



GAHC010037192018

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

PRINCIPAL SEAT AT GUWAHATI

Crl. Pet. No. 156 of 2018

Sri Pradip Patangia, Age- 48 years,
S/o Sri Mukheswar Patangia,
P.O.-Dekargaon, P.S.- Tezpur,
District- Sonitpur, Assam
Pin – 784501.

.....Petitioner

-Versus-

Dr. Tarulata Saikia,
W/o Dr. Jayanta Kr. Das,
R/o- Village-Udmari Borjhar,
P.O.- Dekargaon, Mouza- Haleswar,
P.S.- Tezpur, District. – Sonitpur (Assam).
Pin - 784501

.....Respondent

Advocates for the appellant : Mr D C Kath Hazarika,
Ms J Kalita.



Advocate for the respondent : Mr P K Singha

With
Crl. Pet. No. 242 of 2018

Sri Gul Kumar Kalita @ Papu Kalita, Age- 41 years,
S/o Late Hridaya Kalita,
R/O- Village- Mazgaon Tamuli Chuburi,
P.O. & P.S.- Tezpur,
District – Sonitpur, Assam,
Pin- 784001

.....Petitioner

-Versus-

Dr. Tarulata Saikia,
W/o Dr. Jayanta Kr. Das,
R/o- Village-Udmari Borjhar,
P.O.- Dekargaon, Mouza- Haleswar,
P.S.- Tezpur, District. – Sonitpur (Assam).
Pin - 784501

.....Respondent

Advocates for the appellant : Mr D C Kath Hazarika,
Ms J Kalita.

Advocate for the respondent : Mr P K Singha

BEFORE
HON'BLE MRS. JUSTICE MALASRI NANDI

Date of Judgment : 02.03.2023



JUDGEMENT AND ORDER (CAV)

Heard Mr D C Kath Hazarika, learned counsel appearing on behalf of both the petitioners and Mr P K Singha, learned counsel appearing on behalf of the respondent

2. Both the criminal petitions have been taken up together as they relate to the same set of incidents.

3. The criminal petitions, being Criminal Petition No. 156 of 2018 and Criminal Petition No. 242 of 2018, are being filed under Section 482 CrPC, 1973, for quashing of Negotiable Instrument proceeding, vide NI Case No. 6 of 2017 and NI Case No. 7 of 2017, pending in the Court of learned Additional CJM, Sonitpur, Tezpur, to avoid the abuse of process of law and to secure ends of justice.

4. The instant application, being Criminal Petition No. 156 of 2018 is filed by the petitioner, Pradip Patangia for quashing of the written complaint dated 24.01.2017, against him under Section 138 and 142 of the Negotiable Instruments Act, 1881 (hereinafter, referred to as "the NI Act"), before the learned CJM, Sonitpur, Tezpur (Assam), which has been registered as NI Case No. 6 of 2017, whereby the complainant has claimed for payment of alleged legally enforceable debt.

5. The criminal petition, being Criminal Petition No. 242 of 2018, is being filed by the petitioner Gul Kumar Kalita @ Papu Kalita for quashing of the complaint dated 24.01.2017, filed by the respondent/complainant against him under Sections 138 and 142 of the NI Act, before the learned CJM, Sonitpur, Tezpur (Assam), vide NI Case No. 07 of 2017, whereby the complainant has claimed for payment of alleged legally enforceable debt.

6. The brief facts of the case is that the respondent/ complainant in consultation with her

husband decided to buy a plot of land to build their dwelling house. The petitioner, Pradip Patangia and his friend, Gul Kumar Kalita @ Pappu Kalita, who deal in lands, having come to know about the respondent/complainant's desire for purchasing a suitable plot of land, approached the respondent/complainant and her husband with an offer of sale of a plot of land. They offered a plot of land measuring 2 kathas covered under Dag No. 525 of P.P. No. 124, situated at Harigaon. They told her that the owners of the said land had executed a Power of Attorney No. 28 dated 28.02.2014, in favour of Gul Kumar Kalita, which was duly registered before the Sr. Sub-Registrar, Sonitpur. By the said Power of Attorney, the owners of the said land bestowed all the powers to Gul Kumar Kalita, to take decision upon the said land. Thereafter, the complainant and her husband talked with both the petitioners and the price of the land was fixed at Rs. 13,60,000/- (Rupees Thirteen Lacs Sixty Thousand) only. The petitioners requested for advance money and the complainant and the petitioner, Gul Kumar Kalita entered into an agreement for sale, which was duly notarized vide SI. No. 227/2015. On the date of execution of the sale deed, the respondent/complainant paid a sum of Rs. 3,60,000/- (Rupees Three Lacs Sixty Thousand) only vide Cheque Nos. 119616 & 119617, drawn on SBI, Tezpur Branch, in favour of the petitioner, Gul Kumar Kalita. Both the petitioners had given the understanding that the amount would be shared equally even if the cheque were issued to only one of them. The petitioners further agreed and assured to obtain necessary permission from the concerned offices.

7. The petitioners during the first week of October, 2015, approached the respondent/complainant and offered to sell another plot of land measuring 1 katha covered under Dag No. 524 of P.P. No. 124, which is adjacent to the earlier land.

The respondent/complainant found the offer suitable and agreed to purchase the same. The

price of the said land was fixed at Rs. 6,80,000/- (Rupees Six Lacs Eighty Thousand) Only.

The petitioners were doing the dealings together. A request for advance money was made and an agreement between the respondent/complainant and the petitioners was entered into on 01.12.2015, which also duly notarized vide Sl. No. 1323/2015, dated 03.12.2015. On the date of execution of the said deed, the complainant paid a sum of Rs. 2,00,000/- (Rupees Two Lakhs) only, in cash which was duly received by the petitioners. The petitioners agreed to obtain necessary permission from the concerned offices.

8. In between this period, both the petitioners requested for some more amount and accordingly, through different cheques, amounts were further paid. The respondent/complainant requested the petitioners to give in writing in regard to the different payments received by them on different dates in connection with the said agreement of the land. Both the petitioners executed an agreement dated 01.12.2015, wherein they gave the details of the money received and mentioned the cheque number(s) and Bank, through which they had received the total amount of Rs. 13,60,000/- (Rupees Thirteen Lacs Sixty Thousand) Only. The agreement was duly notarized before the Public Notary, vide Sl. No. 1324/2015 dated 03.12.2015. Thus, both the petitioners jointly received the entire amount from the respondent/complainant towards the sale agreement dated 21.05.2015.

9. Subsequently, the respondent/complainant enquired about the sale permission and about the execution of the sale deed. The petitioners kept on promising that within a couple of months' time, the permission would be received from the concerned offices. The respondent/complainant believed the words of the petitioners and waited for months. On 17.10.2015, the petitioners in collusion with officials of Sub-Registry Office, Tezpur, deceived the respondent/complainant, inducing her to believe that the registration process for

execution of the sale of agreed land was being done in accordance with law. Both the petitioners induced the respondent/complainant to such fake belief just to grab the sale consideration amount fraudulently,. Since after discovery of the fraudulent act on the part of the petitioners and also on discovery of the fact that also there were some disputes pertaining to the land to be sold, the respondent/complainant asked both the petitioners to refund the entire amount so far received. Thereafter, the petitioners executed one deed of cancellation on 04.06.2016, cancelling all the agreements for sale of land and agreed to refund the entire amount taken jointly by them. The petitioners handed over three post-dated cheques for a total amount of Rs. 14,60,000/- (Rupees Fourteen Lacs Sixty Thousand)Only. The reason behind the issue of post-dated cheques were that at the relevant time of cancellation of the deed, the petitioners did not have sufficient amount in their accounts to cash the said cheque amount.

10. The petitioner, Gul Kumar Kalita, just to clear their legally enforceable debt towards the respondent/complainant had issued one cheque bearing No. 000014 for an amount of Rs. 7,00,000/-only drawn on the HDFC Bank, Tezpur Branch, dated 16.08.2016. The petitioner, Pradip Patangia issued one cheque for an amount of Rs. 7,00,000/- (Rupees Seven Lacs) Only, drawn on the State Bank of India, Tezpur Branch, dated 16.08.2016 and another cheque for Rs. 60,000/- (Rupees Sixty Thousand) Only. On 16.08.2016, the respondent/complainant enquired about the banker of the petitioner, Pradip Patangia as well as the bank account of the petitioner Gul Kumar Kalita, as to the availability of fund to cash the cheque amounts handed over to the respondent/complainant, but to her utter shock and surprise, the respective bank officials verbally informed the respondent/complainant that there were not sufficient funds maintained in their accounts to get the cheque amounts.

Immediately, the respondent/complainant lodged the FIR against both the petitioners before the Tezpur Police Station, vide Tezpur PS Case No. 1414 of 2016, under Sections 420/406/468 IPC. On the basis of the said FIR, the concerned Police arrested the petitioner, Pradip Patangia, who later secured bail. Subsequently, the petitioner Gul Kumar Kalita @ Pappu Kalita, approached before the learned Sessions Judge, Sonitpur, for granting pre-arrest bail, which was rejected. Then he approached before this Court and interim bail was granted with a direction to give an undertaking to refund the cheque amount to the complainant. Subsequently, the respondent/complainant presented the said cheque to her banker, namely, Indian Overseas Bank, Tezpur Branch, under genuine belief that this time the cheque will be honoured in terms of the undertaking given before this Court. But, surprisingly, the cheque was dishonoured, due to "Cheque Stop Instruction". The said intimation memo was received by the respondent/complainant on 11.11.2016. Then the complainant sent a legal notice to the petitioners through her Advocate by registered post under Section 138 of the NI Act, bringing to his knowledge the dishonor of the cheque due to Cheque Stop Instruction. Despite information, the petitioners had not paid the amount till filing of the complaint before the learned trial Court.

11. Thereafter, the respondent/complainant finding no other alternative has approached before the learned trial Court by filing a case under Section 138 of the NI Act, against both the petitioners.

12. It is submitted by the learned counsel for the petitioners that in the proceeding in question, the respondent/complainant brought on record the agreement dated 01.12.2015, and 04.06.2016, as which the respondent claimant has relied upon and procured cheque 0000014, dated 16.08.2016, drawn on HDFC Bank, Tezpur Branch for 7 lacs and another 7



lacs, vide Cheque No, 305949, dated 16.08.2016, drawn on SBI Branch, which are void as because they were unauthorized persons to settle the dispute through compromise on behalf of the owners of the land with intending purchaser of the land, i.e., with the respondent/claimant, by inducting a stranger to the contract.

13. It is also submitted by the learned counsel for the petitioners that during the course of defence argument on charge, the learned counsel for the petitioner has pointed out to the learned trial court, regarding aforesaid agreements as brought on record are not enforceable by law and same are void. Further, it has drawn up attention of the learned Court that the respondent/complainant procured the said cheque on the basis of aforesaid contracts, which are immaterial and have no significance on the statutory proceeding which are inadmissible under Section 145 of the NI Act. Hence, the charge framed against the present petitioners are considered to be an abuse of the process of the Court, and the impugned criminal proceedings bearing NI Case No. 06/2017, dated 24.01.2017 and NI Case No. 07/2017, dated 24.01.2017, respectively, should be set aside.

14. In support of his submission, the learned counsel for the petitioners has placed reliance on the following caselaws:-

- 1) (2010) 3 SCC 83; (*Mandvi Cooperative Bank Limited vs. – Nimesh B Thakore*)
- 2) (2022) SCC Online SC 1312; (*Ram Kumar Vs. State of Rajasthan & Others.*)

15. On the contrary, learned counsel for the respondent/claimant has submitted that the petitioners have raised disputed questions of facts. Those cannot be adjudicated by this Court in a petition under Section 482 CrPC

16. It is further submitted that once the cheque has been issued by the petitioners there is a presumption under Section 139 of NI Act that the same has been issued in discharge of legally enforceable liability and therefore, once the petitioners have admitted their signatures on the impugned cheques they could not confront their liability to pay. It is further submitted that the notice of demand was given as required under Section 138 of Act and therefore, within time and therefore, no illegality has been committed by the learned trial Court in framing of charge. In support of his submission, the learned counsel for the respondent has cited the following caselaws:-

- 1) AIR 1998 SC 1400; (*Tarsem Singh vs. Sukhminder Singh*)
- 2) (2002) 6 SCC 426; (*I.C.D.S. Ltd. vs. Beena Shabeer & Anr.*)
- 3) (2004)24 GLH 726; (*Chetanbhai Vasantbhai Mistary Vs. State of Gujarat*).
- 4) AIR 2010 SC 1898; (*Rangappa vs. Sri Mohan*)
- 5) (2012) 7 SCC 621 (*Sangeetaben Mahendrabhai Patel vs. State of Gujarat & Anr.*)
- 6) (2015) 3 SCALE 832 (*HMT Watches Ltd. vs. M. A. Abida & Ors.*)

17. I have considered the submissions of learned counsel for both the parties. I have also perused the scanned copy of record of NI Case No. 6 of 2017 and NI Case No. 7 of 2017.

18. Having heard the learned counsel for the parties and having perused the record, it is fruitful to have a glance on the relevant provisions of NI Act, which appear necessary for the disposal of this petition. Section 138 of the NI Act reads as under:-

“Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for [a term which may be extended to two years'], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless--

- (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
- (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the 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; and
- (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.”

Section 142 of Negotiable Instruments Act reads as under :

“(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:

[Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period;]

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.

(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction-

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated."

19. On a bare look at the aforesaid provisions it reveals that under Section 138 of the NI Act, where a cheque is issued by the drawer in the discharge of any debt or any other liability is returned by the bank unpaid, because the amount standing to the credit of that account is insufficient to honour the cheque, the said person is deemed to have committed an offence, subject to proviso to Section 138 which provides that the cheque should have been presented

to the bank within the period of six months from the date of which it is drawn or within the period of its validity, whichever is earlier.

20. The payee must also make a demand for the payment of the said amount by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of the information by him from the bank regarding the return of the cheque unpaid, despite this demand, the drawer fails to make the payment within fifteen days of the receipt of the notice, a cause of action arises for prosecuting him for the offence punishable under Section 138 of the Act. Section 142 provides that the court shall take cognizance of an offence punishable under Section 138 of the Act upon receipt of a complaint in writing made by the payee or, as the case may be, the holder in due course of the cheque. Such complaint must be made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138. However, discretion is given to the court to take cognizance of the complaint even after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making the complaint within such period.

21. It is not disputed that the drawer of the cheque makes himself liable for prosecution under Section 138 of the Act if he fails to make the payment within fifteen days of the receipt of the notice given by the drawee. His failure to make the payment within the stipulated period gives rise to a cause of action to the complainant to prosecute the drawer under Section 138 of the Act.

22. Having regard to the conditions which are required to be fulfilled before summoning any person to face the trial with regard to Section 138 of the Negotiable Instruments Act, prima facie it appears that those requirements/conditions have apparently been fulfilled.

23. What is emerging from the materials on record is that the signatures of the petitioner, Pradip Patangia on the cheque bearing No. 305949, dated 16.08.2016, drawn on SBI, and Gul Kumar Kalita on cheque bearing No. 000014 dated 16.08.2016, drawn on the HDFC Bank, Tezpur Branch are not disputed by the petitioners. The petitioners have also not disputed that there are transactions between the parties. Therefore, once the petitioners have admitted that the cheques bear their signature there is presumption that there exists a legally enforceable debt or liability under Section 139 of the N.I. Act. However, such a presumption is rebuttable in nature and the accused is required to lead the evidence to rebut such presumption.

24. In the case of *K.N. Beena vs. Muniyappan*; (2001) 8 SCC 458, it is observed that under Section 118 of the N.I. Act, unless the contrary is proved, it is to be presumed that the negotiable instruments (including a cheque) had been made or drawn for consideration. It is further observed and held that under Section 139, the Court has to presume, unless the contrary is proved, that the holder of the cheque received the cheque for discharge, in whole or in part, of a debt or liability. It is further observed that thus in complaints under Section 138, the Court has to presume that the cheque had been issued for a debt or liability. This presumption is rebuttable. However, the burden of proving that the cheque has not been issued for a debt or liability is on the accused.

25. In the case of *Rangappa vs. Sri Mohan*, (2010) 11 SCC 441 Hon'ble Supreme Court held as under:-

"Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments.

While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant accused cannot be expected to discharge an unduly high standard of proof."

26. In *Kisan Rao vs. Shankargouda*, (2018) 8 SCC 165 after considering the decision of Hon'ble Supreme Court in the case of *Kumar Exports vs. Sharma Carpets*, (2009) 2 SCC 513, it is observed by Hon'ble Supreme Court that the accused may adduce evidence to rebut the presumption, of section 139 of N I Act but mere denial regarding existence of debt shall not serve any purpose.

27. Coming back to the facts in the present case and considering that the petitioners have not denied their signatures on the cheques in question and that even according to the petitioners, agreement was made between the parties for cancellation of execution of deed for sale of land, there is a presumption under Section 139 of the NI Act that there exists a legally enforceable debt or liability. Of course, such presumption is rebuttable in nature and the same could only be done by adducing evidence at trial, but at this stage as the minute appreciation of evidence is not to be done complaint could not be quashed on this score. Therefore, at this stage of trial, the respondent/complainant is entitled for the presumption as provided under Section 139 of the NI Act.

28. The Hon'ble Supreme Court in the case of *Rajeshbhai Muljibhai Patel Vs. State of Gujarat*; (2020) 3 SCC 794, it was held as under:-

“The High Court, in our view, erred in quashing the criminal case in CC No. 367 of 2016 filed by Appellant 3 Hasmukhbhai under Section 138 of the NI Act. As pointed out earlier, Yogeshbhai has admitted the issuance of cheques. When once the issuance of cheque is admitted/established, the presumption would arise under Section 139 of the NI Act in favour of the holder of cheque that is the complainant Appellant 3. The nature of presumptions under Section 139 of the NI Act and Section 118(a) of the Evidence Act are rebuttable. Yogeshbhai has of course, raised the defence that there is no legally enforceable debt and he issued the cheques to help Appellant -3 Hasmukhbhai for purchase of lands. The burden lies upon the accused to rebut the presumption by adducing evidence. The High Court did not keep in view that until the accused discharges his burden, the presumption under Section 139 of the NI Act will continue to remain. It is for Yogeshbhai to adduce evidence to rebut the statutory presumption. When disputed questions of facts are involved which need to be adjudicated after the parties adduce evidence, the complaint under Section 138 of the NI Act ought not to have been quashed by the High Court by taking recourse to Section 482 CrPC. Though, the Court has the power to quash the criminal complaint filed under Section 138 of the NI Act on the legal issues like limitation, etc. criminal complaint filed under Section 138 of the NI Act against Yogeshbhai ought not to have been quashed merely on the ground that there are inter se disputes between Appellant -3 and Respondent-2. Without keeping in view the statutory presumption raised under Section 139 of the NI Act, the High Court, in our view, committed a serious error in quashing the criminal complaint in CC No. 367 of 2016 filed under Section 138 of the NI Act.”



29. In view of the aforesaid legal propositions as well as the factual matrix of the case, this Court does not find any merit in this petition. Thus, the criminal petitions being Criminal Petition No. 156 of 2018 and Criminal Petition No. 242 of 2018 are dismissed. However, the learned trial Court is directed to proceed with both the complaint cases and dispose of the same in accordance with law. Nothing stated above shall be construed as an expression of an opinion on merit of the matters and the learned trial Court shall be free to come at its own conclusions, having regard to the evidence adduced by the parties.

30. Both the criminal petitions accordingly, stand disposed of.

31. Stay order, if any, be vacated accordingly.

JUDGE

Comparing Assistant