HIGH COURT OF KARNATAKA

Bench: Justice Ramachandra D. Huddar

Date of Decision: 14th June 2024

Case No.: CRIMINAL APPEAL NO. 508 OF 2015

APPELLANT: SMT. PARVATHAMMA M.

VERSUS

RESPONDENT: SMT. CHANDRAKALA V.

Legislation:

Section 138 of the Negotiable Instruments Act, 1881

Sections 378(4), 200, 313 of the Code of Criminal Procedure (CrPC), 1973

Subject: Criminal appeal challenging the acquittal of the respondent by the Additional Chief Metropolitan Magistrate in a case of cheque dishonor under Section 138 of the Negotiable Instruments Act, 1881.

Headnotes:

Negotiable Instruments Act, 1881 – Cheque Dishonor – Respondent accused of dishonoring a cheque issued to discharge a hand loan of Rs. 4,50,000/- – Trial court acquitted the respondent, finding the complainant entitled to Rs. 50,000/- with interest, observing doubts regarding the loan transaction – High Court held trial court erred in assessing evidence and misinterpreted the presumption under Section 139 of the NI Act – Appeal allowed, acquittal set aside, respondent convicted and fined twice the cheque amount [Paras 1-22].

Presumption under Section 139 NI Act – Burden of proof – High Court emphasized mandatory presumption in favor of complainant under Section 139 upon proving issuance and dishonor of cheque – Respondent's defense of cheque issued as security found unsupported by evidence – Reiterated that presumption under NI Act is rebuttable only by credible evidence, not mere assertions [Paras 10-20].

Decision: Appeal allowed – Judgment of acquittal set aside – Respondent convicted under Section 138 of the NI Act and sentenced to fine twice the cheque amount i.e., Rs. 9,00,000/- failing which simple imprisonment for one year – Complainant awarded compensation of Rs. 8,90,000/- from the fine amount [Paras 21-22].

Referred Cases:

- Rajesh Jain v. Ajay Singh, (2024) 1 SCC (Crl.) 1
- T.P. Murugan (dead) through legal representatives vs. Bojan, (2018) 8 SCC 469
- K.N. Beena v. Muniyappan, (2001) 8 SCC 458
- Rangappa v. Sri Mohan, (2010) 11 SCC 441

Representing Advocates:

for the appellant: Sri A.V. Ramakrishna

for the respondent: Smt. M. Mohan Kumar

JUDGMENT

Respondent-accused was tried for the offence under Section 138 of Negotiable Instrument Act, 1881 (for short `the NI Act'). by the XXII Addl. Chief Metropolitan Magistrate, Bengaluru City in CC No.5070/2015. The learned ACMM (`trial Court' for short) acquitted him of the charges levelled against him. Being aggrieved by the same, now the complainant is before this Court by preferring this appeal.

<u>FACTS OF THE CASE AS STATED IN THE COMPLAINT IN BRIEF</u>

2. Accused-Smt.Chandrakala V. (respondent herein) approached the complainant in the first week of November 2012 and availed a hand loan of Rs.4,50,000/- to meet her urgent commitments and family necessities. She assured to return the said amount within six months. After six months when complainant approached the accused, in discharge of the said loan amount, accused issued a duly filled cheque bearing No.539601 dated 29.8.2013 mentioning the consideration as Rs.4,50,000/- drawn on Syndicate Bank, Dr.Ambedkar Institute of Technology, Nagarbhavi Road, Bengaluru 560 056

in the name of complainant. It was assured by the accused that on presentation of the said cheque, it will be honoured.

3. It is alleged that when the cheque was presented for encashment, it was dishonoured by the Banker with an endorsement `***Payment stopped by the Drawer***' by issuing a memo dated 31.8.2013. Complainant got issued legal notice on 5.9.2013 calling upon the accused to pay the cheque amount. The legal notice so issued by RPAD was duly served on the accused on 6.9.2013. Despite service of notice, accused did not pay the amount or issued any reply to the said notice. Thus, it is alleged that accused has committed the offence under Section 138 of the NI Act. Accordingly, complainant filed a private complaint under Sec.200 of Cr.PC.

PROCEEDINGS BEFORE THE TRIAL COURT

4. The trial Court took the cognizance of the offence, summoned the accused before the Court. Plea against accused for the offence under Section 138 of NI Act framed, read over and explained in Kannada the language known to her. She pleaded not guilty and came to be tried.

5. In support of complainant's case, she herself entered witness box as PW.1 and got marked Ex.P1 to P8 and closed her evidence. The accused was questioned under Section 313 of Cr.PC so as to enable her to answer the incriminating circumstances appearing in the evidence of the prosecution. She denied her complicity in the crime and entered the witness box as DW.1. None of the documents are marked on her behalf.

6. On consideration of the evidence placed on record and on hearing the arguments, the trial Court recorded the findings that accused was not guilty. The trial Court found that it is suggested to PW.1-the complainant in the cross-examination that the accused availed a loan of Rs.50,000/- and

at that time, complainant got the cheque of the accused duly signed by her and the remaining contents of the cheque were filled by the complainant. The said cheque was issued by way of security. In fact, accused was and is ready to pay Rs.50,000/- so availed by her from the complainant. According to the trial Court, this suggestion directed to PW.1 though denied by PW.1, but, it has come to the conclusion that in view of the evidence spoken to by PW.1, the complainant is entitled for Rs.50,000/- with 6% interest. The trial Court has come to the conclusion that in view of the facts so brought on record by the accused in the crossexamination and her evidence, a doubt arises in the case of the prosecution with regard to the very transaction stated by the complainant, therefore, the trial Court has passed the impugned judgment of acquittal.

PROCEEDINGS BEFORE THIS COURT

7. In this appeal, the respondent appeared before the Court through her counsel. Despite giving sufficient opportunities has not appeared before the court. All the while it is recorded that there is no representation for respondent. As this appeal is of the year 2015, the appeal was posted on 31.5.2024 to hear the arguments. On that day, the counsel for the appellant advanced the arguments. The appeal was posted on 7.6.2024 for the arguments of respondent as finally. On that day, there was no representation for the respondent. On hearing the further arguments, once again, one more opportunity was given to the respondent to advance arguments by adjourning the case to 14.6.2024. Inspite of that, he has not appeared before the Court.

8. It is argued by the counsel for the appellant that when accused admits issuance of the cheque, her signature on the same and receipt of the legal notice, nothing remains to be proved by the complainant. He submits that, under the provisions of the NI Act, a presumption is very much available in favour of the complainant with regard to the issuance of the cheque.

Though the accused lead evidence, but, to prove the earlier transaction and the receipt of only Rs.50,000/- except her self-serving evidence, there is no evidence placed on record by the accused to prove her defence of issuing the cheque by way of security in lieu of receipt of Rs.50,000/-.

9. He submits that complainant has lead the evidence, produced the documents and has proved her case. The suggestions directed to her are flatly denied with regard to the issuance of cheque by way of security. So also, he submits that, once the complainant has discharged her burden, then, onus lies on the accused to disprove the case of the complainant. He submits that the trial Court strangely has observed in a case of present nature as if it is a civil suit, holding that complainant is entitled for compensation to the tune of Rs.50,000/- with simple interest at the rate of 6% p.a. from the date of cheque till realization of entire amount. It was directed to pay the said amount within thirty days. He submits that the judgment impugned in this appeal requires interference by this Court as grave illegality has been committed by the trial Court in acquitting the accused.

10. Having heard the arguments and on perusal of the records of this appeal, the question for consideration that arises is that:

"Whether the accused is said to have discharged her evidential burden with regard to the transaction based upon the presumption as available under Section 139 of NI Act ?"

11. On reading the provisions of Section 138 of the NI Act, it is the bounden duty of the complainant to prove the ingredients of the offence. They are:

i. Issuance of a cheque by the drawer with regard to the account maintained by him with his banker.

ii. The said cheque is issued in discharge of the legally enforceable debt.

iii. On presentation of the cheque, its dishonour for various reasons as stated under the provisions of NI Act.

iv. The return of the said cheque by the drawee bank as unpaid (In this case, the cheque was returned with an endorsement `payment stopped by the drawer').

v. Issuance of a notice to the drawer of the cheque, or the holder in due course calling upon him to pay the cheque amount within 30 days.

vi. The drawer of the cheque failing to make the payment of the cheque within fifteen days from the date of receipt of notice.

12. Thus, the offence under Section 138 of the NI Act is said to be completed if the aforesaid components of the offence are completed.

13. On perusal of the provisions of Section 139 of the NI Act, the burden of proof is on the complainant. It is the evidentiary burden on the complainant. It is said that always burden of proof remains static and onus of proof goes on shifting. For better appreciation, it is just and proper to incorporate the provisions of Section 139 of NI Act. It reads as under:

"**139. Presumption in favour of holder.—** It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability."

14. PW.1 the complainant has reiterated the contents of the complaint in her evidence on oath. In support of her case, she relied upon Ex.P1 to P6. She has been cross-examined by the accused at length. All the suggestions so directed to her are denied by her in material particulars. She is consistent in her evidence about giving loan to the accused. It is suggested to PW. 1 that except the signature on the cheque Ex.P1, the other contents are filled by complainant only. But, PW.1 has denied this suggestion. It is suggested that there were earlier so many similar transactions took place in between the complainant and accused and with regard to the said

transactions, the accused has paid money. It is suggested that accused has issued the said cheque by way of security and it has been misused by the complainant. But, complainant has flatly denied this suggestion.

15. Ex.P1 is the cheque. The signature on the same is admitted by the accused. Ex.P2 is the memo issued by the banker of the complainant stating that the cheque issued by the accused was sent for encashment to the banker of the accused i.e., Syndicate Bank so stated in the complainant and it was dishonoured because of "payment stopped by drawer". Thereafter, complainant issued the legal notice as per Ex.P3 on 5.9.2013. According to the complainant the said notice was duly served on 6.9.2013. The returned cover is produced by the complainant is produced Ex.P6. Ex.P7 is the acknowledgement signed by the accused on 6.9.2013 for having received the notice. Receipt of this notice is not denied by the accused in her evidence on oath. In her examination-in-chief itself in unequivocal terms she has stated about the receipt of the notice because of dishonour of the cheque. It is stated by her that as she was mentally upset she could not issue reply. In the crossexamination, it is stated by her that she has no document to show that she has taken Rs.50,000/- from the complainant in the month of January 2012. According to her, she has not taken a loan of Rs.4,50,000/-. Except this evidence, nothing is stated by PW.1. But, the trial Court believed the evidence of DW.1 and denial in the cross-examination directed to PW.1 and has directed the accused to pay Rs.50,000/- with interest.

16. So far as presumption available under the aforesaid Section 139 of NI Act so also Section 118 of the said Act, if these two sections are read together, *inter alia* they direct that it shall be presumed until the contrary is proved that every negotiable instrument was made or drawn for

consideration. This presumption is a presumption of fact which directly relates to one of the ingredients to sustain a conviction for the offence under Section 138 of NI Act.

17. Section 139 of the NI Act speaks with regard to the presumption and as per the law laid down by the Hon'ble Apex Court, this Section 139 requires the Court "*shall presume*", the facts stated therein. The learned counsel for the complainant relied upon a recent judgment of Hon'ble Apex Court in a case ***Rajesh Jain v. Ajay Singh, reported in (2024) 1 SCC (Crl.)1*** at paragraphs 33,34 and 35 is observed as under:

*"**33.** The NI Act provides for two presumptions: Section 118 and Section 139. Section 118 of the Act inter alia directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Section 139 of the Act stipulates that "unless the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque, for the discharge of, whole or part of any debt or liability". It will be seen that the "presumed fact" directly relates to one of the crucial ingredients necessary to sustain a conviction under Section 138.*

***34.** Section 139 of the NI Act, which takes the form of a "shall presume" clause is illustrative of a presumption of law. Because Section 139 requires that the Court "shall presume" the fact stated therein, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. But this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary as is clear from the use of the phrase "unless the contrary is proved".*

***35.** The Court will necessarily presume that the cheque had been issued towards discharge of a legally enforceable debt/liability in two circumstances. Firstly, when the drawer of the cheque admits issuance/execution of the cheque and secondly, in the event where the complainant proves that cheque was issued/executed in his favour by the drawer. The circumstances set out above form the fact(s) which bring about the activation of the presumptive clause. [Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal."*

18. Thus by applying the aforesaid principles laid down in the aforesaid judgment. Once the complainant discharges the burden to prove that Ex.P1 the cheque was issued by the accused for discharge of debt, the

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presumption arises under Section 139 of the NI Act. Though the accused set upto a defence of issuing a cheque by way of security for loan of Rs.50,000/- but, that defence has remained as defence without any proof. That means, evidential burden which was cast on accused is not properly discharged by her.

19. The peculiar effect of the presumption of law is, merely to invoke a rule of law. The standard of proof which was to be discharged by the accused is heavy on the accused. But, except her self-serving evidence, there is no evidence placed n record either oral or documentary. As it is a rebuttable presumption and to prove the contrary, it was open for the accused to raise a probable defence. In this case, except setting up of a defence of issuing a cheque, by way of security, no other defence has been set up by the accused which in my opinion is not duly proved in accordance with law. No direct evidence has been adduced by the accused. The evidence so adduced by her is not acceptable. When she admits her signature on the cheque and issuance of the said cheque, then the presumption definitely arises in favour of the complainant.

20. As discussed above, the presumption available under the provisions of Section 113 of NI Act is a rebuttable presumption. The said rebuttable presumption must be by adducing credible evidence. Mere raising a doubt is not sufficient. In this regard, the Hon'ble Apex Court in a judgment reported in ***(2018) 8 SCC 469*** in ***T.P.Murugan (dead) through legal representatives vs. Bojan*** have observed in

para 21, 22 and 23 as under:

21. *We have heard the Senior Counsel for both parties, and perused the record. Under Section 139 of the NI Act, once a cheque has been signed and issued in favour of the holder, there is statutory presumption that it is issued in discharge of a legally enforceable debt or liability [Refer to K.N. Beena v. Muniyappan, (2001) 8 SCC 458, p. 459, para 6 : 2002 SCC (Cri) 14 and Rangappa v. Sri Mohan, (2010) 11 SCC 441, p. 453, para 26 : (2010) 4 SCC (Civ) 477 : (2011) 1 SCC (Cri) 184.] . This presumption is a*

rebuttable one, if the issuer of the cheque is able to discharge the burden that it was issued for some other purpose like security for a loan.

22. *In the present case, the respondent has failed to produce any credible evidence to rebut the statutory presumption.*

23. *The appellant has proved her case by overwhelming evidence to establish that cheque was issued towards the discharge of an existing liability and legally enforceable debt. the respondent having admitted that a cheque was signed by him, the presumption under Section 139 would operate. The respondent failed to rebut the presumption by adducing any cogent or credible evidence. Hence, defence is rejected.*

21. Therefore, the trial Court has committed illegality in passing the impugned judgment of acquittal. That means, the trial Court has committed a fundamental error with regard to the facts of the case and its approach in holding that complainant is entitled for Rs.50,000/- with interest from the accused is a complete erroneous finding and against the facts of the case and law alleged in the complainant. Because of this, observation made by the trial Court in the course of the judgment and its concluding finding has caused miscarriage of justice. Therefore, the point raised supra is answered in favour of the complainant/appellant and against the accused. Hence, the appeal deserves to be allowed and the impugned judgment passed by the trial Court in CC No. 5070/2014 dated 13.3.2015 passed by the XXII ACMM, Bengaluru City is liable to set aside.

22. So far as sentence is concerned, the law mandates that if the offence under Section 138 of the NI Act is duly proved, the accused is to be sentenced with a fine of twice the cheque amount. Accordingly, the accused is liable for conviction and sentence.

Resultantly, the following order is passed:

ORDER

i) Appeal is ***allowed.***

ii) Judgment of acquittal passed in CC No.5070/2014 dated 13.3.2015 by the XXII ACMM, Bengaluru City is hereby set aside.

iii) Respondent-accused is convicted for the offence under Section 138 of the Negotiable Instruments Act 1881 and is sentenced to fine twice the cheque amount i.e., Rs.9,00,000/- (Rupees nine lakh only) failing which, she shall undergo simple imprisonment for one year.

iv) Out of the fine amount, complainant is held entitled for compensation of Rs. 8,90,000/-(Rupees Eight Lakh Ninety thousand only) and balance of Rs. 10,000/- be realised as fine amount to be deposited to the State Account.

v) Respondent-accused shall deposit/pay the same within one month from the date of this order.

vi) Send the operative portion of the judgment to the trial Court for compliance by mail.

vii) Send back the trial Court records along with a copy of this judgment forthwith.

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