

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

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

(Criminal Appeal Case No. 32/15)

Appeal against the Judgment & order dated 13/08/2015 passed by learned Addl. Chief Judicial Magistrate, Nalbari in connection with N.I. Case No. 44/14 u/s-138 NI Act.

Sri Sridhar Kalita

S/O- Late Tarani Kalita

R/O-Vill-Adabari

P.S- Mukalmua

Dist- Nalbari, Assam.Appellant/ accused.

-Versus-

1. Jagat Ch. Medhi

S/O- Humeswar Medhi

Vill- Narayanpur

P.S.- Mukalmua

Dist- Nalbari, Assam.

2. State of Assam.Respondents.

Judgment delivered :- 18/06/2020

JUDGMENT

1. The instant appeal has been preferred by appellant Sridhar Kalita u/s-374 Cr.P.C against the impugned judgment and order passed by the then learned Addl. CJM, Nalbari in connection with N.I. Case No. 44/14 u/s-138 of the N.I. Act whereby the learned Addl. CJM, Nalbari convicted the accused Sridhar Kalita under section 138 N.I. Act and sentencing him to undergo simple imprisonment for 1 (one) month and further directed to pay a sum of Rs.3,50,000/- (Rupees three lakhs fifty thousand) only as compensation to the complainant within a period of

six months thereof, failing which to pay interest @ 5 % per annum till realization.

2. The brief fact leading to this appeal is that the respondent Jagat Ch Medhi filed a complaint petition before the Learned CJM, Nalbari, u/s-138 of N.I. Act against the present appellant Sridhar Kalita inter alia citing that complainant/ respondent is a LIC agent and have a DTP shop at Mukalmua chowk and the accused/ appellant is a retired service man and he is doing business of furniture. In the month of June 2012, accused appellant seek 3 lakhs from the complainant and complainant gave Rs.1,50,000/- to accused appellant vide cheque No. 785197 and on February, 2014 accused appellant took another amount of Rs.1,50,000/- from complainant and accused made promise to repay the whole borrowed money amounting Rs.3,00,000/- to complainant at a single time and on 29/04/2014 accused/ appellant issued a cheque vide No. 290808 amounting to Rs. 3,00,000/- in favour of the complainant and complainant deposited the cheque in the UCO Bank, Mukalmua Branch and due to insufficient fund, the cheque was not disbursed and returned to the respondent/ complainant on 10/06/14 and due to this fact complainant suffer economical and mental loss and complainant issued demand notice to the accused on 19/06/14 through his engaged advocate and again issued another on 21/07/14 and not getting any response from the accused/ appellant, complainant filed this complaint petition on 26/08/14.

3. Learned CJM took cognizance u/s 138 NI Act and transferred the case to JMFC, Nalbari for disposal and learned JMFC, Nalbari issued process against the accused Sridhar Kalita and accused on receiving the process contested the proceeding. Learned JMFC, Nalbari after furnishing the necessary copies to the accused, explained and read over substance of offence u/s-138 NI Act to the accused to which accused pleaded not guilty and claimed to be tried and finally the case is transferred to the court of Addl. CJM, Nalbari after transfer of JMFC, Nalbari.

4. 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. 1,50,000/- from complainant and he already repaid the same to complainant and in support of his plea of denial he adduced his evidence as DW-1. Learned trial court, the then Addl CJM, Nalbari after hearing of counsel delivered the judgment convicted the accused and sentenced him to undergo simple imprisonment of one month and to pay compensation to complainant amounting to Rs. 3,50,000/- within a period of 6 (six) months failing of which interest at the rate of 5 % per annum till realisation.

5. I have scrutinized the material and evidence on record and statutory provision of law. PW-1 Jagat Ch Medhi deposed that on 11/06/12, he gave Rs.1,50,000/- to accused/ appellant and accused was in trouble due to furniture house and with the money of the complainant, accused completed the order of furniture and on 12/03/14, accused again took money of Rs. 1,50,000/- from the complainant. He denied the defence suggestion that he only paid Rs.1,50,000/- to accused by cheque.

6. PW-2 Uday Goswami deposed he came to court as per the direction of branch manager of the UCO Bank, Mukalmua after receiving summons from the court. He deposed the cheque vide Ext-1 which was dishonoured by the bank was deposited at their branch by complainant and cheque was issued by Sridhar Kalita in favour of complainant on 29/04/14 amounting to Rs. 3,00,000/- vide cheque No. 290808, drawn on SBI Mukalmua Branch, Account Number of Sridhar Kalita was 10958281986. PW-2 further deposed that Ext-1(1) is the signature of Sridhar Kalita and Ext-3 was the cheque return memo issued by their branch and the cheque was returned with reason "insufficient fund". In cross by defence he stated that the signature of the accused and the other things which were written on the body of the cheque were written by same person and the signature of the accused has been verified by the bank authority of SBI.

7. PW-3 stated at the time giving cheque by respondent/ complainant to accused/ appellant he was present and complainant taken Rs.30,000/- from him and given to the accused. He further deposed in Ext-1 there was slight difference in the signature of accused and handwriting in the amount column. He also stated that he did not know if accused had returned the borrowed money to complainant.

8. The plea of the accused in his 313 CrPC statement is that he borrowed Rs. 1,50,000/- from complainant and he already repaid the same to complainant. Accused while adducing his evidence as DW-1 deposed that he asks for some money from complainant and complainant ask for blank cheque in lieu of lending money. He further deposed that he repaid the borrowed money to complainant and asked the complainant to return the cheque which he denied and later complainant by filling up the cheque lodged the false case. In cross stated on 11/06/12, complainant gave him money amounting Rs. 1,50,000/- by cheque. He denied that he again took money amounting Rs.1,50,000/-. DW-1 admitted that he gave the Ext-1 cheque to complainant on 29/04/14 and Ext-1(1) is his signature. He further denied that he had filled up the amount of cheque in the cheque leaf. He deposed that he gave the cheque for Rs.1,50,000/- and he repaid the borrowed money on 14/06/13. t he did not inform bank about giving of blank cheque to complainant and to take necessary action. He denied that he borrowed Rs.3,00,000/- from complainant and in return gave Ext-1 cheque for payment.

9. Section 138 Negotiable Instruments Act, 1881 says: "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 payment 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

for¹⁹ [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 months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(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,²⁰ [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.”

10. Section 142 of the NI Act says: Cognizance of offences. —Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138: 24 Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

11. The plain reading of the statutory provision of law u/s-138 and 142 of the N.I. Act says when legally enforceable debt of the holder of cheque is not cleared due to insufficient fund, the account holder deemed to be committed an offence.

Section 142 N.I.Act prescribed the limitation period when complainant u/s-138 of N.I. Act. It says when cheque is not cleared due to insufficient fund the holder of the cheque must serve on notice to the drawer of the cheque within fifteen days from the date of return of the

cheque if drawer of the cheque failed to repay the cheque amount and complaint u/s-138 N.I. Act has to be presented within 30 days from the date of receipt of the notice and section 118 of the N.I. Act draws presumption that if cheque is issued by the accused, it is presumed that cheque has been issued for legally enforceable debt.

12. 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. The statement of accused made in his 313 CrPC and his evidence and from the statement of PWs it is evident that accused gave Ext-1 cheque to complainant. Accused took plea that he borrowed Rs. 1,50,000/- when made his defence and at the time of recording his statement u/s-313 CrPC. Accused admitted that the signature present on the Ext-1 cheque to be his signature and he again admitted that name of complainant is also written by him. Here, issuance of cheque, signature on the cheque are admitted fact. Only fact disputed is amount written on the cheque and accused paid the borrowed money. Complainant took plea that he issued 1st demand notice and acknowledgement due of 1st demand notice was not returned to him, so thus he issued 2nd demand notice on 21/07/14 which was received by accused on 25/07/14. Now point to be find out whether complaint filed by the respondent u/s-138 N.I.Act covered and satisfy the provision of section 142 of the N.I.Act.

13. With regard to issue of notice evidence of complainant and material on record revealed complainant issued demand notice on 19/06/14 which according to cross of PW-1 received by accused but complainant avoid disclosing the said date. He again stated he issued 2nd demand notice on 21/07/14 and same was received by accused on 25/07/14 and case has been filed by him on 26/08/14.

14. The complainant in para 15 of the in chief mentioned he issued demand notice on 19/06/14 and 01/07/14 but in para 18 of his petition date of cause of action is mentioned as 29/04/14 i.e. date of issue of cheque; 10/06/14 i.e. date of return memo; 19/06/14 i.e. date of 1st demand notice; 21/07/14 i.e. date of 2nd demand notice and 25/07/14 as date of receiving of 2nd demand notice. Ext-1 is the cheque dated

29/04/14; Ext-2 is the deposit slip by which Ext-1 cheque was deposited; Ext-3 return memo; Ext-5 postal receipt of demand notice; Ext-7 postal receipt dated 21/07/14; Ext-8 acknowledgement of demand notice dated 21/07/14; Ext-4 demand notice dated 19/06/14; Ext-6 demand notice dated 21/07/14. Respondent/ complainant filed the complaint on 26/08/14.

15. On scrutiny of the Ext-3 return memo, Ext-4 1st demand notice pointed that 1st demand notice was made within statutory time of 15 days. Cross examination of PW-1 revealed that accused received 1st demand notice dated 19/06/14. In cross PW-1 admitted the fact of receiving 1st demand notice dated 19/06/14 by the accused. In his preliminary statement u/s-200 CrPC and in his in chief in affidavit in para 15 he made statement that he issued 2nd demand notice on 01/07/14 whereas he made statement in his petition that he issued 2nd notice on 21/07/14 and Ext-6 clearly pointed issuance of 2nd demand notice was on 21/07/14. There is nothing to show that complainant again deposited the cheque for clearance after issue of 1st demand notice that was received by the accused or accused took time for payment.

16. Section 138 of the NI Act does not prohibit holder of cheque nor confined or fix any time or number of times to deposit the cheque for clearance. Only condition is made to deposit the cheque within the lifetime of the cheque (Earlier 6 months, now 3 months) and case of the complainant is not that he has deposited the cheque again. Complainant specifically stated he issued 1st demand notice on 19/06/14 and in cross admitted accused received 1st demand notice. So his reason of issuance of 2nd demand notice on 21/07/14 is negated by his own admission in his cross. 2nd demand notice was issued after more than 15 days from the date of return of cheque by bank and from the date of issue of the 1st demand notice.

17. He took plea as acknowledgement was not returned to him, he issued 2nd demand notice but in his cross he admitted that accused received the 2nd demand notice that draws presumption against him that he has received the acknowledgement of 1st demand notice and 2nd demand notice was issued on 21/07/14 which was received by accused

on 25/07/14 vide Ext-8. Complainant filed the case on 26/08/14 that is on 32nd day from the date of receipt of notice. There is no reason or ground shown by him for the delay u/s-142 of the N.I. Act.

18. The Hon'ble Supreme Court in the decision reported in (1999) 3 SCC 1 Saketh India Ltd. v. India Securities Ltd held that "8. Hence, there is no reason for not adopting the rule enunciated in the aforesaid case which is consistently followed and which is adopted in the General Clauses Act and the Limitation Act. Ordinarily in computing the time, the rule observed is to exclude the first day and to include the last. Applying the said rule, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of 15 days from the date of the receipt of the notice by the drawer expires. The period of 15 days in the present case expired on 14-10-1995. So cause of action for filing complaint would arise from 15-10-1995. That day (15th October) is to be excluded for counting the period of one month. Complaint is filed on 15-11-1995. The result would be that the complaint filed on 15th November is within time."

19. The Hon'ble Delhi High Court in Rajender vs Yogender Tyagi decided on 26th September, 2018 held that: "10. In the present case, the notice was served upon the respondent on 11th March, 2011 and the complaint was filed on 26th March, 2011. In view of the pronouncements of the Supreme Court, the date of service is to be excluded from reckoning the fifteen days' period within which the accused is required to make the payment. Thus, the cause of action to file the complaint under Section 138 of NI Act, in the instant case, accrued only on 27th March, 2011. Therefore, the present complaint was premature."

20. As per section 138 and 142 of the NI Act, demand notice has to be issued within 15 days from the date of return of cheque and application u/s-138 N.I. Act has to be presented before the court within 30 days from the date of receipt of demand notice, i.e. total 45 days. The complainant issued 1st demand notice on 19/06/14 and 2nd demand notice on 21/07/14 which exceeds the 15 days limit and filed the complaint on 32nd days from 25/07/14 i.e. on 26/08/14 after receipt of 2nd demand notice by accused on 25/07/14 and from the 1st demand

notice if it is counted from 01/07/14 then complainant filed his complaint on 56th day and on either way count the complaint is filed after 30 days by the complainant. Therefore, the case is barred by limitation u/s-142 of the N.I. Act.

21. In the light of above order, the appeal is allowed and impugned Judgment & order dated 13/08/15 passed by learned Addl. CJM, Nalbari in connection with N.I. Case No. 44/14 u/s- 138 of the N.I. Act is hereby set aside. No cost.

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

Judgment delivered under hand and seal of this court on this 18th day of June, 2020 at Nalbari, District- Nalbari

(Smti S. Bhuyan)
Session Judge, Nalbari

Dictated and corrected by me.

(Smti. S. Bhuyan)
Session Judge, Nalbari

Typed by:
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