

**IN THE COURT OF THE ADDITIONAL CHIEF JUDICIAL MAGISTRATE,**

**SONITPUR, TEZPUR**

***PRESENT***: Smti. A. Rahman, A.J.S.,

Additional Chief Judicial Magistrate, SONITPUR.

For the prosecution..... Sri P. Dhiraj Kr. Medhi, Sri. Chiranjeeb Ghosh, Advocates

For the accused person.. Sri S. K. Acharya, Sri Lakhyajyoti Saikia, Advocates

**Ref. : NI Case No. 12/14**

Sri. Keshab Baruah

-vs-

Bijit Kalita.

Mrs. Bhabani Kalita

... Accused persons

**Under section 138 r/w section 142of NI Act**

Offence explained on..... 27.07.14

Evidence recorded on .....04.10.16,06.01.17,27.01.17,

Arguments heard on ..... 08.05.19,28.05.19

Judgment delivered on ..... 28.05.19.

**JUDGEMENT**

1. The prosecution case in brief is that accused Bijit Kalita, a school teacher had acquaintance and good relationship with the complainant since long. That accused no. 2 Bhabani Kalita, the wife of Bijit Kalita, is having her own business of Poultry Farm. That both of them approached the complainant for a loan of Rs. 1,50,000/-. On being repeatedly requested by the accused persons, he lent an unsecured loan for an amount of Rs. 1,50,000/- without any interest on 10.02.13. Both the accused had promised to repay the loan amount within 6 months. That

after 6 months i.e. on 23.10.13 accused persons issued a cheque bearing no. 563828, amounting to Rs. Rs. 1,50,000/-, which on being presented on 06.01.14 at SBI, Tezpur Evening Branch, was dishonoured and communicated on 09.01.14 for insufficient fund in the account of accused. Thereafter, complainant through his advocate Sri. Chiranjib Ghosh sent statutory notice, with registered AD, on 21.01.14 as per provisions of Section 138 of NI Act. That the notice was received by the accused persons on 21.01.14 and 25.01.14 but they neither made any enquiry about the said notice nor did they make any payment and as such the case has been filed.

2. The accused persons were summoned to face the trial. On their appearance, particulars of offence u/s 138 r/w Section 142 of NI Act have been explained to them to which they pleaded not guilty and claimed to be tried.

During course of trial, the complainant side examined five witnesses, including himself and the defense side examined one witness. After closure of prosecution evidence, accused was examined U/S 313 Cr. P.C. I have heard the arguments advanced by the learned counsel of both the sides.

**POINTS FOR DETERMINATION :**

- (i) **Whether the accused persons had issued cheque being no. 563828 of RS. 1,50,000/- on 23.10.13 of SBI Bank, Tezpur Evening Branch payable to the complainant in discharge of their debt and liability to the complainant?**
- (ii) **Whether the cheque was returned to the complainant by bank due to insufficiency of fund in the account of the accused to honour the cheque?**
- (iii) **Whether the complainant had made demand for payment of the said amount of money by giving a written notice to the accused within 30 days of receipt of information by him from the bank regarding the return of the cheque as unpaid?**

- (iv) **Whether the accused had failed to make payment of the said amount of money to the complainant within 15 days of the receipt of the notice?**
- (v) **Whether the complainant is entitled to the relief/ relieves as prayed for?**

**DISCUSSION, DECISION AND REASONS THEREOF:**

3. **PW1, Sri. K. Baruah, the complainant,** had adduced evidence supporting his complaint petition. He stated that accused Bijit Kalita and Bhabani Kalita were having good relationship with him. Out of their friendly relationship they requested for a loan of Rs. 1,50,000/- from the complainant. The amount was paid by the complainant on 10.02.13 at Tezpur on condition that it will be repaid within 6 months. After 6 months accused persons issued a cheque bearing no. 563828 dated 23.10.13, the Ext-7, for an amount of Rs. 1,50,000/-. On being presented by him on 06.01.14, vide Ext-6, it got dishonoured on 09.01.14, communicated vide Return Memo, the Ext-8, for insufficient fund in the account of the accused persons. That he issued notice u/s 138 of NI Act, the Ext- 1, which was duly received by the accused persons vide Ext 4 and Ext5. But in spite of receipt of the notice, accused persons did not turn up to make the payment.

In cross-examination he stated that accused Bijit Kalita had met with an accident and being a friend he went to enquire about his well being. That accused had insisted for amicable settlement while he was bed ridden. He further stated that he had availed a loan from SBI at the time of providing money to the accused person, from where he paid the amount to the accused person.

He denied the suggestion put by defence that he had provided the loan at the rate of 10 % interest and that he forcefully retained the ATM card of the accused persons with him. That his friends Amullya Deka and Mukut Ch. Deka were present at the time of providing the money to the accused. That after 5-6 months accused had issued the cheque.

He denied the suggestion that accused had issued the cheque for security. He

further denied the suggestion that accused had not taken loan for an amount or Rs. 1,50,000/- from him rather they took a loan for an amount of Rs. 50,000/-. He further denied that at the time of providing the aforesaid amount of rupees he had retained the ATM card of the accused with him and accused had issued a blank cheque as security for return of the ATM card. He denied the suggestion that accused had never borrowed money from him.

4. **PW2, Amullya Deka and PW3 Mukut Ch. Deka** adduced evidence in support of the complainant.
5. In cross-examination Amullya Deka stated that complainant had provided loan of Rs. 1,50,000/- to the accused persons in his presence. That he does not know for what reason the transaction took place and also does not know the terms and conditions of the loan. That he does not know who had issued the cheque in question to whom and for what amount.
6. In cross-examination PW3 Mukut Kalita has also stated that the loan amount of RS. 1,50,000/- was provided by the complainant to the accused persons in his presence. He does not know the cheque amount and for what reason same was issued.
7. **PW4, Saurav Kr. Borkakoti, Chief Manager, SBI Tezpur Evening Branch**, has stated that Ext. 7, the cheque no. 563828 is a leaf of cheque book issued by their bank against account no. 30876752597, standing jointly in the name of Bhavani Kalita and Bijit Kalita. That the said cheque was issued in favour of Keshab Baruah for an amount of Rs. 1,50,000/- on 23.10.13 under signature of Bijit Kalita. He has proved the statement of account of joint account no. 30876752597 for the period of 01.10.13 to 31.12.13 as Ext. 10 wherein Ext. 10(1) – 10(10) are his signatures. He stated that at no point of time there was an amount of Rs. 1,50,000/- in the said joint account in the aforesaid period.

In cross-examination he stated that he had deposed as per record and he was not posted at Tezpur Bazar Evening Branch at the time of dishonour of the cheque in question.

8. **PW5, Smti. Rina Das, Chief Manager, Tezpur Main Branch of SBI,** has stated that account no. 30034234845 stands in the name of Keshab Baruah, maintained in SBI Tezpur Main Branch. She has proved the statement of account of Keshab Baruah for the period 30.10.13 till 6.08.14 as Ext. 11 wherein Ext. 11(1) to Ext. 11(5) are her signatures. She further stated that cheque, Ext. 7 was dishonoured on 09.01.14 vide cheque return memo, the Ext. 8 for insufficient fund in the account of accused.

In cross-examination she stated that if the cheque is of the same bank then bank usually enquire the balance in the account of drawer and in the event of sufficient balance found in the account of drawer, they used to reflect it in the statement. For the aforesaid reason deposit of cheque by the complainant is not reflected in Ext. 11. She denied the suggestion that Complainant had not deposited the cheque, the Ext. 7 in bank for encashment.

9. **DW1, Sri Uttam Kr. Koch** has stated that accused Bijit Kalita is a teacher by profession and accused Bhavani Kalita , wife of Bijit Kalita is a house wife who had a Poultry farm. That the accused persons had a physically and mentally retarded son, by birth, who due to illness died on 11.07.15. That both the accused persons had jointly taken a loan amount of Rs 50,000/- from the complainant for treatment their said son in three installments i.e. Rs 20,000/- again RS 10,000/- and finally Rs 20,000/- in cash in the first part of the year 2013. That complainant had levied interest at the rate of 10 % on the aforesaid principal amount of Rs. 50,000/-. That complainant had asked the accused for handing him over the ATM card and pin no. of their joint SB account no. 30876752597, as security. Accused finding no other alternative way at that point of time handed their ATM on good faith to the complainant as security. Thereafter, complainant used to withdraw interest amount @ 5,000/- per month by using the ATM of accused, every month. That for such illegal act of the complainant both the accused persons got scared. In the month of September 2013 accused persons asked him to accompany them to the house of complainant, accordingly he went with them. That accused then, asked the

complainant to return the ATM, to which complainant refused to return the ATM and insisted for 3 blank cheques from the accused persons for the above 3 transactions. On such demand accused had issued 3 blank cheques as security and got his ATM card back. That accused never took loan of Rs. 1,50,000/- from the complainant in the year 2013 or at any point of time.

In cross-examination he stated that he was very much present at the time of the monetary transaction in between complainant and the accused persons. He denied the suggestion put by complaint that accused had not borrowed Rs. 1,50,000/- from the complainant. He also denied the suggestion that complainant had never retained the ATM card with password from the accused persons. He further denied the suggestion that complainant never withdrew money from the account of accused by using ATM card of the accused.

He also denied the suggestion that after receipt of the Blank cheques only complainant had returned the ATM card.

10. Taking into consideration of the aforesaid evidences led by both the parties and argument advanced, let me decide the points, which are in issue.

**Point For Determination No-1**

11. In the case in hand, PW1 has stated that on 10.02.13 he had extended a loan of Rs 1,50,000/- to the accused persons in presence of witnesses Amulya Deka and Mukut Ch. Deka. For repayment of the said amount accused persons had issued cheque, vide no 563828 amounting to Rs 1,50,000/- dated 23.10.13 of SBI Bazar Evening Branch from SB account no 3087675297. The evidence of PW1 that he had extended loan of Rs 1,50,000/- to the accused persons in presence of PW2, Amulya Deka and PW 3 Mukut Ch. Deka is corroborated by the said two witnesses. PW4, official witness from SBI Bazar Evening Branch has proved that cheque in question, the Ext. 7, bearing no. 563828, was issued from joint account no. 3087675297 which stands in the name of accused Bhavani Kalita and Bijit Kalita. He has further proved that the cheque was issued in the name of complainant Keshab Baruah for an amount of Rs 1,50,000/- on 23.10.13,

by accused Bijit Kalita. PW5, chief manager, Tezpur Main Branch SBI, has proved that complainant is a customer of their bank having account no 30034234845. She further stated that cheque bearing no. 563828, the Ext.7, was deposited for clearance, in the account of complainant, which was dishonoured on 09.01.14 for insufficient fund.

12. The aforesaid evidence of PW 1, the informant and PW 4, PW 5 the official witnesses regarding issuance of cheque , the Ext7, by accused Bijit Kalita, from joint account No 3087675297 of SBI, Bazar evening Branch remained unrebutted. There was no cross examination of the official witnesses regarding the account of the accused persons maintained in SBI Bazar Evening Branch and also regarding issuance of cheque the Ext.7 by the accused Bijit Kalita. Accused Bijit Kalita, has clearly admitted to have issued the cheque, the Ext.7 although he has denied to have issued the same in discharge of any lawful debt and liability towards the complainant. Accused have also not denied of having good friendly relationship with that of the complainant.
13. While putting suggestion to the complainant and in statement recorded u/s 313 Cr.PC, accused no. 1, Bijit Kalita has taken the stand that he had not received Rs 1,50,000/- from the complainant rather he took a loan of Rs 50,000/- from the complainant and at that time complainant had obtained a blank cheque for the purpose of security.
14. Accused Smti. Bhavani Kalita has shown her ignorance regarding issuance of cheque by her husband, from their joint account.
15. The above factual matrix as projected by the accused proves the issuance of cheque by the accused Bijit Kalita in favour of the complainant.
16. That besides providing loan to the accused by the complainant is probable and believable because of the fact that both the parties were having good friendly relationship since long. In cross-examination of complainant, it had been elicited by the defence itself that at the time of illness of accused Bijit Kalita, during the pendency of this case, complainant visited the accused to enquire about his well being. Such materials available on record, shows the amiable

relation between the parties probabilizing monetary transaction, at the time of distress of one of the parties.

**17. Hon'ble Supreme Court in Rangappa v. Sri Mohan {(2010)11 SCC 441} has observed that: that**

**"... it is obligatory on the Court to raise the presumption (u/s 139) in every case where the factual basis for raising of the presumption has been established."**

18. In view of the aforesaid discussion, I am of the considered opinion that complainant has able to discharge his initial burden, to raise presumption u/s 139 of NI Act. to the effect that accused Bijit Kalita had issued the cheque in favour of complainant, in discharge of lawful debt and liability thereby shifting the onus to the accused. Now accused is supposed to rebut the presumption taken, by way preponderance of probability.

19. In the case in hand although accused Bijit Kalita, had taken the stand that he never borrowed Rs 1,50,000/- from the accused, rather he borrowed an amount of Rs 50,000/- at 10% interest from complainant, for treatment of his child and to secure the transaction, blank cheque was issued but neither of the accused had turned up to adduce evidence to substantiate their contention.

20. In suggestion put to the complainant by defence and DW-1, in his evidence has taken the plea that complainant used to withdraw Rs 5,000/- per month as interest by using the ATM card of the accused, which he retained from the accused, as security, to the monetary transaction of Rs 50,000/- and to get back the ATM card from the complainant, accused had issued a blank cheque/ cheques for the purpose of security.

21. The stand taken by the accused that complainant used to withdraw money from the joint account of the accused by use of their ATM card is not substantiated by them by producing bank statement of the period or by calling witnesses from bank to prove the withdrawal.



22. Moreover, the claim of the accused that to get back ATM card and also to secure the transaction, accused had issued blank cheque is not believable to a prudent man as because cheque and ATM card, both are instrument of monetary transaction and authorizes the holder to transact money from the account of the holder. Hence, it is hardly believable that to save themselves from unauthorized withdrawal of money by complainant, by use of ATM card of accused, and also to secure the transaction of Rs 50,000/-, which is a very meager amount , in comparison to present day economy, accused would have issued blank cheque in the name of the complainant.
23. The story put forward by DW1 in his evidence, is also not in conformity with the stand of defence, taken during cross-examination, regarding mode of payment. DW1 although has stated that loan was taken in three installments but no such stand has been taken by defence at the time of cross-examination of the complainant. That apart accused Bijit Kalita had taken plea of issuance of one blank cheque as security, whereas DW1 by going one step further has stated about issuance of three blank cheques as security by the accused.
24. Moreover , accused no. 2 Bijit Kalita in his statement u/s 313 Cr.P.C has stated that he took loan of Rs 50,000/- in 2 installments @ 20,000/- and 30,000/- and at that time he had issued a blank cheque for security purpose whereas his witness, the DW1, in his evidence on affidavit as well as in his cross examination has stated that the loan amount was paid in 3 installments @ of 20,000/- then 10,000/- and finally 20,000/- and in order to stop the complainant from withdrawing Rs 5,000/- per month, accused had issued 3 blank cheques as security.
25. **It was held by Hon'ble Supreme Court in Kumar Export vs. Sharma Carpets, (2009)2 SCC 519 that the accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However the court need not insist in every case that the accused should disprove the –existence of consideration and debt by leading direct**

**evidence because evidence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumption accused should bring on record such facts and circumstances, upon consideration of which, the court may believe the consideration and debt did not exist or their non existence was so probable that a prudent man under the circumstances of the case, act upon the plea that they did not exist.**

26. **In the case in hand accused had tried to bring some facts and circumstances**, viz – cheque was a security cheque, cheque was issued to get back the ATM card of the accused retained by complainant, complainant used to withdraw money unauthorizedly from the account of accused at the rate of Rs 5000/ per month, getting scared of the withdrawal of money accused had issued security cheque to get back the ATM card vis a vis to secure the loan of Rs 50,000/-, **through an independent witness, the DW1**. Since both the accused are husband and wife, either of them was the best person to adduce the aforesaid rebuttal evidences. **There is no material before this court to ascertain as to what prevented them to appear in the witness box and get their veracity checked.**

27. In the light of the aforesaid decisions of Hon'ble supreme court and also taking into consideration of my findings, base on materials available on case record, I am of the considered opinion that accused has failed to bring rebuttal evidence to the requisite level of preponderance of probabilities, and accordingly it is held that complainant has able to prove beyond reasonable doubt that, **the cheque was issued by the accused Bijit Kalita, in discharge of lawful debt and liability.**

**Point no 2 for determination**

28. The allegation of the complainant that the cheque was dishonoured for insufficient fund in the account of the accused is supported by PW 4 the banker of accused, who has proved the bank statement of the accused for the period of 01.01.13 to 31.01.14 as Ext. 10. He has further proved that at no point of time for the period 01.01.13 to 31.01.14, Rs 1,50,000/- was available in the joint account of the accused persons.
29. PW 5, official witness from Tezpur main branch, has proved that ext.7 presented by Keshab Baura, the complainant was returned vide Ext. 8 on 09.01.14 due to insufficient fund in the account of the drawer Bijit Kalita. She has further proved the bank statement of Keshab Baruah from 30.10.13 till 6.08.14 as Ext 11. There was no cross examination to the official witnesses on Ext. 10 and Ext. 11.
30. From Ext. 10 it reveals that from the date of issuance of the cheque on 23.10.13 till its return on 09.01.14 balance amount, in the account of the accused, was not sufficient to honour the cheque. Further, from Ext. 11, the statement of account of complainant, it reveals that the cheque amount was not deposited in the account of complainant.
31. Section 146 of NI Act provides for statutory presumption as regards the cheque return memo issued by the bank in respect of the dishonor of cheque. Hence, from the aforesaid discussion and findings arrived, it is held that the said cheque was dishonoured due to insufficient fund in the account of the accused.

**Point for determination No-3**

32. PW 1 has deposed that he had issued the demand notice the Ext. 1 in respect of dishonor of the said cheque through his advocate on 21.01.14 vide registered post after receipt of information of dishonor of cheque on 09.01.14 vide ext. 8. Complainant had produced the said notice and bank return memo which were exhibited as ext. 1 and 8 respectively. Complainant has further deposed that the said notice was received by the accused persons on 22.01.14 and 25.01.14. That in spite of receipt of notice the accused persons have not

responded the same. The postal receipts and the track consignments were exhibited as Ext. 4 and Ext. 5 respectively. The aforesaid plea taken by the complainant was not denied by the accused persons. There was no cross examination of the complainant on this count. That apart accused person in their statements u/s 313 Cr.PC have admitted to have received the demand notices. This point is accordingly decided in favour of the complainant.

**Point for determination no. 4**

33. From the decision taken in the aforesaid points it is evident that accused had failed to make payment of the said amount of money to the complainant within 15 days of the receipt of the notice.

**Point for determination no.5**

34. 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.
35. In the instant case at hand it is already held that the cheque was issued by accused Bijit Kalita from the joint account of both the accused and the said cheque was dishonoured due to insufficient funds. The cheque was issued in the instant case on 23.10.2013 and it was presented within six months for encashment. The cheque was dishonoured on 09.01.13 as is revealed from the cheque return memo; and the demand notice was issued by the complainant on 21.01.14, which is within 30 days from the receipt of information of dishonor.
36. The said notices were received by the accused on 21.01.14 and 25.01.14. The complainant had thereafter instituted this complaint on 03.03.14 which is within the statutory period as provided under section 138 of NI Act.

37. 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.
38. So far as the liabilities is concerned , it has been discussed and decided in point for determination No 1 and 2 that although the cheque was issued from joint account of both the accused persons , but it was issued under the signature of accused Bijit Kalita .
39. **Hon'ble Supreme Court in Aparna A. Shah Vs Sheth Developers Pvt. Ltd. and Another , in criminal appeal No- 813 of 2013 has held that a joint account holder can't be prosecuted in a cheque bounce case unless the cheque has been signed by each and every person of such account.** Situated thus accused Bhabani Kalita, can't be prosecuted and made liable for commission of offence u/s 138 of N.I Act.
40. In view of the legal position and also in terms of decisions arrived in the issues in hand , it is held that the accused Bijit Kalita has committed offence under section 138 of the Negotiable Instruments Act,1881.
41. **DECISION: Accused Bijit Kalita has committed the offence under section138 of the Negotiable Instruments Act, 1881 and another accused Bhabani Kalita is acquitted from the offence u/s 138 of NI Act.**
42. In view of the discussions made above and the decisions reached in the foregoing points for determinations it is held that the accused Bijit Kalita has committed offence under section 138 of the Negotiable Instruments Act, 1881 and as such he is convicted under section 138 of the Negotiable Instruments Act, 1881.
43. 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.

44. Heard the accused Bijit Kalita on the point of proposed sentence, to which he stated that he is a teacher by profession and having his family solely dependent on him and as such he may be viewed leniently by way of imposing fine.
45. Considering the nature of the offence and the other attending facts and circumstances of this case, convicted accused Bijit Kalita is sentenced to pay fine of Rs.2,00,000/- ( two lakhs) which is inclusive of the cheque amount of Rs. 1,50,000/- and a lump sum amount of interest as compensation. The entire amount is to be paid to the complainant as compensation. It is further directed that the accused shall undergo simple imprisonment for one month in default of the payment of compensation.
46. The case is disposed of on contest.
47. Signed, sealed and delivered in the open Court on this 28<sup>th</sup> day of May, 2019 at Sonitpur.

**(Smt. A. Rahman)**

**Addl. Chief Judicial Magistrate,**

**Sonitpur :: Tezpur**

**APPENDIX**

**WITNESSES FOR THE PROSECUTION :**

PW1, Sri. K. Baruah

PW2, Amullya Deka

PW3, Mukut Ch. Deka

PW4, Saurav Kr. Borkakoti

PW5, Smti. Rina Das

**WITNESSES FOR THE DEFENCE :**

DW1, Sri. Uttam Kr. Koch

**DOCUMENTS EXHIBITTED :**

Ext.1.... Notice u/s 138 of NI Act.

Ext-2 & Ext- 3- Postal Receipts

Ext-4 & Ext-5.... Postal tracking delivery reports

Ext. 6- Deposit slip

Ext.7- Cheque in the name of Keshab Baruah

Ext-8- Cheque return memo

Ext-9 Statement of account of Bhabani Kalita

Ext-10-Statement of joint account

Ext-11-Statement of account of Keshab Baruah

**(Smt. A. Rahman)**

**Addl. Chief Judicial Magistrate,**

**Sonitpur :: Tezpur**

**ORDER**

**28.05.19**

Accused is present.

Today is fixed for Judgment.

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 pay fine of Rs.1,00,000/- ( one lakh) to the complainant which is inclusive of the cheque amount of Rs. 80,000/- and a lump sum amount of interest as compensation. The entire amount is to be paid to the complainant as compensation. It is further directed that the accused shall undergo simple imprisonment for one month in default of the payment of compensation.

The case is disposed of on contest.

Judgment is prepared on separate sheets and is kept here with the record.

**(Smt. A. Rahman)**

**Addl. Chief Judicial Magistrate,**

**Sonitpur :: Tezpur**



