

GAHC010043432020



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

Case No. : Crl.Pet./170/2020

SMTI. CHIRASREE PAUL
W/O SRI JOYDEV PAUL, R/O RAILWAY QUARTER NO. P/403(A), LUMDING,
P.O. AND P.S.-LUMDING, DIST-HOJAI, ASSAM, PIN-782447

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:CHANDAN ACHARJEE
S/O LATE NEPAL CHANDRA ACHARJEE
VILL-MISTRY PATTY (NEAR BRAHMA MANDIR)
P.O. AND P.S.-LUMDING
DIST-HOJAI
ASSAM
PIN-78244

Advocate for the Petitioner : MR. S B LASKAR

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA

Date of Hearing : 06.06.2023
Date of Judgment : 30.06.2023

Judgment and Order (CAV)

Heard Mr. S.B. Laskar, learned counsel for the petitioner. Also heard Ms. S.H. Borah, learned Additional Public Prosecutor, Assam, for the respondent no.1 and Mr. N.K. Kalita, learned counsel for the respondent no.2.

2. This Criminal petition is preferred by the petitioner assailing the judgement and order dated 27.03.2019 passed by the Court of Sub Divisional Judicial Magistrate (SDJM), Sankardevnagar, Hojai, in C.R. Case No.573/2013 registered under Section 138 Negotiable Instruments Act (in short NI Act), 1881 as well as the judgment and order dated 19.12.2019 passed by the Court of Additional District and Sessions Judge, Fast Track Court, Sankardevnagar, Hojai, in Criminal Appeal No.08/2019. By the judgment and order dated 27.03.2019 passed in C.R. Case No.573/2013 registered under Section 138 of the NI Act, 1881 by the Court of SDJM, Hojai, Sankardev Nagar, the accused petitioner was convicted for an offence under Section 138 of the NI Act, 1881 and sentenced to pay compensation of Rs.5,00,000/- (Rupees Five Lakhs) to the complainant and, in default to undergo simple imprisonment for a term of 6 (six) months. The said judgment was upheld by the Court of Additional District and Sessions Judge, Fast Tract Court, Sankardevnagar, Hojai, by the judgment and order dated 19.12.2019 passed in Criminal Appeal No.08/2019.

3. The brief facts essential for adjudication of this matter are as under:

(i) The complaint dated 03.12.2013 was filed by the respondent no.2 against the petitioner, bearing C.R. No.579/2013 under Section 138 of the NI Act, 1881 as filed before the Court of SDJM, Sankardevnagar, Hojai. It was alleged in the complaint that the petitioner had approached the complainant

requesting for a loan for the purpose of marriage in her family. The accused petitioner borrowed an amount of Rs.3,00,000/- (Rupees three lakhs) from the complainant/respondent no.2 with a promise to return the amount within a year with a lump-sum interest. The respondent no.2 accordingly lent the said amount of Rs.3,00,000/- (Rupees three lakhs) in 3 (three) equal instalments. Subsequently, the accused petitioner did not return the loan, as promised, in spite of several request made by the complainant/respondent no.2. Eventually, the accused petitioner issued and handed over three cheques on 05.09.2013 amounting to Rs.99,000/- (Rupees ninety nine thousand) each. The said cheques were returned as unpaid by the State Bank of India (SBI) on 22.10.2013 for the reason "Insufficiency of Funds". Thereafter, a demand notice was served by the complainant/respondent no.2 on the petitioner through a registered post with A/D on 29.10.2013. On receipt of the said demand notice, the petitioner sent a reply by admitting those cheques and the signatures on it. However, no payment was made for dishonour of the cheques. It was alleged by the complainant/respondent no.2 that the petitioner had wilfully ditched him by issuing the said cheques and committed offences under Section 138 of the NI Act, 1881 and under Section 420 of the IPC.

(ii) Upon receipt of the summons, the petitioner appeared before the Court and pleaded not guilty and as such, the case proceeded for trial. The prosecution examined 2 (two) witnesses and the accused petitioner examined herself as DW.1. The Trial Court upon completion of the hearing by the judgment and order dated 27.03.2019 allowed the complaint petition convicting the petitioner under Section 138 NI Act, 1881 and sentenced her to pay a compensation of Rs.5,00,000/- (Rupees Five Lakhs) to the

respondent no.2 and in default of payment of such compensation, to undergo simple imprisonment for a term of 6 (six) months. The petitioner being aggrieved by the said judgment and order preferred an appeal before the Court of Additional District and Sessions Judge, Fast Tract Court, Sankardev Nagar, Hojai. The said appeal was also dismissed by the judgment and order dated 19.12.2019 whereby, the judgment dated 27.03.2019 passed by the Court of SDJM, Sankardev Nagar, Hojai was upheld.

4. Accordingly, being aggrieved, the petitioner has filed the present Criminal Petition on the following grounds:

(i) For that the handwriting in the cheques in respect of the amount, words and figures, and the signatures were not identical. More so, the dates were written with different ink. Had the accused petitioner issued the cheques for making any repayment of loan, she would not have used different pen and ink, and the said discrepancies abundantly proves claim of the accused petitioner that the P.W.1/Complainant took three signed blank cheques from her in the pretext of advancing loan, but no such loan was advanced.

(ii) For that as per the evidence on record, there was no eye witness and documentary evidence of the fact of borrowing of loan and delivery of cheques by the accused petitioner to the P.W.1, although the P.W.1 stated in his cross that he has a documentary evidence of the loan, but he could not produce any such document.

(iii) For that the learned Court below did not appreciate the fact that, had the accused petitioner borrowed

any money from the complainant, she would have issued only one cheque for repayment of loan instead of giving three cheques of equal amount on the same date.

(iv) For that evidence of P.W.1 makes it apparent that he could not specifically state the time & date of the issuance of cheques by the accused petitioner; and as such, the case was filed by with a mala fide intention.

(v) For that as per deposit slips i.e. Ext.4, 5 & 6, the presentation of the cheques were shown to be on 21.10.2013; but, as per counter sign, it appears to be on 05.09.2013; and, these facts were admitted by the P.W.2, the Deputy Manager of the State Bank of India, Lumding Branch in his cross-examination.

(vi) For that, the date of the presentation of cheques for encashment and the date that appears on the cheques were not tallied; the fact which was admitted by the P.W.1 i.e. Deputy Manager of State Bank of India, Lumding Branch in his cross-examination.

(vii) For that the Courts below did appreciate the evidence of P.W.2 in proper perspective. The Exhibit-1 to 11 does not prove insufficiency of funds in the absence of relevant balance statements of the Bank Account of the accused petitioner.

5. On the said grounds prayers are made for setting aside and quashing the impugned judgment and order dated 27.03.2019 passed by the Court of Sub Divisional Judicial Magistrate (SDJM), Sankardevnagar, Hojai, in C.R. Case

No.573/2013 registered under Section 138 NI Act, 1881, as well as the judgment and order dated 19.12.2019 passed by the Court of Additional District and Sessions Judge, Fast Track Court, Sankardevnagar, Hojai, in Criminal Appeal No.08/2019.

6. Learned counsel for the petitioner submits that there was no "*legally enforceable debt*" between the petitioner and the respondent no.2 so as to bring in and invoke the provisions of Section 138 NI Act, 1881. Learned counsel for the petitioner submits that the actual fact of the matter is that the petitioner is an employee of the railway and she wanted a loan from the SBI Bank because of personal reasons. The complainant/respondent no.2 was known to the petitioner and he had a good rapport with the said Bank officials. The private respondent no.2 assured the petitioner that he will procure the loan for the petitioner and the petitioner is required to furnish the some amount for security reason. Relying upon the suggestions made by the respondent no.2, the petitioner issued 3 (three) cheques of Rs.99,000/- (Rupees ninety nine thousand) each on her belief that these cheques will be used as security for the loan to be procured by the respondent no.2 on her behalf. It is submitted by the learned counsel for the petitioner in the said cheques issued no name was put in by the petitioner. However, subsequently the respondent no.2 because of *malafide* intentions went and deposited the cheques in the bank without any intimation to the petitioner. The petitioner was informed only after the cheques were declined to be honoured by the Bank. As such, the allegations made in the compliant that the petitioner had taken a loan from the respondent no.2 is completely false and the Trial Court as well as the Appellate Court erred on law and facts in proceeding with the assumption that the petitioner had procured a loan from the respondent no.2 and in return had issued the 3 (three) cheques

which were dishonoured by the Bank upon the deposit. Learned counsel for the petitioner submits that before the Trial Court at the time of adducing the evidence, the respondent n.2 could not recollect or mention the dates on which the amount of Rs.3,00,00/- (Rupees three lakhs) were stated to have been given on loan to the petitioner. Further contention of the learned counsel for the petitioner is that assuming though not admitting that the petitioner had taken a loan of Rs.3,00,00/- (Rupees three lakhs) from the respondent no.2, then there was no reason to issue 3 (three) different cheques when the petitioner could have issued a single cheque covering the entire amount. Consequently, it is submitted that there was no “*legally enforceable debt*” in so far as the petitioner is concerned vis-à-vis the respondent no.2 which ingredient is mandated under the NI Act, 1881 for invoking the provisions under Section 138 of the NI Act. Accordingly, the Trial Court as well as the Appellate Court erred in law and on facts in convicting the petitioner on the complaint filed by the respondent no.2 as well as by upholding the convictions by the Trial Court respectively. Learned counsel for the petitioner has relied on the decisions of the Hon’ble Supreme Court in *Sripati Singh (since Deceased) through his son Gaurav Singh vs. State of Jharkhand and Another*, reported in 2021 SCC Online SC 1002 as well as *Arun Shankar Shula vs. State of Uttar Pradesh & Ors.* reported in 1999 (6) SCC 1416 in support of his contentions.

7. Ms. S.H. Borah, learned Additional Public Prosecutor, Assam disputed the contentions of the petitioner and submits that there is no infirmity in the judgment and order dated 27.03.2019 passed by the Court of Sub Divisional Judicial Magistrate (SDJM), Sankardevnagar, Hojai, in C.R. Case No.573/2013 and consequently, the same has been correctly upheld by the Court of Additional District and Sessions Judge, Fast Track Court, Sankardevnagar, Hojai,

in Criminal Appeal No.08/2019 vide judgment and order dated 19.12.2019 and therefore, there is no merit in the present criminal petition and same should be dismissed.

8. Mr. N.K. Kalita, learned counsel for the private respondent no.2 strongly disputes the case projected by the petitioner. Learned counsel for the respondent no.2 at the outset submits that this petition should be dismissed as not maintainable as no revision lies against the order of the Appellate Court under the provisions of law. It is submitted that while the powers of revision and inherent powers under 482 Cr.P.C are available to this Court, the same ought to be exercised sparingly only in the case where there is a miscarriage of justice or for any other purpose as the Court deems fit and proper. The present criminal petition filed and urged before this Court by the petitioner is, but, an appeal under the disguise of a revision which is not permitted under the provisions of law. On merits, learned counsel for the respondent no.2 submits that under the mandate of NI Act, 1881, there is a presumption that any payment which is made by a person like the respondent no.2 and which is dishonoured by the Bank, is in pursuance to the "*legally enforceable debt*". As such, it is for the petitioner to dislodge the burden initially that there is no "*legally enforceable debt*". Learned counsel for the respondent no. 2 submits that before the Trial Court the petitioner had failed to bring out any material in support of her case and also failed to dislodge the burden of "*legally enforceable debt*". Learned counsel for the respondent no.2 submits that no witness except the complainant was examined as a defence witness and that too, the evidence of the petitioner was discarded as the petitioner failed to turn up for cross-examination after adducing her evidence in examination-in-chief. Under such circumstances, the criminal petition ought to be dismissed as not

maintainable.

9. Learned counsels for the parties have been heard and pleadings on record have been perused.

10. The judgments cited at the Bar have also been carefully perused and noted.

11. From the available records of the Trial Court and Appellate Court, which was called for, it is seen that the petitioner availed all the opportunities to examination of herself as DW.1. However, she failed to turn up for cross-examination. Therefore, the evidence adduced by the petitioner had been rejected by the Court of SDJM, Hojai, Sankardev Nagar vide its the judgment and order dated 27.03.2019 passed in C.R. Case No.573/2013. No appropriate application was filed by the petitioner before the Trial Court seeking opportunity for adducing further evidences. The submissions made by the learned counsel for the petitioner that 3 (three) cheques were issued as a matter of security is a statement which is not supported by any evidence to that effect. Even before this Court no supporting documents in support of such statements have been produced. The submission of the learned counsel for the petitioner that these 3 (three) cheques were issued not in pursuance to any "*legally enforceable debt*" but only for the purposes of security in response to a proposal of the respondent no.2 that he will be able to procure a loan for the petitioner which she required for her personal reasons. Learned counsel for the petitioner has also not been able to point out any instance during the proceeding before the Trial Court as well as before the Appellate Court to suggest that there was any miscarriage of justice and/or denial of justice during the process of trial or at any point thereafter. The Trial Court granted ample opportunities to the petitioner to adduce her evidence. However, from the records it is seen that she did not turn up for cross-examination in spite of opportunities being granted and

accordingly, her evidence was discarded.

12. Under such circumstances, what was available before the Trial Court is only the evidence adduced by the respondent no.2 and the arguments made on behalf of the parties. That apart, from the LCR it is seen that the petitioner could not dislodge of a "*legally enforceable debt*" as prescribed under the mandate of NI Act, 1881. 3 (three) Cheques amounting to Rs.99,00,000/- (Rupees ninety nine thousand) each were issued by the petitioner, which is not denied. The petitioner has also not been able to point out any documents to suggest that there was a process undertaken for obtaining loan from the Bank in favour of the petitioner. No communication or any other relevant documents have been placed before this Court. Bereft of such supporting evidences, mere arguments/submissions made by the petitioner with regard to her case cannot be accepted to be sufficient. A coordinate Bench of this Court in *Manik Lodh vs. State of Assam and Anr.* reported in 2007 (3) GLT 207 has held that the burden is on the accused to prove that the drawee did not hold the cheque for discharge of liability of the drawer. The accused can rebut the presumption under Section 139 by proof and not by mere explanation. That apart, the presumption which is mandated under Section 139 of the NI Act can only be rebutted by the adequate evidences.

13. As discussed above, from the evidences adduced, it is seen that the petitioner was not able to rebut the presumption enforced by Section 138 of the NI Act, 1881 that the cheques were issued pursuant to any legally enforceable claim. In view of the discussions made, the judgments pressed into service by the petitioner are not applicable in the facts of the case and it therefore does not come to the aid of the petitioner.

14. Under such circumstances, this Court does not find any materials to invoke

its revision power read with the powers under Section 482 of the Cr.P.C. in favour of the petitioner.

15. The criminal petition fails and the same is, therefore, dismissed.

No order as to cost.

JUDGE

Comparing Assistant