17
28.02.17
01.03.17

Judgment delivered on : 15.03.17

Appearing for the Complainant : Sri T. Das, Smti C. Todi
Appearing for the Accused : Sri M.C. Das, Sri M. R. Barbhuyan

JUDGMENT

1. The accused person, Sri Pranab Sarma, has stood trial for an offence punishable under section 138, Negotiable Instruments Act, 1881, (hereinafter called the Act) as leveled against him by the complainant, M/S Srinath Builders and Housing Co. Pvt. Ltd.

Allegation

2. The facts as brought on record by the complainant are as follows. The accused, Sri Pranab Sarma approached the complainant company seeking financial help in order to purchase a plot of land measuring 50 (fifty) bighas. Accordingly, both parties entered into an agreement on 30.08.2012 and the complainant gave

a loan of Rs. 60,00,000/- (Sixty Lakh Rupees) to the accused. The accused issued money receipt for the same.

3. Subsequently, the accused issued 4 (four) cheques (No. 087828, No. 087829, No. 087830 and No. 087831) all dated 31.07.2014 each for Rs.10,00,000/- (Ten Lakh Rupees) drawn on the Central Bank of India, Azara Branch, Guwahati. The complainant company deposited the cheques in State Bank of India, G.S. Road Branch, Guwahati but the same were dishonoured on 01.08.2014 on the grounds of insufficiency of funds.

4. Thereafter, on 25.08.2014, the complainant sent 2 (two) demand notices to the accused at both of his addresses demanding payment of the cheque amounts. However, the accused despite receiving the notice on 05.09.2014 never paid the cheque amounts. As such, the complainant lodged the instant complaint under section 138 of the Act.

Cognizance and Trial

5. The complainant filed the complaint before the Hon'ble Chief Judicial Magistrate, Kamrup (M). Cognizance of an offence under section 138 of the Act was taken and processes were issued against the accused, Sri Pranab Sarma accordingly. On appearance of the accused, the particulars of offence under section 138 of the Act were explained to him to which he pleaded not guilty and claimed to be tried.

6. During the trial, the complainant's representative, Sri Niranajan Thakuria examined himself as the sole prosecution witness. The accused was thereafter examined under section 313, Criminal Procedure Code (hereinafter called CrPC). He has submitted that the complainant requested him to arrange the purchase of a plot of land and in connection with the same, he received Rs.60,00,000/- (Sixty Lakh Rupees) to pay to the actual landlords. The accused has also stated that Rs. 60,00,000/- (Sixty Lakh Rupees) was given to the original landlords. But they demanded more money which the complainant did not provide. When the landlords refused to return the money, he paid Rs. 20,00,000/- (Twenty Lakh Rupees) to the complainant on condition that if the landlords returned the money, he would return the same to the complainant. He issued the cheques in

question for the remaining Rs.40,00,000/- (Forty Lakh Rupees) and the same were to be returned to him on payment of the money. But at the same time, he has taken the plea that the cheques were forcibly taken from him.

7. In order to establish his defence, the accused examined Sri Pulak Thakuria as DW-1.

8. I have considered the evidence on record in its totality. I have also heard the arguments put forward by both sides.

POINTS FOR DETERMINATION

9. I have framed the following points for determination in order to arrive at a definite finding as regards the dispute in this case.

10. Whether the accused issued cheques No. 087828, No. 087829, No. 087830 and No. 087831 all dated 31.07.2014 (Ext-5, Ext-6, Ext-7 and Ext-8) in favour of the complainant for the discharge of his legally enforceable debt or liability?

11. Whether Ext-5, Ext-6, Ext-7 and Ext-8 were dishonoured due to insufficiency of funds?

12. Whether the accused received the demand notice issued by the complainant regarding the dishonour of the cheques?

13. Whether the accused failed to repay the cheque amounts to the complainant within the stipulated period?

14. Whether the accused has committed the offence under section 138 of the Act?

DECISIONS AND REASONS THEREOF

Whether the accused issued cheques No. 087828, No. 087829, No. 087830 and No. 087831 all dated 31.07.2014 (Ext-5, Ext-6, Ext-7 and Ext-8) in favour of the complainant for the discharge of his legally enforceable debt or liability?

15. The complainant's representative (PW-1), Sri Niranjan Thakuria, in his evidence on affidavit, has reiterated the allegations made by the complainant in its complaint. He has proved his authority to depose on behalf of the complainant by proving the authority letter issued by the company in this regard as Ext-1. He has also produced the agreement entered into with the accused as Ext-2 and the money receipts given by the accused as Ext-3 and Ext-4. He has also produced the dishonoured cheques as Ext-5, Ext-6, Ext-7 and Ext-8.

16. Now, the defence has not disputed the genuineness of Ext-2. Per contra, the defence has relied upon Ext-2 to argue that the accused had no existing liability or enforceable debt towards the complainant.

17. On perusal of Ext-2, it is seen from the contents thereof, that the accused intended to purchase 50 (fifty) bighas of land from the original pattadars but due to his financial crunch, the complainant company undertook to pay off the due amount on his behalf.

18. As per Ext-2, the complainant paid Rs. 50,00,000/- (Fifty Lakh Rupees) on the date of the agreement and another Rs. 10,00,000/- (Ten Lakh Rupees) within 15 (fifteen) days thereof. Ext-3 and Ext-4 have shown that the aforementioned sums have been received by the accused on 30.08.2012 and 10.09.2012 respectively.

19. The learned counsel for the accused has argued that the complainant is not entitled to the cheque amounts. The defence has put in a suggestion to that effect at the time of cross-examination of PW-1 as well. The learned counsel has argued that the terms and conditions of Ext-2 have nullified the liability of the accused. The learned counsel has drawn the attention of this court to clauses (3) and (5) of Ext-2. He has argued that there is, at best, a civil liability of the accused towards the complainant but the complainant has instituted a frivolous case.

20. Now, as per the contents of Ext-2, it is seen therefrom that the complainant had acquired a right to purchase the land in question from the accused or to sell the land to some other third party. On the contrary, the accused would be unable to sell the land to any third party except the complainant. Moreover, if

the accused sold the land, he would have to return the amount of Rs. 60,00,000/- (Sixty Lakh Rupees) along with profits to the complainant.

21. On perusal of the cross-examination of PW-1, it is seen that he has admitted therein that he did not submit any evidence to the effect that the accused had sold off the land. As the complainant has failed to prove that the accused had sold the land, hence, as per clause (5) of Ext-2, it would seem that the accused would not have the liability to pay Rs. 60,00,000/- (Sixty Lakh Rupees).

22. However, one aspect that this court has not lost sight of is the fact that the amount of Rs. 60,00,000/- (Sixty Lakh Rupees) was indeed received by the accused from the complainant company. This receipt of money (proved by Ext-2 and more specifically by Ext-3 and Ext-4) has not even been denied by the defence. The defence has only submitted (admitted by the accused in his statement under section 313, CrPC and corroborated by DW-1, Sri Pulak Thakuria, in his evidence) that the original pattadars kept the money.

23. DW-1 has deposed that when the original pattadars did not return the money, the accused took it upon himself to return Rs, 20,00,000/- (Twenty Lakh Rupees) in cash to the complainant and gave the 4 (four) cheques in question as security for the payment of the remaining sum.

24. The learned counsel for the defence has argued that these cheques were not issued in discharge of any liability and as such, the accused cannot be held liable for dishonor of the same.

25. Per contra, the learned counsel for the complainant has submitted that in addition to the statutory presumption under section 139 of the Act, the contents of Ext-2, Ext-3 and Ext-4 have established beyond any doubt that the accused had acquired a liability of Rs. 60,00,000/- (Sixty Lakh Rupees) towards the complainant. And the cheques in question (Ext-5, Ext-6, Ext-7 and Ext-8) were issued in discharge of this legally enforceable liability.

26. At this juncture, I would like to point out that Section 139 of the Act does spell out a presumption as to the existence of a legally enforceable debt.

> Sec. 139: Presumption in favour of holder
>
> It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

27. This is a presumption of law and as such, this court is duty bound to raise the presumption that Ext-5, Ext-6, Ext-7 and Ext-8 were issued by the accused towards discharging his liability of Rs. 40,00,000/- (Forty Lakh Rupees) towards the complainant.

28. However, let me also point out that the presumption under Section 139 of the Act is a rebuttable presumption; it is up to the accused to prove that the cheques in question had not been issued in discharge of a debt or liability.

29. Now, the question arises as to how the accused shall discharge this burden. In this context, the Hon'ble Supreme Court speaking through its judgment in the case of **Rangappa v. Sri Mohan** reported in **(2010) 11 SCC 441** has observed as follows:

> "Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard of proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of `preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates

> doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.

30. Thus, it appears that the prosecution can fail if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability.

31. The learned counsel for the accused has cited the case law of **Vijay v. Laxman** reported in **(2013) 3 SCC 86** to suggest that the burden of proof on the accused is of not a very high standard. As long as the accused can make his version reasonably probable, the burden would stand discharged. The learned counsel for the accused has also submitted the case law of **Jose Pullan v Uma Jasrasia** reported in **2011 (2) GLT 757** in this regard. I have considered the case laws cited by the defence. The cited judgments have reiterated the well-established law as to the standard of proof required for rebuttal of the presumption under section 139 of the Act.

32. Keeping that in mind, let me see if the defence has been able to rebut the case against it. The defence's main contention is that the accused had no liability for the cheque amounts. But the defence has failed to examine any of the original pattadars who allegedly took the money from the accused. A claim by DW-1 to that effect does not suffice, more so when DW-1 has himself admitted in his cross-examination that the accused did not make any agreement with the original pattadars in connection with payment of money to them. Moreover, he has also admitted that he was not involved in any such business transaction. Further, if what the accused pleads is true –*that the original pattadars did not return the money*- then surely he must have initiated some legal proceedings against them. But the defence has not uttered a whisper in this regard. Thus, it is quite clear that there is no material on record adduced by the defence to suggest that the liability for the return of the money had shifted from the accused to a third party. The plea of the defence that the accused only acted as a conduit between the complainant and the original pattadars has remained unsubstantiated.

33. Let me add here that it is quite apparent that the prosecution has not only relied on the presumption under section 139 of the Act to establish its case. The agreement between the complainant and the accused (Ext-2) and the money receipts (Ext-3 and Ext-4) have clearly established that the accused had received the money in question. As discussed earlier, the accused has also admitted that he had received the money. Thus, I can think of no reason in this scenario to form the opinion that the liability of the accused has been extinguished. Moreover, if the liability had indeed been extinguished, then why did the accused bother to pay Rs. 20,00,000/- (Twenty Lakh Rupees) to the complainant and issue the cheques in question?

34. I would like to add here that though the accused has claimed that the cheques were forcibly taken from him, the claim is not backed by any supporting evidence.

35. The learned counsel for the accused has submitted the case laws of **Sudhir Kumar Bhalla v. Jagadish Chand** reported in **(2008) 7 SCC 137** and **Vinita S. Rao v. Essen Corporate Services (P) Ltd** reported in **(2015) 1 SCC 927** for consideration. I have gone through both case laws and found no bearing with the instant case under adjudication in facts or in law.

36. Another aspect raised by the learned defence counsel is that the cheques in question were issued for security. The learned counsel for the accused has argued that it is an established principle of law that if the dishonoured cheque was issued as a security cheque then no offence under section 138 of the Act is made out.

37. However, I would like to point out that the words "security cheque" do not necessarily disprove the case against the accused. The expression "security cheque" is not a statutorily defined expression in the Act. Moreover, the Act does not *per se* carve out an exception to culpability in respect of a "security cheque".

38. Moreover, the defence has not produced any evidence to suggest that the cheques in question (Ext-5, Ext-6, Ext-7 and Ext-8) were never meant to be

presented for encashment. A mere claim to that effect does not rebut the presumption under section 118 (a) of the Act that every negotiable instrument is made or drawn for consideration.

39. Let me further cite the case of **I.C.D.S. Ltd. v. Beena Shabbir & Anr.** reported in **AIR 2002 SC 3014** in this regard wherein the Hon'ble Supreme Court has observed as follows.

> "…..The commencement of the Section stands with the words "Where any cheque". The above noted three words are of extreme significance, in particular, by reason of the user of the word "any" the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well…."

40. Thus, even if it is presumed that the cheques in question (Ext-5, Ext-6, Ext-7 and Ext-8) were issued as security cheques, they will still come under the ambit of Section 138 of the Act. The only condition is that the security cheque must be backed by some legally enforceable debt on the part of the accused. The aforementioned discussion clearly shows that the accused owed Rs. 40,00,000/- (Forty Lakh Rupees) to the complainant.

41. Situated thus, it is found that the accused issued cheques No. 087828, No. 087829, No. 087830 and No. 087831 all dated 31.07.2014 (Ext-5, Ext-6, Ext-7 and Ext-8) in favour of the complainant for the discharge of his legally enforceable debt or liability. As such, this point is decided in the affirmative.

Whether Ext-5, Ext-6, Ext-7 and Ext-8 were dishonoured due to insufficiency of funds?

42. The fact that Ext-5, Ext-6, Ext-7 and Ext-8 were dishonoured on account of insufficiency of funds has not been disputed by the defence. On perusal

of the statement of the accused recorded under section 313, CrPC, it is found that the accused has admitted to the dishonor of the cheques on account of insufficiency of funds. Moreover, DW-1 has also deposed that the accused did not have sufficient funds to cover the encashment of Ext-5, Ext-6, Ext-7 and Ext-8.

43. As such, this point, being admitted, is decided in the affirmative.

Whether the accused received the demand notice issued by the complainant regarding the dishonour of the cheques?

44. PW-1 has deposed that after the dishonour of Ext-4, Ext-5, Ext-6 and Ext-7, he issued 2 (two) demand notices by registered post at both addresses of the accused. The copies of the notices have been produced and marked as Ext-13 and Ext-13(1). PW-1 has also produced the postal receipts by which the said notices were issued to the accused and the same have been marked as Ext-14 and Ext-14(1).

45. PW-1 has also produced the AD Card showing receipt of the notice by the accused. The same has been marked as Ext-15.

46. I have perused the above exhibits and there is nothing on record to doubt or disbelieve their genuineness. The accused has, however, denied the factum of receiving the said demand notice.

47. In such a situation, I seek guidance from the judgment of the Hon'ble Supreme Court in the case of **C.C. Alavi Haji Vs Palapetty Muhammad & Anr** reported in **(2007) 6 SCC 555** wherein it has been held:

> "According to Section 114 of the (Evidence) Act, read with illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case.

Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

> 27. Meaning of service by post - Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression served by post, whether the expression serve or either of the expressions give or send or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that the notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice un served, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business."

48. The postal receipts, Ext 14 and Ext 14(1), show that the notices were sent by registered post duly prepaid and addressed to the accused. As such, I am of the opinion that the complainant has discharged its burden to show that the notices were duly sent. Hence, this court will have to presume that the notices were delivered to the accused. But this is a rebuttable presumption. So, the burden has shifted to the accused to rebut the same but it is quite evident that the accused has done nothing to rebut the presumption.

49. Moreover, Ext-15 clearly shows that the notice was received by the accused. The defence has not disputed the genuineness of Ext-15.

50. So considering the same, it is held that the accused duly received the demand notice(s). Hence, this point is also decided in the affirmative.

Whether the accused failed to repay the cheque amounts to the complainant within the stipulated period?

51. There is no material on record or any plea taken by the defence to suggest that the accused has paid off the cheque amounts. Hence, this point is also decided in the affirmative.

Whether the accused has committed the offence under section 138 of the Act?

52. Let me sum up the findings of the discussion made above. It has become clear that a liability of Rs. 60,00,000/- (Sixty Lakh Rupees) had accrued on the accused, Sri Pranab Sarma, in connection with the agreement (Ext-2) entered into with the complainant. The accused paid Rs. 20,00,000/- (Twenty Lakh Rupees) in cash and issued the 4 (four) cheques in question (Ext-5, Ext-6, Ext-7 and Ext-8) all dated 31.07.2014 for the remaining Rs. 40,00,000/- (Forty Lakh Rupees).

53. The cheques were submitted for encashment but were dishonoured for insufficiency of funds. The complainant received the information regarding the dishonour of the cheques on 01.08.2014 as is evident from the Cheque Return Memos (Ext-9, Ext-10, Ext-11 and Ext-12). The demand notices, Ext-13 and Ext-13 (1) are dated 25.08.2014 and as revealed from Ext-14 and Ext-14 (1), they were issued on 25.08.2014 that is within 30 (thirty) days of receiving information of the dishonour. Now, there is no material on record or for that matter any plea taken by the defence that the accused has paid the amount after receiving the demand notice.

54. Thus, the cause of action for the instant case rose 15 (fifteen) days after the receipt of the notice by the accused. It appears from Ext-15 that the

notice was received by the accused on 05.09.2014. Thus, the cause of action arose on 20.09.2014. The complaint, which had been filed on 08.10.2014, was filed within 30 (thirty) days of the cause of action. Hence, the complaint is deemed to have been lodged within the period of limitation.

55. In view of the above discussion, it is evident that all the ingredients of the offence under section 138 of the Act are satisfied in the instant case. As such, I am of the considered opinion that the accused, Sri Pranab Sarma, has committed the offence under section 138 of the Act. This point is decided in the affirmative.

ORDER

56. Considering the discussions made above and in light of the above decisions, the accused person, Sri Pranab Sarma is found guilty of the offence under section 138 of the Act and is convicted for the same accordingly.

Probation

57. I have considered the applicability of the benefits of the Probation of Offenders Act to the convict. In the instant case, it is quite clear that the convict has committed the offence not under any compulsion but to guard his financial interests, thereby depriving the complainant of its due money. Considering the magnitude of the due amount and the overall socio-economic nature of the offence, I am of the opinion that granting the benefits of probation might send a wrong message to the victim.

58. Moreover, a court of law is bound not just to see that the actual offender receives a punishment commensurate to his crime but also to see that potential offenders are deterred from committing a similar offence. As such, I am disinclined to extend the benefits of the Probation of Offenders Act to the convict.

Sentence

59. I have heard the convict, Sri Pranab Sarma, before sentencing him. I have also considered the quantum of sentence to be imposed upon him. I am also cognizant of the fact that already more than 2 (two) years have passed since issuance of the cheques to the complainant. This period has seen sharp inflation.

Moreover, the cheque amounts would have definitely yielded decent returns to the complainant, if invested in some other business.

60. As such, considering the overall facts and circumstances of the case and keeping in view that nature of the offence committed, the convict, Sri Pranab Sarma, is sentenced to undergo simple imprisonment for 8 (eight) months and to pay an amount of Rs. 60,00,000/- (Sixty Lakh Rupees) as compensation which shall be payable to the complainant, M/S Srinath Builders and Housing Co. Pvt. Ltd. The compensation shall be recoverable as fine and in default in payment of the same, the convict shall undergo simple imprisonment for another 2 (two) months.

61. His bail bonds are extended for a further period of 6 (six) months as per the provisions of Section 437-A, CrPC.

62. Let a copy of the judgment be given to the convict immediately free of cost as per Section 363(1), CrPC. The convict is informed of his right of appeal against the judgment and order of conviction and sentence.

Given in my hand and under the seal of this court on this the 15th day of March, 2017.

Typed by Me: (Sri Sarfraz Nawaz)

Judicial Magistrate First Class, Kamrup (M)

APPENDIX

Prosecution Witness :

PW-1 : Sri Niranjan Thakuria

Prosecution Exhibits :

Ext-1	:	Authority Letter
Ext-2	:	Agreement dated 30.08.2012
Ext-3	:	Money Receipt dated 30.08.2012
Ext-4	:	Money Receipt dated 10.09.2012
Ext-5	:	Cheque No. 087828
Ext-6	:	Cheque No. 087829
Ext-7	:	Cheque No. 087830
Ext-8	:	Cheque No. 087831
Ext-9	:	Cheque Return Memo
Ext-10	:	Cheque Return Memo
Ext-11	:	Cheque Return Memo
Ext-12	:	Cheque Return Memo
Ext-13	:	Demand Notice
Ext-13(1):		Demand Notice
Ext-14	:	Postal Receipt
Ext-14(1):		Postal Receipt
Ext-15	:	AD Card

Defence Witness :

DW-1: Sri Pulak Thakuria

Defence Exhibits :

None.

Judicial Magistrate First Class, Kamrup (M)