

HIGH COURT OF TRIPURA
_A_G_A_R_T_A_L_A_
Crl. L.P No.03 of 2023 in Crl. A No.03 of 2023

Sri Apu Ghosh

..... Petitioner(s)

V E R S U S

Sri Bhusan Das and another

.....Respondent(s)

For Petitioner(s) : Mr. S. Lodh, Advocate.

For Respondent(s) : Mr. S. Ghosh, Addl. P.P.,
Mr. K. Datta, Advocate.

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH

_O_R_D_E_R_
11/05/2023

Heard learned counsel for the parties.

[2] Petitioner is the complainant who seeks special leave to appeal in terms of Section 378(4) of Cr.P.C. against the judgment of acquittal dated 19.01.2023 passed by the learned Judicial Magistrate 1st Class, Udaipur, Gomati Tripura in Case No. CR (NI) 56 of 2019. The accused/respondent No.1 has been acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (*NI Act, 1881 for short*).

[3] Case of the complainant is that the accused was in friendly relationship with him and an amount of Rs.4,50,000/- was borrowed from the petitioner on 29.03.2019 at hotel Maharaja in presence of one Uttam Sutradhar and another Pritam Datta of Rajarbag, Udaipur. Again on

03.04.2019 at about 5 pm the accused further borrowed Rs.7,50,000/- at the same hotel Maharaja, Rajarbag in presence of one Sanjit Debnath and Ratan Chakraborty for the purposes of his business with a condition that he would return the borrowed money before Durga Puja 2019. On being approached by the complainant, the accused issued a cheque bearing No. 012853 dated 23.9.2019 amounting to Rs.11,06,000/- only to the complainant drawn on Tripura State Co-operative Bank Limited, Udaipur Branch vide Account No.000211010018047 in presence of Sanjit Debnath, Raju Dey and Biswajit Saha, out of his total debt of Rs.12,00,000/- to discharge his debts and liabilities. On the very same day the complainant deposited the cheque in his account NO.0462010237253 lying with United Bank of India, Udaipur Branch for his encashment. However, on 24.09.2019, the Branch Manager, United Bank of India, Udaipur Branch returned the cheque as unpaid stating *inter alia* that due to 'funds insufficient' the cheque had been dishonoured. Thereafter, on 03.10.2019 through his advocate petitioner served a demand notice by registered post asking payment of the amount of cheque of Rs.11,06,000/- within the stipulated period of 15 days from the receipt of the said notice failing which legal action would be taken against him. On 12.10.2019 the accused had received the registered notice dated 03.10.2019 but no payments were made till the filing of the complaint. Therefore, he alleged that the accused has dishonestly cheated and deceived the complainant knowing fully well that there were

insufficient fund in his bank account. His actions construed an offence punishable under Section 138 of NI Act, 1881 and also under Section 420 of IPC.

[4] The accused appeared before the court on summons and substance of accusation were framed under Section 251 of Cr.P.C against him under Section 138 of NI Act which were explained to him in Bengali to which he pleaded not guilty and claimed to be tried. During trial, complainant examined five witnesses including himself and exhibited the following documents:

- “1. Cheque vide No. 012853 dated 23.09.2019 of amount Rs.11,06,000/-(Rupees eleven lac six thousand) only issued by the accused in favour of P.W.1, was marked as Exhibit-1;
2. Counter part of the Deposit Slip dated 23.09.2019 submitted to United Bank of India, Udaipur Branch was marked as Exhibit 2;
3. Bank Return Memo dated 24.09.2019 issued by the United Bank of India, Udaipur Branch;
4. Counter part of the Postal Receipt dated 03.10.2019 was marked as Exhibit 3;
5. Copy of Legal Notice dated 03.10.2019 (in 03 pages), which was marked as Exhibit 4;
6. Acknowledgement Card dated 12.10.2019 with regard to Notice served upon you was marked as Exhibit 5.
7. Copy of Registration Certificate of vehicle bearing Registration No. TR-03-1389 (OM Bus) in the name of CW1, was marked as Exhibit 6 in comparison with original;
8. Copy of Notification vide No. F.8(5)-PWD(C)/2012/dated 4th November, 2015 enlisting the name of contractors including name of PW1, was marked as Exhibit 7, Exhibit 7/1 (in 03 pages) in comparison with the original;
9. Copy of Trade Licence issued by the Udaipur Municipal Council, in the name of partner of PW1 namely Shri Ratan Chakraborty, was marked as Exhibit 8 in comparison with the original;
10. Partnership agreement between PW1 and 02(two) others, was marked as Exhibit 9;

11. Return Memo bearing the seal of Punjab National Bank previously United Bank of India was marked as Exhibit 10.”

[5] The complainant adduced further Examination-in-chief through affidavit. The accused was examined under Section 313 of Cr.P.C after conclusion of the prosecution evidence to which he denied the allegations and expressed his willingness to adduce evidence. He adduced two witnesses, himself and another Sri Swapan Jamatia DW2. He also exhibited Bank slip dated 01.11.2018 Exhibit D/1; (ii) counter copy of the information in writing dated 31.10.2018 given by DW1 and counter signed by Officer-in-charge, R.K Pur Police Station which was marked without objection as Exhibit D/2. The defense took the plea that a blank cheque bearing No.012853 drawn on Tripura State Co-operative Bank Limited, Udaipur Branch containing his signature was missing from beneath his pillow and on the same date the complainant had visited his house. Regarding that, he had made a GD entry at R.K Pur Police Station and submitted a prayer before the Bank authority for cancellation of his missing cheque. After 10 months and 22 days of the incidence the complainant lodged the instant case falsely implicating him of misusing the lost cheque.

[6] The learned trial Court after conclusion of evidence and after hearing the parties framed points for determination *inter alia* (i) whether the accused issued the cheque in question vide No.012853 dated

23.09.2019 for Rs.11,06,000/- against his account with Tripura State Cooperative Bank Limited in favour of the complainant in discharge of any legal debt or liability, either in whole or part and if so; (ii) whether the said cheque was presented in the bank within the period of three months or the period of the validity and that the cheque was returned dishonoured by bank on the ground of insufficiency of fund or otherwise? (iii) whether the complainant issued demand notice to the accused within 30 days from the date of dishonour of the cheque and if so, (iv) whether the accused failed to make payment of the said cheque amount within 15 days from the receipt of said demand notice.

[7] Learned trial Court proceeded to determine these issues. Having dealt with the ingredients of the provisions of Section 118(a) and 139 of the NI Act, and certain decisions on the subject such as *K. Bhaskaran v Sankaran Vaidhyan Balan* reported in (1999) 7 SCC 510, *Hiten P. Dalal v Bratindranath Banerjee* reported in (2001) 6 SCC 16; *Tapan Kumar Saha v Balai Chandra Das* reported in (2022) 1 TLR 537 and *Rangappa vs Mohan* reported in (2010) 11 SCC 441 learned trial Court came to a finding that the complainant had on 01.11.2018 submitted an application intimating the matter regarding missing of his cheque noticed on the afternoon of 30.10.2018, to the Officer-in-charge, R.K Pur PS which was entered in G.D vide No.17 dated 01.11.2018. On the same day he submitted a prayer to the Branch Manager, Tripura State

Cooperative Bank Limited, Udaipur Branch for cancellation of the said missing cheque and deposited Rs.71/- as cancellation charges. DW1 had identified a counter copy of the information in writing dated 31.10.2018 given by him and counter signed by the Officer-in-charge, R.K Pur PS exhibited as D/2. The complainant also had taken a plea that another matter relating dishonour of cheque by the same accused for an amount of Rs.90,000/- was settled through Lok Adalat and Rs.70,000/- was paid to the complainant. DW2 Shri Swapan Jamatia, Branch Manager of Tripura State Cooperative Bank Limited, Udaipur Branch had deposed as per the bank records that one copy of information which was entered into the G.D of R.K. Pur PS was submitted stating that blank cheque No.012853 against the account of the informant with Tripura State Cooperative Bank Limited, Udaipur Branch bearing his signature was lost. Based on such information, the payment of the said cheque was stopped on 01.11.2018 and accordingly a Bank slip of the same date was issued identified as Exhibit D/1.

[8] During cross-examination DW2 also stated that on 24.09.2019 the Bank had received the cheque forwarded by United Bank of India, Udaipur (now, PNB, Udaipur) deposited by the complainant for encashment but was returned unpaid stating that the cheque had been dishonoured on the ground of insufficiency of fund on the account of Sri Bhusan Das i.e. the accused. However, in reply to the question of the

court, the official of Tripura State Cooperative Bank, Udaipur Branch informed the United Bank of India about the dishonour of cheque on the ground of insufficiency of fund. DW2 also replied that it must have been done by mistake because encashment of the said cheque was already stopped by the Bank.

[9] The learned trial Court on appreciation of the evidence came to the conclusion that the defense set up by the accused and the statements of DW1 and DW2 together with the documentary evidences show that the accused had stopped the payment of cheque on 01.11.2018 much prior to the alleged date of execution of the cheque on 23.09.2019 on the ground that the cheque was allegedly missing. Since the accused is not required to prove his case beyond reasonable doubt on the touchstone of preponderance of probabilities, he had been able to rebut the presumption attached to a negotiable instrument in terms of Section 139 of NI Act. The complainant had also not produced the Bank statement or annual turnover or books of account which would lead to the inference that any transaction actually took place between the complainant and the accused. In this regard, learned trial Court relied upon a decision of this Court in case of *Tapan Kr. Saha vs Balai Chandra Das* (*supra*). Based on these findings and other observations the learned trial Court acquitted the accused. The principal point No.1 was decided in negative.

[10] Learned counsel for the petitioner submits that the appreciation of evidence on part of the learned trial Court suffers from error which can be corrected in appeal where the evidence adduced by the parties can be re-appreciated in entirety. It is submitted that the learned trial Court committed an error in arriving at a finding that the accused had successfully rebutted the presumption under Section 139 of the NI Act as not only had he made a GD entry before the R.K Pur Police Station but also informed the Bank of the missing cheque on 01.11.2018. The learned trial Court also committed an error on the issue of testing the *bona fides* of the complainant on the touchstone of his financial capacity despite sufficient evidence on record to the contrary. He submitted that the petitioner has therefore made out an arguable case and good grounds to seek leave to appeal. Therefore, permission may be granted to the petitioner to prefer an appeal against the impugned judgment of acquittal.

[11] The accused-respondent has filed a counter-affidavit. Learned counsel for the respondent submits that the GD entry was exhibited by the learned trial Court without any objection by the complainant side. Moreover, he had adduced the evidence of Bank Manager of the drawee cheque wherein he specifically stated that the Bank authority had received a charge of Rs.71/- for stop payment of the cheque mentioned in the complaint petition and accordingly he had stopped the payment. However, the Bank Manager of Tripura State Co-

operative Bank reiterated that for the reasons not known to him the cheque was dishonoured for insufficiency of fund in the Bank Account of the respondent No.1. The respondent further states that the complainant was not an income tax payee and as such it was not possible for him to lend such big amount of Rs.12 lakh. It renders a probable case of the defense that the cheque was not issued for legally enforceable debt and as such the presumption under Section 139 of the NI Act was successfully rebutted. That is why the learned trial Court acquitted the accused.

[12] I have considered the submissions of learned counsel for the parties and have also taken note of the case of the complainant and the defense and the materials adduced during trial. I have also gone through the judgment of acquittal rendered by the learned trial Court. Without venturing to make any comment on the merits of the case of the parties, at this stage, as it may cause prejudice to either of them, this Court on consideration of the materials adduced during trial and the observations and findings of the learned trial Court, is of the opinion that the issues raised by the petitioner relate to appreciation of evidence by the trial Court which if permitted can be examined in entirety by the appellate Court on granting leave to appeal. The issue revolves around the appreciation of evidence whether the accused has successfully rebutted the presumption raised under Section 139 of the NI Act in the given facts and circumstances of the case. The rebuttal of presumption being

The appeal [Crl. A No.03 of 2023] is admitted for hearing.

Call for the lower court records from the concerned court. Office to prepare the Paper Book. Counsel for the parties may obtain the Paper Book.

सत्यमेव जयते

Dipesh