



IN THE HIGH COURT OF KARNATAKA AT BENGALURU
DATED THIS THE 18TH DAY OF AUGUST, 2023
BEFORE
THE HON'BLE MR. JUSTICE S RACHAIAH
CRIMINAL APPEAL NO. 76 OF 2012 (A)

BETWEEN:

T H M SIDDARAJU
S/O LATE MALLIKARJUNAIAH
AGED ABOUT 40 YEARS
R/AT NO. 571,
6TH MAIN, 9TH CROSS
SADASHIVA NAGAR, BANGALORE.

...APPELLANT

(BY SRI. YOGESH V KOTEMATH, ADVOCATE FOR
SRI. P H VIRUPAKSHAIAH, ADVOCATE)

AND:

T H M RAJASHEKAR
S/O LATE MALLIKARJUNAIAH
AGED ABOUT 46 YEARS
C/O MRITHYUNJAYA GOUDA
HOUSE NO 1194, MANJUSHRI
1ST FLOOR, 6TH CROSS, M J NAGAR
HOSPET – 583 201.
BELLARY DISTRICT.

...RESPONDENT

(BY SRI. N S EDWARD, ADVOCATE)

THIS CRL.A. IS FILED U/S. 378 CR.P.C PRAYING TO SET
ASIDE THE JUDGMENT PASSED IN C.C.NO.15164/2008 DATED:
15-10-2011 ON THE FILE OF THE XV ADDITIONAL CHIEF
METROPOLITAN MAGISTRATE, BANGALORE AND ETC.,

THIS APPEAL, COMING ON FOR FINAL HEARING, THIS
DAY, THE COURT DELIVERED THE FOLLOWING:



JUDGMENT

1. This Criminal Appeal is filed by the appellant, being aggrieved by the judgment and order dated 15.10.2011 in C.C No.15164/2008 on the file of the Court of XV Additional Chief Metropolitan Magistrate, Bengaluru, wherein the Trial Court acquitted the respondent / accused for the offence punishable under Section 138 of the Negotiable Instruments Act (for short 'N.I Act').

2. For the sake of convenience, the rank of the parties would be henceforth referred to as per their rankings before the trial Court.

Brief facts of the case:

3. The complainant / appellant and the accused / respondent are brothers. It is stated in the complaint that, the respondent had availed loan of Rs.15,00,000/- by way of cash from the complainant in the month of June, 2007 and towards repayment of the said amount, the accused issued a cheque to the appellant on 11.04.2008 and asked the complainant to present the same for encashment. When it was presented for



encashment, the complainant received an endorsement as 'Payment stopped by the drawer'. The complainant issued a legal notice to the accused by Registered Post and Acknowledgement due and Under Certificate of Posting. In spite of receipt of notice, the accused failed to repay the amount, hence, the complainant was constrained to file a complaint before the jurisdictional Magistrate.

4. To prove the case of the complainant, the complainant examined himself as PW.1 and got marked Exs.P1 to P7. On the other hand, the accused got marked Exs.D1 to D5. The Trial Court after appreciating the oral and documentary evidence on record opined that, the complainant failed to prove the existence of legally recoverable debt or liability, hence, the Trial Court acquitted the accused. Hence this appeal.

5. Heard Sri.Yogesh V.Kotemath, learned counsel appearing on behalf of Sri.P.H.Virupakshaiah, learned counsel for the appellant and Sri.N.S.Edward, learned counsel for the respondent.

6. It is the submission of the learned counsel for the appellant that the judgment and order of acquittal passed by



the Trial Court is erroneous and against the facts and circumstances of the case. Hence, the same is liable to be set aside.

7. It is further submitted that the Trial Court failed to consider the loan transaction which is different from Ex.D2-Memorandum of Agreement. There were two cases filed against the respondent, one is filed under Section 138 of N.I Act and another one is for recovery of the amount under civil proceedings. In spite of having brought to the knowledge of the Trial Court that two separate transactions have taken place between the appellant and the respondent, the Trial Court failed to consider the said aspect and opined that the appellant failed to establish the financial capacity and also the loan transaction and acquitted the respondent, which is erroneous and the same is liable to be set aside. Having submitted thus, the learned counsel for the appellant prays to allow the appeal.

8. *Per contra*, the learned counsel for the respondent vehemently justified the judgment and order of acquittal passed by the Trial Court and submits that the contention of PW.1 that he had lent amount of Rs.15,00,000/- by way of



cash has been discredited by producing Ex.D2 – Agreement. Ex.D-2 – Agreement contains the signature of the appellant herein and it is admitted by the appellant. On rising the probable defence by the respondent, the presumption envisaged under Section 139 of N.I. Act has been rebutted, however, the appellant / complainant failed to prove the existence of legally recoverable debt or liability of the cheque. Therefore, the Trial Court rightly recorded the acquittal which requires no consideration. Having submitted thus, the learned counsel for the respondent prays to dismiss the appeal.

9. After having heard the learned counsel for the parties and also perused the documents available on record, the points which arise for my consideration are:

- (i) Whether the judgment and order of acquittal passed by the Trial Court for the offence under Section 138 of N.I Act is justifiable?*
- (ii) Whether the appellant has made out grounds to interfere with the judgment of acquittal passed by the Trial Court?*



10. This Court being the First Appellate Court is having an authority to have a re-look upon the evidence of the witnesses and documents and also the findings recorded by the Trial Court.

11. The learned counsel for the appellant contended that he had lent loan of Rs.15,00,000/- to his brother who is accused / respondent in this case. On repeated requests made by the appellant, the present cheque was issued to clear the loan which alleged to have been borrowed by the respondent. When it was presented for encashment, the said cheque came to be dishonoured as 'Payment stopped by the drawer'. The said fact brought to the knowledge of the accused / respondent through the legal notice and a reply was issued by the respondent. However, amount stated in the cheque had not been paid by the accused. Hence the complaint.

12. It is settled principle of law that the complainant is protected under the presumption of law until contrary is proved. The presumption has to be rebutted by the accused by



leading cogent evidence. Initially, the burden lies on the accused to prove his case.

13. The accused initially replied the notice after having received the legal notice in respect of dishonour of cheque, which is marked as Ex.P6, wherein he contended that he has not borrowed any loan from his brother. There was a partition effected among the brothers on 23.11.2005 and produced the said partition deed which is marked as Ex.D1. Schedule 'C' property was allotted to the share of the respondent herein. There is one more document which is produced and marked as Ex.D2. As per the said agreement, the accused was asked to sell his property for his benefit or to purchase a residential property. In case if the property sold by the accused gets better price, the accused had to pay the amount to other brothers as per the said agreement. According to the said agreement, the accused proposed to pay a sum of Rs.15,00,000/- to the complainant. The agreement was signed by the complainant on 23.11.2005.



14. In the present case, the complainant said to have lent loan of Rs.15,00,000/- in the month of June 2007 and cheque dated 11.04.2008 was issued to clear the said debt by the accused. The accused after having produced Exs.D1 and D2 has raised probable defence that the cheque was issued as a security as per the agreement. The accused herein has produced Ex.D6 which is sale deed executed by the accused and his other brothers including the complainant in favour of M/s. Shrushti Developers for a sum of Rs.92,00,000/-. The said sale deed was executed on 11.04.2008. Admittedly, the cheque is also dated 11.04.2008. Therefore, the accused has rebutted the presumption. However, the complainant failed to establish the existence of debt or liability of the cheque.

15. On careful reading of Ex.P6 – legal notice, cross-examination of PW.1 and also documents namely Exs.D1, D2 and D6, it is clear that the accused had issued cheque other than legally enforceable debt or liability. Therefore, the findings of the Trial Court in recording the acquittal appears to be appropriate and interference with the said findings may not be warranted.



16. In the light of the observations made above, the points which arose for my consideration are answered as:

Point No.(i) in the "Affirmative "

Point No.(ii) in the "Negative"

17. Hence, I proceed to pass the following:

ORDER

The Criminal Appeal stands *dismissed*.

**Sd/-
JUDGE**

UN
List No.: 1 Sl No.: 38