

GAHC010084292022



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Petition No. of 415 of 2022

Sri Prabhat Gogoi, aged about 39 years
Aged about 54 years,
Son of Sri Lambit Gogoi,
Resident of H No. 140, Village-Gogamukh Rangpuria
Under Gogamukh Police Station in the district of
Dhemaji, Assam
PIN- 787034 .

.....Accused/Petitioner

-Versus-

1. The State of Assam,
Represented by the Public Prosecutor, Assam.
2. Sri Sagar Choudhury,
Son of Sri Dilip Kr. Choudhury,
Resident of Nakari, Ward No. 2,
North Lakhimpur Town, P.O.-North
Lakhimpur Town under North Lakhimpur

Police Station in the district of Lakhimpur,
Assam, PIN-787001.

Present Address:- Japorigog, P.O.- Dispur,
Guwahati under Dispur Police Station in the
District of Kamrup (Metro) Assam,
Pin-781006.

.....Respondents

Advocates for the petitioner : Mr B M Choudhury
Advocate for the respondents : Mr J I Borbhuiya
Mr B Sarma, Addl. P.P, Assam.

BEFORE
HON'BLE MRS. JUSTICE MALASRI NANDI

Date of Judgment : 05.01.2023

JUDGEMENT AND ORDER (CAV)

Heard Mr B M Choudhury, learned counsel for the petitioner and Mr J I Borbhuiya, learned counsel for the respondent No. 2. Also heard Mr B Sarma, learned Additional Public Prosecutor appearing on behalf of the State of Assam/respondent No. 1.

2. This is an application filed by the petitioner under Section 482 of the Code of Criminal Procedure, 1973, read with Section 397 of CrPC, 1973, against the impugned order dated 05.10.2021, passed by the learned Additional CJM, Kamrup (Metro) in CR Case No. 1410^c/2021, whereby, the learned Additional CJM has taken cognizance of offence against the petitioner under Section 138 of Negotiable Instruments Act, 1881 (hereinafter, in short, the

NI Act).

3. The brief facts of the case is that the complainant/respondent No. 2 is a businessman by profession, having friendly relationship with the accused petitioner. On several occasions and financial hardship, the accused petitioner availed financial assistance from the complainant and the total amount of money taken by the accused petitioner was Rs. 21 lacs only, on several installments from the year 2017 to 2019 and out of the said amount, the accused petitioner in order to discharge his liability issued a cheque vide No. 748178, dated 12.10.2020, for an amount of Rs. 6 lacs, drawn on the State Bank of India, Gogamukh Branch. On 12.10.2020, the complainant presented the said cheque before his banker, i.e., the State Bank of India at Lakhimpur, for collection of the said amount, but the said cheque was dishonoured by drawee bank and the cheque was returned to the respondent with a returning memo.

4. The respondent, then contacted the accused over phone and the accused assured him that he would deposit the money in his account and later on, as per instructions of the accused petitioner the respondent again deposited the said cheque on 23.10.2020, which was again returned back to him on 26.10.2020 with the endorsement –“funds insufficient” and the cheque was dishonoured. Thereafter, the complainant had received the cheque from the Axis Bank, Noonmati Branch on 15.02.2021.

5. On 02.03.2020, the complainant served a notice through registered post with A/D through his engaged Advocate with a demand for making payment of the said amount of Rs. 6 lacs within 15 days from the date of receipt of the said notice and the said notice was duly received by the accused petitioner on 12.03.2021, but it was again returned back on

16.03.2021, by post. Thereafter, the respondent as complainant filed the case against the accused petitioner under the provisions of NI Act, before the Court of CJM, Kamrup (Metro), vide CR Case No. 1410^C of 2021.

6. The wrong contemplated under Section 138 of the NI Act is a criminal offence and hence, all the ingredients constituted by the legal provision must be strictly met with. Therefore, a brief mention of the same is an order. Culpability for the offence of dishonor of cheque under Section 138 NI Act requires that the accused should have drawn the cheque on a bank account maintained by him and issued the same to the complainant in discharge of her debt or other legal liability. The cheque should have been dishonoured for the reasons specified in Section 138 of the NI Act. It further enjoins the payee to send a notice to the drawer demanding payment of the cheque amount within 30 days of the dishonor of the cheque. It is only upon non-payment of the cheque amount within 15 days of the receipt of the demand notice, the complainant is at liberty to file a criminal complaint against the drawer for dishonour of the cheque.

7. Learned counsel for the petitioner has argued that under Clause- (b) of the proviso to Section 138 of the NI Act, the payee or the holder of the cheque in due course is required to give a written notice to the drawer of the cheque within a period of 30 days from the date of receipt of the information from the bank regarding the return of the cheque as unpaid and under Clause- (c), the drawer is given 15 days time from the date of receipt of the notice to make the payment and only if he fails to make the payment the complaint may be filed against him. But in the present case, the complainant deposited the cheque on 23.10.2020, and he received an information from the bank regarding the return of the cheque as unpaid

on 26.10.2020, with the endorsement "funds insufficient". But only on 02.03.2021, i.e., after 128 days of receipt of information from the bank regarding the return of the cheque which is much beyond the period of 30 days, the complainant gave notice through registered post with A/D to the accused petitioner through his engaged Advocate, making demand of the said Rs. 6 lacs only within 15 days from the date of receipt of the said notice.

8. It is also the submission of the learned counsel for the accused petitioner that as per Clause- (b) of the proviso to Section 138 of the NI Act, the complainant was required to give a written notice to the drawer of the cheque within a period of 30 days from the date of receipt of information from the bank regarding the return of the cheque as unpaid, i.e. on 25.11.2020. Therefore, the present complaint lodged by the respondent No. 2 is not maintainable in the eye of law and the learned Magistrate ought not to have taken cognizance of the offence against the accused petitioner under the provision of NI Act.

9. In support of his submission, the learned counsel has placed reliance on the following case-law:-

Suo Motu Writ Petition (Crl.) No. 2 of 2020

10. On the other hand, learned counsel for the respondent/claimant has argued that there was a delay in filing the complaint petition on account of the pandemic situation and also of the relaxation of extended period in computing the period of limitation provided by the Hon'ble Apex Court w.e.f. 15.03.2020 to 14.03.2021 and in support of his submission learned counsel has cited the following case-law:-

Miscellaneous Application No. 21 of 2022

In Miscellaneous Application No. 665 of 2021

In Suo Motu Writ Petition (C) No. 3 of 2020

In Re: Cognizance for extension of limitation

11. I have given my anxious consideration to the submissions made by the respective learned counsel and perused the materials on record. In furtherance whereof, the issue that falls for my consideration is whether time barred debt attracts an offence under Section 138 of the NI Act!

12. The aforesaid facts are not in dispute and as such, they are not reiterated again. I have perused the judgment cited by the learned counsel for the respondent/claimant. It appears from the Judgment that the Hon'ble Supreme Court had clarified that the period from 15.03.2020 till 28.02.2022, shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

13. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event, the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.

14. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12 A of the Commercial Courts Act, 2015 and

provisos (b) and (c) of Section 138 of the NI Act, and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

15. The contention of the learned counsel for the petitioner is that the debt towards the respondent/claimant is barred by limitation and therefore, the proceedings could not have been initiated by the respondent/complainant against the time barred debt.

16. The submission of the learned counsel for the petitioner is unacceptable, as the Hon'ble Apex Court considers the very plea of time barred debt in the case of **S.Natarajan V. Sama Dharman & Another; (2021) 6 SCC 413**, wherein the Apex Court holds as follows:

"7. In our opinion, the High Court erred in quashing the complaint on the ground that the debt or liability was barred by limitation and, therefore, there was no legally enforceable debt or liability against the accused. The case before the High Court was not of such a nature which could have persuaded the High Court to draw such a definite conclusion at this stage. Whether the debt was time-barred or not can be decided only after the evidence is adduced, it being a mixed question of law and fact.

8. In this connection, we may usefully refer to a judgment of this Court in A.V. Murthy v. B.S. Nagabasavanna [A.V. Murthy v. B.S. Nagabasavanna, (2002) 2 SCC 642] where the accused had alleged that the cheque issued by him in favour of the complainant in respect of sum advanced to the accused by the complainant four years ago was dishonoured by the bank for the reasons "account closed". The Magistrate had issued summons to the accused. The Sessions Court quashed the proceedings on the ground that the alleged debt was barred by

limitation at the time of issuance of cheque and, therefore, there was no legally enforceable debt or liability against the accused under the Explanation to [Section 138](#) of the NI Act and, therefore, the complaint was not maintainable. While dealing with the challenge to this order, this Court observed that under [Section 118](#) of the NI Act, there is a presumption that until the contrary is proved, every negotiable instrument was drawn for consideration. This Court further observed that [Section 139](#) of the NI Act specifically notes that 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](#) of the NI Act for discharge, in whole or in part, of any debt or other liability. This Court further observed that under sub-section (3) of [Section 25](#) of the Contract Act, a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits, is a valid contract. Referring to the facts before it, this Court observed that the complainant therein had submitted his balance sheet, prepared for every year subsequent to the loan advanced by the complainant and had shown the amount as deposits from friends. This Court noticed that the relevant balance sheet is also produced in the Court. This Court observed that if the amount borrowed by the accused therein is shown in the balance sheet, it may amount to acknowledgment and the creditor might have a fresh period of limitation from the date on which the acknowledgment was made. After highlighting further facts of the case, this Court held that at this stage of proceedings, to say that the cheque drawn by the accused was in respect of a debt or liability, which was not legally enforceable, was clearly illegal and erroneous. In the circumstances, this Court set aside the order passed by the High Court upholding the Sessions Court's order quashing the entire proceedings on the ground

that the debt or liability is barred by limitation and, hence, the complaint was not maintainable. It is, therefore, clear that the contention urged by the appellant herein can be examined only during trial since it involves examination of facts.

9. In Rangappa v. Sri Mohan, reported in (2010) 11 SCC 441, the legal question before this Court pertained to the proper interpretation of Section 139 of the NI Act which shifts the burden of proof on to the accused in cheque bouncing cases. This Court observed that the presumption mandated by Section 139 of the NI Act includes a presumption that there exists a legally enforceable debt or liability. This is of course in the nature of rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. This Court further observed that Section 139 of the NI Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. This Court clarified that the reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. This Court, then, explained the manner in which this statutory presumption can be rebutted. Thus, in cheque bouncing cases, the initial presumption incorporated in Section 139 of the NI Act favours the complainant and the accused can rebut the said presumption and discharge the reverse onus by adducing evidence.

10. In our opinion, therefore, the High Court could not have quashed the proceedings on the ground that at the time of issuance of cheque, the debt had become time-barred and therefore, the complaint was not maintainable. The High Court, therefore, fell into a grave error in quashing the proceedings."

17. In view of the aforesaid legal proposition it reveals that the Apex Court clearly holds

that the High Court was not correct in quashing the complaint on the ground that the debt or liability was time barred by limitation and, therefore it did not become a legally enforceable debt. The Apex Court holds that it is a mixed question of law and fact and the High Court exercising its jurisdiction under Section 482 of the Cr.P.C. ought not to have quashed the complaint or entire proceedings.

18. The aforementioned judgment of the Apex Court has been followed by several other Judgments, one of which is in the case of **Shreeyansh Rayappa Nandishwar V. Prakash Ponde**, (Criminal Petition No. 3991 of 2020, decided on, 28 January 2021, at High Court of Karnataka at Bengaluru), wherein it is held as follows:

"27. The learned counsel also referred to the recent judgment of the Apex Court in the case of Basalingappa v. Mudibasappa reported in (2019) 5 Supreme Court cases 418, and referring to this Judgment, the learned counsel would submit that the Apex Court in this judgment, held that, the complainant will have to initially lead evidence under Section 139 of the NI Act and rebut the presumption, which is lacking in the present case. The learned counsel would submit that the issuance of summons is wholly without jurisdiction. The learned counsel vehemently contends that it is necessary that when a sworn statement be recorded it should also contain the ingredients of Section 139 of the NI Act when the same has not been stated in the affidavit and also there is an admission that the loan was allegedly received during 2013, there is clearly lack of application of mind on part of the Magistrate in the matter of issual of summons, therefore, the judgments relied on in S.Natarajan's case (supra) that only after the accused rebuts the presumption during a trial the matter can be disposed off is far-fetched."

19. The Hon'ble Apex Court also in the case of **Pulsive Technologies Private Limited v. State of Gujarat and others**; reported in **(2014) 13 Supreme Court Cases 18**, has categorically held that when High Court was dealing with a petition filed under Section 482 of Cr.P.C. for quashing the complaint, considered the factual issue, as to whether the complainant had discharged its obligations or not, the High Court could not have given its final verdict at this stage. It is a matter of evidence. The Apex Court reiterating the principles laid down in the Judgment of **M.M.T.C. Ltd. and another v. Medchl Chemicals and Pharma (P) Limited and another**; reported in **(2002) 1 Supreme Court Cases 234**, has observed that the High Court failed to take note of the most vital caution sounded therein. Whether any money is paid by the accused to the complainant is a matter of evidence. The accused has ample opportunity to probabalise his defence. On that count, in the facts of the case,, the complaint cannot be quashed.

20. The Hon'ble Apex Court also in the case of **HMT Watches Limited v. M.A.Abida and Another**; reported in **(2015) 11 SCC 776**, has held that-

“If complainant was with ulterior motive then power under Section 482 of Cr.P.C, can be exercised to prevent abuse of process of law. Where complaint filed was genuine then High Court cannot travel beyond prescribed limits. It was made clear that sometimes on same set of facts, civil and criminal proceedings are maintainable. Exercise of power under Section 482 of Cr.P.C, based on disputed question of fact, impermissible. Only the Trial Court can determine the disputed questions of fact.”

21. Having considered the principles laid down in the Judgments referred above, though the petitioner's counsel referred several judgments of different High Courts, it is settled law

that whether the transaction is time barred or not has to be considered only after the trial, not at the preliminary stage or at the time of taking cognizance.

22. In the case of ***Dinesh B. Chokshi Vs. Rahul Vasudeo Bhatt and Another; [2013 (2) Mh.L.J. 130]***, it is held that even issuance of cheque in respect of a time barred debt amounts to entering into a fresh contract in accordance with section 25(3) of the Indian Contract Act; and elaborating on the Section 25(3) of the Contract Act, the following observations are made:

"9. Thus, Sub-section (3) of Section 25 of the Contract Act is an exception to the general rule that an agreement made without consideration is void. Sub-section (3) of Section 25 of the Contract Act applies to a case where there is a promise made in writing and signed by a person to be charged therewith to pay wholly or in part a debt which is barred by law of limitation. A promise covered by Sub-section (3) becomes an enforceable agreement notwithstanding the fact that it is a promise to pay a debt which is already barred by limitation. Thus, Sub-section (3) of Section 25 of the Contract Act applies to a promise made in writing which is signed by a person to pay a debt which cannot be recovered by reason of expiry of period of limitation for filing a suit for recovery. Therefore, if a debtor after expiry of the period of limitation provided for recovery of debt makes a promise in writing signed by him to pay the debt wholly or in part, the said promise being governed by Sub-section (3) of Section 25 of the Contract Act becomes an agreement which is enforceable in law. By virtue of the promise governed by Sub-section (3) of Section 25 of the Contract Act, the time barred debt becomes enforceable. The Sub-section (3) of Section 25 of the Contract Act does not apply to promise to pay all categories of debts which are not enforceable in law. It

applies only to a debt which is not recoverable in law only on the ground of bar created by the law of limitation. Thus, the promise under Sub-section (3) of Section 25 of the Contract Act will not validate a debt which is not enforceable on a ground other than the ground of bar of limitation. For example, if there is a promise to pay an amount advanced for immoral purposes which is hit by Section 23 of the Contract Act, it will not attract Sub-section (3) of Section 25 of the Contract Act and the said provision will be attracted only when a promise is made in writing and signed by the promisor to pay a debt which is barred by limitation."

23. Therefore, it is now clear that the meaning that can be ascribed to the expression legally enforceable debt or liability found in explanation to section 138 of NI Act is a debt or liability arising out of legally enforceable contract. Even if in respect of a time barred debt, an agreement comes into existence subsequently according to section 25(3) of the Contract Act, it becomes a new contract, which is enforceable. Sections 18 and 19 of the Limitation Act only extend the period of limitation if there is acknowledgment of debt before the limitation period expires. Even if there is no acknowledgment of debt or liability in terms of section 18 or 19 of the Limitation Act, if a new agreement comes into existence according to section 25(3), it is a valid contract and thus a cheque issued in this connection, if dishonoured, attracts penal action under section 138 of N I Act.

24. Reverting back to the case in hand, though it appears that it is a time barred transaction, but the same has to be decided only after recording the evidence not at the preliminary stage of taking the cognizance. It is settled law that whether it is time barred or not involves disputed facts and the same cannot be determined in a proceeding under Section 482 of Cr.P.C. since it involves mixed question of law and fact. Hence, the very contention

that the transaction is time barred cannot be decided while taking the cognizance. The Apex Court also in M.M.T.C. Ltd.'s case (supra), has categorically held that complaint need not allege existing of a subsisting debt or liability against which cheque issued. Burden of proving non-existence of any debt or liability is on the accused, to be discharged at the trial. Prior to that complaint cannot be quashed by High Court under Section 482 of Cr.P.C. In the case on hand also, the Court has only after considering the evidence has to decide whether the liability is in existence or not and the same cannot be decided without recording the evidence. Hence, Section 482 of Cr.P.C. cannot be invoked to quash the proceedings.

25. In the light of the aforesaid preceding analysis made by the Hon'ble Apex Court and some other High Courts, I do not find any warrant to interfere with the initiation of the proceeding against the petitioner in taking cognizance against him by the learned trial Court.

26. In the result, the petition is dismissed.

JUDGE

Comparing Assistant