

(2024) 05 GAU CK 0062
In the Gauhati High Court
Case No : Criminal Petition No. 9 Of 2024

Samsul Hoque Laskar

APPELLANT

Vs

Joy Kumar Saha

RESPONDENT

Date of Decision : 17-05-2024

Acts Referred:

Constitution Of India, 1950 — Article 21, 227
Code Of Criminal Procedure, 1973 — Section 243, 243(2), 482
Negotiable Instrument Act, 1881 — Section 138, 139

Citation : (2024) 05 GAU CK 0062

Hon'ble Judges : Robin Phukan, J

Bench : Single Bench

Advocate : M.H. Rajbarbhuiya, R. Chetri, S. Rasul, S.D. Purkayastha, S.S. Bora

Final Decision : Disposed Of

Judgement

1. Heard Mr. M.H. Rajbarbhuiya, learned counsel for the petitioner and also heard Mr. S.D. Purkayastha, learned counsel for the respondent.

2. In this petition, under Section 482 Cr.P.C. read with Article 227 of the Constitution of India, the petitioner has put to challenge the judgment and order, dated 23.11.2023, passed by the learned Additional Sessions Judge (FTC), Cachar, Silchar, in Criminal Revision No.79/2021. It is to be noted here that vide impugned judgment and order, dated 23.11.2023, the learned Court below has upheld the order, dated 30.10.2021 passed by the learned C.J.M., Cachar, Silchar, in N.I. Case No.191/2015. It is also to be noted here that vide impugned order, dated 30.10.2021, the learned C.J.M., Cachar, Silchar, in N.I. Case No.191/2015 has dismissed the petition under Section 243(2) of the Cr.P.C. filed by the petitioner for sending the cheque in question (Exhibit-1) to the handwriting expert.

3. The background facts leading to filing of the present petition, is briefly stated as under:-

"The petitioner was standing trial in N.I. Case No.191/2015, lodged by the respondent, in connection with dishonor of a cheque of Rs.10,00,000/- (Rupees ten lacs) allegedly issued by the present petitioner. While the trial of the said case was going on, the petitioner, who is an accused in the said case, had filed a petition, under Section 243(2) Cr.P.C., for sending the cheque in question, to the handwriting expert as he has not issued the same to the respondent. The ground of filing such petition before the learned C.J.M., Cachar, Silchar is that the petitioner has lost his saving passbook of his SBI account, bearing No.11033234178, and two numbers of cheque books and ATM card, while he was coming from his home to Silchar Town and to that effect he reported the matter to police, upon which the Officer-in-Charge, Silchar Police Station had recorded a G.D. Entry, No. 1186 dated 29.05.2013 and also issued a report thereto. Then, after hearing learned Advocates of both the parties and also considering the evidence of the PW-1, the respondent, the learned Chief Judicial Magistrate, Cachar, Silchar, has dismissed the petition on the ground that the petitioner has admitted his signature in the cheque in question and as such the statutory presumption is available in favour of the respondent.

Then, being aggrieved, the petitioner had preferred one revision petition, being Criminal Revision No.79/2021, before the Court of learned Additional Sessions Judge (FTC), Cachar, Silchar. Thereafter, hearing learned Advocates of both the parties, the learned Additional Sessions Judge (FTC), Cachar, Silchar, has dismissed the petition, vide impugned judgment and order, dated 23.11.2023, on the ground that the petitioner has admitted his signature in the cheque in question. The learned Additional Sessions Judge had also relied upon a decision of Hon'ble Supreme Court in the case of Bir Singh v. Mukesh Kumar, [Criminal Appeal No.230-231 of 2019 in SLP Nos.9334-35 of 2018.] in arriving at such a decision.

4. Being aggrieved, the petitioner approached this Court by filing the present petition for setting aside the impugned judgment and order, dated 23.11.2023, passed by the learned Additional Sessions Judge (FTC), Cachar, Silchar, in Criminal Revision No.79/2021 and also the order dated 30.10.2021, passed by the learned C.J.M., Cachar, Silchar, in N.I. Case No.191/2015, on the grounds mentioned herein below:-

(i) That, the learned Additional Sessions Judge as well as the learned C.J.M., Cachar, Silchar, committed gross illegality and injustice and passed the impugned judgments and orders without applying judicial mind.

(ii) That, the learned Courts below had failed to appreciate the fact that the SBI authority in the Annexure-2 dated 28.08.2015, has stated that the payment was stopped on the basis of information given by the petitioner about loss of the cheque, ATM and passbook and the respondent had manipulated the said cheque in question and fill up the date and amount by different pen and ink and committed forgery for the purpose of cheating by depositing the said cheque, which came to be dishonored and thereafter, instituted N.I. case in the year

2015, for wrongful gain.

(iii) That, the learned Courts below had failed to appreciate the fact that the petitioner is not acquainted with the opposite party and they have no any relation and he had noticed the opposite party for the first time in the Court of learned C.J.M., Cachar, Silchar.

(iv) That, the learned Court below also failed to consider the G.D. Entry No. 1186, dated 29.05.2013, which is annexed with the petition as Annexure-1.

(v) That, the learned Courts below also failed to take into account different decisions of the Apex Court and of High Court in respect of entertaining petitioner's application under Section 243(2) Cr.P.C. and the matter ought to have been referred for opinion of handwriting expert so as to enable the petitioner to lead the defence evidence.

(vi) That, the petitioner has been denied his legal right, his right to fair trial as guaranteed by Article 21 of the Constitution of India and also fair opportunity to prove his innocence in the said case.

4. Mr. Rajbarbhuiya, learned counsel for the petitioner reiterated the aforementioned grounds at the time of argument. Referring to several case laws of Hon'ble Supreme Court and also of this Court, Mr. Rajbarbhuiya submits that fair opportunity is denied to the petitioner to prove his innocence and as such, the right of the petitioner to fair trial is denied here in this case. Mr. Rajbarbhuiya also submits that the learned Addl. Session Judge, though relied upon the decision in *Bir Singh (supra)* in arriving at the finding, yet, said decision is not applicable in all force to the facts and circumstance herein this case in as much as here in this case the petitioner had never handed over the signed blank cheque to the respondent and that the pleaded case of the petitioner is that he had lost the cheque and he had reported the matter to police upon which one G.D. entry is recorded. Therefore, Mr. Rajbarbhuiya has contended to allow the petition. Mr. Rajbarbhuiya has also relied upon following case laws in support of his submission :-

(i) *Kalyani Baskar (Mrs.) v. M.S. Sampooram (Mrs.)*, reported in (2007) 2 SCC 258;

(ii) *T. Nagappa v. Y.R. Muralidhar*, reported in (2008) 5 SCC 633;

(iii) *Dip Bora v. State of Assam & Ors.*, reported in 2018 (1) GLT 127;

(iv) *Hanuman Sahay Sharma v. Manish Dhamani*, reported in 2013 CrL.L.J. 370.

5. Whereas, Mr. S.D. Purkayastha, learned counsel for the respondent has supported the impugned judgment and order passed by the learned Additional Sessions Judge(FTC), Cachar, Silchar, in Criminal Revision No.79/2021 and also the order dated 30.10.2021, passed by the learned C.J.M., Cachar, Silchar, in N.I. Case No.191/2015. Mr. Purkayastha submits that as the petitioner has admitted in his petition and also in his evidence that he put his signature in the cheque in

question and as such, presumption under Section 139 N.I. Act is available and both the Courts below had rightly pressed the same into service and as such, this criminal petition is devoid of merit and therefore, it is contended to dismiss the same. Mr. Purkayastha also referred to a decision of Hon'ble Supreme Court in *Oriental Bank of Commerce v. Prabodh Kumar Tewari*, reported in 2022 0 Supreme(SC) 837 in support of his submission.

6. Having heard the submission of learned Advocates of both the parties, I have carefully gone through the petition and the documents placed on record and also perused the impugned judgment and order, dated 23.11.2023, passed by the learned Additional Sessions Judge (FTC), Cachar, Silchar and also the order dated 30.10.2021, passed by the learned C.J.M., Cachar, Silchar, in N.I. Case No.191/2015, and also the petition under Section 243(2) Cr.P.C. filed by the present petitioner before the Court of learned Chief Judicial Magistrate, Cachar, Silchar.

7. It appears that the present petitioner is an accused in N.I. Case No.191/2015, under Section 138 of the N.I. Act, pending before the Court of learned C.J.M., Cachar, Silchar. Further, it appears that during the course of trial the petitioner had filed one petition, bearing No. 6309, dated 28.09.2018, before the Court of learned Chief Judicial Magistrate under Section 243(2) Cr.P.C. for passing an order for sending the Exhibit-1 i.e. the cheque in question, to the handwriting expert for obtaining handwriting expert's opinion so as to ensure fair trial and fair decision as well as for proper adjudication of the subject matter in dispute. It also appears that the petitioner, from the very beginning, has been taking a stand that he had lost two cheque books on 28.05.2013, which were issued against his SBI account No.11033234178, and he reported the matter to police, upon which the Officer-in-Charge, Silchar Police Station had recorded a G.D. Entry No. 1186, dated 29.05.2013, and also issued one report on 30.05.2013 and further it appears that he has denied the writing in the cheque in question.

8. It also appears from the cross-examination of the respondent, i.e. PW-1, that he had filled up the contents of the Exhibit-1, the cheque in question, except however, the signature thereon. This cross-examination of the respondent by the present petitioner, coupled with the contents of the petition under section 243(2) Cr.P.C. persuaded the learned Courts below in arriving at the finding that since the signature on the disputed cheque is admitted, the statutory presumption under section 139 of the N.I. Act is available. The learned Additional Sessions Judge also relied upon the decision of the Hon'ble Supreme Court in the case of *Bir Singh* (supra).

9. Further, it appears that the petitioner has all along denied having filled up the contents of the cheque in question. He categorically denied having any relation with the respondent and having acquaintance with him. He denied issuing and handing over the disputed cheque to the respondent. His stand is that he had lost two cheque books on 28.05.2013 and he had reported the matter to police and upon his reporting G.D. Entry No. 1186 dated 29.05.2013 has been

recorded. And after almost two years the respondent, having found the lost cheque manipulated the same for the purpose of cheating and lodged the false case to black mail him.

10. In the given factual scenario this court afraid, the ratio laid down in the case of Bir Singh (supra) is applicable in the case in hand. It is to be noted here that in the said case Hon'ble Supreme Court in para 36 has held that -

"36. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt."

11. It is to be noted here that here the petitioner had never handed over any signed cheque to the respondent not to speak of voluntarily. The element of voluntariness in signing and handing over the disputed cheque to the respondent is not there. Therefore, this court is of the view that the ratio laid down in the case of Bir Singh (supra) would not advance the case of the respondent and Mr. Rajbarbhuiya has rightly pointed this out at the time of hearing and I find substance in the same.

12. Whereas, in the case of Kalyani Baskar (Mrs.) (supra), Hon'ble Supreme Court has stated as under:-

"12. Section 243(2) is clear that a Magistrate holding an inquiry under CrPC in respect of an offence triable by him does not exceed his powers under Section 243(2) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a handwriting expert because even in adopting this course, the purpose is to enable the Magistrate to compare the disputed signature or writing with the admitted writing or signature of the accused and to reach his own conclusion with the assistance of the expert. The appellant is entitled to rebut the case of the respondent and if the document viz. the cheque on which the respondent has relied upon for initiating criminal proceedings against the appellant would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion of the handwriting expert has deprived the appellant of an opportunity of rebutting it. The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. "Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and the courts should be jealous in seeing that there is no breach of them. We have not been able to appreciate the view of the learned Judge of the High Court that the petitioner has filed application under Section 243 CrPC without naming any person as witness or anything to be summoned, which are to be sent for handwriting expert for examination. As noticed above, Section 243(2) CrPC

refers to a stage when the prosecution closes its evidence after examining the witnesses and the accused has entered upon his defence. The appellant in this case requests for sending the cheque in question, for the opinion of the handwriting expert after the respondent has closed her evidence, the Magistrate should have granted such a request unless he thinks that the object of the appellant is vexation or delaying the criminal proceedings. In the circumstances, the order of the High Court impugned in this appeal upholding the order of the Magistrate is erroneous and not sustainable.”

13. Same principle is echoed in the case of T. Nagappa (supra) referred by Mr. Rajbarbhuiya also. It is to be noted here that the presumption under section 139 of the N.I. Act is a rebuttable presumption. And to rebut such a presumption an opportunity is required to be given to the petitioner, in view of the principle discussed in the aforementioned two cases. It is also to be noted here that right to fair trial is a fundamental right as guaranteed by Article 21 of the Constitution of India. Fair trial, as held in the above noted cases, includes fair and proper opportunities allowed by law to prove his/her innocence. Adducing evidence in support of the defence is a valuable right. And denial of such right means denial of fair trial. And in the given factual scenario, this Court is of the view that a fair opportunity is required to be given to the petitioner to prove his case before the learned Court below. And on such count the cheque in question is required to be sent to the handwriting expert to ascertain whether the respondent herein had filled up the contents of the cheque or not.

14. Thus, having examined the impugned judgment and order so passed by the learned Additional Sessions Judge (FTC), Cachar, Silchar, in Criminal Revision No.79/2021 and also the impugned order passed by the learned Chief Judicial Magistrate, Cachar, Silchar, in N.I. Case No.191/2015, in the light of aforementioned proposition of law, this Court is of the view that the same failed to withstand the test of legal scrutiny and as such, the same requires interference of this Court.

15. Thus, I find sufficient merit in the submission of Mr. Rajbarbhuiya, learned counsel for the petitioner and the case laws, discussed herein above and also the other case law, referred by him also fortified his submission.

16. I have also considered the submission of Mr. S.D. Purkayastha the learned counsel for the respondent and also gone through the case law, Oriental Bank of Commerce (supra) referred by him. But, it appears that in the said case, the decision in Kalyani Baskar (Mrs.) (supra) and T. Nagappa (supra) have never been referred to and taken into account. It is to be noted here that the decisions in Kalyani Baskar (Mrs.) (supra) and T. Nagappa (supra) are earlier in point of time and the strength of the Bench is also same in all the three decisions. Being so, and also, in view of decision of Constitutional Bench of Hon’ble Supreme Court in the case of National Insurance Company Limited vs. Pranay Sethi reported in (2017) 16 SCC 680, the decision in Oriental Bank of Commerce (supra) may not be available as precedent. That being so, it would not advance

the case of the respondent.

17. In the result, I find sufficient merit in this petition and accordingly, the same stands allowed. The impugned judgment and order dated 23.11.2023, passed by the learned Additional Sessions Judge (FTC), Cachar, Silchar, in Criminal Revision No.79/2021, as well as the impugned order dated 30.10.2021, passed by the learned C.J.M., Cachar, Silchar, in N.I. Case No.191/2015, are set aside and quashed. It is provided that the learned Chief Judicial Magistrate, Cachar, Silchar, shall forward the Exhibit-1, the cheque in question to the handwriting expert for examination and opinion, and to obtain a report to that effect and thereafter, proceed to hear the case.

18. In terms of above, this criminal petition stands disposed of.