IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE
SONITPUR AT TEZPUR

PRESENT : SRI S. DAS
ADDITIONAL SESSIONS JUDGE
SONITPUR, TEZPUR

CRIMINAL APPEAL NO. 31 (S-4) OF 2013

Sri Mukut Patangia, ... **Appellant**
S/O- Late Dambaru Patangia
Resident of Kora Namghar,
Da-Parbatia,
P.O. & P.S. Tezpur,
District- Sonitpur, Assam.

-VERSUS-

1. Md. Sarfaraz Alkama Hussain @ Panna,
S/O- Hazi Noor Hussain,
Resident of Nepalipatty,
Ward No. 13,
P.O. & P.S. Tezpur,
District – Sonitpur, Assam. ..... **Respondent**

2. State of Assam ..... **Respondent**
(Represented by Public Prosecutor, Sonitpur, Tezpur)

APPEARANCE

For the Appellant : Sri Sumitra Borthakur, Advocate

For the respondent : Sri Sudesh Kr. Singh, Advocate.

For the State : Smti. Ranjana Chakravorty, Addl. P.P.

11-5-15
Sessions Judge

Date of Argument : 28-04-2015

Date of Judgement : 11-05-2015

JUDGEMENT

This criminal appeal has been preferred u/s 374 of Cr.P.C. against the Judgement and order dated 25-09-2013 copy which was supplied and delivered on 27-09-2013 to the accused person passed by the Ld. Judicial Magistrate, Sonitpur, Tezpur in G.R. Case No. 357/2010 under section 138 of Negotiable Instrument Act 1881 sentencing the appellants to pay fine of Rs. 70,000/- ((Rupees Seventy Thousand) only under Section 138 of N.I. Act, 1881.

The facts necessary leading to filing of this appeal are as follows :

The case of prosecution, in brief, is that accused Sri Mukut Patangia approached complainant Sarfaraj Alkama, for a loan of Rs. 70,000/- on the first week of December, 2009 and on basis of their long standing relationship, requested him for some money, required by him for his treatment. Complainant accordingly handed over Rs. 70,000/- (Rupees seventy thousand only) to him, and the latter promised to repay the same in the last week of March, 2010.

The accused approached the complainant on 25-03-10, requesting him to repay the loan amount of Rs. 70,000/-. The accused person with a view to repay the loan, amount gave the complainant a cheque bearing bearing no. 891036 dated 25-03-10 for Rs. 70,000/- only, drawn on HDFC Bank Ltd, Guwahati, GS Road, Branch with a request to deposit the said cheque on or after the 1st day of May, 2010. Complainant deposited the said cheque on 05-05-10 in HDFC Bank, Tezpur for encashment, but the same was returned by the HDFC Bank, due to insufficient fund with a memo of declaration on 05-05-10.

The complainant, thereafter, issued legal notice to the accused person on 10-05-10 through his Adcocate Sri Sudesh Singh, to repay the debt amount of rupees seventy thousand but the accused person failed to pay the said amount within the stipulated period of fifteen days. Complainant, Sarfaraz Alkama Hussain, therefore, failed a complaint petition before the Ld. CJM, on 09-06-10 u/s 138 of the Negotiable Instruments Act, and hence, the incident case.

Bring aggrieved and dissatisfied with impugned Judgement dated 25-09-2013 passed by Learned Judicial Magistrate, 1st class, Tezpur in C.R. Case No. 357/10

under section 138 of N.I. Act, humble petitioner begs to prefer this appeal on the following amongst other grounds :

GROUNDS

i) The impugned Judgement and Order of Learned Trial Court below is against law, equity and fact and on case law.

ii) The Learned Judicial Magistrate did not apply her mind judiciously in convicting and sentencing the appellant, hence the same is liable to be set aside.

iii) The Learned Trial Court below failed to give detailed reason for decision in impugned Judgement as required under Section 354 (i) (b) of Cr.P.C.

iv) The prosecution has failed to prove legally enforceable debt as required to prove its case, Hence the impugned Judgement is liable to be set aside.

v) The complainant himself admitted in his cross examination that he put his own home in writing in the alleged cheque. The Learned Trial Court committed mistake in sentencing the appellant to pay fine. Hence liable to be set aside.

vi) The alleged cheque was not cross cheque as required Section 269 of Indian Income Tax Act. So Learned Trial Court ought not to sentencving the appellant.

vii) The appellant fully all to prove that there is no legally enforceable date. The said burden is not heavy on appellant in negotiable Instrument Act Case. A standard of proof is preponderance of probability. And accused/ appellant able to raise probable defence.

viii) The prosecution deliberately withhold the witness of Bank Official as non-examination of Bank official bring adverse inference against the complainant.

11-5-15

I have gone through the evidence on record. I have also perused the impugned judgement and the grounds cited in the memo of appeal. I have also heard argument of both sides.

Decision & Reasons thereof :

PW 1 is the complainant, in his complaint as well as evidence stated that the accused approached the complainant on 25-03-10, requesting him to repay the loan amount of Rs. 70,000/-. The accused person with a view to repay the loan, amount gave the complainant a cheque bearing no. 891036 dated 25-03-10 for Rs. 70,000/- only, drawn on HDFC Bank Ltd, Guwahati, GS Road, Branch with a request to deposit the said cheque on or after the 1st day of May, 2010. Complainant deposited

the said cheque on 05-05-10 in HDFC Bank, Tezpur for encashment, but the same was returned by the HDFC Bank, due to insufficient fund with a memo of declaration on 05-05-10.

PW 1 denied defence suggestion that he did not give Rs. 70,000/- in cash to the accused.

He also stated that on 25-03-2010 accused gave the cheque but there was no agreement between them. He also stated that he has not produced any document from bank to prove payment Rs. 70,000/-

He also denied that he got a lost cheque.

He also stated that the accused got no business transaction with the accused.

When examined u/s 313 Cr.P.C. accused simply denied that he issued the cheque in favour of the complainant. He also stated that the complainant in connivance with his driver might have stolen the said cheque from his bag and misused it and filed this false complaint.

The complainant has produced and exhibited the following documents in support of his case :

i. Ext- 1 is the Cheque No. 891036 dated 25/03/2010 issed by the accused. Ext-1(1) & 1(2) are his signature.
ii. Ext- 2 – Deposit slip dated 05-05-10
iii. Ext- 3 Cheque returning memo issued by HDFC, Bank Tezpur Branch, dated 05-05-10.
iv. Ext- 4 is the copy of the notice dated 10-05-20 issued on the accused by Sri Sudesh Kr. Singh, Advocate wherein Ext- 4(1) is his signature which he know.
v. Ext- 5 is Postal Receipt dated 11-05-10 No. RLAD E 2414.
vi. Ext- 6 is the letter dated 24-05-10 written by his advocate to the Department of Post. Ext- 6 (1) is signature of his advocate.
vii. Ext- 7 is the Report dated 01-06-10 of the Department of Post.

Before i come to any conclusion in this case I may look at the ingredients of Sec. 138 of N.I. Act

(i) That there is a legally enforceable debt.

(ii) That the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and,

(iii) That the cheque so issued had been returned due to insufficiency of funds.

I have carefully analysed the materials on record. I find that in the instant case from the materials on record it emerges as follows :

1. The complainant has been able to prove by adducing cogent evidence that the accused received an amount of Rs. 70,000/- from him as loan.
2. There is no denying the fact that the complainant holds the cheque issued by the accused.
3. It is also palpable from the evidence on record that the cheque in question was refused by the concerned bank due to insufficient fund.
4. Defendant has not denied his signature in the cheque.
5. Plea of accused that the cheque in question was lost and fell in the hands of complainant is not acceptable in as much as the accused failed to bring on record any circumstances to disprove the claim of the complainant.

Here I may refer to the observation made in the case of Rangapa Vs. Sri Mohan CRI.L.J. 2871 as regards presumption and Rebuttal as envisaged u/s 138/139 and 118 (a) of N. I. Act. In the said Judgement the observation made in the following cases were referred which is re-produced below :

In **Hiten P. Dalal v. Bratindranath Banerjee, (2001) 6 SCC 16**, it was held (Ruma Pal, J. at Paras. 22-23):

11-5-15

"22. Because both Sections 138 and 139 require that the Court 'shall presume' the liability of the drawer of the cheques for the amounts for which the cheques are drawn, ..., it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption has been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused (...). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court may presume a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable probability of the non-existence of the presumed fact. 23. In other words, provided the facts required to form the basis of a

presumption of law exists, the discretion is left with the Court to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man."

In **Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm & Ors., 2008 (8) SCALE 680**, wherein it was observed:

"Under Section 118(a) of the Negotiable Instruments Act, the court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the Court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal. ..."

So, having regard to the facts and principles laid down/ observation made in the above referred cases I find that complainant has been able to bring home the charge u/s 138 of N.I. Act against the accused.

I find that the Ld. Court below rightly come to its finding holding the accused guilty u/s 138 of N.I. Act. As such the Order of conviction passed by Ld. Court below is hereby affirmed.

I find no merit in the appeal. Accordingly, appeal stands dismissed on contest without cost.

Given under my hand and seal of this court on this 11th day of May 2015.

(**S. DAS**)
11-5-15
Additional District & Sessions Judge,
Sonitpur :: Tezpur