

DON AYENGIA

v.

THE STATE OF ASSAM & ANR.

(Criminal Appeal Nos. 82-83 of 2016)

JANUARY 28, 2016

[T.S. THAKUR, CJI AND KURIAN JOSEPH, J.]

*Negotiable Instruments Act, 1881: s.138 – Dishonour of cheque – Complainant entered into an agreement for construction of building with one 'N' and paid him Rs.10 lakhs – Agreement did not materialise and was cancelled in terms of promissory note executed by 'N' in favour of complainant – Promissory note stipulated promise to pay Rs.10 lakhs within one month and further the clause that the amount was being refunded by the executant in terms of five post dated cheques – Promissory note further stipulated that the cheques were being issued as a security and shall be returned to 'N' when the amount of Rs.10 lakhs is paid by him within a period of one month – Interest was also promised to be paid on Rs.10 lakhs – Payment not made within the prescribed time – Presentation of cheques after expiry of period of one month – Dishonour of cheques – Respondent no.2 appeared at this stage and indemnified the complainant by acknowledging that the cheques in question were actually issued by him and handed over to 'N' – Cheques were again presented and got dishonoured – Complaint against respondent no.2 and 'N' – 'N' expired meanwhile – Trial court found respondent no.2 guilty – High Court set aside the conviction – Held: The promissory note executed by 'N' contained an unequivocal acknowledgment of not only the debt/liability but promised to liquidate the same within one month with interest at the bank rate – Five cheques handed over were to be returned but only upon payment of the amount in question – Such being the fact situation, it cannot be said that the cheques had nothing to do with any debt or other liability – Thus, there was direct relationship between the liability and the cheques issued in connection therewith – The endorsement made by the respondent on the promissory note that the cheques can be presented for encashment after a month clearly shows that the cheques issued by him were not ornamental but were meant to*

- A *be presented if the amount in question was not paid within the extended period – High Court fell in error in upsetting the conviction recorded by the Courts below.*

**Disposing of the appeals, the Court**

- B **HELD: 1. The execution of the Promissory Note and the endorsement made by the Respondent was satisfactorily proved at the trial. Concurrent findings recorded by the trial court and the first appellate court to that effect conclude the factual part of the controversy. The only question that survives in the above background is whether the cheques issued by the Respondent**
- C **were meant to discharge, in whole or part, “any debt or other liability” within the meaning of Section 138 of the Negotiable Instruments Act, 1881. The facts showed that ‘N’ had received Rs. 10 lakhs from the complainant in connection with the agreement executed between the two. That upon termination of the agreement, the amount paid to ‘N’ was refundable to the**
- D **complainant and that ‘N’ had agreed to refund the same within one month. The promissory note executed by ‘N’ contained an unequivocal acknowledgment of not only the debt/liability aforementioned but promised to liquidate the same within one month with interest at the bank rate. Five cheques handed over**
- E **were to be returned but only upon payment of the amount in question. Such being the fact situation, it cannot be said that the cheques had nothing to do with any debt or other liability. The cheques were post dated, only to give to the drawer the specified one month’s time to pay the amount. There is thus a direct relationship between the liability and the cheques issued in**
- F **connection therewith. Thus far there is no difficulty. The difficulty arises only because the promissory note uses the words “security” qua the cheques. This would ordinarily and in the context in which the cheques were given imply that once the amount of Rs. 10 lakhs was paid, the cheques shall have to be returned. There**
- G **would be no reason for their retention by the complainant or for their presentation. In case, however, the amount was not paid within the period stipulated, the cheques were liable to be presented for otherwise there was no logic or reason for their having been issued and handed over in the first instance. If non-payment of the agreed debt/liability within the time specified also**

H

did not entitle the holder to present the cheques for payment, the issue and delivery of any such cheques would be meaningless and futile if not absurd. It was not a case where no debt or liability was determined or acknowledged to be payable. If cheques were issued in relation to a continuing contract or business where no claim is made on the date of the issue nor any determinate amount payable to the holder, one could perhaps argue that the cheques cannot be presented or prosecution launched on a unilateral claim of any debt or liability. The present is, however, a case where the existence of the debt/liability was never in dispute. It was on the contrary acknowledged and a promise was made to liquidate the same within one month. Failure on the part of the debtor to do so could lead to only one result, viz. presentation of the cheques for payment and in the event of dishonour, launch of prosecution as has indeed happened in the case at hand. The endorsement made by the respondent on the promissory note that the cheques can be presented for encashment after 25-09-2007 clearly shows that the cheques issued by him were not ornamental but were meant to be presented if the amount in question was not paid within the extended period. The High Court fell in error in upsetting the conviction recorded by the Courts below. [Paras 10 to 12] [411-B-H; 412-A-E]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 82-83 of 2016

From the Order dated 02-04-2014 by the Gauhati High Court at Gauhati in Criminal Appeal No. 10 of 2012 and Crl. Rev. Petition No. 41 of 2012

Parthiv K. Goswami, Yashuwardhan Singh, Diksha Rai, for the Appellants.

Navnit Kumar, Apeksha Saran, M/s. Corporate Law Group, Manoj Goel, Shuvodeep Roy, for the Respondents.

The Judgment of the Court was delivered by

**T.S. THAKUR, CJI.** 1. Leave granted.

2. These appeals arise out of a judgment and order dated 2<sup>nd</sup> April, 2014 passed by the High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh at Guwahati in Criminal Appeal No.10 and

A Criminal Revision No.41 both of the year 2012 whereby the High Court has allowed the Criminal Revision No.41 of 2012 and set aside the conviction of respondent Haren Mudoj under Section 138 of the Negotiable Instruments Act, 1881 and dismissed Criminal Appeal No.10 of 2012 filed by the Complainant/Appellant.

B 3. The Complainant/Appellant in these appeals is a partner in M/s. Ayaan Consortium. He entered into an agreement with one Nazimul Islam for construction of a multi-storeyed building over a certain parcel of land. It is not in dispute that the Complainant/Appellant paid to Nazimul Islam in connection with the said agreement a sum of Rs.10,00,000/- (Rupees Ten Lakhs only). It is also not in dispute that the agreement did not materialise in the execution of the work in question with the result that the same was cancelled in terms of a Promissory Note dated 13<sup>th</sup> August, 2007 executed by Nazimul Islam in favour of the Complainant/Appellant. The Promissory Note, apart from cancelling the agreement, promised to pay to the Complainant/Appellant the amount of Rs.10,00,000/-  
C  
D - received by the executant Nazimul Islam within a period of one month from the date the Promissory Note was executed. What is important is that the Promissory Note further stipulated that the amount of Rs.10,00,000/- was being refunded by the executant in terms of five post-dated cheques dated 5<sup>th</sup> September, 2007, 7<sup>th</sup> September, 2007, 9<sup>th</sup> September, 2007, 11<sup>th</sup> September, 2007 and 13<sup>th</sup> September, 2007, the receipt whereof was acknowledged by the Complainant/Appellant. The Promissory Note, at the same time, somewhat contradicted itself when it mentioned that the cheques were being issued as a security and shall be returned to Nazimul Islam when the amount of Rs.10,00,000/- is paid by him within a period of one month. Interest at the bank rates was also  
E  
F promised to be paid on the said amount of Rs.10,00,000/-.

4. The cheques so received by the Complainant/Appellant appear to have been presented for payment after the expiry of the period of one month stipulated for the return of the amount when no such return was made to the Complainant/Appellant. All the cheques were, however,  
G dishonoured by the bank on the ground of insufficiency of funds. A second presentation also proved abortive for the same reason. It was at this stage that Respondent No.2-Haren Mudoj appeared on the scene and indemnified the Complainant/Appellant by acknowledging that the cheques in question were actually issued by him and handed over to Nazimul Islam. This acknowledgment was reflected in the form of an  
H

endorsement on the Promissory Note in which he agreed to the cheques being presented for payment after 25<sup>th</sup> September, 2007. The Complainant/Appellant accordingly once again presented the cheques for payment on 5<sup>th</sup> November, 2007 but the same were dishonoured by the bank for the third time. This led to the issue of a statutory notice by the Complainant/Appellant to which the Respondent sent a reply through the lawyer denying that he had any knowledge of handing over of all the cheques to the Complainant/Appellant by Nazimul Islam and also about the dishonour of the cheques due to insufficiency of funds. What is significant is that, in the reply, the Respondent undertook to pay the whole amount of Rs.10,00,000/- by the second week of January, 2008 by issuing fresh cheques.

5. A complaint under Section 138 of the Negotiable Instruments Act, 1881 was in the above backdrop filed by the appellant against both Nazimul Islam and Haren Mudoi. Since Nazimul Islam had, in the meantime, passed away, proceedings against him abated but the trial court found the Respondent guilty and accordingly convicted him for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him to undergo simple imprisonment for a period of one year. In addition, the trial court awarded compensation to the Complainant/Appellant in a sum of Rs.12,00,000/- to be paid within a period of three months.

6. Aggrieved by the judgment and order passed by the trial court, the Respondent preferred Criminal Appeal No.9 of 2010 before Additional Sessions Judge, Kamrup at Guwahati, who, while upholding the conviction of the Respondent modified the sentence awarded to him to payment of a fine of Rs.2,000/- (Rupees Two Thousand only) and, a default sentence of imprisonment for a period of one month, in addition to the amount of compensation awarded by the trial court. The sentence of imprisonment was, in that view, set aside by the appellate court.

7. Criminal Appeal No.10 of 2012 and Criminal Revision No.41 of 2012 were then filed before the High Court at Guwahati by the parties. While Criminal Appeal No.10 of 2012 was filed by the Complainant/Appellant, Criminal Revision No.41 of 2012 challenged the conviction of the Respondent by the trial court and affirmed by the Appellate Court for an offence under Section 138 of the Negotiable Instruments Act, 1881. The High Court has, as seen earlier, set aside the conviction of the Respondent and allowed Criminal Revision No.41 of 2012 while

- A dismissing Criminal Appeal No.10 of 2012 in terms of the judgment and order impugned in the present appeals.

8. We have heard learned counsel for the parties at some length who have taken us through the orders passed by the courts below. We may at the outset gainfully extract Promissory Note dated 13<sup>th</sup> August, 2007 executed by Nazimul Islam in favour of the complainant in which the deceased Nazimul Islam had acknowledged his liability to refund the amount of Rs.10,00,000/- received by him from the Complainant/Appellant in this appeal. The Promissory Note was in the following words:

• "PROMISSORY NOTE Dated 13.8.2007

C *I Shri Nazimul Islam s/o Late Sirajul Islam resident of Bishnu*  
*Rabha Path Beltola do hereby declare that after mutual*  
*discussion between us (the parties) as per agreement dated*  
*06/07/07 have decided to cancel the said agreement and as*  
D *such the advance amount of Rs.10,00,000/- (Rupees Ten Lakhs*  
*only) shall be refunded within a period of one month from*  
*today. The amount is being refunded vide cheques Nos.*  
*191254 dated 05.09.2007, 191255 dated 07.09.2007, 191256*  
*dated 09.09.2007, 191257 dated 11.09.2007 and cheque*  
*No.191258 dated 13.09.2007 which has been acknowledged*  
E *by Mr. Dhan Ayengia, resident of Nabagrah Road, Guwahati.*  
*It may here be mentioned that these cheques have been issued*  
*as a security and shall be returned to me as and when the*  
*payments are received from me, within the mentioned period.*  
*Further it may be also be mentioned that one month's bank*  
F *interest shall be paid by me, after the payment is cleared,*  
*within the stipulated period.*

(Nazimul Islam) 13.8.2007"

9. We may also extract, at this stage, the endorsement which the Respondent made on the Promissory Note acknowledging that the cheques handed over to the Complainant/Appellant herein were actually issued by him and agreeing that the same may be presented for payment after 25<sup>th</sup> September, 2007. The endorsement was in the following manner:

H *"The above cheques are issued by me to Nazimul Islam to*  
*deliver to Mr. Don Ayengia the cheques are already been*  
*bounce. Now, we have requested Mr. Dona Ayengia to*

*represent the cheques after 25.09.2007 to contact me.* A  
15.09.2007

(H.Mudoi)”

10. It is not in dispute that the execution of the Promissory Note and the endorsement made by the Respondent has been satisfactorily proved at the trial. Concurrent findings recorded by the trial court and the first appellate court to that effect conclude the factual part of the controversy. The only question that survives in the above background is whether the cheques issued by the Respondent were meant to discharge, in whole or part, “any debt or other liability” within the meaning of Section 138 of the Negotiable Instruments Act, 1881. B C

11. We have no hesitation in answering that question in the affirmative. The facts as narrated above and as held proved by the trial Court and the appellate court, leave no manner of doubt, that Nazimul Islam had received an amount of rupees ten lakhs from the complainant in connection with the agreement executed between the two. It is also not in dispute that upon termination of the agreement, the amount paid to Nazimul Islam was refundable to the complainant and that Nazimul Islam had agreed to refund the same within one month. The promissory note executed by Nazimul Islam contained an unequivocal acknowledgment of not only the debt/liability aforementioned but promised to liquidate the same within one month with interest at the bank rate. Five cheques handed over were to be returned but only upon payment of the amount in question. Such being the fact situation, it cannot be said that the cheques had nothing to do with any debt or other liability. As a matter of fact, the existence of the debt or liability was never in dispute. On the contrary, it was acknowledged by Nazimul Islam who simply sought one month’s time to pay up the amount. The cheques were post dated, only to give to the drawer the specified one month’s time to pay the amount. There is thus a direct relationship between the liability and the cheques issued in connection therewith. Thus far there is no difficulty. The difficulty arises only because the promissory note uses the words “security” *qua the cheques*. This would ordinarily and in the context in which the cheques were given imply that once the amount of rupees ten lakhs was paid, the cheques shall have to be returned. There would be no reason for their retention by the complainant or for their presentation. In case, however, the amount was not paid within the period stipulated, the cheques were liable to be presented for otherwise there was no logic or reason for D E F G H

- A their having been issued and handed over in the first instance. If non-payment of the agreed debt/liability within the time specified also did not entitle the holder to present the cheques for payment, the issue and delivery of any such cheques would be meaningless and futile if not absurd. It is important to note that it was not a case where no debt or
- B liability was determined or acknowledged to be payable. If cheques were issued in relation to a continuing contract or business where no claim is made on the date of the issue nor any determinate amount payable to the holder, one could perhaps argue that the cheques cannot be presented or prosecution launched on a unilateral claim of any debt or liability. The present is, however, a case where the existence of the
- C debt/liability was never in dispute. It was on the contrary acknowledged and a promise was made to liquidate the same within one month. Failure on the part of the debtor to do so could lead to only one result, viz. presentation of the cheques for payment and in the event of dishonour, launch of prosecution as has indeed happened in the case at hand.

- D 12. The argument that the respondent had no liability to liquidate the debt owed by Nazimul Islam, has not impressed us. What is important is whether the cheques were supported by consideration. Besides the fact that there is a presumption that a negotiable instrument is supported by consideration there was no dispute that such a consideration existed in as much as the cheques were issued in connection with the discharge
- E of the outstanding liability against Nazimul Islam. At any rate the endorsement made by the respondent on the promissory note that the cheques can be presented for encashment after 25-09-2007 clearly shows that the cheques issued by him were not ornamental but were meant to be presented if the amount in question was not paid within the extended
- F period. The High Court in our view fell in error in upsetting the conviction recorded by the Courts below who had correctly analysed the factual situation and applied the law applicable to the same.

- G 13. In the result, we allow these appeals and set aside the order passed by the High Court to the extent it allowed Criminal Revision No.41 of 2012 filed by the respondent. Consequently the order passed by the appellate court shall stand restored. We, however, do not see any reason to interfere with the order passed by the High Court to the extent it dismissed Criminal Appeal No.10 of 2012. No costs.

Devika Gujral

Appeals disposed of.

H