IN THE COURT OF THE XVII ADDL. JUDGE, COURT OF SMALL CAUSES & ADDL. CHIEF METROPOLITAN MAGISTRATE, MAYO HALL UNIT, BENGALURU (SCCH-21).

Dated: This the 1st Day of October 2019

PRESENT: **Smt. VANI A. SHETTY, B.A. Law L.L.B, XVII ADDL. JUDGE, Court of Small Causes & ACMM, Bengaluru.**

C.C. No. 55647/2017

Complainant : Sri. P.Ravi Kumar,
Aged about 30 years,
S/o. late Puttaraju,
Residing at No.412,
Muniyamma Garden,
Near Shani Mahatma temple,
Old Byappanahalli, M.S.Nagar Post,
Bengaluru – 560 033.

(By Sri/Smt. C.S.R., Advocate)

V/s.

Accused : Sri. Nagendra,
Aged about 40 years,
Proprietor of M/s. Mini Traders,
R/at No.6, J.L.Shetty Cross,
Banasawadi, M.S.Nagar Post,
Kammanahalli Main Road,
R.S.Palya, Bengaluru – 33.

(By Sri/Smt. S.K.Y., Advocate)

JUDGEMENT

The accused in this case is tried for the offence punishable under Section 138 of Negotiable Instrument Act 1881, on the complaint of the complainant.

2. The summary of the complainant's case is that:

The accused borrowed hand loan of Rs.1,28,000/- from the complainant on various dates from 07.05.2014 to 16.08.2014. In discharge of said amount, the accused issued a cheque bearing No.185064 dated 30.09.2014 for Rs.15,000/- drawn on State Bank of Mysuru, HEBR Layout Branch, Bengaluru, assuring that the cheque would be honoured if presented for payment. The complainant presented the said cheque for encashment through his banker Corporation Bank, Banaswadi branch, Bengaluru. But the said cheque came to be dishonoured on the ground of 'Funds Insufficient' on 08.10.2014. As per the request of the accused, the complainant again represented the said cheque for encashment through his banker Corporation Bank, Banaswadi branch, Bengaluru. But the said cheque came to be dishonoured on the ground of 'Funds insufficient' on 09.12.2014. Thereafter, on 08.01.2015 complainant got issued legal notice to the accused by RPAD demanding for repayment of the cheque amount within 15 days from the date of receipt of the notice. The notice sent through RPAD was served on the accused on 12.01.2015. The accused has not paid the amount and therefore, this complaint filed on 13.02.2015.

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 orally stated to the accused and his plea was recorded. Accused pleaded not guilty and submitted that he has defence to make.

4. In support of the complainant's case, the sworn statement of the complainant filed by way of affidavit during the pre-summoning stage is considered as evidence of the complainant and 8 documents are marked as per Ex.P1 to Ex.P8. The statement of the accused is recorded under Section 313 of Cr.P.C and his answers were recorded. The accused has neither cross examined P.W1 nor led defence evidence.

5. Heard the argument on behalf of the complainant. Accused has not advanced the argument.

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

8. **POINT No.1:** 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.

9. The sworn statement of the complainant filed by way of affidavit during the pre-summoning stage is considered as the evidence of the complainant. In the affidavit, complainant has testified regarding the lending of Rs.1,28,000/- 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 cheque bearing No.185064 dated 30.09.2014 for Rs.15,000/- drawn on State Bank of Mysore, HRBR Layout branch, Bengaluru alleged to be issued by the accused. Ex.P1 stands in the name of complainant for Rs.15,000/-. Ex.P2 & 3 are the

endorsements issued by the bank stating dishonor of Ex.P1 cheque. Ex.P2 & 3 shows that Ex.P1 was dishonoured for 'Funds Insufficient'. Ex.P6 is the office copy of legal notice dated 08.01.2015. Ex.P7 is the postal receipt for having sent legal notice to the accused. Ex.P8 is the postal acknowledgment evidencing service of the notice.

10. In the present case, cheque is dated 30.09.2014. Ex.P3 shows that cheque in question was dishonoured on 09.12.2014. As per Ex.P3, it appears that cheque was presented within the period of three months from the date of cheque. The notice was issued within the statutory period of time. The notice issued to the accused was served to the accused on 12.01.2015 as per Ex.P8 postal acknowledgment. The cause of action for filing the complaint arose on 28.01.2015. The complainant has filed this complaint on 13.02.2015 i.e. within 30 days from the date of arisal of cause of action. In this way, the complainant has complied all the mandatory requirements of Section 138 and 142 of N.I. Act.

11. Section 118 of N.I. Act lays down that, until the contrary is proved, it shall be presumed that every Negotiable Instrument was made or drawn for consideration. Section 139 of N.I. Act, contemplates that unless the contrary is proved, it shall be presumed that the holder of the cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole of any debt or liability. In the decision reported in **2001 Crl.L.J. page 4647 (SC)** (Hiten P.Dalal –Vs-

Bratindranath Banerjee) and in various other decisions of Hon'ble Supreme Court and our Hon'ble High Court, repeatedly observed that in the proceeding under Section 138 of N.I. Act the complainant is not required to establish either the legality or the enforceability of the debt or liability since he can avail the benefit of presumption under Section 118 and 139 of N.I. Act in his favour. It is also observed that, by virtue of these presumptions, accused has to establish that, the cheque in question was not issued towards any legally enforceable debt or liability. Later in the year 2006, the Hon'ble Supreme Court in the decision M.S. Narayan Menon @ Mani –vs- State of Kerala and another **(2006 SAR Crl. 616)** has held that, the presumption available under Section 118 and 139 of N.I. Act can be rebutted by raising a probable defence and the onus cast upon the accused is not as heavy as that of the prosecution. It was compared with that of a defendant in civil proceedings. Subsequently, in the year 2008, in Krishna Janardhana Bhat –Vs- Dattatreya G. Hegde **(2008 Vo.II SCC Crl.166)** Hon'ble Supreme Court has held that, existence of legally recoverable debt is not a presumption under Section 138 of N.I. Act and the accused has a constitutional right to maintain silence and therefore, the doctrine reverse burden introduced by Section 139 of N.I. Act should be delicately balanced.

12. In the decision, Rangappa – Vs – Mohan **(AIR 2010 SC 1898)** Hon'ble Supreme has considered this issue and

clarified that, existence of legally recoverable debt or liability is a matter of presumption under section 139 of N.I. Act. In para 14 of the judgment the Hon'ble Supreme Court observed as here below:

> *"In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, 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. As clarified in the citations, 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. "*

13. In view of the above decision, now it is clear that the presumption mandated by Section 139 of N.I. Act does indeed include the existence of legally enforceable debt or liability. It is a rebuttable presumption. It is open to the accused to raise the defence wherein the existence of legally enforceable debt or liability can be contested. For rebutting presumption, the accused do not adduce evidence with unduly high standard of proof but, the standard of proof for doing so with that of preponderance of probabilities. If the accused is able to raise a probable defence, which creates doubt about the existence of legally enforceable debt or liability, the onus shifts back to the complainant. It is also clear for rebutting the presumption accused can rely on the materials submitted by the complainant or his cross-examination and he need not necessarily adduce his evidence in all the cases.

14. In the present case, complainant has complied all the mandatory requirements of Section 138 and 142 of N.I. Act by producing the documents and evidence. To rebut the same, the accused has not cross examined PW.1. The case of the complainant remained uncontested. Therefore, the complainant has proved the guilt of the accused for the offence

punishable under Section 138 of N.I. Act. Accordingly, I answer Point No.1 in the **AFFIRMATIVE.**

15. **POINT No.2:** 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 30.09.2014 for Rs.15,000/-. The complainant was deprived of money that was rightfully due to him for a period of more than five 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 under Sec.265 of Cr.P.C, the accused is found guilty for the offence punishable under Sec.138 of N.I. Act and he is sentenced to pay a fine of Rs.30,000/- (Rupees thirty thousand only). In default to pay fine, the accused shall undergo simple imprisonment for a period of three month.

Further, acting under Section 357(1)(b) of Cr.P.C., out of the fine amount, a sum of Rs.28,000/- (Rupees twenty eight thousand only) on recovery shall be paid as compensation to the complainant.

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

(Dictated to the Stenographer directly on computer, computerised by her, same is corrected, signed and then pronounced by me in the open court on this the 1st day of October 2019)

(VANI A. SHETTY)
XVII ADDL. JUDGE,
Court of Small Causes &
ACMM, Mayo Hall Unit, Bengaluru.

ANNEXURE

List of witnesses examined on behalf of the complainant:

P.W 1: Ravi Kumar P.

List of documents exhibited on behalf of the complainant:

Ex.P.1	:	Cheque
Ex.P.2 & 3	:	Bank endorsements
Ex.P 4 & 5	:	Bank challen
Ex.P.6	:	Legal notice
Ex.P.7	:	Postal receipt
Ex.P.8	:	Postal acknowledgment

List of witnesses examined on behalf of the accused: -Nil-

List of documents exhibited on behalf of the accused: -Nil-

(VANI A. SHETTY)
XVII ADDL. JUDGE,
Court of Small Causes &
ACMM, Mayo Hall Unit, Bengaluru.