

C. R CASE NO: 5088 OF 2008
COMPLAINANT: SHRI BISWAJIT RAI BARUAH Vs
ACCUSED: SHRI TAPAN DEKA

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

CR CASE NO: 5088/ 2008
U/S 138 N. I ACT

COMPLAINANT: SHRI BISWAJIT RAI BARUAH
VERSUS
ACCUSED: SHRI TAPAN DEKA

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

ADVOCATE FOR THE PROSECUTION: SHRI T. ISLAM

ADVOCATE FOR THE ACCUSED: SHRI S. DAS

OFFENCE EXPLAINED ON: 28/7/2009

EVIDENCE RECORDED ON: 14/12/2009, 8/10/2010, 7/6/2011,
28/7/2011, 6/2/2012

ARGUMENT HEARD ON: 16/8/2012

JUDGMENT DELIVERED ON:31/8/2012

JUDGMENT

1. The is a case instituted under section 138 of the Negotiable Instruments Act, 1881 alleging therein that the accused, Shri Tapan

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Deka had issued a cheque in favour of the complainant which was dishonoured due to insufficient funds in the account of the accused.

2. The brief facts giving rise to the institution of this complaint case is that the complainant, Shri Biswajit Rai Baruah had friendly relationship with the accused herein. The complainant has alleged that the accused approached him for a loan of Rs.60,000/- which was advanced by the complainant. The complainant had further alleged that the accused issued cheque bearing no:073335 dated 29/8/2008 for Rs.60,000/- in favour of the complainant for the discharge of his liability. The complainant accordingly deposited the said cheque for encashment to his bank, but the same was returned unpaid on 30/8/2008 as the accused did not have funds in his account to honour the said cheque.
3. The complainant thereafter issued legal notice to the accused on 3/9/2008 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.
4. 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.
5. The complainant examined himself in support of his case and also examined other independent witnesses; whereas the accused examined himself in his defence.
6. The defence case is of denial as is evident from the statement of the accused recorded under section 313 CrPC and also the evidence of the accused. The accused has admitted to the issuance of the said cheque in question, but has stated that the said cheque was issued as a security and that he took only a loan of Rs.20,000/- which was paid by him; hence there is no existing liability.
7. I have heard the learned counsels for both the parties.

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8. 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 for insufficient funds in the account of the accused?
 - (3) Whether the accused received the demand notice issued by the complainant regarding the dishonor of the 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?

9. The complainant had contended that the accused owed Rs.60,000 /- to him and in discharge of the aforesaid debt the accused gave him the cheque in question.
10. The complainant examined himself in support of his case. The complainant has stated that the accused sought for a loan from him and accordingly he advanced a loan of Rs.60,000/- to the accused. The complainant has deposed that the accused issued the cheque in question towards the discharge of his debt of Rs.60,000/-. The complainant has deposed that the accused issued cheque bearing no: 073335 dated 29/8/2008 for the discharge of his aforesaid debt. The said cheque is produced and marked as exhibit 1. The signature of the accused is identified and marked as exhibit 1(1). The complainant was cross examined by the defence and in the cross examination the complainant was suggested that the accused took

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Rs.20,000/- as loan from him and that the aforesaid cheque in question was issued as a guarantee for the aforesaid loan. The complainant has denied the above suggestion. The above suggestion clearly reveals that the defence has not disputed the factum of the issuance of the said cheque.

11. The accused has examined himself in his defence and in his evidence the accused has specifically admitted that he took the loan of Rs.20,000/- and issued the said cheque in question as a security. The above also clearly reveals that the said cheque was in fact issued by the accused.
12. Now the only dispute that remains is whether the said cheque was issued as a security and also whether the accused took Rs.20,000/- as loan.
13. The section 139 of the Negotiable Instruments Act, 1881 raised a presumption in favour of the holder of the cheque that unless contrary is proved it shall be presumed that the cheque was issued for the discharge of a legally enforceable debt or liability. In the instant case at hand the accused has admitted that he had issued the said cheque in question and also admitted as such the legal presumption that can be drawn under section 139 of the said Act is that the said cheque (exhibit 1) was issued for the discharge of a legally enforceable debt.
14. The burden now lies with the accused to prove the contrary. The accused has stated that he took a loan of Rs.20,000/- only and that he had repaid the said amount. The accused has further stated that he had issued the blank cheque as a security.
15. The accused had not produced any document to show that he took a loan of only Rs.20,000/- and not Rs.60,000/-. The accused has stated that at the time of taking the loan they had entered into a written agreement. The accused has stated that the said agreement is with the complainant. It cannot be believed that when a person enters into a written agreement he would not keep a copy of the said agreement with himself. In addition to the above the accused had contended that the agreement is lying with the complainant, but strangely enough the accused had not prayed for calling the said document from the complainant. In addition to the above the accused had not at all cross

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examined the complainant as regards the aforesaid alleged agreement; hence in view of the above discussion it is held that the accused has not taken the loan of Rs.20,000/- as alleged but has taken the loan of Rs.60,000/-, because the complainant has issued the cheque of Rs.60,000/-.

16. The learned counsel for the accused had contended that the accused gave a blank cheque as security for the loan of Rs.20,000/-. The said contention of the accused is also not sustainable and cannot be believed because it cannot be expected that a person would hand over a blank cheque after signing the same and that too for a paltry loan of Rs.20,000/-. If the accused had to issue the said cheque as security then he could very well have issued the cheque for Rs.20,000/- only by putting the figure of Rs.20,000/- but there is no explanation as to why he would hand over a blank cheque.

17. In addition to the above the complainant has examined one Shri Hemanta Kalita (PW4) and he has deposed that he was present at the time when the complainant gave the loan of Rs.60,000/- to the accused and he was also present when the accused gave the cheque in question to the complainant. The PW4 has stated that after signing the said cheque in question, the accused had handed over the cheque to him (PW4) for filling up the same and that he filled up the cheque as per the instruction of the accused and in his presence. The evidence of the PW4 is consistent with that of the PW1 and there is no material on record to doubt or disbelieve the said witness.

18. In view of the above it is held that the accused issued the said cheque in question for the discharge of his debt of Rs.60,000/-.

19. DECISION: The cheque was issued for the discharge of a legally enforceable debt.

POINT FOR DETERMINATION NO.2: Whether the cheque was dishonoured for insufficient funds in the account of the accused?

20. The complainant has deposed that the said cheque was presented to his bank for encashment, but the same was dishonoured because of insufficient funds in the account of the accused. The complainant has

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produced the cheque return memo and the same is marked as exhibit 3. The PW1 was not cross examined in this regard; as such it is held that the said cheque was dishonoured.

21. In addition to the above the complainant has examined the bank officials Shri Sanjay Kumar Boruah (PW2) and Shri Dipjyoti Boruah (PW3) who had specifically stated that the said cheque in question was dishonoured due to insufficient funds in the account of the accused to honour the said cheque. The witnesses also identified the cheque return memo.

22. In addition to the above 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 due to insufficient funds in the account of the accused.

23. DECISION: The cheque was dishonoured for insufficient funds in the account of the accused.

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

24. The complainant (PW1) has deposed that he had issued the demand notice in respect of the dishonor of the said cheque through his advocate on 3/9/2008 by registered post. The complainant has produced the said notice and the same is marked as exhibit 4. The complainant has further deposed that the said notice was received by the accused on 19/9/2008. The complainant was not cross examined by the defence in this regard; hence there is nothing on record to doubt or disbelieve him.

25. In addition to the above the accused has admitted that he received the said notice in his evidence recorded in court; as such it is held that the accused received the demand notice on 19/9/2008. The complainant had produced the acknowledgement card of the registered post by which he sent the said notice and the accused has admitted his signature thereon as exhibit 8(1).

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26. In view of the above it is held that the accused had received the demand notice.

27. DECISION: The demand notice was duly served upon the accused.

POINT FOR DETERMINATION NO.4: Whether the accused has committed the offence under section 138 of the Negotiable Instruments Act, 1881?

28. 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.

29. 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 due to insufficient funds. The cheque was issued in the instant case on 29/8/2008 and it was presented within six months for encashment. The cheque was dishonoured on 30/8/2008 as is revealed from the cheque return memo; and the demand notice was issued by the complainant on 3/9/2008, which is within 30 days from the receipt of information of dishonor.

30. The said notice was received by the accused on 19/9/2008. The complainant had thereafter instituted this complaint on 30/9/2008 which is within 15 days from the date of receipt of demand notice. The learned counsel for the accused has stated that the complaint was filed prematurely; hence the complaint is not valid and hence no cognizance could be taken.

31. The perusal of the record reveals that the complaint was filed on 30/9/2008, but the cognizance was taken by the court on 24/10/2008; hence it is seen that even though the complaint was filed prematurely, but the cognizance was taken after the lapse of 15 days from the date of receipt of the notice.

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32. The Hon'ble Supreme Court of India in a similar case of **Narsingh Das Tapadia Vs Goverdhan Das Paltani [AIR 2000 SC 2946]** under the Negotiable Instruments Act, 1881 held that the fact that the complaint was filed prematurely is of no consequence if the cognizance was taken by the court after the complaint or the cause of action has become mature.
33. In the instant case also the complaint was filed prematurely, but the cognizance was taken on 24/10/2008, which is when the cause of action matured; as such it is held that the complaint is valid.
34. 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.
35. **DECISION:** The accused has committed the offence under section 138 of the Negotiable Instruments Act, 1881.
36. 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.
37. 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.
38. 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 4 (four) months and further to pay compensation of Rs.1,00,000/- (one lakh)

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to the complainant as the cheque amount is Rs.60,000/- and about four years have elapsed from the date of issuance of cheque. It is further directed that the accused shall undergo simple imprisonment for another one month in default of the payment of compensation.

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

40. The case is disposed of on contest.

Given under my hand and the seal of this court on this the 31st day of August, 2012 at Guwahati.

Yusuf Azaz,
SDJM(S) II, Kamrup

APPENDIX

PROSECUTION EXHIBITS:

1) EXHIBIT 1- CHEQUE

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- 2) EXHIBIT 2- DEPOSIT SLIP
- 3) EXHIBIT 3- RETURN MEMO
- 4) EXHIBIT 4- DEMAND NOTICE
- 5) EXHIBIT 5- POSTAL RECEIPT
- 6) EXHIBIT 6- LETTER ADDRESSED TO POSTAL DEPARTMENT
- 7) EXHIBIT 7-LETTER OF POSTAL DEPARTMENT
- 8) EXHIBIT 8- ACKNOWLEDGMENT CARD
- 9) EXHIBIT 9- STATEMENT OF SAVINGS OF TAPAN DEKA
- 10) EXHIBIT 10- STATEMENT OF ACCOUNT OF BISWAJIT RAI

DEFENCE EXHIBITS

NONE

PROSECUTION WITNESSES

- 1) SHRI BISWAJIT RAI BARUAH
- 2) SHRI SANJOY KR. BORUAH
- 3) SHRI DIPJYOTI BORUAH
- 4) SHRI HEMANTA KALITA

DEFENCE WITNESSES

- 1) SHRI TAPAN DEKA

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