

GAHC010001912017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Rev.P./2/2018

ARATI DEKA
W/O- SRI RABINDRA MAJUMDAR, R/O- VILL- NAMDONGA, P.S- NALBARI,
DIST- NALBARI, ASSAM

VERSUS

THE STATE OF ASSAM
PP, ASSAM

2:PRANAB JYOTI BARMAN
S/O- DR. PROMOD CH. BARMAN
R/O- RUKMINI NAGAR
H NO. 31
P.S- DISPUR
GUWAHATI-06
DIST- KAMRUP(M)
ASSAM

Advocate for the Petitioner : MR. S BARMAN

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI**

JUDGEMENT AND ORDER(CAV)

Date : 23-08-2023

Heard Mr. A.K. Bhuyan, learned counsel for the respondent No.2.
None appears for the petitioner.

2. The petitioner has filed an application under Section 397/401 Cr.P.C. against the impugned judgment and order dated 06.11.2017 passed by the learned Addl. Sessions Judge No. 4(FTC), Kamrup(M), Guwahati in Criminal Appeal No. 305/2016, whereby, affirming the judgment and order dated 18.10.2016 in C.R. Case No. 2268/2016 passed by the learned S.D.J.M.(S) II, Kamrup(M), Guwahati whereby, the petitioner was convicted under Section 138 of Negotiable Instrument Act, 1881(herein after referred as N.I. Act) and sentenced to undergo simple imprisonment for a period of 10(ten) months and to pay compensation of Rs. 5,50,000/-, in default of payment of compensation, shall undergo simple imprisonment for another 4(four) months.

3. The respondent No. 2 as complainant filed a complaint case bearing No. C.R. Case No. 53/2014 in the court of Chief Judicial Magistrate, Nalbari and subsequently, it was transferred to the court of S.D.J.M.(S) 2, Kamrup(M), Guwahati and renumbered as C.R. Case No. 2268/2016.

4. The present petitioner took a personal loan from the complainant

to the tune of Rs.3,32,000/- in the month of November, 2013. After receiving the said amount, the petitioner handed over three filled up post dated cheques to the complainant amounting to Rs.1,00,000/- bearing No. 084434 dated 22.07.2014, cheque No. 084435 dated 22.07.2014 amounting to Rs.1,00,000/- and cheque No. 084436 dated 22.07.2014 amounting to Rs.1,32,000/-.

5. According to the complainant/respondent No.2 as per instruction of the petitioner, the complainant has deposited the aforesaid cheques before the United Bank of India, Ambikagiri Nagar Branch but those cheques have been dishonoured due to 'insufficient funds'. Subsequently, a legal notice was sent to the petitioner demanding payment of the cheque amount i.e. Rs.3,32,000/- within 15 days from the date of receipt of the legal notice. Though, the notice was served to the petitioner, she failed to pay outstanding cheque amount within 15 days of the receipt of the legal notice and thereafter, the complaint case was filed against the petitioner.

6. The learned S.D.J.M.(S), II, Kamrup(M), after appreciation of evidence of the witnesses, convicted the accused/petitioner as aforesaid. On appeal, the judgment of the learned trial court was affirmed by the first appellate court.

7. Learned counsel for the petitioner has submitted that the petitioner is a Headmaster in Tantra Sankara Prathamick Vidyalaya. She is about 53 years of age, having various ailments. It is further submitted that the petitioner had issued three number of blank

cheques in favour of the respondent No. 2, though, she had not any legally undue liability towards respondent No. 2. The respondent No. 2 in his cross-examination before the learned trial court stated that he had taken the said cheques as security for obtaining loan.

8. It is also the submissions of learned counsel for the petitioner that the judgment of conviction passed by the trial court and confirmed by the first appellant court is contrary to the evidence and material placed on record and hence, the same deserves to be set aside. The learned counsel further contends that the trial court has not provided sufficient reasoning to appreciate the evidence led by the petitioner and the documents produced by her.

9. It is further submitted that the trial court has committed an error in not following necessary procedure and mandatory requirement for fulfillment of the offence under Section 138(b) of N.I. Act which is service of legal notice to accused. It is also stated that despite the knowledge that the petitioner is not residing in the address mentioned in the complaint petition, the complainant has sent a legal notice to the address of the petitioner at Nalbari, subsequently, she shifted her residence in her permanent address as such, the petitioner did not receive any notice and the notice was not properly served to her as a result of which, she failed to reply the notice. The learned counsel for the petitioner also contends that unless requirement under proviso (a) to (c) of Section 138 of N.I. Act is complied with the offence under Section 138 of N.I. Act is not made out.

10. In support of his submissions learned counsel for the petitioner has placed reliance on the following case laws –

(i) 2023 CrLJ 311 [Rathish Babu Unnikrishnan vs. The State(Govt. of NCT of Delhi) and Ors.]

(ii) 2023(1)ICC 686 (Jain P. Jose vs. Santosh & Ors.)

11. Per contra, the learned counsel for the respondent No. 2 has argued that the judgment passed by the learned trial court and the first appellate court are based on material evidence both oral and documentary and hence, the same does not call for any interference by this Court.

12. It is further contended that the legal notice to accused has been served on the address of accused/petitioner in which she was residing at the relevant time as such, there is due compliance of the requirement of Section 138 of N.I. Act. It is further contended that the accused/petitioner has admitted the loan transaction and she has also admitted the issuance of cheques and her signature on the cheques. Therefore, when loan transaction and issuance of cheques were admitted, the presumption under Section 139 of N.I. Act will come into play and it is for the accused/petitioner to rebut the presumption under Section 139 N.I. Act and it is for the accused/petitioner to rebut the same and prove to the contrary that no such cheques were issued or non existence of any legally recoverable debt.

13. On these submissions, the learned counsel for the respondent No. 2 seeks to dismiss the revision petition and confirm the order passed by both the courts.

14. Having heard the leaned counsel for the parties, the points that arise for consideration before this Court are:

- (i) Whether the necessary mandatory requirement under Section 138 N.I. Act is fulfilled?
- (ii) Whether there is any illegality or perversity in the impugned orders passed by the learned trial court and the first appellate court?

15. To answer these points, it is required to look into the complaint petition. It reveals that the accused/petitioner had issued three number of cheques in favour of the complainant which were presented to the bank and the cheques were dishonoured for the reason 'Insufficient Funds'. Thereafter, legal notice was served to the petitioner. As demanded amount was not paid, complaint came to be filed by the complainant.

16. Proviso(a) to (c) of Section 138 of NI Act reads as under:

(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.

17. Proviso (b) to Section 138 of N.I. Act states that 'payee' or the holder in due course shall make a demand for payment of the said amount by giving a notice in writing to the drawer of the cheque. Therefore, in the present case, payee/complainant has made a demand to the last address of the accused by sending a legal notice through registered post which was returned as delivered as per Ext.3. Therefore, there is compliance of proviso (a) to (c) of Section 138 of N.I. Act in the present case.

18. After the complaint is filed there is a presumption as per Section 139 of N.I. Act in favour of the complainant. Section 139 of N.I. Act reads as under;

"It shall be presumed, unless the contrary is proved, that the holder of

a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

19. Bare reading of the above provisions would show that the holder of the cheque received the cheque for discharge in whole or in part of any debt or other liability, unless, the contrary is proved by the accused. There is no doubt that the presumption stated above, is a rebuttable presumption. For the accused to prove to the contrary and rebut the presumption the petitioner has to lead evidence or produce material documents something which should be more than mere denial and mere suggestions.

20. In the instant case, though the petitioner has adduced two witnesses but she has not been able to rebut the presumption by way of adducing such evidence or by placing any documentary evidence. She has merely stated that she had issued three blank cheques in favour of the petitioner though she had no any legally enforceable debt or liability. But it is not clear from the evidence of her evidence and her witnesses why she had issued such blank cheques though she had no any legally enforceable debt or liability towards respondent No. 2.

21. Admittedly, the petitioner has not produced any material before the learned trial court or the first appellate court to show that she has repaid the loan amount. Therefore, when petitioner herself admits the loan transaction, admits the issuance of cheque, admits the signature on the cheques, under such circumstance, the presumption laid

under Section 139 of N.I. Act, is further fortified in favour of the complainant as there is no rebuttal evidence. The trial court has rightfully convicted the accused/petitioner for the aforesaid offence. So also, the first appellate court has re-evaluated and examined the entire materials on record and affirmed the order passed by the learned trial court. The mandatory requirements of proviso of Section 138 of N.I. Act has been properly complied with in this case. Accordingly, this Court finds no illegality or perversity in the impugned orders passed by both the courts. Hence, there is no ground to interfere with the judgment of conviction passed by the learned trial court and affirmed by the first appellate court.

22. Coming to the question of sentence, it appears from the record that the accused/petitioner was convicted by the learned trial court and sentenced to simple imprisonment for 10(ten) months. The alternative averment in the revision petition was that considering the age and health condition of the petitioner, instead of imposing the sentence of imprisonment, the sentence of fine may be imposed. The learned counsel for the respondent No.2/complainant has opposed on the prayer of the petitioner by stating that the sentence of imprisonment and the compensation imposed by the learned trial court as well as affirmed by the learned first appellate court is commensurate with the gravity of the offence committed by the petitioner.

23. In view of the above and considering the fact that the petitioner

is a Headmaster of a school, aged about 57/58 years, the ends of justice will be met if the petitioner is sentenced to pay a fine of Rs.1,00,000/- in addition to the amount of compensation imposed by the learned trial court i.e. Rs.5,50,000/-. Accordingly, the revision petition is dismissed with aforesaid modification.

24. Send back the LCR.

JUDGE

Comparing Assistant