

GAHC010318732019



In the Gauhati High Court

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

Crl. Rev.P. No. 129/2020

With

I.A. (Crl.)7/2020

Narayan Barman

S/O Late Lalit Chandra Barman, R/O Vill-Sadilapar, P.O.-Pandu,

P.S.-Jalukbari, Dist-Kamrup(M), Assam, Guwahati-781012

..... **Petitioner**

VERSUS

The State Of Assam and Anr.

Represented By the Public Prosecutor, Assam

2. Dr. Khabiruddin Ahmed

S/O Late Rakibur Rahman

R/O Kachari Salmari (Rangia)

P.S.-Rangia

Dist-Kamrup

Assam

Pin-78135

..... **Respondents**

BEFORE

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Advocate for the Petitioner : Mr. A. Paul, Advocate

Advocate for the Respondent : Mr. B. Sarma, learned Addl. P.P.

Mr. S. Munir, for respondent no. 2.

Date of Hearing : **27.07.2023**

Date of Judgment : **29.11.2023**

JUDGMENT & ORDER (CAV)

1. Heard Mr. A. Paul, learned counsel appearing for the petitioner. Also heard Mr. B. Sarma, the learned Additional Public Prosecutor representing the State of Assam and Mr. S. Munir, learned counsel for the respondent no. 2.

2. This application under section 397/401 of the Code of Criminal Procedure (Cr.P.C for short) has been preferred by Sri Narayan Barman - petitioner herein challenging the legality and propriety of the order dated 22.04.2019 passed by the learned Addl. Sessions Judge (FTC) No. 3, Kamrup (M) in Crl. Appeal No. 215/2017 by partly allowing the appeal and upholding the judgment and order dated 24.08.2017 passed by the JMFC, Kamrup (M), Guwahati, in C.R. 1966/2010.

3. The genesis of the case was that the petitioner issued a cheque bearing No. 416097 dated 03.02.2010 for an amount of Rs. 7,10,000/- only drawn on the Panbazar Branch of the State Bank of India allegedly to discharge his liability of a debt. On 19.03.2010, the respondent no. 2 presented the aforementioned cheque in his bank, i.e. the Union Bank of India at G.S. Road, Guwahati, but the

cheque was returned due to insufficiency of funds. A demand notice was issued by the respondent No. 2 via registered post with A/D to the petitioner through his advocate on 07.04.2010, intimating him about the dishonour of the cheque and asking him to pay the amount within 15 days of receipt of the demand notice, but the petitioner failed to repay his debt.

4. The respondent No. 2 was impelled to move the Court and the complaint under Section 138 of the Negotiable Instrument Act, 1881 (N.I. Act for short) was filed against him and cognizance was taken and summonses were issued. On his appearance, offence was explained and the petitioner contested the proceeding and examined 2 (two) witnesses to buttress his claim. The witnesses were cross-examined in extenso. On closure of prosecution evidence, the petitioner's statement was recorded under section 313 Cr.P.C and his plea of defence was that he had already paid an amount of Rs. 3,90,000/- to the respondent No. 2 in cash. He also adduced the evidence of D.W-1.

5. The following points were delineated by the trial court in order to conclusively decide the case.

“a) Whether the accused had issued the cheque (Ext. 1) bearing no. 416097 in discharge of his lawful debt and liability?

b) Whether the Ext.1 cheque was dishonoured due to "insufficient fund" as mentioned in Ext.2 Return Memo?

c) Whether a valid legal notice was issued to the accused?

d) Whether the accused, in spite of receiving the demand notice, had failed to repay the cheque amount within the stipulated period?"

6. *It was held by the learned trial Court that the plea of the petitioner that the cheque marked as Exhibit-1 was issued by the petitioner as security lacks merit. There is no dispute between the parties that an amount of Rs. 8,10,000/- was given to the petitioner by the respondent No. 2 on different dates and out of the said amount Rs. 1,00,000/- had been repaid by the petitioner. The initial burden on the prosecution was to prove that the petitioner had issued the cheque in discharge of a legally enforceable debt and liability. The defence was to rebut the liability.*

The plea taken by the defence - petitioner herein is that:-

- (i) He paid an amount of Rs. 1,50,000/- on 10.06.2009 in presence of Robin Thakuria,
- (ii) An amount of Rs. 1,50,000/- on 11.10.2009 at the railway station and,
- (iii) An amount of Rs. 48,000 on 16.12.2009 in his nephew's flat to the respondent no. 2.

It was held by the learned trial court that there is no ocular or documentary evidence to buttress the claim of the petitioner that the total amount of Rs. 3,90,000/- was already paid to the respondent No. 2.

7. The learned trial court relied on the decision of Hon'ble the Supreme Court

in **Rangappa Vs. Sri Mohan**, in Crl. Appl. No. 1020/2010 decided on 07.03.2010, wherein it has been observed and held that:-

“Once the cheque relates to the account of the accused and he accepts and admits the signatures on the said cheque, then initial presumption as contemplated under Section 139 of the N.I Act, has to be raised by the Court in favour of the complainant. The presumption referred to in Section 139 of the NI Act is a mandatory presumption and not a general presumption but the accused is entitled to rebut the said presumption.”

8. It was held by the learned Trial Court that the petitioner herein has failed to prove part payment of Rs. 3,90,000/- before presentation of the cheque, Exhibit-1. It was held that the defence failed to rebut the presumption under Section 139 of N.I. Act, and the point No. (a) was decided in favour of the informant – respondent no. 2. It was thereafter held that as per Section 58 of the Indian Evidence Act, 1872 (the Evidence Act for short) an admitted fact is not required to be proved and it was held that the cheque was returned due to ‘insufficiency of funds’. The petitioner was held guilty of the offence under Section 138 N.I. Act, and he was sentenced to undergo simple imprisonment for 6 (six) months and to pay an amount of Rs. 10,00,000/- as compensation, which shall be recoverable as fine and in default of payment of the compensation, the petitioner was to undergo simple imprisonment for 2(two) months.

9. Aggrieved by this order of the learned Trial Court, the petitioner preferred an appeal which was registered as Crl. Appeal No. 215/2017 and vide order

dated 22.04.2019, the appellate Court partly allowed the appeal. The order of conviction was upheld but the sentence of imprisonment was modified and scaled down to 2(two) months instead of 6(six) months. The sentence of fine was however upheld.

10. It was held by the learned Addl. Sessions Judge (FTC No. 3) that the plea of the petitioner that he had already paid an amount of Rs. 3,90,000/- and the remaining amount out of Rs. 7,10,000/- has to be paid is not sustainable as Section 139 of the N.I Act raises a statutory presumption in favour of the holder of the cheque.

11. The learned Addl. Sessions Judge relied on the decision of ***K.N. Beena Vs. Muniyappan (AIR 2001 SC 2895)***, wherein, it was observed that:-

*"Thus in complaints under Section 138, the Court has to presume that the cheque had been issued for a debt or liability. This presumption is rebuttable. However, the burden of proving that a cheque had not been issued for a debt or liability is on the accused. This Court in the case of **Hiten P. Dalal vs. Bratindranath Banerjee reported in (2001) 6 SCC 16** has also taken an identical view".*

12. It was also held by the learned appellate Court that in the present case, the petitioner, except making a bald statement that he had paid in part the money, has not produced any evidence nor produced any money receipts. The onus lies on the accused/petitioner to rebut the presumption and to establish that the cheque in question was not given in respect of any debt or liability, with

the standard of proof being preponderance of probabilities.

13. The explanation of the accused (petitioner) coupled with the evidence on record is sufficient to disclose the presumptions envisaged by Section 118 and 139 of the N.I Act, but the petitioner has failed to rebut the presumption that he had issued the cheque, Exhibit-1 not in discharge of any debt but as a security relating to a land deal between the petitioner and the respondent No. 2.

14. The concurrent decisions of the learned JMFC and the learned Addl. Sessions Judge No. 3 is under challenge before this Court under the following amongst other grounds:-

(i) Both the Courts below had committed grave error in law as well as in facts. The oral testimony of the petitioner was not rebutted by the complainant during the cross-examination of the petitioner.

(ii) It has been erroneously held by both the Courts that the cheque Exhibit-1 was issued for a legally enforceable debt, on the basis of some irrelevant factors and on conjectures and surmises. It was held by the learned Addl. Sessions Judge that the issuance of the cheque was admitted by the petitioner (accused), but the probative value of the cheque in question was not properly examined in facts and circumstances of the instant case. It was totally ignored that the cheque was issued as a security relating to a land deal between both the

parties. The petitioner is greatly prejudiced by the order because he has already paid a part of the amount in question.

(iii) the learned Courts below had failed to consider the proposition of law laid down by Hon'ble the Supreme Court in ***Vijay Vs. Laxman and Another (2013) 3 SCC 86***, wherein, it has been observed that:-

Rebutting the initial evidential burden, the defendant can rely on direct evidence or for the purpose of circumstantial evidence or on presumptions of case on fact. On such convincing rebuttal evidence is adduced and accepted by the court. Having regard to all circumstances of the case and the preponderance of probabilities, the evidential burden shifts to the plaintiff who also has the legal burden, but in the instant case, the aforesaid proposition of law has not been followed by the Courts below.

15. It is prayed on behalf of the petitioner that the judgments of the Courts below are perverse and the petitioner has been highly prejudiced as he has been sentenced to simple imprisonment for 2(two) months and to pay an amount as high as Rs. 10,00,000/- as compensation. The petitioner has prayed to set aside the impugned orders.

16. Per contra, the learned counsel for the respondent no. 2 laid stress in his argument that until and unless the orders suffer from great perversity, concurrent findings of two forums cannot be interfered with. It is submitted that both the courts below have correctly held that the cheque was issued in discharge of a debt. The compensation of Rs. 10,00,000/- cannot be considered to be too harsh a sentence. The order of sentence was passed well within the realm of Section 138 of the N.I. act. The payment of Rs. 3,90,000/- could not

be established by the petitioner. It is not true that as submitted by the learned counsel for the petitioner, the appellate court has dealt with points for determination taken up by the trial court in a mechanical manner and not separately and it is also not true that, as argued by the learned counsel for the petitioner, the contents of the complaint has not been incorporated in the legal notice and the evidence of PW-1 and DW-1 has been arbitrarily dealt with.

17. The learned counsel for the respondent No. 2 has prayed to dismiss the petition and uphold the concurrent findings of the two Courts.

18. I have considered the submissions at the bar with circumspection.

19. The concurrent findings of two forums cannot be interfered with, until and unless the findings are found to be perverse. In a revision petition, the evidence is not required to be reappraised and reappreciated, and only the legality and propriety of the orders are to be dealt with.

20. It cannot be held that the order of sentence is too harsh, as the petitioner had already paid a part of the amount of Rs. 7,10,000/-.

21. It has been appositely held by the learned trial Court that the petitioner has failed to rebut the evidence of the respondent no. 2. The petitioner was unable buttress his submission that he has paid Rs. 3,90,000/- through any receipts or documents.

Despite the fact that the petitioner deposed as DW-1, he failed to substantiate his claim through any ocular or documentary evidence that he paid an amount of Rs. 1,50,000/- on 10.06.2009 in presence of Robin Thakuria, an amount of Rs. 1,50,000/- on 11.10.2009, at the Railway station and an amount of Rs. 48,000/- on 16.12.2009.

22. A scrutiny of the evidence reveals that there is no evidence substantiating part payment of Rs. 3,90,000/- out of Rs. 7,10,000/-. Thus, it has been rightly held by the learned trial Court and the Appellate Court, that the petitioner has failed to prove that he paid Rs. 3,90,000/- out of the total amount of Rs. 7,10,000/-. It has been appositely held by the learned trial and learned Addl. Sessions Judge, FTC-3, that the petitioner has admitted that he borrowed a total amount of Rs. 8,10,000/- and out of Rs. 8,10,000/- he has paid Rs. 1,00,000/- to the respondent No. 2. This fact has been admitted by the respondent No. 2 and thus, it is manifest that the petitioner had to pay Rs. 7,10,000/- and so, he issued the cheque marked as Exhibit-1. It has been discussed in detail by the learned trial court while deciding the instant case that both the parties i.e. the petitioner as well as the respondent no. 2 has admitted that the money was given to the petitioner by the respondent no. 2 in relation to a land deal, which is marked as Exhibit-5. The money was received by the petitioner and when, he had to return the money, he issued the cheque marked as Exhibit-1.

23. It has been appositely held by the learned trial Court as well as by the learned Appellate Court that as the cheque Exhibit-1 was issued in discharge of a liability, the petitioner is liable under Section 138 of the N.I. Act, when his cheque was returned due to insufficiency of funds. The presumption under Section 118 and 139 of the N.I. Act operates against the petitioner as Section 139 N.I. Act raises a statutory presumption in favour of the holder of the cheque. The appellate Court upheld the decision of the learned trial court by observing that except making a bald statement, the petitioner has not produced any evidence nor any money receipts to prove that he had already paid a part of the amount of the cheque as he has paid Rs. 3,90,000/- and he is liable to pay only the remaining amount.

24. The learned trial court as well as the learned Appellate Court have spelt out sound reasoning while deciding the instant case. I record my concurrence to the findings of the trial court as well as the Appellate court and the conviction of the petitioner under Section 138 of the NI Act is upheld.

25. However, the sentence is reduced and modified and the petitioner is directed to pay Rs. 8,00,000/- as compensation while the sentence of imprisonment of 2(two) months is set aside. In default of payment of the compensation, the petitioner is to undergo rigorous imprisonment for 6(six)

months only. The petitioner to complete the payment of Rs. 8,00,000/- within 6(six) months from today. Any advance, paid by the petitioner is merged with the compensation of Rs. 8,00,000/- (Rupees eight lakhs).

26. Parties will bear their own costs.

Send back the LCR.

JUDGE

Comparing Assistant