KABD020029222022

IN THE COURT OF ADDL. SENIOR CIVIL JUDGE & JMFC., AT BIDAR

Present : Abdul Khadar, B.A. LL.B.,
Addl. Senior Civil Judge & JMFC.
Bidar.

Dated this the 02nd day of March 2024

Criminal Case No.1172/2023

Complainant: Md. Gokul Motors ®at # 8-11-145, Shop No.30/31, 1st floor, Raghvendra Swamy Temple Complex, Near KEB office, Bidar Represented by its Managing Partner, Mr. Kishanrao S/o Gyanobarao Nitturkar, Age: 52 years, Occ: Business, R/o: Nandi colony, Bidar.

(**By Sri.V.U-Advocate**)

-Vs-

Accused : Ahmed Khan S/o Habib Khan, Age: 40 years, Occ: Business, R/o: H.No.39, village Ameerabad, Tq. Humnabad Dist. Bidar 585415.

(**By Sri.J.M.S-Advocate**)

:J U D G M E N T:

The complainant filed the private complaint under Sec.200 of Cr.P.C., against the accused for having committed an offence punishable under Sec.138 of Negotiable Instruments Act.

2. It is the case of the complainant that, the M/s SAI GOKUL MOTORS® its Managing Partner of the complainant firm, being the principal officer, is duly authorized and competent to file the complaint. The accused herein had availed the H.P. loan on Hypothecation of Tata Ace goods auto bearing No. KA-37/8554 in the loan account bearing No. 3196/24 a sum of Rs 80,000/- at the interest @ 18% per annum from the complainant on Dt; 21-09-2019 on execution of necessary documents & on the guarantee of Fayaz Shah S/o Mahatab Shah R/o Village Kamthana that the loan was to be repaid in 24-EIM of Rs 4,550/-, but after availing the loan the accused has failed to repay the loan amount as per agreement, despite, repeated demands and persuasions of the complainant.

The complainant further deposed that he has repeatedly approached & requested to repay the loan amount with up to date interest, the accused has issued his account payee cheque bearing No. 102242 dated; 18-08-2021 for Rs 1,00,000/- drawn in favour of the complainant firm and payable in his account at Pragathi Krishna Gramin Bank, Halliked branch, Dist Bidar. On the receipt of the said cheque, the complainant has presented the cheque for encashment in his account at The Gandhi Gunj CO- Op Bank Ltd, Bidar, on 27-10-2021 from where the said cheque was referred to your account for clearance, but the said cheque issued by accused in favour of complainant in respect of legally enforceable debts has come to be returned. unpaid by cheque return memo dated; 28-10-2021 on the reason **"drawers signature differ"** which in turn is communicated to the complainant by his banker, that on the return of cheque to the accused. Immediately the complainant informed the accused about dishonoring of cheque, but he has not come forward to pay the dishonored cheque amount. Hence, the complainant got issued legal notice dated 24-11-2021 through RPAD calling upon the accused to pay the dishonored cheque amount within 15 days from the date of receipt of said notice. The accused issued tenable reply by denying the transaction, but not paid the cheque amount. Accordingly, complainant has filed the present complaint to take action against the accused in accordance with law and to award suitable compensation in the interest of justice and equity.

3. Being satisfied with the complaint averments, this Court has taken cognizance and after recording sworn statement being satisfied with the prima-facie case, issued summons to the accused compelling his appearance. Accused appeared through his counsel before this Court and got enlarged on bail. Substance of accusation was read over to the accused. Accused pleaded not guilty for the offence punishable U/s.138 of NI Act. Hence, this Court called upon the complainant to prove his case.

4. In support of the case, the complainant himself examined as P.W.1 and got marked 8 documents as per Ex.P1 to Ex.P8 and after closure of evidence of Complainant, the accused was examined as contemplated U/s.313 Cr.P.C and his statement was recorded. The accused, totally denied the case of the complainant and he has defense evidence. Accused

himself examined as DW1 and no document marked on his behalf and closed his side evidence.

5. Heard arguments canvassed by the learned counsel for the complainant and the accused.

6. Now the points that arise for my consideration are:

- 1.Whether the complainant proves that the accused has issued cheque bearing No. 102242 dated:18-08-2021 for Rs.1,00,000/- drawn on Pragati Krishna Gramina Bank, Branch Bidar in Discharge of legally enforceable debt and the said cheque returned dishonored for **"drawers signature differ"** after issuance of legal notice, he fails to repay dishonored cheque amount within the stipulated period and thereby committed an offence punishable under Sec.138 of N.I. Act?

  2. What order?

7. My findings on the above points are as under:

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

REASONS

Point No.1:-

8. It is pertinent to note that, whenever a private complainant is filed seeking prosecution of the accused for an

offence punishable under Section 138 of Negotiable Instrument Act, if the issuance of cheque and the signature on the cheque is accepted and admitted by the accused, an initial presumption has to be raised by the Court in favour of the complainant, that the cheque in question was issued towards legally recoverable debt or liability. Of course, this presumption is rebuttable presumption. Such rebuttable evidence has to be placed before the Court by the accused. It is well known that, the accused can rebut the said legal presumption either by cross-examination of complainant or by leading evidence. The complainant himself examined as PW.1 filed affidavit by way of chief examination has reiterated the versions of complaint. I would not like to reproduce the same to avoid repetition of facts since the complainant has explained the details of complaint averments in chief examination. The complainant has produced 8 documents at Ex.P1 to P8.

9. So far as, the document is concerned Ex.P1 is the cheque bearing No.102242 for Rs.1,00,000/- dated 18-08-2021 drawn on Gandhi Gunj CO- Op Bank Ltd, Bidar, Ex.P2 is the Cheque deposited Slip issued by the Gandhi Gunj CO- Op Bank Ltd, Bidar on 27-10-2021, Ex.P3 is the Bank Endorsement, wherein Ex.P1-Cheque was presented by the complainant through his banker PKGB branch Bidar, which was returned for the reason **“DRAWERS SIGNATURE DIFFER”.** Ex.P4 is the Postal receipt, Ex.P5 is the office copy of the legal notice,dated24-11-2021 wherein the complainant called upon the accused to pay the amount of Rs.1,00,000/- covered under the Ex.P1-cheque within 15 days from the date of receipt of

notice. Ex.P6 is the unserved postal envelop remarks as party out of station, Ex.P6(a) notice dated 02-12-2021. Ex.P7 is the H.P loan Agreement, Ex.P7(a) Accused signature, Ex.P8 is the B-extract. According to the learned counsel for the complainant, when the issuance of cheque and his signature are admitted, then the presumption as required under Section 139 of N.I. Act comes to the aid of the complainant and it is the turn of the accused to explain or rebut the said presumption by raising a probable defence.

10. In this regard, the court has to see whether the accused has been successful in rebutting the presumption through cross-examination of PW-1 and his evidence. In support of his defence, the accused cross examined PW-1 in length, but nothing has been elicited from his mouth to show that the consideration does not exist as alleged by the complainant under Ex.P1. During the course of cross examination of PW-1, he stated that, at the time of lending loan to the accused, the TATA ACE values for Rs.1,00,000/-, their finance sanctioned Rs.80,000/- loan to the accused. The accused repaid Rs.37,000/- to their finance in this regard they have not produced receipt. He admits they seized the Auto. After 16 month of lending loan. He admits that 24 month EMI to repay the loan to the accused out of which the accused paid 8 months EMI, if the accused due of 3 EMI, they have seized the vehicle. After 3 month they have not issued seizing notice to the accused. They sold Auto for Rs.45,000/-, without the consent of accused. He has not pleaded in the complaint that, who purchased the Auto in Auction and how much amount and

they have not valued the Auto from RTO Bidar. He has not taken the cheque prior to lending loan from the accused. He denied that he misuse the blank cheque of accused. The TATA ACE model was 2009. He denied that the market value of the said vehicle at the time of auction was Rs.3 Lakhs and they have not conducted the auction in order to extract money from the accused he filed false complaint.

11. On careful appreciation and evaluation of the evidence of PW1 coupled with contents of Ex.P1 to P8 makes it clear that, the accused and complainant were known to each other very well. Herein, this case the accused does not dispute issuance of cheque and his signature found on the cheque in question. Moreover, when the accused admits his signature found on Ex.P1 and handling over the same to the complainant, the presumption under Sec.139 of N.I. Act would arise in favour of the complainant.

12. The learned counsel for the complainant has argued that, the accused has issued cheque in question to the complainant and when it presented for encashment, which came to be dishonoured. He issued notice, after expiry of 15 days the accused has not paid the amount covered under the cheque. Hence, the complainant has proved that, the accused has committed an offence punishable under Sec.138 of N.I. Act.

13. Admittedly, in the cross examination of PW-1, the counsel for the accused admitted the money transaction with the complainant that, the accused had availed vehicle loan of

Rs.80,000/- from the complainant finance and towards its repayment he had issued Ex.P1 cheque to the complainant, but no contra documents produced, that the complainant seized the vehicle during Covid-19 without any prior notice and sold the said vehicle for meager value, its value was Rs.3,00,000/- and caused loss and in order to extract more money from the accused, misused the cheque by filing false complaint against accused. The say of the accused is that, the cheque was given by him to the complainant towards the security of auto loan. To prove the same he has not produced any contra documents. Hence the complainant proved his case from four corners of N.I. Act. The accused has not at all disputed the issuance of cheque or signature on it. Hence, it is crystal clear that the cheque in question was issued by the accused in favour of complainant towards discharge of his liability. If at all, the cheque was misused by the complainant, what prevented the accused to take legal action against the complainant immediately after the receipt of demand notice. To escape from the liability, the accused intentionally denied the transaction.

14. The statutory presumption under Sec.139 of N.I. Act explains initial presumption in favour of the producer of an instrument. It says court shall presume that one instrument is handed over in favour of another person only for the purpose of recover of existed debt. Therefore, the statutory presumption explained under Sec.139 of N.I. Act always provides presumption in favour of the complainant. But, it does not mean that the statutory presumption cannot be rebutted. The said presumption can be rebutted at the strength of strong

oral and documentary evidence. Let us see the attempt of the accused to rebut the evidence of complainant.

15. To defeat the case of the complainant, accused himself examined as DW-1, wherein he deposed that, he is the owner of the vehicle involved in the case which he has purchased by obtaining loan from the complainant. He has already paid installment amount to the complainant and some amount is due payable by him to the complainant. The complainant seized the vehicle during Covid-19 without any prior notice, intimation and later on the complainant sold the said vehicle without the consent knowledge of the complainant and even there is no paper proclamation, legal notice, public auction of the vehicle and thus the complainant caused loss harassed him. When the said sold by the complainant its value was Rs.3,00,000/- but the complainant sold the vehicle in scrap condition with very meager rate for recovery of due amount and caused loss harassed him. His poor family members were solely depend upon the income of the said vehicle, but due to seizing of said vehicle during Covid-19 till now he and his entire family members are facing a great hardship, starvation and thus the complainant and committed a great mistake, illegal activities by selling the said vehicle with less value, so the complainant himself is liable and responsible to pay loss damages caused to him. Since the Covid-19 from the date of seizing of said vehicle till today. He is unable to do any other work except to drive vehicle. The complainant purposely intentionally sold the vehicle by seizing during Covid-19 and

put him in a great loss. Hence, prayed to dismiss the complaint by acquitting him in accordance with law.

16. This witness cross examined wherein he deposed that he is an illiterate person, since from birth he is residing in Ameerabad. He had own land doing agriculture, he had borrowed Rs.80,000/- from the complainant. He do not remember, how much EMI he paid to the complainant and not produced EMI receipt. Since October 2019 to September 2021 per month, he has to pay Rs. 4,550/- in 24 EMI to the complainant. He paid Rs.30,000/- to the complainant, due to lock down he is unable to pay the installments. He purchased the Auto for Rs.2 Lakhs and borrowed Rs.50,000/- loan from the complainant and he has not produced purchase receipt. He denied that, by purchasing the Auto he was given it to his son-in- law. He do not have document to show that the market value of the Auto was Rs.3 Lakhs at the time of sale. He admits that his signature found on Ex.P9 i.e., undertaking letter. The finance was seized his Auto, but he do not know, when and whom the complainant has sold the auto. He has not given complaint to the police as the finance forcibly the seized the vehicle. He denied that he himself was authorized the complainant to sell the Auto by executing Ex.P9.

17. It is well settled law that the NI Act provides for two presumptions, one under Section 118 of the Act, which directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Further, under Section 139, which stipulates that

unless the contrary is proved, it shall be presumed that, the holder of the cheque received the cheque for the discharge of, whole or part of any debt or liability. The ‘presumed fact’ directly relates to one of the crucial ingredients necessary to sustain a conviction under Section 138. Further, it said that Section 139 of the NI Act, which takes the form of a ‘shall presume’ clause is illustrative of a presumption of law. It is obligatory for the Court to raise this presumption in every case where the factual basis for the raising of the presumption has been established. But this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary, as is clear from the use of the phrase ‘unless the contrary is proved’.

18. In the case of **Bir Singh v. Mukesh Kumar, (2019) 4 SCC 197,** wherein it was held that presumption takes effect even in a situation where the accused contends that ‘a blank cheque leaf was voluntarily signed and handed over by him to the complainant. Therefore, the Court said that mere admission of the drawer’s signature, without admitting the execution of the entire contents in the cheque, is now sufficient to trigger the presumption. The Apex Court further held that as soon as the complainant discharges the burden to prove that the instrument was issued by the accused for discharge of debt, the presumptive device under Section 139 of the Act helps shift the burden on the accused. The effect of the presumption is to transfer the evidential burden on the accused of proving that the cheque was not received by the Bank towards the discharge of any liability. Until this evidential

burden is discharged by the accused, the presumed fact will have to be taken to be true, without expecting the complainant to do anything further.

19. In the case of **Basalingappa v. Mudibasappa, (2019) 5 SCC 418** the Apex Court was held that to rebut the presumption and prove to the contrary, it is open to the accused to raise a probable defence, wherein the existence of a legally enforceable debt or liability can be contested. The words ‘until the contrary is proved’ occurring in Section 139 do not mean that accused must necessarily prove the negative that the instrument is not issued in discharge of any debt/liability, but the accused has two options. The first option is to prove that the debt/liability does not exist- and conclusively establish with certainty that the cheque was not issued in discharge of a debt/liability. The second option is to prove the non-existence of debt/liability by a preponderance of probabilities by referring to the circumstances of the case. The Apex Court further added that the nature of evidence required to shift the evidential burden need not necessarily be direct evidence i.e., oral or documentary evidence or admissions made by the opposite party; it may comprise circumstantial evidence or presumption of law or fact. Thus, the Court concluded that once the accused adduces evidence to the satisfaction of the Court that on a preponderance of probabilities there exists no debt/liability in the manner pleaded in the complaint or the demand notice or the affidavit-evidence, the burden shifts to the complainant and the presumption ‘disappears’ and does not haunt the accused any longer. The onus having now shifted to the complainant, he will

be obliged to prove the existence of a debt/liability as a matter of fact and his failure to prove it would result in dismissal of his complaint case. The Apex Court noted that the accused has neither replied to the demand notice nor has led any rebuttal evidence in support of his case.

20. On perusal of the defence taken by the accused is thoroughly riddled with contradictions. It is apparent on the face of the record that there is not the slightest credibility perceivable in the defense set up by the accused. The accused admits that he borrowed vehicle loan from the complainant and he prayed EMI due to Covid-19, he is in due of EMI as the complainant seized the vehicle and sold the same for meger amount and he misuse the cheque which was even to complainant at the time of borrowing of vehicle loan. Hence he is not liable to a any amount to the complainant. Hence, it highly unnatural to presume that the accused would gave his signed blank cheque to the accused as he has not taken any action against the complainant for misuse of cheque and nothing significant has been drawn from the cross-examination of the complainant to raise any suspicion in the case set up by the complainant. Other than some minor inconsistencies, the case of the complainant has been consistent throughout. The complainant’s case satisfied every ingredient necessary for sustaining a conviction under Section 138.

21. The case of the defense was limited only to the issue as to whether the cheque had been issued in discharge of a debt/liability. The accused, having miserably failed to discharge his evidential burden, that fact will have to be taken to be

proved by force of the presumption, without requiring anything more from the complainant. Once the presumption under Section 139 was given effect to, the Courts ought to have proceeded on the premise that the cheque was, indeed, issued in discharge of a debt/liability. The entire focus would necessarily have to shift on the case set up by the accused, since the activation of the presumption has the effect of shifting the evidential burden on the accused. The nature of inquiry would be to see whether the accused has discharged his onus of rebutting the presumption. If he fails to do so, the Court should have proceeded to convict him, subject to satisfaction of the other ingredients of Section 138. If the Court finds that the evidential burden placed on the accused has been discharged, the complainant would be expected to prove the above said fact independently, without taking aid of the presumption.

22. On appreciation of the oral testimony of the accused, it can be held that entire defense taken by the accused regarding issuance of cheque is admitted. Therefore, when there is an evidence of complainant regarding issuance of cheque and dishonor of cheque on it's presentation, when there is no defence evidence to rebut the presumption available u/s.118 & 139 of the Act. So, it is an admitted fact of issuance of cheque by the accused. It is the main contention of the accused that he has borrowed loan of Rs.80,000/-from the complainant and issued Ex.P1 cheque as security to the vehicle loan. Then, in my opinion question arises that as it is a matter of the year 2021, why the accused has not lodged complaint against

Complainant for misuse of cheque by the Complainant and the evidence also discloses that after receipt of demand notice, the accused has not taken any legal action against the complainant for misuse of cheque in question.

23. In this regard it is useful to refer the decision reported in **AIR 2019 SC 1876 in the case of Rohitbhai Jivanlaa Patel V/s State of Gujarat and another** wherein it is held that, once presumption of existence of legally enforceable debt drawn in favour of complainant, onus is shifted on accused- Unless onus is discharges by accused that preponderance of probabilities are tilting in his favour. Doubt on case of complainant cannot be raised for want of evidence regarding source of funds for advancing loan to accused.

24. No doubt the accused has clearly admitted his cheque and his signature on Ex.P1 and borrowing of Rs.80,000/- by hyphothicating TATA ACE Goods Auto on 24 EMI and by agreeing to pay interest 18% p.a. on 21-09-2019 and he is due of cheque amount to the complainant. The evidence of DW-1 clearly shows that no legal action has been taken by the accused against complainant to show that cheque in question was misused by the complainant to file this false case against him. There, itself the accused has failed to raise the probable defence. When Ex.P1 was not issued to the complainant towards discharge of his debt, the say of accused is presumed to be true and then there was no impediment to the accused to take legal action against the complainant. Therefore the contradiction in the version of the accused with

regard to the issuance of the cheque in dispute by him to the complainant also gives raise to series doubts with regard to his defence. Accused has not made out any probable defence so as to shift the burden on the complainant. Accused has failed to establish his defence that, cheque was misused by the complainant which was issued by him towards security to the vehicle loan. It is well settled law that, rule of presumption of innocence of accused cannot be applied with same rigor to offence U/s 138, particularly where presumption is drawn that holder received the cheque for discharge the debt or liability. Thus, accused has failed to rebut the presumption arise in favour of the complainant under Sections 118(a) and 139 of N.I. Act.

25. On perusal of the entire evidence on record, it reveals that, cheque was presented to the bank for encashment which came to be dishonored as **"DRAWERS SIGNATURE DIFFER"** and notice was duly served on accused. The accused has admitted cheque belongs to his account and his signature on Ex.P1, it is sufficient to hold that the complainant has proved the existence of debt under Ex.P1 by the accused. Thus, it clearly goes to show that since the accused had issued the cheque in question to the complainant towards repayment loan amount owed to the complainant.

26. The oral and documentary evidence available on record are clear and categorically established all the ingredients of Section 138 of N.I. Act and also proved the fact that the accused had issued the cheque in question in favour of

the complainant towards the discharge of due of amount and the said cheque was dishonored when it presented for encashment. Then the accused failed to pay the cheque amount within 15 days from the date of service of the demand notice. Hence, the dishonor of the cheque in question is clearly attracts the penal provision of Section 138 of the N.I. Act and the complainant has proved the guilt leveled against the accused for the offence P/u/s Section 138 of the N.I. Act. The accused has utterly failed to rebut the presumption under Sec.138 of N.I. Act in favour of the complainant. Hence, the complainant is entitled for benefit of statutory presumption as contemplated under Sec.139 of the Act. I did not find any informalities or contradictions elicited to render his evidence incredible. Therefore, the testimony of PW-1 inspires confidence to believe and to act upon the evidence of PW.1 and the documentary evidence at Ex.P1 to P8 are consistence, corroborative and supporting to each other and in accordance with the case of the complainant and which leads me to conclude that the complainant has proved beyond reasonable doubt against the accused for the alleged offence punishable under Sec.138 of N.I. Act.

27. Sec.138 of NI Act has been inserted to the NI Act in order to inculcate faith in the efficacy of banking operations and credibility in transaction business on negotiable instruments. The Court is empowered to impose fine double to the cheque amount, but there is no yardstick to the effect that how much of fine is required to be imposed upon the accused granting of compensation to the Complainant is more

important than sending the accused behind the Bars. From the provisions of Sec.357 of Cr.P.C when fine is not a part of the sentence, compensation can be awarded out of the fine amount as provided by sub section 1. In the face value of the cheque is Rs.1,00,000/-this Court can impose a fine of Rs.2,00,000/. After lapse of 2 years this case is reached for judgment. It is also to be borne in mind that the Complainant has to meet the litigation expenses. Accordingly, considering facts and circumstances of case and conduct of parties, it is fit to award the cheque amount plus the loss caused to the Complainant has to be suitably compensated by the accused. By considering the pendency of litigation and amount involved in the case it would be appropriate to award compensation amount of Rs.1,25,000/- to the Complainant Accordingly, I answer **Point No.1 in the Affirmative**.

Point No.2:

28. In view of my above discussions and findings on Point No.1, I proceed to pass the following:

ORDER

Acting under Section 255[2] of Cr.P.C, the accused is hereby convicted for the offence Punishable U/s. 138 of the N.I. Act.

The accused shall pay fine of Rs.1,25,000/-. In default of payment of fine amount, the accused shall under go Simple Imprisonment for three months.

Out of the amount so realized, the accused shall pay a sum of Rs.1,20,000/- to the Complainant as compensation, as provided U/s.357 Cr.P.C. The remaining amount of Rs.5,000/- shall go to the State.

The bail bond and surety bond is hereby stand canceled .

Office is directed to furnish free copy of this judgment to the accused.

(Dictated to the stenographer on computer, corrected and then pronounced by me in the open court on this the 02nd day of March-2024.)

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- **(Abdul Khadar)**
  Addl. Sr Civil Judge & J.M.F.C
  BIDAR.

ANNEXURE

List of Witnesses examined on behalf of complainant:

PW1	:	Kishanrao Managing Partner

List of Documents marked on behalf of complainant:

Ex.P1	:	Cheque dt: 18-08-2021
Ex.P2	:	Cheque deposited slip dt: 27-10-2021
Ex.P3	:	Return Memo dt:28-10-2021
Ex.P4	:	Postal receipt
Ex.P5	:	Legal notice
Ex.P6	:	unserved postal envelop
Ex.P6(a)	:	Notice dt: 02-12-2021
Ex.P7	:	H.P Loan agreement
Ex.P7(a)	:	Accused signature
Ex.P8	:	B-extract

List of Witnesses examined on behalf of accused:

DW-1 : Ahmed Khan

List of documents marked on behalf of accused:

NIL

- **(Abdul Khadar)**
Addl. Sr Civil Judge & J.M.F.C
BIDAR.

Order pronounced in the open court

vide separate judgment

ORDER

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Office is directed to furnish free copy of this judgment to the accused.

(Abdul Khadar)
Addl. Sr. Civil Judge & JMFC
Bidar.