GAHC010055952017

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

Case No. : Crl.Rev.P./452/2017

DEBESH GOSWAMI
S/O LATE ANANTA MOHAN GOSWAMI, R/O NAMGHAR PATH, HOUSE NO. 6, NEAR CHAMPAWATI HIGH SCHOOL, GANESHPARA, GUWAHATI, PS-FATASIL AMBARI, DIST. KAMRUP METRO, ASSAM, PIN-781025

VERSUS

1. THE STATE OF ASSAM and ANR.

2:SRI MAHESH SARMA
S/O LATE ABHAY CH. SARMA
R/O KAHILIPARA
GUWAHATI
DIST. KAMRUP METRO
ASSAM
PIN-78102

Advocate for the Petitioner : Ms. P. Chakraborty, ld. Adv.

Advocate for the Respondent : Mr. K. Baishya, ld. Addl. P.P. for 1;

Mr. A. K. Das, ld. Adv. for 2.

BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 27.02.2024
Date of Judgment : 03.05.2024

JUDGMENT & ORDER (CAV)

Heard Ms. P. Chakraborty, learned counsel for the petitioner. Also heard Mr. K. Baishya, learned Additional Public Prosecutor for the State respondent as well as Mr. A. K. Das, learned counsel for the respondent No. 2.

2. This is an application under Section 397 and 401 of the Code of Criminal Procedure, 1973, challenging the Judgment and Order dated 07.07.2017 passed by the learned Additional Session Judge (FTC) No.3, Kamrup (M), Guwahati in Criminal Appeal No.200/2013, affirming the Judgment and Order dated 15.10.2013 passed by the Court of learned Judicial Magistrate First Class, Kamrup (M), Guwahati in connection with the Complaint Case No. 1940/2008.

3. The brief facts of the case is that; the trial was initiated on the basis of the complaint made by one Sri Mahesh Sarma/present respondent No.2 alleging dishonor of cheque amounting to Rs.2,50,000/- (Rupees Two lakhs fifty thousand) only dated 07.01.2008. As per the complainant/present respondent No.2, the said amount was paid by him to the accused/petitioner for investment in some business which he failed to repay, and on repeated demand, the accused/petitioner was compelled to issue a cheque amounting to Rs.2,50,000/- (Rupees Two lakhs fifty thousand) only in favour of the complainant/present respondent No.2. But, when the cheque was presented for encasement, the Bank informed the respondent No.2/complainant about the dishonor of cheque

due to insufficient funds. Accordingly, the respondent No.2 issued a legal notice within the stipulated time through registered post, but, the accused/petitioner refused to accept the same and hence, the complaint was filed under Section 138 of N. I. Act. Thereafter, the ld. JMFC, Kamrup (M) took cognizance against the accused/petitioner, only after hearing the arguments of both sides and on the basis of the evidences available on record, and accordingly, the said Court passed the order of conviction by sentencing the accused/petitioner to undergo S. I. for 2(two) months along with a compensation amount of Rs. 5,00,000/- (Rupees Five lakhs) only and in default S. I. for another 1(one) month. Thus, on being highly aggrieved, the present petitioner preferred the criminal appeal being numbered as Crl.A. Case No.200/2013, wherein, the learned Additional Sessions Judge (FTC) No.-3, Kamrup (M), Guwahati passed the Judgment and Order dated 07.07.2017 by dismissing the appeal and by affirming the Judgment and Order dated 15.10.2013.

4. On being highly aggrieved and dissatisfied with the Judgments and Orders dated 07.07.2017 and 15.10.2023 passed by the ld. Addl. Sessions Judge (FTC) No.3, Kamrup (M), and the ld. JMFC, Kamrup (M), respectively, this criminal revision petition has been preferred by the accused/petitioner praying for setting aside and quashing of the same.

5. The learned counsel for the petitioner, Ms. Chakraborty has submitted that the appeal was decided mechanically taking a very hyper technical view, while, upholding the judgment and conviction order as passed by the learned Trial Court. She also submits that the learned Court below failed to appreciate that the cheque in question was never given as an enforceable debt in as much as the complainant miserably failed to prove that there was any enforceable debt

to invoke Section 138 of the N.I. Act. And the Court also misinterpreted the provision of Sections 138 and 139 of the N. I. Act, while, upholding the judgment and sentence of the learned Court below and hence, the same is not sustainable in the eye of law. Thus, the impugned judgments and orders are liable to be set aside and quashed.

6. She further submits that the learned Courts below failed to appreciate that in the instant case in hand the complainant has failed to prove that the cheques were issued by the petitioner against any legally enforceable debt. In that view of the matter the impugned judgment and conviction is bad in law and liable to be set aside and quashed and thus, the interference of this Court is required.

7. Ms. Chakraborty, learned counsel for the petitioner has submitted further that the petitioner along with one Dilip Kr. Sarma took the money from the present respondent No.2 as per the agreement dated 09.05.2008, but, the said Dilip Kr. Sarma was not made a party in the proceeding. However, it is an admitted fact that the accused/petitioner did not cross examine the PWs, but, the question arises as to why the accused/petitioner being the bank employee have to take loan from a private person when the facility of taking loan is very much available for him. Accordingly, the learned counsel for the petitioner submitted that it is a fit case wherein, the Court can interfere with the judgments and orders passed by the learned Courts below on 07.07.2017 and 15.10.2023 in Crl.A. Case No.200/2013 and Complaint Case No. 1940/2008 respectively.

8. In this context, Mr. Das, learned counsel for the respondent No.2 has submitted that the learned Courts below had rightly passed the judgments and orders by convicting the accused/petitioner and thus, there is no reasons to

interfere in the judgments and orders passed by the learned Courts below. He submitted that the accused/petitioner failed to cross examined the PWs adduced by the respondent No.2 and also he refused to accept the legal/demand notice which was issued to him after dishonor of cheque which was presented before the Bank for encashment.

9. After hearing the submissions made by the learned counsels for both sides, I have perused the Case Record and the judgment passed by the learned Courts below. From the judgments and orders passed by the learned Courts below as well as from the record, it is seen that the accused/petitioner did not cross examine the PWs, and he himself admitted in his statement made under Section 313 of Cr. P.C. regarding the issuance of check to the respondent No.2. But, he failed to substantiate his plea by not adducing any reliable and cogent evidence that the cheque was blank at the time of issuance to the respondent No.2. Further, from the exhibited documents, it is seen that the respondent No.2 had already exhibited the agreement between the parties, whereby, the accused/petitioner took loan of Rs.2,50,000/- (Rupees Two lakhs fifty thousand) only from the respondent No.2 which is exhibited as Exhibit-1 and the cheque in question is exhibited as Exhibit-2 and the other documents i.e. the signature of the accused/petitioner is exhibited as Exhibit-2(1). The respondent No.2 also exhibited the return memo as Exhibit-3, demand notice as Exhibit-4, the postal receipt as Exhibit-5 and an envelope, whereby, the demand notice was refused to accept by the accused/petitioner is exhibited as Exhibit-6. Despite of the exhibitions of 6 (six) numbers of documents including the cheque in question along with the signature's, the accused/petitioner did not avail the opportunity to cross examine the respondent No.2 inspite of ample opportunity given to him.

10. More so, he admitted his signature in the cheque in question, although, he took the plea that the cheque was blank at the time of issuance. In the same time, he took another plea that he took Rs.90,000/- (Rupees Ninety thousand) only from the respondent No.2 and not Rs.2,50,000/- (Rupees Two lakhs fifty thousand) only as stated in the agreement (Exhibit-1). But the accused petitioner did not adduce any evidence to substantiate his plea that the cheque in question was blank at the time of issuance and he took Rs.90,000/- (Rupees Ninety thousand) only from the respondent No.2 while making the agreement. Thus, evidences of PWs as well as the documents exhibited by the respondent No.2 goes unrebutted and the accused/petitioner failed to produce the evidence to substantiate his plea or to rebut the case of the respondent No.2.

11. More so, the accused/petitioner has also admitted the execution of the agreement (Exhibit-1) and issuance of cheque to the respondent No.2 and thus, under such circumstances, it is clear that the accused/petitioner issued the cheque amounting in discharge of his legally enforceable liability.

12. To attract the Section 138 of N.I Act, the complainant has to prove the following facts;

a. That the cheque was drawn for payment of an amount of money for discharge of a debt or liability and the cheque was dishonored;

b. That the cheque was presented within the prescribed period;

c. The payee made a demand for payment of the money by giving a notice in writing to the drawer within stipulated period and;

d. That the drawer failed to make the payment within 15 days from the

receipt of the notice.

13. Here in the instant case, it is seen that the money was taken by the accused/petitioner by executing an agreement and thereafter, he also issued a cheque amounting to Rs.2,50,000/- (Rupees Two lakhs fifty thousand) only which was dishonored by the bank and he also refused to accept the demand notice which was issued by the respondent No.2 within the stipulated time. Thus, having no other alternative, the respondent No.2 filed complaint case under Section 138 of N.I. Act.

14. Section 139 of the N. I. Act, read as under;

> **"139. Presumption in favour of holder.—**
>
> It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

15. So, under Section 139 of the N.I. Act, there is a legal presumption that the cheque issued for discharging an antecedent liability and that presumption can be rebutted only by the person who drew the cheque. The presumption is a rebuttable presumption under Section 139 of N. I. Act itself and the accused/petitioner issuing the cheque is at the liberty to prove to the contrary. However, in the instant case, the accused/petitioner not only fail to discharge his burden to disprove the plea of the respondent No.2 by adducing rebuttable evidence, but, he also failed to cross examine the PWs despite of ample opportunity given to him by the learned Court below.

16. Considering all the facts and circumstances of the case, I do not find any illegality or irregularity committed by the Court of learned Additional Sessions

Judge (FTC) No.3, Kamrup (M), Guwahati in Criminal Appeal Case No. 200/2013, affirming the Judgment and Order dated 15.10.2013 passed by the Court of learned Judicial Magistrate, 1st Class, Kamrup (M), Guwahati in connection with Complaint Case No. 1940/2008. Thus, there are no reasons to make any interference in the judgments and orders passed by the learned Appellate Court and the learned JMFC, Kamrup (M), Guwahati on 07.07.2017 and 15.10.2013 respectively. In the result, I find no merit in this revision petition and accordingly, the same stands dismissed.

17. With above observations, this revision petition stands disposed of.

JUDGE

Comparing Assistant