KABGC00013372017

IN THE COURT OF SENIOR CIVIL JUDGE AND JMFC AT RAMDURG

PRESENT
MISS. B.T. ANNAPOORNESHWARI.
B.A, LL.B, LL.M.
SENIOR CIVIL JUDGE and JMFC,
RAMDURG.

C.C. NO.809/2017
DATED THIS 28th DAY OF FEBRUARY 2024

COMPLAINANT : Sri.Samiulla A. Nakarchi,
Age: 32 years, Occ, Business,
R/o: Pendaragalli, Ramdurg,
Tq: Ramdurg, Dist: Belagavi.

(By Sri. N.S.Karamadi, Advocate.)

Vs.

ACCUSED : Smt. Mairaaji W/o Dongarasab Talikoti,
Age: 42 years, Occ: Household work,
R/o: Ningapur, Opposite to Sankamma Mandira,
Ramdurg, Dist: Belagavi.

(By Sri. M.D.Haji, Advocate.)

J U D G M E N T

The complainant has filed the complaint under Section 200 Cr.P.C against the accused for the offence punishable under Section 138 of the Negotiable Instruments Act **(herein after referred to as the 'Act').**

2. The brief facts of the complainant's case are as under:

The complainant is resident of Pendaragalli of Ramdurg town and complainant and the accused are known to each other. The accused used to take hand loan from the complainant. Accordingly, on 15.10.2016 the accused came to the house of complainant and took loan of Rs.3,00,000/- as she needed for repayment of bank loan and her family necessity and said amount was lend to the accused in presence of witness Smt.Renuka P. Halagi. The accused agreed to repay the said loan in the month of January 2017. AS per said agreement when the complainant demanded for repayment of loan from the accused she postponed on one or the other reason. When the complainant demanded repayment of said loan in presence of elders, at that time the accused on 04.08.2017 gave cheque No:564696 for Rs.3,00,000/- which he presented on 10.8.2017 through his banker Syndicate Bank, Ramdurg Branch but it returned on 23.08.2017 for the reason of insufficient funds. The complainant gave legal notice to the accused on 24.08.2017 which received by the accused and he received acknowledgment on 30.8.2017 but even then the accused did not repay the loan amount. Hence, the accused has committed the offence punishable under section 138 of NI 'Act'.

3. After the complaint is filed, this court has recorded the sworn statement of the complainant and ordered to register Criminal Case and issued the process against the accused.

4. The accused has appeared before the court and has been enlarged on bail. Thereafter the plea of the accused is recorded and the accused has not pleaded guilty and claimed to be tried.

5. The sworn statement treated as evidence of complainant. The complainant, in order to prove his case examined himself as P.W.1 and got 5 documents marked as Ex.P.1 to Ex.P.5.

6. The examination of accused under Section 313(1)(b) of Cr.P.C is recorded. She has denied the incriminating circumstances of the evidence of the P.W.1 and later submitted that she has no any defence evidence.

7. The bail bond of accused and surety is taken as per Section 437-A of Cr.P.C.

8. I have heard the arguments of both sides and perused the materials on record.

9. The points for consideration are:-

1. Whether the complainant has proved that the accused has issued the Cheque bearing No.564696 dated 04.08.2017 for Rs.3,00,000/- drawn at Syndicate Bank, Ramdurg branch to discharge the legally recoverable debt borrowed by her from the complainant and after the complainant has presented the cheque through his Banker Syndicate Bank, Ramdurg branch, it is returned with an endorsement 'Funds Insufficient'; in spite of the receipt of the legal notice by the accused, she has not paid the amount of the Cheque within a statutory period and thereby the accused has committed an offence punishable under Section 138 of the 'Act'?

2. What Order?

10. The answers to the points are:-

Point No.1 : In the negative,
Point No.2 : As per final order,
for the following;

R E A S O N S

11. POINT NO.1:- Learned counsel for the complainant has argued that the complainant has complied the ingredients of section 138 of the 'Act' by producing the materials on record and has also proved his case against the accused; the accused has failed to rebut the presumption available under Section 139 of the 'Act' in favour of the complainant. The accused has not disputed the signature on the cheque and not given reply to the notice which clearly proves the case of the complainant as averred. Accordingly, learned counsel for the complainant has prayed to punish the accused as prayed in the complaint.

12. The counsel for the complainant has relied upon the following decisions; (1) 2020(4) KCCR 2505 M/s.Saptagiri Traders Vs. D.Venkatesh, (2) 2013(5) KCCR 3716 S.A.Suryanarayana Vs. M.S.Devendrappa, (3) 2015(4) KCCR 3938 Gurupadaswamy Vs. M.Partha, (4) 2023 (3) Civil L J 523 Uma Rani Vs. Rajesh Jain on the principle that the accused has burden to prove that the cheque has not been issued for any debt or liability and non reply to the notice drawing inference against the accused and when the accused has admitted signature on cheque presumption arises that holder of cheque received it for discharge of any debt or liability.

13. Learned counsel for the accused has argued that the complainant has no financial capacity and his chief examination and cross-examination are contradictory which itself shows that there was no such transaction as alleged by the complainant. The averments of complaint and the evidence of complainant itself creates suspicion with regard to alleged loan transaction. The accused has set up the defence that the complainant has no financial capacity and that there was no transaction as alleged by the complainant and there is no legally recoverable debt and rebutted the presumption available under Section 139 of the ‘Act’ in favour of the complainant. Accordingly, learned counsel for the accused has prayed to acquit the accused.

14. The counsel for the accused has relied upon the decisions which are; (1) 2012 (3) KCCR 2057 Veerayya Vs. G.K.Madivalar, (2) 2015 (1) Crimes (SC) 48 : K.Subramani Vs. K.Damodara Naidu, (3) 2019 0 Supreme (SC) 423 : Basalingappa vs. Mudibasappa, (4)2022 (3) KCCR 2239 and on relying said decisions the counsel contended that the complainant has to prove that he has source of income to lend the loan to the accused and the existence of legally recoverable debt is not a matter of presumption under Section 139 of the ‘Act’.

15. Now it is necessary to examine the case on hand as to whether the complainant has proved his case. In order to constitute an offence under Section 138 of the 'Act', the complainant has to fulfill the following requirements-

1. The cheque should be issued for the discharge, in whole or part, of any debt or other liability;
2. The cheque should be presented before the bank within the period of three months from the date of drawn or the period of its validity whichever is earlier;
3. The payee or the holder in due course of the cheque, as the case may be, should issue a notice in writing to the drawer of the cheque within 30 days of the receipt of information by him from the bank regarding the return of cheque as unpaid;
4. The drawer of the cheque should fail to pay the amount of cheque to the payee or the holder in due course of the cheque, as the case may be, within 15 days of the receipt of the said notice;

5. On non-payment of the amount of the cheque by the drawer within 15 days of the receipt of the notice, the complainant should file the complaint within one month of the date of expiry of 15 days before the court not below the rank of a Metropolitan Magistrate or Judicial Magistrate of First Class.

16. In the present case, the complainant presented the cheque marked as per Ex.P.1 through his banker Syndicate Bank, Ramdurg branch on 10.08.2017; thereafter the cheque was dishonored as "funds insufficient" as per the memo marked at Ex.P.2 on 23.08.2017; then the complainant issued the legal notice as per Ex.P.3 on 24.08.2017 demanding the accused to make the payment of cheque amount of Rs.3,00,000/-; the notice was served to the accused on 30.08.2017 as found from Ex.P.5/postal acknowledgment. Then, the complainant has filed the present complaint on 09.10.2017.

17. After service of legal notice to the accused, the accused gets the time of 15 days to pay the cheque amount. After lapse of 15 days, the complainant has to file the complaint within a month. In the present case, the legal notice came to be served to the accused on 30.08.2017. The accused got the time of 15 days to pay the cheque amount of Rs.3,00,000/- from 30.08.2017. After lapse of the said 15 days i.e., 15.09.2017, the complainant had to file the complaint within a month i.e., on or before 15.10.2017. The present complaint is filed on 09.10.2017. Therefore, the complainant has complied the ingredients of Section 138 of N.I. Act.

18. The general principles pertaining to burden of proof on an accused especially in a case where some statutory presumption regarding guilt of the accused has to be drawn. In the case of “Kali Ram Vs. State of Himchal Pradesh” reported in “(1973) 2 SCC 808” the Hon’ble Apex court held as follows;

> *“23. One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts*

which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal."

19. In the case of "M.S. Narayana Menon Alias Mani Vs. Sate of Kerala and Another, (2006) 6 SCC 39" the Hon'ble Apex court had considered Section 118(a), 138 and 139 of the Negotiable Instruments Act, 1881, holding that Sec.118(a) and 139 of N.I. Act are rebuttable in nature. In para No.28, it is held as follows;

"28. What would be the effect of the expressions "may presume", 'shall presume" and 'conclusive proof' has been considered by this Court in Union of India V. Pramod Gupta, (2005) 12 SCC 1, in the following terms:

"It is true that the legislature used two different phreaseologies 'shall be presumed' and 'may be presumed' in Section 42 of the Punjab Land Revenue Act and furthermore although provided for the mode and manner of rebuttal of such presumption as regards the right to mines and minerals said to be vested in the Government vis-à-vis the absence thereof in

relation to the lands presumed to be retained by the landowners but the same would not mean that the words 'shall presume' would be conclusive. The meaning of the expressions 'may presume' and 'shall presume' have been explained in Section 4 of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus, the expression 'shall presume' cannot be held to be synonymous with 'conclusive proof'.

30. Applying the said definitions of "proved" or disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon."

"32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies."

20. In “Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, (2008) 4 SCC 54,” the Hon’ble Apex Court held that an accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record and it is held as under;

> *“32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different.”*
>
> *“34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is ‘preponderance of probabilities’. Inference of preponderance of probatilities can be drawn not only from the materials brought on record by the parties but als by reference to the circumstances upon which he relies.”*

21. In “Rangappa Vs. Sri.Mohan, (2010) 11 SCC 441”, the Hon’ble Apex court had elaborately considered provisions of Sections 138 and 139, as follows;

> *"13. The High Court in its order noted that in the course of the trial proceedings, the accused had admitted that the signature on the impugned cheque (No.0886322 dated 8.2.2001) was indeed his own. Once this fact has been acknowledged, Section 139 of the Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. This presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. With regard to the present facts, the High Court found that the defence raised by the accused was not probable."*
>
> *"26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the N.I. Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bha, (2008) 4 SCC 54 may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant."*

"27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonor of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high stand of proof.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debtor liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases *that accused may not need to adduce evidence of his/her own."*

22. Applying the preposition of law as per the decisions of Hon'ble Apex court cited above, to the facts of the present case, it is clear that signature on cheque having been admitted, a presumption shall be raised under Section 139 that cheque was issued in discharge of debt or liability. Now the question is to be looked into is as to whether any probable defence is raised by the accused.

23. Now, it is necessary to examine the case of the complainant on the basis of the factual matrix. The complainant has deposed in his sworn statement as per the contents of the complainant. As per the defence of the accused she gave the Ex.P.1 cheque as security to the loan availed by Smt.Renuka P. Halagi from Sri.Raju Harlapur who known to her but the accused misused it and filed the present complaint.

24. In the cross examination of the complainant made by learned counsel for the accused, it is forthcoming that, he is auto driver since 12-13 years, he has not stated in the complaint or his evidence that he is doing business, he earns Rs.1,000/- - Rs.1200/- but not produced documents, he saves Rs.15,000/- per month, he is not an IT payer. Further elicited that, he came to know the accused only 8-10 days prior to lending of money the accused, on 15.10.2016 Smt.Renuka P. Halagi who is known to him had brought the accused to the tiles shop of Umathar and on the very same day he lent Rs.3,00,000/- to the accused, at that time said Umathaar was not there, he did not take any security document from the accused on that day, in presence of said Smt.Renuka only he did lend said loan to the accused. Further elicited that, about 6-7 years back he obtained loan of Rs.25,000/- from Shivbhodaranga Society, Ramdurg and repaid it after one and half years, during 2016-17 he took loan of Rs.5,000/- from Sukhsagar Finance, Ramdurg, in 2018-19 he took loan of Rs.20,000/- which is still has to be repaid, he is getting notices from said society demanding its repayment, on 04.08.2017 the accused gave cheque at her house when himself alongwith Smt.Renuka P. Halagi and Althaf Hosur went for asking repayment of loan. Further elicited that he knows Raju Harlapur who had tiles shop, said person was also practicing advocate who is now doing business but the complainant pleads ignorance about other suggestions put regarding money lending business of said person. The PW.1 admits that Smt.Renuka P. Halagi and accused are known to each other but denied that accused gave cheque in question as security for the loan obtained by said Smt.Renuka. Further states that his father gave Rs.1,50,000/- to him from pension amount and he also saved some money and hence he lent Rs.3,00,000/- to the accused. The complainant pleads ignorance about quarrel between accused and Smt.Renuka P. Halagi about said cheque given for only security purpose and there are 3-4 cheque cases lodged against said Smt.Renuka.

25. It is clear from the above facts that the accused issued the signed cheque. It is the defence of the accused that she issued the said cheque as security for the loan obtained by Smt.Renuka P. Halagi but said cheque has been misused and the accused has no financial capacity at all to lend such a huge amount. Keeping in mind the said defence, it is necessary to examine as to the financial capacity of the complainant to lend amount of Rs.3,00,000/- to the accused.

26. The complaint shows that the accused is doing business but the cross-examination shows he is an auto driver and further complaint, chief evidence of complainant shows that the accused took loan from him on several occasions and they were known to each other but in the cross-examination the complainant clearly stated that only 8-10 days of lending amount he known the accused, which are contradictory. Further in the chief examination the complainant deposed that the accused came to his house for hand loan which is contrary to his own cross-examination that he lent loan in the shop of Umathar. Further, in the cross-examination the complainant stated that he lent the said amount to the accused in the presence of Smt.Renuka P. Halagi but the complainant has not examined said lady to prove the said fact. It is found from the cross examination that he is an auto driver and getting income of Rs.1,000/- Rs.1200/- per day but he has not produced any document to show that he has got such a income daily. The complainant stated that he saved some amount and his father also gave one and half lakh but it is not stated in the complaint. Further, the complainant himself took hand loans from various institutions and in which some are still to be repaid which is forthcoming from the above cross-examination of PW.1.

27. As discussed above, when the complainant himself obtained loan of small amounts then definitely doubt arises with regard to his financial capacity to lend amount as stated by him to the accused. Therefore, the complainant is required to establish his financial capacity to show that he had so much of amount at the time of lending it to the accused. As mentioned above, the complainant has not produced any documents to prove said fact. Therefore, the financial capacity of the complainant is doubtful and this court is of the opinion that the complainant had no financial capacity to lend the amount of Rs.3,00,000/- to the accused. Further, looking to the conduct of the complainant and the evidence, it can be gathered that there was no any loan transaction between the complainant and the accused and if at all it was so then definitely the complainant had knowledge about the things stated above and in normal circumstances a prudent man will not lend a loan that too huge loan amount to stranger or the person who only came to be known to him 8-9 days back without knowing his full details and background. Therefore, under such circumstances, it is the duty of the complainant to prove the guilt of the accused by proving the legally enforceable debt against him.

28. It is also found from the cross examination of the complainant that he lent the said loan amount to the accused without getting any document executed by the accused. He has simply stated that he lent the said amount to the accused since he knew the accused. As mentioned above, the amount involved is not small amount. Hence, generally some documents would be executed to show the transaction as a matter of precaution. But non execution of such documents raises a sort of doubt about the transaction in question itself.

29. There is no doubt that the accused has admitted the issuance of signed cheque only. Such being the case, the complainant is required to establish the fact that the accused has issued the cheque towards the discharge of existence legally recoverable debt. But the complainant has failed to establish his financial capacity and the alleged transaction between himself and the accused itself. Such being the case, the question of existence of legally recoverable debt does not arise. Therefore, it is clear that the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail.

30. It is clear from the ruling of Hon'ble Apex Court reported in **2019 Cr.R. 639 (S.C) (Basalingappa Vs. Mudi Basappa)** that:-

(i) Once the execution of cheque is admitted, Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

(ii) The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

(iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only form the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

(iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden,

(v) It is not necessary for the accused to come in the witness box to support his defence.

31. Applying the above ratio to the present case, it is very clear that this ratio is aptly applicable to the case on hand in which the complainant has also failed to establish his financial capacity and accused has rebutted the presumption by cross-examining the complainant. Therefore, I am of the opinion that though the accused has admitted the issuance of signed cheque, the complainant has failed to establish his financial capacity and alleged transaction and existence of legally recoverable debt and issuance of the cheque by the accused towards the said debt as stated in the complainant.

32. In view of the above preponderance of probabilities, the accused has been able to rebut the presumption held under section 118 and 139 of negotiable instrument act. The burden is shifted on the complainant to disprove the defence but the complainant has not discharged the burden cast on him. As discussed supra, the accused has rebutted the presumption held in favour of complainant under section 118 and 139 of the Negotiable Instrument Act. Further, it is the duty of the complainant to establish the foundational facts of the case. Then only the presumption can be drawn against the complainant under Section 139 of the Act. In view of the well settled preposition of law, no doubt, it is the duty of the complainant to establish his foundational facts of the case, in order to avail presumption under Section 139 in his favour. It is well settled principle of criminal jurisprudence that, the complainant has to prove his case beyond reasonable doubt, wherein the case of the accused rests on the preponderance of probabilities.

33. Therefore, as per the above discussion, I am of an opinion that the complainant has not proved the point No.1 and in the result the accused needs to be acquitted. Consequently, the **point No.1** is answered in the **negative.**

34. POINT NO.2:- In the light of the finding on point No.1, I proceed to pass the following:-

O R D E R

By exercising powers conferred u/Sec.255(1) of

Cr.P.C. the accused is acquitted of the offence punishable under Section 138 of Negotiable Instruments Act, 1881.

The bail bond of the accused and surety executed during trial stage stands canceled.

The bail bond of the accused and surety taken as per Section 437-A Cr.P.C. will be in existence for six months from this day.

(Dictated to the stenographer directly on the computer, corrected by me and then pronounced in the Open Court on this 28th day of February 2024.)

(MISS. B.T. ANNAPOORNESHWARI),
Senior Civil Judge and JMFC,
Ramdurg

A N N E X U R E

1. WITNESS EXAMINED FOR THE COMPLAINANT:-

P.W.1 : Sri.Samivul A Nakarchi.

2. DOCUMENTS MARKED FOR THE COMPLAINANT:-

Ex.P.1 : Cheque.

Ex.P.1(a)	: Signature of accused.
Ex.P.2	: Memo of Bank of India, Ramdurg branch.
Ex.P.3	: Legal notice.
Ex.P.4	: Postal receipt.
Ex.P.5	: Postal acknowledgment.

3. WITNESSES EXAMINED FOR THE DEFENCE:-

-Nil-

4. DOCUMENT MARKED FOR THE DEFENCE:-

-Nil-

(MISS. B.T. ANNAPOORNESHWARI),
Senior Civil Judge and JMFC,
Ramdurg.

B T ANNAPOORNESHWARI
Digitally signed by B T ANNAPOORNESHWARI
Date: 2024.02.28 17:44:10 +0530