

**IN THE COURT OF THE PRINCIPAL SESSIONS JUDGE,
ADILABAD.**

Present:
Dr.Ch.V.R.R. Varaprasad,
Principal Sessions Judge, Adilabad.

THURSDAY, THE 8TH DAY OF FEBRUARY, 2024

Crl.A.No.41 of 2022

Judgment in Criminal Appeal	41 of 2022
From what court the appeal is preferred	Special Judicial Magistrate of First Class Mobile (PCR), Adilabad.
Number of case in that court	CC.No.71/2015
Name and description of appellant/ accused	Gulam Amjad s/O Gulam Dastagiri, aged 62 years, Occ: Business, R/o Adilabad.
Name and description of the Respondent/ complainant.	1.Milian Korthalwar S/o Krishnamurthy, aged 43 years, Occ: Business, R/o Adilabad. 2.State of TS through Public Prosecutor, Court of Sessions, Adilabad.
Sentence and section of law under which it was imposed by the trial court.	Accused was sentenced to undergo Simple Imprisonment for a period of Six months for offence under Section 138 of N.I. Act and directed to pay compensation of Rs.2,43,500/- and in default of payment of compensation, accused shall undergo Simple Imprisonment for a period of 30 days.
Whether judgment of the trial	Reversed

court is confirmed/ modified/ reversed	
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Date of presentation	Date of filing	Date of notice issued	Date of bail bond	Date of appearance	Date of Hearing	Date of judgment
20.10.22	20.10.22	20.10.22	--	--	06.02.2024	08.02.2024

This Criminal Appeal has been finally heard on 06.02.2024 in the presence of Sri N.Nagesh, Advocate for Appellant/accused, Sri Naresh Kumar Joshi, Advocate for Respondent No.1 and Sri Sanjay Kumar Vairagare, Addl. PP for the State-Respondent No.2 and on hearing both sides and having stood for consideration till this day, this Court delivered the following:

J U D G M E N T

1. Appellant is the accused in CC No.71 of 2015 on the file of Special Judicial Magistrate of First Class Mobile (PCR), Adilabad and he was prosecuted for offence under Section 138 of the Negotiable Instruments Act, for short 'the Act'. He was convicted for offence under Section 138 of the Act by judgment dated 12.10.2022 in CC No.71 of 2015 and sentenced to undergo Simple Imprisonment for Six months and pay compensation of Rs.2,43,500/- under Section 357(3) of the Code of Criminal Procedure and in default of payment of compensation to suffer Simple Imprisonment for a period of 30 days. Being aggrieved by the said judgment, this appeal is filed by appellant praying the court to set aside the said judgment.

2. Appellant and respondent are hereinafter referred to as accused and complainant respectively, as arrayed in CC No.71 of 2015, for the sake of convenience.

3. Complainant filed complaint, inter-alia, stating that accused was known to him and on his request complainant advanced an amount of Rs.1,50,000/- on 11.04.2014, pursuant to which accused issued post dated Cheque No.024138, dated 01.08.2014 (Ex.P1) drawn on State Bank of Hyderabad, CCI Township Branch, Dasnapur, Adilabad for Rs.1,50,000/- acknowledging the receipt of said amount from complainant. Complainant deposited Ex.P1 cheque in his bank account maintained with State Bank of Hyderabad, Main Branch, Adilabad. However, it was returned unpaid with endorsement 'insufficient funds' through Cheque Return Memo, dated 01.08.2014 (Ex.P2). Complainant got issued legal notice, dated 28.08.2014 (Ex.P3) calling upon accused to pay amount covered by Ex.P1. Having received notice accused neither paid cheque amount nor issued any reply, which compelled complainant to file the complaint prosecuting accused for offence under Section 138 of the Act.

4. After recording sworn statement of complainant trial court has taken cognizance of offence under Section 138 of the Act and issued summons to accused in CC No.71 of 2015. Having received summons accused made his appearance, on which the trial court furnished copies of relevant documents as required under Section 207 of Cr.P.C. Accused was examined under Section 251 of Cr.P.C. He pleaded not guilty and claimed to be tried.

5. Complainant himself was examined as PW1 and got examined V.Subrahmaniyam, Branch Manager of State Bank of Hyderabad, Adilabad Town Branch as PW2. Exs.P1 to P7 were marked on behalf of complainant. Ex.P1 is original Cheque No.021438, dated 01.08.2014, Ex.P2 is Cheque Return Memo, dated 01.08.2014, Ex.P3 is office copy of legal notice, dated 28.08.2014, Ex.P4 consists of two postal receipts, Ex.P5 is postal acknowledgment, Ex.P6 is reply notice, dated 04.09.2014 got issued by accused and Ex.P7 is certified copy of statement of account of accused for the period from 01.04.2014 to 31.12.2014 maintained with State Bank of India, Town Branch, Adilabad.

6. Accused was examined under Section 313 of Cr.P.C. and the incriminating evidence available in the evidence of PW1 alone was put forth to accused. Accused has denied the incriminating evidence by stating that PW1 deposed false version. Accused further stated that he has friendship with PW1, he used to purchase gold from him, there is a Mosque situated near the shop of complainant, he went to said Mosque for namaz by keeping his licence, cheque book and other documents in the shop of complainant and accordingly, PW1 himself misused the cheque and that he had never taken any amount from him nor issued any cheque and the signature on Ex.P1 cheque does not belong to him.

7. Accused himself was examined as DW1. No documentary evidence was adduced by accused.

8. After hearing both sides and after perusal of the material on record, the learned trial court has delivered the judgment under appeal on 12.10.2022 recording conviction for offence under Section 138 of the Act and imposed sentence of imprisonment and compensation as stated above.

9. In Memorandum of Appeal, accused stated that the judgment under appeal is biased, illegal and against the evidence on record and principles of natural justice and the trial court has not properly appreciated the evidence on record and committed grave error by recording conviction against accused. Though the complaint failed to establish the existence of legally enforceable debt the said fact was not appreciated by the trial court in proper perspective. Trial court failed to observe that the cheque was issued in the name of Sri Kanakalaxmi Jewellers but not in the name of PW1 and no documentary evidence is filed to show that PW1 is the Proprietor of Sri Kanakalaxmi Jewellers. Even the licence of Sri Kanakalaxmi Jewellers standing in the name of PW1 was not filed. All these important aspects were totally ignored by trial court. Even the admissions made by PW1 regarding the business and financial transactions between himself and accused were ignored by trial court. Thus submitting, accused prayed the court to allow the appeal and set aside the judgment under appeal.

10. Heard Sri N.Nagesh, learned counsel for appellant/accused and Sri Naresh Kumar Joshi, learned counsel for respondent No.1/complainant.

11. Following points arise for determination:

- 1. Whether complainant has brought home the guilt of Accused beyond all reasonable doubt for offence under Section 138 of the Act?*
- 2. Whether the judgment dated 12.10.2022 in CC No.71 of 2015 of the learned trial court convicting and sentencing the appellant/accused is sustainable under law?*

POINT No.1:

12. Right from the stage of Ex.P3 legal notice, dated 28.08.2014 it is the consistent case of complainant that he has advanced an amount of Rs.1,50,000/- to accused on 11.04.2014 and on the same day accused issued Ex.P1 cheque in discharge of the said hand loan. Contents of complaint and chief-examination affidavit of PW1 also reflected the same. PW1 admitted in cross-examination that there are no financial transactions between himself and accused and there was no due amount to be paid between each other. PW1 also admitted that he is not doing any money lending business. The said admission of PW1 is sufficient to hold that in his individual capacity he had no financial transactions with accused and there was no due amount between each other. The said admissions of PW1 goes quite contrary to the contents of Ex.P3 legal notice and the contents of chief-examination affidavit of PW1. When there were no financial

transactions between PW1 and accused the question of accused borrowing Rs.1,50,000/- from PW1 on 11.04.2014 does not arise. The said admission of PW1 elicited in cross-examination cuts the entire case of complainant at its root.

13. Learned counsel for complainant submits that in view of the presumption under Section 139 of the Act court has to presume that Ex.P1 was issued in discharge of legally enforceable debt. On the other hand, learned counsel for accused contended that since PW1 himself admitted that there were no financial transactions it has to be taken that accused has successfully rebutted the presumption under Section 139 of the Act. Section 139 of the Act, no doubt, enables the court to draw presumption that Ex.P1 cheque is issued in discharge of legally enforceable debt. However, it is a rebuttal presumption. The said presumption can be rebutted by accused either by eliciting certain statements in cross-examination of PW1 or by adducing evidence by himself. The above admission of PW1 successfully rebutted the presumption under Section 139 of the Act. Court cannot ignore at bypass the above statements deposed in cross-examination by PW1 because they were deposed by him out of his personal knowledge.

14. Learned counsel for complainant contended that accused has taken different pleas at different stages and, therefore, court cannot accept the inconsistent and self contradictory pleas of accused. In Ex.P6 reply notice, which was got issued by accused in reply to Ex.P3, accused has denied to have taken hand loan from PW1 and issuance of Ex.P1 cheque and also stated that there was no transaction at all with PW1, as stated by him. The said plea of accused reflected in Ex.P6 is established by the above statements deposed by PW1, wherein he has categorically stated that there were no financial transactions between himself and accused.

15. During the course of cross-examination accused has suggested to PW1 that he has pledged 4 tulas of gold with him, paid Rs.1,00,000/- and PW1 deducted Rs.80,000/- towards the value of the gold and that for the remaining amount of Rs.20,000/- PW1 received blank cheque from the accused towards security and the said suggestion was denied by PW1. In his examination under Section 313 of Cr.P.C. accused took the plea that when he went to nearby Mosque situated at the shop of PW1 he has kept his licence, cheque book and other documents in the shop of PW1 and accordingly, PW1 has misused Ex.P1 cheque and the signature

thereon does not belong to him. In evidence also DW1 repeated the same version as stated in his 313 Cr.P.C. examination. It is true that the suggestion given by accused in cross-examination of PW1 shows that he has admitted his signature on Ex.P1 cheque and took the plea that it was given towards security regarding gold transaction with PW1. It is also true that in 313 Cr.P.C. examination and in evidence accused has taken quite contrary plea. As already stated, in view of the admission of PW1 in cross-examination the presumption under Section 139 of the Act stood successfully rebutted. Therefore, burden shifts back to complainant to establish the factum of accused borrowing Rs.1,50,000/- from him on 11.04.2014 and issuance of Ex.P1 cheque by accused in discharge of said legally enforceable debt. Unfortunately, there is absolutely no evidence whatsoever adduced by complainant in this regard. Therefore, complainant cannot take advantage of the above inconsistent pleas taken by accused. Dehors the above pleas taken by accused complainant has to establish the guilt of accused beyond all reasonable doubt by cogent and trustworthy evidence, which is absent in this case.

16. Learned counsel for accused contended that Ex.P1 cheque is in the name of Sri Kanakalaxmi Jewellers but the complaint is filed in the name of complainant and there is no documentary evidence filed by complainant to establish that there was any financial transaction between Sri Kanakalaxmi Jewellers and accused. On the other hand, learned counsel for complainant, drawing the attention of court to the admission of DW1 in cross-examination, contended that the said admission is sufficient to record conviction against accused. DW1 nowhere stated in his chief-examination affidavit or in cross-examination that he had issued Ex.P1 cheque in favour of Sri Kanakalaxmi Jewellers during the course of purchase of gold transaction. However, DW1 admitted in his cross-examination that complainant is the sole Proprietor of Sri Kanakalaxmi Jewellers. It is not known how the said sentence deposed by DW1 in cross-examination is helpful to the complainant. By the said admission of DW1 court can at the most come to a conclusion that PW1 is the sole Proprietor of Sri Kanakalaxmi Jewellers.

17. It is an admitted fact that in Ex.P3 legal notice there is no mention of any financial transaction between Sri Kanakalaxmi Jewellers and accused and the same is also absent in the complaint

and evidence of PW1. It is also an admitted fact that complaint was filed by complainant in his individual capacity but not as Proprietor of Sri Kanakalaxmi Jewellers. At the stage of issuing Ex.P3 legal notice itself the case of complainant went on wrong track and the said mistake has been repeated in the complaint and the evidence of PW1 and it cannot be reversed now. Without properly perusing the beneficiary's name in Ex.P1 complainant has set up his case from the stage of issuing Ex.P3 legal notice wrongly and continued the said mistake in complaint and in the evidence of PW1 and, thereby, destroyed his own case and it has become a boon to the accused to escape from the clutches of law. Since Ex.P1 cheque was issued in favour of Sri Kanakalaxmi Jewellers the very complaint is not maintainable at all as it was filed in the individual capacity of complainant. As already stated, PW1 himself admitted in cross-examination that there were no financial transactions between himself and accused. On the said ground also no credence can be given to the case of complainant.

18. PW1 deposed in cross-examination that he receives any gold item if it is purchased from his shop earlier and he will not give any loan by pledging gold ornaments and he will not give any loan to any

person and there is no credit facility in his business on purchase of ornaments. As already stated, PW1 denied the suggestion regarding accused pledging 4 tulas of gold with PW1, paying Rs.1,00,000/- by PW1, deducting Rs.80,000/- towards value of gold and giving Ex.P1 blank cheque for Rs.20,000/- as security. Therefore, it is not the case of complainant that during the course of gold transaction accused issued Ex.P1 cheque. One cannot deny that a register is maintained in Jewellery shop for the daily transaction that take place. No documentary evidence is filed by complainant in court. There is no certainty in the mind of complainant as to whether the loan transaction is individual transaction with accused or it had taken place during the course of business transaction of accused with Sri Kanakalaxmi Jewellers. On this ground also, no credence can be given to the case of complainant.

19. PW1 deposed that accused brought the cheque by signing it and he did not sign on the cheque in his presence. PW1 admitted that he does not know to whom the signature on Ex.P1 belongs to. PW1 further deposed that he presumed that the signature belongs to the person who issued the cheque. PW1 also admitted that the signature on Ex.P1 and the signature on Memo of Appearance of

accused are differing with each other. Learned counsel for complainant contended that evidence of PW2 confirmed that the signature on Ex.P1 cheque belongs to accused. No doubt, the suggestion given by accused to PW1 in cross-examination regarding pledging of gold ornaments and giving blank cheque compels the court to come to a conclusion that the signature on Ex.P1 cheque belongs to him. However, on that ground alone court cannot record finding of guilt against accused, in view of serious infirmities discussed supra in the case of complainant.

20. The trial court has not put-forth the incriminating evidence of PW2 to accused in his cross-examination under Section 313 of Cr.P.C. Law requires that the entire incriminating evidence has to be putforth to accused. Since the evidence ofPW2 was not purforth to accused in his examination under Section 313 of Cr.P.C. court cannot rely on the evidence of PW2 and the contents of Ex.P7. No doubt, on that ground court can remand the case but no useful purpose will be served even if it is remanded. Even if assuming that entire evidence of PW2 can be totally relied upon as true and correct, it will only establish that Ex.P1 cheque was returned dishonoured with endorsement 'insufficient funds' under Ex.P2 cheque return memo,

which cannot bring home the guilt of accused for offence under Section 138 of the Act.

21. Above discussion leads me to conclude that complainant failed to establish the guilt of accused beyond all reasonable doubt for offence under Section 138 of the Act. Point No.1 is accordingly answered against the complainant and in favour of appellant/accused.

POINT NO.2:

22. Court has carefully perused the judgment under appeal passed by the learned trial court and noticed that the learned trial court has not appreciated the evidence on record, particularly the admissions elicited in cross-examination of PW1 and they were not discussed at all. Trial court has also totally ignored the factum of issuance of Ex.P1 cheque in favour of Sri Kanakalaxmi Jewellers while the complaint was filed in the individual capacity of complainant. Trial court has not discussed as to the maintainability of the complaint in the background of name of beneficiary in Ex.P3 legal notice. Though the accused is able to rebut the presumption under Section 139 of the Act trial court has recorded contradictory finding, which is not as

per law. Court is of the considered opinion that the trial court has not properly appreciated the evidence on record and recorded incorrect finding against accused. Therefore, the judgment, dated 12.10.2022 in CC No.71 of 2015 passed by the learned Special Judicial Magistrate of First Class Mobile (PCR), Adilabad is not sustainable under law and it is liable to be set aside. Point No.2 is accordingly answered against the complainant and in favour of appellant/accused.

23. **In the result**, appeal is allowed setting aside the judgment, dated 12.10.2022 in CC No.71 of 2015 passed by the learned Special Judicial Magistrate of First Class Mobile (PCR), Adilabad. Bail bonds of appellant/accused shall stand cancelled after expiry of appeal time. Part of the compensation amount, if any paid by appellant/accused, shall be refunded to him after expiry of appeal time.

Dictated to Stenographer, transcribed by him, corrected and pronounced by me in open court on this the 8th day of February, 2024.

**SESSIONS JUDGE,
ADILABAD.**