

DISTRICT : DHUBRI

IN THE COURT OF THE SESSIONS JUDGE, DHUBRI

PRESENT : Shri A. Chakravarty, M.A., LL.M.,A.J.S.

Criminal Appeal No. 8 of 2017

(This appeal against conviction has been filed under section 374 of the Code of Criminal Procedure, 1973 challenging the impugned Judgment and Order dated 19-07-2017, passed by the learned Additional Chief Judicial Magistrate, Dhubri, Shri N.J. Hoque, in complaint case No. 9251/2014, under section 138 of the Negotiable Instruments Act, 1881.)

Shri Ashutosh Saha

...Appellant

-Versus -

1. The State of Assam
2. Shri Subhash Ch. Das

...Respondents

Appeal filed on : 17-08-2017

Arguments heard on : 18-11-2017

Judgment Delivered on : 01-12-2017

ADVOCATES WHO APPEARED IN THIS CASE :

Shri Abdul Latif, advocate for the appellant

Shri Maniruz Zaman, P.P. for the respondent No. 1

Shri Dinesh Chaudhury, advocate for the respondent No.2

J U D G M E N T

1. This appeal arises out of the Judgment and Order dated 19-07-2017, passed by the learned Additional Chief Judicial Magistrate, Dhubri, Shri N.J. Hoque, in complaint case No. 9251/2014, under section 138 of the of the Negotiable Instruments Act, 1881 ("the NI Act", for short), whereby the appellant Ashutosh Saha was convicted for commission of an offence punishable under section 138 of the NI Act and sentenced to undergo rigorous imprisonment for one year and to pay compensation of Rs. 1,00,000/- (Rupees one lakh) only, which shall be realized as fine.

2. The factual matrix of the case in which the appellant (hereinafter referred to as "the accused") came to be prosecuted and convicted is that he is a near relative of the respondent No.2 (hereinafter referred to as "the complainant"). On 10-04-2012, the accused requested the complainant to lend him an amount of Rs.73,000/- (Rupees seventy three thousand) only, for business purposes. As the accused is his near relative, the complainant lend him the amount of Rs. 73,000/- (Rs.70,000/- vide cheque No.949187, dated 10-04-2012 and Rs.3,000/- in cash). In discharge of the said debt, the accused issued the cheque No. 321172, dated 06-10-2014, for Rs. 73,000/- (Rupees seventy three thousand) only, to the complainant. When the complainant deposited the cheque with his bank for encashment, the same was dishonoured due to insufficient fund in the account of the accused. The complainant then issued statutory notice to the accused demanding payment of the cheque amount, but in vain. Therefore, the complainant filed the aforesaid complaint under section 138 of the NI Act before the concerned Magistrate.

3. The learned trial court framed the following point for determination:-

Whether the accused person received Rs.73,000/- from the complainant as loan without interest for his urgent need of money on 10-04-2012 with an agreement to repay the same within a short period but, the complainant several time demanded the aforesaid sum from the accused and accordingly, on 06-10-2014 the accused Ashutosh Saha issued an A/C payee cheque vide No.321172 dated 06-10-2014 for Rs.73,000/- (Seventy three thousand) only of United Bank of India, Dhubri Branch in the name of complainant as a payment of said loan

and subsequently said cheque was returned by United Bank of India on 07-11-2014 with an endorsement of insufficiency of fund in the Drawer Account bearing A/C No.0008210302777 in United Bank of India, Dhubri and subsequently after receiving the advocate demand notice dated 21-11-2014, accused failed to repay the said amount to complainant and thereby committed an offence under Section 138 of N.I. Act?

4. During the course of hearing, the complainant examined two witnesses. The accused did not examine any witness.

5. After examining the evidence on record and hearing the arguments advanced by the learned counsels for both the sides, the learned trial court decided the point in the affirmative and passed the impugned judgment and order dated 19-07-2017 convicting the accused as aforesaid.

6. Aggrieved, the accused preferred this appeal on the following amongst other grounds: -

I. That the learned trial Court has committed grave error and illegality in passing the impugned judgment and order and hence, the impugned judgment and order is liable to be set aside and quashed.

II. That the learned trial Court should have held that the statutory notice was not served upon the accused before filling the complaint and hence, the complaint should have been dismissed as not maintainable and the accused should have been acquitted from the charge under Section 138 N.I. Act.

III. That the learned trial Court should not have admitted the exhibit-7 letter issued by the Head Post-Master regarding service of notice upon the accused in evidences and should have dismissed the complainant for non-compliance of this mandatory provision.

IV. That no cause of action has been arisen on 06-11-2014 and 07-11-2014, therefore, the complainant should have been dismissed for want of cause of action.

V. That the complainant failed to prove that the cheque was issued in discharge of any legally enforceable debt or security and hence, no presumption should have been drawn under 118 and 139 N.I. Act and complaint should have been dismissed as not maintainable.

7. Now the question that requires to be answered in this appeal is whether the impugned judgment and order dated 19-07-2017 is sustainable in the law and facts of the case?

8. I have carefully examined the impugned judgment and order dated 19-07-2017, the memorandum of appeal, the evidence and the documents on record and after hearing the arguments advanced by the learned counsels for both the sides, give my decision as follows:-

9. The learned counsel for the accused vehemently argued that the learned court below has erred both in law and facts in passing the impugned judgment and order in as much as the complainant has failed to prove his case. Therefore, the learned counsel for the accused has submitted that the impugned judgment and order is liable to be set aside and quashed.

10. On the other hand, the learned Public Prosecutor and the learned counsel for the complainant have argued that applying judicial mind and relying on the evidence on record, the learned trial court has rightly passed the impugned judgment and order dated 19-07-2017. Therefore, they have submitted that the appeal may be dismissed and the impugned judgment and order may be upheld.

11. To understand the rival contentions, let us discuss the evidence on record.

12. PW-1 Subhash Das, the complainant has submitted his examination-in-chief on affidavit. In his affidavit, he has repeated the averments made in the complaint petition and has exhibited the Exhibit-1 Copy of Statement (proved in original), the Exhibit-2 Copy of Cheque (proved in original), the Exhibit-3 Bank receipt (Proved in original), the Exhibit-4 Copy of return slip (Proved in Original), the Exhibit-5 Copy of Advocate notice (Proved in original), the Exhibit-6 Postal receipt dated 20-11-2014 (Proved in original) and the Exhibit-7 copy of the letter issued by the Postal Department.

13. In the cross-examination, he has stated that he has mentioned the date of occurrence as 06-11-2014 and 07-11-2014. He has denied the suggestion that no cause of action has arisen 06-11-2014 and 07-11-2014. He cannot say when the demand notice was issued. He also cannot say when the demand notice was served upon the accused. The Post-Master of the Dhubri Head Post Office has informed him that the demand notice was served upon the accused and has

issued a certificate to that effect. He has denied the suggestion that no demand notice was served upon the accused. He has also denied the suggestion that his engaged advocate did not have authority to issue the exhibit-5 demand notice on his behalf. He does not have personal knowledge about serving of the exhibit-5 demand notice upon the accused. He has denied the suggestion that the exhibit-5 demand notice was not served upon the accused. He has also denied the suggestion that he has filed a false case.

14. PW-2 Hemanta Kumar Das, Senior Manager, United Bank of India, Dhubri Branch has deposed that he has brought the statement of account of S/B Account No. 0008010027090, standing in the name of Nilima Das and Subhash Ch. Das and the statement of transactions in the said account with effect from 09-04-2011 to 07-09-2016. On 10-04-2012, an amount of Rs.70,000/- was credited to the Account No. 0008210302777, standing in the name of Ashutosh Saha (the accused). The said amount was credited on the basis of a cheque issued by Subhash Ch. Das (the complainant) in favour of Ashutosh Saha (the accused).

15. PW-2 was re-examined and in his re-examination, he has deposed that he has brought the Cheque Return Register in connection with cheque No.321172, dated 06-10-2014. The said cheque was issued in favour of Subhash Ch. Das (the complainant) for an amount of Rs.73,000/- by Ashutosh Saha (the accused). The cheque was deposited at the United Bank of India, Dhubri Branch for collection, but was dishonoured due to insufficient fund.

16. By cross-examining the PW-2, the defence has failed to bring out anything based on which it can be said that he was not telling the truth.

17. The proviso to Section 138 of the NI Act stipulates three distinct conditions precedent, which must be satisfied before the dishonour of a cheque can constitute an offence and become punishable. The first condition is that the cheque must be presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The second condition is that the payee or the holder in due course of the cheque, as the case may be, must make a demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque within thirty days from the date of receipt of the information from the bank

regarding the return of the cheque as unpaid. The third condition is that the drawer of such a cheque has to fail to make payment of the said amount of money to the payee or as the case may, to the holder in due course of the cheque within fifteen days of the receipt of the said notice. After expiry of the said fifteen days, a written complaint has to be filed within one month.

18. In the instant case, the accused issued the cheque No.321172, dated 06-10-2014, for Rs.73,000/- (Seventy three thousand) only and the complainant presented the cheque for encashment in the bank on 07-10-2014, that is within the period of six months from the date on which the cheques was drawn and also within the period of its validity. The complainant received the information about the dishonour of the cheque on 07-11-2014. The complainant then issued demand notice to the accused by registered post with A/D on 20-11-2014, informing him about the return of the cheque as unpaid and asking him to make the payment of the cheque amount and the accused received the demand notice on 21-11-2014. The accused failed to make payment of the cheque amount to the complainant within fifteen days of the receipt of the demand notice. The complainant then filed the complaint under Section 138 of the N.I. Act before the concerned Court on 08-12-2014, that is, within one month from the expiry of the fifteen days' time. Therefore, in the case in our hand, the complainant has satisfied all the above mentioned conditions.

19. Failing to shake the prosecution case, relying on the case of **John K. Abraham Vs. Simon C. Abraham and Anr.**, reported in (2014) 2 SCC 236, the learned counsel for the accused vehemently argued that as the complainant did not adduce any evidence to prove that he had the capacity to lend the money in question to the accused, the complaint is liable to be dismissed. In the said case the Hon'ble Supreme Court has held that, "It has to be stated that in order to draw the presumption under Section 118 read along with 139 of the Negotiable Instruments Act, the burden was heavily upon the complainant to have shown that he had required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced was true and that the accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant."

20. In the instant case, it can be seen from the above discussion that the PW-2 has proved that on 10-04-2012, the complainant paid an amount of Rs.70,000/-

to the accused by cheque. The PW-2 has also proved that the accused issued the cheque No.321172, dated 06-10-2014 for an amount of Rs.73,000/- to the complainant and the same was dishonoured due to insufficient fund in the account of the accused. The accused did not challenge the complainant in the cross-examination that he has not borrowed the amount of Rs.73,000/- from him. Further, as the complainant has proved that he has paid Rs.70,000/- to the accused by cheque, he had the capacity to lend Rs.73,000/- to the accused. Therefore, the complainant has proved that the accused issued the cheque No. 321172, dated 06-10-2014, for Rs. 73,000/- (Rupees seventy three thousand) only, to him in discharge of a legally enforceable debt. Therefore, the contention of the learned counsel for the accused is rejected.

21. Further, in the case of **M.M.T.C. Ltd. & Anr. Versus Medchi Chemicals and Pharma (P) Ltd. & Anr.**, reported in (2002) 1 SCC 234), the Hon'ble Supreme Court has held that there is no requirement under the law that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debtor liability was on the accused. This he could have proved during the trial. The burden of proving that there was no existing debtor liability was on the accused. But, in the instant case, the accused did not adduce any evidence to prove that he was not liable to pay the amount of Rs.73,000/- to the complainant and the evidence on record, as can be seen from the discussion, does not support the same. Therefore, based on the argument of the learned counsel for the accused, it cannot be held that that there was no existing debt or liability for the issuance of the exhibit-2 cheque to the complainant.

22. The learned counsel for the accused further argued that before filing of the instant complaint, the statutory notice was not served upon the accused and hence, the complaint is not maintainable. He has further argued that the exhibit-7 certificate issued by the Post Master of the Dhubri Head Post-Office that the demand notice was delivered to the accused on 21-11-2014 is not acceptable as the complainant failed to prove the same by examining the Head Post-Master. The acknowledgment card of the registered letter containing the notice sent to the accused was also not submitted by the complainant. Therefore, let us discuss whether the notice was served upon the accused or not?

23. In the instant case, the complainant did not exhibit the acknowledgement card of the registered letter containing the notice sent to the accused as he did not receive back the same. But, in view of the exhibit-7 certificate issued by the Post Master, the notice must be deemed to have been served upon the accused and hence the contention of the learned counsel for the accused must be rejected.

24. In the case of **C.C. Alavi Haji Vs. Palapetty Muhammed and Anr.**, reported in (2007) 6 SCC 555, a three-Judge Bench of the Hon'ble Supreme Court has held as follows:-

“ It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act. In our view, any other interpretation, of the proviso would defeat the very object of the legislation. As observed in Bhaskarans case (supra), if the giving of notice in the context of Clause (b) of the proviso was the same as the receipt of notice a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act.”

25. Therefore, the notice must be deemed to have been served upon the accused and the contention of the accused must be rejected. Further, even if the accused did not receive the notice, he could have escaped from the criminal consequences of the section 138 of the NI Act by making payment of the money after receiving summons from the Court.

26. Let us now discuss whether the quantum of sentence imposed upon the accused is proper and adequate.

27. The offence under Section 138 of the Negotiable Instrument Act is punishable with imprisonment for a term which may extend to two years or with fine which may extend to twice the amount of the cheque or with both. In the instant case, the learned trial Court has sentenced the accused to undergo rigorous imprisonment for one year, but has not imposed any fine and has directed the accused to pay compensation of Rs.1,00,000/- (Rupees one lakh) only, to the complainant. The sentence of imprisonment of one year is not on the higher side and the learned trial court has given sufficient reason for imposing the sentence. Further, as fine can be imposed extending to twice the amount of the cheque, compensation of Rs.1,00,000/- (Rupees one lakh) only, which is less than twice the cheque amount of the instant case, may be held to be adequate as the complainant would have earned that much amount had he invested the amount of Rs.73,000/- in fixed deposit. Therefore, the quantum of sentence imposed upon the accused is also proper.

28. In the impugned judgment and order dated 10-03-2017, the learned trial court has discussed in detail the reasons for holding the accused guilty of committing the offence under Section 138 of the NI Act. Therefore, I do not find any justification to interfere with the impugned Judgment and Order dated 19-07-2017, passed by the learned Additional Chief Judicial Magistrate, Dhubri, Shri N.J. Hoque in complaint case No. 9251/2014, under Section 138 of the Negotiable Instruments Act, 1881 which, I find to be correct.

O R D E R

29. In the result, the appeal is dismissed on contest.

30. The impugned Judgment and Order dated 19-07-2017, passed by the learned Additional Chief Judicial Magistrate, Dhubri, Shri N.J. Hoque in complaint case No. 9251/2014, under Section 138 of the Negotiable Instruments Act, 1881, is correct and proper and has been passed in accordance with the law. Therefore, the impugned Judgment and Order dated 19-07-2017 is hereby affirmed.

- 31.** The accused is directed to surrender before the learned trial court to serve out the sentence.
- 32.** Return the LCR along with a copy of this judgment to the learned trial court, immediately.
- 33.** Signed, sealed and delivered in the open Court on this the 1st day of December, 2017, at Dhubri.

(A.Chakravarty)
Sessions Judge, Dhubri

Dictated & corrected by me

(A.Chakravarty)
Sessions Judge, Dhubri