

GAHC010164432010



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

Case No. : Crl.A./111/2010

HIRU DAS,
S/O LATE JOYDEB DAS, JOYDEB BHAWAN, KALIBRI ROAD, TARAPUR,
SILCHAR-3, DIST. CACHAR, ASSAM.

VERSUS

RANJAN DUTTA CHOUDHURY and ANR,
S/O LATE DHIRENDRA DUTTA CHOUDHURY, 8-B, BALARAM BOSE, 1ST
LANE, URIYAPARA, KOLKATA-700020, WEST BENGAL.

2:THE STATE OF ASSAM

REPRESENTED BY THE PUBLIC PROSECUTOR

Advocate for the Petitioner : P BHUYAN

Advocate for the Respondent : PP, ASSAM

:::BEFORE:::
HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 17.07.2023
Date of judgment & order : 25.08.2023

JUDGMENT & ORDER (CAV)

Heard Mr. S. Banik, learned counsel for the appellant. Also heard Mr. J. Borah, learned counsel for the respondent No. 1 and Mr. P. S. Lahkar, learned Additional Public Prosecutor for the State respondent No. 2.

2. This is an appeal under Section 378 (4) of the Code of Criminal Procedure, 1973, against the judgment and order dated 25.11.2009, passed by the learned Additional Chief Judicial Magistrate, Cachar, Silchar, in CR Case No. 2802/2006, acquitting the accused from the said case.

3. The brief facts of the case is that the respondent No. 1, as an accused, took a loan of Rs. 5,00,000/- (Rupees five lakhs) only from the appellant by executing a hand note with an assurance to repay the amount within December, 2004. But the accused failed to repay the loan amount within the stipulated period and issued another hand note in the month of March, 2005 stating that he would repay the loan amount within 1 (one) month. But, even after several request made by the appellants, the accused did not make any payment and

thereafter he issued 5 (five) numbers of account payee cheques to the appellant for the total loan amount of Rs. 5,00,000/-. The appellant presented the said 5 (five) cheques in UBI, Silchar Branch, on 21.06.2005. But on 12.07.2005, the appellant was informed that the said cheques were dishonoured due to insufficient fund and returned those cheques vide return memo dated 28.06.2005. The appellant informed about the dishonoured of cheques to the accused/respondent, but the accused did not respond and hence, the appellant had to served a legal notice to the accused through Registered post on 15.07.2005 making a demand for the said loan. The notice was issued within 15 (fifteen) days from receipt of the information of dishonoured of cheques. But, on 18.07.2005, the accused refused to accept the notice and on 22.07.2005, the parcel containing the notice was returned to the appellant. The accused, however, did not pay any amount even after expiry of 15 (fifteen) days from his refusal to accept the legal notice sent by the appellant.

4. Thereafter, the accused, along with one of his relative, met the appellant at Silchar in middle part of August, 2005, requesting him not to file any complaint and had promised the appellant that he would refund back the loan amount of Rs. 5,00,000/- to the appellant within 1 (one) years in 2 (two) installments, the first installment to be paid in the month of April, 2006 and the second installment in the month of July, 2006 and hence, the appellant did not filed any complaint within the period of limitation with the *bona fide* belief that the accused would repay the loan amount. But, even after the expiry of a year, the accused in the month of April, 2006 took the plea of his illness and assured

that he would make the payment in the month of July, 2006. But, in the month of July, 2006, he told his relatives that he would not make any payment to the appellant and for which, the appellant filed a complaint case in the Court of learned Chief Judicial Magistrate, Cachar, Silchar, on 17.08.2006. Thereafter, the complaint was transferred to the Court of learned Judicial Magistrate First Class, Cachar, Silchar, and Court accordingly made an enquiry under Section 200 Cr.P.C. and vide order dated 15.09.2006, the process was issued under Section 138 of the N.I. Act against the accused by condoning the delay. But, subsequently, the case was transferred to the Court of learned Additional Chief Judicial Magistrate, Cachar, Silchar.

5. During trial, the appellant examined 3 (three) witnesses including himself and the Manager of UBI, Silchar Branch, in support of his case and also exhibited some documents through the witnesses. The accused was also properly examined under Section 313 Cr.P.C., but the accused did not adduce any evidence in support of his case.

6. The accused/respondent also filed a criminal petition, being Criminal Petition No. 79/2009, before this Court assailing the order dated 28.11.2008 and also for condonation of delay in lodging the complaint. However, this Court, vide order dated 18.03.2009, dispose of the said criminal petition with an observation that the accused would be able to raise the plea of limitation at the time of final hearing of the case.

7. The learned Chief Judicial Magistrate, Cachar, Silchar, after hearing the arguments put forward by both the parties, vide judgment and order dated 25.11.2009, dismissed the case holding that the appellant failed to prove his case beyond doubt that the accused gave him the cheques in discharge of debt and also made an observation that the complaint was filed with much delay without any satisfactory ground and accordingly, acquitted the accused/respondent from the said N.I. Act case. On being aggrieved and dissatisfied with the impugned judgment and order passed by the learned Additional Chief Judicial, Cachar, Silchar, the present appeal has been preferred against the acquittal order of the accused/respondent.

8. It is further stated that the learned Court below failed to appreciate the evidence on record in its true perspective and reached at a conclusion which is perverse with the materials on record. The issuance of 5 (five) numbers of cheques, i.e. Exhibits- 3 to 7, in question, were never denied by the accused and the signatures on the cheques were also not denied by the accused/respondent. The appellant also proved the hand notes, i.e. Exhibits- 1 & 2, and there was no denial by the accused regarding the existence of those hand notes. The execution of hand notes remain unrebutted during cross-examination of the witnesses and the appellant also proved the Exhibit-12, i.e. registered envelope addressed to accused with the endorsement "refused" dated 18.07.2005. The accused did not challenge this part of evidence and also did not make any explanation as to how the 5 (five) numbers of cheques in question came to hands of the complainant.

9. The learned Trial Court also came to a conclusion that the accused had taken a loan of Rs. 5,00,000/- from the appellant and also held that the statutory notice under Section 138 of the N.I. Act was also duly served on the accused. The fact of issuance of the cheques in question is never denied by the accused and the service of statutory notice is also not disputed. However, rejecting the explanation offered by the appellant in filing the complaint after period of limitation, the learned Court dismissed the complaint acquitting the accused. The learned Trial Court committed manifest illegality in concluding that though the appellant had proved that he had advanced loan of Rs. 5,00,000/- to the accused, he had failed to prove beyond doubt the fact that the cheques issued by the accused were in discharge of the said debt. The Court gave emphasis to the fact that the signatures of the accused and the amount in words and figures were written in one ink while the names of the complainant and the dates were written in different ink in Exhibits- 3, 4 & 7.

10. The learned Court below erred in law and as well as in facts in holding that the presumption as provided under Section 118 and 139 of the Act cannot be applied in favour of the complainant and as such, the impugned judgment and order dated 25.11.2009 is liable to be set aside and quashed.

11. The accused has miserably failed to rebut the presumption under Section 139 of the N.I. Act and hence, the learned Court below committed manifest illegality in acquitting the accused and as such, the impugned judgment and

order dated 25.11.2009 is liable to be set aside and quashed. The learned Court below committed illegality in observing that there was no separate petition filed by the complainant showing the reasons for delay and hence, there could not be any ground to condone the delay of 350 days in filing the complaint and also hold that there was no acceptable evidence on record for condoning the delay which is perverse to the materials on record and as such, the impugned judgment and order dated 25.11.2009 is liable to be set aside and quashed.

12. The learned counsel, Mr. S. Banik, appearing for the appellant, submitted that the ingredients under Sections 6, 13 & 26 of the N.I. Act is fulfilled here in this case. And, as per Section 30 of the said Act, it is the duty and liability of a drawer to compensate the holder of the cheque provided due notice of dishonour has been given to or received by the drawer as hereinafter provided. He further submitted that the issue raised in the case regarding the place of handing over the cheques is not material as the holding of the cheques by the appellant and the issuance of the cheques by the accused/respondent and even the advancement of loan of Rs. 5,00,000/- are also not disputed in this case and thus, the learned Court below did not appreciate the evidence on record in its true perspective and arrived a wrong decision acquitting the accused/respondent from this case.

13. On the other hand, the learned counsel, Mr. J. Bora, appearing on behalf of respondent No. 1, submitted that the entire complaint is totally silent on the

part of the delay of the case. He further submitted that in evidence-in-chief, the P.W.-1 stated that the cheques were delivered at Kolkata on the day of advancing the loan, i.e. in the month of June, 2002, and contradicting his own statement, he stated in his cross-evidence that the cheques were given at Silchar but without any explanation as to how the cheques were deposited on the very next date, i.e. 21.06.2005, at Silchar, if the cheques were delivered at Kolkata while advancing the loan amount to the appellant. Further it is submitted that the learned Court below correctly held that there is no proper and satisfactory explanation for delay of 353 days in filing the complaint and as per the N.I. Act, the complaint has to be instituted within the stipulated period of time. More so, there is a total silence on the part of delay from the appellant side. Further, in the complaint, it is stated that the hand notes were executed before delivery of the cheques. But, in cross-evidence, it is stated by the appellant that hand notes were executed only after the delivery of the cheques which is not at all believable and accordingly, the learned Court below committed no error or mistake while dismissing the complaint and acquitting the accused/ respondent. Further, it is the admitted fact that there is difference of ink in the cheques and the witness of the appellant side, i.e. P.W.-3, the bank officials, himself admitted in his evidence that these are the materially altered cheques. Further it is submitted that the case of the accused/respondent is to be established on preponderance of probability and in this case, it is seen that the appellant/complainant could not prove the case that the cheques in question were issued by the accused/respondent in discharge of any legally enforceable debt and in the same time, it is also proved by the P.W.-3, the witness from the

complainant side, that the cheques which were issued are also seemed to be materially altered cheques. Thus, considering all these aspects of the case, the learned Court below dismissed the complaint as reasonable doubt arises regarding the veracity of the prosecution/complainant case and hence the interference of this Court is not at all necessary in the judgment and order passed by the learned Court below.

14. The learned counsel for the respondent No. 1 also relied on a decision of Hon'ble Apex Court in **John K. Abraham Vs. Simon C. Abraham & Anr.**, reported in **(2014) 2 SCC 236**, and further stressed on paragraph No. 10 of the said judgment, which reads as under:

“10. Keeping the said statutory requirements in mind, when we examine the facts as admitted by the respondent-complainant, as rightly concluded by the learned trial Judge, the respondent was not even aware of the date when substantial amount of Rs.1,50,000/- was advanced by him to the appellant, that he was not sure as to who wrote the cheque, that he was not even aware when exactly and where exactly the transaction took place for which the cheque came to be issued by the appellant. Apart from the said serious lacuna in the evidence of the complainant, he further admitted as PW.1 by stating once in the course of the cross- examination that the cheque was in the handwriting of the accused and the very next moment taking a diametrically opposite stand that it is not in the handwriting of the accused and that it was written by the complainant himself, by further reiterating that the amount in words was written by him.

15. Accordingly, the learned counsel for the respondent No. 1 submitted that the appellant/complainant is not even aware as to whether the 5 (five) numbers of cheques in question were delivered to him. The place of delivery of cheques may not be a question to be decided. But, here in the instant case, it is seen

that the place of delivery of the cheques is disputed as the P.W-1 deposed in his evidence-in-chief that the cheques were delivered at Kolkata. However, in the same time, he stated in his cross-evidence that the cheques were delivered not at Kolkata but at Silchar.

16. Further, the learned counsel for the respondent No. 1 also relied on another decision of Hon'ble Apex Court in **Birendra Prasad Sah Vs. State of Bihar & Anr.**, reported in **(2019) 7 SCC 273**, regarding the delay in lodging the complaint, and mainly stressed on paragraph Nos. 7 & 8 of the judgment, which reads as under:

“7. In the present case, the facts narrated above indicate that the appellant issued a legal notice on 31-12-2015. This was within a period of thirty days of the receipt of the memo of dishonor on 4-12-2015. Consequently, the requirement stipulated in proviso (b) to Section 138 was fulfilled. Proviso (c) spells out a requirement that the drawer of the cheque has failed to make payment to the holder in due course or payee within fifteen days of the receipt of the notice. The second respondent does not as a matter of fact, admit that the legal notice dated 31-12-2015 was served on him. The appellant has in the complaint specifically narrated the circumstance that despite repeated requests to the Postal Department, no acknowledgment of the notice was furnished. It was these circumstances that the appellant issued a second notice dated 26-2-2016. Cognizant as we are of the requirement specified in proviso (b) to Section 138, that the notice must be issued within thirty days of the receipt of the memo of dishonor, we have proceeded on the basis that it is the first notice dated 31-12-2015 which constitutes the cause of action for the complaint under Section 138.

8. The complaint was instituted on 11-5-2016. Under [Section 142\(1\)](#), a complaint has to be instituted within one month of the date on which the cause of action has arisen under clause (c) of the proviso to [Section 138](#). The proviso however stipulates that cognizance of the complaint may be taken by the court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a

complaint within such period. Both in paragraphs 7 and 8 of the complaint, the appellant indicated adequate and sufficient reasons for not being able to institute the complaint within the stipulated period. These have been adverted to above. The CJM condoned the delay on the cause which was shown by the appellant for the period commencing from 6-4-2018. However, if paras 7 and 8 of the complaint are read together, it is evident that the appellant had indicated sufficient cause for seeking condonation of the delay in the institution of the complaint. The High Court has merely adverted to the presumption that the first notice would be deemed to have been served if it was dispatched in the ordinary course. Even if that presumption applies, we are of the view that sufficient cause was shown by the appellant for condoning the delay in instituting the complaint taking the basis of the complaint as the issuance of the first legal notice dated 31-12-2015.”

17. Accordingly, the learned counsel for the respondent No. 1 submitted that the cognizance of a complaint may be taken by the Court even after the prescribed period of limitation if the complainant satisfy the Court that he has sufficient cause for not making the complaint within the statutory period of limitation. But, here in the instant case, it is seen that the complainant has totally failed to bring any satisfactory explanation in regards to delay of 350 days in lodging the complaint. More so, it is seen that even after filing of the criminal petition by the accused raising the issue of delay, the appellant did not bother to adduce any evidence or any proper explanation through affidavit regarding the delay of 350 days in institution the complaint.

18. After hearing the submissions made by the learned counsels for both sides and on perusal of the entire case record, it is seen that the complaint was dismissed by the learned Court below and the accused/respondent was acquitted by its judgment and order dated 25.11.2009 with an observation that

though the appellant could prove that he advanced a loan amount of Rs. 5,00,000/- to the accused, but failed to prove that the accused gave him the Exhibits- 3 to 7, i.e. the cheques in question, in discharge of his said debt and liabilities beyond all reasonable doubt and also observed that the complaint was filed with a much delay without any satisfactory grounds and accordingly, it is held that the accused cannot be held guilty for offence under Section 138 of the N.I. Act and accordingly, held that the complainant could not establish his case beyond all reasonable doubt and accordingly, acquitted the accused/respondent from the said case. From the evidence on record and from the judgment passed by the learned Court below, it is evident that the signature made in cheques in question are not disputed and in the same time, it is also seen that the advancement of loan of Rs. 5,00,000/- is also not disputed in this case. However, it is seen that 5 (five) numbers of cheques were issued on the same day for an amount of Rs. 5,00,000/- and the cheques were issued having 2 (two) different Sl. Nos., i.e. Sl. Nos. 777333 & 777334, and other 3 (three) numbers of cheques were issued in another Sl Nos., i.e. Sl. Nos. 777337, 777338 & 777339, though all the cheques were issued on the same day. However, there is no explanation as to why the Sl. Nos. of the cheques are different in numbers with a difference of 3 (three) pages, i.e. 777334 & 777337. Thus, reasonable doubt arises as to whether all the cheques were issued on the same day, i.e. on 20.06.2005, or on the day after taking the loan, i.e. 30.06.2002. It is also a fact that the accused did not denied the signatures bearing the cheques, i.e. Exhibits- 3 to 7, and offered no explanation to that regard. But, from the sequence o the Sl. Nos. as well as from the evidence of

P.W.-3, it is seen that the inks are also different and the P.W.-3 himself admitted that the cheques are materially altered cheques. This also creates a doubt regarding the issuance of cheques for discharge of the legal enforceable debt of the accused on the same date, i.e. on 20.06.2005.

19. It is rightly argued by the learned counsel for the appellant that the issue raised regarding the delivery of cheques at Kolkata and Silchar and the place of delivery of cheques does not have any effect on the issuance of cheques as it is already proved that the appellant is the holder of those cheques. But the learned Court below has observed in his judgment that there is a contradiction in evidence of the P.W.-1, wherein, he deposed that the cheques were delivered at Kolkata, however, in cross-examination, he admitted that the same were delivered not at Kolkata but at Silchar. But the question arises as to how the cheques can be deposited on the very next date, i.e. on 21.06.2005, in the bank of Silchar if it is delivered at Kolkata. More so, reasonable doubt also arise as to what prevented the appellant in issuing a single cheques instead of 5 (five) numbers of cheques on the same day for different amounts that too the cheques which are not in sequence.

20. Coming to the delay in filing the complaint, it is seen that initially the complaint was totally silent regarding the delay in lodging the complaint, however the delay was condoned *ex parte* without any petition praying for condonation of delay and when the petition was moved before this Court regarding the delay, this Court, vide order dated 28.11.2008, allowed the accused to raise the plea and also directed the learned Court below to decide

afresh on the matter of condonation of delay. Accordingly, the learned Additional Chief Judicial Magistrate considered the delay of lodging the complaint at the stage of final hearing of this case. But, in spite of the said order of this Court regarding the delay in lodging the complaint, the complainant/appellant did not adduce any evidence on this aspect of limitation either by re-examining the complainant or by producing any other evidence. But, thereafter also, no separate petition for condonation of delay was filed by the appellant except an affidavit on non-judicial stamp paper filed along with the petition without any proper explanation or single line that the matter of compromise talk was going on between the relative of the accused and on assurance made by the accused, the complaint was not filed within the statutory period of limitation. The learned Court below also discussed about Section 142 of the N.I. Act which has been amended w.e.f. 06.02.2023 to give the payee or holder in due course a chance to overcome some extreme emergency to get a condonation of delay with satisfactory reason. But, here in this case, it is rightly held by the learned Court below that no emergency could be established by the appellant in lodging the complaint with 350 days delay and the complainant was also aware about the law of limitation as the demand notice was accordingly sent within the statutory period of limitation. So the ground that the case was delayed only because that talk of compromise or assurance was given by the accused for repayment of the loan is not acceptable and even the dishonour of the 5 (five) numbers of cheques, there could not be any reason to wait for another 350 days in lodging the complaint. Accordingly, I find that the learned Court below committed no error or mistake while holding that there was no satisfactory explanation in

condoning the delay of 350 days in lodging the complaint.

21. Though the signatures on the 5 (five) numbers of cheques in question are not disputed and the advancement of loan of Rs. 5,00,000/- is not disputed, for the above stated grounds, it is seen that the complainant/appellant could not prove the issuance of 5 (five) numbers of cheques by the accused/ respondent which are not even in sequence, though those are stated to be issued on the same day. More so, the P.W.-3, i.e. the bank officials, himself admitted that the cheques are materially altered cheques as there is difference of ink. In the same time, it is also seen that there is no proper explanation regarding the delay of 350 days in instituting the complaint and in spite of the criminal petition filed by the accused before this Court, the appellant/complainant did not adduce any evidence in support of plea of compromise or to substantiate the delay in lodging the complaint. Accordingly, I find no reason for interference in the judgment and order dated 25.11.2009, passed by the learned Additional Chief Judicial Magistrate, Cachar, Silchar, in CR Case No. 2802/2006.

22. In the result, I find no merit in this appeal and accordingly the same stands dismissed. No order as to costs.

23. Send back the LCR.

JUDGE

Comparing Assistant