

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

**Present:** ARPITA KAR, A.J.S.

**C.R. CASE NO: 38/16**

**U/S 138 N.I.Act**

**Hinduja Leyland Finance Ltd.**

..... Complainant

**-Vs-**

**1. Sadek Ali**

..... Accused.

**Advocate Appeared:-**

For The Complainant: - Mr. P.J.Barman, Sri P. Phukan

For The Accused :-Mr. S. Ahmed.

OFFENCE EXPLAINED ON :18.04.2016

EVIDENCE FILED AND RECORDED ON: 9.02.2016, 11.8.2016,  
29.09.2011.

ARGUMENT HEARD ON: 11.1.2017, 02.03.2017

JUDGMENT DELIVERED ON: 16.03.2017

**JUDGMENT.**

1. This is a case instituted under section 138 of the Negotiable Instrument Act, 1881 alleging therein that the accused Md. Sadek Ali 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, Hinduja Leyland Finance Ltd (hereinafter referred to as the complainant), is that Md. Sadek Ali (hereinafter referred as the accused) in discharge of his existing liability towards the complainant arising out of the loan agreement being contract No. ASGWGW00944 had drawn and executed the cheque bearing No. 283713 dated 30.09.2015 for an amount of Rs.3,19,923/- in favour of the complainant. The complainant deposited the aforesaid cheque for encashment to his bank, but the same was returned unpaid by cheque return memo with reason "Insufficient Funds".

3. 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.

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

5. Complainant side examined witness and exhibited documents. Then examination of accused was recorded u/s 313 Cr.P.C. Defence side also adduced witness.

6. The defence case is of partial denial as is revealed from the statement of the accused recorded under section 313 Cr.P.C. The accused contended that he has already repaid 80% of the amount of the vehicle and has handed over the vehicle to the complainant

when he failed to repay the remaining amount. He contended that he is not liable to pay the cheque amount to the complainant.

7. I heard arguments for both sides.

8. 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. 283713 dated 30.09.2015 in favour of the complainant for the discharge of any legally enforceable debt or liability?**

**ii) Whether the cheque was 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.1: Whether the accused issued the cheque no. 283713 dated 30.09.2015 in favour of the complainant for the discharge of any legally enforceable debt or liability?**

9. The complainant has alleged that the accused had issued the cheque-in-question for the discharge of legally enforceable debt; whereas the accused has contended that the cheque was issued as security.

10. The complainant's witness, Shri Biju Kumar Gogoi has deposed as P.W.1. He deposed that he is the authorised representative of the complainant company. His power of attorney is produced and exhibited as Exbt-1. He further deposed that the accused in discharge of his existing liability towards the complainant arising out of the loan agreement being contract No. ASGWGW00944 had drawn and executed the cheque bearing No. 283713 dated 30.09.2015 for an amount of Rs.3,19,923/- in favour of the complainant.

11. The accused in adduced his evidence as D.W.1 has admitted his cheque and the loan. He deposed that on 30.12.2011 he had taken a loan of Rs.5,59,000/- from the complainant and has paid an amount of Rs.6,15,000/-. The statement of accounts with the complainant company is produced and exhibited as Exbt-A. While taking the loan he issued 3 blank signed cheques as security. He then failed to repay the loan amount to the complainant and hence he handed over the vehicle to the complainant. The inventory is produced and exhibited as Exbt-B. But the complainant did not return him his cheques.

In his cross-examination he deposed that as on 22.05.2015 he was supposed to pay an amount of Rs.8,44,090/- to the complainant. He has admitted the cheque and his signature on the cheque but denied the suggestion that he is liable to pay the cheque amount to the complainant.

12. Thus, from the discussions made so far, it is evident that the accused has admitted his cheque, that there was transaction and the complainant and that on 22.05.2015 he was liable to pay an amount of Rs.8,44,090/- to the complainant. The only contention raised by him is that his vehicle was re-possessed by the complainant. He has also produced Exbt-B in support of his contention.

13. From the perusal of Exbt-B it is seen that the said inventory is dated 22.12.2015 and the complainant was cross-examined on 11.08.2016. But while cross-examining the P.W.1 the defence side has never put a single question to the P.W.1 regarding the re-possession of the vehicle. Also from the perusal of Exbt-B it is evident that although the said inventory contains the signature of the accused but there is no signature of any repossessing agent on the said inventory. Moreover, the inventory does not contain the seal of the company. It is seen that on the inventory there is a column for the signature of the repossessing agent but in the said column only the name of the company is written by hand. Neither the signature of the repossessing agent is put there nor there is any seal of the company.
14. Hence, in absence of any seal of the complainant or any signature of the agent of the complainant, Exbt-B(inventory) becomes mere piece of paper, the same is not proved legally and thus, cannot be believed. Thus, in absence of any concrete evidence on record it cannot be said that the vehicle was repossessed by the complainant.
15. The accused has further contended that the complainant has misused his security cheques but he failed to produce any materials on record to show that he has taken any action against the complainant after coming to know that the complainant has misused his security cheques. The accused could have very easily stop payment his security cheques to prevent its misuse, which a man of ordinary prudence ought to have done.
16. In **I.C.D.S. Vs. Beena Shabeer &Anthr; AIR2002SC3014** the Hon'ble Apex Court has held that:

**10.** *"The commencement of the Section stands with the words "Where any cheque" The above noted three words are of excrement 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."*

17. Thus even if the contention of the accused that the cheque-in-question was issued as security is believed, then also as per the ratio as laid down in **I.C.D.S. Vs. Beena Shabeer &Anthr;(supra)**, security cheque will also come under the purview of section 138 of the negotiable instruments act if it is proved by the complainant that the accused was liable to pay the cheque amount when the same was deposited for encashment.
18. In the instant case the accused himself has admitted that as on 22.05.2015 he was liable to pay an amount of Rs.8,44,090/- and he has not produced any document to show that he has cleared his liabilities prior to the deposit of the cheque for encashment. As such it clear that the accused was liable to pay the cheque amount to the complainant on the day when the same was deposited.
19. In addition to the above there is a statutory presumption under section 118 and 139 of the Negotiable Instruments Act, 1881 in favour of the holder of the cheque, that the cheque was issued for the discharge of debt. In the instant case at hand the complainant Exbt-2 has already proved the liability of the accused and accused could not adduce any evidence to rebut the same; as such the only presumption that can be

drawn in the absence of any evidence to the contrary, is that the said cheque was issued for the discharge of legally enforceable debt.

20. ***DECISION:*** The cheque was issued by the accused for the discharge of a legally enforceable debt.

**Point For Determination No.2:- Whether the cheque was dishonoured for insufficient funds in the account of the accused?**

21. P.W.1, has deposed that the said cheques were presented to the complainant's bank 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-3 which shows that the said cheque was dishonoured for "Insufficient Funds" on 29.10.2015.
22. The accused has not disputed the factum of dishonour of the cheques. 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.
23. Hence, in view of the ratio of the aforesaid decision it is held that the cheque was dishonoured due to funds insufficient in the account of the accused.
24. ***Decision:*** The cheque issued was dishonoured for insufficient funds in the account of the accused.

**Point For Determination No.3:- Whether the accused received the demand notice issued by the complainant regarding the dishonour of the cheque?**

25. P.W.1, has deposed that after the dishonour of the cheques-in-question, demand notice was issued in respect of the dishonour of the

said cheque after the receipt of the cheque return memos. The complainant issued a demand notice to the accused by registered post in his correct address. The copy of the said notice is produced and marked as exhibit-5. The complainant has also produced the postal receipt by which the said notice was issued to the accused and the same are marked as exhibit -5(1).

26. 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 [exhibit – 5(i)] shows that the notice was sent by registered post duly prepaid and addressed to the accused and it was sent on 12.11.2015. The P.W.1 has produced the delivery tracking report and exhibited the same as Exbt-6 which shows that the legal demand notice was delivered to the accused on 16.11.2015.
27. The accused has denied the factum of receiving the notice.
28. In **C.C. Alavi Haji (2007 CrI. L.J. 3214)**; Hon'ble Apex Court has laid down that if a notice is sent in the proper address of the accused, 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.
29. 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, in view of the ratio as laid down in **C.C. Alavi Haji (2007 CrI. L.J. 3214) (supra)** the accused cannot take any advantage of the plea that he has not received the legal demand notice.

30. 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.

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

**Point For Determination No 4:- 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?**

32. 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.

33. In the instant case in hand, it is already held that the cheque was issued by the accused in the account maintained by him and that the said cheque was issued for the discharge of a legally enforceable debt. It is also held that the said cheque was dishonoured due to insufficient fund. The cheque in the instant case was dated 30.09.2015 and it was presented within its validity for encashment. The cheque was dishonoured on 29.10.2015 as is revealed from the cheque return memo; and the demand notice was issued by the complainant on 12.11.2015 which is within 30 days from the receipt of information of dishonour. On this point, defence side has no contrary plea that accused paid the cheque amount within 15 days from the receipt of demand notice and evidences given by complainant remained

unrebutted. The accused has never contended that the case is not filed within its limitation, rather the delivery tracking report exhibited as Exbt-6 shows that the same was delivered upon the accused on 16.11.2015 and the case was filed on 28.12.2015 which shows that the case is filed within 30 days after the lapse of 15 days from the date of receipt of demand notice; hence the complaint is lodged within the period of limitation.

34. In view of the above discussion it is held that all the ingredients of the offence under section 138 of the Negotiable Instruments Act, 1881 are satisfied in the instant case and further the complainant has satisfied all the requisites for the institution of the complaint; hence it is held that the accused has committed the offence under section 138 of the Negotiable Instruments Act, 1881.
35. ***DECISION:*** The accused has committed the offence under section 138 of the Negotiable Instruments Act, 1881.
36. In view of the aforesaid discussions and the decisions reached in the foregoing points for determinations, it is held that the accused have committed offence under section 138 of the Negotiable Instruments Act, 1881 and as such the accused is convicted under section 138 of the Negotiable Instruments Act, 1881.
37. I have heard the parties. I am not inclined to extend the benefit of the provisions of the Probation of Offenders Act, 1958, because the offence committed is in the nature of an economic offence and the backbone of the nation depends on a healthy economy. Moreover the real intention behind the enactment of the said offence is to provide quick remedy to the payee or the holder of the cheque, and also to install a sense of confidence and assurance to the business community. So if accused is given the benefit of probation it will go against the spirit of the legislation.

38. I have heard the parties on the point of compensation and sentence.
39. Considering the nature of the offence and the other attending facts and circumstances of this case, the accused Sadek Ali is convicted of the offence under section 138 of the Negotiable Instruments Act, 1881. The accused Sadek Ali is sentenced to undergo imprisonment for Six(6) months and further to pay compensation of 4,50,000/- (Rupees Four Lakhs and fifty Thousand Only) as the cheque amount is Rs.3,19,923/- (Rupees Three Lakhs Nineteen Thousand Nine Hundred and Twenty Three only) and about Two years have elapsed from the date of issuance of cheque. It is further directed that the accused shall undergo simple imprisonment for another two months in default of the payment of compensation.
40. Furnish a free copy of the judgment to the accused immediately.
41. The case is disposed of on contest.

Given under my hand and the seal of this court on this the 16<sup>th</sup> day of March, 2017 at Kamrup(M).

Judicial Magistrate 1<sup>st</sup> class, Kamrup(M).

**APPENDIX.**

1. **Prosecution Witnesses:-**

P.W.1:Sri Biju Kumar Gogoi.

2. **PROSECUTION EXHIBITS:-**

EXHIBIT 1:Relevant extract of the policy of delegation of powers of the complainant.

EXHIBIT 2 :Returned Cheques.

EXHIBIT 3 :Returning memos.

EXHIBIT 4: Intimation letter dated 30.10.2015 along with postal receipts dated 31.10.2015.

EXHIBIT 5 and 5(1): Copy of Advocate's Notice along with postal receipt dated 31.10.2015.

EXHIBIT 6: Copy of delivery tracking report.

3. **DEFENCE WITNESSES:-**

D.W.1: Md. Sadek Ali.

4. **DEFENCE EXHIBITS :-**

Exhibit A: Statement of accounts with the complainant company.

Exhibit B: Inventory.