

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Revisional Jurisdiction)

DATED : 8th July, 2022

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.Rev.P. No.04 of 2020

Petitioner : Prahlad Sharma

versus

Respondents : Dipika Sharma and Another

Petition under Sections 397 and 401 read with
Section 482 of the Code of Criminal Procedure, 1973.

Appearance

Mr. Jorgay Namka and Mr. Simeon Subba, Advocates for the
Petitioner.

Mr. Bhusan Nepal, Advocate for the Respondent No.1.

Mr. Yadev Sharma, Additional Public Prosecutor with Mr. Sujan
Sunwar, Assistant Public Prosecutor for the Respondent No.2.

J U D G M E N T

Meenakshi Madan Rai, J.

1(i). The Petitioner assails the Judgment dated 20-06-2020, in Criminal Appeal Case No.01 of 2019 of the Court of Learned Sessions Judge, South Sikkim, at Namchi which upheld the Judgment of the Learned Chief Judicial Magistrate, South Sikkim, at Namchi in Private Complaint Case No.07 of 2018. The Learned Magistrate had convicted the Petitioner herein under Section 138 of the Negotiable Instruments Act, (for short, the "NI Act") 1881 and sentenced him to pay a fine of Rs.4,00,000/- (Rupees four lakhs) only, within a period of two months from 31-12-2018 with a default clause of imprisonment.

(ii) The facts briefly stated are that an Agreement for sale for a Flat situated at Siliguri, West Bengal belonging to the

Respondent No.1 (hereinafter, "R1"), to be purchased by the Petitioner was entered into between them on 02-06-2017, for a consideration amount of Rs.30,00,000/- (Rupees thirty lakhs) only. Towards this an advance of Rs.6,00,000/- (Rupees six lakhs) only, was paid by the Petitioner to R1 on 02-06-2017. It was agreed between the parties that the entire consideration amount was to be paid by the Petitioner to R1 within a period of three months from the date of agreement and the period for total payment would not exceed four months. In partial payment thereof, the Petitioner issued two account payee cheques of Rs.2,00,000/- (Rupees two lakhs) only, each, dated 19-01-2018 (Exhibit 1) and 22-01-2018 (Exhibit 2) respectively, in favour of R1 who presented the cheques to the State Bank of India, Namchi Branch, South Sikkim on 30-01-2018. Both the cheques came to be dishonoured by the Bank with the remark "insufficient fund". Pursuant thereto, R1 sent two Legal Notices, the first one dated 25-01-2018, being Exhibit 5, posted on 01-02-2018. Exhibit 10, the postal receipt indicated that the Notice Exhibit 5 was posted only on 01-02-2018. Exhibit 11, being the "track consignment" of the Notice. The second Notice, Exhibit 6, dated 08-02-2018, was sent on 09-02-2018, Exhibit 8 is the "track consignment" of the said Notice. According to R1, the Petitioner instead of paying the amounts of the dishonoured cheques responded to the Legal Notice, Exhibit 6, by his Notice Exhibit 9 dated 22-02-2018, contending that Exhibits 1 and 2 were dishonoured intentionally on his instructions to the Bank on account of the unilateral cancellation of the agreement between them by the R1, vide Exhibit 5.

2. The Learned Court of Chief Judicial Magistrate in its Judgment dated 31-12-2018, in Private Complaint Case No.07 of 2018, which was impugned before the Court of the Learned Sessions Judge, South Sikkim, at Namchi, *inter alia* observed that in terms of Section 4 of the Indian Contract Act, (for short, the "Contract Act") 1872, as to when communication is complete, the Section provides that a communication of revocation is complete against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it. Hence, the communication vide Exhibit 5 was not complete when the cheques bounced. That, the defence of the Petitioner herein, that the two cheques were returned unpaid on account of his instructions to the Bank to stop payment is belied by the fact that the Bank's return Memos Exhibits 3 and 4 stated "insufficient fund" and "not payment stopped by the drawer".

3(i). The Learned Magisterial Court also disbelieved the case of the Petitioner that the cheques were handed over by way of security and concluded that the accused had failed to rebut the presumption as enshrined in Section 139 of the NI Act and convicted the Petitioner herein vide Order on sentence dated 31-12-2018 which *inter alia* is extracted hereinbelow;

"4.
However, considering the financial condition of the convict, this Court deems it in the interest of justice to impose a sentence of fine of rupees 4,00,000/- (Rupees Four Lakhs only) to be paid to the Complainant within a period of 2 months from today. Further in case of failure to pay the amount, the convict shall be sentenced to simple imprisonment of 12 months."

The Learned Sessions Judge, South Sikkim, at Namchi in its impugned Judgment dated 20-06-2020 while upholding the

Judgment of the Learned Magisterial Court however did not discuss Section 4 of the Contract Act.

(ii) Before this Court, Learned Counsel for the Petitioner reiterated the argument that there was no legally enforceable debt by the Petitioner towards R1 when she presented the cheques Exhibits 1 and 2 as she had terminated the agreement between them by her Notice dated 25-01-2018. The cheques was presented before the Bank on 30-01-2018 post the termination of agreement on 25-01-2018. Besides the cheques were handed over to the R1 by way of future security. Hence, the Learned Courts below were in error in convicting the Petitioner.

4(i). *Per contra* Learned Counsel for the R1 contended that when the cheques were presented the agreement was not terminated in view of the fact that the Notice although dated 25-01-2018 was posted only on 01-02-2018, reliance was placed on ***Purna Kumar Gurung vs. Ankit Sarda***¹ and ***Sancha Bahadur Subba vs. Ramesh Sharma***² which deals with legal liability and on ***Kalamani Tex and Another vs. P. Balasubramanian***³. On the question as to when a contract is terminated between the parties reliance was placed on ***Bir Singh vs. Mukesh Kumar***⁴. That, in view of the legally enforceable debt there is no requirement of interference in the impugned judgment of the Learned Sessions Judge, South Sikkim, at Namchi.

(ii) I have heard Learned Counsel for the parties at length and perused the pleadings and evidence on record and the citations made at bar.

¹ SLR (2018) SIKKIM 1065

² SLR (2020) SIKKIM 158

³ (2021) SCC Online 75

⁴ (2019) 4 SCC 197

(iii) The only question for consideration before this Court is whether a legally valid debt or liability existed against the Petitioner towards R1 in view of Exhibit 5, dated 25-01-2018, posted on 01-02-2018.

5. In ***Bhagwandas Goverdhandas Kedia vs. Girdharilal Parshottamdas and Co. and Others***⁵, the Hon'ble Supreme Court while discussing Section 4 of the Contract Act *inter alia* observed that it will be seen that the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made but a different rule is made about acceptance. Communication of an acceptance is complete in two ways – (1) against the proposer when it is put in the course of transmission so as to be out of the power of the acceptor; (2) as against the acceptor when it comes to the knowledge of the proposer.

6(i). The observation of the Learned Chief Judicial Magistrate Court cannot be faulted with regard to the provisions of Section 4 of the Contract Act. It is clear that only once the Notice is posted will the agreement be determined between the parties. Undoubtedly, the Notice Exhibit 1 is dated 25-01-2018, Exhibit 11 stands testimony to the fact that it was booked in the post on 01-02-2018 and received by the Petitioner only on 08-02-2018. It emerges that there was no termination of Contract when the cheques, Exhibits 1 and 2 were presented by the R1 on 30-01-2018 before the Bank and came to be dishonoured. The ground taken by the Petitioner that he had stopped payment is untenable as the Bank has clearly stated in its notes Exhibits 3 and 4 that the cheques were returned on account of insufficient fund. The act of

⁵ (1966) 1 SCR 656

the Petitioner is clearly covered by the provisions of Section 138 of the NI Act. On the question of legal liability the explanation to Section 138 of the NI Act clarifies that the term "debt" referred to in the Section means to "legal debt", that is one which is recoverable in the Court of law. The term liability as per ***Black's Law Dictionary, 10th Edition***, is the quality, state or condition of being legally obligated or accountable. Liability otherwise has also been defined to mean all character of debts and obligations, an obligation one is bound in law and justice to perform; an obligation which may or may not ripen into a debt, any kind of debt or liability, either absolute or contingent, express or implied.

(ii) That, having been said it would be apposite to consider the provisions of Section 139 of the NI Act which provides that unless the contrary is proved, the Court shall presume that the holder of a cheque received the cheque of the nature referred to in Section 139 for the discharge, in whole or in part of any debt or other liability. It would appear that the presumption under Section 139 of the NI Act is an extension of the presumption under Section 118(a) of the same Act, which provides that, the Court shall presume a negotiable instrument to be one for consideration. If the negotiable instrument happens to be a cheque, Section 139 raises a further presumption that the holder of the cheque received the cheque in discharge in whole or in part of any debt or other liability. The presumption to be raised under Sections 118 and 139 of the NI Act are rebuttable presumptions. Thus, the Court shall presume the NI Act to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the

consideration so probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.[See **Kamala S. vs. Vidhyadharan M.J. and Another:** (2007) 5 SCC 264]. So far as the argument of Learned Counsel for the Petitioner that the two cheques were handed over to R1 by way of future security cannot be countenanced. This Court in **Purna Kumar Gurung vs. Ankit Sarda** (supra) while considering security *inter alia* held as follows;

"16.....
On this aspect, we may look into the meaning of "security". As per the Oxford Dictionary "security" *inter alia*, means "a thing deposited or hypothecated as pledge for fulfillment of undertaking or payment of loan to be forfeited in case of failure". The circumstances of the matter at hand in no way fulfil the ingredients of security as defined *supra* neither was an attempt made to furnish evidence on this aspect by the Respondent. I hasten to add that this Court is aware that the proof so demanded in offences under Section 138 of the NI Act is not to be beyond a reasonable doubt but only extending to preponderance of probability. This too, was not established by the Respondent."

The above circumstances, squarely fit the circumstances in the instant matter. The two cheques which were dishonoured surely do not come within the ambit of "security" as defined hereinabove.

(iii) Paragraph 10 of the Legal Notice Exhibit 9 issued by the Learned Counsel for the Petitioner is evidently false as according to the contents thereof after receiving the Notice dated 25-01-2018 his client (Petitioner) requested the R1 not to present the two cheques, despite which she did. This is an unbelievable

circumstance as it is evident from Exhibit 11 that the Notice dated 25-01-2018 was received by the Petitioner only on 08-02-2018.

(iv) The existence of an agreement between the parties has also not been denied. The issuance of the cheques as partial payment towards the terms of the agreement has also not been denied. The evidence of the Complainant stating that the two cheques were towards discharge of a legal liability has not been demolished under cross-examination. Hence, in view of the above discussions it is evident that Exhibits 1 and 2 were issued by the Petitioner in the discharge of a legal liability. The Agreement was subsisting between the parties in view of Section 4 of the Contract Act and considering the date of posting of Notice Exhibit 11 by the R1 to the Petitioner and the fact that it was received by the Petitioner only on 08-02-2018.

7. Hence, on the anvil of the foregoing discussions, the impugned Judgment dated 20-06-2020, of the Learned Sessions Judge, South Sikkim, at Namchi, upholding the Judgment of the Learned Chief Judicial Magistrate in Private Complaint Case No.07 of 2018, dated 31-12-2018, requires no interference.

8(i). Accordingly, as ordered the Petitioner shall pay a total fine of Rs.4,00,000/- (Rupees four lakhs) only. The remaining amount of fine being Rs.3,20,000/- (Rupees three lakhs and twenty thousand) only, i.e., 80% of Rs.4,00,000/- (Rupees four lakhs) only, shall be paid by the Petitioner to R1 within a period of two months from today. Rs.80,000/- (Rupees eighty thousand) only, already deposited before the Court of Learned Sessions Judge, South Sikkim, at Namchi (as reflected in the impugned Judgment at Paragraph 31), shall be handed over to the R1, also

by 06-09-2022, by the Court of Learned Sessions Judge, South Sikkim, at Namchi.

(ii) In default of payment of fine, the Petitioner shall surrender before the Court of the Learned Chief Judicial Magistrate, South Sikkim, at Namchi, to undergo the sentence of imprisonment imposed on him by the Learned Trial Court.

9. Crl.Rev.P No.04 of 2020 stands disposed of accordingly.

10. Pending applications, if any, also stand disposed of.

11. No orders as to cost.

12. Copy of this Judgment be transmitted to the Learned Court below, for information, along with its records.

(Meenakshi Madan Rai)
Judge
08-07-2022