KAUP300007592022

IN THE COURT OF ADDITIONAL DISTRICT & SESSIONS JUDGE, UDUPI (SITTING AT KUNDAPURA)

Present: Sri Abdul Rahim Hussain Shaikh,
B.Sc., B.Ed., LL.B.(Spl.),
Additional District and Sessions Judge,
Udupi,(Sitting at Kundapura)

Dated :- **This the 20th day of January, 2024**

CRIMINAL APPEAL No.571/2022

Arathi, 40 years,
D/o Lalu Prasanna,
R/o Kalamma Nilaya,
Mangalpande Road,
Vaderhobli Village,
Kundapura Taluk, Udupi District ..... **Appellant**

(By Sri M. D. Shetty, Advocate)

- versus -

Meenakshi, 48 years,
W/o Krishna,
R/o 'Darimane', A.K.G. Road,
Vaderhobli Village,
Kundapura Kasaba,
Kundapura Taluk, Udupi District .....**Respondent**

(By Smt A.C. Hundekar, Advocate)

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JUDGMENT

The appellant has filed this appeal under Section 374(3) of Cr.P.C., challenging the judgment and order on sentence that passed in C.C. No. 408/2020 dated 07-09-2022 on the file of Court of Addl. Civil Judge and J.M.F.C., Kundapura. The appellant is accused and the respondent is the complainant before the trial Court. Therefore, for the sake of convenience, the parties to this appeal are herein afterwards referred with their ranks before the trial Court.

2. Brief facts as stated in the memorandum of appeal are that, the complainant has filed complaint under Section 200 of Cr.P.C. before the trial Court against the accused contending that the accused had borrowed a sum of Rs.5,00,000/- from the complainant to improve her business with a promise to repay the same within three months. It is further case of the complainant that as the accused failed to repay the amount as promised, she had issued cheque bearing No.068571 dated 04-11-2019 drawn on The SCDCC Bank, Kundapura Branch for Rs.5,00,000/- on demand which on presentation for encashment, the same was dishonoured for the reason

'insufficient funds' as per memo dated 16-11-2019. It is further case of the complainant that the complainant issued the legal notice dated 18-11-2019 demanding payment of amount which was duly served on the accused on 20-11-2019 and in spite of service of the said notice, the accused has not replied nor repaid the cheque amount. In view of the same, the complainant has lodged the complaint against the accused for having committed the offence under Section 138 of N.I. Act.

3. The trial Court has registered the said complaint as C.C. No.408/2020 and has issued summons to the accused. In pursuance of service of the summons, the accused has put her appearance before the trial Court and was enlarged on bail. When the plea was read over and explained to her, pleaded not guilty of the alleged offence and claimed to be tried. In order to prove the case, the complainant examined as PW1 and got marked the documents as per Ex C1 to Ex C5/Ex P1 to Ex P5 wherein Ex C1/Ex P1 is cheque, Ex C2/Ex P2 bank memo, Ex C3/Ex P3 legal notice dated 18-11-2019, Ex C4/Ex P4 postal acknowledgment, Ex C5/Ex P5 private complaint. Thereafter, the statement under Section 313 of Cr.P.C recorded by explaining the incriminating evidence

appeared against her which was denied by the accused and has not led any defence evidence and not marked any documents on her behalf.

4. After appreciating the evidence placed and the arguments urged, the trial Court has convicted the accused for the offence punishable under Section 138 of the N.I. Act by means of impugned judgment and order on sentence dated 07-09-2022 by holding that she is found guilty of the offence punishable under Section 138 of N.I. Act. The trial Court has imposed fine of Rs.5,05,000/- to the accused, in default of payment of fine, she has to undergo simple imprisonment for a period of 6 months. The trial Court has also directed the accused to pay Rs.5,00,000/- to the complainant as compensation and remaining amount of Rs.5,000/- shall be paid as fine to the State. The trial Court has opined that the accused has failed to rebut the statutory presumption and therefore, the complainant has proved her case.

5. Being aggrieved by the impugned judgment and order of sentence of the trial Court, the accused has preferred this appeal contending that the trial Court has not rightly appreciated the documentary and oral evidence produced

by the complainant in support of her case and without considering the defence of the accused raised in the cross-examination of PW1 and without considering the fact that the complainant had no capacity to lend the amount of Rs.5,00,000/- convicted the accused. It is further contended that when the appellant in trial Court very specifically questioned the lending capacity of the complainant, the burden shifts upon the complainant to establish the fact that she is having source of income to lend Rs.5,00,000/-, but the trial Court has not considered the fact that the complainant has failed to satisfy the Court that she had financial capacity to lend the amount mentioned in the cheque. On the above grounds, the appellant prays to allow the appeal and prays to acquit her.

6. After registering the appeal, notice was issued to the respondent and the respondent appeared through her counsel. The entire trial Court records have been secured.

7. Heard the arguments of counsels for the appellant and the respondent and perused the records.

8. The following points do arise for my consideration after hearing the counsel and on appreciation of oral and documentary evidence :-

(1) Whether the trial Court is justified in holding that the cheque in question has been issued by the accused towards discharge of lawful debt or liability ?

(2) Whether the trial Court has committed any error in appreciating the oral and documentary evidence led by the parties?

(3) Whether any interference in the impugned judgment by this Court is required ?

(4) What order or sentence?

9. For the reasons to be stated hereinafter, I answer the above points as follows:-

Point No.1: In the Affirmative

Point No.2: In the Negative

Point No.3: In the Negative

Point No.4: As per final order

REASONS

10. **Point Nos.1 to 3**:- In order to avoid the repetition of discussion of facts and the provisions of law and for the

purpose of convenience, I deem it appropriate to consider points No.1 to 3 above together.

11. It is the case of the accused that the trial Court has not rightly appreciated the documentary and oral evidence produced by the complainant in support of her case and without considering the defence of the accused raised in the cross-examination of PW1 and without considering the fact that the complainant had no capacity to lend the amount of Rs.5,00,000/- convicted the accused. It is contended by the accused that the complainant and her husband used to visit the house of the accused and at that time, they obtained the cheque from the accused and by misutilizing the said cheque, filed false complaint.

12. Per contra, it is the contention of the complainant that the accused had borrowed a sum of Rs.5,00,000/- from the complainant to improve her business with a promise to repay the same within three months. It is further case of the complainant that as the accused failed to repay the amount as promised, she had issued cheque bearing No.068571 dated 04-11-2019 drawn on The SCDCC Bank, Kundapura Branch for Rs.5,00,000/- on demand which on presentation for encashment, the same was dishonoured

for the reason 'insufficient funds ' as per memo dated 16-11-2019. It is further case of the complainant that the complainant issued the legal notice dated 18-11-2019 demanding payment of amount which was duly served on the accused on 20-11-2019 and in spite of service of the said notice, the accused has not replied nor repaid the cheque amount.

13. To know whether the complainant has fulfilled the statutory requirements, it is necessary to sum up sections 118, 138, 139 and 142 of the N.I. Act and several other case laws. Section 138 of the N.I. Act provides that:

> *“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 the 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 cheque or with both.......".

Section 118 of the N.I. Act provides that:

"*Until the contrary is proved, the fallowing presumption shall be made:-*

(a) of consideration – 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 ......,

Section 139 of the N.I. Act provides that:

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

The dictum of law mandates that there exists presumption that the accused has issued the cheque in discharge of legal debt unless the same has been rebutted by the accused. The scope of Section of 139 of the Act is that an accused has to rebut the presumption and the standard of proof for doing so is that of 'preponderance or probabilities'.

14. In the instant case, the main defence of the accused counsel in the cross-examination of PW1 that she and her husband had been to the house of the accused and obtained disputed cheque and by misutilizing the said cheque filed false complaint for the reason of civil dispute between her husband with father-in-law of the complainant. The entire burden is cast on the accused to prove by producing cogent evidence and relevant documents that she has not issued the disputed cheque in discharge of legal debt and liability for the amount mentioned in the disputed cheque Ex P1 .

15. At this juncture, I would like to rely on the dictum of law laid down by the Hon'ble Supreme court reported in **2019 SAR 2446 (Criminal) 309 Supreme Court, (Bir Singh Vs Mukesh Kumar)**

“(E) Negotiable Instruments Act (26 of 1881), s. 138, 139 – Dishonour of cheque – Presumption as to legally

enforceable debt – Rebuttal – Onus to rebut presumption that cheque issued in discharge of debt or liability is on accused. (Para 36)

(G) Negotiable Instruments Act, (26 of 1881), Ss. 138, 139 – Presumption as to legally enforceable debt – Rebuttal – Signed blank cheque. If voluntarily presented to payee, towards payment, payee may fill up amount and other particulars and it in itself would not invalidate cheque – Onus would still be on accused to prove that cheque was not issued for discharge of debt or liability by adducing evidence (Para-38).

(H) Negotiable Instruments Act (26 of 1881), Ss. 138 – Dishonour of cheque – Complainant can fill up amount or particulars in blank cheque. (Para 38).

(J) Negotiable Instruments Act 26 of 1881), SS. 138, 139- Dishonour of cheque – Absence of finding that cheque was not signed by accused or not voluntarily made over to payee. No evidence regarding circumstances in which blank signed cheque given to complainant – Cheque presumed to be filled in by complainant being payee in presence of accused, at his request or with his acquiescence. No change in amount, its date or name of payee. Subsequent filing

in of an unfilled signed cheque is not alteration – Accused liable to be convicted".

16. From the aforesaid case laws and provisions of relevant Sections, it is clear that the cheque must be issued for discharge of legally enforceable debt or other liability to attract the provisions of Section 138 of N. I. Act. It is also clear that initial presumption shall be raised that the cheque was issued by the accused for discharge of legally enforceable debt unless the accused proves that he has not issued the disputed cheque with his signature in discharge of legal debt or liability. It is for the accused to rebut the said presumption by raising a probable defence and the standard of proof for rebutting the presumption is that preponderance of probabilities. To rebut the presumption, it is open for the accused to rely on evidence led by him/her or accused can also rely on the materials submitted by the complainant. In the event, the accused is able to raise a probable defence which creates doubt with regard to the existence of a debt or liability, the presumption may fail. If the complainant has proved the existence of legally enforceable debt or liability, the Courts could have proceeded to draw presumption under Section 139 of the N.I. Act and thereafter find out as to whether or

not the accused has rebutted the said presumption. Once such rebuttal evidence is reduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and therefore, the presumption under Section 118 and 139 of the Act will not again come to the complainant rescue.

17. In the instant case, while appreciating the evidence of PW1 in the Judgment, the trial Court has considered the fact that the complainant has examined herself as PW1 and got marked Ex P1 the disputed cheque and produced Ex P2 bank memo, Ex P3 legal notice, Ex P4 postal acknowledgment, Ex P5 private complaint. Further the trial Court had elaborately discussed the cross-examination of the complainant by the accused counsel, wherein the accused has taken the contention that the complainant has no financial capacity to lend the amount mentioned in the disputed cheque. It is very pertinent to note that in the cross-examination of PW1, it is denied by the complainant PW1 that she is involved in money lending business and had no financial capacity to advance hand loan to the accused. The trial Court has also appreciated the evidence of PW1 in her cross-examination,

wherein she has deposed that she was working in a school for a salary of Rs.2,700/- per month and from her 15 years savings, she had an amount of Rs.2,00,000/- with her. Further in the cross-examination, PW1 deposed that the amount of Rs.3,00,000/- which she had obtained by selling three sovereign gold was handed over to the accused along with her 2,00,000/- rupees savings in the month of June 2019 in her house for the improvement of the business of the accused. It is very pertinent to note that in the entire cross-examination of PW1, the accused has elaborately cross-examined the source of income of the complainant, but has not elicited any evidence to prove that the complainant has no financial capacity who lend the amount mentioned in the disputed cheque. It is observed by the trial Court that the main defence of the accused in the cross-examination of PW1 that the complainant and her husband visited the house of the accused and after obtaining the cheque, has misutilized the same. The trial Court has observed that if it was the defence of the accused that the complainant has no financial capacity and cheque obtained from them has been misutilized, then why reply is not given to the notice issued by the complainant. Further it is also observed that non-production of document regarding proof of income by the complainant is not at all a ground for dismissal of the complaint when the accused has failed to rebut the presumption by producing cogent evidence regarding financial capacity of the complainant and misutilizing the disputed cheque belonged to the accused. It is also observed that till date no legal action was taken by the accused against the complainant and her husband for having obtained the cheque and misutilizing the same. It is equally important to note that there is no evidence before the Court from the accused as to for what reason they handed over disputed cheque to the complainant and her husband and till the cheque was bounced, they have not given any intimation to the bank for stop payment when they had the knowledge that their cheque is in the possession of the complainant and her husband. It is also very important to note that as an prudent man, he will never hand over his signed blank cheque to any person without any reason, but in this case, it is the defence of the accused that the complainant and her husband had come to her house and obtained disputed cheque. This defence of the accused creates suspicion regarding the transaction as contended by the accused. It is clear evidence of the complainant PW1 that the amount saved from her salary that is Rs.2,00,000/- and the amount obtained by selling her gold ornaments that is Rs.3,00,000/- and in total, the said Rs.5,00,000/- was handed over to the accused on her request as a loan. The trial Court has observed that in spite of elaborate cross-examination by the accused, he has failed to rebut the presumption under Section 139 of N.I. Act and never examined herself to prove her defence. The trial Court has rightly come to the conclusion that the accused has obtained a sum of Rs.5,00,000/- from the complainant for her necessity and in discharge of the said debt, has issued disputed cheque Ex P1 with her signature and the said cheque on presentation was dishonoured for the reason of funds insufficient, holding that intentionally the accused has issued the disputed cheque and failed to rebut the same.

18. At this juncture, I would also like to refer on the decision of the **AIR 2018 Hon'ble Supreme Court 3601 (T.P. Murugan (Dead) Thr. Lrs. V Bojan and Posa Nandi Rep. Thr. POA holder, T.P. Murugan Vs Bojan)**. In this ruling at para -8, the Hon'ble Supreme Court has laid down the dictum of law that **U/s 139 of the N.I. Act, once a cheque has been signed and issued in favour of the holder, there is statutory presumption that it is**

issued in discharge of a legally enforceable debt or liability by referring to K.N. Beena Vs Muniyappan and another, (2001) 8 SCC 458, para -6 and Rangappa Vs Shrimohan (2010) 11 SCC 411, para 26. It is further held that **the presumption is a rebuttable one, if the issuer of the cheque is able to discharge the burden that it was issued for some other purpose like security for a loan**. It is pertinent to note that once execution of cheque is admitted, Section 139 of the Act mandates of presumption that the cheque was for the discharge of any debt or other liability. The presumption under Section 139 is rebuttable presumption and onus is on the accused to raise the probable defence by producing cogent evidence and relevant documents. The said principles has been observed by the Hon'ble Supreme Court in its latest decisions reported in case of **APS Forex Services Pvt. Ltd Vs Shakti International Fashion Linkers and others in Criminal Appeal No.271 of 2020 with Criminal Appeal No.272 of 2020,** in the case of **Sumeti Vij Vs M/s Paramount Tech Fab Industries in Criminal Appeal No(s) 292 of 2021 (arising out of SLP (Crl.) No.(s) 8498 of 2019) with Criminal Appeal No(s), 293 of 2021 (arising out of SLP (Crl.) No(s) 8564 of 2019).** I would also like to refer the judgment of the Hon'ble Supreme

Court in **Tedhi Singh Vs Narayan Dass Mahant in Criminal Appeal No.362 of 2022 (Arising out of SLP (Crl) No.1963 of 2019).**

By applying the dictum of law referred in the above judgments to the facts of this case, it is found that though accused has taken the defence that she has not borrowed a loan of Rs.5,00,000/- and the complainant has no financial capacity, but has not produced any cogent and relevant documents to prove her defence. It is pertinent to note that once the accused admits the execution of disputed cheque Ex P1 with her signature as per Section 139 of the Act which clearly mandates the presumption that the cheque was for the discharge of debt of loan due . The presumption under Section 139 is rebuttable presumption and when the onus was on the accused to raise the probable defence by producing cogent evidence and relevant documents, the accused failed to rebut the same.

19. On this point, I would like to rely on the judgment reported in **ILR 2023 KAR 1037 between Smt Jayamma Vs Smt Jayamma @ Nagamma**, the Hon'ble High Court of Karnataka has held that:

> " In view of the provisions of section 139 of the N.I. Act read with Section 118 thereof, the Court had to presume that the cheque had been issued discharging a debt or liability. The said presumption was rebuttable and could be rebutted by the accused by proving contrary. In this case, there is just a denial. But mere denial or rebuttal by the accused is not enough. The accused has to prove by cogent evidence that there was no debt or liability."

This dictum of law is applicable to the present facts and circumstances of the case since the accused has failed to prove her defence by cogent evidence that the cheque which has been obtained by the complainant and her husband from her house has been mis-utilized by the complainant .

20. I would also like to refer the dictum of law laid down by the Hon'ble Supreme Court in **2021 (2) DCLJ 507 (SC) in between Triyambak S. Hegde Vs Sripad**, wherein the Hon'ble Supreme Court has held that:

"(B) Negotiable Instruments Act, 1881, Section 138, 118 and 139- Cheque dishonour – Presumption under – The signature on the cheque is admitted – The presumption for passing of the consideration would arise as provided u/s 118(a) of Act – The legal position relating to presumption arising u/s 118 and 139 of N.I. Act on signature being admitted has been reiterated – Whether there is rebuttal or not would depend on the facts and circumstances of each case".

In the present case, the accused has failed to produce probable evidence to rebut the statutory presumption that the cheque Ex P1 was not issued in discharge of legally enforceable debt. Per contra, the complainant has proved the case by overwhelming evidence to establish that the cheque Ex P1 with signature was issued by the accused towards discharge of an existing liability of repayment of loan amount of Rs.5,00,000/- obtained by the accused for her necessity which being legally enforceable debt. It is pertinent to note that in the instant case also, when the burden was entirely on the accused to rebut the presumption when she admitted her cheque with her signature, but failed to elicit material evidence in the cross-examination of PW1. Considering all these facts, the accused has failed to establish her probable defence when the onus was shifted on her to rebut the presumption by producing relevant documents and lead cogent evidence by examining herself.

21. In the Judgment, the trial Court has held that the complainant had issued legal notice Ex P3 demanding the payment of the amount mentioned in the cheque and has produced Ex P4 postal acknowledgment to show that the notice has been duly served to the accused on her proper address. It is also held by the trial Court in its judgment that in spite of service of notice, the accused neither made any payment nor replied to the said notice and held that the complainant has complied the service of notice under section 138(b) of N.I. Act. In view of the same, the finding of the trial Court that the notice is duly served to the accused and the complainant has complied the provision Section 138(b) of N.I. Act needs no interference.

22. Having scanned the entire evidence led on record, this Court finds that respondent/complainant successfully proved on record that cheque in question was issued by the accused in discharge of her lawful liability, but same was dishonoured on account of insufficient funds. Since

despite notice, accused failed to make the payment good within the stipulated period, complainant had no option but to initiate the proceedings under Section 138 of the Act. In the case at hand, complainant successfully proved on record all the ingredients Section 138 of the Act and as such, no illegality can be said to have been committed by the trial Court while holding the appellant/accused guilty of having committed offence punishable under Section 138 of the Act and as such, same has been rightly upheld by this Court since after having carefully examined the evidence in the present case and finding of the trial Court it is unable to find any error of law as well as fact, if any, committed by the trial Court while passing impugned judgment.

23. The word '**unless contrary is proved**' is discussed by the Hon'ble Apex Court in a decision reported in **Hiten P Dalal Vs Bartender Nathbannerji in 2001 (6) SCC 16,** wherein it is held that "**The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the**

supposition that it exists unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted...” . In the instant case also, the accused has utterly failed to rebut the presumption under Section 139 of N.I. Act and also failed to prove that there was no legal enforceable debt to the amount mentioned as on the date of the disputed cheque Ex P1 and she has not issued the said cheque for the discharge of her liability on the enforceable debt.

24. At this juncture, I would like to rely on the ruling reported in **2002(2) SCC 420 between Suganthi Suresh Kumar Vs Jagadeeshan** wherein the Hon'ble Supreme Court held that the Court may enforce the order by imposing sentence in default which is reaffirmed in **2010 AIR SCW 3398 between K.A. Abbas H.S.A. Vs Sabu Joseph**. The trial Court has rightly observed in its judgment regarding imposing of default sentence for enforcing the payment of compensation and sentenced the accused to pay fine of Rs.5,05,000/-, in default to undergo SI for a period of six months and out of the fine amount recovered, sum of Rs.5,00,000/- to be paid to the complainant by way of compensation as per the provisions u/s 357 of Cr.P.C. and remaining Rs.5,000/- amount

defrayed to the State for the expenses incurred in the prosecution.

25. In the Judgment of the Hon'ble Apex Court in **Krishnan and another Vs Krishnaveni and another (1997) 4 SCC 241:AIR 1997 SC 987** has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of Higher Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal Court in its judicial process or illegality of sentence of order, but in this case, the Learned counsel representing the accused has failed to point out any material irregularity committed by the trial Court while appreciating the evidence and as such, this Court sees no reason to interfere with the well reasoned judgment passed by the trial Court. Consequently in view of the discussion made herein above as well as law laid down by the Hon'ble Apex Court, this Court sees no valid reason to interfere with the well reasoned judgment recorded by the trial court which otherwise, appear to be based upon proper appreciation of evidence available on record and as such, same is upheld. Further the trial Court has rightly

convicted the accused for the offence under Section 138 of N.I. Act by imposing reasonable amount of fine and compensation. In view of the same, there is no grounds to interfere with the impugned judgment and order on sentence of the trial Court dated 07-09-2022. Accordingly, **point No.1 is answered in the Affirmative and points Nos.2 and 3 in the Negative**.

26. **Point No.4**: In view of the above reasons and discussions and findings on points Nos.1 to 3, I proceed to pass the following:

O R D E R

The appeal filed by the appellant/accused under section 374(3) of Cr.P.C. is hereby dismissed.

The impugned judgment and order of conviction passed against the accused by the Learned Addl. Civil Judge and J.M.F.C., Kundapura in C.C. No. 408/2020 dated 07-09-2022 is hereby confirmed.

Return trial Court record along with the copy of this judgment.

(Typed to my dictation by the Stenographer directly on Computer, corrected by me and then pronounced in open Court on this the **20th day of January, 2024)**

SHAIKH A H
Digitally signed by SHAIKH A H
Date: 2024.02.08 13:20:48 -1000

(Abdul Rahim Hussain Shaikh)
Addl. District & Sessions Judge,Udupi
(Sitting at Kundapura)