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| Presented on | : | 31.08.2021 |
| Registered on | : | 13.10.2022 |
| Decided on | : | 07.02.2025 |

Duration: 03 years, 05 months, 07 days

**IN THE COURT OF V J.M.F.C., AT MYSURU**

**DATED THIS 07th DAY OF FEBRUARY, 2025**

**-: PRESENT :-**

**SMT.SUSHMA C. B.A. L.L.B (Spl.)**
V J.M.F.C., Mysuru

**C.C.No.6889/2022**

**COMPLAINANT:** **Sri. Swamy.Y,**
S/o Late. Yadiyurappa,
Swamy, Aged about 38 years,
R/at No.33, 1st Cross, 1st Main,
Gangothri Layout, Mysuru.

**(By Sri.H.C.P., Advocate,)**

**V/s**

**ACCUSED :** **Sri. Sathish.T,**
S/o Thimmaiah,
Aged about 38 years,
R/at No.29, D.V.C Layout,
4th Main, Church Opposite,
E and F Block, Ramakrishna
Nagara, Mysuru-570022.

**(By Sri.N.K.S., Advocate)**

:: **J U D G M E N T** ::

This case arise out of the complaint filed by the complainant alleging that, the accused has committed the offence punishable under Section 138 of the Negotiable Instruments Act (in short referred as "N.I. Act").

**2. The brief facts of the case are as follows:**

That the accused and complainant are well known to each other, due to that acquaintance, the accused to meet his household expenditure and to develop his chicken stall at Kuvempunagar, Mysuru has borrowed financial aid of Rs.1,30,000/- from the complainant on 21.06.2020 with an assurance to repay the aforesaid principal amount within a year and also agreed to pay interest at the rate of 1.5% p.m. for the borrowed amount. At that context for the prompt repayment of the received consideration amount, the accused issued a post dated cheque bearing No.013290 drawn on Union Bank of India, Kuvempunagar Branch, Mysuru for Rs.1,30,000/- dated 07.07.2021 in favour of complainant. As per the assurance and direction given by the accused, the complainant has presented the said cheque for encashment through his banker Bank of

Baroda branch, Mysuru City on 07.07.2021 but the said cheque returned unpaid for the reason **"Funds Insufficient"** vide bank endorsement memo dated 09.07.2021.

3. After receipt of endorsement, the complainant got issued the legal notice dated 29.07.2021. The notice sent to the accused under registered post has been returned with a postal shara as "During delivery time absent". The accused has not paid any amount towards the amount mentioned in the cheque. Hence, the accused has committed the offence punishable under Section 138 of N.I. Act. By contending so the complainant has prayed to punish the accused as per law.

4. On presentation of the complaint, this Court has taken cognizance of the offence. The summons was issued to the accused. In pursuance of service of summons, the accused has put his appearance and he is on Court bail.

5. The copies of the complaint papers were furnished to the accused as per Section 207 of Cr.P.C. The substance of accusation read over and explained to accused. Accused pleaded not guilty and submitted that, he has defence to lead.

6. The sworn statement of the complainant was considered as evidence per the decision of the Hon'ble Supreme Court rendered in the case of **Indian Bank Association and others versus Union of India and others (2014) 5 SCC 590** and also as the observation made by the Hon'ble High Court in the case of **M/s Mesh Trans Gears Private Limited Versus Dr.R.Parvathreddy (Criminal petition No.8943 of 2010 dated 22.03.213)** and complainant was treated as PW.1 and got marked 8 documents as Ex.P.1 to Ex.P.8 and closed his side, PW.1 was fully cross-examined. Thereafter, the accused was explained about all the incriminating circumstances available against him, in compliance of Section 313 of Cr.P.C., In support his defense, the accused has examined himself as D.W.1and not marked any documents on his behalf. DW.1 was fully cross-examined. Then matter was posted for arguments.

7. Heard the arguments of both parties. Perused the materials on record.

8. In view of the materials placed before me, the following points arise for my considerations:

1. Whether the complainant proves beyond all reasonable doubts that, the accused has issued a cheque bearing **No.013290** dated **07.07.2021** for

sum of **Rs.1,30,000/-** to discharge legally enforceable debt due to the complainant and on presentation it was dishonored and reported with an endorsement as **"Funds Insufficient"** and accused has not made any payment within the stipulated time after issuance of statutory notice and thereby committed an offence punishable under Section 138 of N.I. Act?

2. What order?

9. My findings to the above said points are as follows:

Point No.1: In the **Affirmative**.
Point No.2: As per final order for the following:

**:: <u>R E A S O N S</u> ::**

10. **<u>Point No.1</u>** : At the outset it would be incumbent upon this Court to set out as to what are the ingredients which constitute an offence under the Negotiable Instruments Act. In this regard the Complainant has to show:

*a) That the cheque was issued by the accused*
*b) The same was issued towards a legally recoverable debt.*
*c) That the said cheque came to be dishonored owing to the default on the part of the accused to maintain sufficient balance.*
*d) The Accused has not repaid the amounts covered under the cheque.*

As regards the issuance of Cheque, it must be borne in mind that there is no denial of the fact that the said cheque belongs to the account maintained by the accused. To substantiate his contention the complainant examined himself as P.W.1 and he filed affidavit as per Section 145 of N.I. Act. In his affidavit he has reiterated the complaint averments. In support of his contentions complainant got marked 8 documents as Ex.P.1 to Ex.P.8.

11. The Ex.P.1 is the cheque bearing No.013290 dated 07.07.2021 for a sum of Rs.1,30,000/- drawn on Union Bank, Kuvempunagar Branch, Mysuru in favour of the complainant and the complainant identified the signature of accused, which was marked as Ex.P.1(a). The careful examination of Ex.P.1, it supports the stand taken by the complainant. The Ex.P.2 is the Bank endorsement dated 09.07.2021, it shows that, the Ex.P.1 was returned unpaid for **"Funds Insufficient"**. Ex.P.3 is the legal notice dated 29.07.2021 issued by the complainant to the accused calling upon the accused to make payment. Ex.P.4 is the postal receipt. Ex.P.5 is the returned postal envelope. Ex.P5(a) is the copy of notice. Ex.P6 is the legal notice dated 09.08.2021. Ex.P.7 is the postal receipt. Ex.P.8 is the returned postal envelope. Ex.P8(a) is the copy of notice. Since the accused has not paid the amount, the complainant has filed the present complaint. Thus the complainant has fulfilled all the requirements of Section 138 of N.I. Act.

12. Keeping in view this documentary evidence, now I proceed to discuss the oral evidence. As stated above, the P.W.1 has deposed that, accused has taken hand loan and in order to clear the same has issued cheque Ex.P.1 and the complainant presented the said cheque for encashment through his banker, but the said cheque has been returned unpaid with the Bank endorsement as **"Funds insufficient"**. Hence, the legal notice was issued to the accused calling him to pay the amount. But the accused has not paid the loan amount. Hence, he was constrained to file this complaint. The Ex.P.1 to Ex.P.8 support his contentions.

13. As per negotiable instrument act the presumption is in favour of holder of cheque. Here the holder of cheque is complainant and presumption is in favour of complainant. It is burden on the accused to rebut the above presumption. As per section 118 of Negotiable Instrument Act, presumption has to be raise by the Court in all the cases once the factum of dishonour is established, but it is rebuttal presumption. The onus of proof to rebut this presumption lies on the accused. The standard of such rebuttal evidence depends on the facts and circumstances of each case. Such evidence must be sufficient, cogent and should prove beyond any

reasonable doubt. Therefore, a mere explanation is not enough to repel this presumption of law. Therefore, it is to appreciate whether accused rebut the evidence or not?

14. It is the defense of the accused that, there was no transaction between himself and complainant. Complainant herein has misused the cheque which was given to one Charan for the security of loan of a sum of Rs.50,000/- took by him in the year 2020-2021. Due to the dispute between said Charan and accused, the said Charan has made this complainant to file this complaint. Accused has not even seen this complainant. He saw him before this court for the first time. Further contended that, he is having his own shop and same was let for rent to some other and he is earning well, as such there is no need for him to obtain loan from this complainant. With all these contentions prays to dismiss the complaint.

15. There is presumption in favour of the complainant. In view of the presumption under section 139 which says that, "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" but the

standard of such proof is "preponderance of probabilities". Hence, the accused has to rebut the presumption in the scale of preponderance of probabilities. As soon as the complainant discharges the burden to prove that the instrument, the rules of presumptions under sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

16. Further it is the defense of the accused that notice was not served on him. But on careful perusal of Ex.P5 RPAD cover, it has been returned as “absent at the delivery time” and another RPAD cover Ex.P8 it has been returned has “unclaimed” but accused has not proved that complainant has used tactics and having colluded with post master has made endorsement on Ex.P8 as unclaimed. During the course of cross-examination of the accused he has admitted that notice was served to his correct address “ನನ್ನ ಮನೆಯ ವಿಳಾಸಃ ಮನೆ ನಂ.29, ಡಿ ವಿಸಿ ಲೇಔಟ್ 4 ನೇ ಮುಖ್ಯ ರಸ್ತೆ, ಚರ್ಚ್ 7 ಹಿಂಭಾಗ, ಇ ಮತ್ತು ಎಫ್ ಬ್ಲಾಕ್ ರಾಮಕೃಷ್ಣನಗರ

ಎಂದರೆ ಹೌದು ನೋಟೀಸು ಕೊಟ್ಟ ವಿಳಾಸ ಸರಿಯಾಗಿದೆ ಎಂದರೆ ಹೌದು". When accused admits that, he is residing in the address shown in the cause title as well as mentioned in the legal notice, now the question arises, when he was residing in the same address, if the defense of the accused that, he has not transacted with this complainant, what stopped him from receiving the legal notice and replying the same with the defense which he has taken before this court. Interestingly, the summons was also served to the same address by hand. Accused herein has received the same. When he has received the summons in the same address, why not the legal notice? This shows that, accused has purposely not received the legal notice.

17. In so far as the burden of proof in an offence under Section 138 of N.I.Act is concerned, Section 118 of N.I. Act lays down that, until the contrary is proved, it shall be presumed that, every negotiable instrument was made or drawn for consideration and Section 139 of N.I.Act, contemplates that, 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.

18. It is pertinent to mention that in the decision of Hon'ble High Court of Karnataka between **Sri.Ganesh Shetti Vs Sri.Rajan Chaudhary. Reported in 2020(1)Kar.L.R.SN 21,**

> *"Dishonour of cheque, Cheque returned with an endorsement 'drawer's stop payment', Legal notice was returned 'unclaimed', Sufficient service of the notice proved, Once signature on the cheque admitted, the court is duty bound to draw a presumption in favour of complainant, Presumption not rebutted by accused, Held Case of the complainant stands proved, the accused is liable to be convicted, Petition dismissed.*

19. It is the defense of the accused that he do not know who is this complainant and in the year 2021 when, he has taken loan from Charan for sum of Rs.50,000/-, he has given his blank cheques and same has been taken by the complainant, after taking the same, the complainant herein has misused the same and lodged this false complaint. Even though accused has taken this defense that he has not done any transaction with the complainant, he has failed to prove the same by producing sufficient evidence. Further accused has not produced any document to show that how the said Charan is related to this complainant and how the complainant came into possession of the cheque in

question? Accused has not proved the same with proper documents. Accused taking defense and not proving the same with help of proper documentary evidence, same cannot be taken into consideration. In decision of Hon'ble High Court of Karnataka between ***Thimmaiah Vs Eshwarappa. Reported in 2022(4) KCCR 3697,*** it is held that "*Section 138 and 139 Dishonour of cheque, accused claiming that cheque in question was issued to some other person towards chit fund, It was for him to state as to how that cheque came to the possession of complainant, In absence of proof thereof and in absence of evidence for rebutting presumption available in favour of complainant, conviction of accused not interfered with.*" Therefore this court can safely come to conclusion that accused has not rebutted the presumption. Here also accused has failed to prove how his cheque went into the hands of this complainant.

20. During course of his cross-examination accused has admitted that "ಸಾಕ್ಷಿಗೆ ಈಗ ನಿಪಿ-1 ಚೆಕ್ಕು ತೋರಿಸಲಾಗಿ ಸದರಿ ಚೆಕ್ಕು ನನ್ನದೇ ಅದರಲ್ಲಿರುವ ಸಹಿ ನನ್ನದೇ". This shows that accused has admitted the cheque and signature on the cheque. When cheque and signature on the cheque, is admitted by the accused, it is pertinent to mention **2009 (1) KCCR 249 in case of M/s. Amolak Textiles, Bengaluru Vs. M/s. Uphar**

**Fashions.,** the Hon'ble High Court of Karnataka has held that:-

> *"The signature and writing in the cheques is also admitted. The accused has failed to prove that the complainant got the cheques by unlawful means. The presumption under Section 139 of N.I. Act arises in favour of the complainant. The accused has not rebutted the presumption".*

By placing reliance on the above judgment if once issuance cheque and signature is admitted the presumption is in favour of the complainant.

21. Further in order to prove the defense of the accused that, he has given cheque for purpose of security to one Charan and due to dispute between Charan and himself said Charan has made this complainant to file this false case. Accused has not produced any document to show that complainant has taken the cheque from the said Charan. The accused herein has not proved what is the relationship between Charan and complainant. Accused has not tried to prove that, cheque was not issued to this complainant. Even though accused has taken a defense, same is not helpful to him, because the defense of the accused is doubtful. Without any transaction, how the cheque went in to the hands of this complainant? It is the duty of the accused to give answer to the said question by

way of rebuttal evidence with the help of proper documents.

22. The defense of the accused was really true, accused would have given complaint against this complainant to the police station or give stop payment instructions to his bank, but accused has not done the same. During the course of cross-examination, accused himself admitted that, he has not taken any action against the complainant. To reiterate the same "ಈ ಪ್ರಕರಣ ಹಾಕಿದ ನಂತರವೂ ಸಹ ನಾನು ಪಿರ್ಯಾದಿಯವರ ಮೇಲೆ ಯಾವುದೇ ದೂರನ್ನು ಕೊಟ್ಟಿರುವುದಿಲ್ಲ" Further admits that not taken any action against said Charan "ಚರಣರವರು ಪಿರ್ಯಾದಿಯವರ ಕೈಯಲ್ಲಿ ಸುಳ್ಳು ಪ್ರಕರಣ ದಾಖಲಿಸಿರುತ್ತಾರೆ ಎಂದು ಅವರ ಮೇಲೆ ಯಾವುದೇ ಪೊಲೀಸ್ ದೂರು ಕೊಟ್ಟಿರುವುದಿಲ್ಲ". This shows that, accused has not taken any action either against this complainant or against said charan. If at all if defense of the accused was true, accused would have taken any action upon the bank people. This shows that, accused has not taken any action against the said charan for non-return of cheque. It is pertinent to mention that in the decision between **B.R.Ahmedulla Sheriff Vs Kamlesh Kumar P Jain,** reported in **2022(3) AKR 778**,

> *"Cheque dishonour, Legally enforceable debt, Presumption as to, Accused borrowed loan from complainant, for improvement of business and*

> *cheques issued towards return of loan amount, dishonoured with endorsement 'funds insufficient', Accused denying loan transaction and claiming that complainant misusing the cheque given by him to his father, Accused was builder who developed lands for which he raised loans regularly, accused also admitted that cheque pertaining to him and written in his hand writing, For alleged non-return of cheque by father of complainant, Accused not taking any legal action, complainant establishing that cheque issued to him by accused towards repayment of loan, Non production of bank passbook by complainant, not relevant, Even after service of demand notice, accused did not respond in any manner, Conviction proper."*

The above judgment aptly applies to case in hand here also the defense of the accused is that he has given cheque for security to loan took by him from one Charan and admittedly accused has not taken any action against the said Charan for non-returning of the cheque. There are absolutely no materials placed before the Court to disbelieve oral and documentary evidence of the complainant. The accused has totally failed to disprove the presumption raised in favour of the complainant.

23. As far the question of existence of basic ingredients for drawing of presumption under sections 118 and 139 of the Act is concerned, it is apparent that, the cheque in question that had been drawn in favour of the complainant, on a bank account maintained by the accused. The said cheque is presented to the Bank

concerned within the period of its validity and were returned unpaid. All these basic ingredients of section 138 are made out and the onus, now shifts on the accused to establish a probable defence to rebut such presumption. Now the question is whether a legally valid and enforceable debt existed and the cheque in question was issued in discharge of said liability or debt and to examine whether the defence raised by the accused is able to raise a probable defence which creates doubt about the transaction and existence of a legally enforceable debt or liability, as stated by the Complainant. The burden to prove the consideration for the cheque lies on the accused. If not rebutted, the presumption is that the cheque was issued for consideration.

24. The accused herein has not disputing the issuance of cheque, but later he is taking inconsistent stand is not acceptable. It is pertinent to mention **Seetharama Gowda.A Vs Isubu Kunhammade, 2021(2) KCCR SN 119(DB)**

> *"Dishnour of cheque, accused not disputing issuance of cheque, but taking inconsistent stand later, Accused not initiating any proceedings as regards misuse or forgery of cheque and making of wrongful claim, Except denial, accused not proving his case beyond reasonable doubt as obligation was on him to do so when he took a special plea, Courts below justified in conviction of accused, Revision petition of accused rejected."*

This judgment aptly applies to case in hand here also accused admitted the cheques but not initiating any action an inference can be drawn against the accused. Therefore, once it is established that there was a transaction between the parties and the cheque was issued for payment of such liability in view of the rulings note in the above said cases rendered by Apex Court there is no other reasons in order to deviate the principles laid down therein. Hence, negative inference is drawn against the accused. As stated above, the deposition of P.W.1 has gone unchallenged and in absence of any contra evidence, I do not find any reasons to disbelieve the contentions of the complainant.

25. In order to sum up my view, It contemplates that, 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 the complainant has proved the guilt of the accused for the offence punishable under Section 138 of N.I.Act beyond all reasonable doubts. Further, the accused himself has admitted that, Ex.P.1 belongs to him. Hence considering all these aspect this court do not have impediment to drawn negative inference against accused. Whenever, cloud has arise over the defense of the accused, it is a bounden duty of the accused to clear the same with cogent evidence. But case in hand, accused has totally failed to prove the same. Therefore, this court do not have any

impediment to draw negative inference against the accused. In so far as the burden of proof in an offence under Section 138 of N.I.Act is concerned, Section 118 of N.I. Act lays down that, until the contrary is proved, it shall be presumed that, every negotiable instrument was made or drawn for consideration and Section 139 of N.I.Act. Accordingly, I answer point No.1 in the **Affirmative**.

26. **Point No.2 :** In view of my finding on point No.1 and for the reasons stated above, I proceed to pass the following:

**:: ORDER ::**

In exercise of powers vested in this court under 255(2) Cr.P.C., the accused is hereby convicted for the offence punishable under section 138 of Negotiable Instruments Act.

Consequently the accused is hereby sentenced to pay fine of Rs.1,35,000/- (Rupees one lakh thirty five thousand only) and in default on the part of the accused to pay the fine amount, he shall undergo simple imprisonment for a period of six months.

It is clarified that serving on default sentence will not absolve the accused on payment of the fine amount.

Further after realizing the fine amount from the accused, a sum of Rs.1,30,000/- (Rupees one lakh thirty thousand only) shall be paid to the complainant as compensation under Section 357(1)(b) of Cr.P.C. and the remaining Rs.5,000/- (Rupees five thousand only) shall remitted to the State Government.

The bail bond and surety bond executed by the accused stand canceled.

Office to furnish free copy of this judgment to the accused forthwith.

***(Dictated to the stenographer, transcript thereof is computerized and after corrections pronounced by me in the open Court on this the 07th day of February, 2025)***

**(Smt.SUSHMA C.)**
**V J.M.F.C., Mysuru.**

## :: ANNEXURE ::

### 1. Witnesses examined on behalf of the Complainant:

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| P.W.1 | - | Sri.Swamy Y. |

### 2. Documents marked on behalf of the Complainant:

| | | |
|---|---|---|
| Ex.P.1 | - | Cheque |
| Ex.P.1(a) | - | Signature of the accused |
| Ex.P.2 | - | Bank endorsement |
| Ex.P.3 | - | Legal notice |
| Ex.P.4 | - | Postal receipt |
| Ex.P.5 | - | Returned postal cover |
| Ex.P.5(a) | - | Copy of notice |
| Ex.P.6 | - | Legal notice |
| Ex.P.7 | - | Postal receipt |
| Ex.P.8 | - | Returned postal cover |
| Ex.P.8(a) | - | Copy of notice |

**3. Witnesses Examined on behalf of the Accused:**

D.W.1 - Sri.Sathish T.

**4. Documents marked on behalf of the Accused:**

-NIL-

**V J.M.F.C., Mysuru.**