

GAHC010117532022



**IN THE GAUHATI HIGH COURT
(The High Court of Assam: Nagaland: Mizoram &
Arunachal Pradesh)**

Crl. Rev.P. 295/2022

Keshab Ch Bora

S/O Late Rabi Ram Bora, R/O North Haibargaon, Nagaon, P.S.-

Nagaon Sadar, Dist- Nagaon (Assam)

..... Petitioner

Versus

Sarat Ch Kakoti And Anr

S/O Sri Mahendra Ch. Kakoti, R/O Mukalmuwa, P.S.-Mukalmuwa,

Dist-Nalabri (Assam), Pin-781335

2:The State of Assam

Represented by the Public Prosecutor

Assam

..... Respondent

BEFORE

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Advocate for the Petitioner : Mr. S. Ahmed

Advocate for the Respondent : Mr. J.H. Saikia, (res no.1.)

Date of Hearing : 14.03.2023

Date of Judgment : **14.06.2023.**

JUDGMENT & ORDER (CAV)

1. Heard Mr. S. Ahmed, learned counsel appearing on behalf of the petitioner as well as Mr. J.H. Saikia, learned Addl. P.P. for the State respondent No. 1.
2. The petitioner has filed this petition under Section 397/401 of the Code of Criminal Procedure challenging the legality and propriety of the Judgment and Order 19.04.2022 passed by the learned Addl. Sessions Judge No-2, Nagaon in Criminal Appeal No. 09(N)/2021 upholding the order of conviction and sentence passed by the Chief Judicial Magistrate in connection with NI Case No-71/2016 dated 12.02.2021.
3. The genesis of the case was that both the petitioner and the respondent no. 2 are businessman and they were closely acquainted with each other. Both the petitioner as well as the respondent used to borrow from each other and used to repay their loans. On 02.05.2013, the petitioner borrowed an amount of Rs. 5,00,000/- through cheque No. 776652 of SBI, Nagaon Branch and again on 08.06.2013, the petitioner borrowed an another amount of Rs. 10,00,000/- vide cheque No. 742488 of Apex Bank, Dispur Branch, on 20.06.2013, the petitioner again borrowed an amount of Rs. 5,00,000/- by an agreement, on 05.04.2014, the petitioner borrowed an amount of Rs. 5,00,000/- vide cheque No. 902598 of the SBI, Mukalmuwa Branch, on 10.09.2014, the petitioner borrowed an amount of Rs. 10,00,000/- vide Cheque No. 680801 of SBI, Mukalmuwa Branch, on 05.06.2015, the petitioner borrowed an amount of Rs. 5,00,000/- in cash. Thus, the petitioner borrowed a total amount of Rs. 40,00,000/- on different pretexts and on different dates from the respondent no. 1 Shri Keshab Ch. Bora but failed to repay the same.

4. On 25.07.2016, the petitioner issued a cheque No. 396713 of SBI, Haiborgaon Branch payable through the bank account No. 10707357400 maintained in the name of the petitioner. On 23.08.2016, the respondent no. 1 deposited the cheque of Rs. 40,00,000/- in his Account No. 308223157931 maintained in SBI, Mukalmuwa Branch for collection of money but the cheque was dishonoured by the SBI, Haiborgaon Branch due to "insufficient funds". On being intimated from the concerned branch, on 02.09.2016, the respondent no. 1 issued a demand notice through registered post to the petitioner through his engaged counsel. When the respondent no. 1 did not receive the acknowledgment of service of the demand notice, he wrote a letter to the Post Office, Nagaon and learnt that on 20.09.2016, the petitioner received the demand notice as reported by the Post Master of Nagaon head office. Then the respondent no. 1 filed a case under Section 138 of the N.I. Act. The respondent no. 1 examined himself as PW-1 and exhibited several documents.

5. The statement of the petitioner was recorded under Section 313 Cr.P.C, and he declined to adduce any evidence. The defence of the petitioner was that he did not obtain any loan from the respondent no. 1. There was a land agreement between him and the respondent no. 1, who paid him of Rs. 40,00,000/- as a part payment to buy the land. Subsequently, the respondent no. 1 changed his mind and he asked the petitioner to return the amount of Rs. 40,00,000/- as he did not want to buy the land any more. It is alleged that as both of them had a cordial relationship, the respondent no. 1, somehow managed to procure some cheques from the petitioner's office and foist a false case against the petitioner.

6. The trial Court held that the petitioner did not procure any loan of Rs. 40,00,000/-. The amount was paid by the respondent no. 1 to the petitioner as advance for consideration of loan agreement on different dates. It was over concluded by the learned Trial Court that

the petitioner had issued the cheques in question in favour of the respondent no. 1 in discharge of his liability in land matters and that was dishonoured for "insufficiency of funds" in the account of the petitioner. It was held by the learned trial Court that the prosecution could prove the guilt of the petitioner.

7. It is apt to mention at this juncture that it was observed by the learned trial Court that vide petition no. 1558/2018 dated 20.04.2018, the petitioner agreed to settle this case amicably with the respondent no. 1 and out of an amount of Rs. 35,00,000/-, Rs. 8,00,000/- was already paid by the petitioner to the complainant, (respondent no. 1), and the petitioner prayed for time to allow him to deposit the remaining amount on the next date. The complainant (respondent no. 1) had acknowledged receipt of Rs. 8,00,000/-. The petition with prayer for compromise was allowed, and ample of opportunity was afforded to both the sides to settle the dispute amicably.

8. (i) the learned Appellate Court held that the cheque was issued by the petitioner in favour of the respondent no. 1,

(ii) the cheque was dishonoured due to 'insufficiency of funds',

(iii) the demand notice was received by the petitioner but he did not respond to the notice,

(iv) the criminal complainant was initiated within the period of limitation, and

(v) the evidence narrows down to the fact the petitioner had accepted that he issued a cheque in discharge of "debt or other liability".

9. The learned Appellate court held that in the case at hand, the money due may not be a debt but definitely comes within the ambit of "other liability". The Appellate Court upheld the judgment and order dated 12.02.2021 passed by the trial Court, convicting the petitioner

under Section 138 of the N.I. Act but the sentence was modified and the petitioner was directed to pay of Rs. 34,00,000/- only to the respondent no. 1 with default stipulation. It was made clear that even if the petitioner suffers default imprisonment, the amount of Rs. 34,00,000/- shall be recoverable from the estate of the petitioner as per Section 421 Cr.P.C. The sentence of imprisonment of 6(six) months ordered by the learned Trial Court and fine of Rs. 2,000/- was set aside by the learned Appellate Court.

10. Both the concurrent judgments have been impugned by the petitioner. It is averred that the cross-examination of the PW-1 was ignored and his statement under Section 313 Cr.P.C was recorded in a perfunctory manner. The bone of contention is that the cheque was issued in discharge of a debt whereas the petitioner has denied that he had obtained any loan from the complainant and the complainant i.e. the respondent no. 1 had issued the cheque for payment in advance for a parcel of land proposed to be purchased by the respondent no. 2.

11. It is contended that the petitioner had already paid of Rs. 8,00,000/-, which has been acknowledged by the respondent no. 1. It is also contended that both the courts below have erroneously held that the petitioner, who is liable to repay the amount had issued the cheque in discharge of "other liability".

12. It is true that the respondent no. 1 had admitted in his cross-examination that the Exhibit-A is the legal notice and through Exhibit-A he demanded of Rs. 40,00,000/-, which was given in part as advance for an agreement to purchase land. He has also admitted that no registered sale deed was executed for sale of land for which he has paid an advance payment of Rs. 40,00,000/- to the petitioner. He has also admitted that the petitioner had not

taken any amount from him, except Rs. 40,00,000/-, which he had paid to the petitioner. He has however not accepted the suggestion of the defence (petitioner) that there was a loan agreement between him and the petitioner and the blank cheques were given to him by the petitioner, which he converted into this cheque of Rs. 40,00,000/- and instituted a false case against the petitioner. PW-1 has denied the suggestion on behalf of the petitioner that the petitioner did not take any loan from him.

13. Both the Courts below have concurrently held that this cheque was returned with remark "funds insufficient" to respondent no. 1. The Courts below have concurrently held that the petitioner is liable under Section 138 of the N.I. Act, as the cheque was issued by the petitioner in discharge of (a debt or any other liability) by the petitioner. The evidence clearly reveals that the petitioner accepted Rs. 40,00,000/- from the respondent no. 1. This Court would not like to interfere with the concurrent findings of the trial Court as well as the appellate Court, because no prejudice was caused to the petitioner and this case does not suffer from gross illegality.

14. It is held that the petitioner has failed to substantiate his legal notice marked as Exhibit-A with evidence. Even to establish a case on the touchstone of preponderance of probability, it was incumbent upon the petitioner to rebut the presumption of liability of debt alleged against him. The petitioner, however was very relaxed and at ease by exhibiting the document A and by cross-examination of PW-1, who has not accepted the suggestion of the petitioner that the cheque was issued as an advance payment of purchase of land by the respondent No. 1. By exhibiting a legal notice dated 03.05.2016 marked as Exhibit-A, the respondent has failed to rebut the presumption under Section 118 and 139 of the N.I. Act. It is submitted that the PW-1 has admitted that the Exhibit-A was the legal notice issued by him

to the petitioner but the petitioner has failed to prove his stance that the Exhibit-A is the only legal notice served upon the petitioner, even on the preponderance of probabilities. The legal notice marked as Exhibit-4 was sent to respondent No. 1 on 02.09.2016 i.e. after the issuance of the cheque marked as Exhibit-A. The cheque was issued on 25.07.2016 and Exhibit-A was sent on 03.05.2016, whereas, Exhibit-4 was sent on 02.09.2016, i.e. after the issuance of the cheque No. 396713 of SBI Haiborgaon Branch. It is clear from the Exhibit-4 proved by the PW-1 i.e. the respondent no. 1 that the demand notice was sent after the issuance of the cheque, which was returned as there was "insufficiency of funds" in the petitioners account. The Exhibit-4 clearly reveals that the petitioner was to discharge/repay the debt of Rs. 40,00,000/-, which he had borrowed from the respondent no. 1. It is clear from the Exhibit-4 that the demand notice was sent as the Cheque No. 396713 dated 25.07.2016 was dishonoured due to "insufficiency of funds". Thus, it is held that the petitioner has failed to rebut the presumption under Section 118 and 139 of the N.I. Act. The petitioner has failed to adduce any evidence to substantiate his stance.

15. It has been observed by the Hon'ble Supreme Court in:-

Duli Chand Vs. Delhi Administration, 1975(4) SCC 649 that:- " *Jurisdiction of High Court in criminal revision is severely restricted and it cannot embark upon a re-appreciation of evidence. While exercising supervisory jurisdiction in revision the Court would be justified in refusing to re-appreciate evidence for determining whether the concurrent findings of fact reached by learned Magistrate and Sessions Judge was correct.*

In ***Pathumma and another Vs. Muhammad, 1986(2) SCC 585***, it was observed that in revisional jurisdiction the High Court would not be justified in substituting its own view for

that of a Magistrate on a question of fact.

11. In ***Munna Devi Vs. State of Rajasthan and another, 2001(9) SCC 631***, it was observed that:-

"The revisional power under the Code of Criminal procedure cannot be exercised in a routine and casual manner. While exercising such powers the High Court has no authority to appreciate the evidence in the manner as the trial and the appellate courts are required to do. Revisional powers could be exercised only when it is shown that there is a legal bar against the continuance of the criminal proceedings or the framing of charge or the facts as stated in the First Information Report even if they are taken at the face value and accepted in their entirety do not constitute the offence for which the accused has been charged."

16. In the instant case, I would not like to re-appreciate the entire evidence discussed by the learned trial Court as well as by the Appellate Court. There is no illegality or impropriety in the concurrent findings of the learned trial Court as well as the learned Appellate Court which caused grave injustice to the appellant. I have also taken a pragmatic view after hearing both the sides. It is submitted by the learned counsel for the appellant that the appellant would not be able to pay the entire amount within 6(six) months and it was also agreed by the learned counsel for the respondent that at least 50% of the compensation amount has to be paid within 6(six) months and the remaining amount can be paid within a year from the date of this order.

17. This revision petition is devoid of merits. The conviction is upheld under Section 138 N.I. Act and the sentence of compensation is modified and reduced to Rs. 32,00,000/-. The evidence reveals that the petitioner had already paid of Rs. 8,00,000/- to the respondents.

The petitioner is directed to pay of Rs. 32,00,000/- to the respondents within one year and he is directed to pay 50% of the compensation amount within 6(six) months and complete the payment of the remaining amount within 1(one) year from today and in default of payment compensation, the petitioner is to suffer rigorous imprisonment for 6(six) months. It is also made clear that even if the petitioner suffers a default imprisonment, the compensation shall be recoverable from his estate as per Section 421 Cr.P.C.

18. In terms of the above observations, this petition stands disposed of.

JUDGE

Comparing Assistant