

KACB010019402022



**IN THE COURT OF I-ADDL. DISTRICT AND
SESSIONS JUDGE AT CHIKKABALLAPUR**

Dated this the 30st day of May 2023

:- PRESENT :-

Sri. SHIVAPRASAD K.B., *B.Com., LL.B.*,
I-Addl. District & Sessions Judge,
Chikkaballapura

Crl.Appeal.No.30/2022

APPELLANT:

N. Narasimhappa
S/o late Anjinappa,
aged about 71 years,
R/at Badhimalluru village,
Kasaba Hobli,
Gowribidanur Taluk
[Accused in C.C.No.588/2016]
(Rep. by Sri K.P. Lohith Kumar,
Advocate)

-Vs-

RESPONDENT:

N. Narayanaswamy
S/o Narasimhaiah,
aged about 66 years,
R/at Badhimalluru village,
Kasaba Hobli,
Gowribidanur Taluk
[Complainant in
C.C.No.588/2016]
(Rep. by Sri.S,L. Devaraj,
Advocate)

J U D G M E N T

The appellant/accused preferred this appeal under Section 374 of Cr.P.C., challenging the Judgment of conviction and order of sentence dated 13.09.2022 passed by the learned Addl. Civil Judge and JMFC. Gowribidanur in C.C.No.588/2016, whereby the appellant has been convicted for the offence punishable under Section 138 of Negotiable Instruments Act and sentenced to pay a fine of Rs.1,70,000/-, in default he shall undergo simple imprisonment for a period of five months.

2. The appellant is the accused and the respondent is the complainant in C.C.No.588/2016 on the file of learned Addl. Civil Judge and JMFC. Gowribidanur and the parties herein are referred to as referred before the learned Magistrate.

3. The brief facts of the case of the complainant/respondent is as under: -

4. The accused and complainant are known to each other and the accused borrowed a sum of Rs.1,50,000/- as hand loan from the complainant for his legal necessities. In discharge of said liability, the accused issued the cheque bearing No.527306 dated 22.03.2016 drawn of State Bank of Mysore,

Gowribidanur branch. The complainant presented the cheque for collection through his banker Karnataka Bank, Gowribidanur branch and said cheque has been returned unpaid with endorsement 'funds insufficient' on 22.03.2016. The complainant got issued the legal notice dated 28.03.2016 to the accused demanding the cheque amount and in spite of service of demand notice, the accused has not complied the said demand notice. Therefore, the complainant has filed the private complaint under Sec.200 of Cr.P.C., for the offence punishable under Sec.138 of N.I. before the learned Magistrate on 29.04.2016.

5. The learned Magistrate after sworn statement of the complainant, took the cognizance of the offence punishable under Section 138 of Negotiable Instruments Act. He registered the case in C.C.No.588/2016 and issued summons to the accused. The accused appeared before the learned Magistrate through his counsel and his plea was recorded. The complainant examined himself as PW.1 and got marked Ex.P.1 to P.5 documents. The statement of the accused under Sec.313 of Cr.P.C., recorded and he denied the incriminating materials put against him. The accused examined himself as DW.1. He has not produced any documents.

6. After hearing learned counsels for the complainant and the accused, the learned Magistrate passed the impugned judgment of conviction and order of sentence dated 13.09.2022 as aforesaid, for the offence punishable under Section 138 of Negotiable Instruments Act.

7. Feeling aggrieved by the said Judgment of conviction and order of sentence dated 13.09.2022, the accused preferred this appeal before this Court on the following grounds:

i) The learned Magistrate has not considered the Ex.P.1 cheque has been issued regarding chit transaction and said chit also closed and the complainant misused the Ex.P.1 and filed the case against the accused;

ii) The learned Magistrate without providing an opportunity to accused to file application to send the Ex.P.1 cheque for FSL and without knowledge to the accused, pronounced the impugned judgment;

iii) The appellant is innocent of the alleged offence and he has no liability to pay th amount to the complainant;

vi) The learned Magistrate has not considered that the complainant tampered the numbers and words in Ex.P.1 as Rs.1,50,000/-;

Among other formal grounds, the accused/appellant prays to set aside the impugned judgment of conviction and sentence passed by the learned Addl. Civil Judge and JMFC. Gowribidanur and

acquit him or remand the matter for the purpose of FSL opinion relating to Ex.P.1 Cheque.

8. This Court issued notice to the respondent/complainant and he appeared through his counsel.

9. Securing the Trial Court records, the matter is posted for arguments.

10. During the stage of arguments the learned counsel for the appellant/accused has filed the application under Sec.73 of Indian Evidence Act, contending that the appellant issued the cheque to the respondent/complainant for the purpose of security to chit amount of Rs.50,000/- and the said amount was cleared. After discharge of said amount, the complainant has promised to return the cheque and believing the words of the complainant, the accused went away and thereafter, filed the case due to some misunderstanding. It is further contended that he has not signed the cheque and complainant forged the signature of accused and wrote the amount in the Ex.P.1-cheque. With these contentions, the appellant -accused prayed to send the Ex.P.1 cheque to forensic handwriting expert for comparison.

11. The complainant resisted the said application by filing objection and he contended that the accused has filed the application to drag the proceedings. In the cross examination, he admitted the handing over the instrument to complainant, but denied that he issued the cheque for Rs.1,50,000/-. He also contended that the accused-appellant denies the amount and the writings of the contents of Ex.P.1 and he ought to have filed the application before the trial Court. Hence, he prays to dismiss the application filed by the accused.

12. Heard the learned counsel for the appellant/accused and learned counsel for the complainant/respondent on appeal as well as the application filed under Sec.73 of Indian Evidence Act.

13. Upon hearing the appellant/accused and respondent/complainant and perusal of trial Court records, the following points arise for my determination:

1. Whether the appellant-accused has made out ground to allow the application filed under Sec.73 of Indian Evidence Act?
2. Whether the accused/appellant by preponderance of probability, rebutted the presumption under Sec.139 of Negotiable Instruments

Act, by raising probable defense that there is no legally enforceable debt amount covered under the cheque at Ex.P.1?

3. Whether the impugned Judgment and order of conviction dated:13.09.2022 in C.C.No.588/2016 on the file of learned Addl. Civil Judge and JMFC. Gowribidanur is illegal, perverse and requires interference by this Court?

4. What Order?

14. My answer to the above points for determination are:

Point No.1: In the negative,
Point No.2: In the negative,
Point No.3: In the negative,
Point No.4: As per final order for the following:

REASONS

Point No.1 and 2:-

15. It is the specific case of the complainant/respondent that the accused-appellant borrowed hand loan of Rs.1,50,000/- from the complainant for his legal necessities and towards discharge of said liability, the accused has issued the Ex.P.1 cheque bearing No.527306 dated 22.03.2016 drawn on State Bank of Mysore, Gowribidanur Branch. On presentation of the said cheque by the complainant through his banker i.e, Karnataka bank,

Gowribidanur branch, the said cheque dishonoured and returned with endorsement 'funds insufficient' on 22.03.2016. The complainant issued legal notice dated 28.03.2016 demanding the Ex.P.1 cheque amount, and in spite of service of demand notice, the accused has not complied the said legal notice. Hence, he presented the private complaint before the learned Magistrate on 29.04.2016 for the offence punishable under Sec.138 of N.I. Act.

16. In order to substantiate the case of the complainant, he examined himself as PW-1 and in support of his case, produced Ex.P.1 to P.5 documents. The accused examined himself as DW.1. The learned Magistrate after hearing both the parties, has passed the judgment of conviction and order of sentence against the accused for the offence punishable under Sec.138 of N.I. Act, which is impugned herein.

17. On going through the material evidence adduced by the complainant and accused, there is no dispute that the Ex.P.1 cheque belongs to the bank account of accused and the signature found on Ex.P.1-cheque also belongs to him. The accused during his cross examination admitted that ನಿಷಿ-1 ರಲ್ಲಿರುವ ನಿಷಿ-1(ಎ) ನಂತೆ ಸಹಿ ನನ್ನದೆ. Thus, the signature of the

cheque Ex.P.1 having been admitted by the accused, the complainant, the holder of cheque at Ex.P.1, is entitle for the benefit of presumption under Sec.139 and 118 of Negotiable Instruments Act and it shall be presumed that the accused issued Ex.P.1-cheque in discharge of legal liability. Now, the burden is on the accused to rebut the presumption by raising probable defense that there is no legal enforceable debt, to dislodge the said presumption.

18. On going through the evidence placed on record, it reflects that the accused took the defense that the complainant was carrying on chit business, in which he is a member and in the said transaction the accused issued the Ex.P.1 cheque as security. It is his further defense that the accused wrote the amount Rs.50,000/- in the said cheque and the complainant altering the said amount as Rs.1,50,000/-, filed the false complaint against the accused. Though the accused took the contention of chit business, he has not furnished the particulars of alleged chit business. Further, he has not examined any members of alleged chit business to show that the complainant was carrying on chit business. Except bare contention there is no material placed to show that the the complainant was carrying on the

chit business and the Ex.P.1 Cheque issued in connection with the chit business.

19. The learned counsel for the accused vehemently argued that the accused issued the cheque by writing Rs.50,000/- and the complainant by inserting '1', made the amount as Rs.1,50,000/- and presented the cheque for encashment through his banker. So, he contends the alteration of Ex.P.1 Cheque by the complainant. On the other hand, the learned counsel for the complainant strongly refuted the argument of accused and contended that there is no material alteration and the words mentioned in the Ex.P.1-cheque is not altered.

20. On perusal of the cross examination of DW.1, he stated that he gave the cheque for Rs.50,000/- and inserting '1' in Ex.P.1-cheque, the complainant filed the case by altering the amount as Rs.1,50,000/-. In the cross examination of PW.1, the accused suggested the said aspect and witness answered that ನಿಪಿ-1 ಕ್ಕೆ ಆರೋಪಿತರು ರೂ.50,000/- ಬರೆದು ನೀಡಿರುತ್ತಾರೆ ಎಂದರೆ ಸರಿಯಲ್ಲ. ನಿಪಿ-1 ನ್ನು ನಾನು ತಿದ್ದುಪಡಿ ಮಾಡಿ ರೂ.1.50,000/- ಎಂದು ಅಂಕಿಯಲ್ಲಿ ಹಾಗೂ ಅಕ್ಷರದಲ್ಲಿ ನಮೂದಿಸಿರುತ್ತೇನೆ ಎಂದರೆ ಸರಿಯಲ್ಲ. So, according to accused, he wrote Rs.50,000/- amount in the Ex.P.1 Cheque and the complainant has inserted number '1' in

words and figures on the Ex.P.1-cheque. On perusal of Ex.P.1 cheque, Rs.1,50,000/- has been written in words as well as figures. If really the complainant has inserted the figure '1', there must have been alteration in the words also, but there is no such alteration in the words of the amount mentioned in the Ex.P.1. So, the contention of the accused that the complainant inserted '1' before Rs.50,000/- is untenable and hence, material alteration of Ex.P.1 Cheque contended by the accused cannot be accepted.

21. The learned counsel for the accused argued that the Court can compare the material alterations in Ex.P.1 and therefore, he filed the application under Sec.73 of Indian Evidence Act. However, the accused in the said application prayed to send the cheque to Forensic handwriting expert to compare words, figures in Ex.P.1, signature of the accused in Ex.P.1, P.5 and vakalath of accused. The accused during the cross examination categorically admitted that the signature found in Ex.P.1 and receipt of legal notice at Ex.P.3. As indicated above, the insertion of '1' before Rs.50,000/- cannot be believable as the Ex.P.1-cheque also contain the amount in words as 'One Lakh Fifty Thousand only'. Apparently there is no alteration regarding the amount written in the words.

Therefore, there is no ground to consider the application filed under Sec.73 of Indian Evidence Act by the accused.

22. The learned counsel for the accused also contended that the learned Magistrate has not offered proper opportunity to the accused and therefore, he sought for the remand of the matter to the learned Magistrate. The learned counsel for the complainant argued that the DW.1 has been examined during the year 2019 and he dragged the matter and in spite of opportunities, he has not availed the same and therefore, there is no illegality in passing the impugned judgment.

23. On going through the order sheet maintained before the learned Magistrate, it appears that the statement of the accused under Sec.313 of Cr.P.C., has been recorded on 31.08.2019, and thereafter, the matter was adjourned to 21.09.2019, 19.10.2019. On 19.10.2019, the accused examined himself as DW.1 and cross examination deferred. The learned counsel for the accused submitted that due to Covid-19, the matter was not proceeded due to closure of courts. No doubt, there was closure of Courts for some time due to Covid-19 in the year 2020, however after the re-opening of the Courts, the matter was taken up on

08.02.2021, 31.03.2021, 21.10.2021, 10.01.2022, 14.03.2022, 27.06.2022, 07.07.2022, 05.09.2022, and the cross examination of DW.1 was not completed. It appears from the order sheet that on 12.09.2022, the DW.1 appeared and completed the cross examination and matter was posted for arguments on next day and on next day, learned Magistrate heard the matter and passed the impugned judgment on the same day. The main contention of the accused that the learned Magistrate has not granted sufficient opportunity to lead his evidence. The proceedings before the learned Magistrate reveals that the Magistrate has granted sufficient opportunities to lead his defense evidence and when the matter was set down for his cross examination, he remained absent frequently. The matter was posted for defense evidence three years back. No doubt, there was closure of courts due to Covid-19 for some time, but after reopening of the Court also, several opportunities has been granted to the accused, however the accused has not availed those opportunities and now comes up with the contention that sufficient opportunities has not been granted to him, which can not be accepted.

24. Thus, on appreciation of rival contentions and re-appreciation of evidence placed on record, the

accused could not able to raise the probable defense to dislodge the presumption u/s 139 of Negotiable Instruments Act available to the complainant and the accused could not able to show any ground to allow the application under Sec.73 of Indian Evidence Act. Hence, I hold the point no.1 and 2 are in the **negative.**

Point No.3:

25. The learned Magistrate on appreciation of evidence placed on record observed that accused has taken contrary defenses and he could not substantiate the chit transaction alleged by him. The learned Magistrate further observed that the accused having been admitted the signature on the cheque has failed to rebut the presumption under Sec.139 of N.I. Act and convicted the accused. This Court on re-appreciation on evidence on record found that the accused could not able to prove the chit transaction and failed to prove that the complainant altered the Ex.P.1 cheque. The learned Magistrate provided sufficient opportunities which is not availed by the accused. Under the said circumstances, there is no reason to interfere with the impugned judgment of conviction passed by the learned Magistrate. The learned counsel for the accused has not argued

regarding the sentence imposed and there is no circumstances warranting to interfere with the sentence passed by the learned Magistrate. Hence, I hold the point no.3 is in the **negative**.

POINT NO.4:-

26. In view of my above findings on points No.1 to 3, I proceed to pass the following:

O R D E R

The application filed by the accused-appellant under Sec.73 of Indian Evidence Act, dated 14.03.2023, is **dismissed**.

The Criminal Appeal filed by the appellant-accused under Section 374 of Cr.P.C., is **dismissed**.

The judgment of conviction and order of sentence passed by the learned Addl. Civil Judge and J.M.F.C. at Gowribidanur in C.C.No.588/2016 dated 13.09.2022 is hereby confirmed.

Send TCR along with the copy of this judgment forthwith to the trial court.

(Dictated to the STENOGRAPHER directly on computer, computerized by him, script corrected and then pronounced by me in the open Court on this the 30st day of May 2023)

Sd/-

(SHIVAPRASAD.K.B.)

I-Addl. District and Sessions Judge
Chikkaballapur.