KAHV010037552019

IN THE COURT OF THE ADDL. DISTRICT & SESSIONS JUDGE, FTSC-I, HAVERI

Dated this the 13th day of January 2023

:<u>Present</u>:

Sri. Ningouda B. Patil, B.Sc., LL.M.,
Addl. District & Sessions Judge, FTSC-I,
Haveri.

<u>Criminal Appeal No.82/2019</u>

<u>APPELLANTS:</u>

1. Jagajyoti Basaveshwar Agricultural Centre,
   General Merchant Commission Agent,
   Kirigeri Complex Halageri Road,
   Ranebennur.
2. Manju Bharmappa Nandihalli
   (M.B Nandihalli)
   Age: 51 years, Occ: Agriculture,
   R/o Hullatti,
   Tq: Hirekerur, Dist: Haveri.

   (By **Sri. P.C. Banakar,** Advocate)

/VS/

<u>RESPONDENT</u>:

Haveri District Co-Operative,
Agriculture Marketing Federation
Limited, Haveri
By its Liquidator,
Sri. S.M. Angadi,
Age: Major, Occ: Liquidator,
R/o. Haveri.
(By **Sri. S.R. Patil,** Advocate)

JUDGMENT

Appellants being aggrieved with the Judgment and Order dated 21.10.2019 passed in CC No.169/2018 (Old CC No.313/2003) by the Principal Senior Civil Judge and CJM, Haveri (Herein after called as trial Court) preferred this appeal under Section 374 of Cr.P.C.

2. The brief facts of the case as emanating from the appeal memo are that;

Respondent Federation lodged a private complaint against appellants stating that appellant no.1-Firm purchased maize from respondent-federation on different dates and was due for making payment; in order to make payment of Rs.60,000/- towards dues appellant no.2 on behalf of appellant no.1 issued a cheque drawn on SBI, Ranebennur branch; the said cheque was dishonoured on presentation; hence, respondent-federation filed private complaint against appellants after issuing notice for the offense punishable under Section 138 of NI Act before the trial Court; the trial Court after hearing convicted the appellants; being aggrieved with the same, the appellants preferred criminal appeal no.19/2007 before this Court; the said appeal was allowed and the conviction order was set aside and further the matter was remanded to the trial Court for disposal after considering a document marked under Ex.D.7 a direction was given to the trial Court for sending document marked under Ex.D.7 for obtaining expert opinion regarding signature of the representative of respondent-federation along with his signature on admitted document; it is further also directed to trial Court that both parties are required to provide full opportunities to lead their evidence and to decide the case on merits in accordance with law; accordingly, the disputed document under Ex.D.7 sent to the expert for obtaining opinion along with admitted document; the expert opined that the signature of representative of respondent-federation on Ex.D.7 and his signature on admitted document are one and the same; respondent-federation not challenged the said opinion of the expert; appellants by producing document under Ex.D.7 disproved the case of respondent-federation; inspite of having such kind of documentary evidence on record the trial Court convicted the appellants for the offense punishable under Section

138 of NI Act; they through documentary evidence Ex.D.7 rebutted the presumption under Section 139 of NI Act; however, the trial Court convicted them by passing impugned judgment and order; therefore, they being aggrieved with the same preferred this appeal on the following among other grounds;

1. That the impugned order of conviction and sentence passed by the trial Court is not proper and legal.

2. That the trial Court failed to see that there are no sufficient evidence on record to prove their guilt for the offense punishable under Section 138 of NI Act.

3. That the evidence produced before the trial Court not inspires the confidence to convict them; the evidence of the witness who examined as PW.1 in the trial Court is quite contrary to the cheque produced under Ex.P.1; as such, the trial Court without considering the same, erred in convicting them.

4. That the evidence led by the respondent-federation in the trial Court itself establishes that they have not committed any offense much less the alleged one.

5. That trial Court failed to see that they successfully rebutted the presumption available under Section 138 of NI Act through documentary evidence produced at Ex.D.7; there was no any due payable to the respondent-federation by them; however, trial Court convicted them erroneously.

6. That respondent-federation not produced any material evidence to show that there was a legally enforceable debt against them; respondent federation presented the cheque in question against the law; no cause of action arose for respondent federation to initiate the proceedings against them.

7. That the trial Court erred in believing the evidence of respondent federation and failed to appreciate a documentary evidence produced under Ex.D.7.

8. That they successfully rebutted the presumptions which had been drawn against them; but the trial by giving improper reasons arrived to a wrong conclusion and convicted them by passing the impugned judgment and order; hence, the same are not sustainable under law.

Therefore, for all the reasons stated above and among others appellants prayed to set aside the impugned judgment and order and acquit them for the offense punishable under Section 138 of NI Act.

3. I have gone through the appeal memo, impugned judgment and order and other material on record.

4. Heard the arguments of counsel for both the parties.

5. The counsel for appellants argued that the documentary evidence produced at Ex.D.7 clearly establishes that respondent federation is not having any case against the appellants. He further argued that appellant by producing the documentary evidence produced at Ex.D.7 clearly rebutted the presumptions that respondent-federation is not having any legal enforceable debt against appellant under questioned cheque. He further more argued that respondent-federation not challenged the opinion of the expert regarding her signature on Ex.D.7 and the said opinion attained finality. Therefore, as per Ex.D.7 respondent-federation is not having any cause of action against appellants to initiate the proceedings for the offense punishable under Section 138 of NI Act. However, the trial Court without properly appreciating the documentary evidence produced at Ex.D.7 wrongly concluded that the said document has not been duly proved and appellants have committed the offense punishable under Section 138 of NI Act. Accordingly, convicted them by passing impugned judgment and order. Therefore, the said are no longer sustainable under law and hence, they have to be set aside by allowing the appeal. Accordingly, he urged to allow the appeal.

6. *Per contra*, the counsel for respondent-federation argued that appellants have not discharged the reverse burden casted upon them in view of presumption available under Section 139 of NI Act. The documentary evidence produced at Ex.D.7 has not been duly proved and hence, it cannot be construed that appellants successfully rebutted the statutory presumption available for the offense punishable under Section 138 of NI Act. He further argued that the trial Court rightly appreciated the oral and documentary evidence including Ex.D.7 and passed the impugned judgment and order. Hence, fault cannot be found in the said judgment and order. He further more argued that appellants only to avoid payment and to escape from the conviction unnecessarily preferred this appeal. Therefore, the appeal is liable for dismissal. Accordingly, the counsel for respondent federation prayed the dismiss the appeal.

7. In view of rival submissions, the points that arose for my consideration are;

1) Whether appellant made out the grounds to set aside the impugned judgment and order of trial Court?

2) What order?

8. My answer to the above points are as under:-

Point No.1:-	In the **Affirmative**
Point No.2:-	As per the final order for the following;

R E A S O N S

9. **Point No.1:-** From the material produced on record it can be said that respondent federation being complainant in the trial Court alleged that appellant no.1 being a firm and appellant no.2 being her representative purchased maize from her federation and they were due. In order to discharge the said due, appellants issued a cheque bearing No.033179 dated 15.09.2002 for an amount of Rs.60,000/- in her favour. But, on presentation the said cheque was dishonoured and hence, she initiated proceedings against appellant under

Section 138 of NI Act originally under CC No.313/2003 before the trial Court. In the said case appellants were convicted and they being aggrieved with the judgment and order of the conviction preferred a criminal appeal no.19/2007. The said appeal was allowed and the judgment and order of the conviction was set aside and the matter remanded back to the trial Court with a direction of considering the legality of signature on a document marked under Ex.D.7. The trial Court secured the expert opinion of signature of representative of respondent-federation found on disputed document ie., on Ex.D.7 with his signature on admitted document. According to the expert opinion, the signature of Ex.D.7 and the signature of representative of respondent federation on admitted document are one and the same. But the trial Court held that the document under Ex.D.7 has not been duly proved and appellants failed in rebutting the presumption available under Section 139 of NI Act and hence,they are liable for conviction. Accordingly, the trial Court convicted the appellants by passing impugned judgment and order.

10. It is specific case of the appellants that trial Court that respondent federation by issuing a letter under Ex.D.7 waived their claim under cheque in question. According to them, the said documentary evidence discloses that the cheque in question was replaced and respondent federation instead of the said cheque received other cheques and got realized the dues. Hence, the debt under cheque in question is not enforceable. Respondent-federation produced the said cheque in question in the trial Court and the said cheque is marked under Ex.P.1. The other documents produced by the respondent federation were marked as Ex.P.2 to 12. The documentary evidence produced at Ex.P.2 is a office copy of legal notice dated 10.02.2003, Ex.P.3 and Ex.P.4 are the postal receipts, Ex.P.5 and 6 are postal acknowledgments, Ex.P.7 and 8 are the letters, Ex.P.9 is a bank memo, Ex.P.10 is a counter memo, Ex.P.11 is a vakalath. Ex.P.12 certified copy of complaint. Ex.P.13 is order sheet in Misc. No.1/2006 pending before District Consumer Forum, Haveri.

11. Respondent-federation apart from above said documentary evidence also adduced evidence by examining her representative. The representative of respondent federation examined as PW.1 and in his affidavit of examination-in-chief reiterated the averments of the complaint. The said witness has been cross-examined by the counsel for the appellants. In the said cross-examination the counsel for the appellant took a defense that the cheque under Ex.P.1 and other two cheques were replaced by the appellants by issuing other four cheques of Cardmom Bank, Haveri. It is also defense of the appellants that the respondent federation agreed to receive the debt through cheques of Cardmom bank and further agreed to return the cheque under Ex.P.1 and other two cheques. But, respondent-federation not returned the said cheques as agreed and filed a false case against them. Hence, respondent-federation is not having any legally enforceable debt vide cheque under Ex.P.1.

12. Keeping the above said facts in mind, now the thing to be considered is whether respondent federation proved her case and established beyond all reasonable doubts that appellant committed the offenses punishable under Section 138 of NI Act or not. Respondent federation to prove the case relied the documentary evidence marked under Ex.P.1, Ex.P.2 to Ex.P.6 and Ex.P.9 and also resorted to oral evidence of her representative. The said representative examined as PW.1. The counsel for the appellants cross-examined the PW.1 and in the said cross-examination PW-1 stated that;

> "ಆರೋಪಿಯು ಸ್ಟೇಟ್ ಬ್ಯಾಂಕ್ ಆಫ್ ಇಂಡಿಯಾ, ರಾಣೇಬೆನ್ನೂರಿನ ಮೂರು ಚೆಕ್ ಗಳನ್ನು ವ್ಯವಹಾರದ ಸಲುವಾಗಿ ಕೊಟ್ಟಿದ್ದ ಅನುವುದು ನಿಜಾ. ಆರೋಪಿಯು ನಿಪಿ-1 ಹಾಗೂ ಸಿ..ಸಿ 314 ರಲ್ಲಿಯ ನಿಪಿ-1 ಚೆಕು , ಮತ್ತೊಂದು ಚೆಕು ನಂ. 0033178 ಅನುವುದು ನಿಜಾ. ಮೇಲೆ ನಮೂದು ಮಾಡಿದ ಮೂರು ಚೆಕುಗಳು ಕೊಟ್ಟ ನಂತರ ಆರೋಪಿಯು ಕಾರ್ಡಮಮ್ ಬ್ಯಾಂಕಿನ 4 ಚೆಕುಗಳನ್ನು ಕೊಟ್ಟಿದ್ದಾರೆ ಅನುವುದು ಸುಳ್ಳು, ಆದರೆ 2 ಚೆಕುಗಳನ್ನು ಕೊಟ್ಟಿರುತ್ತಾರೆ. ನಾಲ್ಕು ಚೆಕುಗಳನ್ನು ಬ್ಯಾಂಕಿಗೆ ಸಲ್ಲಿಸಿದ್ದಾಗ ನಗದೀಕರಣ ಆಗಿದೆ ಅನುವುದು ಸುಳ್ಳು ಆದರೆ 2 ಚೆಕುಗಳು ಆಗಿವೆ.ಒಂದೊಂದು ಲಕ್ಷದ ಎರಡು

ಚೆಕುಗಳು ನಗದೀಕರಣ ಆಗಿರುತ್ತವೆ. 55 ಸಾವಿರದ ಒಂದು ಚೆಕ್ಕು ಮತ್ತು 5 ಸಾವಿರದ ಮತ್ತೊಂದು ಚೆಕ್ಕು ನಮ್ಮ ಖಾತೆಗೆ ಜಮಾ ಆಗಿದೆ ಅಂದರೆ 55 ಸಾವಿರದ ಒಂದು ಚೆಕ್ಕು ನಮ್ಮ ಖಾತೆಗೆ ಜಮಾ ಆಗಿರುತ್ತದೆ. ಸದರೀ ಹಣ ಯಾರಿಂದ ಬಂದಿದೆ ಅಂತಾ ಗೊತ್ತಿಲ್ಲದ್ದರಿಂದ ಸದರಿ ಹಣವನ್ನು ಅಮಾನತ್ತಿನಲ್ಲಿ ಇಟ್ಟಿರುತ್ತದೆ. ಕಾರ್ಡಮಮ್ ಬ್ಯಾಂಕಿನ ಎರಡು ಚೆಕ್ಕುಗಳನ್ನು ಕೊಟ್ಟ ನಂತರ ಈ ಪ್ರಕರಣದಲ್ಲಿ ಹಾಜರುಪಡಿಸಿದ ಚೆಕ್ಕು ಹಾಗೂ ಸಿಸಿ-314 ರಲ್ಲಿ ಹಾಜರುಪಡಿಸಿದ ಚೆಕ್ಕುಗಳು ವಾಪಸ್ಸು ಕೊಟ್ಟಿಲ್ಲ ಅನ್ನುವ ಪ್ರಶ್ನೆಗೆ ಬೇರೆ ವ್ಯವಾಹರಿಕವಾಗಿ ಚೆಕ್ಕುಗಳನ್ನು ಕೊಟ್ಟಿರುತ್ತಾರೆ ಅಂತಾ ಸಾಕ್ಷಿಯು ಉತ್ತರಾ ಕೊಟ್ಟಿರುತ್ತಾನೆ.

05.09.2002 ರಂದು ಈ ಕೇಸಿನ ಚೆಕ್ಕು ಹಾಗೂ ಸಿ.ಸಿ.-314:03 ರಲ್ಲಿ ಚೆಕ್ಕು ಹಾಗೂ 033178 3 ಚೆಕ್ಕುಗಳು ಕಳೆದು ಹೋಗಿವೆ ಸಿಕ್ಕಾ ನಂತರ ಕೊಡುತ್ತೇನೆ. ನಗದೀಕರಣಕ್ಕೆ ಕೊಡುವುದಿಲ್ಲ ಅಂತಾ ಬರೆದುಕೊಟ್ಟಿದ್ದೇನೆ ಅನ್ನುವುದು ಸುಳ್ಳು. 24.09.2022 ರಂದು ಆರೋಪಿಯು ಎಸ್.ಬಿ.ಐ ರಾಣೇಬೆನ್ನೂರ ಬ್ಯಾಂಕಿನಲ್ಲಿ ಈ ಕೇಸಿನ ನಿಪಿ-1, ನಿಪಿ-314:03 ರಲ್ಲಿಯ ಚೆಕ್ಕು ಹಾಗೂ ಮತ್ತೊಂದು ಚೆಕ್ಕುಗಳನ್ನು ನಗದೀಕರಣ ಮಾಡಬಾರದು ಅಂತಾ ಪತ್ರಾ ಕೊಟ್ಟಿರುವುದು ಗೊತ್ತಿಲ್ಲ. ಸದರಿ ಚೆಕ್ಕ್ ನಲ್ಲಿ ಕಾರ್ಡಮಮ್ ಬ್ಯಾಂಕಿನ ಚೆಕ್ಕು ಕೊಟ್ಟಿದ್ದರಿಂದ ನಗದೀಕರಣ ಮಾಡಬಾರದು ಅಂತಾ ಪತ್ರ ಕೊಟ್ಟಿರುವುದು ಗೊತ್ತಿಲ್ಲ.

13. On careful perusal of above said testimony of PW.1 it can be grasped that respondent federation get realized the amount under two cheques of Rs.1,00,000/- each and a cheque of Rs.55,000/-. From the said evidence of PW.1 it can be further grasped that appellant instead of cheque under Ex.P.1, the cheque produced under Ex.P.1 in CC No.314 and another cheque, received two cheques of Cardmom Bank issued by the appellants. Appellants to corroborate the evidence of PW.1 also got examined appellant no.2 as D.W.1 and he in his examination-in-chief in para no.2 stated that;

> "ಸದರ ಮೇಲ್ಕಾಣಿಸಿದ ವಿಷಯದಲ್ಲಿ ಫಿರ್ಯಾದಿಯ ತಾನು ತನ್ನ ಸಂಸ್ಥೆಯ ವತಿಯಿಂದ ನನಗೆ ತಾಃ 5/9/2002 ರಂದು ಪಡೆದ ಚೆಕ್ಕುಗಳಳನ್ನು ಪರತ ಕೊಡುವದಾಗಿ ಬರೆದುಕೊಟ್ಟು ನನ್ನಿಂದ ಕಾರ್ಡೆಮಮ್ ಬ್ಯಾಂಕಿನ ನಾಲ್ಕು ಚೆಕ್ಕುಗಳನ್ನು ಪಡೆದುಕೊಂಡ ಸದರ ಎರಡು ಚೆಕ್ಕುಗಳನ್ನು ತಾಃ 12/09/2002 ಹಾಗೂ ತಾಃ 5/10/2002 ರಂದು ನಗದೀಕರಣವನ್ನು ಮಾಡಿಕೊಂಡಿದ್ದು ಇರುತ್ತದೆ. ಹೀಗಿದ್ದಾಗ್ಯೂ ಸಹ ಫಿರ್ಯಾದಿಯು ಅನವಶ್ಯಕ ನನಗೆ ತೊಂದರೆ ಕೊಡುವ ದುರುದ್ದೇಶದಿಂದ ಹಾಗೂ ನನ್ನ ಹಣವನ್ನು ಎತ್ತಿ ಹಾಕಬೇಕೇನ್ನುವ ಇರಾದೆಯಿಂದ ತನ್ನ ಮನ ಬಂದಂತೆ ಕೃತೆಯನ್ನು ಹುಟ್ಟಿಸಿಕೊಂಡು ನಾನು ಕೊಟ್ಟಂತಹ ಚೆಕ್ಕುಗಳನ್ನು ಹಿಂದಿರುಗಿಸದೆ ಸುಳ್ಳು ಫಿರ್ಯಾದಿ ಮಾನ್ಯ ನ್ಯಾಯಾಲಯಕ್ಕೆ ಸಲ್ಲಿಸಿರುತ್ತಾನೆ. ”

14. The counsel for the respondent federation cross-examined DW.1, but nothing adverse has been elicited from his mouth regarding the above said portion of deposition. Further, in support of the above said deposition appellants also relied another documents marked under Ex.D.7. The said documentary evidence is a letter dated 05.09.2002 issued by respondent federation to the appellants. The contents of the said letter discloses that respondent federation received three cheques instead of the cheque bearing no.033177, 033178 and 033179 ie., the cheque under Ex.P.1, cheque under Ex.P.1 in CC no.314 and another cheque. The representative of respondent-federation who examined as PW.1 in the trial Court in his cross-examination stated that he do not know about Ex.D.7. Thus, PW.1 not specifically demises the execution of Ex.D.7. The wisdom answer of PW.1 regarding ignorance towards Ex.D.7 makes it very clear that appellant received the said document. If the above said testimonies of PW.1 and DW.1 coupled with Ex.D.7 have been analyzed, it is clear that respondent federation replaced the cheque under

Ex.P.1 and agreed to return the same to the appellants. If that is so, then absolutely respondents federation is not having any legal enforceable debt against the appellants and her claim under the cheque marked under Ex.P.1 is not sustainable.

15. The counsel for the appellants vehemently argued that Ex.D.7 disprove the case of the respondent federation. He further submitted that by issuing Ex.D.7 respondent federation agreed to adjust her claim through other cheques and hence, her claim under Ex.P.1 is no longer sustainable. He further submitted that the document under Ex.D.7 coupled with the testimony of PW.1 as above said clearly establishes that appellants rebutted the presumption under Section 139 of NI Act. However, the trial Court wrongly held that appellants not proved the document under Ex.D.7 and they not rebutted the presumption. According to counsel for appellants, the said observations of the trial Court one wrong and not proper.

16. The counsel for the respondent-federation argued that mere proof of signature of representative of respondent federation on Ex.D.7 not proves its contents. He further submitted that the expert opinion is an opinion which shall not be the base for a conclusion. He further more submitted that the appellants not examined the expert who had given the opinion. Therefore, it shall not be construed that the document under Ex.D.7 has been duly proved. He also submitted that the trial Court regarding Ex.D.7 rightly observed and rightly held that appellants failed in rebutting the presumption under Section 139 of NI Act and hence, they are liable for conviction.

17. The undisputed fact is that the document at Ex.D.7 was sent to the expert for verification of signature of representative of respondent federation with the signature on the admitted document. It is also undisputed that the expert opined that Ex.D.7 bears signature of representative of respondent federation. Now, the only contention of respondent federation is that

Ex.D.7 has not been duly proved. The legal position of proving of document is available under Chapter V of the Indian Evidence Act. Section 61, 62 and 64 of Indian Evidence Act provides that . The said provisions reads as under;

> ***Section 61: Proof of contents of documents***.*—The contents of documents may be proved either by primary or by secondary evidence.*
>
> ***Section 62. Primary evidence.—****Primary evidence means the document itself produced for the inspection of the Court.*
>
> *Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document; Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.*
>
> *Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but, where they are all*

copies of a common original, they are not primary evidence of the contents of the original. Illustration A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

Section 64: Proof of documents by primary evidence.—

Documents must be proved by primary evidence except in the cases hereinafter mentioned.

18. As per the above said provisions, a document may be proved either by producing it in primary form or in secondary form. In this case, appellants produced the original letter dated 05.09.2002 and got marked at Ex.D.7. The trial Court records discloses that respondent federation raised objections regarding marking of the said document. The trial Court not specifies the grounds for the objection for marking of the said document. The Hon'ble Supreme Court of India in a case reported in **(1992) 2 SC 192** in the matter of **Gulzar Ali Vs. State of Himachal Pradesh** held that the contents and the signature on the documents can be established by following ordinary methods;

1) *by calling as a witness a person who wrote the document or;*

2) *saw it written or signed or;*

3) *who is qualified to express an opinion as to the handwriting by virtue of section 47;*

4) *by a comparison of the handwriting as provided by section 73;*

5) *by admission of the person against whom the document is tendered.*

6) *by expert evidence under section 45 (expert opinion is only relevant, but it is for the court to determine whether a writing is genuine or not);*

7) *by internal evidence afforded by the contents of the document.*

8) *if signature or handwriting is to be proved by circumstantial evidence, the court should be satisfied that the circumstantial evidence irresistibly leads to the inference that the person in question must have signed or written it. Where a document is proved to be executed by proving the signatures or thumb impression of the executant and proved to have been attested by witnesses by proving their signatures or thumb impression, it is not necessary to also prove the handwriting of the person who has written. Proof of execution of a document or where it is required to be attested, proof of attestation also, are sufficient to make the contents of it admissible".*

19. In this case appellants by producing the document under Ex.D.7 contending that respondent federation waived her claim under Ex.P.1 by receiving alternate cheque. The document under Ex.D.7 disclose that the same has been addressed to appellants. Thus, it is not possible to say that appellant not known the contents of the said document. Appellants secured the same as the same has been addressed to them. Thus, as per the ratio laid down in the above said case, they can produce the said documentary evidence. The circumstances makes them to produce before the trial Court. Hence, the objections raised by the respondent-federation regarding marking of the said documentary evidence is of no use. Thus, there is no any fault on the part of the trial Court in marking the said documentary evidence.

20. Now the thing is whether trial Court properly appreciated the said documentary evidence or not. The trial Court in para no.26 of the judgment observed that appellants not adduced any independent witness to prove the said document. When the said document addressed to the appellants, they can produce the said document and they can prove the contents of the said document. It is not the case of the respondent-federation that appellants themselves created the said document or the same has not been addressed to the appellant. PW.1

being representative of respondent-federation stated his ignorance about Ex.D.7 in his evidence. Apart that, appellant no.2 who examined as DW.1 in the trial Court in his examination-in-chief clearly and categorically stated that respondent-federation after making alternate arrangements issued letter under Ex.D.7. The said witness has been cross-examined, but no single suggestion put to him that document under Ex.D.7 was created.

21. Further, the circumstances that appellants produced Ex.D.7, experts opinion regarding signature on it. Silence of PW.1 on it etc discloses that respondent-federation issued the said document. Hence, it can be inferred that the said document has been duly proved. In a case reported in **AIR 1969 SC 93** in the matter of **Baru Ram Vs. Prasanni** it has been held that;

> *"if signature or handwriting is to be proved by circumstantial evidence irresistibly leads to the informed that the person in question must have signed or written it".*

22. In this case also the circumstances are such that the representative of respondent-federation wrote the Ex.D.7 and addressed it to the appellants. Hence, it is to be believed that the handwriting and signature of Ex.D.7 belonged to representative of respondent-federation. The recitals of the said documents establishes that appellants knows the contents of the said document. The trial Court in para no.26 of the judgment further held that the representative of respondent federation who examined as PW.1 denied the said document. The trial Court without perusing the testimony of PW.1 as above said, wrongly made the observations. Thus, the observations made by the trial Court regarding Ex.D.7 are not proper. The trial Court not properly appreciated the documentary evidence under Ex.D.7 coupled with oral evidence of PW.1. Appellants by producing Ex.D.7 and by eliciting from the mouth of PW.1 proved that the cheque under Ex.P.1 and the cheque in Ex.P.1 in CC No.314 were replaced by the other cheques of Cardmom Bank of Haveri issued by the appellants. The case of the appellants is that by producing document under Ex.D.7, they successfully rebutted the presumption under Section 139 of NI Act regarding non existence of legal enforceable debt. However, the trial Court wrongly concluded that appellants not rebutted the said presumption.

23. Section 139 of NI Act generates a presumption that a drawer of the cheque issues cheque for discharging legal enforcible debt. The extracted part of the said provision is as under;

> ***139. Presumption in favour of holder:-***
> *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.*

24. The presumption under the above said provision is a rebuttable one. The appellants are under an obligation of rebutting the said presumptions. The said rebuttal may be by cross-examining the complainant witnesses or by adducing the evidence by themselves.

The representative of Respondent-federation in the trial Court examined as PW.1 and got marked the cheque in question as Ex.P.1. Appellant cross-examined PW.1. In the said cross-examination PW.1 admitted that the cheque in question was replaced by the other cheques of Cardmom Bank, Haveri. The appellants in the trial Court rebutted the said presumption also examined appellant no.2 as D.W.1. Appellant no.2 who examined as DW.1 in his examination-in-chief stated that respondent-federation replaced the cheque under Ex.P.1 and other cheques with cheques Cardmom Bank, Haveri. The said portion of the evidence has not been challenged. Thus from the oral evidence of DW.1 it is clear that the cheque produced in this case has been replaced and the documentary evidence under Ex.D.7 confirms the same.

25. The trial Court records clearly discloses that appellants by producing Ex.D.7 cross-examining PW.1 and also by adducing oral evidence through D.W.1 proved that the cheque under Ex.P.1 entered into the hands of the respondent-federation. Hence,it can be held that appellants rebutted the presumption available under Section 139 of NI Act by leading cogent evidence. Therefore, it can be concluded that respondent-federation is not having legal enforceable debt under Ex.P.1 against the appellants.

26. In this case, though the appellant raised several other grounds, but the ground raised as above said is sufficient to hold that the impugned order and judgment suffers from illegality and not sustainable under the eyes of law and therefore, the same is liable to set aside. Therefore, it is necessary to set aside the impugned judgment and order. Thus, this Court is of the opinion that appellant established the ground to set aside the impugned judgment and order. Accordingly, my answer to point no.1 is in the **Affirmative**.

27. **Point No.2:** In view of my above said answer, I proceed to pass the following;

O R D E R

The appeal preferred under Section 374(3) of Cr.P.C by the appellants is hereby allowed.

The judgment and order dated 21.10.2019 passed in CC No.169/2018 (Old CC No.313/2003) by the trial Court is hereby set aside.

Appellants are acquitted for the offense punishable under Section 138 of NI Act.

Send the lower/trial Court records to the trial Court with immediate effect with a copy of this order.

(Dictated to the Stenographer on computer, computerized by her, corrected and then pronounced by me in open court on the **13th day of January 2023**)

(Ningouda B. Patil)
ADDL. DISTRICT & SESSIONS JUDGE,
FTSC-I, HAVERI.