



THE GAUHATI HIGH COURT AT GUWAHATI

(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Appeal No.65/2017

SRI AMITABH SAIKIA
S/O LATE PABITRA KUMAR SAIKIA,
R/O MD. ROAD, NORTH HAIBORGAON
NAGAON TOWN,
DIST. NAGAON, ASSAM.

..... APPELLANT.

-Versus-

SRI DEBOJIT GOGOI @ DEBAJIT GOGOI
S/O SRI HARENDRA NATH GOGOI,
R/O NA-ALI, LICHUBARI MAYUR
PANKHI TRANSPORT, NEAR BALIA GOHAIN PUKHURI,
JORHAT TOWN, DIST. JORHAT, ASSAM,
PIN 785008 AND HAVING HIS PERMANENT R/O
VILL. HAHCHARA JATHIPATIA GAON,
P.O. HAHCHARA, P.S. SIVASAGAR,
DIST. SIVASAGAR, ASSAM.

..... RESPONDENT.

**BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN**

Advocates for the appellant : Mr. S. Chakraborty,

Advocate for the respondent : Mr. P.K. Munir,

Date of Hearing :- 04.10.2023

Date of Judgment :- 07.11.2023.

JUDGMENT AND ORDER (CAV)

Heard Mr. S. Chakraborty, learned counsel for the appellant, and also heard Mr. P.K. Munir, learned counsel, for the respondent.

2. In this appeal, under section 378 Cr.P.C., the appellant – Shri Amitabh Saikia, has put to challenge the judgment and order, dated 05.08.2016, passed by the learned Chief Judicial Magistrate, Nagaon, in C.R. Case No.1467/09, under Section 138 of the N.I. It is to be noted here that vide impugned judgment and order, the learned court below has acquitted the respondent, of the offence under section 138 N.I. Act.

3. The background facts, leading to filing of the present appeal, under section 378 Cr.P.C. is adumbrated herein below:-

“The appellant and the respondent herein had a good business relationship. Then on 10.07.2008, the respondent had requested

the appellant to advance him a sum of Rs.10,00,000/- with a promise to return the same within three months. Accordingly, the appellant had given a sum of Rs.10,00,000/- to the appellant on 14.07.2008. After three months, i.e. on 24.10.2008, the appellant had demanded the respondent to return the sum. The respondent then issued a cheque, bearing No. 093619, dated 24.10.2008, payable at UCO Bank, Jorhat Branch. The appellant then presented the cheque in his account at Central Bank of India, Nagaon Branch on 24.10.2008. But, the said cheque returned dishonoured on 07.11.2008, due to insufficiency of fund in the account of the respondent. Then on being instructed by the respondent, the appellant had again presented the cheque on 22.12.2008. But, this time also the cheque returned dishonoured on 01.01.2009. Then, again on instruction of the respondent, the appellant had presented the cheque on 09.02.2009, and again the cheque returned dishonoured due to insufficiency of fund; vide cheque returning Memo, dated 14.02.2009. Thereafter, the appellant had issued legal notice through his engaged counsel to the respondent to pay the cheque amount within 15 days of the receipt of Notice. The respondent had received the Notice on 27.03.2009, but failed to make payment of the sum. Thereafter, the appellant had instituted a complaint, being C.R. Case No. 1467/2009, under section 138 of the N.I. Act. The respondent had appeared and contested the case. Thereafter, hearing both the parties, the

learned court below had dismissed the complaint and acquitted the respondent, vide impugned judgment and order dated 05.08.2016.”

4. Being highly aggrieved and dissatisfied with the aforesaid judgment and order, the appellant has preferred this appeal, and contended to allow the same on the following grounds :-

- [i] That, the learned court below has failed to appreciate the mandate of section 139 of the N.I. Act, which provides for drawing of presumption in favour of the holder of the cheque and that the same was issued in discharge of a legally enforceable debt;
- [ii] That, the case of the respondent is that the cheque in question was one of the cheque, amongst the 10 blank cheques, handed over by him to the appellant while borrowing a sum of Rs.4,10,000/-; on 16.02.2007, but the same is not acceptable in as much as per Exhibit-12 and evidence of P.W.2, the Manager of UCO Bank, Jorhat Branch, the cheque book containing cheque leaf(s) No. 093601 to 093650 was issued to the respondent on 11.08.2007, and that being so, the question of handing over of cheque to the appellant by the respondent as security in respect of the loan taken on 16.02.2007, is not at all believable.

- [iii] That, the learned court below has failed to appreciate that the plea of the respondent is not at all probable and the same failed to withstand the test of preponderance of probability;
- [iv] That, the respondent also had admitted in cross-examination that the cheque book containing leaf(s) No.093601 to 093650 was issued to the him on 11.08.2007, and as such the plea of handing over of the cheque in question as security cheque for a loan taken by him on 16.02.2007 is an absurd proposition;
- [v] That, the learned court below has failed to consider the evidence of P.W.3, who had categorically stated that he was aware of payment of a sum of Rs.10,00,000/- by the appellant to the respondent and that the respondent had handed over the cheque of amount Rs.10,00,000/- to the appellant in his residence and in his presence;

5. Mr. S. Chakraborty, the learned counsel for the appellant has canvassed following points for consideration of this court at the time of hearing,:-

- (i) That, the learned court below, in the impugned judgment had never discussed the evidence of the Manager of UCO Bank Jorhat Branch (P.W.2) and also failed to take into account the Exhibit-12;

- (ii) That, the evidence of the P.W.2 and Exhibit 12 clearly shows that the cheque book containing cheque leaf(s) No.093601 to 093650 was issued to the respondent on 11.08.2007, and that being the question of handing over of cheque to the appellant by the respondent, as security in respect of the loan taken on 16.02.2007, is highly improbable;
- (iii) That, the learned court below has failed to consider that the statutory presumption under section 139 of the N.I. Act is available in favour of the appellant;
- (iv) That, the plea of the respondent is highly improbable and despite the learned court below has accepted the same.

These points/circumstances, according to Mr. Chakraborty, have affect the very sustainability of the judgment of the learned court below and therefore, it is contended to set aside the impugned judgment and order. Mr. Chakraborty, also referred a decision of Hon'ble Supreme Court in **Rajesh Jain vs. Ajoy Singh, Special Leave Petition (Crl.) No. 12802 of 2022**) in support of his submission.

6. Per-contra, Mr. P.K. Munir, learned counsel for the respondent, has supported the impugned judgment. Mr. Munir submits that the respondent has successfully rebutted the statutory presumption available in favour of the appellant under section 139 of the N.I. Act.

Further, Mr. Munir submits that as the learned trial court has acquitted the respondent, the presumption of innocence, in favour of the respondent is further strengthened. Therefore, it is contended to dismiss the appeal.

7. Having heard the submissions of learned Advocates of both sides, I have carefully gone through the appeal and the grounds mentioned therein and also the documents placed on record. Also, I have perused the impugned judgment and order and the record of the learned court below and the case laws, referred by the learned counsel for the appellant.

8. Before directing a discussion in to the issues, so raised in this appeal, it would be pertinent to discuss the ingredients of the offence under section 138 of the N.I. Act. In **K. Bhaskaran v. Sankaran Vaidhyan Balan** reported in **(1999) 7 SCC 510** Hon'ble Supreme Court had held that in order to establish a case under section 138 of the N.I. Act the following ingredients are to be established:

- (1) drawing of the cheque,
- (2) presentation of the cheque to the bank,
- (3) returning the cheque unpaid by the drawee bank,
- (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount,
- (5) failure of the drawer to make payment within 15 days of the receipt of the notice.

9. In the instant case, it appears from the evidence on the record that the respondent has not denied issuance of cheque in question and his signature thereon. He had also not denied presentation of the cheque to the bank by the appellant and returning of the same dishonoured by the bank and receiving notice, demanding the cheque amount by the appellant, and failing to make payment of the sum within the stipulated period of 15 days. Thus, it appears that the appellant had succeeded in establishing the aforementioned ingredients of the offence under section 138 of the N.I. Act.

10. Since the respondent has not denied issuance of cheque and also not denied his signature in the cheque in question, the statutory presumption under section 139 of the N.I. Act, is very much available here in this case. In the case of **Rangappa v. Sri Mohan** reported in **(2010) 11 SCC 441**, a three-Judge Bench of Hon'ble Supreme Court had held that Section 139 of the Act mandates that it shall be presumed, unless the contrary is proved, that the holder of a cheque received it, in discharge, in whole or in part, of a debt, or liability. The expression "unless the contrary is proved" indicates that the presumption under Section 139 of the Act is rebuttable. Terming this as an example of a "reverse onus clause" the Court held that in determining whether the presumption has been rebutted, the test of proportionality must guide the determination. The standard of proof for rebuttal of the presumption under Section 139 of the Act is guided by a preponderance of probabilities.

11. It also appears that the learned court below had rightly drawn the presumption under section 139 of the N.I. Act. It is to be mentioned here that the learned court below, while dealing with the issue, had framed following four points in its judgment, for determination:-

- A) Whether the accused had taken loan of Rs.10,00,000/- from the complainant?
- B) Whether the accused had issued the cheque in the name of the complainant and whether the same done in discharge of any legal liability?
- C) Whether the cheque was dishonoured by the bank?
- D) Whether the accused had received the statutory notice?

12. Thereafter, the learned court below had answered the point Nos.C and D, in affirmative. And thereafter, addressing the point Nos.A and B the learned court below had held that the initial presumption, under section 139 of the N.I. Act, is available in favour of the appellant. Then the learned court below had held that the complainant/appellant had discharged his initial burden by proving that the accused/respondent owed him money to the tune of Rs.10,00,000/- and had issued the cheque in discharge of that liability.

13. It also appears that thereafter, discussing the evidence of D.W.1/accused/respondent, the learned court had held that the respondent had issued 10 numbers of blank signed cheque of UCO Bank of Jorhat Branch bearing serial No.093617 to 093626 as

collateral security, while borrowing a sum of Rs.4,10,000/- on 16.02.2007, from the appellant. The learned court below further held that the respondent/D.W.1 had repaid the amount to the appellant, but, the appellant had not returned the said cheques and that the appellant had acknowledged in his cross-examination about receiving the sum of Rs.4,10,000/- and that the respondent prior to receiving statutory Notice had instructed the Bank to stop payment of those 10 numbers of cheque. Also the learned court below had held that the respondent had succeeded in rebutting the statutory presumption under section 139 of the N.I. Act and that the appellant had failed to establish that he had advanced such a huge amount without any document also disbelieved the P.W.3, which happened to be the relative of the appellant. And resultantly, answered the point Nos.A and B in negative and acquitted the respondent.

14. But, the way the learned trial court had held that the statutory presumption available under section 139 of the N.I. Act, stands rebutted, appears to be far from satisfactory. It also appears that the learned court below, has held that the respondent had borrowed a sum of Rs.4,10,000/- from the appellant on 16.02.2007, and at that time the appellant had taken 10 numbers of cheque as collateral security from the respondent and after payment of the said amount of Rs.4,10,000/-, the appellant had not returned the 10 numbers of cheque, and he had presented two cheques bearing No.093617 & 093618 to the Bank for which he had issued stop payment instruction to the Bank before receipt of the statutory notice.

15. However, from the Exhibit-12 and also from the evidence of P.W.2, the Manager of UCO Bank, Jorhat Branch, it appears that the cheque book containing cheque leaf(s) No.093601 to 093650 was issued to the respondent on 11.08.2007, and that being the question of handing over of cheque to the appellant by the respondent as collateral security in respect of the loan taken on 16.02.2007, is not at all believable. Unfortunately, this aspect had eschewed consideration from the learned court below and nowhere in the judgment, had the learned court below discussed the evidence of the P.W.2 and the Exhibit- 12. Mr. Chakraborty, the learned counsel for the appellant has rightly pointed this out during argument and I find sufficient force in the same. Further, the way the learned court below had discarded the evidence of P.W.3, being the relative of the appellant, is also far from satisfactory. These facts, specially, non-consideration of the evidence of the P.W.2 and Exhibit-12, cause serious prejudice to the appellant and on such count the impugned judgment and order has failed to withstand the legal scrutiny. The approach of the trial court in dealing with the evidence of P.W.3 and non-consideration of P.W.2 and Exhibit-12, was patently illegal and the conclusions arrived at by it were wholly untenable, which alone will justify interference of the order of acquittal.

16. How to deal with, decide and dispose of the criminal appeal against an acquittal under Section 378 Cr.P.C., has been elaborately dealt with by Hon'ble Supreme Court, after considering the catena of earlier decisions, in the case of **Guru Dutt Pathak Vs. State of**

Uttar Pradesh, (2021) 6 SCC 116. In paragraphs 15 to 20 it has been observed as under: -

"15. In Babu v. State of Kerala [Babu v. State of Kerala, (2010) 9 SCC 189, this Court has reiterated the principles to be followed in an appeal against acquittal under Section 378 CrPC. In paras 12 to 19, it is observed and held as under: (SCC pp. 196-199)5

"12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject matter of scrutiny by the appellate court.

13. In *Sheo Swarup v. King Emperor* [*Sheo Swarup v. King Emperor*, 1934 SCC OnLine PC42], the Privy Council observed as under: (SCC OnLine PC)'... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.'

14. The aforesaid principle of law has consistently been followed by this Court (See *Tulsiram Kanu v. State* [*Tulsiram Kanu v. State*, AIR 1954 SC 1 : 1954 Cri LJ225], *Balbir Singh v. State of Punjab* [*Balbir Singh v. State of Punjab*, AIR 1957 SC 216 : 1957 Cri LJ 481], *M.G. Agarwal v. State of Maharashtra* [*M.G. Agarwal v. State of Maharashtra*, AIR 1963 SC 200 : (1963) 1 Cri LJ235] , *Khedu Mohton v. State of Bihar* [*Khedu Mohton v. State of Bihar*, (1970) 2 SCC 450 : 1970 SCC (Cri) 479], *Sambasivan v. State of Kerala* [*Sambasivan v. State of Kerala*, (1998) 5SCC 412 : 1998 SCC (Cri) 1320],

Bhagwa Singh v. State of M.P. [Bhagwan Singh v. State of M.P., (2002) 4 SCC 85 : 2002 SCC (Cri) 736] and State of Goa v. Sanjay Thakran [State of Goa v. Sanjay Thakran, (2007) 3 SCC 755 : (2007) 2 SCC (Cri) 162].)

15. In *Chandrappa v. State of Karnataka* [*Chandrappa v. State of Karnataka*, (2007) 4 SCC 415], this Court reiterated the legal position as under : (SCC p. 432, para 42)'42. ...

(1) *An appellate court has full power to review, re appreciate and reconsider the evidence upon which the order of acquittal is founded.*

(2) *The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.*

(3) *Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances",⁷"distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the*

reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.'

16. In Ghurey Lal v. State of U.P. [Ghurey Lal v. State of U.P., (2008) 10 SCC 450 : (2009) 1SCC (Cri) 60] , this Court reiterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court

had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In State of Rajasthan v. Naresh [State of, Rajasthan v. Naresh, (2009) 9 SCC 368 : (2009)3 SCC (Cri) 1069] , the Court again examined the earlier judgments of this Court and laid down that : (SCC p. 374, para 20)'20. ... An order of acquittal should not be lightly interfered with even if the Court believes that there is some evidence pointing out the finger towards the accused."

18. In State of U.P. v. Banne [State of U.P. v. Banne, (2009) 4 SCC 271: (2009) 2 SCC(Cri) 260], this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include: (Banne case [State of U.P. v. Banne, (2009) 4 SCC 271: (2009) 2 SCC (Cri) 260] ,SCC p. 286, para 28)

'28. ... (i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.'

A similar view has been reiterated by this Court in Dhanapal v. State [Dhanapal v. State,(2009) 10 SCC 401 : (2010) 1 SCC (Cri) 336] .

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference

17. And when the findings of fact, recorded by a court, can be held to be perverse, has been dealt with and considered in para 20 in **Babu v. State of Kerala, (2010) 9 SCC 189**, as under:-

"20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality."

It is further observed, after following the decision of this Court in *Kuldeep Singh v. Commr. of Police* [*Kuldeep Singh v. Commr. of Police*, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] , that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

18. As discussed herein above the approach of the trial court in dealing with the evidence of P.W.3 and non-consideration of P.W.2 and Exhibit-12, was patently illegal and the conclusions arrived at by it were wholly untenable, and applying the law laid down in the cases discussed herein above it can be concluded safely that apart from being illegal the same is also perverse, which alone will justify interference of the order of acquittal.

19. I have considered the submission of Mr. Munir, learned counsel for the respondent. This court is not oblivious of the fact that the presumption of innocence of the accused is always available and

further that the trial court's acquittal bolsters the presumption of his innocence. But, in view of above discussion and finding that there is perversity in the impugned judgment and that the same being against the weight of evidence and that the finding so outrageously defies logic as to suffer from the vice of irrationality, and entire approach of the learned court below in dealing with the evidence was patently illegal leading to grave miscarriage of justice; I am unable record concurrence with the same.

20. In the result, I find sufficient merit in this appeal, and accordingly, the same stands allowed. The impugned judgment and order stands set aside. The matter remanded back to the learned court below to decide the matter afresh after due consideration of the evidence of P.W.2 and Exhibit-12. Send down the record of the learned court below, with a copy of this judgment and order. The parties have to bear their own costs.

JUDGE

Comparing Assistant