

GAHC010196562022



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

Case No. : Crl.Rev.P./485/2022

BIJU KUMAR ROY
SON OF LATE MOTIRAM ROY
R/O NEAR L.P. SCHOOL,
NIZ- SARIHA, P.S. PATASARKUCHI
DIST. BARPETA, ASSAM
PIN-781326

VERSUS

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

2:SRI TULEN PATHAK
S/O LATE BIREN PATHAK
LAKSHMINATH BEZBARUAH HIGH SCHOOL

P.O.CHARANA BAZAR
PIN-781328
ASSA

Advocate for the Petitioner : MR. P P BORTHAKUR , ld. Adv.

Advocate for the Respondent : Mr. K. Bhaisya, ld. PP, ASSAM
Mr. D. J. Haloi, ld. Adv.

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA**

Date of hearing : 27.02.2024

Date of Judgment : 17.05.2024

JUDGMENT & ORDER (CAV)

Heard Mr. P. P. Borthakur, learned counsel for the petitioner. Also heard Mr. K. Baishya, learned Additional Public Prosecutor for the State respondent as well as Mr. D. J. Haloi, learned counsel for the respondent No. 2.

2. This is an application under Section 397 *read with* Section 401 of the Code of Criminal Procedure, 1973, praying for setting aside the order dated 12.07.2022 passed by the learned Sub Divisional Judicial Magistrate, Bajali at Pathsala in C. R. (N.I.) Case No.1/2021, whereby, the said Court rejected the prayer for payment of 20% of cheque amount to the complainant/present petitioner under Section 143 A of the Negotiable Instrument Act, 1883.

3. The brief facts of the case is that; the petitioner in the month of January' 2017 shifted to a rented house of Shri Monoranjan Kalita of Baghmora Bazar under Patacharkuchi Police Station, Bajali, where he met the respondent No.2 who used to stay in the same building as a tenant. In the month of January' 2018, the accused/respondent No.2 requested the complainant/petitioner to give loan of Rs.6,00,000/- (Rupees Six Lakhs) only as he was in urgent need of money. After consulting with his wife, the petitioner decided to help the accused/respondent No.2 and he arranged Rs.1,50,000/- (Rupees one lakh fifty thousand) only from his own and paid to the respondent No.2. Thereafter, he also requested his brother-in-law, Sri Diganta Barman, resident of village

Samoitapara to help the accused/respondent No.2 with Rs.4,50,000/- (Rupees Four lakhs fifty thousand) only. Accordingly, the petitioner's brother-in-law also arranged a sum of Rs.3,00,000/- (Rupees Three lakhs) only and Rs.1,50,000/- (Rupees one lakh fifty thousand) only on 03.02.2018 and 08.02.2018 respectively and gave to the respondent No.2 in the residence of the complainant. In both the occasions, while, the accused/respondent No.2 had accepted the aforesaid amounts, the complainant was present along with his wife Smti. Saraju Das.

4. Again in the month of October, 2018, the accused/respondent No.2 approached the complainant to asked for another loan amounting to Rs.3,00,000/- (Rupees three lakhs) only as he was facing serious financial hardship. The respondent No.2 assured the petitioner that he will return the total amount of Rs.9,00,000/- (Rupees Nine lakhs) only by March 2019. Thereafter, the wife of the petitioner took personal loan from the State Bank of India, Simla Bazar Branch and paid a sum of Rs.1,20,000/- (Rupees one lakh twenty thousand) only and the petitioner also arranged another sum of Rs.1,80,000/- (Rupees one lakh eighty thousand) only on his own and paid Rs.3,00,000/- (Rupees three lakhs) only to the accused/respondent No.2. But, till March, 2019 the respondent did not return the money and then, the petitioner asked to the respondent No.2 to return the aforesaid amounts. Then, the accused/respondent No.2 requested the petitioner to accommodate further time. Thereafter, on 30.08.2019, the accused/respondent No.2 vacated the tenanted premises and started residing at a different rented house in the same locality. After several effort made by the petitioner, the respondent No.2 issued a cheque amounting to Rs.9,00,000/- (Rupees Nine lakhs) only on 09.11.2020

vide cheque No.413170 to the petitioner.

5. But, on presentation of the cheque before the State Bank of India, Patacharkuchi Branch, the said cheque returned back with a postal remark "insufficient fund/Drawer Confirmation not received". After receipt of the information from the bank in regards to dishonor of cheque on 11.11.2020, the petitioner tried to inform the respondent No.2, but, he did not respond to the phone calls and thus, after having no other alternative, he issued notice to the respondent No.2 under Section 138 of N.I. Act through his Advocate on 18.11.2020. The legal notice was sent through registered A/D card, but, when the said A/D card was not returned back to the sender, the petitioner obtained the delivery status of the said legal notice from the website of the Indian Postal Service and it was found that the letter was duly delivered on 24.11.2020.

6. In the month of December, 2020, the petitioner received a notice dated 08.12.2020 from Smti. Sangita Das, Advocate, wherein, the said advocate under the instruction of the respondent No.2 acknowledged the receipt of the notice dated 18.12.2020 issued on behalf of the petitioner and further stated that the petitioner/complainant is not known to her client and no cheque was ever issued by the respondent No.2 in favour of the petitioner. Thus, finding no other alternative, the complaint case was lodged before the learned SDJM, Bajali, Pathsala registered under Section 138 and 142 of N.I. Act, *read with* Section 420 of IPC. After perusal of the complaint petition as well as evidence on affidavit, the learned Court below was pleased to take cognizance of the offence committed by the respondent No.2 and further issue summon to the accused person for appearance. Thereafter, the accused/respondent No.2 appeared

before the learned SDJM, Bajali, Pathsala only on 20.01.2021 i.e after 9(nine) consecutive dates of absence and thus, the matter was fixed for offence explanation on 05.03.2022. Again on the fixed dates, the respondent No.2 took 2/3 adjournment and finally offence was explained before the learned Court below on 06.05.2022, wherein, he pleaded not guilty and claimed to be tried. Thereafter on 04.06.2022, the present petitioner filed a petition under provision of Section 143 A of N.I. Act with a prayer for necessary direction to the accused/respondent No.2 to pay 20% of the cheque amount before initiation of the cross examination of PWs. On 12.07.2022, the matter was heard and learned SDJM, had rejected the said petition and fixed the matter on 20.08.2022 for cross examination of the complainant/petitioner.

7. On being highly aggrieved and dissatisfied with the impugned order passed by the learned SDJM. Bajali at Pathsala in C. R. (N.I.) Case No.1/2021, the present petitioner has preferred this petition with a prayer for setting aside and quashing of the impugned order dated 12.07.2022.

8. It is submitted by the learned counsel for the petitioner, Mr. Borthakur that the learned Court below has failed to appreciate the provision under Section 143 A of N. I. Act in its true perspective and as a result of which the said Court arrived at a wrong findings and rejected the petition filed by the petitioner vide order dated 12.07.2022 and as such the same is liable to be set aside and quashed. The learned Court below failed to appreciate the fact that the accused/respondent No.2 played some delaying tactics by adjourning the matter on several occasions only with *malafide* intention to cause delay in disposal of the case. More so, the learned Court below also failed to appreciate the intention of the legislature for incorporating the new provision of Section 143 A

of N. I. Act. The intend behind this provision is to provide an aid to the complainant during pendency of the proceeding under Section 138 of N.I. Act. Thus, he submits that the impugned Judgment and Order dated 12.07.2022 passed by the learned SDJM, Bajali, Pathsala by rejecting the prayer for payment of the 20% of cheque amount under the proviso of Section 143 A of the N.I. Act is liable to be set aside and quashed and the respondent No.2 may further directed to pay 20% of the amount as prayed for.

9. In support of his submission, Mr. Borthakur, learned counsel for the petitioner relies on the decision passed by the Hon'ble Apex Court passed in ***Criminal Appeal No.1123/2022 (Arising out of Special Leave Petition (Criminal) No. 2872/2022)***, wherein, the Hon'ble Apex Court directed to deposit 20% of the cheque amount to the appellant as an interim measure. But, the said judgment is not applicable in the instant case, wherein, the accused/appellant did not challenge the order of interim compensation of 20% of the cheque amount, rather he prayed for extension of 30 days to deposit the said amount.

10. He further relies on another decision of Hon'ble Apex Court ***2019 0 AIR (SC) 3817 [G. J. Raja vs. Tejraj Surana]***, wherein, the Hon'ble Apex Court expressed the view that the applicability of Section 143 A of N. I. Act must, therefore, be held to be prospective in nature and confined to cases where offences were committed after the introduction of Section 143 A, in order to force an accused to pay the said interim compensation. He further emphasized on paragraph Nos. 5 and 22 of the said judgment which reads as under;

"5. Soon thereafter, the Trial Court ordered that 20% of the cheque amount be made over by the Appellant to the Respondent as interim compensation in accordance with the provisions of [Section 143A](#) of the Act. Thus, the Appellant was directed to pay

to the Respondent a sum of Rs.7,00,000/-.

22. In our view, the applicability of [Section 143A](#) of the Act must, therefore, be held to be prospective in nature and confined to cases where offences were committed after the introduction of Section 143A, in order to force an accused to pay such interim compensation."

11. In the aforesaid judgment, the Hon'ble Apex Court also discussed about the recovery of the amount of interim compensation, as per provision of Section 421 of Cr.P.C. In addition to his submission, the learned counsel for the petitioner also cited the decisions of Hon'ble Chhattisgarh High Court which is reported in **2021 3 Crimes (HC) 113 [Rajesh Soni vs. Mukesh Verma]** and emphasized on paragraph Nos. 12 and 14 of the said judgment which reads as under;

"12. From perusal of the amended provision of [Section 143A](#) of the Act, 1881, it is clear that the word 'may' used is beneficial for the complainant because the complainant has already suffered for mass deed committed by the accused by not paying the amount, therefore, it is in the interest of the complainant as well the accused if the 20% of the cheque amount is to be paid by the accused, he may be able to utilize the same for his own purpose, whereas the accused will be in safer side as the amount is already deposited in pursuance of the order passed under [Section 143A](#) of the Act, 1881. When the final judgment passed against him, he has to pay allowances on lower side. [Section 143A](#) of the Act, 1881 has been drafted in such a manner that it secures the interest of the complainant as well as the accused, therefore, from perusal of aims and object of amended [Section 143A](#) of the Act, 1881, it is quite clear that the word 'may' may be treated as 'shall' and it is not discretionary but of directory in nature.

14. The Supreme Court in Surinder Singh Deswal alias [Colonel S.S. Deswal & others Vs. Virender Gandhi](#) 3, has examined provision of [Section 148](#) of the Act, 1881 and held that it is mandatory provision. The relevant para of the judgment is reproduced below:-

"8. Now so far as the submission on behalf of the Appellants that even considering the language used in [Section 148](#) of the N.I. Act as amended, the appellate Court "may" order the Appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court and the word

used is not "shall" and therefore the discretion is vested with the first appellate court to direct the Appellant - Accused to deposit such sum and the appellate court has construed it as mandatory, which according to the learned Senior Advocate for the Appellants would be contrary to the provisions of [Section 148](#) of the N.I. Act as amended is concerned, considering the amended [Section 148](#) of the N.I. Act as a whole to be read with the Statement of Objects and Reasons of the amending [Section 148](#) of the N.I. Act, though it is true that in amended [Section 148](#) of the N.I. Act, the word used is "may", it is generally to be construed as a "rule" or "shall" and not to direct to deposit by the appellate court is an exception for which special reasons are to be assigned. Therefore amended [Section 148](#) of the N.I. Act confers power upon the Appellate Court to pass an order pending appeal to direct the Appellant- Accused to deposit the sum which shall not be less than 20% of the fine or compensation either on an application filed by the original complainant or even on the application filed by the Appellant- Accused Under [Section 389](#) of the Code of Criminal Procedure to suspend the sentence. The aforesaid is required to be construed considering the fact that as per the amended [Section 148](#) of the N.I. Act, a minimum of 20% of the fine or compensation awarded by the trial court is directed to be deposited and that such amount is to be deposited within a period of 60 days from the date of the order, or within such further period not exceeding 30 days as may be directed by the appellate court for sufficient cause shown by the Appellant. Therefore, if amended [Section 148](#) of the N.I. Act is purposively interpreted in such a manner it would serve the Objects and Reasons of not only amendment in [Section 148](#) of the N.I. Act, but also [Section 138](#) of the N.I. Act. [Negotiable Instruments Act](#) has been amended from time to time so as to provide, inter alia, speedy disposal of cases relating to the offence of the dishonoured of cheques. So as to see that due to delay tactics by the unscrupulous drawers of the dishonoured cheques due to easy filing of the appeals and obtaining stay in the proceedings, an injustice was caused to the payee of a dishonoured cheque who has to spend considerable time and resources in the court proceedings to realise the value of the cheque and having observed that such delay has compromised the sanctity of the cheque transactions, the Parliament has thought it fit to amend [Section 148](#) of the N.I. Act. Therefore, such a purposive interpretation would be in furtherance of the Objects and Reasons of the amendment in [Section 148](#) of the N.I. Act and also [Section 138](#) of the N.I. Act."

12. In this context, Mr. Haloi, learned counsel for the respondent No.2 has submitted that the petition filed by the petitioner praying for 20% of the cheque amount is not annexed along with the petition. More so, no reason has been mentioned in the petition for awarding 20% of the cheque amount as

compensation. That, apart the grounds taken in the present petition regarding the delay is also not applicable for the present respondent No.2; as the learned Court had well explained that there was no delay on the part of the accused/respondent No.2.

13. In this regard, Mr. Borthakur, learned counsel for the petitioner has submitted that the respondent No.2 appeared only on 17.01.2022 after lapse of several dates which caused delay in framing the charges as well as the proceeding.

14. Considering the submissions made by the learned counsels for both sides, I have perused the scanned copy of the LCR i.e. the C. R. (N.I.) Case No.1/2021 along with the annexures appended thereto. From the record, it is seen that 05.01.2021 the case was registered for disposal and accordingly, the next date was fixed on 19.01.2021, wherein, the cognizance has been taken and summons were issued against the accused. Thereafter, the accused/respondent No.2 remain absent on three consecutive dates, even after issuance of summon. On 31.05.2021, both the parties remained absent and as per the notification of this Court dated 12.05.2021, no adverse order was passed due to outbreak of Covid-19. Thereafter, the record was put up only on 23.09.2021 and the complainant was asked to take fresh steps upon the accused after physical functioning of the Court. On 29.10.2021, the accused/respondent No.2 again remained absent. Further, on 26.07.2021, same order was passed by the learned Court below and no adverse order was passed due to outbreak of Covid-19, though both the sides remained absent without stay. Finally, the accused/respondent No.2 entered appearance on 17.01.2022 and on the said date he was allowed to go on bail and the next date was fixed for offence

explanation on 05.03.2022 and only on 04.06.2022, the petition was filed by the present petitioner seeking 20% of the cheque amount under provision of Section 143 A of NI Act which was rejected by the learned Court below.

15. Vide order dated 12.07.2022, it has been observed by the learned Court below that accused appeared on 17.01.2022 and 06.05.2022, where, he pleaded not guilty. The complainant has not mentioned any reasons in the petition as to why he should be awarded with 20% of the cheque amount. Further, it has been observed by the learned Court below that in the case in hand, the accused has not unnecessarily affected the proceeding by seeking adjournment as the delay was caused not only for default of the accused, but, due to non-functioning of the Court works during the pandemic. Accordingly, the petition for awarding 20% of the cheque amount as compensation under Section 143 A of N. I. Act was dismissed by the learned Court below. The learned SDJM, had discussed in detail about the judgment of various High Courts, wherein, it has been held that the provision is directory and not mandatory in nature, however, in some of the High Court had expressed the view that it can be considered as mandatory provision.

16. Amended provision of Section 143 A of N. I. Act, 1881, which is extracted below;

"143A - Power to direct interim compensation- (1) Notwithstanding anything contained in the [Code of Criminal Procedure](#), 1973 (2 of 1974), the Court trying an offence under Section 138 may order the drawer of the cheque to pay interim compensation to the complainant-

(a) in a summary trial or summon case, where the drawer pleads not guilty to the accusation made in the complaint; and

(b) in any other case, upon framing charges.

(2) The interim compensation under sub-section (1) shall not exceed twenty per cent of the amount of the cheque.

(3) The interim compensation shall be paid within sixty days from the date of the order under sub-section (1), or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.

(4) If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial years, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

(5) The interim compensation payable under this section may be recovered as if it were a fine under [Section 421](#) of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) The amount of fine imposed under Section 138 or the amount of compensation awarded under [Section 357](#) of the Code of Criminal Procedure, 1973 (2 of 1974)."

17. Thus, as per Section 143 A of the N. I. Act, 20% of the check amount may be awarded as an interim compensation in case, if, the drawer pleads not guilty to the acquisition made in the complaint and after framing of the charge. Here in the instant case, it is seen that the accused pleaded not guilty at the time of offence explanation and but, there is no ground taken in the petition as to why there is a need of 20% of the cheque amount as compensation under Section 143 A of N.I. Act. More so, from the record, it is seen that the order passed by the learned Court below that the delay is caused not for the default of the accused/respondent No.2, but, there was default from the complainant side as well as the matter was delayed for non-functioning of the Court works, due to outbreak of Covid-19. However, it cannot be denied that the accused took several months to appear before the Court below. In the same time, it is seen that the amended provision under Section 143 A of the N.I. Act also cannot be

considered as mandatory provision as there should be some reasons to pass the order on interim compensation as per Section 143 A of N. I. Act.

18. The Hon'ble Apex Court in the judgment passed in ***Criminal Appeal Case No.741/2024 [Rakesh Ranjan Shrivastava vs. The State of Jharkhand & Anr.]***, it has discussed in detail, as to whether the provision under Section 143 A is directory or mandatory and also expressed the view that the word "may" used in Section 143A, cannot be construed or interpreted as "shall". It all depends on the nature of the power conferred by the relevant provision of the statute and the effect of the exercise of the power. The legislative intent also plays a role in the interpretation of such provisions. Even the context in which the word "may" has been used is also relevant. The Hon'ble Apex Court also expressed the view that, under the said provision, if the accused have to pay interim compensation up to 20 per cent of the cheque amount, such an interpretation will be unjust and contrary to the well-settled concept of fairness and justice.

19. In paragraph number 14 of the judgment i.e. the ***Rakesh (Supra)*** read as under:-

"14. In the case of Section 143A, the power can be exercised even before the accused is held guilty. Sub-section (1) of Section 143A provides for passing a drastic order for payment of interim compensation against the accused in a complaint under Section 138, even before any adjudication is made on the guilt of the accused. The power can be exercised at the threshold even before the evidence is recorded. If the word 'may' is interpreted as 'shall', it will have drastic consequences as in every complaint under Section 138, the accused will have to pay interim compensation up to 20 per cent of the cheque amount. Such an interpretation will be unjust and contrary to the well-settled concept of fairness and justice. If such an interpretation is made, the provision may expose itself to the vice of manifest arbitrariness. The provision can be held to be violative of Article 14 of the Constitution. In a sense, subsection (1) of Section 143A provides for penalising an accused even before his guilt is established.

Considering the drastic consequences of exercising the power under Section 143A and that also before the finding of the guilt is recorded in the trial, the word “may” used in the provision cannot be construed as “shall”. The provision will have to be held as a directory and not mandatory. Hence, we have no manner of doubt that the word “may” used in Section 143A, cannot be construed or interpreted as “shall”. Therefore, the power under sub-section (1) of Section 143A is discretionary.

20. Further, in the case of ***Rakesh (Supra)***, the Hon’ble Apex Court had held that while granting interim compensation, the Court shall apply its mind to the quantum of interim compensation to be granted and also by considering various factors such as the nature of the transaction, the relationship etc. before passing the order and in the same time, if it is found that there is prima facie a plausible defence, the Court may exercise discretion in refusing to grant interim compensation.

21. In paragraph number 19 of the aforesaid judgment [***Rakesh (Supra)***] read as under:-

19. Subject to what is held earlier, the main conclusions can be summarised as follows:

a. The exercise of power under sub-section (1) of Section 143A is discretionary. The provision is directory and not mandatory. The word “may” used in the provision cannot be construed as “shall.”

b. While deciding the prayer made under Section 143A, the Court must record brief reasons indicating consideration of all relevant factors.

c. The broad parameters for exercising the discretion under Section 143A are as follows:

i. The Court will have to prima facie evaluate the merits of the case made out by the complainant and the merits of the defence pleaded by the accused in the reply to the application. The financial distress of the accused can also be a consideration.

ii. A direction to pay interim compensation can be issued, only if the

complainant makes out a prima facie case.

iii. If the defence of the accused is found to be prima facie plausible, the Court may exercise discretion in refusing to grant interim compensation.

iv. If the Court concludes that a case is made out to grant interim compensation, it will also have to apply its mind to the quantum of interim compensation to be granted. While doing so, the Court will have to consider several factors such as the nature of the transaction, the relationship, if any, between the accused and the complainant, etc.

v. There could be several other relevant factors in the peculiar facts of a given case, which cannot be exhaustively stated. The parameters stated above are not exhaustive.

22. So, considering the entire facts and circumstances of this case, it is seen that the learned Sub Divisional Judicial Magistrate, Bajali at Pathsala in C. R. (N.I.) Case No.1/2021 has committed no error or mistake in passing the order dated 12.07.2022 rejecting the prayer for awarding of 20% of the cheque amount. In the result, I find no merit in this petition and accordingly, the prayer made by the present petitioner for directing the respondent No. 2 to award 20% of cheque amount as the interim compensation to the respondent No.2 stands dismissed. However, the learned Court below shall proceed with the case and shall dispose of the same expeditiously preferably within 6(six) months.

23. With the above observation and direction, this revision petition stands disposed of.

JUDGE

Comparing Assistant