the fact that the Court itself has allowed the complainant to be represented on several occasions and in the circumstances the complainant/appellant should be given one opportunity to prove his case on its merit rather than mechanically dismissal, of the case for one day default.

11. Persuaded by what has been discussed above appeal is allowed and accordingly the impugned order dated 05.01.2015 passed in C.R. Case No. 2953C/2005 under Section 138, N.I. Act is hereby set aside with a direction to the learned Trial Court to restore the case to the original position and to proceed with the case, at the stage when it was dismissed, with further direction to conclude the case without any further delay in view of the long pendency of the matter, preferably within a period of 3 months from today. Both the parties are directed to appear before the Court on 29.05.2019.

Return the LCR immediately.

Result:- Appeal allowed.

ABC 2019 (II) 266 GAU
ACQUITTAL & BAIL CASES

HIGH COURT OF GAUHATI

(Rumi Kumari Phukan, J.)
Criminal Revision Petition No. 415 of 2010
Decided on 9 May, 2019

BHARAT KUMAR NANDI ***- Petitioner(s).***

Versus

UTTAM MITRA & ANR. ***- Respondent(s).***

Law Covered:- ***(A) Negotiable Instruments Act, 1881 — Section 138 — Stop payment by the accused — denial for the payment — Concurrent conviction by the Courts below — Held. considering the age of the accused petitioner & the submission made by the learned counsel — sentence converted to the fine. (Para 17)***

(B) Code of Criminal Procedure, 1973— Sections 397,401- Revision against the order of the appellate Court— Jurisdiction of Revisional Court — Held, Revisional Court has limited jurisdiction to appraise as to whether there is any illegality or irregularity in the decision so rendered by the Court below or it suffers from any perversity which has resulted miscarriage of justice— The Revisional

Court cannot re-appreciate the evidence that has been adduced & appreciated by the Court below but can assess such evidence & the appreciation of the Court as to whether there has been proper appreciation of evidence on facts as well as on law. (Para 6)

(C) Negotiable Instruments Act, 1881 — Sections 138 & 139 — Stop payment of the cheques — Rebuttal of presumption by accused — failure to produce evidence — Held, the defence has failed to rebut the presumption u/s.139. (Para 6)

(D) Negotiable Instruments Act, 1881 — Sections 138 & 139 — the complainant duly proved his case — in absence of rebuttal evidence, the Court is bound to raise presumption under the law. (Para 15)

Facts:- *The accused/petitioner issued three cheques on three different dates. While the aforesaid cheques were deposited to the Bank, the same were dishonoured. Thereafter the complainant intimated the accused petitioner about such dishonour of cheques and then he was replied by the accused that due to some unforeseen circumstances, the cheques were dishonoured. He requested the complainant to deposit the cheques one month later and accordingly the cheques were deposited again but the same cheques were again dishonoured for insufficient fund in the account of the petitioner. Although the complainant served a legal notice but the accused denied to pay the money and hence having no alternative, the complainant filed the case u/s.138 of the N.I. Act. The learned trial Court convicted the accused. On appeal so preferred by the accused the order of the trial Court was affirmed by the appellate Court. Honourable High Court upheld the conviction, however, the sentence was converted to fine.*

Held:- We have to bear in mind that the present matter being a revision against the order of the appellate Court, this Court has limited jurisdiction to appraise as to whether there is any illegality or irregularity in the decision so rendered by the Court below or it suffers from any perversity which has resulted miscarriage of justice. The Revisional Court cannot re-appreciate the evidence that has been adduced and appreciated by the Court below but can assess such evidence and the appreciation of the Court as to whether there has been proper appreciation of evidence on facts as well as on law. (Para-6)

As has been discussed above, the complainant/respondent has duly proved his case by way of necessary evidence and in absence of rebuttal evidence, the Court is bound to raise presumption under the law which has been done by the trial Court and has been affirmed

by the appellate Court. There being no illegality or irregularity in the aforesaid order, this revisional Court is not inclined to interfere into the findings so arrived at by the Court below. (Para-15)

Of-course the said amount was deposited as per direction of this Court but the same could not be encashed as by the time the complainant could not be intimated, in the meantime, the case record was sent to this Court. The accused/petitioner has already delayed such payment to the complainant/respondent by his conduct but considering the age of the accused petitioner and the submission made by the learned counsel for the petitioner, while maintaining the conviction, the sentence is converted to the fine. He is sentenced to pay fine twice the cheques amount i.e. Rs.9 lacs, in default simple imprisonment for one year. The amount of fine be paid to the complainant/respondent, as a compensation and the said amount be deposited before the trial Court within a period of three months from the date of order and the learned trial Court will return the draft, already deposited by the petitioner to him and the petitioner may proceed for re-validate the draft with the concerned Bank. (Para-17)

Counsel:- ***For Appellant(s):*** *Mr. S. Dey., Adv.*
For Respondent(s): *Mr. G.P. Bhowmik, Ms. J. Purkayastha Mr. R. Hazarika, Advs.*

JUDGMENT & ORDER

RUMI KUMARI PHUKAN, J.: - 1. Heard Mr. S. Dey, learned counsel appearing for and on behalf of the petitioner as well as Mr. G.P. Bhowmik, learned senior counsel, representing the respondent No.1.

2. By way of this revision, the petitioner has challenged the impugned judgment and order passed by the learned Appellate Court of Addl. Sessions Judge (FTC) at Dibrugarh, in Criminal Appeal No.18(2)/2008, dated 31.08.2010, whereby the learned Appellate Court has affirmed the order of judgment and conviction of the accused/petitioner, passed by the learned Court of SDJM (Sadar) at Dibrugarh by the order dated 12.05.2008, in Case No.232C/2004, u/s.138 of the N.I. Act.

3. Briefly sated the case of the petitioner is that on the basis of the complaint filed by one Uttam Mitra/the respondent No.1, against the present petitioner, a Complaint Case u/s.138 of the N.I. Act was registered on the accusation of the complainant that the petitioner sold a plot of land to him for a consideration of Rs.6 lacs but even

after receiving of the money, the petitioner could not deliver the possession of the land to the complainant having some dispute regarding the land. The accused/petitioner agreed to return the amount of Rs.6 lacs to the complainant and out of which he paid an amount of Rs.1.5 lacs in cash and remaining amount of Rs.4.5 lac, he issued three cheques on three different dates i.e. on 01.02.2004, 01.03.2004 and 01.04.2004. While the aforesaid cheques were deposited to the Bank, the same were dishonoured. Thereafter the complainant intimated the accused petitioner about such dishonour of cheques and then he was replied by the accused/petitioner that due to some unforeseen circumstances, the cheques were dishonoured. The accused/petitioner requested the complainant to deposit the cheques one month later and accordingly the cheques were deposited again on 18.05.2004 but the same cheques were again dishonoured for insufficient fund in the account of the petitioner. Although the complainant served a legal notice upon the accused/ petitioner but the accused deny to pay the money and hence having no alternative, the complainant filed the case u/s.138 of the N.I. Act, against the accused/petitioner and the same was registered as Case No.232C/2004.

4. The accused/petitioner stood the trial and denied the charge u/s.138 of the N.I. Act and claimed to be tried. During the course of the trial, the complainant examined two witnesses including himself and the cheques were exhibited as Exhibits 1, 2 and 3, that were issued by the accused/petitioner and Ext.8 is the cheque return memo. The complainant also produced and exhibited certain documents, such as disputed cheque, cheque return memo and reply of the accused/petitioner regarding the cheques in question that due to some unforeseen circumstances, the amount could not be realized and he asked the complainant to bear with him for another one month. But despite the factum of admission of issuance of cheques by the accused/petitioner by his reply through Ext.4, on subsequent stage, the accused/petitioner denied to have any liability through his another reply vide Ext.9. The learned trial Court, after examination of the complainant and his one witness and after appreciation of entire matters on record, convicted the accused/petitioner u/s.138 of the N.I. Act and sentenced him to suffer simple imprisonment for three months with further direction to pay compensation of Rs.6 lacs to the complainant for the loss incurred to him due to intentional refusal of the due amount to the complainant.

5. On appeal so preferred by the accused/petitioner, the same was dismissed and the order of the trial Court was affirmed. Challenging the aforesaid findings of the appellate Court, the present Revision Petition has been preferred.

6. We have to bear in mind that the present matter being a revision against the order of the appellate Court, this Court has limited jurisdiction to appraise as to whether there is any illegality or irregularity in the decision so rendered by the Court below or it suffers from any perversity which has resulted miscarriage of justice. The Revisional Court cannot re-appreciate the evidence that has been adduced and appreciated by the Court below but can assess such evidence and the appreciation of the Court as to whether there has been proper appreciation of evidence on facts as well as on law.

7. Persuaded by the principle, I have examined the evidence on record, which is produced before this Court and it reveals that the complainant/respondent has duly proved that the disputed three cheques in question have been issued by the accused/petitioner. In that context, the complainant/respondent has also further adduced evidence that he issued legal notice demanding the cheque amount and although the accused/petitioner through his reply in the legal notice vide Ext.4, took time for encashment of the cheque amount but subsequently he issued another reply to the legal notice that the complainant is not entitled to get the cheque amount as he has initiated a Civil Suit and there is an order to stop payment of the cheque amount.

8. The Bank official who has been examined by the complainant has also duly proved such deposit of cheques in the Bank and the fact that the cheques were dishonoured and they issued the cheque return memo.

9. It is to be noted that the accused/petitioner stood the trial and was very much present during the entire proceeding and it was not an ex-parte hearing but the petitioner measurably failed to rebut the case of the complainant on any material aspect, neither by effective cross-examination nor by any rebuttal evidence. On careful examination of evidence on record, it would reflect that the accused/petitioner has never denied the issuance of cheques in question or about his reply given in Ext.4.

10. Thus the accused/petitioner has not produced or proved his own document that has been referred into as regard under what

circumstances he has to stop the payment of the cheques. That being the position, it can be safely held that there is no illegality in the decision that has been rendered by the trial Court, which has been upheld by the appellate Court that as the defence has failed to rebut the presumption u/s.139 of the N.I. Act, the accused/petitioner is liable to be convicted u/s.138 of the N.I. Act.

11. The learned appellate Court has taken note of all the above aspects in its impugned judgment and order that although the accused/petitioner take certain plea but he did not adduce any defence evidence on the above context, despite availing sufficient opportunities to produce defence evidence. It is further held that even the plea taken by the accused/petitioner was not suggested to the witnesses during their cross-examination in order to bring some light as to the dispute on the liability on his part. It was certainly a burden on the accused to prove that he is not liable while he was defending the presumption which arose due to the fact of issuance of cheques and thereafter subsequently dishonour of the cheques on account of insufficient fund in the concerned account, whereas the complainant has duly proved his case as per the requirement u/s.138 of the N.I. Act.

12. In view of the evidence adduced by the complainant, it has been sufficiently proved that the presumption u/s.139 of the N.I. Act can be drawn that the cheques in question were issued in discharge of existing liability and the complainant/respondent was the holder of the cheques in due course.

13. Thus from the materials in the LCR and the impugned judgment, it reveals that the petitioner herein has failed to substantiate his plea that has been taken before this Court and also before the trial Court and for non-having of any rebuttal evidence, there is no any illegality while drawing the presumption u/s.139 of the N.I. Act.

14. The law is settled that a case u/s.139 of the N.I. Act can be proved raising certain presumption and in that context, Sections 118 and 139 of the N.I. Act being relevant, are extracted here-in-below for ready reference:

> *Section 118. Presumptions as to negotiable instruments. -Until the contrary is proved, the following presumptions shall be made:-*
>
> *(a) of consideration -that every negotiable instrument was made or drawn for consideration, and that every such instrument,*

when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date -that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance -that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer -that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsements -that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps -that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course -that the holder of a negotiable instrument is a holder in due course:

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

Section 139. Presumption in favour of holder.-It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

15. As has been discussed above, the complainant/respondent has duly proved his case by way of necessary evidence and in absence of rebuttal evidence, the Court is bound to raise presumption under the law which has been done by the trial Court and has been affirmed by the appellate Court. There being no illegality or irregularity in the aforesaid order, this revisional Court is not inclined to interfere into the findings so arrived at by the Court below.

16. It has been submitted by the learned counsel for the petitioner that in fact the petitioner herein is an old aged man of 74 years and he had deposited the cheque amount before the trial Court on 21.12.2012 by way of draft, in compliance to the order passed by

this Court dated 26.11.2012. But unfortunately the said draft was not encashed, as in the meantime the case record was sent to the High Court in connection with the present revision petition. The aforesaid aspect has been reflected in the order sheet of the trial Court also.

17. Of-course the said amount was deposited as per direction of this Court but the same could not be encashed as by the time the complainant could not be intimated, in the meantime, the case record was sent to this Court. The accused/petitioner has already delayed such payment to the complainant/respondent by his conduct but considering the age of the accused petitioner and the submission made by the learned counsel for the petitioner, while maintaining the conviction, the sentence is converted to the fine. He is sentenced to pay fine twice the cheques amount i.e. Rs.9 lacs, in default simple imprisonment for one year. The amount of fine be paid to the complainant/respondent, as a compensation and the said amount be deposited before the trial Court within a period of three months from the date of order and the learned trial Court will return the draft, already deposited by the petitioner to him and the petitioner may proceed for re-validate the draft with the concerned Bank.

18. With the above, the petition stands disposed.

19. Return the LCR immediately along with the copy of the judgment.

Result:- Sentence converted to the fine.

ABC 2019 (II) 273 GAU

ACQUITTAL & BAIL CASES

HIGH COURT OF GAUHATI

(Rumi Kumari Phukan, J.)

Criminal Petition No. 224 of 2017

Decided on 10 May, 2019

SHRI JOY KANTA SINHA ***- Petitioner(s).***

Versus

STATE OF ASSSAM & ANR. ***- Respondent(s).***

Law Covered:- ***(A) Negotiable Instruments Act, 1881 — Section 138(b) — Notice — Service of — contention of the petitioner about non-service — complainant produced certain documents to show that a notice was sent by registered post in the given address — service***