

GAHC010179042023



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

Case No. : Crl.Pet./854/2023

ABDUL AZIZ SHEIKH
S/O LT. JONAL ALI SK.
R/O VILL- DEBOTTAR HARDAHA PT.I
P.O. DEBOTTAR HARDAHA
P.S. DHUBRI
DIST. DHUBRI, ASSAM
PIN-783334

VERSUS

THE STATE OF ASSAM AND ANR
REP. BY THE PP, ASSAM

2:ABDUL MANNAN MONDAL
S/O SUKUR ALI MONDALVILL- JHELTURCHAR PT.III
P.O. BAGRIBARI
P.S. BILASIPARA
DIST. DHUBRI
ASSAM
PIN-783334

Advocate for the Petitioner : MR. M U MONDAL

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI**

JUDGMENT

Date : 27.03.2024

Heard Mr. A.Alim Sk. Learned counsel for the petitioner and Mr. B.Sharma, learned Addl.P.P. for the respondent No. 1. Also heard Mr. P.R.Sarma, learned counsel for the respondent No. 2.

2. Though the case is fixed for admission hearing, with the consent of learned counsel for both the parties, case is taken up for final hearing.

3. Petitioner has preferred an application under Section 482 CrPC praying for quashing of the proceeding of CR Case No.45/2019 under Section 138 of the NI Act, pending in the Court of SDJM (M), Bilasipara.

4. The factual matrix leading to the case is that the opposite party No. 2 as complainant filed a complaint case before the Court of learned SDJM (M), Bilasipara stating *inter-alia* that the accused petitioner is a government servant serving as LD Assistant in the Office of Deputy Commissioner, Dhubri. The petitioner is known to the complainant/ respondent No. 2 and used to visit the house of the complainant. On 27.10.2018, accused petitioner took loan of Rs.4 Lakhs from the complainant in presence of some villagers in his house to complete the contract work of boundary wall of Madrassa in their village and promised to repay the loan amount within one month.

5. After one month, when the complainant approached the accused petitioner for repayment of the said money, the accused petitioner issued a cheque bearing No. 557901 dated 28.11.2018 in State Bank of India, Kismat Hasdah

Branch in A/C No.31229358218 for payment of Rs. 4 Lakhs. Accordingly, the said cheque was deposited by the complainant on 19.12.2018 for realization of the said amount. But the cheque was returned due to insufficient fund.

6. On getting information about the dishonored cheque, the complainant sent a legal notice to the accused/ petitioner about dishonor of cheque and accused/petitioner was directed to pay the said amount but the accused/petitioner refused to receive the notice and ultimately no amount was paid by the accused /petitioner for the said legally enforceable debt. Thereafter, the complainant/ opposite party No. 2 filed this case against the petitioner under Section 138 of the NI Act before the court of SDJM (M), Bilasipara and thereafter cognizance was taken accordingly.

7. On filing of affidavit by the complainant before trial court, witnesses were cross-examined and thereafter, the case was fixed for recording of statement of accused, defense witnesses and arguments. Subsequently, the accused petitioner has preferred this application for quashing of the proceeding of CR Case No.45/2019 under Section 138 of the NI Act.

8. It is submitted by the learned counsel for the petitioner that the learned trial court has committed grave error in law as well as on fact in admitting the proceeding vide CR Case No. 45/2019 in gross violation of Section 138 of the NI Act. As such the impugned proceeding is not sustainable in law and the same is liable to be set aside and quashed.

9. The learned counsel for the petitioner has raised the point that signature in the alleged cheque of the petitioner has been forged by the opposite party No. 2 and the petitioner has never issued cheque to the opposite party No.2. According to learned counsel for the petitioner, the opposite party No. 2 has

manipulated the missing cheque as reflected in the evidence of DW-1 and as such the impugned proceeding is bad in law and the same is liable to be set aside.

10. It is also the submission for the learned counsel for the petitioner that the SBI Kismat Hasdah Branch has failed to appreciate the RBI circular regarding dishonor of cheque for scheduled Bank. It is alleged that the cheque shown to be issued on 28.11.2018 but the cheque was dishonored on 19.12.2018, notice under Section 39 of the NI Act shown to be returned unserved and the complaint was filed on 05.03.2019. Accordingly, the case has been registered as CR Case No. 45/2019 dated 08.03.2019 and as such the mandate of Section 39 and 138 of the NI Act and the RBI circular have been violated in the case and prays to quash the entire proceeding of the complaint case.

11. On the other hand, learned counsel for the opposite party No. 2 submits that trial is going on in the court of learned SDJM (M), Bilasipara and the case is at the stage of examination of defense witnesses. The learned counsel for the opposite party No. 2 has specifically pointed out that though there is no stay order from this court to suspend further proceeding of the case, but the trial court vide order dated 13.09.2023 stayed the proceeding of the case which is reflected in the order that --*"therefore this court is bound to wait for the outcome of the criminal petition No. 845/2023 lying in the Hon'ble Gauhati High Court because proceeding further in this case without waiting for the disposal of the criminal petition may lead to complex and intricate legal issues."*

12. Learned counsel for opposite party No.2 also submits that as the matter is subjudice in the trial court, he has prayed for dismissal of this criminal petition.

13. I have considered the submission of the learned counsel for the parties

and I have also perused the scanned copy of the trial court record.

14. It appears that the accused/petitioner has challenged the signature in the cheque alleged to be issued by him. According to the learned counsel for the accused/petitioner, cheque was forwarded to the FSL for comparing the handwriting of the accused/ petitioner's signature with the cheque which is not yet received.

15. The gist of the submission as put forth by the learned counsel for the accused/petitioner is that the defense of the petitioner regarding the cheque in question indeed missing or not is to be proved. Though it is alleged by the petitioner that the alleged cheque is missing but no FIR has been lodged by the petitioner in connection with missing of the alleged cheque.

16. Section 138 of the NI Act creates a deeming offence. Provision envisages a person who is signatory to the cheque, which is drawn on an account maintained by the said person, issued for the discharge of debt, has been returned by the Bank unpaid, can be said to have committed an offence. For the default of which, a legal notice of demand is sent providing for an opportunity of responding to the same or to discharge the said debt.

17. Hon'ble Supreme Court in the case of *State of Uttar Pradesh –vs- Akhil Sarada & Ors.* Reported in 2022 (3) RCR (CrI.) 841 wherein it has been held as below:

“Having gone through the impugned judgment and order passed by the High Court by which the High Court has set aside the criminal proceeding in exercise of power under Section 482 CrPC, it appears that the High Court has virtually conducted a mini trial which as such is not permissible at this stage and while deciding the application under Section 482 CrPC. As observed and held by this

court in a catena of decisions, no mini trial can be conducted by the High Court in exercise of powers under Section 482 CrPC. At the stage of deciding the application under Section 482 CrPC, the High Court cannot get into appreciation of evidence of the particular case being considered."

18. It is apposite to refer to the judgment of Hon'ble Supreme court in the case of *Rakesh Babu Unni Krishnan –vs- State (Government of NCT of Delhi & anr.)* vide SLP (Criminal) 5781-5782 of 2020 wherein it was held that:

"The consequences of scuttling the criminal process at a pre-trial stage can be grave and irreparable. Quashing of proceeding at preliminary stages will result in finality without the parties having had an opportunity to adduce evidence and the consequence then is that the proper forum i.e. the trial court is ousted from weighing the material evidence. If this is allowed, the accused may be given an unmerited advantage in the criminal process....."

19. The assertion with regard to the factum of cheque in question having been missing, cannot be taken to be a ground for quashing the prosecution at this stage as the veracity of the allegation is yet to be established. In the teeth of the statutory provision of Sections 118 and 139 of the NI Act, it may be a probable defence to rebut the presumption. The accused /petitioner has challenged his signature in the impugned cheque but as per evidence of the Bank employee, the cheque has been issued from the account of the petitioner. It was presented to the Bank concerned within the period of validity and was returned unpaid for the reason of balance being insufficient. Thus, the basic ingredients of Section 138 of the NI Act as also Section 118 and 139 of NI Act are prima facie evident. Trite it is that in a petition filed for quashing of complaint, the disputed question of fact cannot be gone into.

20. The Honb'le Supreme Court in the case of *Krishna –vs- Krishnaveni & anr.* reported in 1997 Vol 1 RCR (crl.) 724 and in the case of *Sakuntala Devi –vs- Chamrumatro & anr.* reported in 2009 Vol 2 RCR (Crl.) 125, held that in order to meet the ends of justice or to prevent abuse of process, the High Court is preserved with inherent power, which should be exercised sparingly so as to avoid needless multiplicity of procedure, unnecessary delay and protraction of proceeding.

21. Thoughtful consideration given to the overall conspectus of facts and circumstances of the case, as narrated herein before, the legal provision and having implored itself with the exposition of law by the abounding pronouncements of Hon'ble Supreme Court, this court does not find any reason to exercise its inherent jurisdiction to quash the complaint vide CR Case No. 45/2019 and the consequent proceeding arising therefrom. As a corollary thereto, the present petition being bereft of merit, is hereby dismissed.

22. It is made clear that nothing contained in this judgment shall be construed as expression of opinion on the merits of this case.

In view of the above, the criminal petition is disposed of at admission stage.

JUDGE

Comparing Assistant