

IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS, BISWANATH
CHARIALI, SONITPUR

CR CASE NO: 108/ 2010

U/S 138 N. I ACT

COMPLAINANT: JYOTI PRASAD BORAH

VERSUS

ACCUSED : LAKHINARAYAN KURMI

**PRESENT : PRANAMI GOSWAMI, JMFC, BISWANATH CHARIALI,
SONITPUR**

ADVOCATE FOR THE PROSECUTION: MR. G.BORA, Learned Advocate

ADVOCATE FOR THE ACCUSED: MR. P.BORA, Learned Advocate

EVIDENCE RECORDED ON : 09/05/2012, 23/03/2015.

ARGUMENT HEARD ON : 12/5/2015

JUDGMENT DELIVERED ON :29/05/2015

JUDGMENT

1. This is a case instituted under section 138 of the Negotiable Instruments Act, 1881 alleging therein that the accused, Lakhi Narayan Kurmi 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 accused person promised to sell a plot of land to the complainant and took an amount of Rs 1,60,000/- (Rupees one lakh sixty thousand) as advance money from the complainant by executing an agreement of sale. The accused failed to sell the plot of land as upon to the Complainant and agreed to repay the aforesaid advance money to the complainant. In lieu of cash payment the accused person in order to repay the aforesaid advance money issue a cheque of RS 1,60,000 bearing No.- ` 951324' on dated 18/04/2010 of State Bank of India,

Biswanath Chariali Branch, against his account No. 11267056662 in favour of the complainant. When the complainant presented the said cheque for collection in his account in the Biswanath Chariali Branch, the same was returned unpaid on 15/07/2010 for insufficient fund.

3. The complainant thereafter issued legal notice to the accused on 26/07/2010 by registered post with acknowledgment due at the address of the accused demanding the amount of cheque, but the accused failed and neglected to pay the same; 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 as P.W 1, whereas the accused examined only himself as D.W 1.

6. The defence case is of total denial as is evident from the statement of the accused recorded as D.W 1. The accused has admitted that he took Rs 1,50,000/- from the complainant for purchasing a plot of land which he repayed entirely on 27/03/2015. The accused has alleged that the complainant took a blank signed cheque from him as security wherein he did not filled up the columns of date, amount and payee column. The accused alleged that the complainant company has misused the said cheque. However the accused has admitted his signature Ext1 (1) in the cheque in question i.e., Ext 1.

7. I have heard the learned counsels for both the parties. 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:

8. POINT FOR DETERMINATION NO.2:

The PW1 has deposed that the said cheque was presented to his bank for encashment on 18-04-2010, but the same was dishonoured and by a memorandum dated 15-07-2010 issued by the banker of the accused the complainant was informed that the said cheque could not be cleared due to insufficiency of fund in the account of the accused. The PW1 has produced the relevant memorandum dated 15/07/2010 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.

9. In addition to the above the section 146 of the Negotiable Instruments Act,1881 provides for a legal presumption that the cheque return memo shall be prima facie evidence of the fact that the cheque was dishonoured. In the instant case at hand the complainant had produced the cheque return memo (exhibit 3) as such it is held that the cheque was dishonoured for insufficiency of fund.

POINT FOR DETERMINATION NO.3:

10. The PW1 has deposed that he had issued the demand notice in respect of the dishonor of the said cheque through his advocate on 26/07/2010 by registered post with acknowledgment due card. The complainant has produced the said notice and the same is marked as exhibit 4. The P.W 1 was not cross examined by the defence in this regard, hence there is nothing on record to doubt or disbelieve him.

11. In view of the above discussion it is held that the complainant had issued the notice to the proper address of the accused and prepaid the same as such the notice is deemed to be served upon the accused.

POINT FOR DETERMINATION NO.1 and NO.4:

12. For the sake of brevity the point no. 1 and point no 4 are discussed together.

The complainant, Sri Jyoti Prasad Borah (PW1) examined himself in support of the case. The complainant had contended that the accused issued the cheque in question towards the payment of the amount which the accused took from the complainant for purchasing a plot of land for the complainant. The complainant had deposed that the accused issued cheque bearing no: 951324 dated 18/04/2010 for Rs.1,60,000/- in favour of the complainant towards the payment of the above stated amount. The complainant has produced the said cheque and the same is marked as exhibit 1. The complainant accordingly deposited the said cheque for encashment to his bank, but the same was returned unpaid by a memorandum dated 15/07/2010 as the accused did not have sufficient funds in his account to honour the said cheque. The complainant has produced the relevant memorandum and the same is marked as exhibit 3.

13. The accused in his deposition as D.W 1 has admitted that he has taken an amount of Rs 1,50,000 from the complainant for purchase a plot of land for the complainant. The accused as D.W 1 exhibited the money receipt of Rs 1,10,000 and marked it as Material Exhibit Ka and exhibit Ka(1) the signature of the accused. He also admitted that the said amount he repayed entirely to the complainant. The accused exhibited the agreement between the complainant and him as Material exhibit Kha. The accused exhibited the money receipt of Rs 1,50,000 as Material exhibit Ga and his signature on the revenue stamp as exhibit Ga (1). But merely exhibiting a document does not prove the fact. The accused did not made any endeavour to produce his wife Smti Arati Kurmi as his witness to prove the fact. Hence it is clearly proved that there is no dispute regarding the loan which the accused took from the complainant.

14. The accused also admitted that Ext 1 (1) is his signature in the cheque Ext 1 but the other column are not filled up by him in the Ext 1. It is alleged that Ext 1 was taken from him by the complainant as security for the amount. The accused has failed to produce any relevant document to show that Ext 1 was

taken as a security for the said loan. During his cross examination he has stated that he has not given any written objection to the complainant against their demand notice. The accused had cross examined the complainant but nothing material could be extracted from the cross examination of the complainant which would lead me to doubt or disbelieve the complainant. The evidence of the complainant had largely remained uncontroverted. The accused has failed to produce any evidence regarding giving of the blank cheque to the complainant. From this it is proved that the ext 1 (1) is the signature of the accused. The accused had merely denied the issuance of cheque, but has failed to produce any cogent material on record to prove the said fact. There is absolutely no material on record to suggest that the accused had not issued the cheque in question; as such it is held that the accused had issued the cheque in question.

15. From the above discussion it transpires that as the signature on the cheque Ext 1(1) is admitted to be that of the accused. The learned advocate for the accused has vehemently argued that the whole transaction started on 15/06/2006 and for the said transaction the cheque was issued on 18/04/2010 and thus the cheque is time barred and the debt is not legally enforceable. The learned advocate for the accused has also cited case laws ie., *Amulya Patowary, (2014)5 GLR 28 versus Amarendra Choudhury and Kumar Exports versus Sharma Carpets (2009) ACR 108*. I have perused both the judgments. To better appreciate the contentions of the parties, the provisions of Section 138 of the Negotiable Instruments Act are reproduced hereunder:

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 provision 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)(b) (c)....

Explanation. - For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability. At this juncture, it would also be appropriate to take note of Section 18 of the Limitation Act which inter alia reads as follows: 18. Effect of acknowledgement in writing-(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.....

16. In this case the transaction was of 15/06/2010. Through Exhibit Kha dated 29/03/2007 the accused acknowledged the debt. The cheque is of dated 18/04/2010 i.e, exceeding three years from acknowledgement i.e, Exhibit Kha. Thus the Cheque issued on 18/04/2010 is clearly outside the period of limitation. Even if we construe the cheque to mean an acknowledgement, in writing, of the debt, we find that the cheque was issued after expiry of three years from the previous acknowledgement. Our Hon'ble Gauhati High Court in the case of Amulya Patowary versus Amarendra Choudhury(supra) has stated that *in respect of a time barred debt, when the cheque in question, had been issued and when such cheque had come to be dishonored , though for insufficiency of fund , no offence could have been said to have been committed by the respondent under section 138 of the NI Act.* In Krishna Janardahan Bhat versus Dattatraya G. Hegde (2008) 4 SCC 54 it is held by the Hon'ble Apex Court that Section 139 of the NI Act only raises a presumption that the cheque has been issued for the discharge of a debt or liability and the existence of a legally recoverable debt is not a matter of presumption under the aforesaid provision of law. Considering the above discussion and in view of the judgments discussed above it is held that the cheque issued by the accused for the discharge of a debt which debt had become time barred. This debt was not a legally enforceable debt within the meaning of Section 138 NI Act and hence the accused has not committed an offence under section 138 NI Act.

17. In view of the discussions made above and the decisions reached in the foregoing points for determinations it is held that the accused has not committed offence under section 138 of the Negotiable Instruments Act,1881 and as such the accused is acquitted under section 138 of the Negotiable Instruments Act,1881.

The bail bonds shall remain in force for next six months from date of this judgment.

Given under my hand and the seal of this court on this the 29th day of May, 2015 at Guwahati.

Pranami Goswami,
JMFC, Biswanath Chariali

APPENDIX

PROSECUTION EXHIBITS:

- 1) EXHIBIT 1- Cheque No 951324
- 2) EXHIBIT 2- Deposit Slip
- 3) EXHIBIT 3 - Cheque Return Memo
- 4) EXHIBIT 4- Demand Notice
- 5) EXHIBIT 5- Registered Postal Receipt
- 6) EXHIBIT 6- Acknowledgement due card

DEFENCE EXHIBITS

- 1) EXHIBIT Ka- Money Receipt Slip
- 2) EXHIBIT Kha- Agreement dated 29/03/2007
- 3) EXHIBIT Ga- Money Receipt

PROSECUTION WITNESSES

- 1) Shri Jyoti Prasad borah

DEFENCE WITNESSES

- 1) Shri Lakhi Narayan Kurmi

P. Goswami
JMFC, Biswanath Chariali