

GAHC010175242016



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

Case No. : Crl.Rev.P./407/2016

SAMIR DEY

S/O. LT. SWAPAN DEY, R/O. KOKRAJHAR TOWN, WARD NO.6, NEAR
KOKRAJHAR ZAME MASJID, P.O., P.S. and DIST. KOKRAJHAR, BTC, ASSAM,
PIN-783370.

VERSUS

PURNIMA DHAR GOYARY

W/O. SRI CHAIMAN GOYARI, R/O. KOKRAJHAR BAZAR, WARD NO.9 NEAR
SITALA MANDIR, P.O., P.S. and DIST. KOKRAJHAR, ASSAM, PIN-783370.

Advocate for the Petitioner : MR.B DAS

Advocate for the Respondent : MS.P MAZUMDAR

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT

Date : 27-02-2023

Heard Mr. A. Dasgupta, learned Senior counsel, assisted by Ms. B. Das, learned counsel for the petitioner. Also heard Mr. M.K. Das, learned counsel for the respondent.

2. In this revision petition, under Section 401, read with Section 397 Cr.P.C., the petitioner, namely, Shri Samir Dey, has put to challenge the judgment and order, dated 29.09.2016, passed by the learned Sessions

Judge, Kokrajhar in Criminal Appeal No.14/2015. It is to be noted here that vide judgment and order, dated 29.09.2016, the learned Sessions Judge, Kokrajhar, has affirmed the judgment and order, dated 07.11.2015, passed by the learned Additional Chief Judicial Magistrate, Kokrajhar in CR Case No.505^C/2014. It is also to be noted here that vide judgment and order, dated 29.09.2016, the learned Additional Chief Judicial Magistrate, Kokrajhar, has convicted the petitioner under Section 138 NI Act and sentenced him to pay a fine of Rs.5,00,000/- (Rupees Five Lacs) as compensation and, in default, to suffer imprisonment for a period of six months.

3. The background facts, leading to filing of this revision petition, are briefly stated as under:-

“The petitioner had taken a loan of Rs.4,93,000/- from the respondent, Smt. Purnima Dhar Goyary, with an assurance to return the same within a period of two months. But, the petitioner had failed to make payment of the loan amount. Then on 06.05.2014, he had issued a check, bearing No.849331, for a sum of Rs.4,93,000/-. Thereafter, on 24.06.2014, the respondent presented the cheque in the State Bank of India, Kokrajhar Branch in her account bearing No.32666655044, for encashment. But, the said cheque returned dishonoured on 27.06.2014 with the endorsement '*insufficient fund*'. Thereafter, on 30.06.2014, the respondent issued a demand notice to the petitioner by registered post with AD intimating him about the dishonour of the cheque and demanding the cheque amount. The petitioner received the notice on 04.07.2014, but in spite of receipt of the notice, he

failed to make payment of the cheque amount. Then, the respondent herein instituted a case under Section 138 NI Act before the Court of learned Additional Chief Judicial Magistrate, Kokrajhar, upon which the learned Court below has taken cognizance of the offence and issued process to the respondent to appear before the Court and to stand trial under the said sections of law. Accordingly, the petitioner appeared before the Court below and the learned Court below, then, explained the offence under Section 138 NI Act to the petitioner to which the petitioner pleaded not guilty and claimed to be tried. Thereafter, the learned trial Court examined the witnesses of the respondent and also examined the petitioner under Section 313 Cr.PC. Thereafter, the learned trial Court examined the witnesses of the petitioner, and thereafter, hearing the argument of learned Advocates of both sides, convicted the petitioner under Section 138 NI Act and sentenced him as aforesaid.

Being aggrieved, the petitioner preferred an appeal before the Court of the learned Sessions Judge, Kokrajhar and the learned Sessions Judge, Kokrajhar, after hearing the learned Advocates for both sides, dismissed the appeal vide judgment and order, dated 29.09.2016, in CrI. Appeal No.14/2015 and affirmed the judgment and order, dated 07.11.2015, passed by the learned Additional Chief Judicial Magistrate, Kokrajhar, in CR Case No.505^C/2014.

- 4.** Being highly aggrieved, the petitioner approached this Court by filing the present revision petition on the grounds that –

- (i) The respondent, in her demand notice, has given only 7 days time; though the petitioner is entitled to 15 days time to make payment of the cheque amount,
- (ii) The cheque, in question, was not filled up by the drawer and the learned Court below has held that the cheque was filled up by the drawer is not based on the evidence available on record,
- (iii) That, the cheque, in question, was blank at the time of issuance and it was filled by the drawer and the amount was not specified in the cheque, and it can be presumed that there is no legally enforceable debt or liability and that in order to attract the culpability of Section 138 NI Act, the respondent has to prove that:-

- (i) The drawer has issued a cheque in favour of the payee,
- (ii) The payee presented the cheque for encashment within six months from the date of issuance of the cheque,
- (iii) The cheque issued by the drawer has been dishonoured,
- (iv) The payee should inform the drawer that the cheque issued by him has been dishonoured and claim the amount,
- (v) Such claim to be made by the payee to the drawer within thirty days from the date of dishonour of the cheque,

(vi) In such writing, the payee must mention that the amount of cheque should be paid within fifteen days from the date of receipt of the notice;

And, as these circumstances could not be proved, the offence under section 138 could not be said to be made out against the petitioner, and therefore, it is contended to allow the petition.

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

6. It appears from the judgments and orders in CR Case No. 505c/2014, dated 07.11.2015, passed by the learned Additional Chief Judicial Magistrate, Kokrajhar, that the learned court has found that there was business transaction between the brother of the respondent and the petitioner and that the petitioner has issued the cheque in question to the respondent and the same was blank. It also appears that the petitioner has not disputed his signature over the cheque in question. Further, it appears that the learned trial court has held that since the cheque in question and the signature is admitted by the petitioner, the presumption under section 139 of the N.I. Act is available against the petitioner and further held that the petitioner has failed to rebut the presumption, and therefore, the culpability under section 138 N.I. Act is attracted against the petitioner.

7. Also it appears from the impugned judgment and order, dated

29.09.2016, passed by the learned Sessions Judge, Kokrajhar, in Criminal Appeal No.14/2015, that the learned court below has considered all aspects and also discussed the relevant case laws, occupying the field, and held that the presumption under section 139 N.I. Act is available in favour of the respondent and the petitioner has failed to rebut the same, and thereafter upheld the judgment and order of conviction passed by the learned Additional Chief Judicial Magistrate, Kokrajhar.

8. That, with regard to the availability of presumption under section 139 of the N.I. Act, it may be noted here that the Act raises two presumptions: firstly, in regard to the passing of consideration as contained in Section 118(a) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature referred to in Section 139 discharged in whole or in part any debt or other liability. These presumptions, both under Sections 118(a) and 139 are rebuttable in nature. And it is not necessary that the accused must step into the witness box to discharge the burden of proof in terms of the aforementioned provision, in view of the definition of terms 'proved' and 'disproved' as contained in Section 3 of the Evidence Act as also the nature of the said burden upon the prosecution vis-à-vis an accused. It is also to be noted here that the standard of proof, so far as the prosecution is concerned, is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability. Reference in this context can be made to a decision of Hon'ble Supreme Court in **K. Prakashan v. P.K. Surenderan**

reported in **(2008) 1 SCC 258**.

9. 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.”

10.1. 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.”

11. The record of the learned trial court also reveals that the petitioner has not disputed issuance of the cheque in question and his signature over the cheque,

rather he admitted it. 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 **Rangappa (supra)** and also in the case of **K. Bhaskaran vs. Sanjaran Vaidhyan Balan** reported in **(1999) 7 SCC 510**, and in the case of **Basaligappa vs. Mudibasappa** reported in **(2019) 9 SCC 418**. And as such, no illegality or impropriety appears to have been committed by both the learned courts below, while drawing presumption under section 139 N.I. Act.

12. Mr. A. Dasgupta, the learned Senior Counsel, however, referring three case laws in **Basalingappa vs. Mudibasappa**, reported in **(2019) 5 SCC 418**, and in **Reverend Mother Marykutty Vs. Reni C. Kottaram and Another**, reported in **(2013) 1 SCC 327**; and **Dashrathbhai Trikambhai Patel Vs. Hitesh Mahendrabhai Patel**, (Criminal Appeal No.1497 of 2022) submits that the amount, for realization of which the case under Section 138 NI Act was filed, was not for an ascertained amount, as admittedly, the cheque in question, Ext.-1, which was dishonoured, was a blank cheque. Mr. Dasgupta further submits that the cheque in question bears the signature of the petitioner on both the sides and as such it was incompletely endorsed and it could not have been presented for encashment and the bank authority cannot entertain it for encashment. Mr. Dasgupta, therefore, submits that the offence under section 138 N.I. Act, cannot be said to be made out against the petitioner and the presumption under section 139 N.I. Act is not available to the respondent on account of her failing to explain the source of the amount she has lent to the petitioner.

13. On the other hand, Mr. M.K. Das, the learned counsel for the respondent, referring two case laws in **Bharat Barrel & Drum Manufacturing Company Vs. Amin Chand Pyarelal**, reported in **(1999) 3 SCC 35**, and in **Oriental**

Bank of Commerce vs. Prabodh Kumar Tewari, Criminal Appeal No. 1260 of 2022, arising out of **SLP (Crl) No. 9836 of 2019**, submits that the petitioner has not disputed the cheque and his signature thereon, and dishonour of the same, and also not disputed receipt of notice of demand and nonpayment of the cheque amount inspite of receipt of notice within the stipulated period and as such both the courts below have rightly drawn presumption under section 139 N.I. Act and the petitioner has failed to rebut the presumption, even by preponderance of probability. Mr. Das, further submits that the learned Court below has rightly convicted the petitioner under Section 138 NI Act and the learned Sessions Judge, Kokrajhar has rightly affirmed the judgment of the learned trial Court and, therefore, it is contended to uphold the same.

14. I have considered the submission of learned Advocates of both sides, and gone through the case laws referred by them, and I find substance in the submission of Mr. M.K. Das, the learned counsel for the respondent and the ratio, laid down in the cases, referred by him also strengthened his submission in view of the discussion and finding recorded in the forgoing paragraphs. In the case of **Bharat Barrel & Drum Manufacturing Company** (supra), in paragraph No.12, Hon'ble Supreme Court has held that –

“12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under section 118(a) would arise that it is supported by a consideration. Such presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove

would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist."

15. The record of the learned trial court reveals that the respondent has vividly explained the source of the sum she had advanced to the petitioner. The record also reveals that the petitioner had admitted having business relationship with the brother of the respondent though, however, he has not admitted any such relationship with the respondent. In view of above, I find no merit in the submission of Mr. Dasgupta, the learned counsel for the petitioner.

16. Now, what left to be seen is whether the petitioner is able to rebut the presumption. Mr. A. Dasgupta, the learned counsel for the petitioner submits that the petitioner has been succeeded in rebutting the presumption available

under section 139 of the N.I. Act. But, the same left this court unimpressed. It is, however, a fact that the respondent has not examined the bank official to prove the Ext.2, the bank slip, which according to Mr. Dasgupta has to be proved as per the provision of Banker's' Books Evidence Act, 1891, and as the bank official has not been examined by the respondent, the petitioner suffered prejudice. Mr. Dasgupta, therefore, contended to allow the petition by setting aside the impugned judgments and orders.

17. But, section 146 of the N.I. Act cast a mandatory obligation upon the courts to presume the fact of dishonor of the cheque, on production of bank's slip or memo having thereon the official mark denoting the cheque has been dishonoured, unless and until such fact is disproved. Apparently, burden to disprove the presumption, so available under this section, is upon the petitioner. Though the respondent has not examined the bank official, the petitioner could have, very well, called him as witness. Having not done so, now, he cannot claim to be prejudiced. Thus, the submission of Mr. Dasgupta appears to be devoid of merit.

18. Mr. Dasgupta, the learned counsel for the petitioner, further submits that the prosecution must prove the guilt of an accused beyond all reasonable doubt, and the petitioner herein this case has failed to establish the same. The submission of Mr. Dasgupta received due consideration of this court. It is well settled principle of criminal jurisprudence that the prosecution side has to prove its case beyond all reasonable doubt. The cases under N.I. Act are also not exception to this settled principle. In the decision **Basalingappa** (supra), referred by Mr. Dasgupta, also Hon'ble Supreme Court has held that the prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is

preponderance of probabilities. But, when statutory presumption is available to the courts and the courts pressed it into service and the accused could not be able to rebut such statutory presumption, this court afraid that submission of Mr. Dasgupta, in this regard has any force.

19. Since, in the case hand the cheque in question was signed and handed over to the respondent in discharge of liability, non-existence of which could not be established by leading cogent evidence, it can reasonably be presumed that the cheque was filled in by the respondent being the payee at his request and/or with his acquiescence and the subsequent filling in of an unfilled signed cheque cannot also be termed as an alteration also.

20. In the case of **Bir Singh Vs. Mukesh Kumar, (2019) 4 SCC 197**, Hon'ble Supreme Court has held as under :-

38. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

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“42. In the absence of any finding that the cheque in question was not signed by the respondent-accused or not voluntarily made over 17 to the payee and in the absence of any evidence with regard to the circumstances in which a blank signed cheque had been given to the appellant-complainant, it may reasonably be presumed that the cheque was filled in by the appellant-complainant being the payee in the presence of the respondent-accused being the drawer, at his request and/or with his acquiescence. The subsequent filling in of an unfilled signed cheque is not an alteration. There was no change in the amount of the cheque, its date or the name of the payee. The High Court ought not to have acquitted the

respondent-accused of the charge under Section 138 of the Negotiable Instruments Act.”

21. In a very recent decision in **Oriental Bank of Commerce** (supra), being referred by Mr. M.K. Das, the learned counsel for the respondent, Hon’ble Supreme Court has held that-

“15. A drawer who signs a cheque and hands it over to the payee, is presumed to be liable unless the drawer adduces evidence to rebut the presumption that the cheque has been issued towards payment of a debt or in discharge of a liability. The presumption arises under [Section 139](#).”

21.1. It is also held that in the said case that:-

“17. For such a determination, the fact that the details in the cheque have been filled up not by the drawer, but by some other person would be immaterial. The presumption which arises on the signing of the cheque cannot be rebutted merely by the report of a hand-writing expert. Even if the details in the cheque have not been filled up by drawer but by another person, this is not relevant to the defense whether cheque was issued towards payment of a debt or in discharge of a liability.”

22. In view of above, the submission of Mr. Dasgupta, the learned counsel for the petitioner that the cheque in question was not drawn for the discharge of, in whole or in part of any debt or other liability and that it was not for an ascertained or fixed amount and that the provision of section 138 N.I. Act is devoid of any substance and as such the same deserved to be repealed and accordingly, the same stands repealed. I have carefully gone through the decision in **Reverend Mother Marykutty** (supra), referred by Mr. Dasgupta carefully and I find that the ratio laid down in the said case would come into his

aid, as the same has to be treated to be restricted to its own facts. I have also gone through the decision of Hon'ble Supreme Court in **Dashrathbhai Trikambhai Patel** (supra), wherein it has been held in para No.30 as under:-

30. In view of the discussion above, we summarise our findings below:

- (i) For the commission of an offence under Section 138, the cheque that is dishonoured must represent a legally enforceable debt on the date of maturity or presentation;**
- (ii) If the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encashed upon maturity, then the legally enforceable debt on the date of maturity would not be the sum represented on the cheque;**
- (iii) When a part or whole of the sum represented on the cheque is paid by the drawer of the cheque, it must be endorsed on the cheque as prescribed in Section 56 of the Act. The cheque endorsed with the payment made may be used to negotiate the balance, if any. If the cheque that is endorsed is dishonoured when it is sought to be encashed upon maturity, then the offence under Section 138 will stand attracted;**
- (iv) The first respondent has made part-payments after the debt was incurred and before the cheque was encashed upon maturity. The sum of rupees twenty lakhs represented on the cheque was not the 'legally enforceable debt' on the date of maturity. Thus, the first respondent cannot be deemed to have committed an offence under Section 138 of the Act when the cheque was dishonoured for insufficient funds; and**
- (v) The notice demanding the payment of the 'said amount of money' has been interpreted by judgments of this Court to mean the cheque amount. The conditions stipulated in the provisos to Section 138 need to be fulfilled in addition to the ingredients in the substantive part of Section 138. Since in this case, the first respondent has not committed an offence under Section 138, the validity of the form of the notice need not be decided.**

But, in view of the decision of Hon'ble Supreme Court in **Oriental Bank of Commerce** (supra), I am afraid, the ratio laid down in the case of **Dashrathbhai Trikambhai Patel** (supra), and in the case of **Basalingappa** (supra) would come into his aid.

23. It also appears that the petitioner has taken different plea at different stages. His plea, before the learned trial court was that he lost the cheques in the premises of the respondent in the month of May, 2014. But, in his statement under section 313 Cr.P.C, he took a different plea, wherein he stated that after receiving notice from the respondent he came to know about the cheque, under which the amount was claimed, lost from his possession in the house of the respondent. Mr. M.K. Das, the learned counsel for the respondent has pointed this out during argument, and I find substance in the same. Had the cheque been lost in the premises of the respondent he could have intimate police about the missing of the cheque and he also could have ask his banker to stop payment. But, he did nothing in this regard. He also remained silent in his statement under section 313 Cr.P.C. Though the petitioner has denied having existence of any debt between him and the respondent, yet, denial simpliciter is not sound convincing.

24. It is to be mentioned here that while exercising revisional jurisdiction, the High Court cannot substitute its view for that of the trial court even if two views are possible. Reference in this context can be made to a decision of Hon'ble Supreme Court in the case of **Helper Girdharbhai vs. Saiyed Mohmad Mirsaheb Kadri and Ors.**, reported in **AIR 1987 SC 1782.**

25. In the result I find this revision petition devoid of merit and accordingly, the same stands dismissed. Interim relief, if any, granted earlier, stands vacated. The parties have to bear their own cost.

J U D G E

Comparing Assistant