

:IN THE COURT OF THE SESSIONS JUDGE, NALBARI:

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

(Criminal Appeal Case No. 14/19)

**Appeal against the Judgment & order dated
29/04/19 passed by learned Chief Judicial
Magistrate, Nalbari in connection with N.I. Case No.
75/15 u/s-138/142 NI Act.**

Sri Munin Barman

S/O- Sri Jogen Barman

R/O-Vill-Dalua

P.S.-Ghograpar

Dist- Nalbari, Assam.Appellant.

-Versus-

Kabita Baishya

w/O- Late Chakradhar Baishya

R/O- Vill-Dihjari

P.S.-Ghograpar

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

Advocates appeared:-

For the appellant :- Smti Deepamani Bhattacharyya,
Advocate.

For the respondent :- Mr. Pankaj Sarmah, Advocate

Date of argument :- 31/07/2021

Judgment delivered :- 16/08/2021

JUDGMENT

1. The instant appeal has been preferred by appellant Munin Barman u/s-374 CrPC against the impugned judgment and order dated 29/04/19 passed by the learned CJM, Nalbari in connection with N.I. Case No. 75/15 u/s-138/142 of the N.I. Act whereby the learned CJM, Nalbari convicted the accused Munin Barman under section 138/142 N.I. Act and sentenced him to undergo simple imprisonment for one year and to pay the amount of Rs.40,000/- (Rupees forty thousand) in double only and in default of payment of the said amount to suffer Simple Imprisonment for 1 (one) year for the offence u/s-138/142 of the NI Act.

2. The brief fact of this appeal is that the complainant Kabita Baishya, D/O-Late Chakradhar Baishya of Vill-Dihjari, PS-Ghograpar, District-Nalbari is an entrepreneur of handloom projects and has her family business establishment at Jajiabari chowk on NH-31 under Nalbari PS and accused Munin Barman who have a friendly relationship with her, borrowed a sum of Rs. 1,30,000/- (Rupees one lakh thirty thousand) from the complainant on 23/05/14 to meet his urgent need in his business and accused executed a hand note on that day in favour of the complainant with a promise to repay the same to the complainant on demand with interest @ 15 % per annum. After expiry of one year, complainant started making demand to the accused for repayment of the aforesaid

debt but accused did not keep his promise. Thereafter, complainant on 03/07/15 in order to make part payment issued a cheque vide cheque No. 359910 dated 03/07/15 of Assam Gramin Vikash Bank, Nalbari Branch for an amount of Rs. 50,000/- (Rupees fifty thousand) only and the cheque was deposited by the complainant in his account maintained in Union Bank of India, Nalbari branch on 04/07/15. But the cheque was dishonored by the bank with cheque return memo showing reason fund insufficient on 08/07/15. Then, complainant contacted accused and informed accused about the insufficiency of fund in his account to which accused replied evasively. Thereafter, complainant finding no alternative issued a demand notice to the accused on 20/07/15 through his Advocate and said notice was served on accused on 24/07/15 as per the delivery report given by the Dy. Postmaster (HSG-I), Nalbari HO. After receiving of notice, accused met complainant and made false promise to pay the debt but accused did not pay the money and therefore, complainant lodged the case against the accused.

3. Complainant present his complaint petition before the learned CJM, Nalbari on 04/09/15 and one N.I. case has been registered. Learned CJM, Nalbari took cognizance of the case and issued notice to the accused. On receipt of the notice from court accused appellant appeared before the trial court and 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 accordingly, trial was commenced.

4. Thereafter, complainant adduced her evidence and evidence of three other witnesses. After that learned trial court recorded statement of accused u/s 313 CrPC and accused adduced his evidence as DW-1 and evidence of two other witnesses as defence witnesses. Learned trial court, the CJM, Nalbari after hearing of counsel delivered the judgment convicted the accused and sentenced him to undergo simple imprisonment for one year and to pay the amount of Rs.40,000/- (Rupees forty thousand) in double only and in default of payment of the said amount to suffer Simple Imprisonment for 1 (one) year for the offence u/s-138/142 of the NI Act and being highly aggrieved with the decision of the learned trial court, accused appellant presented this appeal.

5. I have heard learned counsel for both sides. Learned appellant counsel made submission that complainant was failed to prove that she lended money to accused and therefore she failed to prove her allegation. Learned counsel further submitted that the witnesses of te prosecution did not prove the case of the complainant and there was material informalities in the case of the complainant and therefore, prays for allow the appeal.

6. Learned respondent counsel made submission learned trial court delivered the judgment after rightly going through the evidence on record and as per the law and therefore, prays for upholding the judgment passed by the learned trial court.

7. Now points for determination is whether complaint filed by the complainant is filed within time and whether there is legally enforceable debt of recovery by the accused?

8. I have scrutinized the material and evidence on record and statutory provision of law. Evidence of PW-1 is that she is doing the business of handloom and she had a family business establishment at Jajiabari chowk under Nalbari PS and complainant has a friendly relationship with accused who is a resident of village Dalua and accused was doing the business of land selling. She further deposed that on 23/05/14, accused came to her and borrowed Rs. 1,30,000/- (Rupees one lakh thirty thousand) from her and accused prepared a hand note vide Ext-1 in presence of witnesses and as per the hand note, accused promised to pay the amount with interest @ 15 % per annum when demand made by her. She again stated that on 03/07/15 accused issued a cheque in her name vide cheque No. 359910 for Rs. 50,000/- (Rupees fifty thousand) and on 04/07/15, she deposited the cheque in the Union Bank of India, Nalbari branch where her account exist and on

08/07/15 bank authority returned the cheque with retrun memo showing reason "fund insufficient". Thereafter, complainant contacted accused person and informed the matter but accused again made false promise and did not pay the money and finding no alternative complainant through her advocate issued a legal demand notice to accused and in spite of receiving the notice, accused did not pay te money and complainant lodged the case.

9. PW-2 Prabhat Barman deposed that accused on 23/05/14 borrowed Rs. 1,30,000/- (Rupees one lakh thirty thousand) from complainant and accused made a hand note stating that he (accused) will return the money when complainant needed the same with interest @ 15% per annum and in the said hand he also put his signature as witness. He further deposed that accused issued a cheque for an amount of Rs.50,000/- (Rupees fifty thousand) in favour of complainant on 03/07/15 which was written by accused himself as he identifies the handwriting of accused. He again stated that he came to know that due to insufficient fund the cheque was dishonoured by the bank.

10. PW-3, Rajibuddin Ahmed, Operational Manager, AGVB, Nalbari branch deposed that he appeared before the court on receipt of court summon and he is looking into the matter of cheque bounce as operational manager and he brought the account statement of A/C No. 7092015117385 in the name of Munin Barman from period 01/06/15 to

31/07/17. The disputed cheque is issued in the name of Munin Barman against his account number and said cheque was dishonored due to fund insufficiency.

11. PW-4, Hiranya Kr Goswami, branch Manager, Union Bank of India, Nalbari branch deposed that he had seen the Ext-2 cheque issued by accused to complainant. The said cheque was deposited in the bank on 06/07/15 and cheque was returned due to insufficient fund.

12. DW-1, Munin Barman deposed he was introduced with complainant by one Kalicharan Kalita of his native village when he need Rs.40,000/- in 2013 and complainant handed over money by taking cheque leaf and deed. He further deposed he put his signature three times on the blank cheque and he took Rs.40,000/- in June 2013 and returned the principal amount of Rs.40,000/- and interest of Rs.18,000/- in September 2013 and asked complainant to return the blank cheque and deed paper. But she refused to return the same. He stated he did not receive the notice.

13. DW-2, Kalicharan Kalita deposed that about 5 years ago, accused came to him and asked him to lend money and he told him that at Jajiabari chowk one girl has lended money on interest. Thereafter, they went to meet complainant and complainant gave Rs.40,000/- by taking a cheque and one signed deed paper with interest @ 10%.

14. DW-3, Soneswar Kalita deposed that about 4 years ago Kalicharan Kalita called him at Jajjabari Chowk and Kalicharan and accused talked with complainant regarding taking loan at interest @ 10% and complainant gave Rs.40,000/- and accused gave two cheque leaves and one blank deed paper and accused returned Rs.20,000/- in his presence.

15. I have scrutinized the impugned judgment, complaint petition of the complainant, evidence on record both PW and DW, statement of accused recorded u/s-313 CrPC and exhibited documents.

16. To prove the offence u/s-138 of the NI Act complainant must bring on record the most vital ingredients of section 138 NI Act.

17. Section 138 of the NI Act pointed when legally enforceable debt of the holder of cheque is not cleared due to insufficient fund, the account holder deemed to be committed an offense and section 138 of the NI Act

18. In this case appellant took ground that respondent/complainant without serving him the notice u/s-138 of the NI Act filed the complaint petition. As such complaint petition is liable to be dismissed for non compliance of the statutory provision of law. On scrutiny of the evidence on

record and exhibited document, I find complainant in support of his service of demand notice to accused, appellant submitted copy of legal notice, original postal receipt and delivery reports of postal department. Legal demand notice is marked as Ext-5, postal receipt as Ext-6, delivery report as Ext-7. All these documents are exhibited without any objection. When complainant submitted these documents before the court and exhibited the same and all the three documents are exhibited without any objection, then demand notice dated 21/07/15, postal receipt, name of addressee Munin Barman, address Dalua registered from Nalbari Head Quarter with PIN Code 781335 vide AWB No. RS443946477IN ad delivery report of RS443946477IN pointed article delivered to addressee as the report submitted by Dy Postmaster, (HSG-I), Nalbari Head Office. Thus the tracking report together with legal notice dated 20/07/15 issued by learned counsel of the complainant and postal receipt pointed that complainant served demand notice to appellant/ accused which appellant received on 24/07/15 and after receiving the notice he was silent. Therefore, I find that ground taken by the appellant counsel is devoid of any merits.

19. It has been averred by learned appellant counsel that appellant accused borrowed Rs.40,000/- (Rupees forty thousand) in 2013 at interest rate of 10% and he repaid principal as well as interest but complainant who took one blank cheque with signature of the accused at that time as

security, did not return the same when appellant accused repaid his borrowed money. From the evidence of DW-1, accused it is pointed that when he borrowed Rs.40,000/- he gave deed paper with his signature to complainant and the stamp paper was purchased on 23/05/14 and hand note was prepared on 23/05/14. then his plea of borrowing money on June 2013 and at that time give signature on a blank stamp paper and blank cheque to complainant is beyond his statement made in his evidence. The date of purchase of stamp paper on 23/05/14 pointed he put his signature on Ext-1 on 23/05/14. These facts of admission of the accused fairly established the legally enforceable debt.

20. On scrutiny of the evidence of PWs and DWs, I find that accused admitted his signature on Ext-1. Cross examination of PW-1 and evidence of DW-1 and his witness pointed accused borrowed money from complainant and point disputed by him is that he borrowed Rs.40,000/- at interest of 10% in June 2013 and return the money to the complainant with interest. He admitted signing on stamp paper on the date of taking money from complainant. PW-1 stated Ext-1 hand note was executed by accused on the date of borrowing money from her. Ext-1 was purchased on 23/05/14 which is reflected on back side of the stamp paper. This date of purchasing clearly tally with the date of transaction as disclosed by the PW-1. Therefore, it is established beyond all reasonable doubt

that accused on 23/05/14 borrowed money from complainant by executing hand note and stamp paper of the hand note purchased on 23/05/14 on the date of transaction of money and he failed to rebut the plea taken complainant. Statement of DW-2 and DW-3 revealed they are not present and accompanied when accused went to pay the installment to complainant. Admission of signature on Ext-1 hand note and failure of the accused to rebut the statement made in Ext-1 by the accused clearly established that accused borrowed money amounting to Rs.1,30,000/- (Rupees one lakh thirty thousand) from complainant on 30/05/14.

21. 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 for ¹⁹ [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.”

22. 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.

23. Complainant stated he issued demand notice to accused on on 21/07/15 through his advocate and same was received by accused and it is the admitted fact that accused borrowed Rs.1,30,000/- from complainant and he issued the cheque vide cheque No. 359910 dated 03/07/15 which was dishonoured due to insufficient fund. These two facts of admission of the accused fairly established the legally enforceable debt.

24. Complainant presented his cheque on 04/07/15. Cheque was issued on 03/07/15. That means cheque was presented within time. Bank returned the cheque with cheque return memo on 08/07/15 to complainant. Ext-4 is the proof of same. Complainant served demand notice to accused through his counsel on 21/07/15 vide Ext-5. Ext-6 establish, receiving of demand notice by accused. Therefore, no interference is required by the appellate court in the impugned judgment and order passed by the learned trial court.

25. In R. Vijayan vs Baby & Anr on 11 October, 2011, passed in CRIMINAL APPEAL NO. 1902 OF 2011 the Hon'ble Supreme Court holds that "16. Having reached that stage, if some Magistrates go by the traditional view that the criminal proceedings are for imposing punishment on the accused, either

imprisonment or fine or both, and there is no need to compensate the complainant, particularly if the complainant is not a 'victim' in the real sense, but is a well-to-do financier or financing institution, difficulties and complications arise. In those cases where the discretion to direct payment of compensation is not exercised, it causes considerable difficulty to the complainant, as invariably, by the time the criminal case is decided, the limitation for filing civil cases would have expired. As the provisions of Chapter XVII of the Act strongly lean towards grant of reimbursement of the loss by way of compensation, the courts should, unless there are special circumstances, in all cases of conviction, uniformly exercise the power to levy fine upto twice the cheque amount (keeping in view the cheque amount and the simple interest thereon at 9% per annum as the reasonable quantum of loss) and direct payment of such amount as compensation. Direction to pay compensation by way of restitution in regard to the loss on account of dishonour of the cheque should be practical and realistic, which would mean not only the payment of the cheque amount but interest thereon at a reasonable rate. Uniformity and consistency in deciding similar cases by different courts, not only increase the credibility of cheque as a negotiable instrument, but also the credibility of courts of justice."

26. In the light of above order, the appeal is dismissed. However no costs to the parties. The impugned Judgment & order dated 29/04/19 passed by learned Chief Judicial Magistrate, Nalbari in connection with N.I. Case No. 75/15 u/s-138/142 NI Act is hereby upheld. Fine amount will be treated as compensation and same has to pay to complainant as compensation for her loss on account of dishonour of cheque. Appellant accused is directed to

surrender before the learned trial court to suffer the sentence.

27. Appellant accused is directed to pay the compensation amount to the complainant within 60 days from today. Failure to pay the amount within 60 days interest @ 9% per annum of the total amount would be levied.

28. 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 16th day of August, 2021 at Nalbari, District- Nalbari.

(Smti S. Bhuyan)
Session Judge, Nalbari

Dictated and corrected by me

(Smti S. Bhuyan)
Session Judge, Nalbari

Typed by:
Biswajit Bhattacharjya,
U.D.Assistant