

GAHC010004522009



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

Case No. : Crl.Rev.P./140/2009

SHRI RAM BABU SHAW
S/O LT. DHANPAL SHAW, R/O M G ROAD OPPOSITE SALES TAX OFFICE
NEAR A S T C BUS STAND, BONGAIGAON TOWN, P.S. and DIST.
BONGAIGAON, ASSAM.

VERSUS

THE STATE OF ASSAM and ANR

2:SHRI BHUWAL PRASAD GUPTA
S/O LT. MAHABIR PRASAD GUPTA
R/O BRPL MAIN GATE
DHALIGAON
UNDER P.O. and P.S. DHALIGAON
DIST. CHIRANG
BTAD ASSAM

Advocate for the Petitioner : A. Tewari. Id. Amicus Curiae

Advocate for the Respondent : Ms. A. mBegum, Id. Addl.P.P.
Mr. N. Islam, Id. Adv.

:::BEFORE:::
HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 19.07.2023
Date of Judgment & Order : 25.08.2023

JUDGMENT & ORDER (CAV)

Heard Mr. A. Tewari, learned Amicus Curiae appearing on behalf of the petitioner. Also heard Ms. A. Begum, learned Additional Public Prosecutor for the State respondent No. 1 and Mr. S. Islam, learned counsel appearing on behalf of Mr. N. Islam, learned counsel for the respondent No.2.

2. This is an application filed under Sections 401 *read with* Section 397 of the Code of Criminal Procedure, 1973 challenging the Judgment and Order dated 29.11.2008 passed by the learned Additional Sessions Judge (FTC), Bongaigaon, in Criminal Appeal No.08(I)/2007 by upholding the Judgment and order dated 17.01.2007 passed by the learned Sub-Divisional Judicial Magistrate (S) (in short SDJM), Bongaigaon in C.R. Case No.123/2005 by convicting and sentencing the accused petitioner under Section 138 of Negotiable Instrument Act (in short N.I. Act) to pay a fine of Rs.1,05,000/- (Rupees One Lac and five thousand) only and in default rigorous imprisonment for 1(one) year and to release the said amount in favour of the complainant/present respondent as a compensation as provided under Section 357 of Cr.P.C.

3. The brief facts leading to the filing of the present petition is that;

3.1. The accused petitioner is a businessman, who supplies fish in the Bongaigaon Daily Market. The respondent No.2 as a complainant filed a case against the petitioner under Section 138 of N.I. Act alleging *inter alia* that on

10.12.2004, the petitioner borrowed a sum of Rs.1,00,000/- (Rupees One lakh) only from the complainant for the purpose of his business with a promise to return the loan amount within 2(two) months, in presence of the witness's by executing a handnote in favour of the complainant. On 23.02.2005 in discharge of his debt, the petitioner handed over a Cheque for a sum of Rs.1,00,000/- (Rupees One lakh) only vide Cheque No. AS/90-039609 from the S.B.I Account No.11595/48 maintained with the UCO, Bank, Bongaigaon Branch to the complainant. Thereafter, the aforesaid Cheque was presented for collection through his S.B.I. Account No.36 maintained with the Indian Overseas Bank, Bongaigaon, but, the same was dishonored due to insufficient funds in the account of the petitioner. Thereafter, the complainant served an Advocate Notice on 01.03.2005 to the petitioner and requesting him to make arrangement for payment of the Cheque amount. In reply the petitioner denied the issuance of any check to the complainant on 08.03.2005.

3.2. On 04.06.2005, the complainant lodged a complaint before the Court of learned Chief Judicial Magistrate, Bongaigoan and same was transferred to the Court of learned SDJM (S), Bongaigoan for Trial. Accordingly, the learned SDJM (S), Bongaigoan took cognizance under Section 406/418/420 of IPC *read with* Section 138 of N.I. Act. The prosecution had examined as many as 4 (four) witnesses in respect of the case, and also the statement of the accused petitioner has been recorded under Section 313 of Cr.P.C.

3.3. After considering the evidence on record and hearing the arguments forwarded by the learned Advocates of both sides, the learned SDJM (S), Bongaigoan passed the impugned Judgment and Order dated 17.01.2007 by convicting the accused petitioner under Section 138 of N.I. Act and also by

directing him to pay a fine of Rs. 1,05,000/-(Rupees one lakh and five thousand) only in default of R.I. for 1(one) year as well as to release the complainant's compensation as provided under Section 357 of Cr.P.C.

4. On being highly aggrieved and dissatisfied with the aforesaid Judgment and Order dated 17.01.2007 passed by the learned SDJM (S), Bongaigaon, the accused petitioner had preferred an appeal before the learned Additional Sessions Judge (FTC), Bongaigaon in CrI.Appl.No.08(I)/2007. However, the learned Trial Court had dismissed the appeal vide impugned Judgment and Order dated 29.11.2008 by upholding the Judgment and Order dated 17.01.2007 passed in CR. Case No.123/2005.

5. Being highly aggrieved and dissatisfied with the order passed by the learned Additional Sessions Judge (FTC), Bongaigaon in CrI.Appl.No.08(I)/2007, the present petitioner preferred this instant Criminal Revision Petition on the following grounds:-

5.1. The learned Trial Courts have not considered the materials on record properly and, as such the impugned Judgments and Orders dated 17.01.2007 and 29.11.2008, which were passed by the learned Additional Sessions Judge (FTC) and learned SDJM (S), Bongaigaon respectively are liable to be set aside.

5.2. The learned Trial Courts have committed grave mistake of law in interpreting the Exhibit-2 in as much as the handnote issued by the present petitioner in favour of the complainant/respondent. The learned Trial Courts failed to consider the evidence of the complainant/respondent, wherein, he admitted that the Exhibit-2 was written by himself and not by the petitioner. On the basis of the said hand written note the complainant/respondent, had given

the loan to the petitioner, but, the learned Trial Courts failed to notice that ordinarily in terms of Income Tax Act any advance amount taken by way of loan of more than Rs.20,000/-(Rupees twenty thousand) only had to be made by an account payee Cheque only and, as such, the impugned Judgments and Orders are liable to be set aside.

5.3. The complainant/respondent forcibly took the signature of the accused/petitioner's on some blank papers, thereafter, by pasting two revenue stamps on the said blank paper and converted the same into a handnote (Exhibit-2) and also took signature in a blank Cheque (Exhibit-1) by threatening the accused petitioner with dire consequences and he himself put an amount of Rs.1,00,000/-(Rupees one lakh) only in the said handnote as well as Cheque in question, which has not been considered by the learned Trial Courts while passing the Judgments and orders.

6. Accordingly, it is submitted by the learned counsel for the petitioner, Mr. A. Tewari that the learned SDJM (S) as well as the learned Additional Sessions Judge (FTC), Bongaigaon had committed grave error and mistake, who passed the Judgments and Orders, without considering the vital aspect of the cases. He also submitted that the respondent/complainant never had any business transaction with the petitioner. Neither he is a professional money lender nor he gave any loan to any person and but, the learned Trial Courts passed the orders of conviction without considering the ingredients under Section 138 of N.I. Act.

7. The learned counsel for the petitioner further submitted that in the Cheque (Exhibit-1) in question the name of the present respondent was reflected though earlier it was written as "self", which creates a doubt of genuineness of the Cheque, and the said Cheque was also alleged to have been

issued by the petitioner. Further, the signatures' below the two Revenue Stamps (Exhibit-2) is legally an invalid document and it cannot be considered as money receipt. Also, the witness's in the handnote, one Raju was also arrested in connection with kidnapping case, which was lodged by the present petitioner. Thus, only for previous enmity the case under Section 138 of N.I. Act has been instituted.

8. He further, submitted that the money receipt is also torn from top and easily be seen that it is a torned paper and thus, it can be held that money receipt is a manufactured document which contains the signature below the revenue stamps is also not legally a valid document. More so, from the Exhibit-3, it is seen that the date of issuance was overlapped and it can easily be seen through bare eyes that the date 24.09.2005 is made as 24.02.2005, which is stated to be issued by the UCO bank. He further submitted that from the evidence of PWs, it is seen that the petitioner and the respondent had no business transaction and thus, the respondent failed to proof any legally enforceable debt to attract Section 138 of N.I. Act. However, the learned Trial Courts did not considered all this facts and passed the Judgments and Orders only on the basis of the evidence of PWs and thus, came to an erroneous findings, which is liable to be set aside and quash.

9. The learned SDJM (S), Bongaigaon, also narrated a story of the petitioner in paragraph-10 of the Judgment and Order, wherein, it has been stated that the accused petitioner denied the issuance of Cheque in question (Exhibit-1) in favour of the complainant/respondent. It is also stated in the said paragraph that on 10.01.2005 at around 9.30 P.M., the accused petitioner was kidnapped from his residence by some miscreants and those miscreants also obtained his

signature on some blank stamp paper and on blank Cheque forcibly and to that effect the accused/petitioner lodged an FIR (Exhibit-4). But, the learned SDJM (S) and the learned Additional Sessions Judge (FTC), Bongaigaon had passed the Judgments and Orders without considering those aspects of the case and convicted the present petitioner under Section 138 of N.I. Act. Hence, it is liable to be set aside and quash.

10. In this context, the learned counsel for the respondent has submitted that to give any loan, it is not required to have any business relation between the parties. The FIR was lodged by the accused petitioner with some false and concocted allegations leveled against the present respondent. Further, the Bank Officer also exhibited the Exhibit-3 i.e. the returning memo of Bank and the signature of the petitioner on the Cheque in question as well as in the money receipt. However, the same were not disputed by the petitioner. Thus, the respondent/complainant is able to prove the case beyond reasonable doubt and thus, the learned SDJM (S) as well as the learned Additional Sessions Judge (FTC), Bongaigaon had committed no error or mistake while passing the Judgments and orders and hence, interference of this Court is not at all necessary here in this case.

11. The learned SDJM (S) had rightly passed the order of conviction against the present petitioner, which was rightly upheld by the learned Additional Sessions Judge (FTC), Bongaigaon. Further, it is submitted that if any signature was obtained forcibly from the petitioner on a blank paper as well as in the blank Cheque, the petitioner could have informed the Bank to stop the payment, or could have presented the Cheque before the Bank authority. From the evidence of PW-3, it is very much clear that the accused petitioner never

approached before the Bank authority to stop the payment of the Cheque amount, which was presented before the said Bank nor the signature made in the money receipt as well as the Cheque in question was disputed by the present petitioner. Thus, there is no necessity to make any interference in the Judgments and Orders passed by the learned Trial Courts.

12. After hearing the submissions made by the learned Advocates of both sides, I have perused the Judgments and Orders passed by the learned Trial Courts and also perused the documents relied upon by the parties. It is a fact that the Check was presented before the UCO Bank and after receiving the Return Memo of Cheque, the notice was accordingly issued and the case was filed within a stipulated period of time. From the Bank Return Memo, it is seen that the Cheque was dishonored due to insufficient fund maintained by the accused petitioner for which it was sent back through Return Memo. It is the case of the petitioner that he was kidnapped on 10.01.2005 while he came to the house of one Lalbabu by one Sibnath Chahu, Newaj Raju and Niranjana Das and he was kept in one house of a Bodo person, where, they forcibly took his signature on a blank Cheque and on a blank paper. It is also stated that he filed an FIR alleging the respondent along with some others kidnapped him, but, the question arises as to why he remained silent and did not approach the Bank authority to stop the payment of the Cheque.

13. The statement of the petitioner was recorded under Section 313 of Cr.P.C. where, he stated that one Indu Basumatary was also present when he was kidnapped by the present respondent along with some others. But, he did not discharge the burden by adducing evidence of said Indu Basumatary, who was present at the time of alleged incident. Also, he did not approach before the

Bank authority to stop the payment and he did not file any complaint case in regards to the allegation that the respondent took his signature forcibly on a blank paper and in the Cheque in question. The learned Additional Sessions Judge, Bongaigaon relied on the decision rendered by the **Allahabad High Court reported in 2007 Cri.L. J NOC 520**, wherein, it was decided that if the signature of the accused is admitted and notice of demand issued and duly acknowledged, the complainant succeeded in proving of the ingredients of the offence punishable under Section 138 of N.I. Act.

14. Section 138 of N.I. Act is extracted below, which read as under:-

"Section 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 provisions of this Act, be punished with imprisonment for ¹⁹ [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) 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, ²⁰ [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.

Explanation.— For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.]”

15. Here in the instant case, it is also seen that the Cheque was presented in the Bank, which was maintained by the accused petitioner for a payment of a Cheque amount and the said Cheque in question was dishonored due to insufficient funds and in the same time it is also seen that the signature on the Cheque in question as well as the money receipt are also not disputed by the petitioner, though, it is submitted by the petitioner that the signature were obtained forcibly by the respondent along with some others by kidnapping him and confining in the house of one Bodo man. But, to substantiate the plea, the petitioner did not adduced any evidence nor he adduced the evidence of the said Bodo person, who was present in the house where he was confined by the respondent along with some others and took his signature forcibly on the Cheque as well on the money receipt.

16. Section 139 of N.I. Act is presumed in favour of the holder, which read as under:-

“139. Presumption in favour of holder.—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.”

17. Thus, the presumption is rebuttable under Section 139 of N.I. Act, and the person who issued the check is at liberty to prove the same. In this regard the ratio laid down by the ***Hon’ble supreme Court in the case of M/S. Mandvi***

Co.-Op Bank Ltd. vs. Nimesh B. Thakore, reported in AIR 2010 SC 1402, wherein, it has been held that “ [Section 139](#) created a presumption (rebuttable) that the cheque was issued by the drawer in discharge of any debt or liability owed by him to its holder. [Section 140](#) provided that it would not be open to the accused in a prosecution under [section 138](#) to take the plea that when he issued the cheque he had no reason to believe that on presentation, the cheque may be dishonoured for the reasons stated in that section. [Section 141](#) dealt with offences by companies. [Section 142](#) laid down the conditions subject to which alone the court would take cognizance of any offence punishable under [section 138](#) of the Act”.

18. But, here in the instant case, though the plea is taken by the accused petitioner while recording his statement under Section 313 of Cr.P.C., that he was kidnapped and his signature were obtained in a blank Cheque as well as on a blank paper by the present respondent along with some other, but, he did not make any effort to adduce the evidence to rebut the presumption under Section 139 of N.I. Act.

19. From the above discussions, it is seen that the prosecution was able to establish issuance of Cheque in favour of the respondent and it is also proved that the Cheque was dishonored due to insufficient funds and to substantiate the same the respondent also adduced the evidence of the bank official as PW-3 and in the same time it is also seen that the signature of Cheque as well as in the money receipt are also not disputed. The accused petitioner has admitted his signature in both the vital documents and no effort has been made by the petitioner to disprove the case of the respondent by producing any rebuttal evidence to rebut the presumption under Section 139 of the N.I. Act.

20. Further it is very surprising that though it is pleaded by the petitioner under Section 313 of Cr.P.C. that he was kidnapped and confined in a room by the respondent along with some others and threatened him and forcibly took his signature on some blank paper as well as on a blank Cheque. But, in the FIR he did not mentioned about obtaining is signature on any blank Cheque, though it is stated that the signature were obtained in stamp paper of Rs. 10, but, it is no were mentioned that his signature were also obtained in a blank Cheque. Thus, it creates doubt in the version of the petitioner that the signature of the accused petitioner was obtained only by the threatening him or applying force.

21. So considering above facts and circumstance, I find that the Judgment and Order dated 29.11.2008 passed the learned Additional Sessions Judge (FTC), Bongaigaon, in Criminal Appeal No.08(I)/2007 by upholding the Judgment and order dated 17.01.2007 passed by the learned Sub-Divisional Judicial Magistrate (S) (in short SDJM), Bongaigaon in C.R. Case No.123/2005 have committed no error while the passing the orders and accordingly I find that there is no reasons to make any interference in the Judgments and Orders passed by the learned Trial Courts. Thus, this instant revision petition is devoid of merit and the same stands dismissed.

22. Send back the LCR. No order as to cost.

JUDGE

Comparing Assistant