

C. R CASE NO: 2486 OF 2009
COMPLAINANT: SHRI SAMESH ALI Vs
ACCUSED: SHRI IBRAHIM ALI

DISTRICT: KAMRUP
IN THE COURT OF THE SUB DIVISIONAL JUDICIAL
MAGISTRATE, (S),II, KAMRUP

CR CASE NO: 2486/ 2009

U/S 138 N. I ACT

COMPLAINANT: SHRI SAMESH ALI
VERSUS
ACCUSED: SHRI IBRAHIM ALI

PRESENT : YUSUF AZAZ, SDJM, (S),II, KAMRUP

ADVOCATE FOR THE COMPLAINANT: SHRI B. SARMA

ADVOCATE FOR THE ACCUSED: SHRI S. HAQUE

OFFENCE EXPLAINED ON: 9/7/2010

EVIDENCE RECORDED ON: 10/2/2011, 23/12/2011, 1/3/2012, 1/8/2012

ARGUMENT HEARD ON: 14/8/2012

JUDGMENT DELIVERED ON: 30/8/2012

JUDGMENT

1. This is a case instituted under section 138 of the Negotiable Instruments Act, 1881 alleging therein that the accused, Shri Ibrahim Ali had issued a cheque in favour of the complainant which was dishonoured as the account in which it was drawn was closed.

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YUSUF AZAZ, SDJM(S)II, KAMRUP.

C. R CASE NO: 2486 OF 2009
COMPLAINANT: SHRI SAMESH ALI Vs
ACCUSED: SHRI IBRAHIM ALI

2. The brief facts giving rise to the institution of this complaint case, as is revealed from the complaint is that, Shri Samesh, the complainant knew the accused. The complainant has stated that he had a grocery shop and the accused was his customer; as such the accused was known to him. The complainant has stated that the accused approached him for a loan of Rs.54,000/- and that he gave the said loan to the accused. The complainant had alleged that the accused issued a cheque bearing no:820708 dated 16/4/2009 for Rs.54,000/- in favour of the complainant for the discharge of his debt. The complainant accordingly deposited the said cheque for encashment to his bank, but the same was returned unpaid on 18/4/2009 as the account of the accused was closed by that time.
3. The complainant has stated that he brought the factum of dishonor to the knowledge of the accused to which the accused apologized and requested him to again deposit the said cheque on 6/5/2009 as such he again deposited the same on 6/5/2009, but it was again dishonoured as the said account of the accused was closed.
4. The complainant thereafter issued legal notice to the accused on 12/5/2009 demanding the amount of cheque, but the accused failed and neglected to pay the same even after receipt of the notice; as such the complainant lodged this complaint under section 138 of the Negotiable Instruments Act,1881.
5. The accused was called upon to enter trial and upon his appearance the particulars of offence under section 138 of the Negotiable Instruments Act,1881 was explained to him to which he pleaded not guilty and claimed to be tried.
6. The complainant examined himself in support of his case and also examined the official witness of the bank; whereas the accused examined himself in support of his defence.
7. The case of the accused, as is revealed from the statement of the accused recorded under section 313 CrPC and the other material on record is that according to the accused, the complainant used to run committees. The committees are nothing but "Hundi" wherein each of the members used to put equivalent amount of money at regular interval, and the members received a particular amount as and when required or as and when their turn comes. The accused has contended

TYPED BY ME

C. R CASE NO: 2486 OF 2009
COMPLAINANT: SHRI SAMESH ALI Vs
ACCUSED: SHRI IBRAHIM ALI

that he gave the aforesaid cheque to the complainant as security, because he was one of the members of the “committee” run by the complainant. The accused has stated that he gave three cheques to the complainant, and out of those three cheques, the complainant withdrew two cheques and the third cheque is the cheque in question in this case. The accused has submitted that he does not have any liability as such this complaint is liable to be dismissed.

8. I have heard the learned counsels for both the parties.
9. Upon hearing and on perusal of record I have framed the following points for determination in order to arrive at a definite finding as regards the dispute in this case-
 - (1) Whether the accused issued the cheque for the discharge of any legally enforceable debt or liability?
 - (2) Whether the cheque was dishonoured as the account was closed by the accused?
 - (3) Whether the accused received the demand notice issued by the complainant in respect of the dishonor of the said cheque?
 - (4) Whether the accused has committed the offence under section 138 of the Negotiable Instruments Act,1881?

DISCUSSION, DECISION AND REASONS FOR THE DECISION:

POINT FOR DETERMINATION NO.1: Whether the accused issued the cheque for the discharge of any legally enforceable debt or liability?

10. The complainant had contended that he had business relationship with the accused and that the accused issued the cheque in question for the discharge of his financial liability.
11. The complainant (PW1) has examined himself in support of his case and he has deposed that the accused was known to him. The PW1

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YUSUF AZAZ, SDJM(S)II, KAMRUP.

C. R CASE NO: 2486 OF 2009
COMPLAINANT: SHRI SAMESH ALI Vs
ACCUSED: SHRI IBRAHIM ALI

has stated that the accused approached him for a loan of Rs.54,000/-. The PW1 has stated that he gave the aforesaid loan to the accused and thereafter the accused gave this cheque bearing no: 820708 dated 16/4/2009 for Rs.54,000/- for the discharge of the aforesaid debt. The PW1 has produced the said cheque and the same is marked as exhibit 1. The PW1 has identified the signature of the accused upon the exhibit 1 and the same is marked as exhibit 1(ii).

12.The PW1 has stated that he deposited the said cheque for encashment but the same was dishonoured with the endorsement that the accused had insufficient funds. The PW1 has produced and identified the said cheque return memo dated 18/4/2009 and the same is marked as exhibit 2. The PW1 thereafter informed the accused about the dishonor of the said cheque to which the accused asked him to deposit the said cheque as such he (PW1) again deposited the said cheque, but again the same was dishonoured vide return memo marked as exhibit 3. The cheque was returned by the cheque return memo (exhibit 3) with an endorsement that the account was closed.

13.The PW1 was cross examined by the defence, but nothing material could be elicited from his cross examination. The defence merely suggested to the complainant during cross examination that the complainant used to run "Committee" (Hundi) and the accused was a member. The defence further suggested to the complainant that the complainant took blank cheques as security from the accused as he was a member of the "Committee" and that the complainant misused the said blank cheque and committed fraud by depositing this exhibit 1 without the consent of the accused. All these suggestions were denied by the complainant, except the fact that he used to run "Committee". The PW1 has denied the fact that he took blank cheque.

14.The accused has examined himself in support of his case and stated therein that the complainant took blank cheques from him as he was a member of "Committee" run by the complainant. The accused has stated that he signed upon the blank cheques, but did not write anything there and later on the complainant has written the figures thereon and deposited the cheque without the consent of the accused.

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YUSUF AZAZ, SDJM(S)II, KAMRUP.

C. R CASE NO: 2486 OF 2009
COMPLAINANT: SHRI SAMESH ALI Vs
ACCUSED: SHRI IBRAHIM ALI

15. The contention of the accused is not sustainable because the accused has stated that he was a member of three committees and he was required to pay Rs.5000/- per month for each "committee" and he gave three blank cheques for the aforesaid purpose. It is seen from the evidence of the accused that he was required to pay Rs.5000/- per month for each committee; as such if he was required to pay only Rs.5000/- per month there appears to be no reasonable ground for him to hand over a blank cheque. It cannot be believed that any prudent man would hand over a blank cheque, and that too when he knows that his liability would be only Rs.5000/-.
16. The contention of the accused cannot be further sustained because the accused has deposed that the complainant had withdrawn Rs.5000/- from one cheque and another Rs.850/- from another cheque out of his aforesaid three cheques. It is seen that the accused had admitted that the complainant withdrew Rs.850/-. There is no explanation as to why the complainant would withdraw only Rs.850/- if really the liability of the accused was Rs.5000/- or its multiples.
17. In view of the above discussion it cannot be believed that the accused had handed over blank cheque (exhibit 1) to the complainant and that too as security.
18. The section 139 of the Negotiable Instruments Act, 1881 raises a statutory presumption that the holder of the cheque, unless the contrary is proved, received the cheque for the discharge in whole or in part of any debt or liability.
19. In the instant case at hand the complainant has produced the cheque issued by the accused, and the accused has admitted his signature thereon, as such there is a statutory presumption raised in favour of the fact that the said cheque was issued for the discharge of a debt or liability.
20. In view of the above the burden now shifts to the accused to rebut the above presumption and raise a probable defence that the said cheque was not issued for any debt or liability. It is already discussed above that the accused has failed to raise any probable defence in his favour to dislodge the above statutory presumption; hence it is held that the cheque (exhibit 1) was issued for the discharge of his debt.

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YUSUF AZAZ, SDJM(S)II, KAMRUP.

C. R CASE NO: 2486 OF 2009
COMPLAINANT: SHRI SAMESH ALI Vs
ACCUSED: SHRI IBRAHIM ALI

21. It is held that the accused has failed to dislodge the presumption by bringing on record any credible evidence to show that the cheque in question was issued as a security and not for the discharge of his debt; hence it is held that the said cheque was issued for the discharge of a legally enforceable debt.
22. Further there is nothing on record to doubt or disbelieve the complainant; as such it is held that the accused had issued the said cheque in favour of the complainant for the discharge of his debt.
23. In view of the above it is held that the accused had issued the said cheque (exhibit 1) for the discharge of his liability of Rs.54,000/-.
24. DECISION: The cheque was issued for the discharge of a legally enforceable debt.

POINT FOR DETERMINATION NO.2: Whether the cheque was dishonoured as the account was closed by the accused?

25. The complainant has deposed that the said cheque was presented to his bank for encashment, but the same was dishonoured because the accused has closed the account. The complainant has further deposed that the same cheque was once presented earlier and the same was dishonoured due to insufficient funds.
26. The complainant (PW1) has produced the initial cheque return memo and the same is marked as exhibit 2. The subsequent cheque return memo is marked as exhibit 3. The perusal of exhibit 3 shows that the same was dishonoured as the account was closed by the accused.
27. The complainant was not at all cross examined regarding the factum of dishonor of the said cheque and it is admitted by the accused that the said cheque was dishonoured. The only defence of the accused is that he is not liable to pay any amount.
28. In addition, the section 146 of the Negotiable Instruments Act, 1881 provides for statutory presumption as regards the cheque return memo issued by the bank in respect of the dishonor of the cheque; hence it is held that the said cheque was dishonoured as the account was closed by the accused.

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YUSUF AZAZ, SDJM(S)II, KAMRUP.

C. R CASE NO: 2486 OF 2009
COMPLAINANT: SHRI SAMESH ALI Vs
ACCUSED: SHRI IBRAHIM ALI

29. In view of the discussions made above it is held that the said cheque was dishonoured as the accused had closed his account.

30. DECISION: The cheque was dishonoured as the accused had closed his account.

POINT FOR DETERMINATION NO.3: Whether the accused received the demand notice issued by the complainant in respect of the dishonor of the said cheque?

31. The complainant has deposed that he issued the demand notice in respect of the dishonor of the said cheque by way of registered post. The PW1 has produced the copy of the said notice and the same is marked as exhibit 4. The PW1 has produced the postal receipt by which the said notice was sent and the same is marked as exhibit 4(i). The perusal of the exhibit 4(i) shows that the same is prepaid and addressed to the accused. The perusal of the address mentioned in the demand notice shows that the address of the accused is correctly mentioned in the said notice and the same is also correctly mentioned in the exhibit 4(i). The accused has not disputed the address.

32. The section 27 of the General Clauses Act, 1897 raises a statutory presumption to the effect that if anything is required to be served and it can be shown that the same is sent by post duly prepaid and at the proper address then it shall be deemed to be served within a reasonable time. In the instant case at hand the said notice was sent by registered post duly prepaid and at the correct address as such the same raises a presumption that the notice was duly served within a reasonable time. The notice (exhibit 4) was issued on 12/5/2009 as such the same ought to be delivered within a week or so, i.e. by 20/5/2009; hence it is held that the notice was served on 20/5/2009.

33. The accused has merely stated in his statement recorded under section 313 CrPC and in his evidence that he did not receive any notice, but he has not led any cogent evidence to dislodge the above presumption; hence it is held that the accused has received the demand notice.

34. DECISION: The accused received the demand notice.

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YUSUF AZAZ, SDJM(S)II, KAMRUP.

C. R CASE NO: 2486 OF 2009
COMPLAINANT: SHRI SAMESH ALI Vs
ACCUSED: SHRI IBRAHIM ALI

POINT FOR DETERMINATION NO.3: Whether the accused has committed the offence under section 138 of the Negotiable Instruments Act,1881?

35. The offence under section 138 is complete on the satisfaction of certain conditions which are that the cheque has to be issued on the account maintained by the accused and that the cheque has to be issued for the discharge of a debt or liability. It is further provided that the said cheque has to be deposited within six months of its issuance or within its validity and that the notice regarding the dishonor of the cheque for insufficient funds ought to be given within 30 days of the receipt of information regarding the dishonor.
36. In the instant case at hand it is already held that the cheque was issued by the accused in the account maintained by him and that the said cheque was dishonoured as the accused had closed his account. The cheque (exhibit 1) was issued in the instant case on 16/4/2009 and it was presented within six months for encashment. The cheque return memo (exhibit 3) further shows that the information regarding the dishonor of the said cheque was received on 6/5/2009; and that the demand notice was issued by the complainant on 12/5/2009, which is within 30 days from the receipt of information of dishonor. The notice is deemed to be received by the accused on 20/5/2009. The complainant had thereafter instituted this complaint on 10/6/2009 which is within 30 days after the lapse of 15 days from the date of receipt of demand notice; hence the complaint is lodged within the period of limitation.
37. The learned counsel for the accused has contended that the said cheque was dishonoured with the endorsement that “**account closed**” hence the complaint under section 138 of the Negotiable Instruments Act, 1881 is not maintainable. The said contention of the accused is not sustainable, because the same is no longer res integra and it is already settled by the Hon’ble Supreme Court of India in the case of **Modi Cements Ltd. Vs Kuchil Kumar Nandi [1998 CrLJ1397]** that even in case where the cheque was dishonoured by “Stop Payment instruction” or otherwise, the same would be covered

TYPED BY ME

YUSUF AZAZ, SDJM(S)II, KAMRUP.

C. R CASE NO: 2486 OF 2009
COMPLAINANT: SHRI SAMESH ALI Vs
ACCUSED: SHRI IBRAHIM ALI

under the provision of section 138 of the Negotiable Instruments Act,1881.

38. The learned defence counsel has further submitted that the account was closed way back in the year 2008 itself, i.e prior to the issuance of the cheque in question; hence the provision of section 138 of Negotiable Instruments Act,1881 is not applicable.
39. The PW1 has produced the cheque return memo (exhibit 2) and the same shows that the cheque was initially dishonoured due to lack of funds in the account on 18/4/2009, but it was dishonoured vide exhibit 3 on 6/5/2009 as the account was closed by then. The perusal of the exhibit 2 reveals that the account was operative as on 18/4/2009; hence it is held that the cheque was issued when the account was operative and it was later on that the said account was closed.
40. The learned accused has contended that the PW2, Shri Manu Bharali (PW2) is the official of the Indian Overseas Bank and he has stated that the account was closed on 7/7/2008; hence it is shown that the account was closed as on the date of issuance of cheque. The oral evidence of the PW2 to the effect that the account was closed on 7/7/2008 cannot be believed in the absence of any supporting documentary evidence. Further the document (exhibit 2) of the same bank shows that the cheque was dishonoured on 18/4/2009 as there was insufficient funds; hence the said exhibit 2 is relied upon, because section 146 of the Negotiable Instruments Act,1881 raises a presumption as to the correctness of the entries of the cheque return memo.
41. The accused has deposed that his account was closed in the year 2008, but he has not produced any document to show the same; hence his oral evidence is not relied upon, in the absence of any supporting documentary evidence. Further the accused has produced a Photostat copy of statement of his account, but the original of the said photocopy is not produced; hence the same cannot be relied upon. The accused has contended that the original of the said statement of account was damaged in fire incident. The certified copies of the statement of accounts can very well be procured from the bank upon application; as such if the earlier statement of account

TYPED BY ME

YUSUF AZAZ, SDJM(S)II, KAMRUP.

C. R CASE NO: 2486 OF 2009
COMPLAINANT: SHRI SAMESH ALI Vs
ACCUSED: SHRI IBRAHIM ALI

was damaged in fire, then also the accused could have procured a fresh statement of account or could have produced other document to show that his account was closed as on the date of issuance of cheque.

42. In view of the above it is held that the account was operative at the time of issuance of cheque (Exhibit1); hence it is held that the provision of section 138 of the Negotiable Instruments Act,1881 is applicable to the facts of this case.
43. In view of the above discussion it is held that all the ingredients of the offence under section 138 of the Negotiable Instruments Act,1881 are satisfied in the instant case and further the complainant has satisfied all the requisites for the institution of the complaint; hence it is held that the accused has committed the offence under section 138 of the Negotiable Instruments Act,1881.
44. DECISION: The accused has committed the offence under section 138 of the Negotiable Instruments Act,1881.
45. In view of the discussions made above and the decisions reached in the foregoing points for determinations it is held that the accused has committed offence under section 138 of the Negotiable Instruments Act,1881 and as such the accused is convicted under section 138 of the Negotiable Instruments Act,1881.
46. I have heard the parties. I am not inclined to extend the benefit of the provisions of the Probation of Offenders Act,1958, because the offence committed is in the nature of an economic offence and the backbone of the nation depends on a healthy economy. Moreover the real intention behind the enactment of the said offence is to provide quick remedy to the payee or the holder of the cheque, and also to instill a sense of confidence and assurance to the business community.
47. Considering the nature of the offence and the other attending facts and circumstances of this case, the accused is convicted of the offence under section 138 of the Negotiable Instruments Act,1881 and he is sentenced to undergo simple imprisonment for four (4) months and further to pay compensation of Rs.75,000/- (seventy five thousand) to the complainant as the cheque amount is Rs.54,000/-

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YUSUF AZAZ, SDJM(S)II, KAMRUP.

C. R CASE NO: 2486 OF 2009
COMPLAINANT: SHRI SAMESH ALI Vs
ACCUSED: SHRI IBRAHIM ALI

and about three years have elapsed from the date of loan. It is further directed that the accused shall undergo simple imprisonment for another one months in default of the payment of compensation.

48. Furnish a free copy of the judgment to the accused immediately.

49. The case is disposed of on contest.

Given under my hand and the seal of this court on this the 4th day of September, 2012 at Guwahati.

Yusuf Azaz,
SDJM(S) II, Kamrup

APPENDIX

PROSECUTION EXHIBITS:

- 1) EXHIBIT 1- CHEQUE
- 2) EXHIBIT 2- RETURN MEMO

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YUSUF AZAZ, SDJM(S)II, KAMRUP.

C. R CASE NO: 2486 OF 2009
COMPLAINANT: SHRI SAMESH ALI Vs
ACCUSED: SHRI IBRAHIM ALI

- 3) EXHIBIT 3- RETURN MEMO
- 4) EXHIBIT 4- DEMAND NOTICE
- 5) EXHIBIT 4(1)- POSTAL RECEIPT

DEFENCE EXHIBITS

NONE

PROSECUTION WITNESSES

- 1) SHRI SAMESH ALI
- 2) SHRI MANU BHARALI

DEFENCE WITNESSES

- 1) SHRI IBRAHIM ALI

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