IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 2ND DAY OF AUGUST, 2021

BEFORE

THE HON'BLE Dr. JUSTICE H.B. PRABHAKARA SASTRY

CRIMINAL REVISION PETITION No.352 OF 2012

BETWEEN:

Sri.K. Abraham alias Raju
Son of late Sri.N.P. George,
aged 50 years,
Proprietor of M/s. Riya Industries,
residing at 372, M.M. Garden,
Flower Garden Extension,
Kalyananagar Post,
Bangalore – 560 043.

..Petitioner

(By Sri. G.K. Venkata Reddy, for
Sri.P.N. Hegde, Advocate)

AND:

Sri. B.V.N. Reddy
Son of Sri.B.S. Reddappa Reddy
No.5, 'A' Block, Krishna Reddy Building,
Kaggadasapura Road, Vignana Nagar,
New Thippasandra,
Bangalore – 560 075.

.. Respondent

(By Sri. K. Narayana, Advocate)

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This Criminal Revision Petition is filed under Section 401 read with Section 397 of the Code of Criminal Procedure, 1973, praying to call for and peruse the records of C.C.No.81399/2009 on the file of the XIV Additional Chief Metropolitan Magistrate at Bangalore and also the records of Crl.A. No.25119/2011 on the

file of the Presiding Officer, Fast Track Court – III & Additional Sessions Judge at Bangalore; to set aside the judgment and order dated 22-02-2012 in Crl.A.No.25119/2011 and also the judgment and order dated 29-06-2011 in C.C.No.81399/2009 and to dismiss the said complaint in C.C.No.81399/2009, in furtherance of justice.

This Criminal Revision Petition having been heard through physical hearing/video conferencing hearing and reserved on **20-07-2021, at the Principal Bench at Bengaluru**, coming on for pronouncement of Orders before the **Kalaburagi Bench,** this day, the Court made the following:

O R D E R

The present petitioner as the accused was tried by the Court of the learned XIV Additional Chief Metropolitan Magistrate, Bangalore (hereinafter for brevity referred to as "the Trial Court"), in Criminal Case No.81399/2009 for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter for brevity referred to as "the N.I. Act") and was convicted for the said offence by its judgment of conviction and order on sentence dated 29-06-2011.

Aggrieved by the same, the accused preferred a Criminal Appeal in the Fast Track Court-III, Presiding Officer & Additional Sessions Judge, Mayo Hall Unit, Bangalore (hereinafter for brevity referred to as "the Sessions Judge's Court") in Criminal Appeal No.25119/2011.

The appeal was contested by the respondent who was the complainant in the Trial Court. The Sessions Judge's Court in its order dated 22-02-2012 dismissed the appeal, confirming the judgment of conviction and order on sentence passed by the Trial Court dated 29-06-2011 in C.C.No.81399/2009.

Aggrieved by both the judgments passed by the Trial Court as well the learned Sessions Judges Court, the accused has preferred this revision petition.

2. The summary of the case of the complainant in the Trial Court was that, the complainant and the accused were into a real estate business since several years. During the course of business, the complainant had given hand loans by cash and also through cheques to the accused. Certain amounts were repaid by the accused through cheques. The complainant and accused decided to settle the accounts, as the real estate business suddenly fell down. Both of them finalised their account on 31-05-2009 before their friends wherein, it was found and agreed that the accused was due to the complainant in a sum of ₹12,48,949/- and another sum of ₹1,35,000/-. Accordingly, the accused agreed to pay the same through two cheques. As such, the accused, towards discharge of his liability to the complainant,

issued two post-dated cheques bearing No.018176 dated 10-06-2009 for a sum of ₹12,48,949/- and another cheque bearing No.018187 dated 12-06-2009 for a sum of ₹1,35,000/-, both drawn on Bank of India, Banasawadi Branch, Bengaluru, in favour of the complainant. The complainant presented the cheque dated 12-06-2009 for a sum of ₹1,35,000/- for its realisation through his banker and the same was honoured. Afterwards, he presented another cheque dated 10-06-2009 for a sum of ₹12,48,949/- for its realisation through his banker. However, it came returned unpaid with the banker's endorsement "*funds insufficient*' in the account of the drawer. It is thereafter the complainant got issued a legal notice dated 10-07-2009, through Registered Post Acknowledgment Due (RPAD) and also Under Certificate of Posting (UCP) to the accused, calling upon him to pay the cheque amount. The accused, instead of making payment of the cheque amount, sent an untenable reply which made the complainant to institute a criminal case against the accused in the Trial Court for the offence punishable under Section 138 of the N.I. Act.

3. The accused appeared in the Trial Court and contested the matter through his counsel. He pleaded not guilty and

claimed to be tried, as such, the Trial Court proceeded to record the evidence wherein, to prove his case, the complainant got himself examined as PW-1 and also examined one Sri. Janardhan Reddy as PW-2 and got marked documents from Exs.P-1 to P-9 and closed his side. The accused got himself examined as DW-1 and got produced and marked as many as seventy-one (71) documents from Exs.D-1 to D-71 in his support. After hearing both side, the Trial Court proceeded to pass the impugned judgment and order.

4. The Trial Court and Sessions Judge's Court's records were called for and the same are placed before this Court.

5. Learned counsel for the revision petitioner/accused is physically appearing in the Court and learned counsel for the respondent/complainant is appearing through video conference.

6. Heard the arguments from both side. Perused the materials placed before this Court including the impugned judgments and also the Trial Court and Sessions Judge's Court's records.

7. For the sake of convenience, the parties would be henceforth referred to as per their rankings before the Trial Court.

8. After hearing the learned counsels for the parties, the only point that arise for my consideration in this revision petition is:

Whether the judgments under revision are perverse, illegal and erroneous, warranting interference at the hands of this Court?

9. From a perusal of the evidence led by the complainant's side as well from the accused's side and perusal of the documents marked by them and also from the submission of the learned counsels from both side, the undisputed facts remain that, the complainant and accused who were involved in real estate business were known to each other. It is not in dispute that the cheque at Ex.P-2 was drawn by the accused. It is also not in dispute that the said cheque, when presented for its realisation by the complainant came to be returned un-paid and dishonoured with the banker's shara of insufficiency of funds in the account of the drawer as could be seen in the banker's endorsement at Ex.P-3. It is also not in dispute that there after

the complainant sent a legal notice demanding the payment of the cheque amount from the accused, as per Ex.P-4, for which, the accused sent a reply as per Ex.P-8. These undisputed facts form a presumption in favour of the complainant about the existence of a legally enforceable debt under Section 139 of the N.I. Act. However, the said presumption is rebuttable.

10. In the process of rebuttal of the presumption, the accused has taken a contention of denying the alleged loan said to have been taken by him from the complainant. He also contended that no documents regarding the alleged loan transaction between the complainant and the accused were produced by the complainant. It was further contended by the accused that the complainant was working under him in his business and during the said period, he has issued the cheque which is at Ex.P-2. These contentions were taken up in the cross-examination of PW-1, evidence of DW-1 as well in the argument of the learned counsel for the petitioner/accused.

Learned counsel for the petitioner also contended that the accused in the Trial Court should not have filed his evidence in

the form of affidavit, as such, the matter requires to be remanded for a fresh trial.

11. Learned counsel for the respondent/complainant in his argument denied all the contentions of the accused taken both in the cross-examination of PW-1, the evidence of DW-1 and also in the argument of the learned counsel for the revision petitioner/accused.

Learned counsel for the respondent/complainant submitted that, when the issuance of the cheque bearing the signature of the accused upon it and its dishonour when presented for its realisation which was followed by issuance of legal notice are admitted facts, the guilt against the accused stands proved.

He further submitted that, on the date of recording of the evidence of the accused in the Trial Court, the practice was, entertaining the examination-in-chief of the accused in the form of affidavit evidence. It is only at a later date, entertaining the affidavit evidence of the accused was discontinued. As such, the matter does not warrant to be remanded to the Trial Court.

He further submitted that the accused has admitted his signature in the Final Settlement Receipt at Ex.P-1. Further, one of the cheques which was for ₹1,35,000/- was also en-cashed by

the complainant, for which, the accused has not objected to and taken any action. Even for recovery of the cheque at Ex.P-2 also, the accused has not taken any steps as per law. Therefore, it clearly establishes that the accused has committed the alleged act.

12. The complainant who got himself examined as PW-1 has reiterated the contents of his complaint even in his affidavit evidence also. In order to show that there existed a legally enforceable debt payable by the accused to him, the complainant has produced a document showing it to be a Final Settlement Receipt and dated 31-05-2009 and said to have been executed by the accused and marked it at Ex.P-1. However, in his cross-examination, he stated that, he has no accounts to show the real estate transaction that had taken place with the accused. However, he denied a suggestion that except Ex.P-1 (Final Settlement Receipt) and Ex.P-2 (cheque), he does not have any other document to show the transaction that was taken place with the accused. It was suggested to the witness (PW-1) in his cross-examination that, Ex.P-1 is a created document by him, however the said suggestion was not admitted as true by the

complainant. He denied a suggestion that he was working with the accused in real estate business.

13. In his support, the complainant also got examined one Sri.Janardhan Reddy as PW-2, who, in his evidence has stated that, he knows both the accused and the complainant, who were doing real estate business together. He has stated that, since both the accused and the complainant decided to finalise their accounts, they called him on 31-05-2009, as such, on the said day, himself, one Sri. Sampangi Ramaiah and another Sri. Vivian Castelino were present in the presence of the complainant and the accused. After finalisation, an amount of ₹13,84,000/- was found to be due to the complainant by the accused, towards which, the accused gave two post-dated cheques and a letter to the complainant. One of the cheques was for a sum of ₹1,35,000/- and another cheque was for a sum of ₹12,49,000/-. The witness has further stated that, the second cheque, which was issued for a sum of ₹12,49,000/-, when presented for realisation came to be dishonoured for want of funds in the account of the accused.

This witness (PW-2) was cross-examined in detail from the accused's side, where, an attempt was made to show that, no

such finalisation of the account was taken place on 31-05-2009 and that PW-2 was not present at that time. However the witness has denied the suggestions made to that effect from the accused's side to him. On the other hand, he has given some more details as to how he was contacted and requested to come over for the meeting of finalisation of the account between the complainant and the accused. He denied a suggestion that the document at Ex.P-1 was got prepared by the complainant in consultation with PW-2. Thus, an attempt made in the cross-examination of PW-2 to shaken his evidence given in his examination-in-chief, could not be successful.

14. Regarding Ex.P-1, the accused also made an attempt in the cross-examination of PW-1 to show that, the said document was a created document by the complainant. A suggestion to that effect was also made to PW-1, which he did not admit as true. On the other hand, he also further stated that at the time of accused executing the document at Ex.P-1, their friends by name Sri. Janardhan Reddy and friends of the accused by names Sri. Sampangi Ramaiah and Sri. Vivian Castelino were all present. Thus PW-1, in his evidence itself, had stated that PW-2 was present at the time of finalisation of

the account between himself and the accused. Even PW-2 also has supported the contention of PW-1 that, he was present at the time when the accused and the complainant finalised their accounts on 31-05-2009. In this background, the self-serving testimony of the accused as DW-1 that Ex.P-1 was created by the complainant, does not inspire confidence to believe the same.

15. The accused, as DW-1, also got produced and marked several documents viz., an acknowledgment slip issued by the Commercial Tax Department at Ex.D-1, receipt for payment of Value Added Tax (VAT) at Ex.D-2, Bank of India Record Slips (which would at the end of the cheque leaves in a Cheque Book) similar to a counter foil at Exs.D-3 and D-4, carbon copies of delivery challans of M/s. Riya Industries of different dates which are 32 in numbers from Exhibits D-5 to D-36, invoice/cash bills of M/s. Riya Industries of different dates and different amounts which are 28 in numbers from Exs.D-37 to D-64 and contended that the complainant was working in his proprietorship concern - M/s. Riya Industries and during the said period, he (complainant) was looking after his (accused's) business and that the complainant even used to sign his signature when he was not

present, on the Sales Tax returns and also on other documents. It is with this contention and background, the accused further alleged that in the said process, when he (accused) had left signed blank letter heads and signed blank cheques in his factory office, the complainant has taken them and misused them.

However, the said evidence of DW-1 has been specifically denied in the cross-examination of PW-1. Attempts were made to elicit more details as to, on what basis the accused could make such an allegation that Ex.P-2 was taken away by the complainant without the notice of the accused. However, DW-1 could not substantiate his contention in his cross-examination. Therefore, the very first contention of the accused that Ex.P-1 is a created document and that Ex.P-2 was taken way by the complainant from his factory office without his knowledge/notice, is not acceptable as the accused has failed to establish the same.

16. Added to that, it also cannot be ignored that, the contention of the complainant that, on the date of alleged settlement which was on 31-05-2009, the accused had also issued one more cheque for a sum of ₹1,35,000/- and that the said cheque was encashed by the complainant, has not been

denied or disputed by the accused. Ex.P-1 refers to both the cheques, i.e. the cheque for a sum of ₹1,35,000/- as well as the cheque at Ex.P-2 as the ones given by the accused to the complainant towards the final settlement of their account. Had really the accused not issued both the cheques to the complainant, he should have necessarily taken appropriate legal action against the complainant either for stealing the cheques or for any criminal misappropriation. Admittedly, the accused, except filing a complaint on 04-07-2009 with the Banasawadi Police Station, Bengaluru, as per Ex.D-67, has not taken any further steps. Even according to the learned counsel for the petitioner/accused, the Police have not taken any action upon the said complaint and that the accused also did not pursue the matter further. Therefore, it can be inferred that, had really the accused not given those two cheques (mentioned at Ex.P-1) including the cheque at Ex.P-2 to the complainant, he should have necessarily and definitely taken appropriate legal action against the complainant for recovery of the cheques.

Furthermore, admittedly, the accused has not given any stop payment order to his banker also, to avoid the payment of the sum mentioned in the cheque at Ex.P-2. These aspects

further strengthens the case of the complainant, and simultaneously, it weakens the attempt of the accused made to rebut the presumption formed in favour of the complainant.

17. The accused, by examining himself as DW-1 had taken a contention in his examination-in-chief that, as on the date of the alleged Final Settlement Receipt at Ex.P-1 which was on 31-05-2009, he was away from Bengaluru. He has stated that on the said day, while he was on his way from Bengaluru to his mother's house at Kerala, there was a minor accident wherein his Car dashed against the side of a small bridge, as such, he left his Car at Kottarakara for repairs and went on by Bus. In this regard, stating that he had also taken food in a Family Restaurant at Kottarakara on the said date, he has produced the motor Car repair bill at Ex.D-68 and a Hotel Bill at Ex.D-69.

The complainant has specifically denied the said suggestion that he (accused) was not in Bengaluru as on 31-05-2009. The documents at Exs.D-68 and D-69 were also disputed from the complainant's side. Therefore, when the complainant has specifically denied that the accused was not in Bengaluru on

31-05-2009 and also has disputed the documents at Exs.D-68 and D-69, the accused should have examined either his friend Dileep or his son or daughter, who, according to him, were present with him in his Car on 31-05-2009. That the accused has not done. As such, the contention of the accused that he was not present in Bengaluru on 31-05-2009, the date on which the alleged Final Settlement is said to have been entered into between the complainant and accused, is not acceptable.

18. Learned counsel for the petitioner/accused as a last point of argument has stated that, the accused since has led his examination-in-chief by filing an affidavit, the same is against Section 145 of the N.I. Act, as such, the matter deserves to be remanded back to the Trial Court.

In his support, he relied upon a judgment of the Hon'ble Apex Court in the case of ***M/s. Mandvi Co-operative Bank Limited Vs. Nimesh B. Thakore*** reported in ***AIR 2010 Supreme Court 1402.***

The Hon'ble Apex Court in the said case with respect to Section 145 (1) of the N.I. Act, was pleased to observe in paragraph 32 of its judgment as below:

32. On a bare reading of section 143 it is clear that the legislature provided for the complainant to give his evidence on affidavit and did not provide for the accused to similarly do so. But the High Court thought that not mentioning the accused along with the complainant in sub-section (1) of section 145 was merely an omission by the legislature that it could fill up without difficulty. Even though the legislature in their wisdom did not deem it proper to incorporate the word `accused' with the word `complainant' in section 145(1), it did not mean that the Magistrate could not allow the accused to give his evidence on affidavit by applying the same analogy unless there was a just and reasonable ground to refuse such permission. There are two errors apparent in the reasoning of the High Court. First, if the legislature in their wisdom did not think "it proper to incorporate a word `accused' with the word `complainant' in section 145(1).....", it was not open to the High Court to fill up the self perceived blank. Secondly, the High Court was in error in drawing an analogy between the evidences of the complainant and the accused in a case of dishonoured cheque. The case of the complainant in a complaint under section 138 of the Act would be based largely on documentary evidence. The accused, on the other hand, in a large number of cases, may not lead any evidence at all and let the prosecution stand or fall on its own evidence. In case the defence does lead any evidence, the nature of its evidence may not be necessarily documentary; in all likelihood the defence would lead other kinds of evidences to rebut the presumption that the issuance of the cheque was not in the discharge of any debt or liability. This is the basic difference between the nature of the complainant's evidence and the evidence of the accused in a case of dishonoured cheque. It is, therefore, wrong to equate the defence evidence with the complainant's evidence and to extend the same option to the accused as well."

In the instant case, admittedly, the examination-in-chief of the accused was taken in the form of his affidavit evidence.

19. In a similar circumstance, a co-ordinate Bench of this Court in the case of ***Sri. Rajaiah Vs. Sri. K.S. Chowdamma*** in ***Criminal Revision Petition No.51/2011*** dated ***22-02-2019***, after considering the judgment of the Hon'ble Apex Court in the case of ***M/s. Mandvi Co-operative Bank Limited (supra),*** and another judgment of the Hon'ble Apex Court in the case of ***J.V. Baharuni and another Vs. State of Gujarat and another*** reported in ***(2014) 10 Supreme Court Cases 494,*** in para-17 of its order, was pleased to observe as below:

> *"17. Now, coming to the case on hand, the petitioner has not raised any such ground in respect of filing the affidavit evidence as a ground in the District Court in appeal and even no such ground is urged in this revision petition. Therefore, learned counsel for the respondent has rightly contended that no such ground is urged by the counsel for the accused at the earliest stage when the affidavit was filed by the accused himself in the Trial Court, which was permitted and later, the same was not the ground urged at the appellate stage as well as while filing this petition. Though it is an acceptable ground, but the petitioner did not raise any such dispute at the initial stage. Therefore, he is not entitled to raise any such ground before this Court. Though allowing the affidavit by accused is not an irregularity, which can be curable, but, it is an illegality, which cannot be cured and the matter can be remanded back for de novo trial. However, in the above said case in a similar situation, Hon'ble Apex Court instead of remanding the matter to the Trial Court, after long lapse of period for de novo trial, disposed of the mater by remanding the same to the High Court for giving a finding as to whether the trial held by the Magistrate was of summary trial or summons trial, which were conducted by the Trial Court. Therefore, when the evidence affidavit of the accused was filed 11 years back and when no objection is raised by the*

> *complainant and when the Court accepted the evidence of the accused under Section 316 of Cr.P.C. and allowed the complainant to cross-examine the accused and there was no dispute throughout filing of the appeal and this revision petition before this Court and for the first time the contention taken by the learned counsel for the accused during the course of arguments cannot be acceptable. Therefore, the grounds urged by the learned counsel for the accused is rejected." (emphasis supplied)*

20. In ***Baharuni's case (supra)***, the Hon'ble Apex Court with respect to Section 138 of the N.I. Act, where the question of remanding a matter arose, made the following observation:

> *" 60. 5. Remitting the matter for de novo trial should be exercised as a last resort and should be used sparingly when there is grave miscarriage of justice in the light of illegality, irregularity, incompetence or any other defect which cannot be cured at an appellate stage. The appellate Court should be very cautious and exercise the discretion judiciously while remanding the matter for de novo trial."*

In the instant case also, the present petitioner as an accused had not raised any such ground in respect of filing the affidavit evidence in his criminal appeal filed before the learned Sessions Judge's Court. No such ground was urged by the accused in the present revision petition also. Therefore, the learned counsel for the respondent/complainant rightly contended that the accused, without even urging any such

ground at the earliest stage, had himself volunteered to lead his evidence by filing an affidavit in lieu of examination-in-chief.

Since in the instant case also, the said affidavit evidence of the accused was filed in the Trial Court more than ten years back and no objection was raised by the complainant and the said affidavit evidence of the accused was also accepted by the learned Magistrate and permitted the complainant to cross-examine the accused, there was no dispute in the Trial Court by either side regarding receiving the affidavit evidence of the accused. Further, even in the criminal appeal also, the accused had not taken any such contention. More over, the accused has also not shown that any *prejudice* as such is caused to him.

Therefore, without considering the present case to be a precedent and considering the special facts and circumstances of the case on hand, and also concurring to the view taken by the co-ordinate bench of this Court in *Sri. Rajaiah's case (supra)*, I am of the view that the argument of the learned counsel for the petitioner/accused that the affidavit evidence led by the accused requires to be discarded and the matter requires to be remanded, is not acceptable.

21. Barring the above, the petitioner/accused has not raised any other grounds worth to be considered. As analysed above, the complainant could able to establish that the cheque in question (Ex.P-2) was issued to him by the accused, pursuant to the Final Settlement Receipt executed by the accused as per Ex.P-1. The evidence of PW-2 which inspires confidence to believe the same also supports the case of the complainant and also the accused executing the Final Settlement Receipt as per Ex.P-1 and delivering two cheques including the cheque at Ex.P-2 to the complainant towards settlement of the due amount.

22. The above analysis also has established that pursuant to the very same Final Settlement Receipt at Ex.P-1, the accused had also issued one more cheque for a sum of ₹1,35,000/- in favour of the complainant and the same came to be honoured and en-cashed by the complainant, for which, the accused has not taken any action against him. All these aspects would only go to show that, the complainant has proved the guilt of the accused beyond reasonable doubt, for the offence punishable under Section 138 of the N.I. Act.

23. It is after analysing the evidence placed before it in its proper perspective, the Trial Court has convicted the accused for the offence punishable under Section 138 of the N.I. Act and sentenced the accused proportionately to the gravity of the proven guilt against the accused. The said judgment of conviction and order on sentence of the Trial Court was further confirmed by the learned Sessions Judge's Court. Thus, no perversity, illegality or error can be found in the impugned judgments, warranting any interference at the hands of this Court.

Accordingly, I proceed to pass the following:

O R D E R

The Criminal Revision Petition stands **dismissed as devoid of any merit**.

Registry to transmit a copy of this order to both the Trial Court and also to the Sessions Judge's Court along with their respective records, immediately.

Sd/-
JUDGE

BMV*