

GAHC010141172022



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

Case No. : Crl.Pet./787/2022

KABINDRA NARZARY
S/O LT. KRISHNA MOHAN NARZARY
R/O VILL- TITAGURI AMLAIGURI
P.O. TITAGURI, 783370
P.S. AND DIST. KOKRAJHAR, BTC, ASSAM

VERSUS

MAFIJUL HOQUE AND ANR
S/O HUSSAIN ALI
R/O VILL- CHAUTAKI PT.I
P.O. SALAKATI
P.S. AND DIST. KOKRAJHAR, BTC, ASSAM
PIN NO. 783376

2:MIER ALI
SO LT. ABU BAKKAR
R/O VILL- CHAUTAKI
P.O. SALAKATI
P.S. AND DIST. KOKRAJHAR
BTC
ASSAM
PIN NO. 78337

Advocate for the Petitioner : MR G BAISHYA

Advocate for the Respondent : MR. I A TALUKDAR (R1, R2)

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner : MR G. Baishya. Advocate.

For the Respondents : Mr. I. A. Talukdar, Advocate.

Date of Hearing : 23.11.2023

Date of Judgement : 23.11.2023

JUDGMENT & ORDER (ORAL)

1. Heard Mr. G. Baishya, learned counsel for the petitioner. Also heard Mr. I. A. Talukdar, learned counsel for the respondent No. 2.
2. The present criminal petition under Section 482 read with Section 397 and 401 of the Cr.P.C., 1973, has been filed assailing the order of cognizance dated 17.01.2022 passed by the learned Court of Additional Chief Judicial Magistrate, Kokrajhar, whereby cognizance against the petitioner under Section 138 of the Negotiable Instruments Act, 1881 (in short as NI Act, 1881) was taken in complaint Case N.I. No. 03/2022.
3. The basic grievance of the petitioner is that there is no legally

enforceable due against the present petitioner as alleged in the complaint. The cheque was a security cheque given by the petitioner to one Md. Mier Ali. Said Md. Mier Ali handed over the cheque to the respondent for honouring the dues of Md. Mier Ali and the respondent without having any enforceable debt against the petitioner, presented the cheque which got dishonoured. Such fact, according to the petitioner is established from the F.I.R. lodged by the said Md. Mier Ali against the petitioner and his son. Therefore, in view of such factum and existence of the FIR, which is a public document, the learned Court below ought not to have proceed with the matter and could not have taken cognizance under Section 138 of the NI Act, 1881.

4. Mr. Baishya, learned counsel for the petitioner submits that the proviso to Section 139 of the NI Act, 1881, merely raises a presumption in favour of a holder of the cheque and therefore, the learned Court below has committed a serious error in proceeding on the basis of that the accused is to appear before the Court and produce his defence. Mr. Baishya, learned counsel further submits that such course of action has been prohibited by the Hon'ble Apex Court in the case of **Krishna Janardhan Bhat –VS- Dattatraya G. Hegde** reported in **2008 4 SCC 54**. While relying on the aforesaid judgment, he contends that presumption of innocence is a human right and therefore, the learned Court below ignoring such factum of existence of FIR could not have taken cognizance only on the ground that there is a presumption against the holder of a cheque. Therefore, Mr. Baishya, learned counsel submits that the entire process is nothing but abuse of the process of the Court and therefore, this Court can very well set aside and quash the entire proceeding in exercise of its power under

Section 482 of Cr.P.C. inasmuch as in the case of ***State of Haryana and Others –VS- Bhajan Lal*** reported in ***AIR 1992 SC 604***, in no unambiguous term, the Hon'ble Apex Court has held that when there is an abuse of the process of the Court, the High Court can interfere with a criminal proceeding to avoid such abuse of the process of the Court.

5. Per contra, Mr. I. A. Talukdar, learned counsel for the respondents submits that a Magistrate is to take cognizance on the basis of the material and statement made in the complaint as well as initial deposition recorded under Section 200 of Cr.P.C.
6. On the perusal of the aforesaid, the learned Court below has taken cognizance. A bare reading of the complaint reflects that, a prima facie case under NI Act, 1881 is made out. Therefore, a prima facie case being made out, this Court may not like to exercise its power under Section 482 of Cr.P.C. to quash the entire complaint.
7. This Court has given anxious consideration to the submissions advanced by the learned counsel for the parties.
8. The whole plank of argument of Mr. Baishya, learned counsel for the petitioner is the existence of an FIR. From the perusal of the FIR, it is seen that one Md. Mier Ali lodged an FIR before the IGP, Kokrajhar on 22.09.2020 against the petitioner and his son that the petitioner and his son were the contractors and they had taken money from the informant with a promise of giving share of construction work and said Md. Mier Ali (informant) has taken money from some persons listed in the aforesaid FIR. The grievance raised by Md. Mier Ali (informant) is that the petitioner and

his son are not repaying the said borrowed amount to the informant and he is facing problem in repaying the due which he has in turn taken from other parties. Since such FIR is the core of contention, same is quoted herein below:-

“To,

The Hon'ble I.G.P., BTAD,

Kokrajhar District

Dated Kokrajhar the 22 day of September, 2020.

Sub: Prayer for accept information and complain against Sri Kabindra Narzary & others Janak Kr. Narzary.

Respected Sir,

With reference to the subject cited above, I have the honour to state that the few lines for your kindness order.

That Sir, the following named person who was a Contractor and he taken many amount at various time from me with a promise of giving share of the construction work and I have also taken amount from following person. Now, at present the said contractor is refusing to repayment of the said borrowed amount and I am also facing many problem for this purpose to repayment the be due which I have landed from persons.

Therefore, I pray that you would be kindly grant this application and please issue an order to repayment the amount which is be due and thus oblige.

Yours faithfully

Md. Mier Ali

Name of the persons/contractor

1. Kabindra Narzary

S/O Late Krishna Mohan Narzary

*R/O- Village- Amlaiguri, P.O-
Titaguri, P.S. & Dist- Kokrajhar,
BTAD, Assam.*

2. *Janak Kr. Narzary*

S/O Kabindra Narzary.

*R/O- Village- Amlaiguri, P.O-
Titaguri, P.S. & Dist- Kokrajhar,
BTAD, Assam.*

<i>Name of the landed persons</i>	<i>Amount</i>
1. <i>Miar Ali & Othrs</i>	<i>Rs. 1,82,89 Lakh</i>
2. <i>Akbar Ali & Others</i>	<i>Rs. 30,00,000 Lakh</i>
3. <i>Behaj Ali & Others</i>	<i>Rs. 35,00,000 Lakh</i>
4. <i>Sofikul Ali & Others</i>	<i>Rs. 11,00,000 Lakh</i>
5. <i>Abdul Barek</i>	<i>Rs. 51,00,000 Lakh</i>
6. <i>Rafiqul Ali</i>	<i>Rs. 8.5 Lakh</i>
7. <i>Saijuddin Ali</i>	<i>Rs. 25,00,000 Lakh.</i>
8. <i>Halim Ali</i>	<i>Rs. 34,00,000 Lakh".</i>

9. It is to be noted that in the aforesaid list of persons, the name of the present respondent No. 1 is not reflected.

10. From the materials available on record, it is also seen that on 11.12.2023, a notice under Section 138(b) of NI Act, 1881 was issued alleging that the petitioner was a contractor in constructing Nursing Training Building at Kokrajhar and during such construction work, when the petitioner faced financial problem to complete the Nursing Training Building as well as other

construction works requested the respondent No. 1 for an amount of Rs. 24,00,000/- (Rupees Twenty Four Lakhs) as loan which was paid by the informant. The basic contention lodged in the aforesaid demand notice is quoted herein below:-

“1) That, my client is a reputed license holder Contractor by profession as well as he works within the boundary of NTPC, Salakati, all round development contract works. He is a regular income tax payee and regular GST payee. Hence, my client was/is known to you very well. You are also a Class-1 Contractor of all over Assam as well as you have got name and fame in the all department. About ¾ years back you got some construction works including the construction of Nursing Training Building of Kokrajhar. At the time of constructing the Nursing Building, you faced financial problem to complete the Nursing Training Building as well as other construction works. As a result, my client being well known to you as a Contractor, you requested him to give Rs. 24,00,000/- (Rupees Twenty Four Lakhs) to you as a loan in 2 (two) instalment in different dates for running your construction works.

2) That, after expiry of stipulated period, my client requested you to return Rs. 24,00,000/- (Rupees Twenty Four Lakhs) along with benefits amount, but, you did not pay any amount to my client. On the basis of repeated request of my client, last on 29.11.2021, you issued a cheque bearing Nos. 822242 of SBI, Kokrajhar Branch (Courtpara) amounting Rs. 9,00,000/- (Rupees Nine Lakhs) and on 02.12.2021, you again issued another cheque bearing Nos. 822244 of SBI, Kokrajhar Branch (Courtpara) amounting Rs. 15,00,000/- (Rupees Fifteen Lakhs), in total Rs. 24,00,000/- (Rupees Twenty Four Lakhs) in the name of my client against the loan amount which you had taken from my client. It is also told by you that within a week, you will pay the benefits amount to my client. Accordingly, on 30.11.2021 & 04.12.2021, my client deposited the said cheques in the SBI, Salakati Branch in his A/C bearing No. 33306543050 for encashment”.

11. The petitioner through his counsel replied to such notice on 21.12.2023 denying taking of loan and further took a stand that the informant in the

FIR as discussed hereinabove (supra) namely Md. Mier Ali handed over two numbers of cheques mentioned above to the respondent No. 1 belonging to the petitioner and for wrongful gain, the respondent No. 1 had misused the said two numbers of cheques and deposited at the bank for encashment.

12. Pursuant to this, a complaint under Section 138 of NI Act, 1881 was filed before the learned Court below. The basic contention in the said complaint case is quoted herein below:-

“1) That, the complainant is a permanent resident of Vill-Chautaki P-I, PO- Salakati under P.S. & Dist.- Kokrajhar, BTC (Assam). He is a reputed License holder Contractor by profession as well as he works within the boundary of NTPC, Salakati, all round developmental contract works. The complainant is a regular income tax payee and regular GST payee. Hence, the complainant was/is known to the accused person very well. The accused person is also a Class-1 Contractor of all over Assam as well as he has got name and fame in the all department. About ¾ years back, the accused person got some construction works including the construction of Nursing Training Building of Kokrajhar. At the time of constructing the Nursing Building, the accused person faced financial problem to complete the Nursing Training Building as well as other construction works. As a result, the complainant being well known to the accused person as a Contractor, the accused person requested the complainant to give Rs. 24,00,000/- (Rupees Twenty Four Lakhs) as loan to run his construction works with a promise to return the loan amount along with lump sum benefits within a period of 1 (one) year. As a result, on good faith as well as to get benefits, the complainant had given Rs. 24,00,000/- (Rupees Twenty Four Lakhs) to the accused person as a loan in 2 (two) instalment in different dates for running your construction works.

2) That, after expiry of stipulated period, the complainant requested the accused person to return Rs. 24,00,000 (Rupees Twenty Four Lakhs) along with benefits amount, but, the accused person did not pay any amount to the complainant. On the basis of repeated request of the complainant, last on 29.11.2021, the accused person has issued

a cheque bearing Nos. 822242 of SBI, Kokrajhar Branch (Courtpara) amounting Rs. 9,00,000/- (Rupees Nine Lakhs) and on 02.12.2021, the accused person again issued another cheque bearing Nos. 822244 of SBI, Kokrajhar Branch (Courtpara) amounting Rs. 15,00,000/- (Rupees Fifteen Lakhs), in total Rs. 24,00,000/- (Rupees Twenty Four Lakhs) in the name of the complainant against the loan amount which the accused person had taken from the complainant. It is also told by the accused person that within a week, the accused person will pay the benefits amount to the complainant. Accordingly, on 30.11.2021 & 04.12.2021, the complainant deposited the said cheques in the SBI, Salakati Branch in his A/C bearing No. 33306543050 for encashment.

4) That, after getting the Cheque Return letters dtd. 02.12.2021 & 07.12.2021 along with the cheques, the complainant several times requested the accused person to pay the cheque amount along with benefits, but, the accused person did not pay any attention on the request of complainant. As a result, the complainant served notice to the accused person through his engaged lawyer Abdul Kader Miah, Advocate, Kokrajhar on 11.12.2021 and the said notice was sent through registered post with A/D and the same was received by the accused person. Last on 21.12.2021, the accused person had given reply of the Pleader's Notice through his engaged lawyer. Hence, the notice is properly served as per provision of law. So, the accused person is liable for the offence U/S 138 N.I.Act".

13. Thereafter the complaint was registered and statement of the complainant was taken on oath and on the perusal of the same, after appreciation of the same by the learned Court below by the impugned order dated 17.01.2023 took cognizance under Section 138 of NI Act, 1881 and issued process.
14. From the perusal of the aforesaid complaint petition as well as the demand notice, it is seen that the respondent No. 1 has specifically stated that there is a legally enforceable debt, for which the cheques were issued and which were dishonoured. It is also stated in the complaint that notice

was issued and same has duly been received by the petitioner.

15. That being the position, on a bare reading of the complaint, taking the same as a whole reflects that a prima facie case under Section 138 of the NI Act, 1881 is made out. Therefore, this Court is to look into the whether on the basis of the FIR dated 22.09.2020, this Court in exercise of power under Section 482 of Cr.P.C. or in exercise of its revisional power can enter into the determination of the fact that the FIR relates to the same matter and the cheque dishonoured was a security cheque given to Md. Mier Ali by the petitioner for other obligation. There is no quarrel on the propositions of law that when admitted materials are available which shows that the lodging of a criminal case is an abuse of the process of a Court, this Court is not powerless to interfere to such criminal proceeding.
16. However, in the case in hand, reading of the FIR, in the considered opinion of this Court reflects that the informant in the FIR i.e. Md. Mier Ali is having a grievance against the present petitioner for the reason that the present petitioner has taken money from him which he has not repaid to said Md. Mier Ali and in turn, Md. Mier Ali could not honoured his debt to the other persons from whom he has taken loan including the present petitioner. Even if it is assumed that contention of the FIR is correct, this Court cannot come to a conclusion on the basis of such allegation made in the FIR that there is no other enforceable liability between the petitioner and the respondent No. 1.
17. That being the position, this Court cannot set aside and quash a criminal proceeding or a complaint when a prima facie case is made out.

18. Now coming to the abuse of the process of this Court, law is by now well settled that an abuse of process is something unfair and wrong with the prosecution, which a superior Court should not allow a prosecutor to proceed. Therefore, certain criterions are to be looked into when it is alleged that it is an abuse of the process of the Court. Firstly, it is to be seen, where it would be impossible to give an accused a fair trial and, secondly, where it would amount to misuse and manipulation of the process.
19. In the case in hand, as discussed hereinabove, the petitioner shall have a chance to fair trial inasmuch as under the Scheme of the NI Act, there is only initial presumption against an accused person and if the accused is able to discharge his burden, the onus will shift to the complainant to prove such case. Therefore, the petitioner will have a fair opportunity to rebut such presumption as well as the contention that has been raised in the present case i.e. the dispute that the cheque dishonoured is a security cheque meant to Md. Mier Ali, not for the complainant and Md. Mier Ali handed over the cheque to the complainant.
20. Therefore, in the totality of the matter, this Court is of the opinion that filing of complaint by the respondent, in the given facts of the case cannot be treated as misuse or manipulation of process. In view of the aforesaid, this Court finds no merits in this present criminal petition. Accordingly same stands dismissed.
21. While parting with this record, it is made clear that this order should not be treated as comment on the merit of the claim of the present petitioner as well as the respondent complainant.

22. As the learned counsel representing the petitioner and the respondent No. 1 are duly represented, parties shall appear before the learned Court below on 26.12.2023.

JUDGE

Comparing Assistant