

(2018) 02 GAU CK 0065
In the Gauhati High Court
Case No : 236 of 2016

KULDEEP SARMAH

APPELLANT

Vs

THE STATE OF ASSAM AND ANR

RESPONDENT

Date of Decision : 22-02-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 397](#), [Section 401](#) - Calling for records to exercise powers of revision - High Courts powers of revision
[Negotiable Instruments Act](#),

Citation : (2018) 02 GAU CK 0065

Hon'ble Judges : Hitesh Kumar Sarma

Bench : Single Bench

Advocate : S C BISWAS, D CHOUDHURY

Final Decision : Allowed

Judgement

1. This criminal revision petition is filed under Sections 397/401 of the Cr.PC, challenging the legality, propriety and correctness of the judgment

and order, dated 22.09.2014, passed by the learned Chief Judicial Magistrate, Bongaigaon, in NICR Case No. 06/2009, convicting and

sentencing the accused-petitioner to undergo simple imprisonment for 1 (one) month and to pay a compensation of Rs. 4,00,000/- under Section

138 of the Negotiable Instrument Act, (hereinafter referred to as the NI Act), as well as the judgment and order, sated 31.05.2016, passed by the

learned Sessions Judge, Bongaigaon, in Criminal Appeal No. 41(4)/2014, dismissing the appeal and affirming the judgment and order passed by

the learned Chief Judicial Magistrate in the aforesaid NICR Case No. 06/2009.

2. The fact of the case is that, a complaint was filed by the present respondent No. 2, Sri Tarun Patgiri, alleging that the present petitioner Kuldeep

Sarma, who is a contractor by profession, in the BSNL, Bongaigaon and his son Raju Moni Patgiri did business jointly since February 2008 as per

agreement by giving a new Tata Sumo, being No. AS-26-1248 to the BSNL authority, Bongaigaon, through the accused-petitioner as per the

work order obtained by the accused-petitioner, on monthly rental of Rs. 14,000/- to the son of the complainant/respondent No. 2.

3. On 24.12.2008, the accused asked the complainant and his son, aforesaid, that he had obtained a tender from the BSNL, Bongaigaon for

construction of BSNL Tower and due to insufficient fund he wanted to involve the complainant and his son as partners on condition that profit and

loss will be shared by both of them. Accordingly, financial help was sought for by the accused-petitioner and the complainant/respondent No. 2's

son agreed to work with the accused-petitioner and complainant/respondent No. 2 provided him financial help of Rs. 4 lakhs, out of his retirement

benefit, on condition to return the same alongwith the share of profit earned from his contract works. On 27.01.2009, the complainant/respondent

No. 2 requested the accused-petitioner to repay the said loan amount and the accused issued a cheque, being No. 018818, on 17.03.2009,

amounting to Rs. 4 lakhs in favour of the complainant/respondent No. 2 to be encashed through the Central Bank of India, Bongaigaon branch.

This cheque was issued while the complainant/respondent No. 2 visited the house of the accusedpetitioner. Thereafter, the complainant/respondent

No. 2 deposited the said cheque in his bank, Bank of India, Bongaigaon branch, on 17.03.2009. But, the said bank through witness No. 3, issued

a statement that the said cheque could not be encashed and returned for insufficient fund on 17.03.2009, and duly intimated the same to the

complainant/respondent No. 2. Thereafter, the complainant/respondent No. 2 served legal notice through his advocate to the accused-petitioner

for payment of the said amount within 15 (fifteen) days from the date of receipt of the notice. Although the notice was duly received by the

accused-petitioner yet he failed to pay the amount, aforesaid. Therefore, the instant complaint under Section 138 of the NI Act

4. The learned trial court after observing all required formalities and recording evidence before charge, framed a formal charge against the

accused-petitioner under Section 138 of the NI Act, to which the accused-petitioner pleaded not guilty and claimed to be tried. Hence, the trial.

5. I have heard Mr. SC Biswas, learned counsel for the accused-petitioner as well as Mr. AD Choudhury, assisted by Mr. D Choudhury, learned counsel appearing for the respondent No. 2.

6. I have perused the record of the learned trial court including the evidence and the judgments of the learned courts below.

7. The complainant examined as many as 4 (four) witnesses and the defence examined none.

8. The learned trial court, after scanning the evidence on record and hearing the arguments advanced by the learned counsel for the parties,

rendered the decision convicting the accused-petitioner, as aforesaid. Thereafter, the accused-petitioner preferred an appeal before the learned

Sessions Judge, being Criminal Appeal No. 41(4)/2014. The learned Sessions Judge, vide the judgment, referred to above, dismissed the appeal

and affirmed the judgment and order of the learned trial court.

9. The issue required to be decided in the instant petition is whether the decision convicting the accused-petitioner under Section 138 of the NI Act

by the learned trial court as well as the learned appellate court is based on the evidence on record and whether there is any illegality, impropriety

and incorrectness in the decisions rendered by both the Courts below.

10. In his evidence, the complainant/respondent No. 2, before the learned trial court, stated that he had paid an amount of Rs. 4 lakhs in cash after

collecting the same from his three bank accounts, on the verbal request of the accused-petitioner, seeking financial assistance to do his contract

work with the BSNL. He also stated that the accused-petitioner came to his house on 17.03.2009, and issued a cheque, bearing No. 018818, in

his favour for Rs. 4 lakhs which he deposited in his bank, Bank of India. He also deposed that the accused-petitioner had handed over him the

cheque, filled up by himself, in his house. On that date itself, he was informed by the Bank that the cheque was dishonoured which he intimated to

the accused-petitioner verbally, and thereafter, issued a legal notice on 30.03.2009. He has exhibited the cheque in question vide Ext-1. Ext-3 is

the letter of information indicating the reason for dishonor of the cheque.

11. It deserves to be mentioned here that, at para 4 of the complaint petition itself, the complainant/respondent No. 2 stated that the accused-

petitioner had given him the cheque in the house of the accused-petitioner when

he visited his house, and in his evidence on oath, he has stated that the accused-petitioner handed over the cheque to him in his house (complainant's house). Thereafter, vide Ext-5, the accused-petitioner replied to the legal notice. In the legal notice, Ext-4, in paras 4 and 5, the complainant/respondent No. 2 claimed as follows:-

4. That during the period of said Tata Sumo business you through my clients said son Raju Mani Patgiri help had taken Rs. 55,000/- on

30.09.2008 and Rs. 60,000/- on 24.12.2008 for BSNL Tower Work and told my client that my client said son will be involved on the said work

and the profit will be divided equally. That my client and his son somehow give you the said money and in security you issued two numbers of Self

Cheque to my client. That you take more Rupees without the above mentioned amount and in all total you totally received an amount of

Rs.4,00,000/- (four lakhs) from my client.

5. That on 27th January, 2009 my client asked you to pay the total balance money amounting to Rs. 4,00,000/- (four lakhs) only but you asked

my client that within a short period you will refund back the said all total Rs. 4,00,000/- (four lakhs) but after that you not refund back the total

money Rs. 4,00,000/- (four lakhs). That my client on the several occasions himself and with his son Raju Mani Patgiri visits you for the said money

but in all the time you refund back with empty hands my client without showing any cause.

12. It appears from the contents of para 4 of the legal notice (Ext-4) that the complainant-respondent No. 2 claimed that the accused-petitioner

has taken, through his son Raju Mani Patgiri, an amount of Rs. 55,000/- and another amount of Rs. 60,000/- on 30.09.2008 and 24.12.2008

respectively, and as a security for the said money, the accused-petitioner issued two cheques to the complainant/respondent No. 2. In para 5 of

Ext-4, it has been clearly stated that the complainant/respondent No. 2 asked the accused-petitioner to pay the total balance money amounting to

Rs. 4 lakhs. In para 6 of the said legal notice, issuance of the cheque for Rs. 4 lakhs by the accused-petitioner has been claimed by the

complainant/respondent No. 2, vide the cheque involved in this case.

13. In response to the said legal notice, the accused-petitioner replied that he received financial help of Rs. 1,15,000/- only and it was decided that

the said amount will be refunded within the period from 24.01.2008 to 15.06.2008 and part payment thereof will be made every month to the complainant/respondent No. 2. Receipt of part-payment has also been acknowledged by the complainant/respondent No. 2 by issuing receipts therefor. The claim of the complainant/respondent No. 2 for Rs. 4 lakhs has been denied by the accused-petitioner. He has also denied the fact that he issued the cheque in question to him.

14. The PW2, Raju Mani Patgiri, who is the son of the complainant/respondent No. 2, has deposed in tune with PW1, his father, in respect of the facts, with the only deviation that he claimed that he was present with his father/PW1 when the accused-petitioner handed over the cheque to him, which fact has not been stated by the PW1/complainant/respondent No. 2 himself in his evidence.

15. The evidence of PW3, who is the Officer of the Central Bank of the concerned branch is that, on 17.03.2009, cheque no. 018818 for Rs. 4

lakhs was presented from the Bongaigaon branch of the Bank of India for clearing. But on that date, the account of the accused-petitioner did not

have that much of amount, and therefore, the cheque could not be cleared due to insufficient fund and the cheque was returned on the ground of

insufficient fund in the account of the accused-petitioner. He has exhibited the return memo, vide Ext-3. In his cross-examination, he has admitted

that he joined the Bongaigaon branch of the Central Bank on 01.12.2009. The account no. 3753/2011 of the accused-petitioner was closed on

11.12.2009 as there was no minimum balance in the said account. He has admitted that Ext-"Ka" is the account statement, dated 28.08.2009, of

the accused-petitioner in respect of his account no. 3753, aforesaid. He also admitted that Ext-"Ka" is same as that of Ext-7. Ext- Ka was written

by his predecessor with his handwriting to the effect that the account was closed on 17.10.2008. The relevant cheque was, admittedly,

dishonoured on 17.03.2009 after 5 (five) months of the date of closure, as per the statement Ext-"Ka". According to him, as per the current

statement, Ext-7, the account was closed on 11.12.2009. He has also admitted, in his cross-examination, that his predecessor closed the account

following necessary rules and regulations. He has also admitted that in Ext-Ka there is a note ""stop payment"" and ""balance zero"" was not written on

it but admitted that the account was closed as the balance was low. As per Ext-"Ka", the accused-petitioner could not operate his account after

17.10.2008. But, the PW3 has admitted, in his evidence, that he could not say, from the record, as to what for payment of the cheque was

stopped, and rather, the PW3 has expressed his ignorance as to why the payment of the cheque was stopped. He has also expressed his

ignorance about lodging of any information with the Police by the accused petitioner about the loss of his cheque looks.

16. PW7 is the Branch Manager of the Bank of India, Bongaigaon branch, who has proved the dishonor of the cheque in question which was

deposited in his bank on 17. 03.2009.

17. The demand of payment of Rs. 4 lakhs, vide legal notice marked as Ext-4, by the complainant/respondent No. 2 from the accused-petitioner

and the response to the said notice, vide Ext-5, by the accused-petitioner show that the accused-petitioner admitted his liability for payment of Rs.

1,15,000/- and he denied his liability for payment of Rs. 4 lakhs, and according to him, during the period specified for payment of said Rs.

1,15,000/- as agreed between them, the complainant/respondent No. 2 acknowledged receipt of some amount. It appears from the evidence on

record, as indicated above, that the complainant/respondent No. 2 has claimed in his petition that in discharge of liability the accused-petitioner

issued a cheque, vide Ext-1.

18. Learned counsel for the accused-petitioner, referring to the following judgments of the Hon"ble Supreme Court, namely, (1) Krishna

Janardhan Bhat -vs- Dattatraya G Hegde, reported in (2008) 4 SCC 54, (2) Vishnu Dutt Sharma -vs- Daya Sapra (Smt), reported in (2009) 13

SCC 729, (3) Vijay -vs- Laxman and Anr., reported in (2013) 3 SCC 86, and (4) Rangappa -vs- Sri Mohan, reported in (2010) 11 SCC 441,

has pressed upon the Court that presumption under Sections 118 and 139 of the NI Act is in favour of the accused-petitioner since he is the

holder of the cheque and the accused-petitioner has not denied his signature. In para 4 of the legal notice, marked as Ext-4, the claim of the

respondent No. 2/complainant appears to be that the accused-petitioner had taken Rs. 4 lakhs, in total, which included an amount of Rs. 55,000/-

and Rs. 60,000/- given to him by the complainant/respondent No. 2 on

30.09.2008 and 24.12.2008 respectively, stating further that the accused-petitioner received the amount of Rs. 4 lakhs from the complainant/respondent No. 2. As such, if the statement in para 4 of the Ext-4 is correct then the complainant/respondent No. 2 did not give Rs. 4 lakhs, as claimed, on 24.12.2008, rather, as per the legal notice, vide Ext-4, Rs. 60,000/- was only given on that day, and therefore, the statement in the legal notice, which is part of the evidence, being Ext-4, clearly shows that as against the payment of Rs. 55,000/- and Rs. 60,000/- respectively, two cheques were issued as security by the accused-petitioner to him, and therefore, the accused-petitioner could not have issued another cheque of Rs. 4 lakhs, as the claim itself, as per Ext-4, is that Rs. 4 lakhs consists of the aforesaid amount of Rs. 55,000/- and Rs. 60,000/- respectively. That apart, the burden is heavily upon the complainant/respondent No. 2 to show that he had required funds for giving an amount of Rs. 4 lakhs to the accused-petitioner.

19. In this context, learned counsel for the petitioner has referred to the decision of the Hon"ble Supreme Court in the case of John K. Abraham - vs- Simon C. Abraham and another, reported in (2014) 2 SCC 236 and particularly, paragraph-9 thereof. Paragraph-9 of the aforesaid decision is reproduced below for convenience.

9. It has to be stated that in order to draw the presumption under Section 118 read along with 139 of the Negotiable Instruments Act, the burden was heavily upon the complainant to have shown that he had required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced was true and that the accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant.

20. In the instant case, the complainant/respondent No. 2 stated in his evidence to the effect that he collected Rs. 4 lakhs from his three bank accounts and gave the same to the accused-petitioner. But, in his cross-examination he has not been able to produce the account details and he has also not led any evidence to show that he had the required fund of Rs. 4 lakhs to give the same to the accused-petitioner. He has also not led any evidence to show that he had really drawn Rs. 4 lakhs from his such accounts.

21. That apart, the complainant/respondent No. 2 has also not discharged his burden of existence of a legally enforceable debt, and if he fails to do

so, merely because he is a holder of a cheque allegedly issued by the accused-petitioner, conviction of the accused will not be warranted. In this

context, the decision of the Hon'ble Supreme Court in the case of Anjelus Topno vs Shree Kanta Sharma, reported in 2016 (3) GLT 474,

particularly, paragraph-14 thereof, which reads as follows, can be usefully referred to:-

14. Reading of Sections 138 and 139 of the N.I. Act goes to show that out of the three ingredients comprising Section 138, a presumption is

available in favour of holder of a cheque that the same had been issued for discharge of any debt or other liability under Section 139 of the N.I.

Act. Section 139 of the N.I. Act does not give rise to a presumption with regard to existence of legally enforceable debt. A complainant has to

discharge this burden of existence of a legally enforceable debt and if he fails to do so, merely because he is a holder of a cheque issued by the

accused, conviction of the accused will not be warranted.

22. In the instant case, the accused-petitioner has taken the stand that he did not issue the cheque in question. If, because of the signature of the

accused-petitioner in the cheque, the complainant/respondent No. 2 claimed that it was issued to him by the accusedpetitioner yet the

complainant/respondent No. 2 has to discharge his burden that there is a legally enforceable debt. Under Section 139 of the NI Act presumption is

in favour of the holder of the cheque about debt/ liability but it does not give rise to a presumption with regard to existence of a legally enforceable

debt. Now, as the evidence of the complainant/respondent No. 2, vide Ext-4, is that the cheque for Rs. 4 lakhs allegedly issued by the accused-

petitioner consists of the amount of Rs. 55,000/- and Rs. 60,000/-, indicated above, given by the complainant/respondent No. 2, on different

dates, to the accusedpetitioner can be accepted to be true in view of the admission of the accused-petitioner in his response to the legal notice,

vide Ext-5, to the effect that he owed an amount of Rs. 1,15,000/- to the complainant/respondent No. 2. In his cross-examination, the

complainant/PW1 categorically deposed that he had paid Rs. 4 lakhs on 24.12.2008. But, the contents of para 4 of Ext-4 makes it clear that on

24.12.2008, he paid an amount of Rs. 60,000/-. He has not claimed, in Ext-4, that he paid Rs. 4 lakhs to the accused-petitioner on 24.12.2008,

and rather, as regards the date of payment of Rs. 4 lakhs he is completely silent in Ext-4 and he only claimed, as aforesaid, payment of Rs.

60,000/- on that day. In the face of the denial of the accused-petitioner, the complainant/PW1 is required to prove payment of Rs. 4 lakhs. The

learned trial court, referring to the admission of the accused-petitioner made in his reply to the legal notice (Ext-4) vide Ext-5, held that the

business relationship between the complainant/PW1 and his son with the accused-petitioner has been established, and therefore, presumption

under Section 139 of the NI Act is in favour of the holder of the cheque, i.e., the complainant/PW1. The learned trial court, in the considered view

of this Court, misread such evidence to hold as above. Because, Rs. 1,15,000/- given to the accused-petitioner is admitted and that the

complainant gave an amount of Rs. 4 lakhs has been denied in the Ext-5. When taking Rs. 1,15,000/- is claimed by the complainant and admitted

by the accused-petitioner in the legal notice and the reply thereto, the reply cannot be read as admitting obtaining an amount of Rs. 4 lakhs also,

particularly when, the complainant himself has not claimed, as per the legal notice, Ext-4, that on 24.12.2008, he extended financial help of Rs. 4

lakhs. He is specific, in Ext-4, as to the amount of financial help he extended to the accused-petitioner on 24.12.2008. Therefore, the presumption

drawn by the learned trial court in respect of issuance of the cheque for Rs. 4 lakhs by the accused-petitioner cannot be said to have been based on

materials on record. In respect of Rs. 1,15,000/-, referred to above, the admission of the accused-petitioner, made in Ext-5, has been taken into

consideration by the learned trial court. The evidence of the complainant/PW1 himself is that he lent the said amount on 30.09.2008 and

24.12.2008. But, vide Ext-5, the reply to the legal notice, the accused-petitioner said that there was an agreement to repay the said Rs. 1,15,000/-

in installment during the period from 24.01.2008 to 15.06.2008. This fact has not been disputed by the complainant, particularly, as regards the

period within which Rs. 1,15,000/- was to be repaid. If it is so, how the period for return of the said amount be prior to the date of lending that

amount? Such facts, rather, put the burden on the complainant to prove lending of Rs. 4 lakhs to the accused-petitioner beyond all reasonable

doubt and the complainant/PW1 has not been able to do so. On the other hand, as discussed above, this Rs. 1,15,000/- is included in Rs. 4 lakhs

as per Ext-4 which means that Rs. 4 lakhs, as claimed, was not given by the complainant/respondent No. 2 to the accused-petitioner. Therefore,

the complainant/respondent No. 2 has failed to discharge his burden that the said cheque was issued against any legally enforceable debt where the

amount of the alleged debt/liability itself is doubtful as appears from the discussions above and also due to the fact that the complainant/respondent

No. 2 has not been able to prove that he had sufficient fund to lend to the accused-petitioner, as claimed.

23. On the other hand, as provided in Section 138 NI Act the cheque has to be returned unpaid, either because of the amount of money standing

to the credit of the account of the accused-petitioner as insufficient to honour the same or that it exceeds the amount to be paid from the account.

On satisfaction of one of these two grounds, the accused-petitioner can be held to be guilty. In the instant case, although the cheque was returned

due to "insufficient fund" yet during the cross-examination, the PW3, the Branch Manager of the concerned bank, has admitted that vide Ext-"Ka",

the account of the accused-petitioner was closed on 17.10.2008 by his predecessor whose handwriting and signature he has proved. But, he has

also deposed that as per Ext-7, the account was closed on 11.12.2009. So, there are two versions of the PW3/the concerned Branch Manager of

the bank. He has admitted the Ext-"Ka" to have been issued by his bank after observing rules and regulations and at the same time claims the Ext-

7 also to have been issued by him to be correct. So, the account cannot be closed on two dates and there is nothing in the record to show that

Ext-"Ka" cannot be acted upon, for any reason, the same being admittedly a document issued by the bank itself/as stated to by the PW3, and if

the same is accepted that on the date of presentation of the cheque, i.e., 17.03.2009, the cheque could not have been dishonoured due to

insufficient fund as the account was closed on 17.08.2008, this principal ingredient of the provisions of Section 138 of the NI Act is as found to

have not been proved by the complainant-respondent No. 2. That apart, the evidence of PW3, in the considered view of this Court, cannot be

accepted to be true so far the closure of the account is concerned as both the Ext-"Ka" and Ext-7 are admitted by him to have been issued by his

bank and as both contradict each other in respect of the date of closure of the account of the accused-petitioner.

24. For the above view, in the considered view of this Court, judgment of the learned trial court as well as the learned appellate court appears to

be incorrect in view of the evidence on record as the material aspects of the evidence, mentioned during the discussions above, have not been

taken into consideration by the learned trial court and had such evidence been taken into consideration the accused-petitioner would have been

entitled to an order of acquittal on benefit of doubt.

25. Therefore, the revision petition is allowed and the judgments of the learned trial court as well as the learned appellate court are set aside.

26. Send back the LCR along with a copy of this judgment.