

IN THE HIGH COURT OF KARNATAKA

DHARWAD BENCH

DATED THIS THE 8TH DAY OF DECEMBER 2020

BEFORE

THE HON'BLE MR.JUSTICE RAVI V.HOSMANI

CRIMINAL APPEAL No.100213/2015

BETWEEN:

SRI RAM TRANSPORT FINANCE COMPANY LTD.,
HAVING ITS REGD.OFFICE AT CHENNAI,
ITS DIVISIONAL OFFICE AT KALABURGI COMPLEX,
DESHPANDE NAGAR, HUBLI AND ITS BRANCH
OFFICE AT PALA BADAMI ROAD, GADAG,
R/BY ITS P.A. HOLDER AND AUTHORIZED
SIGNATORY MR.SHARAD KUMAR BOMMANAGI,
S/O MOHAN RAO, AGE: 35 YEARS,
OCC: ASSISTANT MANAGER,
R/O GADAG, TQ. & DIST: GADAG.

... APPELLANT

(BY SRI R.H.ANGADI, ADVOCATE)

AND

BASAVARAJ BUDAPPA KURI,
AGE: MAJOR, OCC: BUSINESS,
R/O DEVALAPUR AT POST: GOURIPUR,
GANGAVATI, DIST: KOPPAL.

... RESPONDENT

(BY SRI D.V.PATTAR, ADVOCATE)

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 378(4) OF CR.P.C. PRAYING TO SET ASIDE THE JUDGMENT OF ACQUITTAL DATED 09.07.2015 PASSED BY THE LEARNED I ADDL.CIVIL JUDGE AND JMFC-I, GADAG IN C.C.NO.123/2014 AND CONVICT THE RESPONDENT HEREIN FOR THE OFFENCE PUNISHABLE UNDER SECTION 138 OF N.I. ACT

THIS APPEAL BEING RESERVED FOR JUDGMENT ON 04.12.2020, THIS DAY, THE COURT, DELIVERED THE FOLLOWING:

JUDGMENT

Challenging the judgment dated 09.07.2015 passed by I Addl. Civil Judge and J.M.F.C-I, Gadag in C.C.No.123/2014 acquitting accused for offence punishable under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'N.I.Act' for short), this appeal is filed by complainant-appellant.

2. Brief facts leading to this appeal are that complainant Sri Ram Transport Finance Company Limited, filed a complaint under Section 200 of Code of Criminal Procedure, 1973, (herein after referred to as 'Cr.P.C.' for short) stating that accused being one

of its customer had availed loan from it to purchase Mahindra make 2007 model vehicle bearing registration number KA-26/6026 under loan-cum-hypothecation agreement number GDG BRO0076201 for a total value of Rs.1,36,604/-. The loan was agreed to repay in periodic installments. But accused defaulted in paying installments and was finally due to pay a sum of Rs.1,02,000/-. Towards discharge of said due, accused issued cheque bearing No.270164 dated 01.12.2012 for Rs.1,02,000/- drawn on Corporation Bank, Gadag Branch. When cheque was presented for realization through HDFC Bank, Gadag Branch, on 04.12.2012, it returned on 04.12.2012 with endorsement 'insufficient funds'. Therefore, statutory notice was issued to accused on 12.12.2012, by RPAD demanding payment of cheque amount within fifteen days. The notice was served on accused on 19.12.2012. However, accused neither made payment nor replied to the notice, constraining

the complainant to file complaint against accused for offence punishable under Section 138 of N.I.Act.

3. After recording sworn statement of power of attorney holder on behalf of complainant-company and taking cognizance, summons was issued to accused. On appearance, accused pleaded not guilty; therefore the matter was set for trial. On behalf of complainant one witness was examined as PW.1 and Exhibits P1 to P6 were marked.

4. Thereafter, incriminating material was explained to accused and his statement under Section 313 of Cr.P.C. was recorded. Accused denied everything, did not offer explanation or lead any evidence.

5. Thereafter, trial Court framed following points for its consideration:

- (1) Whether the complainant/company proves that, the accused had

maintained an account at Bank of Corporation Bank, Gadag Branch and issued cheque No.270164 dated 01.12.2012 for an amount of Rs.1,02,000/- in favour of the complainant/company for discharge of their liability and the said cheque was returned unpaid by the bank, because of the amount of money standing to the credit of that account is insufficient to honour the cheque as "INSUFFICIENT FUNDS" and the complainant/company issued statutory notice and in-spite of service of statutory notice, the accused have not paid the cheque amount and thereby committed an offence punishable U/Sec.138 of Negotiable Instrument Act?

(2) What order?

6. After answering point No.1 in the negative, the trial Court proceeded to acquit the accused vide impugned judgment. Challenging the acquittal, the complainant is in appeal.

7. Learned counsel Sri R.H.Angadi, for appellant submitted that though a complaint was filed giving full details of loan transaction between complainant and accused and also produced the loan agreement, statement of account and also the cheque, bank endorsement, legal notice copy and postal acknowledgement etc., the trial Court instead of considering the complaint on merits, proceeded to acquit the accused on technical grounds, which is wholly unsustainable, calling for interference by this Court.

8. The learned counsel submitted that the reasons assigned by trial Court for passing impugned judgment were that the power of attorney issued by Company in favour of PW.1 was invalid, therefore complaint filed under its authority was not maintainable. It was also held that the cheque was given by accused as security at the time of taking

loan and was not issued towards existing debt. Hence, complaint for offence under Section 138 of N.I.Act was not maintainable. It was also held that complaint was not maintainable without necessary averments in complaint regarding specific knowledge of complainant about transaction between Company and accused.

9. Learned counsel submitted that at the time of taking cognizance, trial Court had recorded sworn statement of power of attorney. But found fault with power of attorney, only at time of impugned judgment, which was perverse. He further submitted that a letter of authorization also produced, which was not considered. It was also urged that complaint contained explicit averment in para 1 that complainant was acquainted with facts of complaint, which was sufficient compliance with requirements of Order 19 Rule 1, which is also not considered by the

trial Court. The complainant stated that after accused defaulted in payment of loan installments, the vehicle was seized and sold to third party and realized a portion of dues and that on a demand for balance amount, accused issued cheque in consideration for due amount. Therefore, cheque was not issued as security for loan amount at the time of its sanction but was issued towards then existing outstanding due amount. Hence the reasons assigned by trial Court were perverse.

10. Learned counsel for appellant also relied upon a decision of this Court dated 09.06.2016 passed in Criminal Appeal No.100211/2015, wherein this Court remanded matter back to trial Court for fresh consideration by providing reasonable opportunity to both parties to lead evidence.

11. On other hand, learned counsel Sri D.V.Pattar, appearing for accused submitted that the

accused had taken a stand before the trial Court that the entire loan amount was cleared and there was no balance payable by the accused. Complainant failed to produce account statement. Therefore, acquittal of accused by trial Court was justified. It was further submitted that the point involved in this appeal is already decided in case of ***M/s Shriram Transport Finance Co. Ltd., Vs. Smt. Akhilabanu*** reported in ***2015 (3) KCCR 2578***. It was further submitted that this Court held therein that a complaint, by a power of attorney holder, without making necessary averments regarding his knowledge about transaction between Company and accused, would be not maintainable, by referring to decision of Hon'ble Supreme Court in the case of ***A.C. Narayanan Vs. State of Maharashtra***, reported in ***2014 (11) SCC 790***. It was submitted that even if the reason assigned by trial court that cheque in this case was issued as security, might be incorrect, but complaint

in any case has to fail on above ground and therefore, there was no need for remanding matter back to trial Court.

12. I have heard learned counsel, perused the impugned judgment and record.

13. The points that arise for consideration herein are:

- (a) Whether complaint filed by a power of attorney without making specific assertion about his knowledge about transaction with accused, is maintainable?
- (b) Whether present complaint is maintainable?

14. It is an admitted fact that complaint is filed by a power of attorney holder, on behalf of Company. In the complaint, only averment made with regard to knowledge of complainant is contained in para 1 of complaint which reads as follows:

"1. That, complainant institution is a company incorporated and registered under Indian Companies Act, 1956. It is engaged in the vehicle finance business under the name and style as M/S. SRIRAM TRANSPORT FINANCE COMPANY LTD., represented by its authorized signatory and power of attorney holder, ***is acquainted with the facts of the complaint, has verified and signed the complaint***".

(emphasis supplied)

15. In view of authoritative pronouncement of Hon'ble Supreme Court in *A.C.Narayanan's* case (supra), point no.1 for consideration in this case is no more *res-integra*. A bench of three Hon'ble Judges of Supreme Court raised and answered following questions:

Questions framed

"21.3: Whether specific averments as to the knowledge of the power-of-attorney holder in the impugned transaction must be explicitly asserted in the complaint?"

21.4: *The power-of-attorney holder fails to assert explicitly his knowledge in the complaint then can the power-of-attorney holder verify the complaint presumption of knowledge?*

Answered as

33.2: *The power-of-attorney holder can depose and verify an oath before the Court in order to prove the contents of the complaint. However, the power-of-attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.*

33.3: *It is required by the complainant to make specific assertion as to the knowledge of the power-of-attorney holder in the said transaction explicitly in the complaint and the power-of-attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case."*

16. From a perusal of examination-in-chief of PW1, it is seen that deponent has clearly averred that he is working as Assistant Manager of complainant-company and knows facts of the case. During cross-examination, there are no elicitations or admissions that deponent is not aware of transactions between complainant and accused. It has been held by the Hon'ble Supreme Court in case of ***Kishan Rao V/s Shankargouda***, reported in ***(2018) 8 SCC 165***, referring to earlier decision in the case of ***Kumar Exports V/s Sharma Carpets***, reported in ***(2009) 2 SCC 513***, that:

"The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither

possible nor contemplated. ***At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist.***

emphasis supplied

17. In this case, accused contended that cheque in question was a post dated cheque issued for security purposes only. Which means that accused admitted his signature on cheque and its issuance to

complainant. Consequently presumption under Section 118 and 139 of N.I. Act would be available to complainant as per **Kishan Rao** (supra) and **Rangappa V/s Sri Mohan**, reported in **2010 (11) SCC 441**. As accused failed to substantiate his contention by cogent evidence, it has to be held that he failed to rebut presumption in favour of complainant.

18. Apart from above, Complainant in this case, has produced Cheque as Ex.P1, the Bank Endorsement as Ex.P2, the Statutory notice as Ex.P3, the Postal receipt and RPAD acknowledgment as Exs.P4 and P5 respectively and the complaint as Ex.P6. I have perused contents and find that they duly corroborate complainant's case and substantiate all the ingredients to constitute offence under Section 138 of N.I. Act.

19. The reasons assigned by the trial Court firstly regarding filing of complaint through a power of attorney and examination of power of attorney as witness, the observations of the Hon'ble Supreme Court in **A.C.Narayanan's** case (supra) would hold good. The finding of the trial Court that the cheque in question was a post dated cheque, given as security is also found unsubstantiated by any evidence. Therefore, the reasons assigned by trial Court for acquittal are not only contrary to law but also the evidence on record and liable to be held as perverse. Hence, point no.(ii) is answered in the negative and in favour of complainant.

20. Though appellant has relied upon decision dated 09.06.2016 in Criminal Appeal No.100211/2015, it is seen that the Court did not consider issues that are raised and considered in this appeal. On examination of facts of that case, it was

found that there was no reasonable opportunity to both sides to lead evidence during trial and matter was remanded to avail such opportunity. As no question of law was decided, same does not bind this Court.

In the result, appeal is allowed, the impugned judgment passed by the trial Court is set aside, the accused is convicted of offence punishable under Section 138 of Negotiable Instruments Act, 1881.

Sd/-
JUDGE

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ORDER ON SENTENCE

Learned counsel for the appellant submitted that accused borrowed loan from the complainant and failed to repay the same. Nearly a decade has passed since. The cheque issued by accused on 01.12.2012 was dishonoured on the ground of insufficiency of funds, which the accused was well aware of. The complainant is constrained to resort to litigation for recovery. On the above grounds, the counsel for appellant sought for imposition of sentence and maximum penalty permissible in law.

On the other hand, learned counsel for accused submitted that the accused was an agriculturist with very modest means and currently suffering severe financial hardship due to ill-health and therefore sought for minimal sentence/penalty.

Following the directions issued by Hon'ble Supreme Court in ***Damodar S.Prabhu V/s Sayed***

Babalal H., reported in **(2010) 5 SCC 663**, I feel it just and proper to impose a sentence of fine instead of imprisonment as the offence is in the nature of a civil wrong and the purpose of Section 138 is compensatory and not punitive. The accused is hereby sentenced to pay a fine of Rs.2,04,000/- (Rupees two lakh four thousand only) i.e. twice the amount of the cheque and in default of payment of fine, to undergo simple imprisonment for a period of four months.

Acting under Section 357 of the Code of Criminal Procedure, it is ordered that a sum of Rs.1,95,000/- (Rupees one lakh ninety-five thousand only) shall be paid to the complainant as compensation and the remaining amount is ordered to be defrayed to the State towards expenses incurred in prosecution.

Sd/-
JUDGE

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