

**IN THE COURT OF LXXIII ADDL.CITY CIVIL &
SESSIONS JUDGE, MAYOHALL UNIT, BANGALURU.
(CCH.74)**

PRESENT:

**Sri.Yamanappa Bammanagi, B.A., LL.B., (Spl.,)
LXXIII Addl.City Civil & Sessions Judge,
Mayohall Unit, Bangaluru.**

Dated this the 21st day of February, 2022.

Crl. Appeal No.25362/2019

Appellant/

Accused No.1:

Smt.Kalai Selvi,
W/o.V.Pachiyappa,
Major,
R/at.House No.6, 2nd Floor,
4th Cross, Opp.Om Shakthi Temple,
Hosapalya, Bommanahalli Post,
Bangaluru-560068.
Proprietor of M/s.Sri.Thirumala
Builders and Developers.

(By Sri.Manjunatha.B.T. – Adv.)

V/S

Respondent/

Complainant:

C.S.Ramesh,
S/o.C.Subbanna,
aged about 33 yrs,
R/at.No.65/2, Sorahunase Road,
Left Side House, Varthur,
Bangaluru-560087.

***(By Sri.Manjunatha Reddy.K.G. –
Adv.)***

JUDGMENT

Being aggrieved by the judgment and sentence, passed by the learned XVII Addl. Judge, Court of Small Causes & ACMM, Bangaluru (SCCH-21), in CC No.56442/2017, dated 04.11.2019, convicting the appellant for the offence punishable under Section 138 of N.I. Act, sentencing her to pay fine of Rs.11,00,000/-, in default of payment of fine amount, the accused No.1 shall undergo simple imprisonment for 6 months. Further trial court has directed to the appellant to pay compensation of Rs.10,95,000/- to the complainant, being aggrieved by the said order, the appellant is before this court, challenging the legality and correctness of judgment and sentence of trial court.

2. Brief facts of the case:

It is the case of the appellant that, the present respondent has filed complaint against the present appellant u/S 200 of Cr.P.C. for the offence punishable u/S 138 of the N.I. Act. It is alleged in the complaint that,

the accused Nos.1 and 2 are the Proprietors of Sri.Thirumala Builders and Developers. The complainant searching for flat, requested the accused persons for flat, the accused had demanded Rs.10,00,000/- to provide flat to be constructed. The complainant has paid Rs.10,00,000/- to the accused persons, but the accused did not started construction work, after reasonable time, the complainant has demanded for refund amount paid by him, in order to refund the said amount the accused has issued a cheque bearing No.124577, dated 17.02.2016, for sum of Rs.10,00,000/-, drawn on Union Bank, HSR Layout, said cheque was presented for encashment on 5.5.2017, same was returned with bank endorsement dated 10.5.2016 as 'Funds Insufficient'. Thereafter, the complainant has issued notice on 17.05.2016 to the accused calling upon the accused persons to pay cheque amount within 15 days from the date of receipt of notice, same was returned with endorsement 'Intimation Delivered' on 19.05.2016, even after service of notice, the accused

failed to pay the cheque amount, hence the complainant has filed the complaint against the accused for the offence punishable u/S 138 of N.I. Act.

3. On being satisfied with the material placed before it, the trial court has taken cognizance for the offence punishable u/S 138 of the N.I. Act, issued summons u/S 204 of Cr.P.C. In pursuance of the summons, the accused persons have appeared before the trial court, the trial court enlarged the accused persons on bail, thereafter, plea was recorded, the accused persons pleaded not guilty and claimed to be tried.

4. In order to prove his case the complainant was examined as P.W.1 and got marked Ex.P.1 to P.10, the learned counsel for the accused persons has cross-examined PW1. On 27.04.2019 & 01.04.2019 statements of accused persons were recorded U/sec.313 of Cr.P.C. Thereafter, the SPA holder of accused No.1 was examined as D.W.1 and got marked Ex.D.1 and accused No.2 was examined as D.W.2 and D.W.1 and D.W.2 were cross

examined by the learned counsel for complainant. After hearing the argument of the learned counsel for the complainant and accused persons, the trial court has recorded the order of conviction, convicting the appellant/accused persons for the offence punishable u/S 138 of the N.I. Act, with default clause, being aggrieved by the said judgment and order of conviction, the accused No.1 is before this court, challenging the correctness and legality of the said judgment order of conviction on the following:-

“GROUNDS

I. The impugned judgment of trial court is illegal, unlawful and bad in law, the conviction and sentence is contrary to the facts, materials and evidence placed before trial court, hence liable to be set aside.

II. The trial court failed to consider the fact that the complainant failed to prove payment of loan, the demand notice not served on the accused,

the accused has issued cheque in question as security not for payment of any debt.

III. The trial court failed to consider the fact that the complainant failed to prove his financial capacity, source of income, not produced income tax return, failed to consider cross of P.W.1, contradiction. The complainant has not at all produced any documents nor examined any corroborative to prove that he has paid Rs.10,00,000/- for purchasing flat.

IV. The trial court failed to appreciate the evidence of D.W.1 and D.W.2 and failed to appreciate oral and documentary documents. With this, the appellant prayed for allowing the appeal.”

5. On admitting the appeal, this court has passed the order, on the application filed by the appellant u/S 389 (1) of Cr.P.C., and suspended the operation and execution

of the trial court order and issued notice to the respondent. The respondent appeared through counsel and received TCR and arguments on appellant and respondent side are taken as heard.

6. I have perused impugned judgment and order of the trial court, re-appreciated oral and documentary evidence, led by both the parties before the trial court, considered material placed before the court. On perusal of the same, the points that would arise for my consideration are as follows:-

- 1. Whether complainant proves that he has discharged initial burden to have a benefit u/S 139 of the N.I. Act?**
- 2. Whether complainant proves the existence of legally recoverable debt and accused No.1 has issued cheque towards discharge of legally recoverable debt?**
- 3. Whether the complainant proves that he has financial capacity to advance the loan amount to the accused No.1?**

4. Whether the complainant proves that he has issued notice to the accused No.1 as required u/S 138 of N.I. Act?

5. Whether accused No.1 proves that she has rebutted the presumption on preponderance of probabilities?

6. Whether the appellant/ accused No.1 made out grounds to show that the order of conviction and sentence recorded by the trial court, in C.C. No.56442/2017, dated 04.11.2019, is deserves to be set-aside and call for the interference of this court?

7. What order?

7. My answer to the above points are as follows:-

Point No.1: In the Affirmative,

Point No.2: In the Affirmative,

Point No.3: In the Affirmative,

Point No.4: In the Affirmative,

Point No.5: In the Negative,

Point No.6: In the Negative,

Point No.7: As per final order,
for the following:-

REASONS

8. POINT Nos.1 to 4: These points are interconnected to each other, in order to avoid repetition, I proposed to answer these points commonly. The rank of the parties is referred as they were referred before the trial court. In order to prove his case, the complainant is examined as P.W.1 and produced 10 documents, which have been marked at Ex.P.1 to P.10. P.W.1 deposed before the court that, he was searching for flat, the accused persons are Proprietors of Thirumala Builders and Developers, the complainant has paid Rs.10,00,000/- to the accused persons for purchasing flat. Since the accused persons have not started construction work, hence the complainant demanded for refund of Rs.10,00,000/-, so, in order to refund of Rs.10,00,000/- the accused has issued cheque in question, same was dishonoured for 'Insufficient Funds' in the account maintained by the accused.

9. In order to prove his case, the complainant has produced documents which have been marked at Ex.P.1 to Ex.P.10. Ex.P.1 is the original cheque issued by the accused persons in the name of complainant, Ex.P.2 is the Bank endorsement issued by the Union Bank of India showing the reasons for dishonour of cheque, Ex.P.3 is the legal notice issued by the complainant through Advocate to the accused persons by RPAD, Ex.P.4 is the postal receipts, Ex.P.5 & P.6 are the postal covers, Ex.P.7 is the postal acknowledgement, Ex.P.8 is the order sheet of PCR No.354/2016 and Exs.P.9 and P.10 are the bank statements.

10. On being satisfied with the above documents, the trial court has issued summons to the accused persons U/sec.204 of Cr.P.C. In pursuance of the summons, the accused persons appeared through counsel and plea was recorded by reading substances of accusation, in the language known to the accused persons.

11. The defence of the accused is that they were doing building builders work and used to sell the flat. The complainant had come to the accused for flat and paid Rs.4 ½ lakhs through bank to the accused company account. The cheque in question was given for the security for the said amount. Due to loss of business, the accused were not in possession to provide the flat, hence the accused had repaid Rs.4,50,000/- to the complainant. But, the complainant did not returned cheque to the accused after refund of Rs.4,50,000/- and assured that cheque is in Andra Pradesh, he will return said cheque after 15 days. But, did not returned and misused the cheque by filing false complaint.

12. In support of their defence, the SPA holder of accused No.1 is examined as D.W.1 and got marked Ex.D.1 and accused No.2 is examined as D.W.2. Ex.D.1 is the special power of attorney.

13. I have re-appreciated oral and documentary evidence led by both the complainant and the accused, it is

clear that the issuance of the cheque, signature on cheque, existence of the transaction are not in dispute between the parties as it could be seen from the case of the accused. Now it is relevant to note the chief-examination of D.W.1, dated 19.08.2019, which reads thus:

“1ನೇ ಆರೋಪಿಯವರು ನನ್ನ ಹೆಂಡತಿ. 2012
ರಿಂದ ನಾನು ತಿರುಮಲ ಬಿಲ್ಡರ್ಸ್ ನಲ್ಲಿ
ಪಾಲುದಾರನಾಗಿ 2ನೇ ಆರೋಪಿಯವರೊಂದಿಗೆ
ಕೆಲಸ ಮಾಡುತ್ತಿದ್ದೇನೆ. ನಾವು ಪ್ಲಾಟ್ ನ್ನು ಮಾರಾಟ
ಮಾಡುವ ಸಮಯದಲ್ಲಿ ಪರ್ಯಾಯದಾರರು ನಮ್ಮ
ಬಳಿ 2015 ರಲ್ಲಿ ಬಂದಿದ್ದರು. ಪರ್ಯಾಯದಾರರು
ರೂ.4ವರೆ ಲಕ್ಷ ಹಣವನ್ನು ಬ್ಯಾಂಕ್ ನ ಮೂಲಕ
ನಮ್ಮ ಕಂಪನಿಗೆ ಪಾವತಿಸಿರುತ್ತಾರೆ. ರೂ.4ವರೆ
ಲಕ್ಷಕ್ಕೆ ಭದ್ರತೆಗಾಗಿ ಪರ್ಯಾಯದಾರರಿಗೆ ಕಂಪನಿ
ಚೆಕ್‌ನ್ನು ಕೊಟ್ಟಿದ್ದೆವು. ನಮ್ಮ ಬಿಸಿನೆಸ್ ನಲ್ಲಿ ನಷ್ಟ
ಉಂಟಾದ ಕಾರಣ ಪರ್ಯಾಯದಾರರಿಗೆ ನಾವು
ಪ್ಲಾಟ್ ಕಟ್ಟಿಸಿ ಕೊಡಲು ಆಗಲಿಲ್ಲ. ಅದಾದ ನಂತರ
ಪರ್ಯಾಯದಾರರು ನಮ್ಮ ಬಳಿ ಬಂದಾಗ ನಾವು
ಅವರಿಂದ ಪಡೆದ ರೂ.4ವರೆ ಲಕ್ಷ ಹಣವನ್ನು ಅವರಿಗೆ
2016 ರಲ್ಲಿ ಹಿಂದಿರುಗಿಸಿರುತ್ತೇವೆ. 2015 ರಲ್ಲಿ
ನಮ್ಮ ಬಿಸಿನೆಸ್ ನಲ್ಲಿ ನಮಗೆ ನಷ್ಟ ಉಂಟಾಯಿತು.
ರೂ.4ವರೆ ಲಕ್ಷ ಹಣವನ್ನು ಹಿಂದಿರುಗಿಸಿದ
ಸಮಯದಲ್ಲಿ ಪರ್ಯಾಯದಾರರ ಬಳಿಯಿಂದ
ವಿವಾದಿತ ಚೆಕ್‌ನ್ನು ಹಿಂದಕ್ಕೆ ಕೊಡಿ ಎಂದು ಕೇಳಿದ್ದೆವು.
ಆ ಸಮಯದಲ್ಲಿ ಪರ್ಯಾಯದಾರರು ಸದರಿ ಚೆಕ್‌ನ್ನು

ಆಂಧ್ರ ಪ್ರದೇಶದಲ್ಲಿರುವ ನನ್ನ ಮನೆಯಲ್ಲಿದೆ 15 ದಿನಗಳ ನಂತರ ಅದನ್ನು ತಂದುಕೊಡುತ್ತೇನೆ ಎಂದು ತಿಳಿಸಿದರು. 15 ದಿನಗಳ ನಂತರ ಪಿಯಾದುದಾರರು ಚೆಕ್ಕನ್ನು ನಮಗೆ ಕೊಡಲಿಲ್ಲ ಎರಡು ತಿಂಗಳ ನಂತರ ಪುನಃ ಪಿಯಾದುದಾರರನ್ನು ಕೇಳಿದಾಗಲೂ ಸಹ ಅವರು ಚೆಕ್ಕನ್ನು ನಮಗೆ ಹಿಂದಿರುಗಿಸಲಿಲ್ಲ.”

14. On perusal of deposition extracted supra, it is clear that there was transaction in respect of purchase of flat. It is also relevant to extract cross of D.W.1 dated 19.08.2019, page-3, second para, which reads thus:

“ರೂ.ನಾಲ್ಕುವರೆ ಲಕ್ಷ ಹಣವನ್ನು ಹಿಂದುರುಗಿಸಿದ ನಂತರ ವಿವಾದಿತ ಚೆಕ್ಕನ್ನು ಹಿಂದಕ್ಕೆ ಕೊಡಿಯೆಂದು ಪಿಯಾದುದಾರರಿಗೆ ನಾನು ನೋಟೀಸು ಕಳುಹಿಸಿರುವುದಿಲ್ಲ. ಈ ಪ್ರಕರಣದ ದಾಖಲಿಸಿದ ನಂತರ ವಿವಾದಿತ ಚೆಕ್ಕು ದುರುಪಯೋಗ ಪಡಿಸಿಕೊಂಡಿರುತ್ತಾರೆಂದು ನಾನು ಪಿಯಾದುದಾರರ ವಿರುದ್ಧ ಪೊಲೀಸರಿಗೆ ದೂರನ್ನು ನೀಡಿರುವುದಿಲ್ಲ. ವಿವಾದಿತ ಚೆಕ್ಕನ್ನು ಪಿಯಾದುದಾರರಿಂದ ಪಡೆದ ಹಣದ ಬಾಬು ನೀಡಿರುವ ಕಾರಣ ಅವರ ವಿರುದ್ಧ ಯಾವುದೇ ಕಾನೂನು ಕ್ರಮ ಕೈಗೊಂಡಿರುವುದಿಲ್ಲ ಎಂದರೆ ಸರಿಯಲ್ಲ.”

15. On careful perusal of the deposition extracted supra, it is clear that, there is no material before the court that the accused has repaid the loan amount. Thus, the accused failed to substantiate his defence. The defence of the accused is that the notice issued by the complainant is not served on the accused. I have perused Ex.P.3 to P.7. Ex.P.3 is the legal notice and Ex.P.4 and P.5 are the postal receipts and Ex.P.6 and P.7 are the RPAD envelope acknowledgement due, returned with a endorsement 'Not Claimed'.

16. Ex.P.6 and P.7 are the returned RPAD envelope issued by the complainant to the accused Nos.1 and 2 returned with a endorsement 'Not Claimed'. The complainant has issued notice to the correct address of the accused Nos.1 and 2. Accused has not denied the address shown in Ex.P.3 and Ex.P.6 and P.7. Now it is relevant to extract the cross-examination of D.W.1, dated 19.8.2019, page-3, para-3, which reads thus:

“ನೋಟೀಸಿನಲ್ಲಿ ತಿಳಿಸಿರುವ 1ನೇ ಆರೋಪಿಯವರ
ವಿಳಾಸದಲ್ಲಿಯೇ ನಾವು ವಾಸಿಸುತ್ತಿದ್ದೇವೆ.

ಯಾವುದೇ ಪತ್ರ ವ್ಯವಹಾರಗಳು ನೋಟಿಸಿನಲ್ಲಿ
ತಿಳಿಸಿರುವ 1ನೇ ಆರೋಪಿಯವರ ವಿಳಾಸಕ್ಕೆ
ಬರುತ್ತದೆ. ನಿಜವು ಮತ್ತು 6 ರಲ್ಲಿ ತಿಳಿಸಿರುವ ನಮ್ಮ
ಕಚೇರಿಯ ವಿಳಾಸ ಸರಿಯಿದೆ.”

17. So, on careful perusal of the evidence of D.W.1 and D.W.2, it is clear that the accused has not denied the address to which the complainant has issued notice under Ex.P.3 to P.7. It is also not in dispute that address shown in Ex.P.6 and P.7 are belongs to accused No.1 and 2.

18. When complainant got issued notice to the correct address of the accused, then it can be presumed that the notice has been served on the accused u/S 27 of the General Clause Act. In support of my opinion I relied on the decision reported ***in (2007) 6 SCC 555 in case of C.C.Alavi Haji v/s Palapetty Mohammed and Another,*** held thus:

“According to Section 114 of the Evidence Act, read with illustration (f), hereunder, when it appears to the court that the common course of business

renders it probable that a thing would happen, the court may draw presumption that thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business followed in particular cases. When applied to communications sent by post, Section 114 enables the court to presume that in the common course of natural events, the communications would have been delivered at the address of the addressee. But, the presumption that is raised u/S 27 of the

General Clauses Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready and reference, Section 27 of G.C. Act is extracted below:

Section 27. Meaning of Service by post – Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression served by post, whether the expression serve or either of the expressions give or send or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be

delivered in the ordinary course of post.”

19. Section 27 of G.C. Act gives rise to a presumption that service of notice has been effected when it sent to the correct address by registered post. In view of the said presumption, when it is stated that the notice has been sent by registered post to the address of the drawer, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business.

20. When issuance of cheque Ex.P.1 and signature on it is not in dispute, then the complainant is entitle to have shelter U/sec.118 and 139 of the N.I. Act as held in the decision reported ***in (2010) 11 SCC 441 in case of Rangappa v/s Sri.Mohan.*** The Hon'ble Apex Court has held thus:

“Once issuance of cheque and signature thereon are admitted, the presumption of legally enforceable debt in favour of the holder of the cheque arises. It is for the accused to rebut the said presumption. Though accused need not adduced his own evidence and can rely upon the materials submitted by the complainant. However, mere statement of the accused may not be sufficient to rebut the said presumption.”

21. On the basis of undisputed fact as extracted supra and on perusal of the oral and documentary evidence it is clear that complainant has proved that he has discharged initial burden by producing the documents Ex.P.1 to P.10 and proved the issuance of cheque, signature, existence of transaction between the complainant and accused. Thus, on basis of material placed before the court and on admitted facts it can be safely held that cheque in question was issued towards

discharge of legally recoverable debt and same was dishonoured for want of sufficient fund in the account maintained by the accused. Hence, I hold that complainant is entitled to have a shelter u/S 118 and Section 139 of N.I. Act. With the above observation, reasons assigned and relying on the decisions referred supra, I answer points No.1 to 4 ***in the Affirmative.***

22. POINTS No.5 & 6: These two points are interconnected to each other, in order to avoid repetition, I proposed to answer these two points commonly. The defence of the accused persons is that, the complainant has paid only Rs.4,50,000/- for purchase of flat as advance, when the complainant paid Rs.4,50,000/- to the accused at that time, the accused persons had issued cheque in question to the complainant as security for the said amount. Due to loss of business, the accused persons have not started construction, hence the accused persons have repaid Rs.4,50,000/- to the complainant and demanded for return of security cheque, the complainant

told that cheque is in Andra Pradesh, after 15 days cheque will be returned. Thereafter, the complainant did not returned, instead of returning cheque the complainant has misused the cheque against the accused. Another defence is that, the notice was not served on the accused persons. The defence of financial capacity of the complainant.

23. The defence of the accused is that they have repaid amount of Rs.4,50,000/-, but no documents produced before the court to show that they have repaid amount of Rs.4,50,000/-. Because, the accused Nos.1 and 2 are the Proprietors of Thirumala Builders and Developers, admittedly, all transaction taken place through bank. So, if really, the accused repaid whatever amount taken there would be documents for having re-payment of Rs.4,50,000/-, but no documents produced.

24. Further the accused have taken the defence that the complainant has misused the cheque issued for security. The accused did not taken any action against the complainant for non-return of cheque.

25. On perusal of deposition of the accused extracted supra, it is clear that no prudent man could accept the defence of the accused, because, if really, the complainant misused the cheque for such huge amount of Rs.10,00,000/-, no person kept quiet, atleast the accused would have lodged the complaint against the complainant for misuse of cheque. But, the accused did not taken any action. So, the defence cannot be accepted, because mere defence without any document or evidence are not sufficient to hold that the accused has rebutted the presumption. The accused failed to rebut the presumption atleast on preponderance of probability.

26. I have gone through the reasonings given by the trial court for awarding the compensation u/s 357 of Cr.P.C. On going through the same, it is clear that trial court has considered the facts and circumstances of the case and awarded the compensation to the complainant. On perusal of the observation made, reasoning assigned by the trial court, for awarding the compensation, I am of the

opinion that the trial court has awarded the compensation in accordance with the principle laid down by the Hon'ble Apex Court in the decision reported ***in (1988) 4 SCC 551 in case of Hari Singh v/s Sukbhir Singh.***

The lordships have held that; power given to the court to direct for payment of compensation is intended to do something for the victim. The provision was held to be a step forward in our criminal justice system. The lordships have made the observation in the said decision at para No.10, which reads thus;

“It empowers the court to award compensation to victim while passing judgment of conviction, in addition to conviction, the court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of accused. It may be noted that this power of courts to award compensation is not a ancillary to other sentence but it is in addition thereto. This power was

intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We therefore, recommend to all courts to exercise this power liberally, so as to meet the ends of justice in a better way.”

27. Hence, on going through all the circumstances of the case, I am of the opinion that, the trial court has considered the admitted facts and oral and documentary evidence, led by both the parties, with reference to fact in dispute. Hence, I hold that the trial court rightly hold the guilty of the accused of offence punishable u/s 138 of N.I. Act. With these reasons, conviction order, recorded by the trial court is confirmed, and does not warranted the

interference of this court. Hence, I answer points No.5 & 6 ***in the Negative.***

28. POINT No.7: In view of the discussion made on point Nos.1 to 6, I proceed to pass the following:-

ORDER

***Acting u/S 386 of Cr.P.C.
the appeal preferred by the
appellant/accused No.1 is
hereby dismissed.***

***Consequently, the
judgment and order of
conviction and sentence, dated
04-11-2019, passed by learned
XVII Addl. Judge, Court of
Small Causes & ACMM,
Mayohall Unit, Bangaluru
(SCCH-21), in CC
No.56442/2017, is hereby
confirmed.***

***The suspension order,
dated 18.12.2019, passed by
this court, on the application***

***filed u/S 389 of Cr.P.C. stands
canceled.***

No order as to costs.

***Office is directed to send
TCR to the trial court with
copy of the judgment.***

(Dictated to the Stenographer, on computer, after computerization, corrected and pronounced by me in the Open Court, this the 21st day of February, 2022)

(Yamanappa Bammanagi)
73rd Addl. CC & SJ, M.H.Unit,
Bangaluru. (CCH-74)

