

:: IN THE COURT OF THE SESSIONS JUDGE, NALBARI ::

Present: Smti S. Bhuyan.
Session Judge,
Nalbari.

(Criminal Appeal Case No. 17/16)

Appeal against the Judgment & order dated 20/07/2016 passed by learned Addl. CJM, Nalbari in connection with N.I. Case No. 6^c/2013 u/s- 138/142 of the N.I Act.

Papulal Horijan

S/O- Lt. Rambilash Horijan

R/O-Vill- Rangia Town

P.S- Rangia

Dist-Kamrup (R), Assam.Appellant/ accused.

-Versus-

State of Assam

Md. Irsad Hussain

S/O- Lt. Chand Mahammad Ali

R/O-Vill- Nalbari Town, Ward No.8 Barama Road, Nalbari

P.S- Nalbari

Dist- Nalbari, Assam.....Respondent.

Advocates appeared:-

For the Appellant :- Pankaj Sarma

For the Respondent:- Sonapati Sarma

Date of argument :- 13/03/2020, 29/05/2020

Date of judgment :- 10/06/2020

JUDGMENT

1. This is an appeal preferred by the accused/ appellant u/s 374 r/w section 382/389 CrPC. Being highly aggrieved and dissatisfied with the impugned judgment and order of conviction and sentence passed by Learned Addl. CJM, Nalbari dated 20/07/2016 under N.I Case No. 6^c/2013 u/s 138 N.I Act to undergo simple imprisonment and to pay compensation of ₹ 5,75,000/-

and in default of payment of compensation another 4 months simple imprisonment.

2. The brief fact leading to this appeal is that the respondent as complainant filed a complaint petition before the Learned CJM, Nalbari, u/s 138/142 of NI Act against the present appellant Papulal Horijan to initiate trial against the accused u/s 138 of the N.I Act and for recovery of double the cheque amount. The brief fact of the complainant case is enumerated herein below.

3. Complainant/ Respondent Irsad Hussain stated he is a businessman and accused is a IVth grade bank employee of SBI and accused collected Rs. 5,00,000 as loan for the treatment of his wife on 01/02/2012 by consenting to make the payment within one year at the Government rate of interest 12.5%, but after taking the money accused did not repay the amount and lastly accused issued a cheque amounting of Rs. 5,00,000 on 30/05/2013 on his SBI A/c 10958150248 and complainant deposited the cheque in his a/c No. 11004647714 on 04/06/2013 and bank intimated him the cheque has been dis-honored due to insufficient balance by the bank statement dated 06/06/2013 of accused's account. After getting statement of the bank complainant issued pleader's notice to the accused which accused received on 18/06/2013 but he did not clear the amount and therefore, complainant filed the complaint on 21/07/2013 and submitted initial deposition in affidavit.

4. Learned CJM transfer the case to the court of JMFC, Nalbari and learned Nalbari after going through the complaint and initial deposition took cognizance u/s 138 NI Act issued process against the accused Papulal Harijan and accused on receiving the process contested the proceeding. Learned JMFC Nalbari after furnishing the necessary copies to the accused, explained the particulars of offence u/s 138 NI Act and read over the same to the accused to which accused pleaded not guilty and claimed to be tried.

5. Thereafter, complainant adduced his evidence and evidence of two other witnesses. After that learned trial court recorded statement of accused u/s 313 CrPC. Accused plea is total denial, his plea is that he borrowed Rs. 12,000 from complainant and complainant took one blank signed cheque and 8 no's of unsigned cheque and he repaid the whole amount and at that time returned signed cheque but did not return remaining 8 cheque and in one of

those cheque complainant took his signature forcefully while he was working at SBI, Guwahati Branch. In support of his plea of denial he adduced his evidence as defence witness-1.

6. I have heard learned counsel. Learned appellant counsel submitted that complainant failed to prove one of the condition to attract provision of NI Act that the debt is a legally enforceable debt and the court below committed wrong in granting direct compensation to the complainant of the case which court cannot grant and therefore, the judgment and order of conviction and sentence of imprisonment and order of compensation passed by the learned trial court is liable to be set aside.

7. Learned respondent counsel submitted that issuance of cheque has not been disputed by the accused and so the debt is a legally enforceable debt has been proved and order of compensation granted by the accused is within the ambit of NI Act and judgment and order passed by the Learned trial court is required to be upheld by this appellate court.

8. I have scrutinized the record of trial court, gone through the evidence on record, taken into consideration the submission made by the learned counsel for the parties and perused the statutory provision of law to arrive at the just decision of the appeal.

9. PW-1 Irsad Hussain deposed that he is an Indian citizen by birth and is a businessman. He deposed that accused borrowed an amount of Rs. 5,00,000 telling serious ailments of accused wife last on 01/02/2020 from him promising to repay within one year at the Govt. rate of interest 12.5%. Thereafter, accused not repaying the money, though frequent request made and to avoid request accused issued a cheque amounting Rs. 5,00,000 on 30/05/2013 of SBI Nalbari Branch under No. 242816 Of SBI A/c no. 10958150248. He deposited the cheque at his A/c No. 11004647714 at SBI Nalbari Branch on 04/06/2013, but the cheque was dishonored for insufficient fund which is confront by Bank Management on 06/06/2013. Then, he issued pleader's notice but accused did not communicate him. Since, the amount was pending with accused, he suffered severe injury and irreparable loss. Therefore, being incapacitated, he filed the case before the Hon'ble Court for the recovery of his amount with interest. In cross PW-1 Irsad Hussain stated that he knows

accused Papulal Harijan while accused was working at Nalbari SBI. At that time accused was working as Grade IV employee and he meet and acquainted with accused when visited bank for money transaction matter and after 2 years he gave the money on credit to accused. In cross he stated accused borrowed the money telling serious ailments of accused wife but did not disclose what ailment the wife was suffering. He has no knowledge if Government employee get medical reimbursement bill. He lends money to accused after one week of his demand. He gave the amount to accused at bank and pay in cash and there is 4 packets of Rs. 1,000 and 2 packets of Rs. 500 denominations. His further cross is that he was accompanied by Rekibur Zaman and 4 others when he went to take cheque from accused but rest are waiting outside. His account was not credited after depositing cheque. The amount and his name is written by him in the cheque leave and then accused put his signature. He denied taking Rs. 12,500 at Nalbari, from accused and accused deposited rest amount at his account. He further denied that he took the cheque forcefully from the accused giving threatening to finish his life.

10. PW-2 Md. Rekibur Zaman stated he is a businessman. He deposed he knows the accused and accused is an SBI employee and accused an amount of ₹ 5,00,000 (five lakhs) from the complainant telling serious illness of his wife last on 01/02/2020 promising to repay within one year at the Govt. rate of interest 12.5% and he knows everything in regards of the transaction. After accepting the money the accused not paying any amount of loan or interest to the complainant. He has knowledge about issuance of cheque, dishonor of cheque, issue of pleader's notice, receipt of pleader's notice and institution of this case for the recovery of double amount along with punishment. He also knows, complainant suffered severe injury and irreparable loss and that amount was complainant's business money. In cross, he stated informant is his friend. He meet accused Papulal only once at Guwahati Panbazar Branch when they went to bring complainant's money. Papulal gave cheque as unable to pay cash amount. He further deposed in cross that accused seek pardon and finding no alternative, issued cheque and at that time amount was not written and asked them to write the amount. He again said in cross accused only gave a signature and amount was noted by Irsad Hussain, complainant as per dictation of the accused.

11. The cross of PW-3 is deferred. The record does not reveal the accused been given chance to cross examine the PW-1. In chief of PW-3 is that Ext-1 is the SBI cheque amounting of Rs. 5,00,000 issued on 30-05-2013 and cheque was in the name of Irsad Hussain and papulal Harijan issued the cheque who was an employee of SBI, Nalbari. Irsad Hussain deposited the cheque on 04-06-2013 in his account and cheque was not cleared due to insufficient fund in the drawer account. Ext-3 deposit slip where same date was written. Ext-2 is the bank return statement slip mentioning due to insufficient fund, payment could not be made vide Ext-1 and cheque. Signature in the over lift of the cheque was of Bank authority officer.

12. DW-1 Papulal Horijan in his evidence stated that friendship started with complainant when he was working at SBI Branch Nalbari. He deposed he was working as Grade IV employee at SBI Branch at Nalbari from 2007 to 2010 and at that time he borrowed Rs. 12,500 from complainant and repaid Rs. 7,000 to complainant while working at Nalbari and balance amount paid in the bank a/c of informant vide a/c 11004647714. In cross he stated he is presently working at SBI Six Mile Branch Guwahati, and borrowed money from the accused. Ext-1 cheque is issued by him and the signature is also his signature. Amount mentioned is Rs. 5,00,000, cheque is from Nalbari Branch and cheque is dishonored due to in-sufficient fund and complainant informed by serving him pleader's notice. Ext-4 acknowledgment receipt bearing his signature. Ext-3 deposited slip Ext-5 copy of pleader's notice. He was working at SBI Panbazar Branch on 30/05/2012 and at about 2 to 2.30 PM complainant with 3/4 unknown persons came to his bank and forcefully took cheque from him. Complainant gave him threatening to finish his life and out of fear he did not lodge FIR.

13. The plea of the accused in his 313 CrPC statement is that he borrowed Rs. 12,000 from complainant which he repaid and at the time of borrowing money he gave one signed cheque to accused and 8 no. of unsigned cheque and when he returned whole of the amount to complainant, complainant returned him the signed cheque and did not return him the remaining 8 no. of cheque in which complainant forcefully took his signature in one of the cheque while he was working at Guwahati branch. Accused while adducing as DW-1 stated he borrowed Rs. 12,500 from complainant while working at SBI Nalbari branch and repaid an amount of Rs. 7,000 while working at SBI Nalbari and

could not pay rest of the amount of Rs.5,500 because of his family problem and in the year 2010 he transferred to Guwahati. After that he deposited balance amount in complainant bearing A/c No. 11004647714 and on 30/05/2013 while he was working at SBI Panbazar Branch, complainant with Rekibur Zaman and 3 others came to Panbazar State Bank and took one blank cheque with his signature under threatening of finishing his life and at that time official and other bank staff were present. In cross he stated, presently he is working at SBI, Six Mile branch. He borrowed money from complainant and complainant filed the case for cheque bounce matter. Ext-1 is the cheque tendered by him to the complainant and the cheque is for amount of Rs. 5,00,000. The signature present in the cheque Ext-1 is his signature. He again state that he did not have any papers either for borrowing money or for returning the borrowed money to the complainant. On 30/05/2013 he was working at SBI Panbazar branch and on that day at about 2/2.30 PM while he was working inside the office, complainant came with three or four unknown boys and forcefully took one cheque from him. He further stated other staffs were also present. He did not lodge ejarah as complainant had given him threatening.

14. Complainant in cross stated that he gave the money to accused and accused admitted this facts. Accused admit that he has given ext-1 cheque to complainant. So thus, it is proved beyond reasonable doubt that there is legal transaction of money in between the accused and complainant and debt is legally enforceable debt because accused admits tendering of the cheque to complainant. Complainant in his complain and evidence stated he was accompanied with his witness Rekibur Zaman and they were four persons to receive his lending money but accused could not pay him so handed him cheque. It is a fact that cheque in question was dishonored due to insufficient fund in the account holder. Accused took plea that he repaid the whole of the borrowed money but he failed to so any document. Accused took plea that he deposited money in complainant account but he does not have document to prove it. Under such a situation it is not believable and acceptable the theory put by the accused of his clearing debt by depositing amount in complainant account or in part of amount directly. Had accused paid the borrowed money to accused by depositing in complainant account or part of the amount directly then accused could have disclosed date of such payment and deposit slip or by adducing the evidence of bank official to substantiate his statement

to rebut the plea of the complainant but accused totally failed to discharge the same.

15. The Supreme Court of India in Vijay Vs. Laxman and others in Crl. Appeal No. 261/2013 decided on 07/02/2013 in para 10 and 12 reported-

“10. It is undoubtedly true that when a cheque is issued by a person who has signed on the cheque and the complainant reasonably discharges the burden that the cheque had been issued towards a lawful payment, it is for the accused to discharge the burden under section 118 and 139 of the N.I. Act that the cheque had not been issued towards discharge of a legal debt but was issued by way of security or any other reason on account of some business transaction or was obtained unlawfully. The purpose of the NI Act is clearly to provide a speedy remedy to curb and to keep check on the economic offence of duping or cheating a person to whom a cheque is issued towards discharge of a debt and if the complainant reasonably discharges the burden that the payment was towards a lawful debt, it is not open for the accused/signatory of the cheque to set up a defence that although the cheque had been signed by him, which had bounced, the same would not constitute an offence.”

“12. While dealing with the aforesaid two presumptions, learned Judges of this Court in the matter of P. Venugopal VS Madan P Sarathi been pleased to hold that under section 139, 118 (a) and 138 of the N.I. Act existence of debt or other liabilities has to be proved in the first instance by the complainant but thereafter the burden of proving to the contrary shifts to the accused. Thus, the plea that the instrument/cheque had been obtained from its lawful owner or from any person in lawful custody thereof by means of an offence or fraud or had been obtained from the maker or acceptor thereof by means of an offence or fraud or for unlawful consideration, the burden of disproving that the holder is a holder in due course lies upon him. Hence, this Court observed therein, that indisputably, the initial burden was on the complainant but the presumption raised in favour of the holder of the cheque must be kept confined to the matters covered thereby. Thereafter, the presumption raised does not extend to the extent that the cheque was not issued for the discharge of any debt or liability which is not required to be proved by the complainant as

this is essentially a question of fact and it is the defence which has to prove that the cheque was not issued towards discharge of a lawful debt.”

16. Section 118 in The Negotiable Instruments Act, 1881: “118 Presumptions as to negotiable instruments. Until the contrary is proved, the following presumptions shall be made:—

(a) of consideration - that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date - that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance - that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer - that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsements - that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps - that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course - that the holder of a negotiable instrument is a holder in due course:

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.”

17. Section 139 in The Negotiable Instruments Act, 1881: “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.”

18. Section 138 in The Negotiable Instruments Act, 1881: “138 Dishonour of cheque for insufficiency, etc., of funds in the account. Where any cheque drawn by a person on an account maintained by him with a banker for pay-

ment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless-

- (a) the cheque has been presented to the bank within a period of six month
- (b) the payee or the holder in due course of the cheque, as the case may be, makes 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] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
- (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.— For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.”

19. On scrutiny of the entire evidence on record of the trial court the statement of the accused recorded u/s 313 CrPC, it is revealed that there was a transaction of money in between accused and complainant while accused was working at SBI Nalbari branch. The statement of accused made in his 313 CrPC and his evidence and from the statement of PWs it is evident that accused tendered Ext-1 cheque to complainant. Accused took plea that he borrowed Rs. 12,000 when made his defence at the time of recording his statement 313 CrPC and when he adduced his defence evidence he stated he borrowed Rs. 12,500. Thus, so accused is not stick to his defence. In his 313 statement he stated at the time of borrowing money he gave one signed cheque and 8 no. of unsigned cheque to the complainant. After full payment complainant returned him signed cheque but kept all the 8 no. of unsigned cheque in his possession and while working at Guwahati on 30/05/2013, complainant went to SBI Panbazar and took signature in one of those unsigned cheque. But at the time adducing the evidence as defence witness, he made different statement.

He stated that on 30/05/2013 accused along with Rekibur Zaman and three four others came to SBI Panbazar and forcefully took one signed cheque from him. Here he did not state that accused forcefully took his signature in one of those unsigned cheque. The accused statement u/s-313 CrPC pointed when complainant returned the signed cheque then why he will keep the unsigned cheque and his evidence in cross pointed he himself tendered Ext-1 cheque to complainant on 30/05/2013. During hearing of the appeal, accused took time for compromise and filing the petition vide no. 846/19 accused admitted non-payment of amount. That being so here the accused conduct clearly shown that he has failed to rebut the evidence prosecution and he is to repay the money to complainant for which he issued Ext-1 cheque which was bounced due to insufficient fund and complainant fairly able to establish the case against accused beyond all reasonable doubt and accused failed to rebut the evidence of prosecution.

20. In view of the aforesaid discussion, I find that learned trial court has rightly passed judgment and order of conviction and no interference required from this appellate court. Accordingly, judgment and order dated 20/07/2016 passed by Learned Addl. CJM, Nalbari in N.I Case No. 6^C/2013 u/s-138/142 of N.I Act is hereby upheld. Appeal has no merit and is dismissed. However no cost.

21. Accused/ appellant is directed to appear before the learned trial court within 40 days from today to serve out the sentence imposed upon him and to pay the compensation amount to the respondent.

22. Send down the LCR with a copy of this court judgment to the learned trial court immediately.

Judgment delivered under hand and seal of this court on this 10th day of June, 2020 at Nalbari, Dist-Nalbari.

(Smti S. Bhuyan)
Session Judge, Nalbari

Dictated and corrected by me.

(Smti. S. Bhuyan)
Session Judge, Nalbari

Typed by: Anzima Brahma, Stenographer Gr.III

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