

GAHC010073702021



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

Case No. : Crl.Pet./446/2021

PRANAB JYOTI DUTTA
S/O SHRI MOHAN CHANDRA DUTTA
R/O VILL- DECIAL
P.O. DHULLAGAON
P.S. SIVASAGAR
DIST. SIVASAGAR, ASSAM
PIN-785684

VERSUS

THE CHIEF BRANCH MANAGER, SBI
ONGC COLONY BRANCH,
P.O. AND P.S. SIVASAGAR,
DIST. SIVASAGAR, ASSAM
PIN-785640

Advocate for the Petitioner : MR D C K HAZARIKA

Advocate for the Respondent : MR G JALAN

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT

Date : 27-01-2023

Heard Mr. D.C.K. Hazarika, learned Senior counsel, assisted by Ms. J. Kalita,

learned counsel for the petitioner and also heard Mr. G. Jalan, learned counsel for the respondent.

2. In this petition under Section 482 of the Code of Criminal Procedure, the petitioner, namely, Shri Pranab Jyoti Dutta, has prayed for quashing of the complaint, dated 05.08.2020, filed by the respondent/complainant bank under Section 138 and 145(1) of the Negotiable Instrument Act (in short, 'NI Act'). It is to be noted here that upon the said complaint the learned court below has registered a case being N.I. Case No. 25/2020, and after taking cognizance upon the same issued summon to him to appear before it 05.04.2021 to stand trial.

3. The factual background leading to filing of the present petition is briefly stated as under:-

“The petitioner has applied to the respondent bank for a loan of Rs. 4,24,000/- to purchase one Marshall Ambulance (Mahindra & Mahindra) vehicle for commercial purpose. Accordingly, the loan was sanctioned by the respondent bank and the petitioner has accepted the terms and conditions of the said loan, and executed an agreement thereby agreeing with all the terms and condition of the said loan. Thereafter, the petitioner has failed to make repayment of the loan amount despite request being made by the respondent bank and he accepted the liabilities by signing letters on 22.12.2009, and 27.01.2011, and 11.12.2012. As the petitioner has failed to make payment of the amount, the defendant bank has instituted a Money Suit, being Money Suit No. 05/2016, for recovery of the outstanding dues, before the court of learned Civil Judge, Sivasagar, and after hearing the parties, the learned Court below has decreed the suit in favour of the respondent. The petitioner then preferred a Regular First Appeal before this Court, being RFA No. 65/2019, on various grounds, and the same is

pending before this Court for final adjudication.

At the time of sanctioning of the loan, the respondent bank has taken some security cheques from the petitioner. Then the respondent bank has presented one of the Cheque, bearing No. 418162, dated 20.05.2020, for a sum of Rs. 5,40,000/ for encashment. The said cheque returned dishonoured. Then the respondent bank has issued legal notice to the petitioner demanding the cheque amount. But, the petitioner has failed to make payment of the cheque amount within the stipulated period. Then the respondent bank has filed a case under section 138 N.I. Act, on 05.08.2020, before the learned Chief Judicial Magistrate, (CJM) Sivasagar, Assam. Upon the said case the learned CJM, Sivasagar has taken cognizance and issued summon to the petitioner to stand trial in the court."

4. Being highly aggrieved by the order of taking cognizance under Section 138 of the NI Act, against him by the learned Chief Judicial Magistrate, the petitioner has filed this petition for quashing the criminal proceeding of N.I. Case No. 25/2020, pending before the Court of learned CJM, Sivasagar, Assam, on the following grounds that :-

(i) Filing of Money Suit, No. 05/2016 against the petitioner on 04.07.2016, which was adjudicated in favour of the respondent, vide Judgment and Order dated 17.11.2018, and the Decree dated 27.11.2018, and subsequent filing of the NI Act case, suppressing the material fact that the appeal preferred by the petitioner is pending before this Court for hearing, amounts to double jeopardy under Article 20(2) of the constitution of India;

(ii) Secondly, the respondent bank has concealed vital material facts as well as relevant papers and manufactured documents such letter of

Assurance and the Cheque, which it has taken prior to sanction of the loan on 26.12.2006, and instituted the case under Section 138 of the NI Act with ill motive, which is barred by the law of estoppel under Section 115 of the Indian Evidence Act and ignoring the same, the learned Court below has taken cognizance against the petitioner; and

(iii) Thirdly, the conduct of the respondent is mischievous and the thing, which cannot be done directly, cannot also be done indirectly, which is a settled principle of law.

5. Mr. Hazarika, learned Senior Counsel, during the course of argument, reiterated the grounds mentioned in the petition and further submits that filing of the civil suit against the petitioner for recovery of the cheque amount and subsequent filing of the NI Act case against the petitioner amounts to double jeopardy. Secondly, Mr. Hazarika submits that while the RFA is pending before this Court and the judgment and decree passed by the learned Civil Judge, Sivasagar is stayed, filing of the NI Act by the respondent bank is against the established principle of law and it is barred by the principle of estoppel under Section 115 of the Indian Evidence Act. Therefore, Mr. Hazarika contended to allow this petition by quashing complaint under NI Act. Mr. Hazarika referred the following two case laws of Hon'ble Supreme Court:- **(i) *Ram Kumar -Vs- State of Uttar Pradesh and ors. (Civil Appeal No. 4258/2022)*** and **(ii) *Mandvi Cooperative Bank Limited -Vs- Nimesh B. Thakore*** reported in **(2010) 3 SCC 83**.

6. Per contra, Mr. Jalan, learned counsel for the respondent, submits that the doctrine of double jeopardy is not applicable herein this case as the petitioner has filed one Money Suit for recovery of the amount lent by it to the petitioner and, thereafter, filed one case under NI Act for recovery of the cheque amount, and the relief sought for in both the cases are not

similar as one is civil proceeding and the other is criminal proceeding and as such the bar of Double Jeopardy, under Article 20(2) of the constitution of India is not attracted herein this case. Mr. Jalan, further submits that there is no statutory bar in filing the civil suit for recovery of the money and also filing the NI Act case for recovery of the cheque amount and in support of his aforesaid contention, Mr. Jalan has referred one case law of Hon'ble Supreme Court in the case of ***D. Purushotama Reddy and Another -Vs- K. Sateesh***, reported in ***(2008) 8 SCC 505*** and another case law of this Court in the case of ***Golden Menthol Export Pvt. Limited, reported in 2007 (2) GLT 47*** and another case law of Hon'ble Supreme Court in ***Monica Bedi -Vs- State of A.P. (Criminal Appeal No. 782/2007)***. Mr. Jalan further submits that the present petition under Section 482 Cr.P.C., is misconceived and as such it is not maintainable and, therefore, it is contended to dismiss the same.

7. Having heard the submission of learned Advocates of both the sides and having gone through the materials on record and also on perusal of the case laws, referred by the learned Advocates of both the sides.

8. The simple question, to be decided in this petition, is whether for recovery of the money, lent by the respondent bank to the petitioner by way of loan, the bank can maintain a civil proceeding and for dishonor of the cheque issued to the bank in discharge of the said legally enforceable debt, the respondent bank can maintain a proceeding under Section 138 of the NI Act. The law in this regard is well settled by the Hon'ble Supreme Court in the case of ***D. Purushotama Reddy*** (*supra*) in paragraph No. 9, the Hon'ble Supreme Court has held as under:-

“9. A suit for recovery of money due from a borrower indisputably is maintainable at the instance of the creditor. It is furthermore

beyond any doubt or dispute that for the same cause of action a complaint petition under terms of Section 138 of the Act would also be maintainable.”

9. Similar observation is made by a co-ordinate Bench of this court in the case of ***Golden Menthol Export Pvt. Limited (supra)***, wherein it has been held in paragraph No. 9 as under:-

“9. In UTI Bank Ltd. (supra), in which a prayer for winding up of the respondent-company therein, was involved, the petitioner had additionally instituted a criminal proceeding under Section 138 of the Negotiable Instruments Act 1881 (as amended) by filing a criminal complaint in the appropriate Court. The plea against its maintainability on that count was negatived by the jurisdictional High Court. As it is Section 138 of the Negotiable Instrument Act, 1881, defines a criminal offence consequent upon the dishonour of a cheque drawn by a person to discharge in whole or any part, his debts or any other liability. Though the said penal provision provides for a sentence of imprisonment, as well as of fine to the extent of an amount twice the sum of the cheque, a proceeding thereunder cannot be construed to be for recovery of the money in default. In other words, a proceeding under Section 138 of the Negotiable Instrument Act, 1881, cannot be construed to be an alternative to a civil suit or any other proceeding for realization of the amount remaining unpaid as a debt following the dishonour of a cheque by the debtor. The empowerment of a Court under the legal provision to impose a fine of a sum, which may extend to twice the cheque amount, per se does not render the proceeding to be dominantly one for the recovery thereof. The remedies

comprehended under the Negotiable Instrument Act 1881 and the Act, are therefore, distinctively different and not mutilative each other. In that view of the matter, I feel persuaded to sustain the contention of the learned counsel for the petitioner bearing on the maintainability of the company petition.”

10. Again in the case of **M. Krishnan vs. Vijay Singh and Anr.(Appeal Crl.) No. 1028 of 2001**, Hon’ble Supreme Court has held as under :-

Accepting such a general proposition would be against the provisions of law inasmuch as in all cases of cheating and fraud, in the whole transaction, there is generally some element of civil nature. However, in this case, the allegations were regarding the forging of the documents and acquiring gains on the basis of such forged documents. The proceedings could not be quashed only because the respondents had filed a civil suit with respect to the aforesaid documents. In a criminal court the allegations made in the complaint have to be established independently, notwithstanding the adjudication by a civil court. Had the complainant failed to prove the allegations made by him in the complaint, the respondents were entitled to discharge or acquittal but not otherwise. If mere pendency of a suit is made a ground for quashing the criminal proceedings, the unscrupulous litigants, apprehending criminal action against them, would be encouraged to frustrate the course of justice and law by filing suits with respect to the documents intended to be used against them after the initiation of criminal proceedings or in anticipation of such proceedings. Such a course cannot be the mandate of law. Civil

proceedings, as distinguished from the criminal action, have to be adjudicated and concluded by adopting separate yardsticks. The onus of proving the allegations beyond reasonable doubt, in criminal case, is not applicable in the civil proceedings which can be decided merely on the basis of the probabilities with respect to the acts complained of. The High Court was not, in any way, justified to observe :

11. In the case of **Aristo Printers Pvt. Ltd. vs. Purbanchal Erade Centre**, reported in **AIR 1992 Gau 81**, a division Bench of this court also held as under:-

“5. There is dispute between the parties regarding the nature of transaction between them, as to the circumstance under and the purpose for which the cheques were issued. That being so it is open to either of the parties to seek remedy in a civil Court and if such remedy is sought, the Civil Court is bound to give a decision. If, however, either of the parties seeks recourse to a competent criminal Court, there is no reason why the criminal court should be restrained from examining the complaint in the light of [Section 138](#) of the Act and in accordance with the provisions of the Code of Criminal Procedure.”

12. Keeping the aforesaid principle in mind, while the facts and circumstances of the case in hand are examined, I find sufficient force in the submission of Mr. Jalan, learned counsel for the respondent. It is a fact that the NI Act proceeding is instituted before the Court of learned Court

below while the Regular First Appeal is pending before this Court against the judgment and decree passed by the learned Civil Judge, Sivasagar, in the money suit. But, it is the prerogative of the concerned party when he will start a criminal proceeding, which of course, subject to the limitation provided in the concerned Act.

13. To a pointed query of this Court, Mr. Hazarika, learned counsel for the petitioner, submits that there is no legal bar in filing both the proceedings simultaneously or subsequently. Being so, this court afraid, the principle of double jeopardy, under Article 20(2) of the Constitution of India will help him anymore. Mr. Jalan, the learned counsel for the respondent has rightly pointed this out and the ratio laid down in ***Monica Bedi*** (supra) also fortified his submission. It is to be mentioned here that in the case of ***Monica Bedi*** (supra) Hon'ble Supreme Court has held that -what is prohibited under [Article 20 \(2\)](#) is, the second prosecution and conviction must be for the same offence. If the offences are distinct, there is no question of the rule as to double jeopardy being applicable.

14. Again in the case of [Maqbool Hussain vs. The State of Bombay, reported in \(1953\) SCR 730 1](#), Hon'ble Supreme Court has explained the scope of the right guaranteed under [Article 20 \(2\)](#) as under:-

“What is incorporated in it as "within its scope the plea of autrefois convict as known to the British jurisprudence or the plea of double jeopardy as it known to the American Constitution, but, circumscribed it by providing that there should be not only a prosecution, but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence." That in order for the protection of [Article 20 \(2\)](#) to be invoked by a person there must have been a prosecution and as

well as punishment in respect of the same offence before a court of law of competent jurisdiction or a tribunal, required by law to decide the matters in controversy judicially on evidence. That the proceedings contemplated therein are in the nature of criminal proceedings before a court of law or a judicial tribunal and the prosecution in this context would mean an initiation or (1953) SCR 730 starting of the proceedings of a criminal nature in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.

15. In the State of Bombay vs. S.L. Apte reported in (1961) 3 SCR 107 it has been held as under:-

"To operate as a bar the second prosecution and the consequential punishment there under, must be for 'the same offence'. The crucial requirement therefore for attracting the Article is that the offences are the same, i.e., they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of fact in the two complaints might be substantially similar, the benefit of the ban cannot be invoked. It is, therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out."

16. In the instant case, admittedly, the first one is a civil proceeding instituted by the respondent for recovery of money borrowed by the petitioner, not for commission of any offence. There is no question of conviction and punishment there. The second proceeding is a criminal proceeding for dishonour of cheque, issued by the petitioner to the

respondent, in discharge of a legally enforceable debt. Here, if the respondent succeeds in establishing the offence, then the same will entail conviction and punishment. This being the position, this court is unable to record concurrence with the submission of Mr. Hazarika, the learned counsel for the petitioner.

17. I have considered the submission of Mr. Hazarika, learned counsel for the petitioner in respect of estoppel under Section 115 of the Indian Evidence Act. Section-115 of the Indian Evidence Act defined Estoppel as follows:-

“When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

18. The Doctrine of estoppel does not apply to statutes, but only to the facts, which meant that where the converse of a provision mentioned in a statute exists, the party would not be estopped by his previous given statement(s). Estoppel, if applied to the law would go against public policy and general welfare of the society. The principle of estoppel can never be invoked for the purpose of defeating the provisions of law.

19. The filing of a complaint under Section 138 of the NI Act is provided by the statute, of course subject to fulfillment of certain conditions, i.e., existence of an legally enforceable debt between the parties and issuance of cheque towards discharge of the said debt, and dishonour of a cheque

on presentation to the bank and issuance of notice demanding the payment of the cheque amounts and failing to make the payment within the stipulated period. Here in this case, the aforementioned conditions seem to have been fulfilled, and as such, to the considered opinion of this Court, estoppel would not operate against the respondent in filing the NI Act case before the learned Court below. This being the position, there is no substance in the submission of Mr. Hazarika, the learned counsel for the petitioner.

20. I have also gone through the case laws, so referred by Mr. Hazarika, learned counsel for the petitioner, and I find that the same has to be treated to be restricted to its own fact and not applicable to the facts and circumstances of the present case.

21. Whether the respondent bank has concealed vital material facts as well as relevant papers and manufactured documents such letter of Assurance and the Cheque, which it has taken prior to sanction of the loan on 26.12.2006, and instituted the case under Section 138 of the NI Act with ill motive, are matters of disputed question of facts, which cannot be adjudicated in a petition under section 482 Cr.P.C. This is well settled proposition of law by a string of judgments delivered by the Supreme Court in the case of **R.P. Kapur vs. State of Punjab** reported in **AIR 1960 SC 866**, **State of Haryana & Ors. vs. Bhajal Lal & Ors.** reported in **1992 Supp (1) SCC 335**, **The State of Bihar vs. P.P. Sharma**, reported in **1992 Supp(1) SCC 222** and **Zandu Pharmaceutical Works Ltd. vs. Mohd. Saraful Haq** reported in **(2005) 1 SCC 122**.

22. **In R.P. Kapur (supra)** Hon'ble Supreme Court has summarized some

categories of cases where inherent power can and should be exercised to quash the proceedings:

- (i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings;**
- (ii) where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;**
- (iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.**

23. Again in the case of **Bhajan Lal** (supra) Hon'ble Supreme Court has by way of illustration has held that in following kinds of cases wherein such power should be exercised:

- (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.**
- (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under [Section 156\(1\)](#) of the Code except under an order of a Magistrate within the purview of [Section 155\(2\)](#) of the Code.**
- (3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.**

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under [Section 155\(2\)](#) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions [of the Code](#) or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in [the Code](#) or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

24. In the case of **M/S Neeherika Infrastructure Pvt. Ltd. vs. State of Maharashtra & Ors.** reported in **2021 SCC OnLine SC 315**, while dealing with the power and scope of quashing the FIR/Complaint petition Hon'ble Supreme Court, amongst other, has laid down following proposition:-

(i) The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the 'rarest of rare

cases (not to be confused with the formation in the context of death penalty).

(ii) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;

(iii) Criminal proceedings ought not to be scuttled at the initial stage;

(iv) Quashing of a complaint/FIR should be an exception rather than an ordinary rule;

(v) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;

(vi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;

(vii) The power under [Section 482](#) Cr.P.C. is very wide, but conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the court;

(viii) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint;

25. In the case in hand the petitioner, from the materials placed on record,

has failed to make out any exceptional circumstances to interfere with the case at the very threshold as held the cases discussed herein above. In the result, I find no merit in this petition and, accordingly, the same stands dismissed. Interim order, passed earlier, stands vacated. The parties have to bear their own costs.

JUDGE

Comparing Assistant