

GAHC010159202020



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

Case No. : Crl.Rev.P./11/2022

NANDKISHORE BASFORE
S/O. LATE BHUGLI BASFORE, STATE BANK OF INDIA, BHANGAGARH
BRANCH, GHY- 05, P.S. BHANGAGARH, DIST. KAMRUP(M), ASSAM

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY THE PUBLIC PROSECUTOR, GAUHATI HIGH COURT

2:ASWINI DAS
S/O. SRI RAJEN DAS
R/O. VILL. CHANGSARI
DIST. KAMRUP
ASSA

Advocate for the Petitioner : MR D CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN
JUDGMENT

19.01.2023.

Heard Mr. B Choudhury, learned counsel for the petitioner. Also heard Ms. S.H. Bora, learned Addl. PP, appearing for the State Respondent No.1 and Mr. H

Kalita, learned counsel for respondent No.2.

2. In this petition, under Section 397/401 Cr.P.C., the petitioner has challenged the legality, propriety and correctness of the Judgment and Order, dated 02.01.2020, passed by the learned Additional Sessions Judge No.3, Kamrup (M), Guwahati in Criminal Appeal No.163/2018.

3. It is to be noted herein that vide impugned judgment and order, the learned Addl. Sessions Judge has upheld the judgment and order dated 13.09.2018, passed by the learned Judicial Magistrate First Class, (JMFC) Kamrup (M), in C.R. Case No.3192/2016, wherein, the learned court below has convicted the petitioner under section 138 of the Negotiable Instruments Act and sentenced him to suffer simple imprisonment for 6 months and also to pay Rs.3,50,000/- against the cheque amount of Rs.1,80,000/- with default stipulation. However, the learned Addl. Sessions Judge has modified the sentence of imprisonment from six months to one month only.

4. The factual background leading to the filing of the present petition is briefly stated as under:-

“The petitioner has borrowed a sum of Rs.1,80,000/-, from the respondent. In order to discharge the said debt, the petitioner has issued a cheque, bearing No.575457, dated 20.07.2016, drawn in SBI Bhangagarh Branch. Thereafter, the respondent herein deposited the said cheque for encashment with his banker, Overseas Bank on 20.07.2016. But, the same returned dishonoured with endorsement, ‘exceed arrangement’. Thereafter, the respondent herein has issued notice to the petitioner, through his Advocate, on 01.08.2016, demanding

the cheque amount. But, the petitioner has failed to make the payment of the same within the stipulated period, inspite of receipt of the notice on 23.09.2016. Being left with no other option, the respondent herein, has filed a complaint before the Court of learned Chief Judicial Magistrate, Kamrup, Guwahati, under section 138 NI Act. Thereafter, hearing both the parties, the learned JMFC has found the offence under section 138 NI Act well established against the petitioner, and accordingly, convicted him under section 138 NI Act and sentenced him as aforesaid.

Thereafter, being aggrieved the petitioner preferred an appeal before the Court of learned Additional Sessions Judge No.3, Kamrup, Guwahati, being Criminal Appeal NO.163/2018, and the learned Additional Sessions Judge No.3, has dismissed the appeal and upheld the judgment and order, dated 13.09.2018, passed by the learned JMFC, however, modified the sentence of imprisonment from six months to one month only.

5. Then being highly aggrieved, the petitioner has approached this Court and preferred the present petition on the ground that the learned Additional Sessions Judge No. 3, Kamrup, Guwahati has :-

- (i) failed to appreciate the evidence in its proper perspective and as such, the impugned judgment is liable to be set aside and
- (ii) drawn presumption under section 118 and section 139 of the NI Act and the petitioner has succeeded in rebutting the said presumption and as such, the impugned order is liable to be set aside and
- (iii) the respondent has failed to establish that there was any legally enforceable debt between him and the petitioner and the learned court

below has failed to consider this aspect

- (iv) the learned courts below have failed to consider Exhibit-B, the FIR lodged by wife of the petitioner and also he failed to establish that the sum lent to the petitioner was from a lawful source and
- (v) the wife of the petitioner has shown one cheque to the wife of the respondent and she has failed to return the cheque and to that aspect, one FIR has been filed with the Dispur Police Station and the learned court below has failed to consider this aspect and therefore, it is contended to allow this petition by setting aside the impugned judgment and order.

6. Mr. D Choudhury, the learned counsel for the petitioner, submits that there was no legally enforceable debt between the parties and the learned courts below have drawn the presumption under section 139 of the NI Act, but, the petitioner has succeeded in rebutting the same and the learned courts below has failed to consider the same and that the respondent has failed to establish the source of the sum, allegedly lent to the petitioner, and he has not submitted any income tax return to that effect, and that the learned court below failed to appreciate this aspect and as such, the judgments & orders of the learned courts below, failed to withstand the test of correctness and therefore, it is contended to allow this petition by setting aside the impugned judgments and orders. Mr. Choudhury has referred following case laws of Hon'ble Supreme Court in support of his submission.

- (i) **Basalingappa Vs. Mudibassapa, (2019) 5 SSC 418**
- (ii) **Triyambak S. Kegde Vs. Sripad, (2022) 1 SCC 742**
- (iii) **Rumi Hazarika Vs. Anirban HatiKakoti, 2015 Legal Eagle**

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7. On the other hand, Mr. H. Kalita, learned counsel for the respondent submits that the learned court below has rightly drawn presumption under section 118 and 139 of the NI Act and the petitioner has failed to rebut the presumption available under the law, and both the learned courts below has recorded their concurrent finding and found that a case under section 138 NI Act, is well established against the petitioner, and accordingly, convicted him and as such no interference of this Court is called for. Mr. Kalita has also referred following case laws in support of his submission:-

(i) **Bir Singh Vs. Mukesh Kumar, (2019) 4 SCC 197**

(ii) **Kishan Rao Vs. Shankargouda (2018) 8 SCC 165**

8. Having heard the submission of learned Advocates for both the sides, I have carefully gone through the petition and the documents placed on record and also gone through the case laws, referred to by the learned Advocates appearing for both the sides.

9. It appears from the impugned judgment and order of the learned JMFC, Kamrup, Guwahati dated 13.09.2018, that the learned Magistrate has framed following points for determination:

- (a) Whether the cheque was issued for discharge of any legally enforceable debt or liability?
- (b) Whether the cheque was dishonoured for the reason of exceed arrangement?
- (c) Whether the accused received the demand notice issued by the complainant regarding dishonour of cheque?

Thereafter, the learned Magistrate has decided all the aforesaid issues in favour

of the respondent and held that the ingredients of section 138 NI Act well established, and accordingly, convicted the accused and sentenced him as aforesaid.

10. It appears that while arriving at the finding on the point No.1, the learned JMFC has disbelieved the evidence of the D.W.1, and arrived at the finding that there was a legally enforceable debt, and in discharge of the same, the cheque in question was issued and the learned court below has drawn the presumption under section 118 and 139 of the NI Act in favour of the holder of the cheque, as the petitioner has admitted his signature over the cheque in question, which is exhibited by the respondent as Ext.-1. The learned JMFC has also found that the FIR was lodged after receipt of the demand notice from the respondent.

11. And having carefully gone through the impugned judgment and order, dated 02.01.2020, passed by the learned Addl. Sessions Judge, Kamrup, Guwahati in Criminal Appeal No.163/2018, I find that the learned court below has considered all aspects and discussed the relevant case laws on the point and found that the presumption under 118 and 139 N.I. Act is available in favour of the respondent and the petitioner has failed to rebut the same by adducing any cogent evidence.

12. It is to be noted here that in the case of **Rangappa v. Sri Mohan** reported in **(2010) 11 SCC 441**, a three-Judge Bench of Hon'ble Supreme Court held as under:-

“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."

12.1. It is further held that:-

"28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

13. The record of the learned court below also reveals that the petitioner has not disputed his signature over the cheque in question, rather he admitted it. Also admittedly, he possessed cheque books and used cheques as a mode of payment. And as such the presumption under section 118 and 139 of the N.I. Act is very much available here in this case as held in the case of **K. Bhaskaran vs. Sanjaran Vaidhyar Balan** reported in **(1999) 7 SCC 510**, and in the case of **Basaligappa vs. Mudibasappa** reported in **(2019) 9 SCC 418**. The petitioner has not appeared as witness before the learned court below. Instead he has examined his wife as D.W.1, and according to her she has given the cheque to one Bijuli Kalita, but said Bijuli Kalita is not examined as witness. Instead, the petitioner has examined the Investigating Officer of the case lodged by his wife about the lost cheque, with the Dispur P.S. upon which Dispur P.S. Case No. 1139/2017 was registered, as D.W. 2, who stated that

during investigation of the said case he has not found anything regarding the lost cheque. The petitioner, who happened to be an employee of the bank, did not ask his banker to stop payment. Moreover, filing of the FIR is sequel to the demand notice issued to him by the respondent. All these facts and circumstances lead the learned court below to disbelieve the probable defence of the petitioner, and rightly so.

14. Thus, having examined the findings so arrived at by the learned courts below in the light of the ratio laid down in the aforesaid case, it cannot be said that the learned courts below, the same suffered from any illegality or infirmity, as the same are based on the materials available on the record. Mr. H. Kalita, the learned counsel for the respondent, has rightly pointed this out at the time of hearing and the case law- **Bir Singh** (supra) and **Kishan Rao** (supra) referred by him also fully supported his submission.

15. Though Mr. Chaudhury, the learned counsel for the petitioner, has tried to persuade this court that the petitioner has successfully rebutted the presumption available from the evidence adduced by the petitioner on the basis of the basis of the decisions of Hon'ble Supreme Court in **Basaligappa (supra)** and in the case of **Rumi Hazarika (supra)**, yet, I find that in the case in hand the petitioner has neither put any question to the respondent about his financial capacity nor a suggestion was also put to him. Being so, I am afraid; the said decisions would come into his aid. Rather, they have to be treated as restricted to its own facts. Also I have carefully gone through the decision of Hon'ble Supreme Court in **Triyambak S. Kegde (supra)** and I find that the said decision, instead of helping the petitioner has strengthened the case of the respondent.

16. Indisputably, the cheque in question, on presentation by the respondent,

returned dishonoured with the reason 'exceed arrangement' and thereafter, the respondent has issued legal notice to the petitioner. And it appears that the petitioner has received the notice and despite receipt of notice, he failed to make payment of the cheque amount and as such, the ingredients of the offence under section 138 NI Act appears to be established here in this case and both the learned court below rightly arrive at the conclusion that the respondent has succeeded in establishing the offence under section 138 N.I. Act. And as such, the impugned order passed by the learned courts below requires no interference of this court.

17. In the result, I find no merit in this revision petition and accordingly, the same stands dismissed. The parties have to bear their own cost.

JUDGE

Comparing Assistant