KAUP010008922024

<u>IN THE COURT OF THE II ADDITIONAL DISTRICT AND SESSIONS JUDGE, UDUPI</u>.

<u>Present</u>

Sri.A.SAMIULLA.
B.Sc, LL.B.,

II Additional District & Sessions Judge, Udupi.

Dated: 05^{th} day of June 2026

<u>Crl.A.No.52 of 2024</u>

<u>Between:</u>

Smt.Jayanthi,
Age; 54 years,
W/o Yogish,
R/at D.No.12-7, 'Sri Sannidhi'
Near James Compound,
Koppalthota, Malpe,
Udupi Taluk & District. **...... Appellant**

(By Sri.PMP)

Versus

The Udupi Taluk Protestant
Christians Credit Co-operative
Society Ltd., having its head office
at Grace Plaza, Bailore, Udupi
represented by its Manager.

...... Respondent

(By Sri.SGA)

<u>J U D G M E N T</u>

Appeal is filed under Section 374(3) and 382 of CrPC by the appellant, who suffered judgment of conviction in CC.No.30 of 2019 rendered by the Principal Civil Judge **&** JMFC, Udupi, on 07th March, 2024.

2. Parties shall be referred to by their actual rank.

3. **Facts in brief;** the complainant is a co-operative society duly constituted and registered under the provisions of the Karnataka Co-operative Societies Act, 1959. The accused, a borrower who availed financial assistance of ₹2.30 lakh on 28.09.2016 undertaking to repay the same with interest at 16% per annum with penal interest 3% in case of default and on the guarantee of Yogish & Ganesh. The accused executed all necessary documents evidencing the loan transaction. Towards the partial discharge of the outstanding loan liability, the accused issued a cheque bearing No.230246 dated 17.07.2018 for

₹1,51,600 drawn on Karnataka Bank, Cart street, Udupi.

The complainant presented the said cheque for encashment through its banker. However, the cheque was returned unpaid by the bank with the endorsement 'funds insufficient' via bank return memo dated 26.08.2018. Following the dishonor, the complainant issued a statutory legal notice on 14.09.2018 calling upon the accused to pay the cheque amount within 15 days from the date of receipt of the notice. Despite the receipt of the legal notice, the accused failed to make the payment within stipulated 15-day period, thereby committing an offence punishable under Section 138 of Negotiable Instruments Act *(in short NI Act)*. Consequently, the present complaint has been filed well within the limitation period on 31.10.2018, praying for suitable legal action against the accused.

4. Upon receiving the complaint, which was registered as PC.No.1022/18, the learned Trial Court being satisfied that a *prima facie* case had been made out against the accused, the Court took cognizance of the offence under Section 138 of NI Act, 1881, and ordered the issuance of process to the accused.

5. In response to the summons, the accused entered her appearance before the Trial Court. She was granted bail.

6. The substance of the accusation was recorded. The accused pleaded not guilty to the charge, completely denied the allegations, and claimed to be tried. Consequently, the matter was posted for the recording of evidence.

7. To prove its case, the complainant society examined its Branch Manager as Pw1 and documents Exhibits P1 to P8 were marked. After closure of complainant evidence; statement of accused under Section 313 CrPC was recorded; wherein, she denied the incriminating circumstances against her; she has not offered defence evidence. During cross of Pw1 the documents Exhibits D1 to D4 were marked.

8. After hearing arguments; the Trial Court passed judgment dated 07.03.2024 convicting the accused and directing her to pay ₹1,56,600 and in default, she shall undergo simple imprisonment for three months and out of fine amount ₹1,51,600 is to be paid to the complainant as compensation under Section 357 of CrPC and ₹5,000 shall be remitted to the State towards litigation expenses.

9. Being aggrieved; accused filed this appeal on the following **grounds;**

i) The impugned judgment is contrary to law, facts of the case, weight of evidence and principles of natural justice. The Trial Court ought to have believe the evidence of accused and the cross-examination of the complainant,

ii) The approach of the Trial Court is wrongful and injustice. The impugned judgment is not proper, without grasping the facts of the case. Further it is against the established principles of law. There are no proper grounds to convict the accused.

iii) The complaint version and the evidence of Pw1 are not corroborated. There are contradictions and the Trial Court ought to have acquitted the accused by giving benefit of doubts.

iv) The accused had produced the documents about the transaction between her & the complainant and the payment made by her. The real value of the vehicle is higher than the loan amount. There is no proper valuation of the hypothecated vehicle.

v) The Trial Court has failed to appreciate the provision of law. It is well-settled principle under NI Act if the accused convince the Court that the cheque was not issued towards payment and misused by the complainant, the burden of disproving the same is on the complainant. Without proving the same the Trial Court allowed the complaint. Among these and other grounds she prayed to allow the appeal; consequently, to acquit her by setting aside the judgment and order of conviction.

10. After registration of appeal; notice was issued; respondent marks its appearance; Trial Court records were secured; heard arguments; perused records.

11. Following points arise for consideration:

> *1) Whether accused shows that judgment impugned suffers from legal and factual infirmity requiring interference in the hands of this Court?*
> *2) What order?*

12. Answer to the above points is as follows;

Point-1: Affirmative.
Point-2: As per final order for the following;

<u>R E A S O N S</u>

13. **<u>Point-1:</u>** It is pertinent to note that; whenever a private complaint is filed seeking prosecution of the accused for an offence punishable under Section 138 of NI 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 rebuttal 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.

14. Accused argued that; she denied the alleged transaction; denied the existence of legally recoverable debt; denied the issuance of cheque; complainant fails to prove the existence of a legally enforceable debt and the defense raised by her is a probable one; thereby, the presumption raised, if any, stands rebutted & the complainant fails to discharge the shifted onus.

15. Complainant argued that; it has satisfied all the ingredients to attract the offence under Section 138 of NI Act. It is argued that; the accused admitted that the cheque in question belongs to her, as such initial presumption to be raised in its favour, which is not rebutted by the accused.

16. It is worth to note that; in the case at hand the accused hasn't disputed the compliance of provisions of Section 138 of NI Act to file the complaint, as such there is no need to consider the same.

17. In light of the settled principles and submissions made by the learned counsels; let us analyze the factual situation at hand to unmask the truth regarding the contentions raised by the parties to lis.

18. In light of the above principles, it is necessary to first determine whether the complainant has made out a case to raise a presumption in its favour as contemplated under Section 139 of NI Act, 1881.

19. In cross-examination of complainant (Pw1) at **page-9,** it was suggested that the cheque issued towards security at the time of availing loan has been misused. During cross, the accused has not disputed the signature on the cheque in question.

20. The above evidence makes it clear that the disputed cheque Exhibit P1 belongs to the accused, it bears her signature and it was placed in the hands of complainant society.

21. Given the proof of the accused's signature on the disputed cheque and the complainant society's possession of the cheque, a statutory presumption arises in favour of the complainant society under Section 139 of the NI Act, presuming that the cheque was issued towards a legally recoverable debt or liability.

22. Now the question arises for consideration is whether accused is able to raise a probable defence regarding the existence of legally recoverable liability and that the cheque in question wasn’t issued towards the discharge of said liability.

23. The accused's specific defence is that there was no legal liability for which the disputed cheque was issued. She denied the existence of a legal debt/ liability of ₹1,51,600 as claimed by the complainant and further denied issuing the cheque in question on 17.07.2018 for ₹1,51,600 in favour of the complainant society.

24. Since, the statutory presumption is about the existence of a legally recoverable debt and that the cheque was issued to discharge the same, the burden of proof is squarely on the accused to rebut it. Now, the question is whether the accused is able to rebut the presumption raised in favour of the complainant. To rebut the presumption, the accused mainly relied on the cross-examination of Pw1.

25. In cross-examination at **page-1,** Pw1 stated that the accused availed vehicle loan from the society. He admits that in the statutory notice, complaint and in evidence affidavit, it hasn't been stated that the accused availed vehicle loan. He deposed that there is no specific reason for not mentioning the availment of vehicle loan by the accused in the legal notice, complaint as well as evidence affidavit.

a) Under Section 138 of NI Act complaint must disclose nature of transaction. The complaint says loan & evidence says vehicle loan with hypothecation, it's material variance. It appears that complainant deliberately hid vehicle loan to avoid producing seizure/sale documents.

b) A cooperative society, being an institutional lender, is expected to maintain audited records. Hiding the repossession and sale of an asset in the pleadings proves that complainant didn't approach the Court with clean hands. Suppression of material facts probablizes the defence theory of handing over the cheque towards security to avail vehicle loan.

26. In cross-examination at **page-2,** Pw1 stated that currently the vehicle sold in a public auction and at that time a notice was issued to the accused.

a) It is worth mentioning that the said notice is not produced before the Court.

b) In cases of vehicle loans, the liability of borrower gets crystallized only after legal sale of hypothecated asset following mandatory pre-sale notice as per RBI guidelines.

c) The auction notice is the best evidence to prove date of sale, sale price, upset price and compliance of natural justice. Non-production of said notice despite specific admission that it was issued draws adverse inference under Section 114(g) of the Evidence Act that if produced, it would show that vehicle was sold for amount sufficient to liquidate entire loan and no balance was due. The accused's defence that blank security cheque obtained at loan inception rendered highly probable.

27. In cross-examination at **page-3,** Pw1 stated that after one and half years of seizure of vehicle, the vehicle was sold in a public auction. At the time of public auction the vehicles valuation was made and the valuation report is available in the office and there is no difficulty to produce the same. He doesn't know what was the valuation of vehicle mentioned in the report. He doesn't know who purchased the vehicle in the public auction. He stated that said documents are available in the office and there is no difficulty in producing said documents in future. The vehicle was sold in public auction on 28.03.2018 in favour of one Vinod.

a) The society must sell seized vehicle within reasonable time. 1.5 year delay causes depreciation. Loss to be borne by the society. If the vehicle kept for 18 months and then sold, society cannot claim deficiency when value eroded due to own delay.

b) Valuation report is primary document to prove fair sale price. It is available with the society but not produced, as such adverse inference under Section 114(g) Evidence Act is drawn.

c) Pw1 does not know valuation or purchaser, which shows that he has no personal knowledge. His evidence on balance due amount is hearsay and it is inadmissible.

d) During cross-examination of Pw1 the vehicle valuation report dated 13.03.2018 was confronted and marked at Exhibit D3, wherein the present market value was assessed at ₹1,75,000. As per Pw1 the vehicle was sold after one and a half years of seizure and it was sold for ₹1,57,000.

e) Pw1's admissions that vehicle was sold after 1.5 years delay with valuation report available in office but not produced, and that he does not know valuation or purchaser, prove suppression of best evidence, violation of RBI guidelines, lack of personal knowledge of Pw1, & failure to establish exact legally enforceable debt post-sale, thereby rebutting Section 139 Presumption and rendering conviction under Section 138 NI Act perverse.

28. In cross-examination, Pw1 stated that he was not present when the vehicle was sold in the public auction and at that time he was not working in this branch and he was working in the main branch.

a) The above evidence shows the lack of knowledge of Pw1 regarding auction sale and his evidence is hearsay, which is inadmissible.

29. In cross-examination at **page-3,** Pw1 stated that in cheque Exhibit P1 the accused put signature in

Kannada. He admits that the other writings in the cheque are in English and he does not know who had written them.

a) The above evidence proves that the cheque was given as blank signed instrument and the body was filled subsequently, which probablize the version of defence that the cheque was given as security at the time of availing vehicle loan.

30. In cross-examination at **page-3,** Pw1 stated that after the sale of vehicle in public auction, the accused issued the cheque Exhibit P1. He stated that on 17.07.2018 they visited the house of accused for recovery of balance amount and at that time the accused issued cheque Exhibit P1. But in **page-12,** Pw1 stated that after public auction a notice was issued to the accused and on the basis of that notice the accused came to their office & issued the cheque.

a) Pw1's mutually contradictory statements at **page-3** and **page-12** that accused issued Exhibit P1 cheque at his house on 17.07.2018 after society's visit and accused came to office after public auction & notice for payment of balance amount, prove material self-contradiction on foundational fact rendering entire testimony unreliable. These contradictions further probablize the defence theory of issuing security cheque.

31. In cross-examination at **page-8,** Pw1 stated that he can produce document to show the exact balance amount as on the date of issuance of cheque Exhibit P1. But no such document is produced till this date. The ledger account extract is produced at Exhibit P8 and the last entry is of dated 28.03.2018 whereas cheque was issued on 17.07.2018. No document is produced to show the exact balance amount as on 17.07.2018.

a) The non-production of available best evidence results in drawing adverse inference and it proves non-discharge of burden to establish legally enforceable debt on cheque date.

32. In cross-examination at **page-8,** Pw1 stated that after sale of vehicle in public auction, a notice was issued to the accused mentioning the balance amount due & said notice was issued from the main branch. He does not remember what was the balance amount mentioned in the said notice. To recover the said balance amount they visited the house of accused with a recovery list and at that time the balance was

₹1,51,600. No such documents are produced before the Court. Even if it is considered that as on that date the balance amount due was ₹1,51,600, then why in the notice and complaint it is stated that the accused issued the cheque Exhibit P1 towards the discharge of part payment. These facts also manifest that the complainant fails to prove legally enforceable debt on cheque date.

33. The complainant's failure to produce account ledger (Ex.P8) with complaint or in chief-examination and belated production after cross by recalling Pw1 under Section 311 CrPC amounts to impermissible filling of lacuna, draws adverse inference that ledger was suppressed as it would disprove debt of ₹1,51,600 post-sale of vehicle valued ₹1,75,000 (Ex.D3). In vehicle loan cases, balance on cheque date must be proved by ledger after adjusting sale proceeds. No such proof is made available by the complainant.

34. The suppression of the vehicle loan, combined with the non-production of the sale documents and the mismatched account extract, completely decimates the credibility of Pw1. The presumption under Section 139 of the NI Act cannot survive such material contradictions,

35. The accused has successfully rebutted the statutory presumption under Section 139 of the NI Act by raising a probable defence regarding the lack of transparency in the accounting of the loan. The burden then shifted to the complainant, which remained undischarged.

36. To discharge the shifted burden the complainant ought to have produced those documents which were available with it as per the admissions of Pw1 during cross-examination. The non-production of vital documents without offering a plausible explanation results in concluding that if the available documents are produced, they will go against the interest of the complainant society, and as such, the documents are withheld.

37. Charging high interest (16% + penal interest) while also keeping the proceeds from the vehicle sale, which renders the debt uncertain and not legally enforceable under Section 138.

38. The fact that Pw1 admitted to having documents but failed to produce them is a critical blunder for the prosecution. Under Section 114 (g) of the Evidence

Act, if a party possesses evidence that could clarify a fact but withholds it, the Court can presume that the evidence, if produced, would have been unfavourable to them.

39. Since, the vehicle was sold, the burden shifts to the society to prove the sale price and remaining balance. Without the sale note or ledger, there is no legally enforceable debt established for the specific amount of the cheque.

40. The Trial Court erred by not drawing an adverse inference under Section 114 (g) of the Evidence Act. The non-production of the sale note of the vehicle is fatal to the complainant's case. The Trial Court wrongly placed a heavy burden on the accused to prove a negative (that she owes nothing). Here, the accused established the vehicle was sold, the probable defence was raised. The burden shifted back to the complainant to prove the remaining liability through documentary evidence, which they failed to do.

41. The view expressed *supra* is further fortified from the notice and the complaint averments, wherein nothing is stated about the repayments made by the accused, seizure of vehicle, sale of vehicle, sale amount, and how the accused was in due of more than ₹1,51,600 as on the cheque date are not stated.

42. The complainant's case is marred by inconsistencies and lack of documentary evidence. The non production of crucial documents and the contradictions in Pw1's testimony undermine the complainant's credibility. Given these, the accused defence gains traction, and the presumption under

Section 139 of NI Act is effectively rebutted, favouring the accused.

43. The accused, by raising a probable defence regarding the very existence of a legally recoverable debt or liability, has successfully rebutted the statutory presumption in favour of the complainant. Consequently, the onus shifted to the complainant, which they failed to discharge.

44. The complainant argued that the accused, despite issuance of statutory notice, failed to issue a reply notice, and therefore, cannot now be permitted to dispute the transaction. However, this contention is not tenable. Although it is true that the accused's first opportunity to defend herself was upon receiving the statutory notice, her failure to reply doesn't preclude her from raising her defense during the trial.

The absence of a reply notice doesn't amount to an admission of the complainant's case, and the accused is entitled to dispute the claim during the trial.

45. In the background of discussion *supra* it can be said without any hesitation that the accused successfully raised a probable defence, which creates doubt about the very existence of legally enforceable debt and thereby the onus of proof shifts to the shoulder of complainant to prove its case but it has not adduced any other evidence other than the evidence, which is already discussed herein. Thus, the Trial Court erred in not considering and appreciating the documents in a proper perspective, which *prima facie* probablizes the defence version. Hence, interference is warranted. Accordingly, above point is answered in the affirmative.

46. <u>Point-2:</u> By virtue of findings *supra* Court proceeds to pass the following;

<u>O R D E R</u>

Appeal is allowed.

Consequently, judgment of conviction is set aside.

Accused is acquitted of the offence punishable under Section 138 of Negotiable Instruments Act, 1881.

Bail and surety bonds shall stand canceled.

Accused is set at liberty forthwith.

Let the record of the Trial Court be transmitted back at the earliest accompanied by a copy of this judgment.

(Dictated to the Stenographer-III directly on computer, typed by her, corrected by me and then pronounced in the open Court on this the 05^{th} day of June, 2026).

SAMI ULLA Digitally signed by SAMI ULLA Location: II Addl District and Sessions Judge Udupi Date: 2026.06.10 11:04:46 +0530

(A.Samiulla)
II Addl. District & Sessions Judge,
Udupi.