KABC0A0045592022

IN THE COURT OF THE LXXII ADDL. CITY CIVIL & SESSIONS JUDGE AT MAYO HALL BENGALURU, (CCH-73)

Present:
Sri. P. G Chaluva Murthy,
M. A. L.L.M
LXXII Addl. City Civil & Sessions Judge, Bengaluru.

Dated this the 27th day of November, 2023.

Crl. Appeal. No.25291/2022

Appellant/ Accused:-	***Fairoze Basha,*** *S/o T Yunis Basha,* *No.841, 8th Cross,* *Hidayath Nagar, KG Halli,* *Bangalore-560 045.* ***[By Sri. T R Ramakrishna -Adv]***

V/s

Respondent/ Complainant:	***Edwin Paul Sudhakaran,*** *S/o I Selvaraj,* *Aged about 43 years,* *HRBR Layout 1st Block,* *2nd Cross, Subhas Layout,* *Bangalore-560 043.* ***[By Sri. T Peter Prabhu Dattan-Adv]***

JUDGMENT

This appeal is by the accused before the trial court, who suffered the judgment of conviction for the offence punishable U/Sec.138 of NI Act passed by XXXIII Addl.CMM, Mayohall Unit, Bengaluru, in CC No.51584/2016, dtd.07.10.2022, challenging the validity of the judgment.

2. *For the sake of convenience the parties herein after will be referred to with their ranking assigned before the trial court.*

3. The facts of the case:-

The complainant initiated proceedings against the accused for the offence punishable U/Sec.138 of NI Act, on the ground that, the accused being known to the complainant from past several years, availed loan of Rs.4 lakhs from the complainant, assuring the complainant to repay the same within a short period. After repeated requests, the accused has issued three cheques bearing Nos.038782, 038789 and 038790 for a sum of Rs.50,000/-, Rs.50,000/- and Rs.2 lakhs respectively drawn on Union Bank of

India. On its presentation, the all the cheques came to be dishonored with an endorsement, funds insufficient in the account of the accused. Inspite of issuance of demand notice, the accused failed to pay the outstanding amount towards cheques and thereby the accused committed an offence punishable U/Sec.138 of NI Act. Thereafter the complainant approached the trial court for appropriate legal action against the accused.

4. *Pursuant to summons the Accused entered appearance through his counsel before the Trial Court. The substance of the accusation was read over and explained to the Accused in the language known to him. The Accused pleaded not guilty and claimed to be tried. The complainant got himself examined as PW1 and got marked 10 documents. The complainant also examined two witnesses as PW2 and PW3 and closed his side. The accused got himself examined as DW1 and one witness as DW2 and got marked Ex.D1 to 7 documents and closed his side.*

5. *The trial court after hearing the counsel for both the parties, convicted the Accused for the offence punishable U/Sec.138 of NI Act vide Judgment dtd.07.10.2022.*

6. *Feeling aggrieved by the said judgment of conviction, the Accused is in appeal on the following grounds.*

> *1. The impugned order passed by the court below is highly illegal and not a speaking order.*
>
> *2. The learned magistrate has committed grave error in law in taking the cognizance of the offence and as such the conviction is bad in law.*
>
> *3. The trial court has failed notice that the complainant has failed to prove the purpose of loan borrowed by the accused.*
>
> *4. The trial court has failed to notice that the complainant has not proved that he had capacity to lend loan amount of Rs.4 lakhs to the accused.*
>
> *5. The learned magistrate failed to observe the fact that PW1 failed to prove the enforceable debt or liability. Hence the judgment passed by the learned magistrate is one sided.*
>
> *6. There are several weaknesses in the evidence of prosecution which have been*

overlooked by the learned magistrate and evidence was sufficient to create suspicion.

7. That appraisal of evidence on record by the learned magistrate thus suffers from legality, manifest error and the finding of the learned magistrate was therefore unreasonable and perverse.

8. The sentence passed by the learned magistrate is too harsh and severe and the impugned judgment is illegal, incorrect and improper and has resulted miscarriage of justice.

9. The trial court has summarily convicted the appellant without looking and with appreciating the cross-examination points.

10. The ground No.11 urged by the appellant is more in the nature of arguments than the grounds. On perusal of the said ground, it could be seen that, the appellant is contending that the learned magistrate has not appreciated the inconsistency in the evidence of PW1 as to the relationship of the complainant and the accused. It is also stated that, there are contradictions in the statement of complainant and the accused and same has not been properly appreciated by the learned magistrate.

On the aforesaid grounds, the appellant sought for his acquittal by allowing the appeal.

7. *Pursuant to the notice, the Respondents entered appearance through his counsel. I secured the records from the Trial Court.*

8. *Heard the counsel for both the parties. The learned counsel for the Appellant and the respondent filed written arguments. Perused the evidence, documents on record and also impugned Judgment of conviction passed by the Trial Court.*

9. *On re-appreciation of the evidence, documents on record, the following points would emerge for the consideration of this court.*

> ***1. Whether the Appellant proves that the cheques in question were not issued towards any legally recoverable debt?***
>
> ***2. Whether the Judgment of conviction passed by the Trial Court calls for interference by the hands of this court?***
>
> ***3. What Order?***

10. *My finding on the above points are as under:*

Point No.1 : In the Affirmative;

Point No.2 : In the Affirmative;
Point No.3 : As per final order for the following :

R E A S O N S

11. POINT NOS. 1 and 2:-

Since the above two points are interlinked, in order to avoid repetition of facts the above points have been taken up together for consideration.

In the written arguments, the learned counsel for the appellant contended that, the complainant had no capacity to advance any amount, much less Rs.4 lakhs to the accused and therefore there was no legally enforceable debt and the learned magistrate is not justified in convicting the accused. The learned counsel for the appellant relied on the rulings of the Honb'le Apex Court,, Basalingappa V/s Mudibasappa case. The learned counsel while referring to the evidence of PW1 to 3 repeatedly contended that, the complainant had no source of income to advance loan of Rs.4 lakhs to the accused and the cheques which were issued as security, has been misused by the complainant. Therefore the learned counsel sought for acquittal of the accused by allowing the appeal.

12. *On the other hand, the learned counsel for the respondent in his written arguments tried defend the judgment of the learned magistrate relying on the judgment in Rangappa V/s Mohan. According to learned counsel, the accused failed to rebut the presumption available infavour of the complainant U/Sec.138 of NI Act and the learned magistrate is justified in convicting the accused by drawing presumption. The learned counsel while referring to the evidence of DW1 in the cross-examination contended that, admittedly the accused was in great difficulty in the month of January 2014 and admittedly borrowed some loan amount from the complainant. That itself shows that the complainant was capable of advancing loan to the accused. Therefore the learned counsel for the respondent sought for dismissal of the appeal.*

13. *Before appreciating the evidence, documents and the impugned judgment of the learned magistrate and the arguments canvased by the learned counsel for both the parties, it is necessary to refer two judgments referred to by the* *learned counsel for both the parties. The* ***Hon'ble Apex Court in a ruling, reported in 2019 (3) KCCR 2473(SC) (Basalingappa V/s Mudibasappa),*** *while considering several earlier rulings on the offence U/Sec.138 of NI Act and also on the presumption U/Sec.118 and 139 of NI Act, at Para 23 was pleased to observe as follows:*

> *23. We having noticed the ratio laid down by this Court in above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:-*
>
> *(i) Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.*
>
> *(ii) The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.*
>
> *(iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the Complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.*
>
> *(iv) That it is not necessary for the accused to come in the witness box in support of his defence, Sec.139 imposed an evidentiary burden and not a persuasive burden.*

(v) It is not necessary for the accused to come in the witness box to support his defence.

14. *In one more ruling* ***the Hon'ble Apex Court reported in AIR 2010 SC 1898 (Rangappa V/s Mohan),*** *it is observed as under:-*

> *"Existence of legally recoverable debt or liability- The presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. This is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the Complainant. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139, is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and*

> *interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the Complainant and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."*

15. *Keeping inview broad principles laid down by the Honb'le Apex Court,, let me reappreciate the evidence and documents on record. At the outset it is made clear that the accused is not disputing the compliance of mandatory provisions contemplated U/ Sec.138 of NI Act before initiating the proceedings against the accused. In none of the grounds, the accused disputed the same. Even otherwise the alleged cheques are dtd.26.06.2015, 29.06.2016 and 04.07.2015 and all the cheques have been presented and dishonored on 21.07.2015 as per Ex.P6.*

Demand notice is dtd.11.08.2015, Ex.P8 is the postal receipts, Ex.P9 and 10 are the postal acknowledgments. The demand notice is duly served on the accused and thereafter the complaint is filed before the learned magistrate on 03.10.2015. Thereby the complainant has complied with all the mandatory provisions contemplated U/Sec.138 of NI Act before initiating the proceedings against the accused. Therefore it appears that the accused is not disputing the same.

16. *Coming to the merits of the case, the initial presumption requires to be drawn infavour of the complainant as provided U/Sec.118(A) and 139 of NI Act. The burden is on the accused to rebut the presumption by raising probable defence. The defence of the accused has to be gathered from the reply notice, from the defence evidence and from the line of cross-examination of PW1. In the case on hand, the demand notice is issued on 11.08.2015 and there is no reply from the accused. Therefore this court has to know the defence of the accused from the defence evidence. The accused in his* *examination in chief opened his mouth stating that the he does not known the complainant and he never availed any loan of Rs.4 lakhs from the complainant and never issued four cheques infavour of the complainant. However in the further chief, the witness stated that, he was in great difficultly in the month of January 2014 and at that time, he had availed Rs.50,000/- from the complainant, agreeing to repay the same with interest at 10% pm. On completion of every three months, the complainant used to visit his house and insisted the accused to pay the money or hike the interest. According to accused, in the month of June 2014, the complainant arrived at the house of the accused quarreled with the accused and forcibly taken two cheques from him. In the month of November 2014, he had requested the complainant that he cannot pay the money as claimed by him and as such the complainant sought for more cheques. Therefore the accused issued one more signed blank cheque to t he complainant. In the month of December 2014, the parents of the accused requested the complainant and at that time the complainant had taken one more* *cheque from the accused forcibly. The accused has paid interest to the complainant till June 2015 and thereafter in the month of June 2015, when he approached the complainant to return the cheques, the complainant failed to return the cheques and demanded Rs.4 lakhs. Therefore he had issued a notice to the complainant on 16.07.2015, calling upon the complainant to return the cheques. Thereafter the complainant misused the cheques.*

17. *From the examination in chief of DW1, it could be gathered that, the accused is not disputing availment of loan from the complainant, but only disputing the quantum of amount availed from the complainant. According to accused, cheques were forcibly taken by the complainant.*

18. *Coming to the cross-examination of DW1, the witness admitted that, he knew the complainant since 2014. Whereas in his examination in chief, as stated above he opened his mouth stating that, he does not know the complainant. Be that as it may. In the further cross-examination the witness admitted that he had availed Rs.50,000/- from the* *complainant. According to accused, the complainant used to collect cheques once in three months and he has handed over 8 to 9 cheques to the complainant. It is also stated by the witness that the cheques were obtained by the complainant by giving threat to him. Admittedly no complaint is lodged against the complainant for having collected the cheques forcibly under threat. On the other hand the witness states that, instead of lodging complaint, he insisted to settle the matter with the complainant. Therefore it is suggested to the witness that he had received Rs.4 lakhs from the complainant and now falsely claiming that he had borrowed only loan of Rs.50,000/- from the complainant. The fact admitted by the witness is that, he has not repaid Rs.50,000/- to the complainant till the date of his giving evidence before the court. Though the witness has stated that, he has paid Rs.90,000/- towards interest for a period of 18 months, no material is placed on record by the accused. Therefore it is suggested that, the accused inorder to meet the marriage engagement expenses of his sister, he had borrowed a sum of Rs.4 lakhs from* *the complainant and the said suggestion is denied by DW1.*

19. *The accused also examined one of his friends as DW2, who tried to support the case of the accused stating that he was badly in need of money and he approached the complainant, who introduced the complainant as financier. Both himself and the accused borrowed a sum of Rs.50,000/- each from the complainant and at that time the complainant had collected some cheques as security purpose. The witness in his examination in chief stated that, they have not paid interest to the loan amount and the complainant has demanded Rs.2 lakhs from the witness. According to witness, after exchange of notices in the month of July 2015, both accused and this witness approached the complainant and paid amount of Rs.50,000/- each to the complainant and requested not to demand more money from them.*

20. *A brief cross-examination was directed against this witness, wherein the witness admitted that, he came to know the complainant through the* *accused and the fact admitted by this witness is that, the accused had financial transaction with the complainant and they have cleared entire loan amount to the complainant.*

21. *Coming to the evidence of PW1, the complainant naturally stated that, he had advanced loan amount of Rs.4 lakhs to the accused and the accused issued cheques towards advancement of loan. He relied on 10 documents, which are already referred to above. This witness was cross examined at length by the learned counsel for the accused. The first paragraph is regarding avocation of the complainant and his annual income. The witness admitted that in his notice, he has stated that, he had met the accused as a passenger in the auto rickshaw during the 1st week of April 2014. However the witness tried to clarify the same by saying that since 2014 the accused become close to him. According to witness, he was traveling in the auto rickshaw to see the exhibition. The witness further stated that, in the month of June 2014, the accused availed loan of Rs.4 lakhs in cash near tent house at*

Mukthi Nagar, KG Halli. The complainant is not having any receipt for having paid the amount. In so far as mobilization of the amount is concerned, the witness stated that, he got money from his provident fund and also borrowed some money from the some relatives. According to witness, he was having Rs.83,000/- from the provident fund and remaining amount was borrowed by him from his relatives namely Ravindran and Sudharshan. According to witness, he received Rs.2 lakhs from Ravindran byway of cash and Rs.1,20,000/- from Sudharshan in cash. However the witness is not in a position to depose regarding date of receipt of amount from his friends.

22. *Similarly the witness is not in a position to depose as to the date on which he withdrew the amount from the provident fund. Equally the witness is not in a position to depose as to the payment of advancement of loan to the accused. When Ex.D1 the notice issued to the accused, is confronted, the witness denied the same. The witness has stated that, he had advanced loan in installments in the* *month of April and May 2014 and Rs.2 lakhs in the month of June 2014 and fourth installment of Rs.1 lakh in the month of July 2014. Ex.D2 is reply notice said to have been sent by the complainant through his counsel to the notice issued by the accused on 16.07.2015. Ex.D2 is dtd.29.07.2015. Since the witness admitted the said document, the same is marked as Ex.D2. The notice sent by the accused dtd.16.07.2015 is also confronted and on admission the same is marked as Ex.D3. Ex.D1 to 3 are the notices exchanged between the parties. The fact admitted by the witness is that, in the legal notice the complainant has stated that, the cheques have been taken as security, at the time of advancing loan of Rs.4 lakhs. Admittedly the cheques were presented prior to July 2014. Therefore it is suggested that, the complainant has misused the cheques received by him, when he had advanced loan of Rs.50,000/- to the accused. The remaining cross-examination are only stock suggestions, which have been denied by DW1.*

23. *The complainant also examined one witness as PW1, who in his examination in chief stated that, the complainant is his elder brother and he had lent Rs.1,20,000/- to the complainant to advance it to the accused for improvement of accused provision business. Admittedly in the cross-examination the witness stated that he was not having any documents to show that he had paid a sum of Rs.1,20,000/- to the complainant to advance it to the accused. Therefore it is suggested that inorder to help his brother he was deposing falsely before the court.*

24. *Similarly PW3 by name Ravindran, in his affidavit stated that, he had lent Rs.2 lakhs to the complainant and this witness is also a brother of the complainant. According to witness, he accumulated the said amount, from his monthly salary and his wife's salary and at the request of the complainant, the said amount was advanced to the complainant.*

25. *In the brief cross-examination, the witness stated that, in the month of June 2014 his brother asked him for money. But the witness is not in a* *position to remember the date. According to witness he had paid Rs.2 lakhs in cash to his brother and it was not withdrawn from any bank. Admittedly he has not produced any documents to show and he was infact having Rs.2 lakhs in cash with him. The remaining cross-examination are only stock suggestions, which have been denied by DW2.*

26. *On careful evaluation of entire evidence on record. Inorder to know the true facts of the case, it is necessary to refer the notices exchanged between the parties prior to filing of the complainant at Ex.D1 to 3. Ex.D3 is the material document, which was issued on 16.07.2015 by the accused to the complainant at an earliest point of time. Ex.D3 is the notice issued by the accused to the complainant on 16.07.2015, wherein he has stated that, he had availed only Rs.50,000/- from the complainant and complainant has collected several cheques for security for the said loan and failed to return the same. On the other hand, he is demanding exorbitant interest and as such he sought return of the said cheques. The said notice was replied by the* *complainant as per Ex.D2 dtd.29.07.2015 and at page No.2, para No.3, the complainant has stated that, he had advanced Rs.4 lakhs to the accused in three installments. According to complainant, the same is as follows:-*

> *"First installment is Rs.1,00,000/-, 2nd installment is Rs.50,000/- and final third installment is Rs.50,000/-.*
>
> *[The total of which comes to Rs.3,00,000/-.]"*

27. *However in the said reply notice, he claims that, in total he had advanced loan of Rs.4 lakhs to the accused. From the naked eye, one can see the amount in figures is altered by using whitener in the reply notice.*

28. *The material notice is at Ex.P7, which is demand notice dtd.11.08.2015. As aforesaid, under Ex.D3 in the month of July 2015 itself, the accused sought for return of the cheques issued as security to the complainant. Thereafter it appears that the cheques in question were presented on 21.07.2015 and the demand notice as per Ex.P7 was issued on dtd.11.08.2015. In the demand notice the* *complainant has stated that, he had advanced huge loan of Rs.4 lakhs to the accused on several occasions and inorder to repay the said amount, he had issued cheques in question and on presentation of all the cheques, the cheques have been dishonored for want of funds in the account of the accused. In the notice, it is stated by the complainant that, the cheque No.038780 for a sum of Rs.50,000/-, cheque No.038789 dtd.29.06.2015 for a sum of Rs.50,000/- and cheque No.038790 dtd.04.07.2015 for a sum of Rs.16,000/-. The total of which comes to Rs.1,16,000/- only. However on perusal of the original cheques produced by the complainant, the cheque No.038790 is for Rs.2,00,000/-, but in the notice it is stated that, it is only for Rs.16,000/-. However at the end of the demand notice, the complainant called upon the accused to pay a sum of Rs.4 lakhs to the complainant under the cheques referred to in his demand notice. However the total amount of all the cheques come to Rs.3 lakhs only and whereas the demand notice is for Rs.4 lakhs. Therefore the demand notice issued by the complainant, prima facie appears to be defective* *notice. The notice is not in accordance with law as contemplated U/Sec.138(b) of the NI Act. The demand notice ought to have been issued for the payment of the cheques amount only and not lesser than the cheque amount or more than cheque amount. However the demand notice, as aforesaid, is invalid and defective notice.*

29. *Coming to the merits of the case, the specific case of the complainant is that, he had advanced loan of Rs.4 lakhs byway of cash to the accused. Nowhere in the complainant, the date, month and year of advancement is reflected. In the evidence before the court, the complainant has stated that, he had advanced Rs.4 lakhs byway of cash as handloan. In the examination in chief also he has not mentioned the date of advancement of loan. The amount inrespect of cheque No.038790 dtd.04.07.2015 for a sum of Rs.2 lakhs is not mentioned in the sworn statement of the complainant. In the cross-examination, the witness has stated that, in the month of June 2014, the accused had approached him for a loan of Rs.4 lakhs* *and he had paid the loan of Rs.4 lakhs in the month of August 2014. The date of payment or month of payment is absent in the pleadings as well as in the examination in chief of PW1. In the further cross-examination the witness states that, in so far as source of income is concerned, he had withdrew a sum of Rs.83,000/- from provident fund and remaining amount from his relatives Ravindran and Sudharshan at Rs.2 lakhs and Rs.1,20,000/- each. The pleadings of the complainant are silent regarding his availing loan from his relatives and paying amount to the accused in the month of August 2014. It is the specific case of the complainant that, he has paid the entire Rs.4 lakhs to the accused in the month of August 2014, whereas in the cross-examination he has stated that, he had availed loan from his relatives and paid the amount to the accused.*

30. *It is not the case of the complainant that, he had advanced loan on interest. Nowhere in the pleadings or in the evidence, the complainant had stated that, he had advanced loan to the accused on* *interest. That being the case, there was no occasion or reason for the complainant to avail loan from the others and advance loan to the accused. Of-course he examined his own brothers as PW2 and 3, who deposed regarding payments of Rs.1,20,000/- and Rs.2 lakhs respectively to his brother to advance loan to the accused. Both of them do not remember the date of advancement of loan. Absolutely no material is produced by the complainant for having withdrawn any provident fund of Rs.83,000/- from his PF account or for having availed loan from his brothers. Therefore the accused repeatedly questioned the financial capacity of the complainant to advance any loan to the accused. Admittedly the complainant annual income is only Rs.30,000/- and as such it probablesis that the complainant had no source of income to advance huge loan of Rs.4 lakhs to the accused.*

31. *Infact in his demand notice, the complainant has stated that, he met the accused, who is an auto driver as a passenger during the first week of April 2014 and on the said friendship, he* *advanced loan to the accused. Therefore it is highly improbable to believe that, the complainant would advance loan to the auto driver to the tune of Rs.4 lakhs, on the basis of relationship of auto driver and passenger that too by availing loan from the others. Therefore the defence of the accused, appears to be more probable, when compared to the case of the complainant.*

32. *Infact similar case was filed by the complainant against another friend of the accused by name Mujahid in CC Ni,54412/2016 as per Ex.D6, which is ended in acquittal. The learned magistrate considering the probabilities in the defence of the accused, acquitted the accused therein for the offence punishable U/Sec.138 of NI Act. It is significant to note that, in the said case also the complainant had claimed a sum of Rs.2 lakhs from the said Mujahid, by presenting two cheques for Rs.50,000/- and Rs.16,000/-, respectively.*

33. *Therefore the Honb'le Apex Court,* ***in Rangappa V/s Mohan*** *case observed thus:-*

> *"It is settled position of law that, the accused has to rebut the presumption available U/Sec.139 of NI Act, the standard of proof for doing so is that of preponderance of probabilities. Therefore it is the accused is able to raise a probable defence, which creates doubt about existence of legally enforceable debt or liability, the prosecution can fail."*

34. *In the case on hand, the complaint requires to be dismissed for more one reason. Firstly the notice issued by the complainant is defective one and there is no proper compliance of mandatory provisions as contemplated U/Sec.138 of NI Act. Secondly the cheques in question were presented only after exchange of notices between the complainant and the accused. At an earliest point of time, the accused issued notice to the complainant seeking return of several cheques collected from the accused, as security for the loan of Rs.50,000/-. Thereafter the cheques have been presented by the complainant, got it dishonored and filed the complaint against the accused. Thirdly, the accused* *has been able to rebut the presumption as to the existence of legally enforceable debt and infact the complainant had no source of income to advance of loan of Rs.4 lakhs to the complainant, since admittedly the complainant claims to have availed loan from his relatives to advance loan to the accused that too free of interest. All these circumstances clearly establish that the cheques in question were not issued towards the legally enforceable debt. However the trial court proceeded to convict the accused based on the presumption available infavour of the complainant U/Sec.139 and 118(A) of NI Act. But the evidence and documents on record clearly indicate that the cheques in question were not at all issued towards legally enforceable debt. Therefore this court is of the opinion that, cheques in question were not issued by the accused towards any existence of legally enforceable debt, as on the date of presentation of the cheques and as such the accused is entitled for acquittal for the offence punishable U/Sec.138 of NI Act. The judgment of the trial court indicate that, it has proceeded to convict the accused on the presumption* *that the complainant had proved the advancement of loan of Rs.4 lakhs to the accused. But it is not so. The documentary evidence available on record is considered, the total amount of cheques in question is only Rs.3 lakhs, whereas the claim of the complainant is Rs.4 lakhs and trial court has wrongly came to the conclusion that the complainant had advanced loan of Rs.4 lakhs to the accused and inorder to discharge the said amount, the accused had issued cheques in question to the complainant.*

35. *The learned counsel for the respondent relied on the ruling reported in* ***2021 SCC Online SC 201 (Sumethi Vij V/s M/s Paramount Tech Fab Industries) and also Rangappa V/s Mohan Case.*** *The principle laid down in the Rangappa V/s Mohan case is already referred to above in this case. I have gone through the principle laid down in the Sumeti Vij's case also, wherein the Honb'le Apex Court, extracted the principle laid down in the* ***Kumar Exports V/s Sharma Carpets, reported in (2009) 2 SCC 513,*** *wherein it is observed thus:-*

> *"To disprove the presumption, the accused should bring on record such facts*

> *and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist.”*

36. *In the case on hand, the facts and circumstances clearly indicate that the complainant had no capacity to advance loan of Rs.4 lakhs to the accused. It is not the case of the complainant that, in his demand notice or in the pleadings or in the examination in chief that, he had availed loan from the others to advance loan to the accused. For the first time in the cross-examination an attempt was made by the accused to improve his case as to his source of income. As stated supra, no prudent person would advance loan to third parties by availing loan from the others, that too free of interest. Therefore the case of the accused is more probable that the case of the complainant. Under the above circumstances,* ***Point Nos.1 and 2 are answered in the Affirmative.***

37. Point No.3:

Inview of the findings on the above points the appeal filed by the Appellant deserves to be allowed. Accordingly, I proceed to pass the following:-

ORDER

The appeal filed by the Appellant U/Sec.374(3) of Cr.PC is hereby allowed.

The Judgment of conviction passed by the Learned XXXIII Addl. CMM, Mayohall Unit, Bengaluru, in CC No.51584/2016, dtd.07.10.2022, is hereby set aside.

The accused is acquitted of the offence alleged against him. The bail bonds and surety bonds executed by the accused and surety shall stand canceled. Refund the amount, to the appellant, if any, deposited by the appellant before the trial court, after the appeal period is over.

Send back the records with a copy of this Judgment to the Trial Court.

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*(Dictated to the Stenographer, typed by her, corrected and then pronounced by me, in the open court on this the **27th day of November, 2023.**)*

P G CHALUVA MURTHY

Digitally signed by P G CHALUVA MURTHY
Date: 2023.12.12 15:09:32 +0530

[P. G Chaluva Murthy]
LXXII Addl.City Civil & Sessions Judge, Bengaluru. (CCH-73)