

GAHC010241832017



**IN THE GAUHATI HIGH COURT
(The High Court of Assam: Nagaland: Mizoram &
Arunachal Pradesh)**

Crl.Rev.P. 357/2017

Man Mohan Gupta
S/O Lt. Manik Chand Gupta R/O H. No.4 G. S. Colony, Fatashil, P.S. Bharalumukh, Dist.
Kamrup, Ghy-9

.... **Petitioner**

VERSUS

Super Sales Corporation

Through His Authoried Signatory, Sri Binod Agarwal Son Of Lt Shiv Lal Agarwal, R/O Tarun
Nagar, G S Road, Ghy-5, Dist.Kamrup, Assam

..... **Respondent**

**BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND**

Advocate for the Petitioner	:	Mr. H. Gupta
Advocate for the Respondent	:	Mr. A.K. Jain
Date of Hearing	:	23.03.2023
Date of Judgment	:	23.06.2023

JUDGMENT & ORDER (CAV)

1. Heard Mr. H. Gupta, learned counsel for the petitioner as well as Mr. A.K. Jain, learned counsel for the respondent.
2. The petitioner has filed this petition under Section 397/401 read with Section 482 Code of Criminal Procedure, 1973 (Cr.P.C for short) challenging the legality and propriety of the judgment and order dated 24.08.2017 passed by the learned Additional Sessions Judge No.

IV, FTC, Kamrup (M), Guwahati, in Criminal Appeal No. 64/2012, dismissing the appeal and upholding the judgment and order dated 16.05.2012 passed by the learned SDJM(S) No. 2, Kamrup (M), Guwahati in Complaint Case No. 6075^c/2008.

3. The petitioner in this case is Man Mohan Gupta and the respondent is 'Super Sales Corporation', through the Authorized Signatory, Sri Binod Agarwal. The respondent Sri Binod Agarwal had filed a complaint under Section 138 of the Negotiable Instruments Act, 1881, before the Sub-Divisional Judicial Magistrate (S) No. 2, Kamrup, Guwahati, alleging inter-alia that the petitioner issued 5(five) cheques in the name of the respondent bearing cheque numbers:-

- (a) 835183 dated-01.07.2008,
- (b) 835184 dated-01.08.2008,
- (c) 835185 dated-01.09.2008,
- (d) 835186 dated-01.10.2008,
- (e) 835187 dated-01.11.2008

each for Rs. 8,749/-amounting to a sum total of Rs. 43,475/-. All the cheques were drawn in the 'State Bank of India', Bulbul Market, Fancy Bazar, S.R.C.B. Road, Guwahati and the account number was 10069864956. The cheques were issued to clear outstanding dues recoverable by the respondent from the petitioner. The respondent presented the five cheques on 04.11.2008. The cheques were dishonoured due to "insufficiency of funds" and the Complaint Case No. 6075^c/2008 was initiated by the respondent. Cognizance was taken against the petitioner.

4. During trial, two prosecution witnesses and two defence witnesses were examined. The statement of the petitioner was also recorded under Section 313 Cr.P.C. During trial, the

authority of Binod Agarwal was questioned on the ground that he is not the authorised representative of the respondent firm. The petitioner/appellant/accused was convicted and sentenced vide order dated 16.05.2012 passed by the Court of SDJM(S) No. 2 to pay double the amount of cheque and also to undergo imprisonment for one month. Against this order dated 16.05.2012, the criminal appeal no. 64/2012 was preferred and the impugned order dated 24.08.2017 was passed by the learned Appellate Court. The grounds on which, the earlier appeal was impugned and the grounds on which the appellate order was passed, will be discussed at the appropriate stage.

Decision of the trial Court

5. The evidence and the pleadings of the respondent reveals that the petitioner borrowed on amount of Rs. 1,20,000/-. Out of which Rs. 70,000/- was paid to the petitioner in cash on 19.12.2007 and Rs. 50,000/- was paid through cheque no. 216607 dated 20.12.2007. The written undertaking executed by the petitioner is marked as Exhibit-3. It was held by the learned Trial Court that the petitioner tried to rebut the presumption under Section 139 of the N.I. Act but failed to do so. The petitioner adduced the evidence of two witnesses and he as DW-1 admitted of having borrowed an amount of Rs. 50,000/- by cheque no. 216607 dated 20.12.2007. He has further stated that at the time of borrowing the amount from the respondent, his signatures over 27 blank cheques were taken. The respondent also took 7(seven) LIC polices and some blank papers containing his signature as security. Then on 19.12.2007, the petitioner was brought to the SBI, Fancy Bazar by the respondent Binod Agarwal and his signature was taken on some papers for a loan, but he was never informed whether the loan was sanctioned or not. The respondent had withdrawn an amount of Rs. 52,494/- with the help of those cheques taken from the petitioner. When the petitioner

approached the respondent Binod Agarwal and requested him to return the remaining cheques and the LIC policies, the respondent ignored his requests. During the pendency of this case, the petitioner learnt through the letter issued by the SBI that a loan was sanctioned in his name for Rs. 91,000/- and the entire loan was transferred to the account of Binod Agarwal, the account number being 00104842130 and the loan account number is 3296023016. The DW-2, who is an officer of SBI, Fancy Bazar has deposed that a loan amounting to Rs. 91,000/- was sanctioned in the name of Man Mohan Gupta and the policies of the petitioner Man Mohan Gupta was kept as security against the loan account no. 3296023016. When the petitioner failed to repay the loan, the LIC policies were surrendered and adjusted along with the loan account. It was held by the learned trial Court that even if it is established that the amount of Rs. 91,000/- was transferred to the account of Binod Agarwal, it does not indicate that the payment was made to the respondent i.e. 'Super Sales Corporation' from whom the petitioner had admittedly borrowed a loan.

Decision by the Appellate Court

6. It was also held that the DW-2 had admitted that the money was not transferred from the petitioner's account to 'Super Sales Corporation'. So stating, it was held by the Appellate Court that the petitioner failed to rebut the presumption through his evidence to create any doubt over the prosecution case and the appeal was thereafter dismissed.

Submissions

7. It is submitted on behalf of the petitioner that there is no case under Section 138 N.I. Act against him as this present case is not related to a legally enforceable debt. In fact, the legal notice and the initial deposition of the respondent does not reflect the amount of debt.

It is averred that the petitioner was convicted on presumption. The respondent is a proprietorship firm and not a partnership firm or a registered firm having a separate legal entity. Notice was issued to the petitioner prior to filing of the case. The authorisation letter is disputed. It is submitted that the authorisation letter exhibit-1(1) clearly depicts Smt. Kaushalaya Devi Agarwal authorised the respondent to take necessary steps in connection with C.R. Case No. 6075^C/2008, which clearly reveals that the authorisation letter was issued after this case was registered. PW-1 has also admitted in his cross-examination that the authority letter was issued after filing of the case. Mr. Binod Agarwal as PW-1 has also admitted that the petitioner had borrowed an amount of Rs. 1,20,000/- and five cheques were issued for payment of Rs. 50,000/- but the debt and the amount of those cheques are not categorically mentioned. The remaining part of the argument will be discussed at the appropriate stage.

8. Per contra, the learned counsel for the respondent laid stress in his argument that the exhibit-1 is the authority letter. When the proprietor was unable to continue with the proceedings of the case, the authority letter was issued after registration of the case on 29.12.2008. As the authority letter could not be filed at the time of filing the petition, the authority letter was issued on a later date. The respondent firm is a proprietorship firm with a trade name and the respondent's firm 'Super Sales Corporation' was not involved with the LIC policies relating to the loan procured from the State Bank. The respondent firm was only concerned with the five cheques. The PW-1 has exhibited Exhibit-2 and Exhibit-3. The signatures on Exhibit-2 and Exhibit-3 have not been denied by the petitioner. The documents Exhibit-2, Exhibit-3 and Exhibit-13 clearly depicts that the statutory presumption under Section 118/139 of the N.I. Act operates against the petitioner, who has admitted his

signatures. The petitioner has failed to rebut the presumption under Section 139 of the N.I. Act. It is also averred that the petitioner as DW-1 has admitted his liability in his cross-examination. No plausible explanation to rebut the presumption has been given by the petitioner. The transaction of bank loan against LIC policy to Binod Agarwal is not relevant to this present case. The loan account number of the petitioner for procuring and transferring the loan amount to Binod Agarwal's account is relating to a personal loan and cannot be correlated with this case. The respondent has also relied on the decision of the Hon'ble Supreme Court in ***Bir Singh Vs. Mukesh Kumar (2019) 4 SCC 197.***

9. On the anvil of these submissions, I proceed to decide this case.

10. The petitioner in his evidence as DW-2 has admitted that he has borrowed Rs. 1,20,000/- through cheques as well as in cash, and an amount of Rs. 50,000/- was given to the petitioner by the respondent through a cheque and Rs. 70,000/- was given to the petitioner by the respondent in cash. Thereafter, he issued five cheques for an amount of Rs. 8,749/- each for the repayment of loan but these cheques were dishonoured with the endorsement "insufficiency of funds". He has also admitted that he borrowed an amount of Rs. 97,750/- from Binod Agarwal on 05.02.2007 through cheque no. 039051, which was deposited in his Account No. 100698664956. An amount of Rs. 54,494/- was withdrawn by the respondent against six cheques which were issued by him as security. Thus, the story of the petitioner that Rs. 91,000/- was fraudulently procured by Binod Agarwal by the respondent does not hold good. The allegations relating to withdrawal of Rs. 91,000/- on the basis of the documents of LIC policies and blank cheque issued by the petitioner is not related to this case. It has been correctly held by the concurrent decision of the trial Court as well as the Appellate Court that admittedly the cheques were issued by the petitioner and they were

returned due to "insufficiency of funds".

11. It has been held by the Hon'ble Supreme Court in ***Uttam Ram Vs. Devinder Singh Hudan and Another*** reported in **(2019) 10 SCC 287** that:-

25. In other judgment reported as Rohitbhai Jivanlal Patel v. State of Gujarat and Another, this Court held as under:

"15. So far the question of existence of basic ingredients for drawing of presumption under [Sections 118](#) and [139](#) the NI Act is concerned, apparent it is that the accused-appellant could not deny his signature on the cheques in question that had been drawn in favour of the complainant on a bank account maintained by the accused for a sum of Rs. 3 lakhs each. The said cheques were presented to the Bank concerned within the period of their validity and were returned unpaid for the reason of either the balance being insufficient or the account being closed. All the basic ingredients of [Section 138](#) as also of [Sections 118](#) and [139](#) are apparent on the face of the record. The Trial Court had also consciously taken note of these facts and had drawn the requisite presumption. Therefore, it is required to be presumed that the cheques in question were drawn for consideration and the holder of the cheques i.e., the complainant received the same in discharge of an existing debt. The onus, therefore, shifts on the accused-appellant to establish a probable defence so as to rebut such a presumption.

17. On the aspects relating to preponderance of probabilities, the accused has to bring on record such facts and such circumstances which may lead the Court to conclude either that the consideration did not exist or that its nonexistence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that the consideration did not exist. This Court has, time and again, emphasized that though there may not be sufficient negative evidence which could be brought on record by the accused to discharge his burden, yet mere denial would not fulfil the requirements of rebuttal as envisaged under [Section 118](#) and [139](#) of the NI Act....

22. The result of discussion in the foregoing paragraphs is that the major considerations on which the Trial Court chose to proceed clearly show its fundamental error of approach where, even after drawing the presumption, it had proceeded as if the complainant was to prove his case beyond reasonable doubt. Such being the fundamental flaw on the part of the Trial Court, the High Court cannot be said to have acted illegally or having exceeded its jurisdiction in reversing the judgment of acquittal. As noticed hereinabove, in the present matter, the High Court has conscientiously and carefully taken into consideration the views of the Trial Court and after examining the evidence on record as a whole, found that the findings of the Trial Court are vitiated by perversity. Hence, interference by the High Court was inevitable; rather had to be made for just and proper decision of the matter."

12. It has been held by the Hon'ble Supreme Court in ***Kumar Exports Vs. Sharma Carpets*** reported in **(2009) 2 SCC 513** that:-

"The accused has also an option to prove the non-existence of consideration and debt or liability either

by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under [Sections 118 and 139](#) of the Act will not again come to the complainant's rescue.”

13. It has been held by the Hon'ble Supreme Court in ***Bir Singh Vs. Mukesh Kumar***, reported in **(2019) 4 SCC 197** that :-

“24. Qua this defence, it is pertinent to note that even if the same is accepted, merely stating that the same does not help the accused. Reliance in this regard is placed by this court on the judgments of Hon'ble Supreme Court of India in Sampelly Satyanarayana Rao Vs. Indian Renewable Energy Development Agency Ltd., (2016) 10 SCC 458, Sripati Singh Vs. State of Jharkhand & Anr., 2021 SCC OnLine SC 1002 and Sunil Todi Vs. State of Gujarat & Anr., 2021 SCC OnLine SC 1174 wherein the Hon'ble Apex Court has held that merely because a cheque has been given for security purposes does not mean that there is no legally enforceable debt or liability in favour of the complainant, however, it does mean that the court has to see whether there exists legally enforceable debt or liability as on the date mentioned on the cheque or whether a legally enforceable debt or liability has arisen at the time of presentation of the cheque. It has been held by the Hon'ble Court that the accused would very much be liable u/s. 138 [NI Act](#) for issuance of a security cheque as well, if on the date of the presentation of such cheque there has not been a prior discharge of debt, or if the cheque has not been given towards advance payment, the goods in respect of which have not been received, or if there has been change in circumstances which precludes the complainant from depositing the cheque with the bank.

25. At this juncture, it is quintessential to note that a cheque issued as a security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. 'Security' in its true sense is the state of being safe and the security given in a business relationship implies something given as a pledge of payment. Hence, merely showing that the accused had given the cheques for security purposes is not sufficient and he has to raise a probable defence and has to show on the basis of preponderance of probabilities that no liability exists in favour of the complainant to the tune of the amount of impugned cheques.

26. To cut the long story short, the accused has clearly admitted his liability towards the complainant bank to the tune of the amount of the impugned cheque at every stage of the trial. He has also admitted the execution of loan agreement, and his loan account statement reflecting his liability being equivalent

to the cheque amount. Hence, nothing else with respect to his liability was required to be proved in terms of section 58 of the Indian Evidence Act 1872. As far as the deduction of amount from another savings bank account of the accused after the dishonour of the impugned cheque, to set off the outstanding liability towards the loan is concerned, this Court is of the considered opinion that the same is of no consequence under Section 138 NI Act. Had the deduction been made after the debt was incurred, but before the presentation of the impugned cheque, no offence would have been made out against the accused in terms of the decision of Hon'ble Apex Court in Dashrathbhai Trikambhai Patel (Supra). Without prejudice to any other remedy the accused might have against the complainant bank regarding the deductions made from his bank account without his consent, but since the deductions have been made by the complainant bank after the presentation of the impugned cheque, the contention of the accused cannot be accepted for the decision in the present case in terms of the provisions of the NI Act. Accordingly, the second defence of the accused also does not hold water, and is accordingly rejected.

27. *In the case at hand, it is noteworthy that the accused did not lead any evidence to prove his defence. The entire defence of the accused consists of only bald, vague and self contradictory assertions, unsubstantiated by any cogent and reliable evidence in support of those assertions. His oral assertions stand rebutted by documentary evidence brought forth on behalf of the complainant and in the absence of any cogent evidence, the accused has failed to rebut the mandatory presumptions existing in the favour of the complainant."*

14. Reverting back to this case, it is held that through this revision, the concurrent orders of conviction of the learned trial Court as well as Appellate Court ought not to be interfered with. The petitioner has failed to rebut that the debt was not a legally enforceable debt. The PW-1 has exhibited Exhibit-2 and 3 and his signatures have not been denied by the petitioner. The documents Exhibit-2, 3 and 13 clearly depicts that the statutory presumption under Section 139 of the N.I. Act operates against the petitioner.

15. The petitioner has also admitted his liability in his cross-examination. No plausible explanation to rebut the presumption has been given by the petitioner. He had issued five cheques in favour of the respondent no. 2 for an amount of Rs. 8,749/- each but all the cheques were dishonoured by the Bank due to "insufficiency of funds". The respondent no. 2 has initiated the corresponding case against the petitioner as the cheques which were issued by the petitioner in discharge of legally enforceable debt have been returned due to "insufficiency of funds".

16. In view of my foregoing discussions, it is held that the case has been initiated for a total amount of Rs. 43,745/- as the five cheques described above have been dishonoured due to "insufficiency of funds". However, it is held that the petitioner has failed to rebut that these cheques were issued by the petitioner to discharge a legally enforceable debt or any other debt as held concurrently by the learned trial Court and the appellate Court. I, therefore record my concurrence to the decisions of the learned trial Court and the decision of the appellate Court with a slight modification. The plea of the petitioner that the cheques were issued as security does not hold good.

17. The conviction of the petitioner under Section 138 N.I. Act is upheld but he is sentenced to pay a compensation of Rs. 43,745/- along with a nominal fine of Rs. 11,000/-, which is rounded to Rs. 55,000/-. The petitioner is directed to approach the learned trial Court immediately and pay the compensation of Rs. 55,000/- and in default of payment of compensation, he is directed to undergo rigorous imprisonment for 3(three) months and it is directed that even if the petitioner serves out the default sentence, the compensation shall be recoverable from his estate as per Section 421 Cr.P.C.

18. In terms of the above observations, this petition stands disposed of.

JUDGE

Comparing Assistant