

IN THE COURT OF THE SESSIONS JUDGE: NALBARI

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

Criminal Appeal Case No. 27/18

(Appeal against the Judgment & order dated 12-10-2018 passed by learned Addl CJM, Nalbari in connection with NI Case No. 106^c/15 u/s- 138 of the NI Act.)

Smti Rajya Bania

W/o- Sri Biren Banik @ Dhiren Banik

R/o- Ward No. 5, Shantipur, Rangia Town

P.S.- Rangia, Dist- Kamrup (Rural), Assam

..... Appellant/ victim

-Versus-

Miss Kabita Sarma

D/o- Sri Manoranjan Sarma

R/o- Village Pragatipur (Barkura)

PS & Dist- Nalbari, Assam

..... Respondent/ accused

Advocates appeared:-

For the Appellant : Pankaj Sarmah, Advocate

For the state : Gautam Barman, Advocate

Date of argument : 25-03-21 & 17-04-21

Date of judgment : 03-05-2021

JUDGMENT

1. The instant appeal has been preferred u/s- 372/382 CrPC by appellant/ victim Smti Rajya Bania against the judgment and order dated 12-10-2018 passed by learned Addl CJM, Nalbari in connection with NI Case No. 106^C/15 u/s- 138 of the NI Act whereby learned Addl CJM, Nalbari acquitted the respondent/ accused Smti Kabita Sarma and set her at liberty from the charge of offense u/s- 138 of the NI Act.

2. The prosecution case in brief is that on 21-03-2014 appellant/ victim Smti Rajya Bania filed a compliant petition before the learned CJM, Nalbari against respondent/ accused Smti Kabita Sarma inter-alia citing that complainant and accused are known to each other when she resided in rented house at Nalbari and friendly relationship grown up between them and on the strength of said relationship accused borrowed Rs. 52,000/- (rupees fifty two thousand) only from her on 13-03-2008 for business by executing hand note with promise to repay the loan amount on 02-10-2010 with interest. But accused did not repay the borrowed money within time and when complainant made demand of her money accused took some excuse and lastly complaint came to house of the accused to collect the said money and on that day i.e. on

01-11-201 as full and final settlement, accused gave her a cheque vide No. 477615 amounting Rs. 60,000/- (rupees sixty thousand) only. Thereafter, complainant deposited the cheque in her bank account at SBI, Nalbari Branch on the same day and bank returned the cheque on 04-11-2013 by return memo with remark "insufficient fund". Then complainant sent legal notice to the accused on 27-11-2013 within 30 days from receipt of the return memo which accused received on 04-12-2013 and sought 90 days time to clear the said amount and time limit expired on 18-03-2014 and when complainant informed accused about RBI norms, accused apologized and asked her to re-deposit for fresh clearance and assured that there is sufficient fund to clear the amount. Accordingly, complainant again deposited the cheque on 22-01-2014 at SBI, Nalbari Branch but same was dishonored and bank returned the cheque with return memo with remark "insufficient fund". Thereafter complainant served pleader notice on 20-02-2014 which was received by one Namita Devi on 26-02-2014 but accused did not pay the amount. Hence complainant filed this case before the learned CJM Nalbari. Therefore, cause of action of the case is started on 11-12-2013, 10-03-2014 and 18-03-2014.

3. On receipt of the complaint petition learned CJM, Nalbari took cognizance, registered NI Case No. 106^C/15

u/s- 138 of the NI Act and transferred the case to the learned Addl CJM, Nalbari for trial and disposal. On receipt of the case record, learned Addl CJM, Nalbari issued process to the accused person, furnished necessary copies to accused person on her appearance to face trial and particulars of offense u/s- 138 of the NI Act were explained to the accused person to which she pleaded not guilty and claimed to be tried.

4. Prosecution in order to prove the offences against the accused person adduced evidences of all together 3 (three) witnesses and exhibited 14 (forteen) nos of documents. After closure of the prosecution evidence learned trial court recorded the statement of the accused u/s-313 CrPC and recorded evidence of accused Kabita Sarma as DW-1. Thereafter, hearing learned counsel for both the sides, delivered judgment acquitting the accused person from the charge of section 138 of the NI Act and dismissed the complaint petition.

5. I have heard learned counsels for both the sides. Learned appellant counsel made submission that when appellant serve the first notice to respondent, she took 90 days time to repay the borrowed money. Ext-7 is the request letter of respondent. But after passing of 90 days

respondent did not repay the amount to the appellant and thereafter she served second notice upon the respondent.

6. Learned respondent counsel submitted that present appeal is not maintainable u/s- 372 CrPC and same lie u/s- 378(4) CrPC which is only before the Hon'ble High Court. Learned respondent counsel further submitted that present case is bared by limitation because appellant served notice on 27-11-2013 which was received by respondent on 04-12-2013/ second notice was issued on 20-02-2014 and it was received by respondent on 26-02-2014. appellant filed the complaint petition on 23-03-2014 and appellant did not file the case after first notice therefore case of the appellant is bared by limitation u/s- 142 of the NI Act.

7. **Points for determination**

- i) Whether the appeal filed by appellant u/s- 372 CrPC is maintainable or not?
- ii) Whether appellant case is bared by limitation or not?
- iii) Whether appellant established his case against respondent/ accused u/s- 138 of the NI Act and whether she is entitled relief under the provisions of NI Act or not?

Decision, Discussion and Reasons Thereof

8. I have scrutinized the trial court case record and entire materials available on record. Respondent argued

that present appeal does not lie u/s- 372 CrPC. As per section 372 CrPC, victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offense or imposing inadequate compensation and such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such Court. Section 2(wa) of the CrPC defines the term "victim".

Section 2(wa) CrPC: "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused persons has been charged and the expression "victim" included his or her guardian or legal heir"

9. In the present case appellant suffers monetary loss and she is covered u/s- 2(wa) CrPC and therefore she has right to appeal before this court u/s- 372 CrPC and first point is decided in favour of the appellant. Now let me discuss whether the complaint petition filed before the trial court was bared by limitation or not.

"Section 138 of The Negotiable Instruments Act: 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 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, 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. In the present case appellant deposited the Ext-2 cheque for the first time at SBI Nalbari Branch on 01-11-2013 and the cheque was dishonored and returned on 04-11-2013 vide Ext- 3 cheque return memo with remarks “insufficient fund”. On 27-11-2013 appellant sent legal notice to the respondent vide Ext-4 via registered post which was received by the respondent on 04-12-2013. Appellant has exhibited the postal receipt vide Ext-5 and receiving acknowledgment vide Ext-6. On receipt of the

demand notice respondent sent reply to the appellant vide Ext-7 promising that she will pay the amount within 90 days from the date of receipt of Ext-7 by the appellant and thus respondent extended the time limit till 18-03-2014. Thereafter on 22-01-2014 appellant on the verbal assurance of the respondent/ accused re-presented Ext-2 cheque at SBI Nalbari Branch but the same was again dishonored and returned vide Ext-8 cheque return memo dated 22-01-2014 with remarks "insufficient fund" and appellant issued second pleader notice dated 20-02-2014 vide Ext-9 which was received by respondent on 26-02-2014 vide Ext-11 receiving acknowledgment card.

11. Record shows that complaint petition was filed before the learned trial court on 21-03-2014 which is after lapse of 3 months 17 days from the date of receipt of first notice by the respondent i.e. on 04-12-2013. But Ext-8 return memo dated 22-01-2014 shows that Ext-2 cheque was again presented at SBI, Nalbari Branch on 22-01-2014 which was dishonored due to insufficient funds and appellant issued Ext-9 reminder legal notice to respondent which was received by Namita Devi on 26-02-2014 at the address of the respondent and respondent admitted receipt of 1st as well as 2nd demand notice and issue of reply in response to 1st demand notice. Now point is to see whether section 138 of the NI Act prescribe any time limitation of

presentation of cheque and for filing of complaint on the strength of subsequent presentation of cheque and subsequent demand notice.

12. In *Msr Leathers vs S. Palaniappan and another* [Crl Apl Nos. 261-264 of 2002] decided on 10-09-2013 Hon'ble Supreme Court held as follows:

“5. The Division Bench since expressed their Lordships reservation about the correctness of the law laid down in *Sadanandan Bhadrans vs. Madhavan Sunil Kumar* [1998 (6) SCC 514] and felt that it requires to be considered by a larger Bench and the matter was placed before the Honble Chief Justice for consideration.

6. Accordingly, the matter was placed before a larger Bench. Their Lordships, while deciding the said question, noticed that proviso to Section 138 stipulates following three distinct conditions precedent, which must be satisfied before dishonour of the cheque can constitute an offence and becomes punishable.

8. After analysing Sections 138 and 142 of the Act, their Lordships held that we find it difficult to hold that the payee would lose his right to institute such proceedings on a subsequent default that satisfies all the three requirements of Section 138. Accordingly, their Lordships held as follows:

23. Coming then to the question whether there is anything in Section 142(b) to suggest that prosecution based on subsequent or successive dishonour is impermissible, we need only mention that the limitation which *Sadanandan Bhadrans case* (supra) reads into that provision does not appear to us to arise. We say so because while a complaint based on a default and notice to pay must be filed within a period of one month from the date the cause of action

accrues, which implies the date on which the period of 15 days granted to the drawer to arrange the payment expires, there is nothing in Section 142 to suggest that expiry of any such limitation would absolve him of his criminal liability should the cheque continue to get dishonoured by the bank on subsequent presentations. So long as the cheque is valid and so long as it is dishonoured upon presentation to the bank, the holder's right to prosecute the drawer for the default committed by him remains valid and exercisable. The argument that the holder takes advantage by not filing a prosecution against the drawer has not impressed us. By reason of a fresh presentation of a cheque followed by a fresh notice in terms of Section 138, proviso (b), the drawer gets an extended period to make the payment and thereby benefits in terms of further opportunity to pay to avoid prosecution. Such fresh opportunity cannot hold the defaulter on any juristic principle, to get a complete absolution from prosecution.

9. It was further held as follows: 31. Applying the above rule of interpretation and the provisions of Section 138, we have no hesitation in holding that a prosecution based on a second or successive default in payment of the cheque amount should not be impermissible simply because no prosecution based on the first default which was followed by a statutory notice and a failure to pay had not been launched. If the entire purpose underlying Section 138 of the Negotiable Instruments Act is to compel the drawers to honor their commitments made in the course of their business or other affairs, there is no reason why a person who has issued a cheque which is dishonored and who fails to make payment despite statutory notice served upon him should be immune to prosecution simply because the holder of the cheque has not rushed to the court with a complaint based on such default or simply because the drawer has

made the holder defer prosecution promising to make arrangements for funds or for any other similar reason. There is in our opinion no real or qualitative difference between a case where default is committed and prosecution immediately launched and another where the prosecution is deferred till the cheque presented again gets dishonoured for the second or successive time.

32. The controversy, in our opinion, can be seen from another angle also. If the decision in *Sadanandan Bhadrans case (supra)* is correct, there is no option for the holder to defer institution of judicial proceedings even when he may like to do so for so simple and innocuous a reason as to extend certain accommodation to the drawer to arrange the payment of the amount. Apart from the fact that an interpretation which curtails the right of the parties to negotiate a possible settlement without prejudice to the right of holder to institute proceedings within the outer period of limitation stipulated by law should be avoided we see no reason why parties should, by a process of interpretation, be forced to launch complaints where they can or may like to defer such action for good and valid reasons. After all, neither the courts nor the parties stand to gain by institution of proceedings which may become unnecessary if cheque amount is paid by the drawer. The magistracy in this country is overburdened by an avalanche of cases under Section 138 of Negotiable Instruments Act. If the first default itself must in terms of the decision in *Sadanandan Bhadrans case (supra)* result in filing of prosecution, avoidable litigation would become an inevitable bane of the legislation that was intended only to bring solemnity to cheques without forcing parties to resort to proceedings in the courts of law. While there is no empirical data to suggest that the problems of overburdened magistracy and judicial system at the district level is entirely because of the compulsions arising out of the decisions in

Sadanandan Bhadrans case (supra), it is difficult to say that the law declared in that decision has not added to court congestion.

10. In the result, their Lordships overruled the decision in Sadanandan Bhadrans case (supra) and held that the prosecution based on second or successive dishonour of the cheque is also permissible so long as it satisfies the requirements stipulated under the proviso to Section 138 of the Act.”

13. In the present case second presentation of Ext-2 cheque was made on 22-01-2014, Ext-9 second demand notice was served upon the respondent on 26-02-2014 vide Ext-11 acknowledgment card and appellant filed the complaint petition before the learned trial court on 21-03-2021 which is within 30 days from the date of receipt of second notice by the respondent. In view of the aforesaid decision of the Hon’ble Supreme court, it can clearly be held that date of cause of action is permissible from the date of second or subsequent presentation of a cheque and therefore, the complaint petition filed before the learned trial court is not bared by limitation. Accordingly, 2nd point for determination is decided in favour of the appellant.

14. Appellant deposited the Ext-2 cheque for the first time at SBI Nalbari Branch on 01-11-2013 and the cheque was dishonored and returned on 04-11-2013 vide Ext- 3 cheque return memo with remarks “insufficient fund”. On 27-11-2013 appellant sent legal notice to the respondent

vide Ext-4 via registered post which was received by the respondent on 04-12-2013 vide Ext-6 acknowledgment card. On receipt of the demand notice respondent sent reply to the appellant vide Ext-7. In Ext-7 in para-1 respondent admitted issuing about Ext-2 cheque amounting Rs. 60,000/- in favour of the appellant and in para-5 she sought 90 days time to clear the amount. Thereafter on 22-01-2014 appellant re-presented Ext-2 cheque at SBI Nalbari Branch but the same was again dishonored and returned vide Ext-8 cheque return memo with remarks "insufficient fund" and appellant issued second pleader notice dated 20-02-2014 vide Ext-9 which was received by respondent on 26-02-2014 vide Ext-11 receiving acknowledgment card. There is admission of fact by the respondent/ accused with regard to issuing of cheque vide no. 477615 dated 01-11-2013 in favour of the appellant and non payment of the same. It is also within the knowledge of the accused that cheque was dishonoured due to insufficient fund of account holder. The fact once admitted needs no prove. Here in this case Ext-7 is the clear proof with regard to the accused issuing Ext-2 cheque in favour of the appellant and thereafter, appellant/ complainant served demand notice within 15 days from the date of return of cheque and accused failed to repay the money within the statutory period of time and sought time but even then she did not repay for which complainant

compelled to lodge the case u/s-138 of the N.I. Act for recovery of her money. Therefore, all the ingredients of section 138/142 N.I. Act fulfilled and respondent/ accused owe legally enforceable debt towards the appellant which she failed to clear and hence respondent accused is liable to pay the same. Here in this case, complainant/ appellant fairly established the offense u/s- 138 of the NI Act against the respondent/ accused Kabita Sarma beyond all reasonable doubt and she is found guilty u/s- 138 of the NI Act. Accordingly, respondent/ accused Kabita Sarma is convicted u/s- 138 of the NI Act.

15. Accordingly, respondent/accused Kabita Sarma is sentenced to pay the cheque amount of Rs. 60,000/- (rupees sixty thousand) only with cost of the proceeding @ Rs. 10,000/- (rupees ten thousand) only to the appellant within 60 days from today itself, in default to undergo simple imprisonment for 4 (four) months for committing offense u/s- 138 of the NI Act and respondent/ accused is directed to appear before the learned trial court. Failure to pay the compensation amount within time, as directed, will attract interest @ 9% per annum on the total compensation amount.

16. In the light of the above order, present appeal is allowed and judgment and order dated 12-10-2018 passed

by learned Addl CJM, Nalbari in connection with NI Case No. 106^C/15 u/s- 138 of the NI Act is hereby set aside.

17. 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 3rd day of May, 2021 at Nalbari, Dist-Nalbari.

(Smti S. Bhuyan)
Sessions Judge, Nalbari

Dictated & corrected by me

(Smti S. Bhuyan)
Sessions Judge, Nalbari.

Typed by
Jitumani Talukdar, Computer Typist