

IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH

DATED THIS THE 22ND DAY OF JULY, 2021

BEFORE

THE HON'BLE MR.JUSTICE RAJENDRA BADAMIKAR

CRIMINAL APPEAL NO.200113/2014

BETWEEN:

SHRI M. VIJAYASARATHI
S/O. LATE M.V.NARASIMHACHARI
AGE: 51 YEARS, OCC: BUSINESS
R/O. STRT, 11/8, 12TH CROSS
ALSTOM TOWNSHIP, SHAHABAD
TQ: CHITTAPUR, DIST: GULBARGA

... APPELLANT

(BY SRI BABURAO MANGANE,
SRI ASHOK B. MULAGE AND
SMT. M. JHANSI RANI, ADVOCATES)

AND:

SHRI UMRAN MALIK
S/O. ABDUL NABI
AGE: 38 YEARS, OCC: BUSINESS
R/O. H.NO.B-136, ABL SOCIETY
SHANTH NAGAR, BHANKUR
SHAHABAD, TQ: CHITTAPUR
DIST: GULBARGA

... RESPONDENT

(BY SRI RAJESH DODDAMANI, HCGP)

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 378(4) OF CR.P.C. PRAYING TO SET ASIDE THE ORDER DATED 16.08.2014 PASSED BY THE LEARNED IV ADDL. JMFC AT GULBARGA IN C.C.NO.1487/2013 AND CONSEQUENTLY CONVICT THE RESPONDENT FOR THE OFFENCE PUNISHABLE UNDER SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT AND PASS SUCH OTHER ORDER AS THIS COURT DEEMS FIT UNDER THE CIRCUMSTANCES OF THE CASE.

THIS CRIMINAL APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 19.07.2021, COMING ON FOR 'PRONOUNCEMENT OF JUDGMENT' THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

This is an appeal by the complainant against the judgment of acquittal passed by the IV Additional Civil Judge and JMFC, Kalaburagi in C.C.No.1487/2013 dated 16.08.2014, whereby the learned Magistrate has acquitted the accused/respondent herein for the offence punishable under Section 138 of Negotiable Instruments Act, 1881 (for short 'N. I. Act).

2. For the sake of convenience, the parties herein are referred with their original ranks occupied by them before the trial Court.

3. The brief facts leading to the case are that the complainant has filed a private complaint under Section 200 of Cr.P.C. against the accused alleging that he has committed an offence under Section 138 of N. I. Act. It is alleged that the complainant and the accused are acquainted with each other and accused was in need of money for clearing his personal debts and hence, he has approached the complainant for hand loan and considering the relationship, the complainant has advanced hand loan of Rs.4,25,000/- to accused in the month of November, 2010. The accused agreed to repay the loan within two months and when the accused failed to repay the loan within two months, the complainant has approached him and demanded repayment of loan. Initially, the accused

went on postponing and finally issued a cheque dated 02.11.2012 for Rs.4,25,000/- drawn on State Bank of India, Industrial Estate, Bhankur, Kalaburagi district towards the discharge of his legally enforceable debt. The complainant has presented the said cheque to his Banker i.e., ING VYSYA Bank limited, Super Market, Kalaburagi for encashment and it was returned with an endorsement 'funds insufficient' on 12.12.2012. Thereafter, on 03.01.2013, the complainant has got issued a legal notice to the accused making demand for repayment of amount covered under the cheque and notice was served on the accused, but, he failed to make any payment. Hence, it is alleged that the accused has cheated the complainant by issuing a cheque having knowledge that he had no sufficient funds and hence, it is alleged that he has committed an offence under Section 138 of N. I. Act. In this

regard, the complainant has lodged a complaint under Section 200 of Cr.P.C. against the accused.

4. Thereafter, the learned Magistrate has taken cognizance and has recorded the sworn statement of the complainant. After perusing the records, he found that there is sufficient material evidence as against the accused and hence, issued process against the accused. The accused has appeared before the Magistrate in pursuance of the summons and was enlarged on bail. The plea was recorded and the accused has pleaded not guilty. Thereafter, the complainant himself got examined as PW.1 and one witness was examined on his behalf as PW.2. He has also placed reliance on nine documents as Exs.P1 to P9. Then, the statement of the accused under Section 313 of Cr.P.C. is recorded to enable the accused to explain the incriminating evidence appearing against him in the case of the prosecution.

The case of accused is of total denial. The accused has also got examined himself as DW.1 and placed reliance on five documents as per Exs.D1 to D5.

5. After having heard the arguments and appreciating the oral and documentary evidence, the learned Magistrate has framed the following points for consideration:

1. Whether the complainant has proved beyond all reasonable doubt that accused has committed an offence punishable under Section 138 of Negotiable Instrument Act?

2. What order?

6. Then, by the judgment dated 16.08.2014, the learned Magistrate has answered the point No.1 in the negative and thereby acquitted the accused/respondent herein by setting him at liberty. Being aggrieved by this judgment of acquittal, the appellant/complainant has filed this appeal.

7. The learned counsel for the appellant would argue that the impugned judgment passed by the learned Magistrate is contrary to law and facts on record; that the learned Magistrate has failed to consider the fact that there is a presumption available in favour of the complainant under Section 139 of N. I. Act and that fact is not properly appreciated; that the learned Magistrate has failed to note that issuance of cheque and signature on the cheque is admitted and mandatory presumption is required to be drawn; the learned Magistrate has also failed to consider that due to acquaintance between the parties, the complainant has advanced loan; that the learned Magistrate has also failed to consider that except formal denial, the accused has not rebutted the said presumption and hence, the learned Magistrate was erred in acquitting the accused; the learned Magistrate has also failed to consider that the accused

has admitted availment of loan of Rs.50,000/- and his contention regarding repayment and as a security issuance of cheque in dispute, but, he has failed to prove the said defence; the learned Magistrate has failed to consider Exs.P1 and P2, which are the demand promissory note and acknowledgment receipt respectively regarding payment of the amount as hand loan and further did not appreciate the evidence of PW.2 and hence, he would contend that accused has failed to rebut the statutory presumption available in favour of the appellant/complainant and sought for allowing the appeal by setting aside the impugned judgment by convicting the accused/respondent herein.

8. Per contra, the learned counsel for the respondent/accused has supported the impugned judgment of the learned Magistrate and he would contend that in paragraph Nos.18 and 19 of the

impugned judgment, the learned Magistrate has discussed the issue in detail. He further contended that there is absolutely no date on which the amount was lent to accused and even the same is missing in the complaint and further, in the legal notice, execution of Exs.P1 and P2 were also not referred and the accused has not admitted execution of Exs.P1 and P2. He would further submit that the complainant is required to prove his case beyond all reasonable doubts, but, rebuttal is only on the basis of preponderance of probability. He would further submit that the complainant is a Banker and he is in the habit of doing money lending business and in this context, he has placed reliance on Exs.D1 and D3, which establish that he is a money lender and as a security, he used to take cheques and in the instant case, the rebuttal is established. Hence, he would argue that the learned Magistrate is justified in

acquitting the accused/respondent herein and hence, sought for dismissal of the appeal.

9. Having heard the arguments and perusing the records of the trial Court, now the following point would arise for my consideration:

"Whether the complainant has proved beyond all reasonable doubts that accused has issued a cheque for Rs.4,25,000/- towards legally dischargeable debt and the judgment of acquittal passed by the learned Magistrate calls for any interference?"

10. The complainant has got examined himself as PW.1 and he has got examined one attesting witness to Ex.P1 as PW.2. Further, he placed reliance on nine documents. Ex.P1 is the promissory note while Ex.P2 is the acknowledgment cum receipt said to have been executed by the accused. Ex.P3 is the cheque and Ex.P4 is the Bank endorsement. Ex.P5 is

the legal notice issued by the complainant and Ex.P6 is the postal acknowledgement. Ex.P7 is the postal receipt while Ex.P8 is the reply notice. Ex.P9 is an application of bill discount submitted by the accused to Saptagiri Finance Company. Admittedly, the complainant is a Managing Director of Saptagiri Finance Company.

11. The accused examined himself as DW.1. Ex.D1 is the certified copy of the complaint in C.C.No.205/2010 and Ex.D3 is the certified copy of the complaint in C.C.No.206/2010 and both these complaints were filed under Section 138 of N. I. Act by the present complainant/appellant himself. Ex.D2 is the certified copy of the order sheet in C.C.No.205/2010. Ex.D4 is the postal receipt for having sent reply notice and Ex.D5 is the postal acknowledgement.

12. According to the complainant, he is acquainted with the accused and in the month of November, 2010, as per the request of the accused, he advanced hand loan of Rs.4,25,000/- to the accused and the accused has promised to repay the same within two months and at the time of availment of loan, he has executed Exs.P1 and P2. It is also asserted by the complainant that when the accused has failed to repay the loan as agreed, he issued a cheque dated 02.11.2012 for a sum of Rs.4,25,000/-. The defence of the accused is that he has availed loan of Rs.50,000/- from the complainant in the month of January, 2011 and he has repaid the same in the month of April, 2011, but, he could not repay the interest of Rs.10,000/- and the complainant took a blank cheque as a security for the interest part. Hence, he has disputed the debt of Rs.4,25,000/- .

13. It is an undisputed fact that the cheque belongs to the accused and there is no dispute regarding signature on the cheque. Hence, the presumption under Section 139 of N. I. Act is available to the accused as observed by the Hon'ble Apex Court in the case of **Rangappa vs. Mohan** reported in **AIR 2010 SC 1898**. The presumption regarding existence of legally enforceable debt or liability is a rebuttal presumption. It is also evident that the accused for rebutting the presumption, need not enter into witness box, but, can rebut the presumption on the basis of the available materials placed on record. Apart from that, it is also important to note here that the complainant is required to prove his case beyond all reasonable doubts. But, for rebuttal, the same standard is not applicable and the accused is required to rebut the presumption on the basis of preponderance of probability. The presumption under

Section 139 of N. I. Act is a statutory rebuttal presumption. Since Ex.P3 is admitted, the presumption is in favour of the complainant. At the same time, it is necessary to consider the evidence of the complainant as to whether on the basis of evidence that presumption is rebutted or not.

14. In his examination in chief, the complainant has reiterated the complaint allegations. However, in the cross examination, he admitted that he is a partner in Saptagiri Finance Company in Shahabad and there are nine partners. It is important to note here that in the complaint as well as in the legal notice, there is no reference of date of advancement of hand loan by the accused and all along it is simply asserted that the loan was advanced in the month of November, 2010. It is also important to note here that it is not a small amount and a huge amount is being advanced as a hand loan and it is

hard to accept that the complainant do not remember the date of advancement of loan. Further, the complainant has not described his avocation in the complaint. But, in Ex.P5 - legal notice, he claimed that he and accused are working in a same office, which he admits that it is a false statement. Now he is claiming that he is a businessman. But, for the first time, he has asserted the same. Even in the complaint, there is no assertion that on 16.11.2010 the accused has executed demand promissory note. Further, his cross examination reveals that it was not signed by the accused in his presence. In the cross examination, for the first time he claims that the loan was advanced on 16.11.2010. But, this fact was never asserted anywhere else. Further, he claims that he advanced the loan by cash as the amount was in his house. He admits that this huge amount was not shown in the income tax return submitted for the year

2010. He claimed that as there was agreement to return the same within two months, he has not reported it. But, admittedly the same was not returned within two months as per the case of the complainant himself. But, he did not show this in the income tax return. He has also admitted that for the next two years, he has not shown this amount in his income tax return for having lent to accused. Apart from that, it is alleged that the hand loan was advanced in the year 2010, but, for two years, the complainant has not taken any steps by issuing any legal notice to the accused. The amount is not a small amount and it is a heavy amount. Further, the complainant claims that he is acquainted with the accused. They are not close friends and there were no financial transactions between them. Under such circumstances, it is hard to accept that the

complainant has advanced such a huge amount to the accused without any interest being charged.

15. In the further cross examination, he admitted that normally such a huge amount would be kept in Bank, but, he claims that he has kept in the house for construction of the house. But, no evidence is placed to show that he was constructing any house. He has also not produced his Bank statements to show his financial status.

16. Apart from that, Exs.P1 and P2 were disputed by the accused. It is also important to note here that that Exs.P1 and P2 were not produced along with the complaint by the complainant, but, they were produced at the time of giving evidence by the complainant. The complainant claims that he is a partner in finance company, but, he denied that he is doing money lending business. He has also specifically

asserted that except accused, he has not advanced any hand loan to anybody else. However, Exs.D1 and D3 disclose that he had advanced hand loan of Rs.3,50,000/- to one Lalitha W/o. Annegouda. These Exs.D1 and D3 are the complaints filed by the present complainant/appellant, wherein, he claims that he is acquainted with Annegouda and therefore, he has advanced loan of Rs.3,50,000/- to his wife. If he is acquainted with Annegouda, he could have advanced loan to Annegouda but not to his wife. Further, from Ex.D3, it is evident that he has also taken a cheque form Annegouda towards interest of Rs.1,26,000/-. These documents clearly establish that the complainant is doing a money lending business privately. No doubt, he is a partner in Saptagiri Finance Company, but, this alleged loan to accused or to Lalitha were not advanced by finance company and they were in personal capacity of the complainant.

The complainant has not explained the reasons for not advancing the loan through finance company and he advancing the loan in his personal capacity. Hence, it is evident from the admissions given by the complainant/PW.1 that he is admittedly doing money lending business illegally. Further, when he is advancing a huge amount of Rs.3,50,000/- to one Lalitha or Rs.4,25,000/- to the accused, he should deal through the Bank but all along it is alleged that he has advanced the loan amount by cash. Dealing with such a huge amount by way of cash is not permissible under the Income Tax Rules and even the complainant has not produced any scrap of paper to show that he was possessing such a huge amount in his house or he has withdrawn from the Bank earlier. He has not produced his Bank statements to show his financial capacity to advance such a huge amount.

17. PW.2 is a attesting witness to Exs.P1 and P2. He claimed that they were executed by the accused by approaching him. In the cross examination, he admitted that he is also a partner in Saptagiri Finance Company along with the complainant wherein the complainant is a Managing Director. He has also admitted that at the time of signing of Exs.P1 and P2, the complainant was not present. Interestingly, in Exs.D1 and D3 also this witness is shown to be an eyewitness. Further, he never identified his signature and his signature was also not marked on Exs.P1 and P2. As such, it is evident that this witness being closely acquainted with the complainant and being a partner in the finance company with the complainant, he supporting him. His evidence also disclose that the complainant though running a finance company, he is doing money lending business illegally without licence. Admittedly, the

accused has denied his signature on Exs.P1 and P2. The complainant has not made any efforts to get the signature of PW.2 marked and he identifying the signature of accused on Exs.P1 and P2 does not have any relevancy at all as admittedly Exs.P1 and P2 were signed in his absence. Apart from that, in Ex.P5 - legal notice, the complainant has nowhere asserted as to in whose presence, the money was lent to the accused, but, for the first time it was referred in the complaint.

18. Further, Ex.P3 is dated 02.11.2012 and for a period of two years, the complainant has not even issued any legal notice and it is hard to accept that he being a financier, he kept mum without demanding interest for two years. Hence, it is apparent from the conduct of the complainant that the loan was not for Rs.4,25,000/- and therefore he kept mum and the hand loan ought to have been for lessor amount and

the figures were entered at higher rate in order to adjust with interest. This is the only probable inference which can be drawn considering the conduct of the complainant as he is doing money lending business without any authority. He has also not given any explanation or special reasons for waiver of the interest as against the accused. Apart from that, from Ex.P9, it is evident that the accused has applied for bill discount of Rs.20,000/- to Saptagiri Finance Company. This Ex.P9 is executed in favour of Saptagiri Finance Company. When the accused is a defaulter in respect of loan availed from Saptagiri Finance Company itself, it is hard to accept that thereafter within one year, the complainant has advanced him a huge amount of Rs.4,25,000/- without charging interest though he is a defaulter. As such, considering the conduct of the complainant itself, the presumption in favour of the complainant

available under Section 139 of N. I. Act stands rebutted. The accused has taken defence stating that he has availed loan of Rs.50,000/- and it is repaid and for security of that loan, a cheque was issued and when he is unable to pay the interest, the complainant has misused the cheque. Considering the conduct of the complainant, who is doing money lending business privately, this defence appears to be more probable rather than the allegations made by the complainant. Hence, it is evident that the accused has raised a probable defence, which creates a doubt about very existence of legally enforceable debt or liability against the accused and in favour of the complainant. As such, the burden again shifts on complainant to prove his case, but, he has not discharged the said burden.

19. The learned counsel for the appellant/complainant has placed reliance on a

decision reported in **2021 (1) SCCrJ 469 (SC)** in the case of **M/s. Kalamani Tax and Anr. Vs. P.Balasubramanian**, wherein it is observed as under:

"Negotiable Instruments Act, 1881, Section 138, 139 and 118 – Dishonour of cheque – Statutory presumption – Once the Signature of an accused on the cheque/negotiable instrument are established, then these "reverse onus" clauses become operative – Obligation shifts upon the accused to discharge the presumption imposed upon him – Appeal dismissed."

20. There is absolutely no dispute regarding the said principles and these principles are in consonance with the principles enunciated in the case of **Rangappa** (Supra) as well as in the case reported in **AIR 2008 SC 1325 [Krishna Janardhan Bhat vs. Dattatreya Hegde]**.

21. Admittedly, the initial presumption is in favour of the complainant and reverse onus clauses become operative and obligations shifts upon the accused to rebut the said presumption. In the instant case also, the accused by way of cross examining the complainant has exposed him and that itself establishes that presumption is rebutted. Hence, the principles enunciated in the above cited decision does not come to the aid of the complainant in any way. He has further placed reliance on a decision reported in **2019 (2) SCCrJ 381 (SC) [M/s. Shree Daneshwari Traders vs. Sanjay Jain and Another]**. The facts and circumstances were again entirely different and there, the presumption under Section 139 of N. I. Act was not rebutted by the accused. But, in the instant case, the presumption was rebutted by the accused on the basis of the materials placed on record. Hence, the principles

enunciated in the above cited decision does not come to the aid of the complainant in any way. Admittedly, the accused need not enter into witness box to rebut the said presumption and he can rebut the presumption on the basis of available records also. Under such circumstances, both the citations relied upon by the learned counsel for the appellant/complainant will not assist the complainant in any way. The complainant though running a finance company, but, he has advanced a huge loan to accused in his individual capacity. Secondly, there is no evidence to prove that he was possessing such a huge amount in his house and further it is hard to accept that he has advanced such a huge amount of Rs.4,25,000/- as a hand loan to accused without charging any interest that too when the accused was a defaulter in respect of loan obtained by him in Saptagiri Finance Company. Under these

circumstances, looking to the facts and circumstances of the case, it is evident that the complainant has failed to establish that the cheque was issued towards discharge of legally enforceable debt so as to attract the ingredients of Section 138 of N. I. Act.

22. The learned Magistrate has analyzed the oral and documentary evidence in proper perspective and also dealt with the citations in detail. He has properly appreciated the oral and documentary evidence including the principle of reverse onus and come to a just conclusion that presumption under Section 139 of N. I. Act was rebutted by the accused. Hence, he has justified in acquitting the accused. As such, the said judgment of acquittal does not call for any interference by this Court. Accordingly, I answer the point under consideration in the negative and proceed to pass the following:

ORDER

The appeal is dismissed by confirming the judgment of acquittal passed by the learned IV Additional Civil Judge and JMFC, Kalaburagi in C.C.No.1487/2013 dated 16.08.2014.

Sent back the LCRs to trial Court with a copy of this judgment immediately.

**Sd/-
JUDGE**

Srt