

KAMS400006032020



Presented on : 24-10-2020
Registered on : 24-10-2020
Decided on : 03-01-2023
Duration : Years Months Days
02 02 09

**IN THE COURT OF
SENIOR CIVIL JUDGE AND JMFC
AT KRISHNARAJANAGARA, MYSURU
(Presided Over by Sujatha Madiwalappa
Sambrani)**

C.C./170/ 2020

COMPLAINANT :: Sri. Natesh, 48 years,
S/o late Thimmegowda,
R/at Mudduguppe Village,
Mirle Hobli, K.R.Nagar Taluk,
Mysuru District.

[By Sri.B.V.N. - Advocate]

V/s

ACCUSED :: Sri. Veerupaksha, 40 years,
S/o late Chikkaveerappa,
R/at Nagaranahalli village,
Doddakadanuru Post,
Halli-Mysore Hobli,
Holenarasipura Taluk,
Hassan District.

[By Sri. B.S. - Advocate]

J U D G M E N T

The complainant has filed the complaint against the accused U/Sec 200 of Cr.P.C. for the offense punishable U/Sec 138 of N.I. Act.

2. It is the case of the complainant that:-

That the complainant and the accused are known to each other. On the basis of the said acquaintance, the accused has borrowed a hand loan of Rs.2,00,000/- from the complainant to discharge his old debts, agreeing to repay the said loan amount within six months. Towards discharge of the said debt, on the same day the accused had issued post dated cheque pertaining to S.B.I. Bank, Holenarasipura Branch bearing cheque No.512319 dated 20.02.2020 for Rs.2,00,000/- in favor of the complainant. When the complainant presented the cheque for en-cashment through his banker i.e. Navanagara Urban Co-Operative Bank Ltd., K.R.Nagar Branch and the same was dishonored as 'Funds Insufficient' in the account of the accused and returned with an endorsement on 02.09.2020. Thereafter, the complainant issued a legal notice to the accused on 08.09.2020 which was returned unserved. Thereafter the complainant informed the

the accused about the issuance of legal notice in connection with the cheque amount through phone. In spite of the same, the accused has not repaid the loan amount. Hence, the complaint.

3. On filing of the complaint cognizance was taken for the offence punishable under section 138 of N.I. Act and sworn statement was recorded. As there was sufficient ground to proceed further, a criminal case has been registered against the accused and he was summoned. The substance of accusation is stated to the accused and plea was recorded. Accused pleaded not guilty and claims to be tried.

4. In support of the complainant's case, the sworn statement of the complainant filed by way of affidavit and 5(a) documents marked as Ex.P1 to Ex.P.5(a) during the pre-summoning stage are considered as evidence of the complainant. The statement of the accused is recorded under Section 313 of Cr.P.C and his answers were recorded and he has chosen to lead defence evidence. But, the accused neither stepped into witness box nor produced any documents on his behalf.

5. Heard the arguments and perused the records.

6. The points that arise for my consideration are:

1. Whether the complainant proved that accused has committed an offence punishable under Section 138 of N.I. Act 1881?

2. What order?

7. My answer to the above points is as follows:

Point No.1 : In the Affirmative

Point No.2 : As per final order for
the following:

REASONS

POINT No.1:-

8. In order to constitute an offence under Section 138 of N.I. Act, the cheque shall be presented to the bank within a period of 3 months from its date. On its dishonor, the drawer or holder of the cheque as the case may be shall cause

demand notice within 30 days from the date of dishonor, demanding to repay within 15 days from the date of service of the notice. If the drawer of the cheque fails to repay the amount mentioned in the cheque within 15 days from the date of service of notice, cause of action arises for filing complaint and after that, the complaint shall be filed within 30 days.

9. The sworn statement of the complainant filed by way of affidavit during the pre-summoning stage is considered as evidence of the complainant. In his affidavit, he has testified regarding lending of hand loan to the accused, issuance of cheque, issuance of demand notice and also failure of the accused to pay the cheque amount. The complainant has produced the Ex.P.1 cheque bearing No.512319 dated 20.02.2020 dated 15.01.2019 for Rs.2,00,000/- drawn on S.B.I. Bank, Holenarasipura Branch, alleged to be issued by the accused, which stands in the name of complainant for Rs.2,00,000/-. The Ex.P.2 is the copy of the bank endorsement. This Ex.P.2 shows that Ex.P1 was dishonored for 'Funds Insufficient' in the account of the accused. The Ex.P.3 is the office copy of legal notice dated 08.09.2020 calling

upon the accused to pay the cheque amount. The Ex.P.4 is the postal receipt. The Ex.P.5 is the unserved postal cover and the copy of the legal notice is marked as Ex.P.5(a).

10. In the present case, the cheque is dated 20.02.2020. Ex.P2 bank endorsement shows that cheque in question was dishonored on 02.09.2020. As per Ex.P2, it appears that the cheque was presented within three months from the date of issuance of cheque. The notice was issued within the statutory period and complaint is filed within the limitation.

11. In spite of sufficient time granted, the counsel for the accused has not cross-examined the PW.1. The statement of the accused is recorded under Section 313 of Cr.P.C and his answers were recorded and he has chosen to lead defence evidence. But, the accused neither stepped into witness box nor produced any documents on his behalf. Therefore, there is nothing on record to disbelieve the case of the complainant.

12. The accused has neither denied and disputed that Ex.P 1 cheque is not issued by him

and it is not bearing his signature. The accused has neither cross examined the complainant nor lead defence evidence to disprove the case of the complainant and rebut the legal presumption. As such, the accused has failed to rebut the presumption that the cheque pertains to legally recoverable debt. Therefore, the oral evidence of PW1 coupled with the documentary evidence produced by PW1 at Ex.P1 to P.5 are remained un-rebutted.

13. Section 139 of N.I.Act mandates a presumption that the cheque pertains to legally recoverable debt or liability. The presumption is of a rebuttal in nature and the onus is on the accused to raise a probable defense with regard to the facts of the case. Further, once issuance of cheque is admitted or established, the presumption under Section 118 and Section 139 of the Negotiable Instruments Act come into play and it is for the accused to rebut the said presumption by leading positive evidence. But in this case accused has failed to rebut the said legal presumption before the court.

14. In support of my observation, I would like to rely on the decision reported in **2018 (8) SCC 469, between T.P. Murugan(Dead) Through Lrs vs Bojan**, it is held that,

Debt, Financial and Monetary Laws- Negotiable Instruments Act, 1881-Ss. 138 and 139 - Complaint as to dishonor of cheque- Presumption under section 138 and 139 of NI Act in favor of holder of cheque- Invocation of, and how may be Rebutted-Rebuttal of said presumption must be adducing credible evidence-Mere raising a doubt sans cogent evidence, with respect to the circumstances, presumption under section 139 of NI Act cannot be discharged.

It is further held that,

Under Section 139 of the N.I. Act, once a cheque has been signed and issued in favor of the holder, there is statutory presumption that it is issued in discharge of a legally enforceable debt or liability¹. This presumption is a rebuttable one, if the issuer of the cheque is able to discharge the burden that it was issued for some other purpose like security for a loan.

(The above ratio is also laid down in the decisions reported in Rangappa vs. Shri Mohan [(2010) 11 SCC 441], K.N. Beena vs. Muniyappan and Anr. [(2001)8 SCC 458]; and T. Vasanthakumar vs. Vijayakumari [(2015)8 SCC 378])

15. Further, in the Judgment of Supreme Court of India in **Criminal Appeal No.508 OF 2019** (Arising out of Special Leave Petition (Crl.) 1883 of 2018), dated 15th March 2019 between **ROHITBHAI JIVANLAL PATEL VS Vijaya OF GUJARAT & ANR.**, it is held that:

Herein above, we have examined in detail the findings of the Trial Court and those of the High Court and have no hesitation in concluding that the present one was clearly a case where the decision of the Trial Court suffered from perversity and fundamental error of approach; and the High Court was justified in reversing the judgment of the Trial Court. The observations of the Trial Court that there was no documentary evidence to show the source of funds with the respondent to advance the loan, or that the respondent did not record the transaction in the form of receipt of even kachcha notes, or that there were inconsistencies in the statement of the complainant and his witness, or that the witness of the complaint was more in know of facts etc. would have been relevant if the matter was to be examined with reference to the onus on the complaint to prove his case beyond reasonable doubt. These considerations and observations do not stand in conformity with the presumption existing in favor of the complainant by virtue of Sections 118 and 139 of the NI Act. Needless to reiterate that the result of such presumption is that existence of a legally enforceable debt is to be presumed in favor of the complainant. When such a presumption is drawn, the factors relating to the want of documentary evidence in the form of receipts or accounts or want of

evidence as regards source of funds were not of relevant consideration while examining if the accused has been able to rebut the presumption or not.

16. Further, as per Section 118(a) of the Act, until the contrary is proved, it is the presumption of law that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred for consideration. Thus, in accordance with the law laid down in the above decisions, it is to be presumed that when a cheque is drawn and delivered, it is for consideration and irrespective of the truth as to its receipt or non-receipt, which is again a matter of evidence; it would be for the accused to rebut the statutory presumption arising under section 118.

17. The Section 139 of the N I Act incorporates a rule of presumption to the effect that until the contrary is proved, it shall be presumed by the Court that the holder of the 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. It is the legislative mandate that the court should proceed

with the assumption that such cheque was received for the discharge of a legally enforceable debt or other liability until the drawer proves that it is not so. Ordinarily the presumption has to be rebutted by the accused-drawer only during the course of trial by proving that the cheque was not issued towards the discharge of the liability. As such, in a prosecution under Section 138, unless the contrary is proved, the court must statutorily presume that;

- * the cheque was drawn on an account maintained by the drawer with the banker;
- * that it was for the purpose of paying money to any other person out of that account;
- * that it was for discharge, in whole or in part, of any debt or any other liability; and
- * that it was received by the holder in discharge of any debt or any liability.

The above said ingredients are aptly applicable to the instant case and hence this court safely drawing the presumptions under section 139 of the N.I Act. As stated above, the accused failed to

rebut the above said presumption during the course of trial by proving that the cheque was not issued towards the discharge of the liability.

18. Admittedly, the complainant got issued a legal notice to the accused through RPAD. In spite of the same the accused has not repaid the cheque amount. Therefore, from the oral evidence of PW.1 coupled with Ex.P1 to P.5(a) and on careful scrutiny of averments made in the complaint, it is clear that the complainant has proved his claim against the accused and the accused has fails to raise a probable defense with regard to the facts of the case. Moreover, the complainant has complied with all the mandatory requirements of provisions of Negotiable Instrument Act. Therefore, when a person issued cheque for payment of any debt or liability and it is dishonored for insufficient of funds or for any legal reasons which are permissible under the Negotiable Instrument Act to proceed against the accused under Section 138 of N.I. Act, the drawer of the cheque is deemed to have been committed an offense U/S 138 of the Negotiable Instrument Act, which is punishable with sentence or fine. In

view of my above reasons, Point No.1 is answered in the **Affirmative**.

POINT NO.2:-

19. Section 138 of N.I. Act empowers the Court to sentence the accused upto two years and also to impose fine which may extend to twice the amount of cheque, or with both. The cheque in question was issued on 20.0.2020 for Rs.2,00,000/-. The complainant was deprived of money that was rightfully due to him for a period of more than two years. However, having regard to the facts of the case and the amount involved, there are no warranting circumstances to award the sentence of imprisonment as substantive sentence. Directing the accused to pay fine and also awarding compensation to the complainant would meet the ends of justice. But adequate default sentence shall have to be imposed to ensure the recovery of fine imposed to the accused. Therefore, the complainant is required to be suitably compensated as per section 80 and 117 of the Negotiable Instrument Act and also appropriate in default sentence. Having regard to all these fact, I pass the following:

ORDER

Acting U/Sec 265 of Cr.P.C, accused is found guilty for an offence punishable under section 138 of N.I. Act and he is sentenced to pay a fine of Rs.2,05,000/- (Rupees Two lakhs Five Thousand only). In default to pay fine, the accused shall undergo simple imprisonment for a period of one year.

Further, acting under section 357(1) (B) of Cr.P.C. out of the fine amount, a sum of Rs.2,00,000/- on recovery shall be paid as compensation to the complainant and remaining Rs.5,000/- shall be deposited as fine amount to State.

The Office is directed to supply a free copy of the judgment to the accused.

(Dictated to the Stenographer directly on the computer, typed by her, corrected and then pronounced in the open Court on this the **3rd January 2023**)

**(Sujatha M.Sambrani),
Senior Civil Judge & JMFC,
K.R.Nagar.**

