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IN THE COURT OF THE LVI ADDL. CITY CIVIL & SESSIONS JUDGE, BENGALURU (CCH 57)

:Present :

Sri.T.Govindaiah, B.Com., LL.B.,
LVI Addl. City Civil & Sessions Judge,
Bengaluru.

Dated this the 14th Day of July, 2023.

Crl. Appeal No.875/2019.

APPELLANT

Smt.Kanaka Rathna
W/o Ganganna
Aged about 60 years
R/at No.216-3c, Blaji Road,
2nd Block, Thyagaraj Nagar
Bengaluru -560 028

(By Sri. Paramesh .Advocate)

Vs.

RESPONDENT :

Sri.K.Ravindra Prasad
S/o Late Kallappa
Aged about 51 years
R/at No.22/1, manjunath Nilaya
Nehru Road, New Guddadahalli
Mysore Road, Bengaluru

(By Sri.S.S.R., Advocate)

: J U D G M E N T :

This appeal is preferred by appellant/accused under Sec.374(3) of Cr.P.C to set aside the judgment in C.C.No.24681/2017 dated 16.03.2019 passed by the XXI Addl. Chief Metropolitan Magistrate, Bengaluru.

2. Appellant is the accused and the respondent is complainant before the trial court and parties will be referred to as per their ranking before the trial court.

3. The brief facts of the case are as follows,

The complainant and accused are family friends. In that acquaintance the accused obtained hand loan of Rs.2,50,000/- from the complainant to clear her earlier debts and to meet her family necessities and she assured to repay the same within a period of nine months. The complainant arranged the said amount of Rs.2,50,000/- by receiving his chit amount of Rs.2,27,000/- from Nanjundeshwara Finance and remaining amount was from his savings. After receiving the said amount the accused had executed on demand promissory note and consideration receipt and issued post dated cheque bearing No.396473 dated 29.06.2017 for Rs.2,50,000/- drawn on Karnataka bank Ltd, Minerva Circle Branch, Bengaluru and assured that she will take back the said cheque by paying the loan amount after 9 months. After expiry of 9 months the complainant the accused and demanded for repayment of loan amount. The accused instructed him to present the said cheque. Accordingly the complainant presented the said cheque through his banker, but the said cheque was dishonoured for the reason "Funds Insufficient". Thereafter the complainant got issued legal notice dated 01.08.2017 calling upon the accused to repay the cheque amount. But the accused intentionally not claimed the said notice. Hence the accused committed the offence punishable under Sec.138 of N.I.Act.

4. Before the trial court the complainant himself examined as P.W.1 and got marked Ex.P.1 to 8. On the other hand the accused herself examined as D.W.1 and 7 documents are marked on his behalf as Ex.D.1 to 7. Statement of accused under section 313 Cr.P.C. was recorded. To which accused denied all the incriminating circumstances appeared in the evidence of P.W.1 as false.

5. The trial court convicted the accused sentencing him to pay fine of Rs.2,55,000/-. Out of which Rs.2,50,000/- is ordered to be paid to the complainant as compensation and Rs.5,000/- to the state exchequer. In default shall undergo simple imprisonment of Three months.

6. Being aggrieved by the judgment, conviction and sentence imposed on the accused by the trial court, the accused has preferred this appeal on the following grounds:

The impugned judgment and sentence passed by the trial court is opposed to settled principles of law. The learned trial court failed to see that the complainant had failed to prove legally dischargeable liability. The order of conviction has resulted in miscarriage of justice. The trial court without following the judgment of Hon'ble High Court of Karnataka erred in shifting the burden from the complainant to accused. The learned magistrate has not considered the reply notice issued by the accused. Hence the impugned judgment is liable to be set aside.

7. Heard the arguments of both the side. Perused the records.

8. The following points arise for my consideration;

1. Whether the judgment passed by the trial court is illegal and perverse?
2. Whether the judgment of the trial Court needs interference by this Court?
3. What order?

9. My answer to the above points are as follows:

Point No1 to 3	: In the Negative
Point No.4	: As per the final order, for the following:

:REASONS:

10. **POINTS No.1 to 3** : Since these points are interconnected to each other they are taken together for discussion in order to avoid repetition of the facts.

11. The complainant and accused are family friends. In that acquaintance the accused obtained hand loan of

Rs.2,50,000/- from the complainant to clear her earlier debts and to meet her family necessities and she assured to repay the same within a period of nine months. The complainant arranged the said amount of Rs.2,50,000/- by receiving his chit amount of Rs.2,27,000/- from Nanjundeshwara Finance and remaining amount was from his savings. After receiving the said amount the accused had executed on demand promissory note and consideration receipt and issued post dated cheque bearing No.396473 dated 29.06.2017 for Rs.2,50,000/- drawn on Karnataka bank Ltd, Minerva Circle Branch, Bengaluru and assured that she will take back the said cheque by paying the loan amount after 9 months. After expiry of 9 months the complainant the accused and demanded for repayment of loan amount. The accused instructed him to present the said cheque. Accordingly the complainant presented the said cheque through his banker, but the said cheque was dishonoured for the reason "Funds Insufficient". Thereafter the complainant got issued legal notice dated 01.08.2017 calling upon the accused to repay the cheque amount. But the accused intentionally not claimed the said notice. Hence the accused committed the offence punishable under Sec.138 of N.I.Act.

12. The complainant in order to prove the complaint, the partner of the complainant company himself examined as P.W.1 and 8 documents have been marked at Ex.P.1 to 8. In the evidence of P.W.1 he reiterated all the averments of the complaint.

13. Further in support of say of P.W.1, he produced the cheque as per Ex.P.1, bank endorsement as per Ex.P.2, Copy of legal notice as per Ex.P.3, postal receipt as per Ex.p.4, returned postal cover as per Ex.P.5, On demand promissary note as per Ex.P.6, Consideration receipt as per Ex.P.7, Bank challan as per Ex.P.8.

14. On the other hand the accused herself examined as D.W.1 and got marked 7 document as Ex.D.1. In order to prove her defence, the accused produced certified copy of deposition in C.C.No.1473/2016 as per Ex.D.1, certified copy of cheque as per Ex.D.2, certified copy of Challan as per Ex.D.3, certified copy of notice as per Ex.D.4, certified copy of

Reply notice as per Ex.D.5, Office copy of notice as per Ex.D.6, Postal receipt as per Ex.D.7.

15. It is important to note that, the evidence of P.W.1 is clearly corroborated with Ex.P.1 to 8. Ex.P.1 is the cheque issued by the accused was dishonoured with an endorsement that "funds insufficient". In that regard P.W.1 produced the bank endorsement as per Ex.P.2 with an endorsement as "funds insufficient". Thereafter the complainant issued notice to the accused as per Ex.P.3 calling upon the accused to repay the loan amount covered under the cheque. But the accused intentionally refused to receive the notice. Further P.W.1 produced the postal receipt and returned postal cover as per Ex.P.4 and 5. Therefore Ex.P.3 to 5 clearly goes to show that notice issued by the complainant is unserved to the accused. But the accused fails to pay the cheque amount.

16. On perusal of the bank endorsement i.e. Ex.P.2 it is clear that, after issuance of cheque to the complainant, the accused intentionally not deposited any amount to her bank account only with intention to avoid the payment of Ex.P.1

cheque. Further the complainant had produced the On demand promissory note, consideration receipt and bank challan as per Ex.P.6 to 8 which goes to show that the accused borrowed money from the complainant and did not repaid. Therefore the evidence of P.W.1 and Ex.P.1 to 8 are clearly establishes that accused being the friend of complainant, she received the loan from the complainant. In spite of service of notice she fails to pay the loan amount. The accused being the friend, she has to pay the loan amount and issued cheque in favour of complainant. On the assurance of accused, the complainant presented the cheque for encashment, but the cheque was dishonoured. Therefore, the evidence of P.W.1 and Ex.P.1 to Ex.P.8 would clearly establishes the case of the complainant.

17. Further the accused failed to prove that Ex.P.1 cheque is not issued to the complainant. Further the accused also failed to prove that if the complainant had misused the blank signed cheque, why the accused has not any action against the complainant. Hence the evidence of D.W.1 and

Ex.D.1 to 7 is noway helpful to the case of the accused to disprove her guilt.

18. At this stage, it is relevant to note down the provisions of Sec.138 of N.I.Act.

Sec.138 of N.I.Act provides as follows:

> "Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both".

19. Thus from reading the aforesaid section, it is clear that the complainant has to prove the following essential ingredients for holding the accused guilty of offences under the said section.

(a) The cheque has been drawn by the accused on Bank account which is maintained by him with a particular Banker.

(b) The amount of money mentioned in the cheque is for discharging the legal liability either wholly or partially and

(c) The cheque is dishonoured or it is returned unpaid due to insufficiency of funds etc.,

20. In the case before the trial court, the complainant has proved the fact that Ex.P.1 is belongs to the accused and the said cheque was drawn by the accused on the bank account maintained by her with insufficient fund. The complainant also proved the fact that the said cheque was presented by him to his banker for collection and the same was dishonoured by the banker of the accused with endorsement "funds insufficient". The aforesaid facts are proved by the complainant by adducing his oral evidence and also by producing the original cheque issued by the accused to him and also by producing bank endorsement and legal notice. In the evidence of P.W.1 he clearly and unequivocally states that the accused has issued cheque for discharge of his legal liability i.e. towards repayment of loan amount.

21. Since the P.W.1 has proved that Ex.P.1 cheque is belongs to the accused and since he has contended that the said cheques were issued by the accused for discharge of her legal liability, the complainant will become overdraft a cheques within the meaning of Sec.8 of N.I.Act. Once a cheque is issued by the drawer, a presumption under Sec.118(a) R/w Sec.139 of N.I.Act as follows:-

Sec.118(a) of N.I.Act provides as follows:-

"Until the contrary is proved, the following presumptions shall be made"

> (a) That every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed,

negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

Sec.139 of N.I.Act provides as follows:-

"It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability".

22. Thus U/s 139 of N.I.Act, the initial presumption arises in favour of the complainant that the said cheque was issued for discharge of legally enforceable debt. Once the cheque is proved to be relating to the account of the accused and he admits his signature on the said cheque, then the initial presumption as contemplated under Sec.139 of N.I.Act has to be arised by the court in favour of the complainant. Presumption under Sec.139 of N.I.Act is a legal presumption and it is a mandatory presumption. The initial mandatory statutory presumption as provided under Sec.118 R/w Sec.139 of N.I.Act are in favour of the complainant.

23. The presumption under Sec.118 R/w Sec.139 of N.I.Act are rebuttable presumption. The Hon'ble Supreme Court of India in the decision are relied upon by the learned counsel for the accused reported in (2019) 5 SCC 418 Basalingappa V/s Modi Basappa has settled the position that when an accused has to rebut the presumption under Sec.139 of N.I.Act. Hon'ble Supreme Court of India has also laid down the standard of proof required to be established for rebutting the presumption u/s. 118 r/w. S. 139 of N.I.Act. In Basalingappa's case, Hon'b1e Supreme Court of India has held that "when on accused has to rebut *the presumption under Sec. 139 of N.I.Act, the standard of proof for doing so is that of preponderance of probabilities."* It is further held that if the accused is able to raise a probable defence which creates doubts about existence of a legally enforceable debt or liability, the prosecution can fail. It is further held that 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 the accused relies. It is further held that if the accused by disputing the financial capacity of the complainant to pay amount and if the accused has lead his evidence to prove it, the accused lead probable defence. It is further held that under such conditions, the burden would be on complainant to establish his financial capacity.

24. In the recent decision of Hon'ble Supreme Court of India reported in *(2021) 5 Supreme Court cases 283: 2021 Online SC 75 (Kalamani Tex and another V/s P/Balasubramanian, rendered by Hon'ble three judges bench, the Hopn'ble Supreme Court of India has* discussed about the provisions of Sec. 139 and 118 of N.I.Act. In the said judgment, the Hon'b1e Supreme Court of India has held in Para No.13 while discussing the provisions of Sec. 118 and 139 of N.1.Act, that the statute mandates that once the signature of accused on the cheque is established, then these "reverse onus" classes become operative. In such a situation, the obligation shifts upon the accused to discharge the presumption imposed upon him.

25. Further in the aforesaid judgment, the Hon'ble Supreme Court of India in Para No.15 has observed that the presumption raised u/Sec. 118 and 139 of N.I.Act are rebuttable in nature. A probable defence needs to be raised, which must meet the standard of “preponderance of probabilities and not mere possibility. Further, a bare denial of passing of consideration would not aid the case of the accused. In para No.17 of the Judgment, the Hon'ble Supreme Court of India has held that even if the arguments raised by the appellants are taken at face value that only a blank cheque and signed blank stamp papers were given to the respondent, yet the statutory presumption cannot be obliterated, because, legally, even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt. In the aforesaid judgment, in Para No. 14, the Hon'ble Supreme Court of India has held that when the accused has admitted his signature on the cheque, the trial court ought to have presumed that the cheque was issued as consideration for a legally enforceable debt. It is further observed that the trial court fell in error when it called upon the complainant to explain the circumstances under which the appellants were liable to pay. It is further observed that, such approach of the trial court was directly in the teeth of the established legal position and amounts to a patent error of low.

26. Thus from the aforesaid decision Supreme Court of India in Kalamani Tex case, it is clear that once the accused admits his signature on the cheque, it can be presumed u/Sec.139 of N.I.Act that the cheque was issued for discharge of legally enforceable debt. The court cannot insist the complainant to explain the circumstances under which the accused is liable to pay the cheque amount.

27. Herein before appellate court accused contended that, the trial court not considered the materials on record and convicted her. The impugned judgment has been passed without any application of mind and without any proper appreciation of evidence on record. Further on the perusal of the trial court records it is clear that the complainant himself examined as P.W.1 and he produced 8 documents at Ex.P.1 to 8 to prove his case. Further the accused contended that he has not issued any cheque in favour of complainant for discharge of legal liability. Further admitted that Ex.P.1 cheque is belongs to the bank account of accused, moreover she has not disputed her signature on Ex.P.1. Under such circumstances the contention of the accused are no way helpful to her case. The accused herself issued Ex.P.1 in favour of complainant and the said cheque is dishonoured only for the reason "Funds Insufficient". Under such circumstances the contention of accused is not helpful to the case of accused.

28. On perusal of the trial court records accused himself examined as D.W.1 and produced 7 document in support of her defence. But the contention of accused and document produced by her to prove her case is no way helpful to prove her case. If really complainant misused the blank cheque belongs to the accused, she has to take necessary action against the complainant before the competent court of law. But she fails to do so. Under such circumstances the contention of accused remained as only contentions, but not proved by producing believable documents. It is the contentions of the learned counsel for the accused that the trial court has not applied judicious mind and not properly appreciated the materials on record.

29. It is important to note that on perusal of the trial court records, it is clear that the complainant has proved that Ex.P.1 is the cheque issued by the accused and the same is belongs to the bank account of accused. Further the accused has not denied her signature on Ex.P.1. Further, complainant presented the said cheque for encashment, but the same was dishonoured as 'funds insufficient'. Thereafter the complainant has also issued notice to the accused, which was served. Though the service of notice accused fails to pay the cheque amount. Therefore evidence of P.W.1 and Ex.P.1 to 8 would clearly establishes the case of complainant. Further the accused had actively participated in the proceedings before trial court at all the stages. But in spite of sufficient opportunity given by the trial court, the accused has not produced any documents in support of her case. Under such circumstances the contentions of the accused remained only contentions, but not proved before the trial court by producing material evidence. Admittedly Ex.P.1 cheque issued by the accused to comply the payment of loan amount. The act of the accused seems that she intentionally wanted to prolong the matter by one or other reason. When the accused fails to prove her contention before the trial court, there is no reasons to remand the case to the trial court. Therefore, the complainant already proved his case before trial court by producing oral and documentary evidence. As such this court is of the opinion that the accused is not entitled for any equity.

30. The oral and documentary evidence adduced on behalf of the complainant before the trial court are sufficient to prove the contention of the complainant that the accused has fails to repay the cheque amount to the complainant. The materials on record i.e. Ex.P.1 belongs to bank account of accused and the accused has not denied her signature on Ex.P.1. Further the complainant has complied the provisions by issuing the notice to the accused and the same are also served to the accused. But she fails to pay the loan amount. Therefore, the complainant already proved his case before trial court by producing oral and documentary evidence. The accused instead of payment of loan amount, she issued a cheque towards discharge her liability, but the same was came to be dishounored with an endorsement that 'Funds Insufficient" only with intention to cause loss to the complainant. Under these facts and circumstances this court is of the opinion that, the trial court has rightly come to the conclusion that the complainant has proved all the essential ingredients of Sec.138 of N.I.Act and complainant has proved that the accused had committed the offence punishable under

Sec.138 of N.I.Act. The accused has failed to rebut the presumption is provided under Sec.118 R/w Sec.139 of N.I.Act by adducing probable defence evidence.

31. The accused has also fails to prove that the complainant has created the documents produced by him before trial court. If really the complainant had misused the blank cheque issued by the accused, the accused has to take necessary action against the complainant before the competent court of law. But accused failed to do so. Therefore, this court do not find any valid reason to disbelieve the oral and documentary evidence adduced on behalf of the complainant before the trial court. Hence this court finds no merits in the appeal filed by the accused. The accused has fails to prove that the trial court has erred in convicting the accused for the offence punishable under Sec.138 of N.I.Act. As such this court has no valid grounds to interfere with the impugned judgment passed by the trial court in convicting the accused for the offence punishable under Sec.138 of N.I.Act. The trial court directed the accused to pay fine of Rs.2,55,000/- (Rupees Two Lakhs Fifty Five Thousand only), out of that Rs.5,000/- to the state. The complainant has not preferred any appeal regarding sentence. As such I do not find any grounds to interfere with the impugned judgment passed by the learned trial court, so far as imposing of sentence is concerned. As such this court is of the opinion that appeal filed by the appellant is deserves to be dismissed. Accordingly points No.1 to 3 is answered in the Negative.

32. **Point No.4:** In view of my findings on points Nos.1 to 3 above, this court proceed to pass the following:

ORDER

The appeal preferred by the appellant/accused under Section 374(3) Cr.P.C. is hereby dismissed.

The order passed by the learned XXI Addl. Chief Metropolitan Magistrate, Bengalur in C.C.No.24681/2017 dated 16.03.2019 is hereby confirmed.

Send back the records to the trial court along with a copy of this Judgment.

(Dictated to the Stenographer directly on computer, then corrected and pronounced by me in the open Court on this the 14th Day of July, 2023)

(T.Govindaiah)
LVI Addl.City Civil & Sessions
Judge, Bengaluru.

Judgment pronounced in open Court (Vide separate order)

ORDER

The appeal preferred by the appellant/accused under Section 374(3) Cr.P.C. is hereby dismissed.

The order passed by the learned XXI Addl. Chief Metropolitan Magistrate, Bengalur in C.C.No.24681/2017 dated 16.03.2019 is hereby confirmed.

Send back the records to the trial court along with a copy of this Judgment.

LVI Addl.City Civil & Sessions Judge, Bengaluru.