

GAHC010084912022



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

Case No. : Crl.Rev.P./198/2022

BIREN SARMA
S/O LT. JAYDEV SARMA, R/O RANGIA TOWN, P.O. AND P.S.-RANGIA, DIST-
KAMRUP, ASSAM

VERSUS

THE STATE OF ASSAM AND 2 ORS
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:NRIPEN CHANDRA BANIA
S/O LT. PRASANNA BANIA
EMPLOYEE OF NF RAILWAY
RANGIA RAILWAY DIVISION
RANGIA
UNDER SS POINTSMEN R/O RANGIA RAILWAY QUARTER NO- 1039 F
NEW COLONY
RANGIA
P.O. AND P.S.-RANGIA
DIST-KAMRUP(M)
ASSAM
PIN-781354

3:SMTI MINA BANIA
W/O SRI NRIPEN CHANDRA BANIA
R/O RANGIA RAILWAY QUARTER NO- 1039 F
NEW COLONY
RANGIA
P.O. AND P.S.-RANGIA
DIST-KAMRUP(M)
ASSAM
PIN-78135

Advocate for the Petitioner : MR. S SAHU

Advocate for the Respondent : MS. B.B. GOGOI(ADDL.PP, ASSAM)

**BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND**

JUDGMENT

Date : 27-06-2023

- 1.** Heard Mr. S. Sahu, learned counsel for the petitioner, Mr. P.K. Deka, learned counsel for the respondent Nos. 2 and 3 and Mr. B.B. Gogoi, learned Additional Public Prosecutor, Assam, appearing for the State respondent No.1.
- 2.** The petitioner has filed this criminal revision petition under Section 397 read with Section 401 of the Code of Criminal Procedure (Cr.P.C. for short) challenging the legality and propriety of the judgment and order dated 17.02.2022 passed by the learned Additional Sessions Judge, Rangia, in Criminal Appeal No.7/2019 acquitting the respondent Nos.2 and 3 by reversing the order of conviction and sentence passed by the learned Sub-Divisional Judicial Magistrate(M), Rangia, Kamrup, in C.R. Case No.5(NI)/2016, dated 22.04.2019.
- 3.** The genesis of the case was that the respondent Nos.2 and 3 borrowed an amount of Rs.4,60,000/- from the petitioner on 08.05.2015 to purchase a plot of land, promising to repay the loan within 31.12.2015 to the petitioner. When the respondents failed to repay the loan, the petitioner demanded the loan amount and the respondent Nos.2 and 3 promised to repay within a short period of time. On 07.05.2016 a cheque was issued in favour of the petitioner to discharge the liability of the loan borrowed by the respondent Nos.2 and 3. The petitioner presented the cheque for payment to the State Bank of India, Rangia Branch on 07.05.2016, but the same was dishonoured by the bank with the endorsement "insufficient

funds". The petitioner immediately met the private respondents and informed them about the dishonoured cheque, but no positive response was received from the respondents.

4. On 10.05.2016 a legal notice was sent by the petitioner to the private respondents demanding payment of the cheque amount within 15 days and thereafter the complaint under Section 138 of the N.I. Act was lodged against the respondents.

5. During trial, the petitioner examined three witnesses including himself and exhibited some documents and both the respondent Nos.2 and 3 adduced their evidence as DW-1 and DW-2.

6. It was held by the learned trial Court that the cheque was issued by the respondents to discharge a legally enforceable debt and the respondents failed to substantiate the plea of loss of cheque. The cheque issued by the respondents being Cheque No. 246736 on 09.05.2016 for an amount of Rs. 4,60,000/- was returned due to 'insufficiency of funds' which has been proved by the petitioner through Ext.-2. After dishonour of cheque, a legal notice was issued to the respondents, (which is marked as Ext.-3) on 10.05.2016, well within the period of limitation. A joint account was maintained by both the respondents. It was also held by the learned trial Court that the case was initiated within the period of limitation, i.e. from 02.06.2016. The private respondents were held guilty of offence u/s 138 of the N.I. Act as they failed to rebut the presumption u/s 139 of the Act and they were convicted u/s 138 of the N.I. Act to undergo imprisonment for 6 months and to pay a compensation of Rs. 7 lacs which is double the cheque amount with default stipulation for 3 months.

7. The learned appellate Court in Criminal Appeal No. 7/2019 overturned the order of the trial Court and acquitted both the respondents. It was held by the learned appellate Court

that the evidence of the private respondents depicts that the petitioner lent money to the respondents on interest. The DW-1 has deposed that he had paid an amount of Rs. 3,000/- to the petitioner as interest. The learned appellate Court held that the complainant/petitioner is a money lender and the petitioner has not proved his source of income and he failed to come out clean by explaining, how he could procure such huge amount of funds for lending. It was held by the learned appellate Court that to prove the fact that the debt was a legally enforceable, a complainant must prove the source of money lent to the accused/respondent was legally acquired.

8. The learned appellate Court relied on the decision of the Hon'ble Supreme Court in *Basalingappa vs Mudibasappa*, reported in (2019) 5 SCC 418, wherein it has been observed that:-

“High Court without discarding the evidence, which was led by defence could not have held that finding of trial court regarding financial capacity of the complainant is perverse. We are, thus, satisfied that accused has raised a probable defence and the findings of the trial court that complainant failed to prove his financial capacity are based on evidence led by the defence. The observations of the High Court that findings of the trial court are perverse are unsustainable. We, thus, are of the view that judgment of the High Court is unsustainable”.

9. The learned counsel for the petitioner has contended that the learned appellate Court overturned the judgment of the trial Court by relying more on the deposition of the accused without considering the evidence on record. DW-1 has admitted in his cross-examination that he did not lodge any FIR regarding loss of cheque which renders his plea of loss of cheque suspect. The learned appellate Court has totally ignored the fact that the respondent, DW-1 has admitted of having borrowed Rs. 40,000/- from the petitioner. It is contended that the defence taken by the respondents is not at all believable.

10. Per contra, the respondents have submitted that a false case has been slammed against them with a concocted story about dishonour of cheque of Rs. 4,60,000/-. The learned Additional Sessions Judge has correctly passed an order, acquitting them by setting aside the judgment & order dated 22.04.2019 passed by the learned SDJM in C.R. Case No. 5NI/2016. The petitioner has miserably failed to prove his legal source of income and hence the instant petition is not maintainable at all. The instant revision petition is not at all maintainable against the order of acquittal as special leave has to be obtained as per Section 378(4) Cr.PC against an order of acquittal in any case instituted upon a complaint.

11. The learned counsel for the respondents has relied on the decision of this Court in *Bikash Bhuyan v. Nepal Chandra Das and Another*, reported in 2020 (5) GLT 671, wherein it has been observed that:-

“On a close scrutiny of the provisions of Sections 401 and 378 Cr.P.C. vis-a-vis the interpretations thereof illustrated in various judgments of the High Courts and the Apex Court particularly in Subhash Chand (Supra) case as well, it is revealed that Sub-Section (5) of Section 401 Cr.P.C. provides that if an application for revision is filed against a decision which is appealable and the High Court if satisfied that the appeal was not filed due to any erroneous belief and the interest of justice so requires, may treat the revision petition as petition of appeal. However, Section 378(4) Cr.P.C. requires that in the event of acquittal of accused in a case instituted upon private complaint, the appeal can be filed only after obtaining a special leave to appeal from the High Court on an application of the complainant. Because sub-Section (4) of Section 378 Cr.P.C. creates a statutory bar in entertaining such an appeal against acquittal in ‘complaint’ case, defined in section 2(d) Cr.PC unless the High Court is satisfied on exceptional grounds and special circumstances cited in such application filed separately by the complainant seeking grant of special leave to appeal within a period of sixty days. Therefore, there can be no revision or conversion of a revision to appeal against an order of acquittal in complaint case and since appeal against order of acquittal under ‘original’ or ‘appellate’ jurisdiction lies under Section 378(4) as such in view of Section 401(4) Cr.P.C., revision against such an order is not sustainable.

Considered thus in detail, as the applicant/revision petitioner has not

satisfied the first procedural requirement of Section 378(4) Cr.P.C., which is a condition precedent to prefer an appeal against acquittal in complaint case, this Court is not in a position to convert the revision application to an appeal application applying Section 401 (5) Cr.P.C. overriding the aforesaid provision of Section 378(4) Cr.P.C. incorporated by the legislature.

Accordingly, the Interlocutory Application stands dismissed.

The applicant/revision petitioner is, however, given liberty to approach the appropriate Court, if so advised, following the prescribed procedure.”

12. The interlocutory application with prayer for conversion of the Criminal Revision to a Criminal Appeal was thus dismissed.

13. In view of my foregoing discussions, it is thereby held that no revision lies against the judgment & order of acquittal passed by the learned Additional Sessions Judge, Rangia, in Criminal Appeal No. 7/2019 vide order dated 17.02.2022.

14. Accordingly, the revision petition is dismissed.

15. The petitioner is however given opportunity to approach the appropriate Court afresh, if so advised, following the prescribed procedure.

JUDGE

Comparing Assistant