

**IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS,
BONGAIGAON.**

PRESENT: SYEDA FARIDA AFZAL ZINNAT, AJS

N.I (C.R) CASE NO: 99/2013

SRIRAM TRANSPORT FINANCE CO. LTD.

VERSUS

DULAL KUMAR SAHA

U/S 138 Negotiable Instruments Act, 1881

FOR THE COMPLAINANT: MR. M. RAHMAN, MR. S. SAHA

FOR THE DEFENCE: MR. P. SHARMA

EVIDENCE RECORDED ON:

ARGUMENTS HEARD ON:

JUDGMENT DELIVERED ON: 3/12/2014

JUDGMENT

1. Sriram Transport Finance Co. Ltd., represented by its Branch Manager being the authorized signatory has sued Sri Dulal Saha U/S 138, Negotiable Instruments Act, 1881, hereinafter referred to as N.I. Act, for the dishonour of a cheque drawn by him in favour of the complainant company.

2. The facts and circumstances as narrated in the complaint petition is that the complainant is a Public Limited company carrying on the business of leasing and financing of vehicles and has authorized the Branch Manager to institute and pursue the proceeding. The accused was provided financial assistance for purchasing a TATA LPT 1109 FBT, manufactured by TATA, 2007 model bearing registration Number AS-18-A-4264 on agreed terms and conditions entered into by both parties by way of a loan-cum-hypothecation agreement bearing number BONGN 0109160001. The accused was supposed to remit the entire loan amount together with interest to the complainant in 35 instalments. But the accused was irregular in payment and after several approaches and official correspondence the accused issued a cheque bearing number 536348 dated 26/6/2013 for an amount of Rs. 5, 03, 319/- (Rupees Five Lakhs Three Thousands and Three Hundred Nineteen) only in favour of the company. The complainant deposited the cheque at Axis Bank, Bongaigaon Branch, for collection on 28/6/2013 but the State Bank of India, Bongaigaon dishonoured the said cheque due to insufficiency of fund on 29/6/2013. Thereafter, the complainant issued notice to the accused on 15/7/2013 informing him about the dishonour of cheque and demanding payment within 15 days of receiving the notice but the accused failed to pay the amount.
3. Upon receiving the statement on affidavit and prima facie case having been found against the accused Sri Dulal Kumar Saha, cognizance was taken and process was issued in pursuance whereof, the accused appeared and the particulars of offence u/s 138 NI Act was explained to the accused, to which he pleaded not guilty and claimed to be tried.
4. During trial, the complainant examined three witnesses while the defence adduced none. On closure of the prosecution evidence, the accused was examined u/s 313 Cr.P.C .It is

pertinent to mention here that the defence plea as emerged from the statement recorded u/s 313 Cr.P.C and also from the cross examination is that the accused did not draw the cheque in favour of the complainant, he gave five numbers of signed cheques at the time of the agreement. However, on the trial being terminated, the arguments advanced by learned counsel for both the sides were heard at length.

5. POINT FOR DETERMINATION:

Whether the accused towards his liability to the complainant, issued a cheque bearing number 536348 dated 26/6/2013, amounting to Rs. 5,03,319/- (Rupees Five Lakhs Three Thousands and Three Hundred Nineteen) only in favour of the complainant which was dishonoured due to Insufficient fund and thereby the accused had committed an offence u/s 138 NI Act?

DISCUSSION, DECISION AND REASONS THEREOF:

6. Learned counsel for the accused has argued that the complaint petition U/s 138 Negotiable Instrument Act, 1881 is not maintainable as the same is filed by the Branch Manager without proper authorization by the company. According to the learned defence counsel Mr. P. Sharma, the power of Attorney has been executed in favour of the Senior Product Manager and not the Branch Manager and so the complaint is not maintainable. He has relied on a judgment of **Hon'ble Madras High Court reported in [2011] 0 CrLJ 3680 (Shakthi Finance Limited represented by its General Manager R.K. Parameswaram vs. K.Selvaraj)**. In this case the Hon'ble Madras High Court had dealt in a situation where the purpose of authorization was not explained before the Courts by way of producing any document. This is not the situation we are

dealing at present in this case. Here the complainant has produced the Power of Attorney (Exhibit 1) which goes to show that the Sriram Transport Finance Company Ltd., through its Company Secretary Mr. V.M Achwal, executed the power of Attorney in favour of Mr. Rajesh Roy, the Senior Product Executive.

7. Section [142](#) of the Negotiable Instruments Act provides that a complaint under Section [138](#) can be made by the payee or the holder in due course of the said cheque. In the case of **Vishwa Mitter v. O.P.Podder** reported in **1984CriLJ1**, the Hon'ble Supreme Court held that it is clear that anyone can set the criminal law in motion by filing a complaint of facts constituting an offence before a Magistrate entitled to take cognizance. It has been held that no court can decline to take cognizance on the sole ground that the complainant was not competent to file the complaint. *It has been held that if any special statute prescribes offences and makes any special provision for taking cognizance of such offences under the statute, then the complainant requesting the Magistrate to take cognizance of the offence must satisfy the eligibility criterion prescribed by the Statute. In the present case, the only eligibility criteria prescribed by Section [142](#) is that the complaint must be by the payee or the holder in due course. This criterion is satisfied as the complaint is in the name and on behalf of the appellant company.*
8. Section [142\(a\)](#) of the Act requires that no Court shall take cognizance of any offence punishable under Section [138](#) except upon a *complaint made in writing* by the payee. Thus the two requirements are that (a) the complaint should be made in writing (in contradistinction from an oral complaint); and (b) the complainant should be the payee (or the holder in due course, where the payee has endorsed the cheque in favour of someone else). The payee, as noticed above, **is Sriram Transport Finance Company Ltd.** Once

the complaint is in the name of the `payee' and is in writing, the requirements of Section [142](#) are fulfilled. Who should represent the payee where the payee is a company, or how the payee should be represented where payee is a sole proprietary concern, is not a matter that is governed by Section [142](#), but by the general law.

9. In Shankar Finance and Investments versus State of Andhra Pradesh and Others 2008(10) SCALE654, Hon'ble Justice R.V.Raveendran observed as follows: 'The attorney holder is the agent of the grantor. When the grantor authorizes the Attorney Holder to initiate legal proceedings and the attorney holder accordingly initiates legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder, and not by the attorney holder in his personal capacity. Therefore where the payee is a proprietary concern, the complaint can be filed: (i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the `payee'; (ii) The proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and (iii) the proprietor or the proprietary concern represented by the attorney- holder under a power of attorney executed by the sole proprietor". **It follows that the complaint petition filed by the power of Attorney Holder of the complainant firm is maintainable.**

10. Let us now look into the provision of section 138 Negotiable Instrument Act, 1881. It provides that **"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 mount arranged to be paid from that account by an**

agreement made with that bank, such person shall be deemed to have committed an offence”.

11. The proviso appended to section 138 Negotiable Instrument Act, 1881, provides for the following conditions to be fulfilled to hold that such person as referred to above has committed an offence under that section:

(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.

12. Section 139 of the NI Act makes it mandatory for the court, unless contrary is proved, to presume that the holder of the cheque holds the same for the discharge, in whole or in part, of the debt or other liability of the drawer. In the case of **Manik Lodh Vs State of Assam, 2007(3) GLT 207**, the Hon'ble Gauhati High Court held that the presumption u/s 139 of the NI Act is a presumption of law as distinguished from a presumption of fact and the said presumption of law cannot be discharged by offering an explanation alone. What must be proved is that the explanation is true.

It is always to be borne in mind that the presumptions are always rebuttable. **The only thing the defence is required to do is to bring on record either by cross examining the**

witnesses or by adducing defence evidence, materials to rebut the said presumption.

13. The complainant has examined the Branch Manager, State Bank of India as PW2. He stated that the cheque i.e. Exhibit 3 was received by SBI, Bongaigaon Branch from Axis Bank, Bongaigaon Branch for clearance and the same was returned due to insufficiency of fund on 29/6/2013. He identified the return memo as Exhibit 4. He identified the computer generated statement of accounts dated 29/6/2013 of Account Number 20082562261 maintained by the accused Dulal Kumar Saha as Exhibit 7 which shows that the balance in the account of Dulal Kumar Saha on 29/6/2013 was Rs. 118/- only. He also identified his signatures as Exhibit 7 (1) to 7(3). He further exhibited the Cheque referred and returned register as Exhibit 8 wherein Exhibit 8(1) is the relevant entry pertaining to return of cheque number 536348. Although learned defence counsel cross examined the PW2 regarding how many pages of cheques there should be and the date of issuing the Passbook but such questions are irrelevant and learned defence counsel could not show how those facts bear any connection to the fact of dishonour of cheque.
14. Further PW3 testified to the effect that Exhibit 3 was presented in Axis Bank, Bongaigaon Branch on 28/6/2013 which was sent to S.B.I, Bongaigaon Branch for collection and was returned due to insufficiency of fund with return memo i.e. Exhibit 4. He exhibited the statement of accounts for 29/6/2013 as Exhibit 10 where Exhibit 10(1) is the relevant entry pertaining to dishonour of Exhibit 3. He also identified the signatures of the Branch Manager, Axis Bank, Bongaigaon Branch as Exhibit 10 (2), 10(3) and 10(4). PW3 exhibited the Outward Clearing Return Register of Axis Bank, Bongaigaon Branch as Exhibit 11 and the statement of 29/6/2013 as Exhibit 11 (1).

15. Section 146 of the N.I Act provides that court shall in respect of every proceeding under that Chapter, on production of Bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved. Defence neither tried to rebut the evidence adduced by PW2 nor disproved the same. Hence it is found that the cheque was dishonoured due to insufficiency of fund.
16. In the instant case, the accused has not denied the cheque in question and his signature therein. He has pleaded that the cheque was given to the complainant at the time of the agreement and that it was a blank cheque but signed.
17. From the above facts, it is found that admittedly accused had issued the cheque in favour of the complainant and the complainant is the holder of the said cheque i.e. cheque number 536348 dated 26/6/2013 for Rs. 5, 03,319/- only. Under the said admitted facts the presumption under section 139 and 118 (a) of Negotiable Instruments Act, 1881 is raised in favour of the complainant that the holder of the cheque has received the cheque for discharge, in whole or in part, of a debt or any other liability and that the cheque was executed for consideration.

The accused has to rebut the presumption. **As discussed above in paragraph 12 the defence has to have an explanation and also has to prove that the explanation is true. The defence can do so by bringing on record either by cross examining the witnesses or by adducing defence evidence, materials to rebut the said presumption.**

18. Let us now look further into the evidence on record in order to find out whether the accused could rebut the said presumption raised against him. PW1 has reiterated the facts stated in the complaint petition while adducing evidence in chief on affidavit. PW1 exhibited the following documents:

- i. Exhibit 1: Power of Attorney
 - ii. Exhibit 1(1) to 1(6): Signatures of Company Secretary V.M. Achwal.
 - iii. Exhibit 2: Loan-cum-Hypothecation Agreement
 - iv. Exhibit 2(1) to 2(19): Signatures of the accused.
 - v. Exhibit 2(20) to 2(36): Signature of authorized signatory, Sriram Transport Finance Co. Ltd.
 - vi. Exhibit 3: Cheque dated 26/6/2013 issued by accused Dulal Kumar Saha.
 - vii. Exhibit 3(1): Signature of accused Dulal Kumar Saha
 - viii. Exhibit 4: Cheque Return Memo
 - ix. Exhibit 5: Demand Notice
 - x. Exhibit 5(1) and 5(2): Signature of advocate T.K.Bhattacharya
 - xi. Exhibit 6: Postal Receipt
19. During cross examination PW1 has stated that no competent authority has compared the power of attorney, i.e. Exhibit 1 with the original. In this regard I would like to point out to an observation made in M/S Haryana State Co-Op Supply and Marketing Federation Ltd. versus M/S Jayam Textiles and Anr. Reported in 2014 STPL (Web) 255 SC, relied on by the complainant side- “..... because procedural defects and irregularities, which are curable, should not be allowed to defeat substantive rights or to cause injustice.”
20. During cross examination PW1 denied that the company had obtained five blank post dated cheques from the accused as per clause 1.7 of the agreement. However the PW1 admitted that the company had disbursed the loan after fulfilling all the

terms and conditions mentioned in the agreement. He also stated that the company maintains statements of accounts of all transactions and that the statement of account in this case has not been submitted. This clearly raises doubt. The complainant stated that the accused was tardy in payment. He has not submitted the statement of accounts to show how much of the loan was already paid. Perusal of Exhibit 2 shows that in Clause 1.7 there is a provision for post dated cheques.

21. In **(2013)3 SCC 86 Vijay vs. Laxman and Anr** it was observed by the Hon'ble Supreme Court that *when a cheque is issued by a person who has signed on the cheque and the complainant reasonably discharges the burden that the cheque had been issued towards a lawful payment, it is for the accused to discharge the burden under Section 118 and 139 of the N.I. Act that the cheque had not been issued towards discharge of a legal debt but was issued by way of security or any other reason on account of some business transaction or was obtained unlawfully. The purpose of the N.I. Act is clearly to provide a speedy remedy to curb and to keep check on the economic offence of duping or cheating a person to whom a cheque is issued towards discharge of a debt and if the complainant reasonably discharges the burden that the payment was towards a lawful debt, it is not open for the accused/signatory of the cheque to set up a defence that although the cheque had been signed by him, which had bounced, the same would not constitute an offence.*

22. In the instant case the complainant has not submitted any statement of accounts of the loan account of the accused. It would be appropriate at this juncture of our discussion to point out to a decision of the Hon'ble Supreme Court reported in **(2009)2 SCC 513 (Kumar Exports vs Sharma Carpets)** wherein it was observed as follows: **When a presumption is**

rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over. The accused in a trial under Section [138](#) of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. 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 non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the 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 presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or

liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant.

23. Here in this case Defence has not adduced any evidence. But through cross examination of PW1, defence has shed light on a very important fact, i.e. the statements of accounts which are maintained by the company has not been submitted in Court to prove that indeed the amount written in the cheque is due to the company. The existence of clause 1.7 in Exhibit 2 regarding obtaining Post dated cheques from the Borrower and the admission of PW1 that the company has disbursed the loan after observing all the terms and conditions of the agreement shifts the burden back to the complainant to prove with just and cogent documentary evidence that the debt or liability amounting to Rs. 5, 03,319/- really existed.

24. The above facts and circumstances brought on record during the cross examination of PW1 disproves the presumption raised in favour of the complainant that the cheque was issued towards the discharge of a debt.

25. Learned counsel for the complainant has relied on a number of decisions on the point of Presumption that is to be drawn in favour of the complainant u/s 139 N.I Act, which are:

- i. Hiten P. Dalal VS Bratindranath Banerjee (A.I.R 2001 SC 3897)
- ii. A.I.R 1964 SC 575
- iii. K.M Veena VS Muniappan
- iv. 2006 ALL MR (Cri) 2931
- v. A. Brahmananda Reddy VS The State of A.P

26. I have gone through all these decisions. But the presumption raised u/s139 N.I Act is a rebuttable presumption of law and as discussed above the accused has been able to disprove the presumption raised in favour of the complainant and created a reasonable doubt as whether the cheque was issued for the amount of Rs. 5, 03, 319/- only. In the absence of the statements of accounts maintained by the complainant company and the admission of the PW1 that all the terms and conditions of Exhibit 2 were observed by the company before disbursing the loan to the accused, the doubt is raised that the cheque was issued not for the discharge of a liability but as security. As discussed above in **(2013)3 SCC 86 Vijay vs. Laxman and Anr**, the accused has discharged the burden under Section 118 and 139 of the N.I. Act that the cheque had not been issued towards discharge of a legal debt but was issued by way of security or any other reason on account of some business transaction or was obtained unlawfully.

27. The learned counsel for the complainant has relied on the following judgments regarding the point of issuance of the cheque towards the discharge of any debt or liability:

- i. I.C.D.S Limited VS. Bina Shabeer and another
- ii. Lillykutty VS Lawrence 2003 (2)DCR 610
- iii. Shatish Jayantilal Shah VS Pankaj Mashruwala and Anr 1996 Cr.L.J 3099
- iv. Joseph Jose VS. Bapy PuthuvalPuravidom Poothoppu and Anr 2002 Cr.L.J 4392
- v. Bhashkaran Chandrasekharan VS. V. Radhakrishnan 1998 Cr.L.J 3223

28. In I.C.D.S Limited VS. Bina Shabeer and another dated 12/8/2002 the Hon'ble Supreme Court considered the

question of maintainability of a proceeding u/s 138 N.I Act, 1881, vis-a-vis a guarantor. In that judgment the three words :where any cheque” was interpreted on the context of cheque issued by a guarantor. The same explanation cannot be applied to security cheques.

29. Bhashkaran Chandrasekhran, Lillykutty VS Lawrence and Shatish Jayantilal Shah VS Pankaj Mashruwala and Anr 1996 Cr.L.J 3099 dealt with the question of filling up of amount and date in the cheque by different persons. These judgments have no bearing in the present case because the accused has not challenged the handwriting in the cheques.

30. In Joseph Jose supra the Hon’ble Kerala High Court held that for establishing the requirements in s/138 N.I Act, there is no burden on the part of the complainant to prove before Court the entire details of the transaction resulting issuance of cheque. But the facts and circumstances of that case is not similar to that of the case at hand before us. In that case the accused in his examination U/S 313 Cr.P.C and through the cross examination of the complainant could not rebut the presumption raised in favour of the complainant. But in the present case, as discussed above in points No. 19 to 23 the accused has, through the cross examination of the complainant disproved the presumption and shifted the burden of proof which the complainant could not discharge by submitting and proving the statement of accounts.

31. Taking into account the discussions made hereinabove in its entirety I am of the considered opinion that defence has been able to rebut the presumption raised in favour of the complainant U/S 139 of N.I. Act, that the cheque was given for the discharge, in whole or in part, of a debt or other liability. Therefore, although the cheque was dishonoured due to insufficiency of fund the same does not constitute an offence

as defined in section 138 N.I. Act. Hence, the accused stands acquitted.

ORDER

The accused Dulal Kumar Saha is hereby acquitted of the offence u/s 138 N.I Act, 1881. His bail bond shall remain in force for a period of six months. Given under my hand and seal of this court on the 3rd day of December/2014.

SYEDA FARIDA AFZAL ZINNAT
JMFC, BONGAIGAON

APPENDIX:

LIST OF WITNESSES:

1. PW1: Sri Rajesh Roy
2. PW2: Sujit Kumar Dey, Chief Manager, SBI, Bongaigaon Branch
3. PW3: Riku Ali Ahmed, Deputy Manager, Axis Bank, Bongaigaon Branch.
 - i. Exhibit 1: Power of Attorney
 - ii. Exhibit 1(1) to 1(6): Signatures of Company Secretary V.M. Achwal.
 - iii. Exhibit 2: Loan-cum-Hypothecation Agreement
 - iv. Exhibit 2(1) to 2(19): Signatures of the accused.
 - v. Exhibit 2(20) to 2(36): Signature of authorized signatory, Sriram Transport Finance Co. Ltd.

- vi. Exhibit 3: Cheque dated 26/6/2013 issued by accused Dulal Kumar Saha.
- vii. Exhibit 3(1): Signature of accused Dulal Kumar Saha
- viii. Exhibit 4: Cheque Return Memo
- ix. Exhibit 5: Demand Notice
- x. Exhibit 5(1) and 5(2): Signature of advocate T.K.Bhattacharya
- xi. Exhibit 6: Postal Receipt
- xii. Exhibit 7: Computer generated statement of account of account number 20082562261 of the accused Dulal Kumar Saha
- xiii. Exhibit 7(1) to 7(3): Signatures of PW2
- xiv. Exhibit 8: Cheque referred and returned register of SBI, Bongaigaon Branch
- xv. Exhibit 8(1): relevant entry pertaining to Exhibit 3
- xvi. Exhibit 9: Authority letter given to PW3 by the Branch Manager, Axis Bank, Bongaigaon Branch
- xvii. Exhibit 9(1): Signature of Sumit Gupta, Branch Mnager, Axis Bank, Bongaigaon Branch
- xviii. Exhibit 10: Statement of account dated 29/6/2013
- xix. Exhibit 10(1): relevant entry pertaining to Exhibit 3
- xx. Exhibit 10(2) to 10(4): Signatures of Branch Manager, Axis Bank, Bongaigaon Branch
- xxi. Exhibit 11: Outward Clearing Return Register of Axis Bank, Bongaigaon Branch
- xxii. Exhibit 11(1): statement of 29/6/2013

