

GAHC010128852013



2024:GAU-AS:9188

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

PRINCIPAL SEAT AT GUWAHATI

CRIMINAL APPEAL NO. 49 OF 2013

Sri Manab Lahkar,
Marketing Manager,
M/s Gupta Hardware Private Limited
(Representing the Company through a registered Power
Of Attorney Deed) situated at-
Dr. R P Road, Ganeshguri Chariali,
Dispur, Guwahati-6,
P.O. and P.S.- Dispur,
District:- Kamrup (Metro), Assam.

.....Appellant.

-Versus-

1. Sri Mukunda Ram Das,
S/o Sri Dharanidhar Das,
C/o Milijuli Enterprise,
P.O.-Panjabari, Bagharbari,
Satgaon Path, P.S.-Dispur,
Guwahati-37,
District: Kamrup, Assam.

2. The State of Assam.

.....Respondents/Opposite parties.

Advocates for the appellant: Ms P Gupta
Mr D Kakoti,

Advocate for the respondent: Mr M J Quadir,
Mr B B Gogoi.

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of hearing : 30.05.2024
Date of judgment : 16.09.2024

JUDGEMENT AND ORDER(CAV)

This appeal has been filed by the appellant, Sri Manab Lahkar, challenging the Judgment and Order dated 06.12.2012, passed by the learned SDJM(S)-II, Kamrup, in connection with C R Case No. 7319C/2005, acquitting Sri Mukunda Ram Das (referred to as respondent No. 1) of offence under Section 138 of the Negotiable Instruments Act, 1881 (the NI Act, for short). The State of Assam is arrayed as respondent No. 2. The appellant was the Marketing Manager of the Company, Gupta Hardware Private Limited (also referred to as "Gupta Hardware"). The appellant was authorized by Sri Rajendra Kashyap Gupta, the

Director of Gupta Hardware, to institute this case on his behalf. The respondent No. 1 had purchased 260 bags of cement @ Rs. 188/- per bag, amounting to Rs. 48,880/- and transportation charge @ Rs. 1120/-

2. It is contended that the respondent No. 1 (also referred to as the accused) handed over a cheque bearing No. 383327, dated 14.10.2005 for Rs. 50,000/- drawn on the State Bank of India in favour of Gupta Hardware, but when the cheque was deposited on 14.10.2005, the same was returned with remark as-“funds insufficient”.

3. It is further submitted that a legal notice was issued by 'Gupta Hardware' on 07.11.2005, demanding the payment of the cheque amount, but the respondent No. 1 neglected to pay the cheque amount and thus, this complaint was initiated against the respondent No. 1.

4. To substantiate its stance, the appellant presented the evidence of three witnesses, including himself and two bank officials. The respondent No. 1 contested the proceedings and examined himself as a witness and his friend Sri Paban Medhi as DW-2. The plea of the respondent No. 1 was that the cheque was issued as security, because he used to purchase goods on credit from Gupta Hardware.

5. The respondent No. 1 has prayed to dismiss the appeal as the cheque was not issued for discharge of any debt or other liability. The learned trial Court has delineated the following points to decide this case:-

“1) Whether the complaint is maintainable in view of the fact that it is lodged by Shri Manab Lahkar?”

- 2) *Whether the accused issued the cheque for the discharge of any legally enforceable debt or liability?*
- 3) *Whether the cheque was dishonoured for insufficient funds in the account of the accused?*
- 4) *Whether the accused received the demand notice issued by the complainant regarding the dishonor of the cheque?*
- 5) *Whether the accused has committed the offence under Section 138 of the Negotiable Instruments Act, 1881?"*

6. It is contended by the appellant that the learned trial Court has dismissed the complaint on frivolous grounds as lack of authorization cannot be a good ground for dismissing. Power of Attorney in favour of the appellant was annexed in the complaint petition. The company's seal was also affixed on the Power of Attorney (POA, for short).

7. It is not disputed by the respondent No. 1 that the complainant was not authorized.

8. The learned counsel for the petitioner has relied on the decision of Hon'ble the Supreme Court in ***Bhupesh Rathod –Vs- Dayashankar Prasad Chaurasia***; reported in **(2022) 2 SCC 355**, wherein it has been observed that-

“19. In the conspectus of the aforesaid principles we have to deal with the plea of the respondent that the complaint was not filed by the competent complainant as it is the case that the loan was advanced by the Company. As to what would be the governing principles in respect of a corporate entity which seeks to file the complaint, an elucidation can be found in the judgment of this Court in Associated Cement Co. Ltd. v. Keshavanand. If a complaint was made in the name of the Company, it is necessary that a natural person represents such juristic person in the court and the court looks upon the natural person for all practical purposes. It is in this context that observations were made that the body corporate is a de jure complainant while the human being is a de facto complainant to represent the former in the

court proceedings. Thus, no Magistrate could insist that the particular person whose statement was taken on oath alone can continue to represent the Company till the end of the proceedings. Not only that, even if there was initially no authority the Company can at any stage rectify that defect by sending a competent person.

20. We find that the judicial precedents cited aforesaid have been breached by the Courts below. The High Court also embarked on a discussion as to the vagueness of the identity of the complainant and its relation with the legality of a loan which may be granted by the Company, something which was not required to be gone into.

25. The description of the complainant with its full registered office address is given at the inception itself except that the Managing Director's name appears first as acting on behalf of the Company. The affidavit and the cross-examination in respect of the same during trial supports the finding that the complaint had been filed by the Managing Director on behalf of the Company. Thus, the format itself cannot be said to be defective though it may not be perfect. The body of the complaint need not be required to contain anything more in view of what has been set out at the inception coupled with the copy of the Board Resolution. There is no reason to otherwise annex a copy of the Board Resolution if the complaint was not being filed by the appellant on behalf of the Company."

9. The learned counsel for the appellant laid stress in his argument that the second ground for dismissing the petition was that the cheque was not issued in discharge of a debt or liability. The cheque was issued as a security, because the respondent No. 1 used to purchase goods on credit from Gupta Hardware.

10. The learned counsel for the appellant has also relied on the decision of the Hon'ble Supreme Court in ***Kalamani Tex & Another –Vs- P Balasubramanian;*** reported in **(2021) 5 SCC 283**, wherein it has been observed that-

“14. Once the 2nd Appellant had admitted his signatures on the cheque and the Deed, the trial Court ought to have presumed that the cheque was issued as consideration for a legally enforceable debt. The trial Court fell in error when it called upon the Complainant–Respondent to explain the circumstances under which the appellants were liable to pay. Such approach of the trial Court was directly in the teeth of the established legal position as discussed above, and amounts to a patent error of law.

15. No doubt, and as correctly argued by senior counsel for the appellants, the presumptions raised under Section 118 and Section 139 are rebuttable in nature. As held in MS Narayana Menon v. State of Kerela, which was relied upon in Basalingappa (supra), a probable defence needs to be raised, which must meet the standard of “preponderance of probability”, and not mere possibility. These principles were also affirmed in the case of Kumar Exports (supra), wherein it was further held that a bare denial of passing of consideration would not aid the case of accused.

17. Even if we take the arguments raised by the appellants at face value that only a blank cheque and signed blank stamp papers were given to the respondent, yet the statutory presumption cannot be obliterated. It is useful to cite Bir Singh v. Mukesh Kumar, where this court held that:

“Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.”

18. Considering the fact that there has been an admitted business relationship between the parties, we are of the opinion that the defence raised by the appellants does not inspire confidence or meet the standard of ‘preponderance of probability’. In the absence of any other relevant material, it appears to us that the High Court did not err in discarding the appellants’ defence and upholding the onus imposed upon them in terms of Section 118 and Section 139 of the NIA.”

11. It is further contended that in this instant case too, it has been admitted by the appellant that he had issued the cheque and his signature has not been denied.

12. It is contended that the learned trial Court has erroneously held that the appellant had no locus standi to file complaint on behalf of the company, which is a wrong notion as held by the Hon'ble Supreme Court in ***National Small Industries Corporation Limited –Vs- State (NCT of Delhi) & Others;*** reported in **(2009) 1 SCC 407**, wherein it has been observed that a company can be represented by an employee or even by a non-employee, who is authorized/empowered to represent the company, either by a resolution or by a power of attorney. As such, the impugned order dated 06.12.2012, is liable to be set aside and quashed.

13. When the respondent No. 1 admitted his signature on the cheque, but denied the writings on the cheque, the cheque was sent for forensic examination, on the prayer by the respondent No. 1, but there was no conclusive report from the Forensic Science Laboratory ('FSL' or 'DFS' for short), relating to the writings on the cheque. Thus, the respondent No. 1 failed to rebut the appellant's stance.

14. On the contrary, the learned counsel for the respondent No. 1 laid stress in his argument that the appellant was not authorized to represent the company Gupta Hardware. The cheque was not issued against a legally enforceable debt as the respondent No. 1 had already cleared his outstanding balance, which was due to the appellant. It is alleged that equity will not prevail if the appeal is allowed, because it is apparent that there was no breakup bill including the truck expenses, loading and unloading of cement etc. It is submitted that the learned trial Court proceeded in its correct perspective and has arrived at a just conclusion, which does not call for interference.

15. The learned counsel for the respondent No. 1 has relied on the decision of this Court in ***Sayed Ahmed Laskar –Vs- State of Assam;*** reported in **2010 (3) GLT 182**, wherein it has been observed that-

“(8.) The Apex Court in a Catena of cases including the aforesaid ones, has already settled the law and the principle on which the revisional Court can set aside a Judgment and Order of acquittal passed in favour of the accused. At the same time the Apex Court has also laid certain limitation on the High Court for exercising the jurisdiction and setting aside the finding of acquittal in revision. It is held that the High Court should exercise this power only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest defect in the procedure on a point of law resulting in flagrant miscarriage of justice.

(9.) The Hon'ble Supreme Court in the case of Chinnaswamy Vs. State of Andhra Pradesh, reported in AIR 1962 SC 1788 observed that it is not possible to lay down the criteria for determining the exceptional case which would cover all contingencies. However, in the said case some illustration of exceptional cases were given in which the High Court can interfere with the findings of acquittal in revision. Extracted from relevant portion of para 7 of the said case, it would stand as follows:

(i) Where the trial Court has no jurisdiction to try the case, but has still acquitted the accused;

(ii) Where the trial Court has wrongly shut out evidences which the prosecution wished to produce;

(iii) Where the Appellate Court has wrongly held the evidence which was admitted by the trial Court to be in admissible;

(iv) Where the material evidence has been overlooked by the trial Court and

(v) Where the acquittal is passed on compounding of the offences which is invalid under the law.

(10.) Going through the present revision petition, it is not found that the petitioner

ever questioned the jurisdiction of the trial Court to try the cases or alleged that the trial Court has wrongly shut out the evidence which the prosecution wished to produce during the trial or the trial Court wrongly held the evidence which the petitioner wished to adduce as inadmissible or the trial Court overlooked the material evidence on record in passing the impugned Judgment and Order acquitting the accused/opposite parties. Nor has it been alleged at any point of time that the acquittal order of the trial Court is passed on compounding of offence not permitted by law.

*(11.) Yet another aspect that is required to be borne in mind is that the Apex Court in a number of cases held that the revisional jurisdiction when it is invoked against the order of acquittal by a private complainant, is not to be lightly exercised and it could be exercised only in exceptional cases as to correct a manifest illegality or to prevent gross miscarriage of justice and not to be ordinarily used merely for the reason that the trial Court has appreciated the evidence on record. This was held originally in a classic Judgment and Order passed by a three Judge Bench of the Hon'ble Supreme Court as far back as in 1951 in the case of *D. Stephens Vs. Nosibolla*, reported in AIR 1951 SC 196 which is being followed as a golden rule in subsequent cases.*

16. In reply to the submissions of the learned counsel for the respondent No. 1, it is submitted by the learned counsel for the appellant that the Director has authorized Manab Lahkar to represent the firm and not to represent him as a person as has erroneously been held by the learned trial Court. In case, the company is a *de jure* complainant and if one Director attorns a Power of Attorney (POA, for short), the same can be rectified.

17. The appellant has also relied on the decision of Hon'ble the Supreme Court in ***TRL Krosaki Refractories Limited –Vs- SMS Asia Private Limited and Another;*** reported in **(2022) 7 SCC 612**, while relating to doctrine of indoor management to correct defect.

18. Heard learned counsel, Ms P Gupta, and learned counsel Mr D Kakoti, for the appellant, learned counsel Mr M J

Quadir, for the respondent No. 1 and Mr B B Gogoi, learned Additional Public Prosecutor for the State/respondent No. 2.

19. I have considered the submissions at the Bar with circumspection.

20. To decide this case in its proper perspective, it is necessary to re-appreciate the evidence.

21. The appellant, through his complaint and evidence-in-chief has stated that a Power of Attorney (POA, for short) vide Deed No. 1268/2002 was executed by the Director of Gupta Hardware Private Limited, Sri Rajendra Kashyap Gupta, authorizing the complainant to represent the Company for and on behalf of the Director. This POA is marked as Exhibit-1 and Exhibit-1(i) is identified as the signature of the executant of the POA. It is stated through the complaint and the evidence-in-chief that the respondent No. 1 approached the complainant's company to purchase building materials such as cement and a total number of 260 bags of cement priced at Rs. 188/- per bag was purchased, including labour and transportation charges. The total bill was for Rs. 50,000/- (Rs. 48,880 + 1120). PW-1 has identified the bill/written invoice No. A-1306 dated 14.10.2005 as Exhibit-2. In discharge of the said liability, the respondent No. 1/accused issued an account payee cheque vide No. 383327 for Rs. 50,000/-, dated 14.10.2005, drawn at the State Bank of India, Dispur Branch. The cheque was identified as Exhibit-3. The complainant Company then, presented the cheque to their banker, i.e., Bank of Baroda, Dispur Branch, on 14.10.2005 in Account No. CA.OD-111, but the cheque was returned on 15.10.2005 from the drawee bank with remarks as- "insufficient fund" in the drawer's account.

Exhibit-4 is the cheque deposit slip and Exhibit-5 is the return memo.

22. It is further submitted that the appellant/complainant immediately contacted the respondent No. 1 over phone and through messenger, but the respondent No. 1 ignored the calls. Later on, the appellant received a phone call from the respondent No. 1, who requested the appellant to allow him some time to pay the cheque amount. After a few days, when there was no positive response, the appellant's company was impelled to send one legal notice with acknowledgment due dated 07.11.2005, which has been identified as Exhibit-6 and the postal slip has been identified as Exhibit-6 (i). The legal notice was received by the respondent No. 1 and Exhibit-7 is the acknowledgment card and Exhibit-7 (i) is the signature of the addressee. The appellant learnt that the respondent No. 1 received the legal notice dated 07.11.2005 on 08.11.2005.

23. At this juncture, it is pertinent to mention that the General Power of Attorney marked as Exhibit-1, clearly reveals that the appellant was appointed as the POA, to represent the Director of M/s Gupta Hardware Private Limited, on 15.03.2002. The complaint was filed on 06.12.2005 and the cause of action arose on 08.11.2005.

24. In the light of decision of Hon'ble the Supreme Court in ***Bhupesh Rathod's case (supra)***, it is hereby held that the complaint filed by the appellant is maintainable. The

complaint clearly reflects the name of the Appellant (de facto complainant) with the authorization of the director by a POA executed by the Director to represent Gupta Hardware.

25. Now relating to the decision of the learned trial Court that the cheque was issued as a security, it is necessary to revert to the evidence.

26. Through his evidence, the respondent No. 1 has stated that in the year 2003, Gupta Hardwares asked for blank cheques as security for the business dealings between him and Gupta Hardware. He then issued a blank cheque as security and on the back of the cheque, Milijuli Enterprise was written. This cheque has been identified by the complainant/appellant as Exhibit-3.

27. In his cross-examination, the complainant, PW-1 has testified that no signature has been affixed on Exhibit-2, but he has denied that the Exhibit-2, i.e., the bill is a fabricated document. He has admitted that the price break-up has not been reflected properly on Exhibit-2. He has also denied the suggestion of the defence that the respondent No. 1 has carried the articles by bearing his expenses for carrying the articles. The articles were loaded by labourers from their godown. He has denied the suggestion that the cheque was paid prior to the delivery of the articles. He has denied the suggestion that the cheque was deposited as a security. The bill has been issued in the name of Milijuli Enterprise. He has denied the suggestion that the respondent No. 1 was not their retail customer or general customer. He has denied the suggestion that the respondent No. 1 has paid-

Rs. 9,000/- on 09.12.2004,

Rs. 9,950/- on 22.02.2005,

Rs. 5,000/- on 01.03.2005,

Rs.12,000/- on 01.03.2005,

Rs. 10,000/-on 20.06.2005, and

Rs. 15,000/-on 24.10.2005.

PW-1 has also denied the suggestion that on 31.03.2005, the driver of the Company, Sri R Barman received Rs. 10,600/- and another payment of Rs. 10,600/- on 07.04.2005. He has also denied the suggestion that Sri R Barman had again taken Rs. 10,550/- and Rs. 9,500/- on 07.03.2005, Rs. 10,500/- on 25.03.2005, and Rs. 10,600/-, on 13.04.2005.

28. PW-2, Sri Khagen Chandra Talukdar has deposed that he is an employee of the Bank of Baroda and he has deposed that he has been authorized by the Chief Manager, Sri Subrata Chakraborty, to adduce evidence in connection with this case. The cheque, Exhibit-3 was presented in their bank for clearance by Gupta Hardware Private Limited and was presented in their account being Account No. 27670400000007, on 14.10.2005. On 15.10.2005, the same was sent back. He has identified Exhibit-9 as the account statement and Exhibit-9 (ii) as the relevant entry. He has further deposed that the cheque was returned on 17.10.2005 by the State Bank of India, Dispur Branch. He has identified Exhibit-9(iv) and Exhibit-9(v) as the signatures of the Chief Manager of their bank. His cross-examination is not noteworthy.

29. Exhibit-2 is the bill, which clearly reflects that the bill was not signed either by the appellant or by the respondent. The break-up of the truck fare cannot be ignored. It could be deduced from the evidence of PW-1 and DW-1 that the respondent carried his goods at his own expenses. He bore the expenses for his goods. He has deposed as DW-1 that he

purchased

50 bags of cement on 09.12.2004,

Another 50 bags on 22.12.2004,

100 bags of cement on 22.02.2005 and,

He paid Rs.9000/- (Rupees Nine Thousand) on 09.12.2004,

Rs.9000/- (Rupees Nine Thousand) on 22.12.2004,

Another Rs.15000/- (Rupees Fifteen Thousand),

Rs.12000/-(Rupees Twelve Thousand) and finally, Rs.16000/- (Rupees Sixteen Thousand) on 20.06.2005 to different employees of Gupta Hardware.

30. The respondent No. 1 has produced the receipts marked as Exhibit-A to F and the signatures of the employees of Gupta Hardware acknowledging the receipts of the aforementioned payment marked as Exhibit-A (1) to Exhibit-F(1). The respondent No. 1 has also produced his books of account marked as Exhibit-G, which shows that he made payments to the employees of Gupta Hardware on different dates. Here, a balance has to be struck. The document that could be produced by the appellant is Exhibit-2 and it is apparent that neither the signature of the appellant nor the signature of respondent No. 1 is affixed on Exhibit-2 which is a bill of Rs.50,000/- (Rupees Fifty Thousand).

31. The evidence of DW-1 is substantiated by the evidence of DW-2 Sri Paban Medhi, who has deposed that in the month of June 2003, he accompanied the respondent No. 1 to Gupta Hardware. In his presence, the respondent No. 1 handed over a blank cheque as security to Gupta Hardware. His evidence could not be rebutted through his cross-examination.

32. It is trite law that defence evidence can be established on the basis of preponderance of probability. A defendant does not have to prove his case beyond reasonable doubt. The presumptions as per Section 118 and Section 139 of the NI Act are rebuttable. The issue is that the cheque was handed over by respondent No. 1 to the appellant as security whereas the appellant claims that the cheque was handed over in discharge of a legally enforceable debt i.e. an amount of Rs.50,000/- (Rupees Fifty Thousand). The break-up of Exhibit-2 clearly reveals that the debt was Rs.48,880/- (Rupees Forty Eight Thousand Eight Hundred and Eighty) and Rs.1120 (Rupees One Thousand One Hundred and Twenty) was the breakup of the truck fare.

33. The evidence of DW-2 reveals that he had taken charge of the goods and goods were not transported by the appellant to be receiving the truck fare. The cheque marked as Exhibit-3 reveals that on 14.10.2005 i.e., when the goods were delivered by the appellant to the respondent No. 1, on the same day, the cheque was deposited in the bank i.e. on 14.10.2005. Exhibit-4 is the deposit slip. Exhibit-6 is the legal notice and the relevant part of the notice is reproduced herein below : -

“.....As per record available with my client's, it is found that you have purchased Cement, a total of 260 bags priced at Rs.188/- per bag + truck fare and etc. amounting to a total of Rs.50,000 (Total rupees fifty thousand) only, on dated 14.10.2005, from my client's company.

Accordingly on purchase you have issued an account payee cheque favouring my client's company vide cheque no. 383327, dt. 14.10.05 drawn at State Bank of India, Dispur branch – 6, through your account no. 01190045703, for Rs.50,000/- against the liability for purchase of cement stated above.

Thereafter my client deposited the said account payee cheque for clearing with his banker on 14.10.05 and later on perusal of enquiry my client came to know that the aforementioned cheque was returned by your bank due to reason being “insufficient funds” in your account, the same was returned on 15.10.05....”

34. At this juncture I would like to rely on the decision of the Hon'ble Supreme Court in

Sripati Singh (since deceased) through his son Gaurav Singh vs. The State of Jharkhand & Another reported in (2021) 7 Supreme 508 wherein it has been held and observed that :

“21. In the above circumstance, the cheque though issued as security at the point when the loan was advanced, it was issued as an assurance to repay the amount after the debt becomes due for repayment. The loan was in subsistence when the cheque was issued and had become repayable during June/July 2015 and the cheque issued towards repayment was agreed to be presented thereafter. If the amount was not paid in any other mode before June/July 2015, it was incumbent on the respondent No.2 to arrange sufficient balance in the account to honour the cheque which was to be presented subsequent to June/July 2015.”

35. Reverting back to this case, it is held that the cheque, Exhibit-3 clearly reflects that on the same date the cheque was deposited when the goods were delivered or accepted on behalf of the respondent No. 1. It is apparent that immediately the cheque which was issued and signed by the respondent No. 1, was presented to the bank for clearance. This cheque indeed cannot be considered to be a cheque issued in discharge of any debt because on the same day when the goods were delivered, the cheque was deposited i.e. on 14.10.2005. There is no instance of any debt or liability of the respondent No. 1. The appellant has thus failed to prove that the cheque was not issued as security whereas on the contrary the respondent No. 1 was able to prove that the cheque is nothing but a document issued as a security and not in discharge of any debt. It has to be borne in mind that the cheque was handed over to the appellant in the month of June 2003. The cheque was immediately presented on the same day i.e. on 14.10.2005, when the goods were received by the respondent. Where is debt? There has to be an instance that the goods were delivered and

the payment for the goods has become due and then the cheque was presented. The debt was not in subsistence when the cheque was presented.

36. I, therefore record my concurrence to the findings of the learned Trial Court. Appeal is hereby dismissed as the appeal is devoid of merits.

37. Send back the Trial Court Records.

38. No order as to costs.

JUDGE

Comparing Assistant