

GAHC010067822018



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)
PRINCIPAL SEAT AT GUWAHATI

CrI.A.365/2018

BAHEJ UDDIN AHMED
S/O- LATE. EYAKAT ALI,
R/O- VILLAGE PALANGSUGURI,
P.S- DHALIGAON, DISTRICT- CHIRANG(BTAD),
ASSAM. PIN-783385.

..... Appellant

VERSUS

1. THE STATE OF ASSAM AND ANR
REPRESENTED BY PP, ASSAM.

2: SHAHIDUL ISLAM
S/O- LATE. MAFIJUDDIN @ MAFIJUDDIN KHANDAKAR
R/O- VILLAGE- SATIPUR
P.S.- DHALIGAON
DIST- CHIRANG (BTAD)
ASSAM. PIN- 783385.

..... Respondents

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Advocate for the Appellant : Mr. B.C. Das, Advocate

Advocate for the Respondents : Mr. MH Ahmed, Advocate
Mr. K.K. Das, Addl. P.P.

Date of Hearing : 14.12.2023

Date of Judgment : 24.01.2024

JUDGMENT & ORDER (CAV)

1. This appeal is directed against the judgment and order dated 03.11.2016 passed by the learned Chief Judicial Magistrate, Chirang in Case No. NICR 4 of 2015 passing an order of acquittal. Accused – respondent No. 2 herein was acquitted from the charges u/s 138 of the Negotiable Instrument Act, 1881 (N.I. Act for short).
2. The genesis of the case was that an undertaking was executed on 10.06.2013 by the respondent No. 2 who borrowed an amount of Rs. 2,50,000/- from the appellant. An agreement was entered into by both the parties and the respondent No. 2 agreed to return the borrowed money within a period of 2 months but he failed to repay the loan in time. The appellant repeatedly requested the respondent No. 2 to repay the debt and finally the respondent No. 2 issued two Account Payee Cheques being Cheque No. 034986 for Rs. 2 lacs from his Account No. 32444819290 of the State Bank of India, BRPL Complex Branch, Dhaligaon and Cheque No. 841618 for Rs. 50,000/- from his Account No. 1201000100139169 of Punjab National Bank, Bongaigoan Branch in discharge of his debt of Rs. 2,50,000/-.
3. The appellant filed a complaint petition of dishonour of cheques and on finding a prima facie case, cognizance was taken by trial Court u/s 138 of the N.I. Act. Process was also issued against the respondent No. 2. On appearance of the respondent No. 2 offence was explained u/s 138 of the N.I. Act and the respondent pleaded not guilty and claimed to be tried.
4. To connect the respondent to the crime the appellant examined 6 witnesses and the respondent No. 2 cross-examined the witnesses to refute the charges. After closure of prosecution evidence, the statement of the respondent No. 2 was recorded u/s 313 of the Code of Criminal Procedure (Cr.PC for short). The tone and tenor of his answers to the questions u/s 313 Cr.PC depicts a plea of total denial. The respondent No. 2 also did not adduce any evidence in defence.

5. The learned trial Court delineated the following points to decide the case:-

“5(i) Whether this court has territorial jurisdiction to try the case or not.

5(ii) Whether the accused had received the legal notice duly served upon him by the complainant and appeared before the court or not.

5(iii) Whether the accused has legally enforceable liability or debt to complainant.

5(iv) Whether the documents exhibited by the accused is admissible in the eye of law or not.

5(v) Whether the statement of the accused recorded under section 313 of Cr.PC has evidential value or not.

5(vi) Whether the complainant is entitled to get the cheque amount in double as compensation or not.

5(vii) Whether the accused has committed offence punishable under section 138 of NI Act, 1881 or not if so if he is liable for punishment under that provision of law.”

6. It is contended by the learned counsel for the appellant that the contention of the respondent No. 2 was that he did not receive pleader's notice and the learned trial Court had erroneously acquitted the respondent No. 2 on the ground that the respondent did not receive the pleader's notice. However, the answers of the respondent No. 2 u/s 313 Cr.PC clearly depicts that he admitted that he did not return the money, which he had received from the appellant. It is submitted that the notice was received by the respondent's brother. The Ext.-6 clearly reveals the delivery of the notice on 05.03.2015 at Dhaligaon.

7. The learned trial Court while deciding the case observed in his judgment at para-16 that:-

“However, it was admitted by the Advocate for the accused that the notice was received by the elder brother of the accused. The receiving of the notice by a male member did not vitiate the proceeding of the N.I. case. Mere denial of the accused of receiving notice the accused did not give evidence to that effect.....”

8. The learned trial Court held that:-

“..... this court has territorial jurisdiction to try the present case because the cheque in question Ext. 2 is a cheque of State Bank of India, Barpeta Branch and the said Bank is a drawee bank who dishonored the cheque and as such this court has territorial jurisdiction to try the case. That section 138 (a) clearly shows that the cheque has been presented to the bank within a period of six month from the date on which it is drawn or within the period of its validity whichever is earlier. The Ext. 2 (cheque) issued by the accused person on 14-05-2014 and it it was deposited the bank on 26-05-2014. So the cheque was presented within the stipulated period mentioned in the section 138(a) of N.I. Act. The complainant filed the case taking recourse of Provision of Law of Negotiable Instruments Act, as amended upto date. Defence Counsel has stated that there has been pleading of the advocate of the complainant in the complaint petition that the there was a typographical mistake of the date of the notice upon the accused. But the complainant side adduced the evidence of postman and the postman could not clarify as to the receipt of the notice by the accused from the complainant. However, it was admitted by the advocate for the accused that the notice was received by the elder brother of the accused. The receiving of the notice by a male member did not vitiate the proceeding of the NI Case. Mere denial of the accused of not receiving notice the accused did not give his evidence to that effect. The pleading stated by the advocate of the complainant side is to prove himself instead of which he adduced two postal witnesses regarding the service of notice upon the accused. The evidence given by PW-5 is not believable as during cross examination he could not identify the elder brother of the accused as Samsul Hoque Khandakar. The exhibit made by the complainant side marked as Ext-9 is partly denied by the accused side. The Point nos. I&II are decided against the complainant. It may be pointed out that the complainant exhibited the Ext-1 without having any legally entity. He has no license of money laundering to the accused and it is against the section 6 of Money Laundering Act.

17. Point for determination No. iii

As per discussion made in issue no. I & II there is no legally enforceable liabilities of the accused to the

PW-1 and it is decided against the complainant side.

18. Point for determination No. IV

The documents exhibited by the complainant side are correct pertaining to Ext-2, Ext-3 and Ext-9 as witnessed by PW-4 and PW-6. Ext-5, Ext-6 and Ext-1 are not proper and inadmissible in the eye of law. This issue is decided accordingly.

19. Point for determination No. V & VI

These issues are discussed all together as they are interrelated and inseparable. As discussion made in issue no. I, II & III the complaint petition filed by the complainant advocate belatedly is devoid of merit. The undertaking exhibited by the accused in presence of witnesses Sahalam Islam and Sirajul Hoque in the form of Ext-1 in a 10 Rupee Non Judicial Paper is not admissible in the eye of law. The non Judicial Paper Sl. No. 11342 was issued on 09-05-2013 but it was exhibited on 10-06-2013 and the complaint petition was filed on 26- 06-2015 with a statement that the cause of action for the case arose on 29-05- 2015 when the complainant came to know that his advocate's notice of demand was delivered to the addresses man with a mention that the notice in the year 2013 has been typographically mistaken and written as 2014. The A/D has not been returned as such the advocate for the complainant adduced the evidence of PW-5 (Post-Master of Bongaigaon Post Office) but the accused is a resident of Satipur, Dhaligaon. It has clouded doubt of the complainant case. The complainant is entitled any benefit as prayed in the complaint petition,

20. Point for determination No. VII

From the forgoing discussion it is not established any case against the accused due to improper service of notice (legal notice) upon the accused as it is one of the basic criteria of the NI case. So, it is decided against complainant.

9. It is submitted that the core question in this case is whether notice was served upon the respondent within the period of limitation and whether respondent No. 2 is liable for offence under

Section 138 of the NI Act.

10. The learned counsel for the appellant has relied on the decision of Hon'ble the Supreme Court in *K. Bhaskaran v. Sankaran Vaidhyan Balan and Another*, reported in (1999) 7 SCC 510 wherein it has been observed that:-

“14. The offence under **Section 138** of the Act can be completed only with the concatenation of a number of acts. Following are the acts which are components of the said offence : (1) Drawing of the cheque, (2) Presentation of the cheque to the bank, (3) Returning the cheque unpaid by the drawee bank, (4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice.

20. If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape-from the legal consequences of **Section 138** of the Act. It must be borne in mind that Court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure.

21. In Maxwell's 'Interpretation of Statues' the learned author has emphasized that "provisions relating to giving of notice often receive liberal interpretation." (vide page 99 of the 12th end.) The context envisaged in **Section 138** of the Act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in clause (b) of the proviso to **Section 138** of the Act

show that payee has the statutory obligation to 'make a demand' by giving notice. The thrust in the clause is on the need to 'make a-demand'. It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is despatched his part is over and the next depends on what the sendee does.

23. Here the notice is returned as unclaimed and not as refused. Will there be any significant difference between the two so far as the presumption of service is concerned? In this connection a reference to [Section 27](#) of the General Clauses Act will be useful. The Section reads thus :

"27. Meaning of service by post. - Where any central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post"

24. No doubt [Section 138](#) of the Act does not require that the notice should be given only by 'post'. Nonetheless the principle incorporated in [Section 27](#) (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the mount would resort to the strategy of subterfuge by successfully avoiding the notice."

11. Relying on the decision of Hon'ble the Supreme Court the learned counsel for the appellant has submitted that in the present case, the notice was received by the respondent No. 2's elder brother and thus notice is deemed to be served. The learned counsel for the appellant has prayed to set aside the impugned judgment and order.

12. Per contra, the learned counsel for the respondent laid stress in his argument that the learned counsel for the appellant was referring to instances of unclaimed notice and this is not so in the present case. The appellant's brother had allegedly received the notice. The appellant's elder brother ought to have been examined as a witness and failure of the examination of appellant's elder brother as a witness renders this case otiose. It is argued on behalf of the respondent No. 2 that the para 3 of the complaint petition clearly reflects that the respondent No. 2 borrowed an amount of Rs. 2,50,000/- from the appellant by executing an undertaking on 10.06.2013 in presence of witnesses. The borrowed amount was agreed to be repaid to the appellant within a period of 2 months and the appellant stated as PW-1 in his cross-examination that there was no time limit in the payment of the borrowed amount. It is averred by the learned counsel for the respondent No. 2 that date has been wrongly mentioned in the notice as 2014 instead of 2013 extending the benefit of doubt to the accused-respondent No. 2 herein. The explanation given in the complaint petition relating to the wrong insertion of date cannot be considered. Moreover, there was no demand from the appellant to the respondent No. 2 before the cheque was issued by the respondent No. 2. All the witnesses are related witnesses and being related witnesses they are partisan to the appellant. The complaint petition clearly reveals that the money which was borrowed was to be paid within 2 months but PW-1 admitted in his cross-examination that there was no limitation of time period within which the borrowed money was to be repaid. This statement is contradictory to the complaint petition. The complainant-appellant herein also deposed that he did not know the contents of the cheque but he identified the signature of the respondent No. 2. He stated that a blank cheque was issued.

13. The other discrepancy in the evidence is that the Advocate who issued notice against the respondent No. 2 was not examined as a witness. Section 138 a & b of the N.I. Act has to be read conjointly and it is apparent that Section 138 a & b of the N.I. Act was not proved against respondent No. 2. When Section 138 a & b of the Act has not been proved, no case has been made out against the respondent No. 2. The token notice was not proved. Token notice was served to the respondent No. 2's brother, who was not properly identified as the brother of the respondent No. 2. The evidence of the independent witness PW-5 reveals that he is an unauthorized employee to prove the notice. No statement of account was brought to prove "insufficiency of funds" in the respondent No. 2's account. The learned counsel for the respondent No. 2 has prayed to dismiss the appeal as the appeal is devoid of merits.

14. Heard Mr. B.C. Das, learned Senior Counsel for the appellant assisted by learned counsel Ms. I. Das. Also heard Mr. K.K. Das, learned Addl. P.P. for the State of Assam and Mr. M.H. Ahmed, learned counsel for respondent No. 2.

15. I have considered the submissions at the Bar. The remaining part of the argument forwarded by the learned counsel for the appellant as well as the learned counsel for the respondents will be discussed at the appropriate stage.

16. To decide this case in its proper prospective the evidence is reappraised.

17. Tiken Kalita an independent witness deposed as PW-5 that he appeared before the Court on receiving summons issued by the Court. He proved the postal receipt of instrument No. RS 475614873 IN, i.e. address of the respondent No.2 as Ext.-5. He deposed that Ext.-5 is the postal receipt of instrument No. RS 475614873 IN address of Sahidul Islam dated 04.03.2015. Ext.-6 is a letter issued by S. Alom, Advocate dated 02.03.2015. The Post Master of Bongaigaon Post Office reported the status of delivery of the instrument No. RS 475614873 IN vide Ext.-6(2). PW-5 identified the signature of the

Post Master of Bongaigaon, Sri Lakhi Boro as Ext.-6(4). He further deposed that after receiving the summons he obtained the attested copy of the delivery of the instrument No. RS 475614873 IN from Sub Post Master, Dhaligaon. As per report, the instrument was delivered to the elder brother of the accused-respondent herein. He identified the attested copy of the delivery report of the legal notice, which he had attained from the post office, Dhaligaon as Ext.-8. He however testified that he was not related to the business or the delivery of the letter as it was within the area between Goalpara and Dhaligaon Sub Post Office. He identified the letter issued to him by the Sub Post Master, Dhaligaon dated 28.08.2016 as Ext.-9 and the signature of the Sub Post Master, Dhaligaon as Ext.-9(1).

18. Referring to the evidence of PW-5, the learned counsel for respondent No. 2 has submitted that this witness was not authorized to deliver letters in the area between Goalpara and Dhaligaon. An unauthorized person deposed about delivery of the demand notice. It was argued that when the delivery of demand notice was not proved, the question of cognizance being taken does not arise.

19. The learned counsel for the appellant has however refuted the averments stating that he (PW-5) was sent to represent the office dealing in the business of delivery of the articles to the addressee. He was an official witness and he may be serving in any area. As he was an official witness, it cannot be ignored that the demand notice sent vide instrument No. RS 475614873 IN address was delivered to the brother of the respondent No. 2.

20. I find substance in the argument of the learned Senior Counsel for the appellant.

21. The learned counsel for the respondent No. 2 has drawn the attention of this Court to the cross-examination of PW-5 who stated that there was no identification of Samsul Hoque Khandakar (respondent No. 2's elder brother) as reported by the postman of Dhaligaon. It is submitted that without any identification it cannot be held that the letter was properly delivered to the addressee.

22. The complainant, PW-1, through his evidence and complaint, stated that when the A/D was not

returned to the Advocate, on 25.03.2015, his Advocate made a representation and sought information from the Post Master of Bongaigaon, about the status report of the demand notice sent through registered post. The Post-Master on 29.05.2015 had furnished an information that a demand letter was delivered on 05.03.2015 to the addressee.

23. In his cross-examination, PW-1 admitted that the A/D of the demand notice was not received from the concerned Postal Department. Vide Exhibit-6, he also affirmed the delivery of the notice to the addressee. He admitted that the delivery marked as Exhibit-6(3) reveals that the notice was received by the respondent No.2's elder brother. PW-1 also admitted in his cross-examination that the pleader's notice was prepared by the engaged lawyer on 02.03.2015. Exhibit-5 (postal slip) was prepared on 04.03.2015 for delivery.

24. The learned counsel for the respondent No. 2 has relied on the decision of Hon'ble the Supreme Court in *M.D. Thomas v. P.S. Jaleel and Another*, reported in (2009) 14 SCC 398 wherein it has been observed that:-

“3. Learned counsel for the appellant argued that his client's conviction is liable to be set aside because before filing complaint, the respondent did not serve upon him notice as per the requirement of Clause (b) of proviso to Section 138 of the Act. He submitted that service of notice on the appellant's wife cannot be treated as compliance of the mandate of law.

4. Learned counsel for respondent No.1 did not dispute that the notice issued by his client was, in fact, served upon the appellant's wife but argued that this should be treated as sufficient compliance of the requirement of giving notice of demand.

6. Proviso to Section 138 specifies the conditions which are required to be satisfied before a person can be convicted for an offence enumerated in the substantive part of the section. Clause (b) of the proviso to Section 138 cast on the payee or the holder in due course of the cheque, as the case may be, a duty to make a demand for payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.

7. In the present case, the notice of demand was served upon the wife of the appellant and not the appellant. Therefore, there is no escape from the conclusion that complainant-respondent had not complied with the requirement of giving notice in terms of Clause (b) of proviso to Section 138 of the Act. Unfortunately, the High Court overlooked this important lacuna in the complainant's case. Therefore, the conviction of the appellant cannot be sustained.

8. In the result, the appeal is allowed. The impugned order is set aside and the order of acquittal passed by the Trial Court is restored.”

25. The ‘*ratio decidendi*’ of the decision of Hon'ble the Supreme Court in *C.C. Alavi Haji v.*

Palapetty Muhammed and Another, reported in (2007) 6 SCC 555 and the decision of Hon'ble the Supreme Court in the case of *M.D. Thomas (supra)* has been dealt with extensively by the High Court of judicature at Tripura, Agartala in the case of *Dr. Abhijit Choudhury v. Sri Chinmoy Sen*, reported in (2015) 0 Supreme (Tri) 30 wherein it has been observed and held that:-

“19. There cannot be any amount of doubt that there is no provision of drawing the statutory presumption on service of notice under the NI Act as is available in respect of the liability of the drawer under Section 139 and Section 118(a) of the NI Act. But Section 27 of the General Clauses Act authorises the court to draw a statutory presumption if certain conditions are proved and remained unrebutted. Similarly the apex court has developed the law over the years importing the provisions of Section 114 of the Evidence Act as the essential tool to presume certain facts based on the facts proved in the evidence. It appears that there had been no occasion for the Supreme Court to deal with the proposition as laid down by M.D. Thomas. There cannot be any amount of ambiguity that M.D. Thomas, even from a very narrow context, has followed the principles of *D. Vinod Shivappa v. Nanda Belliappa* which has been distinguished and clarified by the Supreme Court in *C.C. Alavi Haji* but that aspect of the matter was not at all considered in M.D. Thomas. In *C.C. Alavi Haji*, the apex court in unequivocal term has held that when Section 114 of the Evidence Act, 1872 is applied to the incidence of delivery of the communication/notice sent by the post, it enables the court to presume that in the common course of natural events, the communication/notice have been delivered at the address of the addressee. What is deemed under Section 27 of the General Clauses Act 1897, can equally be inferred by presumption under Section 114 of the Evidence Act. Section 27 of the G. C. Act, 1897 provides for deeming the certain act in regard to the service. Since the law as developed by a larger Bench of the apex court in *C.C. Alavi Haji* has not at all been considered in M.D. Thomas and the proposition is in stark contrast with the proposition advanced in *C.C. Alavi Haji*, that cannot be accepted as a binding precedent as the larger Bench decision of the apex court would hold the field in such conflict phenomenon.

20. On examination of the records and the judgment as questioned in this appeal, it appears that it has been established by the complainant by adducing adequate evidence that the notice sent by the registered post to comply the provisions of Clause (b) of Section 138 of the NI Act was delivered in the address of the respondent No 1. the accused and that was received by his wife.

Thus, the trial court ought to have held by importing the provisions of Section 27 of the General Clauses Act that the notice has been properly served. Even on applying the general principles as provided under Section 114 of the Evidence Act, it has to be presumed that since the wife has received the registered notice it has definitely been brought to the notice of the respondent No.1, unless, of course, the respondent No.1 has rebutted such presumption by adducing evidence. It is apparent from the records that the respondent did not adduce or advance any evidence for rebutting the presumption. Thus, it has to be presumed on the fact as established that the registered letter received by the wife of the respondent No.1 has

been delivered or brought to the notice of the respondent No.1 on the day when the said notice was served on his residential address. Thus, the finding of the trial court that "Since the accused himself did not receive the notice and the same was received by his wife it cannot be held that the notice has been properly served cannot stand scrutiny of law and accordingly is interfered with."

26. Reverting back to this case, it is thereby held that the argument of the learned counsel for respondent No. 2 that the decision of Hon'ble the Supreme Court in *K. Bhaskaran's case (supra)* that the decision referred to by the learned senior counsel for the appellant is relating to an unclaimed notice holds no water. The evidence of PW-5 proves that the notice was accepted by the appellant's brother. PW-5 was an official witness and an independent witness. In the light of the decision of Hon'ble the Supreme Court in *K. Bhaskaran's case (supra)*, it is held that notice was duly served on the respondent No. 2, as the notice was delivered to the addressee and this was proved by the official witness PW-5.

27. It was erroneously held by the learned trial Court that the evidence given by PW-5 was unreliable as during cross-examination he admitted that he could not identify the elder brother of the respondent No. 2. It was also erroneously held that as Ext.-9 was partly denied by the respondent No. 2 and as Ext.-1 was exhibited by the complaint-appellant herein without any legal entity, the appellant failed to prove his case. It was erroneously held that the appellant had no license of money laundering to the respondent No. 2 as Ext.-1 was against Section 6 of Money Laundering Act. In this case the Ext.-9 series are documents consisting of bank statements. Ext.-1 is the agreement between the appellant and the respondent No. 2. The findings of the learned trial Court that PW-1 could not identify the elder brother of the respondent No. 2, could not stand the scrutiny of law. PW-1 specifically mentioned the name of the brother of respondent No. 2, in his cross-examination.

28. The learned counsel for respondent No. 2 laid stress in his argument that the decision of Hon'ble Supreme Court in *K. Bhaskaran's case* was overruled by a larger Bench in *Dashrath Rupsingh Rathod v. State of Maharashtra and Another*, reported in *(2014) 9 SCC 129*.

29. The learned counsel for the appellant has disagreed with the submission of the learned counsel

for the respondent stating that it was held in *Dashrath Rupsingh Rathod's case (supra)* that the view taken in *K. Bhaskaran's case (supra)* needs to be revisited on the judicial approach on jurisdiction of a Court, and not on services of notice. It was submitted that a larger Bench has upheld the decision of Hon'ble the Supreme Court in *K. Bhaskaran's case (supra)* relating to service of notice on the accused. In the present case the notice was served to the brother of the accused-respondent No. 2 herein. I find force in the argument of the learned counsel for the appellant and I would like to reiterate that the notice was served upon the respondent No. 2. The respondent No. 2 failed to rebut the presumption that the notice was not served to his brother, by adducing adequate evidence.

30. Further the learned Senior Counsel for the appellant has also relied on the decision of Hon'ble the Supreme Court in *Dashrath Rupsingh Rathod's case (supra)* and has submitted that the moment the cheque was dishonoured, the accused cannot be absolved solely because he had not received the notice. It has been held by Hon'ble the Supreme Court in *Dashrath Rupsingh Rathod's case (supra)* that:-

“38. A proper understanding of the scheme underlying the provision would thus make it abundantly clear that while the offence is complete upon dishonour, prosecution for such offence is deferred till the time the cause of action for such prosecution accrues to the complainant. The proviso in that sense, simply postpones the actual prosecution of the offender till such time he fails to pay the amount within the statutory period prescribed for such payment. There is, in our opinion, a plausible reason why this was done. The Parliament in its wisdom considered it just and proper to give to the drawer of a dishonoured cheque an opportunity to pay up the amount, before permitting his prosecution no matter the offence is complete, the moment the cheque was dishonoured. The law has to that extent granted a concession and prescribed a scheme under which dishonour need not necessarily lead to penal consequence if the drawer makes amends by making payment within the time

stipulated once the dishonour is notified to him. Payment of the cheque amount within the stipulated period will in such cases diffuse the element of criminality that **Section 138** attributes to dishonour by way of a legal fiction implicit in the use of the words “shall be deemed to have committed an offence”. The drawer would by such payment stand absolved by the penal consequences of dishonour. This scheme may be unique to **Section 138** NI Act, but there is hardly any doubt that the Parliament is competent to legislate so to provide for situations where a cheque is dishonoured even without any criminal intention on the part of the drawer.”

31. The learned counsel for the appellant has also relied on the decision of Hon’ble the Supreme Court in *Mohd. Firoz v. State of Madhya Pradesh*, reported in (2022) 7 SCC 443 wherein it has been held that:-

“37. This Court while dealing with the issue of inculpatory and exculpatory statements of the accused made under Section 313 Cr.P.C. has made very apt observations in case of *Mohan Singh vs. Prem Singh & Anr*; (2002) 10 SCC 236-

“27. The statement made in defence by the accused under Section 313 CrPC can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 of the Code of Criminal Procedure cannot be made the sole basis of his conviction. The law on the subject is almost settled that statement under Section 313 CrPC of the accused can either be relied in whole or in part. It may also be possible to rely on the inculpatory part of his statement if the exculpatory part is found to be false on the basis of the evidence led by the prosecution. See *Nishi Kant Jha v. State of Bihar* [(1969) 1 SCC 347 : AIR 1969 SC 422] : (SCC pp. 357-58, para 23)

“23. In this case the exculpatory part of the statement in Exhibit 6 is not only inherently improbable but is contradicted by the other evidence. According to this statement, the injury which the appellant received was caused by the appellant's attempt to catch hold of the hand of Lal Mohan Sharma to prevent the attack on the victim. This was contradicted by the statement of the accused himself under Section 342 CrPC to the effect that he had received the injury in a scuffle with a herdsman. The injury found on his body when he was examined by the doctor on 13-10-1961 negatives both these versions. Neither of these versions accounts for the profuse bleeding which led to his washing his clothes and having a bath in River Patro, the amount of bleeding and the washing of the bloodstains being so considerable as to attract the attention of Ram Kishore Pandey, PW 17 and asking him about the cause thereof. The bleeding was not a simple one as his clothes all got stained with blood as also his books, his exercise book and his belt and shoes. More than that the knife which was discovered on his person was found to have

been stained with blood according to the report of the Chemical Examiner. According to the post-mortem report this knife could have been the cause of the injuries on the victim. In circumstances like these there being enough evidence to reject the exculpatory part of the statement of the appellant in Exhibit 6 the High Court had acted rightly in accepting the inculpatory part and piercing the same with the other evidence to come to the conclusion that the appellant was the person responsible for the crime."

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"30. The statement of the accused under Section 313 CrPC is not a substantive piece of evidence. It can be used for appreciating evidence led by the prosecution to accept or reject it. It is, however, not a substitute for the evidence of the prosecution. As held in the case of Nishi Kant [(1969) 1 SCC 347 : AIR 1969 SC 422] by this Court, if the exculpatory part of his statement is found to be false and the evidence led by the prosecution is reliable, the inculpatory part of his statement can be taken aid of to lend assurance to the evidence of the prosecution. If the prosecution evidence does not inspire confidence to sustain the conviction of the accused, the inculpatory part of his statement under Section 313 Cr.PC cannot be made the sole basis of his conviction."

In the instant case also, though the conviction of the appellant-accused could not be made merely on his admission of the circumstance of his visit to the house of the informant on the previous day evening of the fateful day, such admission could certainly be taken aid of to lend assurance to the evidence of the prosecution."

32. Relying on this decision the learned senior counsel has drawn the attention of this Court towards the statement of the accused-respondent No. 2 u/s 313 Cr.PC. The question No. 1 u/s 313 Cr.PC is:-

"Q. P.W. 1 has deposed that he had cordial relation with you since he worked as a contractor with you at BRPL; that when required, both of you exchanged money with each other; that you borrowed an amount of Rs. 2,50,000/ from him; that as you could not repay the money within the specified timeframe, you shied away from your responsibly by giving him two bank cheques; that this case has been filed when the informant deposited the bank cheques in the SBI branch at Dhaligaon but did not get the money. Is it true that you did not return the amount of money?"

33. It was admitted by the respondent No. 2 that he had issued the cheques which were dishonoured.

In view of the decision of Hon'ble the Supreme Court in *Mohd. Firoz's case (supra)*, it can be safely held that the inculpatory part of the statement of the respondent No. 2 implicates that he had issued the cheques which were later dishonoured.

34. PW-1 is the complainant and through his affidavit in evidence he has reiterated his complainant

petition. Through his complaint petition and affidavit in evidence he stated that the respondent No. 2 had borrowed an amount of Rs. 2,50,000/- by executing an undertaking dated 10.06.2013 in presence of witnesses, namely, Shahalom Ali and Sirajul Hoque of village Palangasugori. As the respondent No. 2 did not repay the debt within the stipulated period of time, the appellant approached the respondent No. 2. After several requests the respondent No. 2 issued two cheques vide No. 034986 for Rs. 2 lacs from his account of SBI BRPL Complex Branch, Dhaligaon and cheque No. 841618 of Rs. 50,000/- from his account of PNB, Bongaigaon Branch to discharge his debt. These cheques were deposited but the same were returned on 04.02.2015 and 07.02.2015 due to insufficiency of funds. An Advocate's notice was sent on 04.03.2015 by Advocate Mr. Sanowar Alam through registered post with A/D. It was also further stated that there was a typographical error and the year 2013 was erroneously typed as 2014.

35. The complainant, PW-1, further stated that the A/D was not returned to his Advocate and on 25.03.2015, the Advocate made a representation and sought information from the postmaster of Bongaigaon about the status report of the demand notice sent through registered post. The postmaster on 29.05.2015 had furnished an information that the demand letter was delivered on 05.03.2015 to the addressee. As the respondent No. 2 had ignored to repay the debt, the appellant, PW-1 was impelled to move the Court. In his cross-examination, the appellant, PW-1, deposed that he solicited his brother's help to arrange funds to provide a loan of Rs. 2,50,000/- to the respondent No. 2. He also admitted that there was no time limit for repaying the debt by the respondent No. 2. He also admitted that he did not serve any previous notice for repayment of debt by the respondent No. 2. He did not serve any previous notice upon the respondent No. 2 before issuance of cheque. He admitted in his cross-examination that he did not know what was written on the cheque (Ext.-2) but he identified the signature of the respondent No. 2. He admitted that the A/D of the demand notice was not received from the concerned postal department. Vide Ext.-6 he also affirmed the delivery of the notice to the addressee. He admitted

that the delivery marked as Ext.-6(3) reveals that the notice was received by the respondent No. 2's elder brother. He acknowledged that the letters on Ext.-2 (cheque) were written and composed using various ink colours. He, however, denied that he had interpolated the letters on Ext.-2 and deposited the Ext.-2 for encashment on 04.02.2013. He also admitted that on the same date two blank cheques were handed over to him by the respondent No. 2. He admitted that the pleader's notice was prepared by the engaged lawyer on 02.03.2015. Ext.-5 (postal slip) was prepared on 04.03.2015 for delivery.

36. The complainant-appellant herein PW-1 through his affidavit in evidence has reiterated his complaint petition. PW-1 reiterated in his evidence-in-chief, that the respondent No. 2 issued two cheques vide No. 034986 for Rs. 2 lacs from his account of SBI BRPL Complex Branch, Dhaligaon and cheque No. 841618 of Rs. 50,000/- from his account of PNB, Bongaigaon Branch to discharge his debt. These cheques were deposited but the same were returned on 04.02.2015 and 07.02.2015 due to insufficiency of funds.

37. The learned counsel for the respondent No. 2 by highlighting the cross-examination and the evidence-in-affidavit of PW-1 emphasized in his argument that the date on the demand notice was wrongly mentioned. Instead of 2013 the year was mentioned as 2014. It is argued that there was no demand from the appellant to the respondent before cheque was issued. The appellant-complainant stated in his evidence-in-affidavit that the money which the respondent No. 2 had borrowed was to be repaid within 2 months whereas in his cross-examination the appellant, PW-1 admitted that there was no limitation of time period within which the borrowed money was to be repaid.

38. The debt is not a legally enforceable debt. It was a simple transaction between two individuals and it is not a case u/s 138 of the N.I. Act.

39. In reply the learned counsel for the appellant laid stress in his argument that the issue relating to the debt was not disputed by the defence earlier and at this appellate stage it cannot be disputed. The

minor contradictions projected by the defence i.e. projected on behalf of respondent No. 2 cannot absolve the respondent No. 2 of the offence u/s 138 of the N.I. Act. It is argued that the learned trial Court let off the appellant on flimsy grounds.

40. I have scrutinized the evidence both documentary as well as oral evidence. It is true that the Ext.-2 had the signature of the respondent No. 2 and Rs. 2 lacs was inserted with a different colour ink which is not similar to the ink used to affix the signature and write the name of the drawee, but Ext.-2(iii), the return memo clearly depicts insufficiency of funds and the issuance of cheque of Rs. 2 lacs by the Respondent No. 2 [Ext.-2(i)] was proved beyond reasonable doubt. It was not denied by the respondent No. 2 that the cheques were not issued because it is an admitted fact the two blank cheques were handed over to the appellant to repay the debt of Rs. 2,50,000/-. The cheque of Rs. 50,000/- [Ext.3(i)] has no such dispute relating to different ink. Ext-3(iv) is the return memo which also reveals insufficiency of funds of Rs. 50,000/-. The typographical error of inserting the date is a minor discrepancy which can be ignored. The denial of the period of limitation of 2 months by PW-1, in his cross-examination, is also a minor contradiction which can be ignored. The complaint petition and the evidence of PW-1, clearly depicts that the money borrowed was to be repaid within a stipulated time. During cross-examination by an astute lawyer, the PW-1 admitted that there was no condition relating to any period of limitation within which the money borrowed was to be repaid. It is true that the agreement does not mention of any stipulated time period within which the money was to be repaid, but the agreement/undertaking marked as Exhibit-1, clearly reflects that the respondent No. 2 had borrowed an amount of Rs. 2,50,000/-, in presence of witnesses. This agreement cannot be considered to be a normal transaction as argued by the learned counsel for the respondent No. 2. The learned trial Court had erroneously held that the agreement has no value as it was not a registered document. The signature of the accused-respondent No. 2 in the agreement has not been disputed. The respondent No. 2 did not deny his signature on Exhibit-1, meaning thereby, that the accused-respondent No. 2 did not deny borrowing Rs. 2,50,000/- from the appellant. Procedural law has to be construed liberally. Indeed, it must be borne in mind that a Court should not adopt an interpretation,

which helps a dishonest evader and clips an honest payee, as that would defeat the very legislative measure.

41. Apart from the minor contradictions, no major contradictions corroding the evidence could be elicited through the cross-examination of the witnesses. Apart from projecting such minor contradictions, the respondent No. 2 failed to discharge his burden to refute the presumption as per Section 118 and Section 139 of the N.I. Act.

42. The evidence of the other witnesses are not discussed in detail as the evidence of the other witnesses PWs-2, 3 and 4 corroborate the evidence of PW-1-appellant herein.

43. PW-2 Shahalom Ali stated that on 10.01.2013, the accused took an amount of Rs. 2,50,000/- from the informant at Dolaigaon, Bongaigaon in his presence. He proved his signature on the agreement as Ext.1(1).

44. Sirajul Hoque deposed as PW-3 that the accused-respondent No. 2 borrowed an amount of Rs. 2,50,000/- from the informant-appellant in the informant's house at Dolaigaon in his presence.

45. Shahidul Rahman was the Assistant Manager of SBI, Dhaligaon, BRPL Complex and he deposed as PW-4 that he was authorized to depose by the Chief Manager vide Ext.-7. Shahidul Islam (Respondent No. 2) is the account holder of AC No. 32444819290 of the SBI, Dhaligaon, BRPL Complex. He identified the Cheque No. 034986 as Ext.-2 and stated that the cheque was lying in the Bank and it was issued in the name of Bahej Uddin by respondent No. 2 on 04.02.2015 for an amount of Rs. 2 lacs. Bahej Uddin (appellant) deposited the cheque on the same date for encashment from his account No. 30392518737 but the cheque was dishonoured and returned due to insufficiency of funds. This witness identified the signature of the Deputy Manager, Ramesh Basumatary on the return memo as Ext.-2(3) and Ext.-2(4). PW-4 also proved the cheque deposit register and return register as Ext.-8 and Ext.-8(1) as page 20 of the register, Ext.-8(2) as a relevant entry of the deposit and return of Cheque No. 034986 dated 04.02.2015 and Ext.-8(3) as the dishonoured cheque. He proved the certified copy of the cheque as Ext.-9(1). He also deposed that Ext.-3

Cheque No. 841618 dated 04.02.2015 was issued by the respondent No. 2 in favour of the appellant. It was deposited by the appellant but was dishonoured due to insufficiency of funds. He proved the return memo as Ext.-3(3) and Ext.-3(4) as the return memo to the complainant. He proved the cheque No. 84618 dated 07.02.2015 as Ext.-3(5). He proved Ext.-8(4) as a relevant entry of Cheque No. 841618 in Ext.-8 i.e. the cheque deposit and return register.

46. Another Bank official Sri Hemanta Kumar Boro deposed as PW-6 that he was authorized to depose vide Ext.-10. He further deposed that the PNB Bank of Bongaigaon Branch had received Cheque No. 841618 dated 04.02.2015 for encashment but the same was dishonoured due to insufficiency of funds and the cheque in the account of respondent No. 2 was lying in their Bank. He deposed that the cheques are received in their Bank and recorded in the Bank's system. He also produced the system generated return instrument advise from the system of the Bank dated 05.02.2015 vide Ext.-11. The Branch Head had issued the Ext.-11 and he identified the signature of the Branch Head as Ext.-11(1). This witness also identified Ext.-3(iv) as the return memo dated 05.02.2015 issued from their Bank.

47. Scrutinizing the entire evidence it is thereby held that the appellant could prove beyond reasonable doubt that the cheques issued by the respondent No. 2 were dishonoured. Cheque No. 034986 marked as Ext.-2 was dishonoured after it was deposited in the SBI, Dhaligaon, BRPL Complex Branch and Cheque No. 841618 dated 04.02.2015 marked as Ext.-3 was dishonoured after it was deposited in the PNB of Bongaigaon Branch. PWs-1, 4 and 6 have proved beyond reasonable doubt that the cheques were issued by none other than respondent No.2 and these cheques were dishonoured. The notices were duly served on the respondent No. 2 as his elder brother had received the notices issued by the complainant when the cheques were dishonoured. The learned trial Court fell into error by acquitting the respondent No. 2. It is held that the order of acquittal is not sustainable. I would like to reiterate that when the cheques were issued by the respondent No. 2 in discharge of a debt it was his duty to rebut the presumption against him u/s 118 and 139 of the N.I. Act.

48. The order of acquittal dated 03.11.2016 in connection with Case No. NICR 4 of 2015 is hereby set

aside. The appellant is held guilty of offence u/s 138 of the N.I. Act. He is convicted u/s 138 of the N.I. Act and he is sentenced to a fine of Rs. 3,00,000/-. He is directed to pay the fine of Rs. 3,00,000/-, within 3 months from the date of this order and in default of payment of fine, the appellant is directed to undergo Simple Imprisonment for 3 months. The appellant is directed to appear before the learned trial Court immediately and pay the fine.

49. Send back the LCR.

JUDGE

Comparing Assistant

I.A.(Crl.)157/2024

In Crl.A. 365/2018

**B E F O R E
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND**

13.03.2024

- 1.** Heard learned counsel Ms. S. Roy on behalf of learned counsel Ms. R. Choudhury for the applicant Bahej Uddin Ahmed. The learned Addl. PP Mr. K. Baishya is present on behalf of respondent No. 1 and learned counsel Mr. M.H. Ahmed for the respondent No. 2.
- 2.** This is an application for rectification of typographical error in the judgment and order dated 24.01.2024 in connection with Criminal Appeal No. 365/2018.
- 3.** I have considered the submissions at the Bar with circumspection.
- 4.** There was indeed an inadvertent mistake and the typographical error has to be corrected. A rectification of the typographical error will not change the nature of the judgment. It has already been held that the judgment and order of the learned trial Court does not stand the scrutiny of law and the judgment and order of the learned trial Court dated 03.01.2016 in connection with NICR 4 of 2015 was already set aside. Section 362 of

the Cr.PC expounds when Court can correct a clerical or arithmetical error after the Court has signed the judgment or final order of disposing a case.

5. I have also relied on the decision of the Hon'ble Supreme Court in ***Ganesh Patel V. Umakant Rajoria***, reported in ***(2022) 0 Supreme(SC) 1372***, wherein it has been observed that:-

“The respondent thereupon preferred an application for recall of the order dated 13.10.2017. The aforesaid order, it was stated, was passed in the absence of the respondent, and based on false information. The High Court recalled the order dated 13.10.2017 vide the impugned order dated 23.10.2021.

This application for recall of the order was maintainable as it was an application seeking a procedural review, and not a substantive review to which Section 362 of the Code of Criminal Procedure, 1973, would be attracted. [*Grindlays Bank Ltd. v. Central Government Industrial Tribunal & Ors. 1980 (supp) SCC 420*]. On the aspect of the difference between recall and review and when an order of recall can be passed reference can be made to *Budhia Swain and Others v. Gopinath Deb and Others, (1999) 4 SCC 396.*”

6. In the instant case, it is submitted that this case was decided in favour of the appellant but due to a typographical error in para 48 of the judgment and order dated 24.01.2024 in connection with Criminal Appeal No. 365/2018, the word 'appellant' was typed instead of 'accused' or 'respondent No. 2'.

7. I have scrutinised the judgment and order. There is indeed a typographical error in para 48. The word 'appellant' has been wrongly typed. Instead of 'appellant' the 'respondent No. 2' has to be typed and the prayer for correction of the typographical error is allowed.

8. It is thereby held that the paragraph No. 48 has to be typed as:-

“48. The order of acquittal dated 03.01.2016 in connection with Case No. NICR 4 of 2015 is hereby set aside. The respondent No. 2 (Sahidul Islam) is held guilty of offence u/s 138 of the N.I. Act. He is convicted u/s 138 of the N.I. Act and he is sentenced to a fine of Rs. 3,00,000/-. He is directed to pay the fine of Rs. 3,00,000/-, within 3 months from the date of this order and in default of payment of fine, the respondent No. 2 (Sahidul Islam) is directed to undergo Simple Imprisonment for 3 months. The respondent No. 2 is directed to

appear before the learned trial Court immediately and pay the fine.”

9. The afore-mentioned rectified and corrected paragraph No. 48 captioned above will form a part of the judgment and order dated 24.01.2024 in connection with Criminal Appeal No. 365 of 2018.

10. Send a copy of this order to the learned trial Court.

I.A. is disposed of.

JUDGE

Comparing Assistant