

**IN THE HIGH COURT OF KARNATAKA AT BENGALURU**

**DATED THIS THE 30<sup>TH</sup> DAY OF JUNE, 2021**

**BEFORE**

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

**CRIMINAL REVISION PETITION No.3 OF 2019**

**BETWEEN:**

Sri. Dodde Gowda  
S/o. Mudde Gowda,  
Aged about 60 years,  
MPM Employee,  
Fire Department,  
Paper Town,  
Bhadravathi,  
Pin: - 577302.

..Petitioner

(By Sri. K. Vijaya Kumar, for K V K Law Info.,)

**AND:**

Smt. Drakshayani,  
W/o. H. Devendra Kumar,  
Aged about 50 years,  
R/a House No.257,  
Suragitopu, 2<sup>nd</sup> Cross,  
Bhadravathi,  
PIN – 577 302.

.. Respondent

(By Sri. B.S. Prasad, Advocate)

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This Criminal Revision Petition is filed under Section 401 of the Code of Criminal Procedure, 1973, praying to call for the records in Criminal Appeal No.5023/2016 on the file of IV Additional District and Sessions Judge, Shimoga, sitting at Bhadravathi, and set aside the order dated 01-12-2018 passed in

Criminal Appeal No.5023/2016 on the file of the IV Additional District and Sessions Judge, Shimoga, sitting at Bhadravathi and also the order passed in C.C.No.4134/2010 passed by the Principal Civil Judge and JMFC at Bhadravathi dated 31-08-2016 and allow the revision petition, by acquitting the petitioner for the offence punishable under Section 138 of the N.I. Act, in the interest of justice.

This Criminal Revision Petition coming on for Admission, **through physical hearing/video conferencing Hearing** this day, the Court made the following:

### **ORDER**

The present petitioner as the accused was tried by the Court of the learned Principal Civil Judge and Judicial Magistrate First Class, at Bhadravathi, (hereinafter for brevity referred to as the "Trial Court") in C.C.No.4134/2010, 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 31-08-2016.

Aggrieved by the same, the accused preferred a Criminal Appeal in the Court of the IV Additional District and Sessions Judge, Shimoga, sitting at Bhadravathi, (hereinafter for brevity referred to as the "Sessions Judge's Court") in Criminal Appeal No.5023/2016.

The appeal was contested by the respondent who was the complainant in the Trial Court. The Sessions Judge's Court in its order dated 01-12-2018 allowed the appeal in part, modifying the order on sentence and fine passed by the Trial Court and convicting and sentencing the accused to pay a fine of ₹1,10,000/- within 30 days from the date of the said judgment and in default, to undergo simple imprisonment for a period of two months.

Aggrieved by the said judgments, the accused has preferred this revision petition.

2. The summary of the case of the complainant in the Trial Court is that, towards the repayment of the loan borrowed by him, the accused had issued a cheque bearing No.026614 dated 06-09-2010, for a sum of ₹2,00,000/- drawn on Corporation Bank, Jannapura Branch, Bhadravathi, Shimoga District, to the complainant. The said cheque, when presented by the complainant through her banker for realisation, returned unpaid with the banker's shara "*funds insufficient*". It is thereafter the complainant got issued a legal notice to the accused, calling upon him to pay the cheque amount, however,

the accused did not respond. This made the complainant to institute a criminal case against the accused for the offence punishable under Section 138 of the N.I. Act in the Trial Court.

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 the complainant got herself examined as PW-1 and got marked documents from Exs.P-1 to P-7(a). From the accused's side, the accused was examined as DW-1 and no documents were got marked from his side.

4. The Trial Court after recording the evidence led before it, by its impugned judgment of conviction dated 31-08-2016 convicted the accused for the offence punishable under Section 138 of the N.I. Act and sentenced him to undergo simple imprisonment for a period of three months and also to pay a fine of ₹2,75,000/- within thirty days, in default of payment of fine, to undergo simple imprisonment for a period of fifteen days.

Challenging the same, the accused preferred an appeal in Criminal Appeal No.5023/2016 before the learned Session's Judge's Court, which after hearing both side, by its judgment

dated 01-12-2018, allowed the appeal in part, modifying the order on sentence and fine passed by the Trial Court and convicting and sentencing the accused to pay a fine of ₹1,10,000/- within 30 days from the date of the said order and in default, to undergo simple imprisonment for a period of two months.

Being aggrieved by the same, the accused has preferred this revision petition.

5. Learned counsel for the revision petitioner/accused and the learned counsel for the respondent/complainant are appearing through video conference.

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

7. Though this matter was listed for admission, however, as desired by the learned counsels from both side, the arguments on the main matter itself were heard from both side. Perused the materials placed before this Court including the Trial Court and Sessions Judge's Court's records.

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

9. 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?*

10. Learned counsel for the petitioner/accused in his argument submitted that, he would not dispute the fact that the complainant and accused were known to each other and that the cheque at Ex.P-1 was drawn by the accused which returned unpaid for the reason of insufficiency of funds as per the banker's endorsement at Exhibit P-3. He also submitted that, he would not dispute the issuance of legal notice by the complainant to the accused at Ex.P-4, though the contention of the alleged non-service of notice was taken by the accused in the Trial Court.

He voluntarily submitted that, the ingredients of Section 139 of N.I. Act required to form a presumption about the

existence of a legally enforceable debt in favour of the complainant would not be disputed by him.

11. In the light of the above submission of the learned counsel for the petitioner/accused, drawing of the cheque at Exhibit P-1 by the accused and dishonour of the said cheque by the banker and also the issuance of the legal notice by the complainant to the accused, demanding the payment of the cheque amount, need not be discussed once again, taking recourse to the evidence led by the parties. Still, the evidence of the complainant as PW-1 corroborated by the documentary evidence at Exhibits P-1 to P-7(a) would go to show that, the complainant, as payee in the cheque and which cheque was drawn by the accused had presented the said cheque for realisation through her banker, however, the said cheque came to be returned unpaid by her banker with the reason of insufficiency of funds in the account of the drawer of the instrument, as evidenced in the banker's endorsement at Exhibit P-3. The copy of the legal notice at Exhibit P-4 coupled with Certificate of Posting (UCP) at Exhibit P-6, postal receipt at Exhibit P-5 would go to show that, the said notice at Exhibit P-4 was sent to the accused, both by registered post as well Under

Certificate of Posting (UCP). However, as could be seen from the returned postal cover at Exhibit P-7, the notice sent to the accused under registered post has been returned to the sender with the postal endorsement "addressee has remained absent during delivery time, hence return to sender". Still, considering the fact that the said notice was also sent under Certificate of Posting, which, according to the complainant (PW-1), has been duly served upon the addressee and also in view of the fact that the said statement of PW-1 has not been specifically denied from the accused's side.

Further, more importantly, since the learned counsel for the petitioner/accused submitted that, he would not dispute the question of service of notice upon the accused, it has to be taken that, the notice demanding the payment of the cheque amount was issued by the complainant to the accused and despite which, the accused admittedly has not met the demand made in the notice. Thus, the presumption about the existence of a legally enforceable debt forms in favour of the complainant. However, the said presumption is rebuttable.

12. In order to rebut the presumption formed in favour of the complainant, the accused examined the complainant (PW-1) extensively and also got examined himself as DW-1. In the cross-examination of PW-1 as well in his examination-in-chief, the accused as DW-1 contended that, there was no alleged loan transaction between the complainant and himself at any point of time. However, the cheque in question was issued by the accused to one Smt. Devamma, his elder sister and she had, as a security towards the financial transaction with the complainant, given it to the complainant which was misused by her. However, the complainant as PW-1 has denied the suggestions made to her in the cross-examination in this regard. The evidence of DW-1, in this regard, was denied from the complainant's side in the cross-examination of DW-1. Therefore, in the light of the evidence of the parties, both oral and documentary, the matter has to be analysed.

13. Learned counsel for the petitioner/accused in his argument submitted that, the complaint, the legal notice as well the evidence of the complainant as PW-1 in the form of examination-in-chief are all bald, vague and do not mention as to when and how much the loan amount was given by the

complainant to the accused. He further submitted that, if the alleged loan amount is for a sum of ₹1,00,000/-, then, how come the accused issues a cheque for a sum of ₹2,00,000/- to the complainant, is also unbelievable. Further, the complainant has also failed to show her financial capacity to lend such a huge amount as loan to the accused. Thus, these suspicions in the case of the complainant rebuts the presumption formed in her favour.

14. Learned counsel for the respondent/complainant in his argument submitted that, the date and quantum of the loan amount though have not been specifically mentioned either in the complaint or in the examination-in- chief of PW-1, however, the same has been elicited by the accused himself in the cross-examination of PW-1. As such, the details as to the date and quantum of loan amount has come on record.

He further submitted that, the financial capacity of the complainant to lend the loan amount has been clearly explained by the complainant as PW-1, which source revealed by her has not been denied or disputed from the accused's side.

15. The complainant, neither in her evidence nor in her examination-in-chief as PW-1, has stated as to when the alleged loan was given by her to the accused and how much of the amount was given as loan. She has only stated that, towards the repayment of the loan taken by him, the accused issued the cheque at Exhibit P-1 to her. Even in the legal notice at Exhibit P-4 also, the complainant has not stated as to when the loan was given to the accused. However, in the legal notice at Exhibit P-4, it is mentioned that, the loan availed by the accused was a sum of ₹2,00,000/-.

The details as to the date of the alleged loan and quantum of the loan have come out in the cross-examination of PW-1, wherein she has stated that, the loan amount was for a sum of ₹1,00,000/- given to the accused in cash. Thus, according to the evidence of the complainant (PW-1), the loan amount was only for a sum of ₹1,00,000/-. However, as already observed above, the legal notice issued to the accused on behalf of the complainant, a copy of which is at Exhibit P-4 mentioned the loan amount as a sum of ₹2,00,000/-. Thus, between the legal notice and the evidence of the complainant, there is a great variation regarding the alleged loan amount.

16. As to the date when the alleged loan was given to the accused, the complainant, neither in her complaint nor in the legal notice at Exhibit P-4 nor even in the examination-in-chief as PW-1 has stated anything in that regard. However, in her cross-examination, she has stated that it was on 6<sup>th</sup> or 7<sup>th</sup> day of September-2010, the accused has taken loan from her. However, eight days prior to that date, he had approached her and made a request for the loan. Thus, according to the complainant, the date of the alleged loan was either 6<sup>th</sup> or 7<sup>th</sup> of September-2010. In the very same cross-examination, at not less than three places, the complainant as PW-1 has stated that, the accused had brought the cheque duly filled by him while taking the loan amount. Thus, according to the complainant, the cheque at Ex.P-1 was given to her by the accused simultaneously when the accused is said to have collected a sum of ₹1,00,000/- in cash from her as loan. However, even according to the complainant (PW-1), the accused had taken the loan from her, promising to repay the same in fifteen days, which means, the alleged loan would have become due for repayment only after fifteen days of the loan, i.e. not before 21-09-2010. However, admittedly, the cheque at Ex.P-1 was

presented by the complainant for its realisation much earlier to that date. According to complainant (PW-1), she had submitted the cheque to her banker for its realisation on 06-09-2010 itself, which means, on the very same date of the alleged loan said to have been given to the accused in a sum of ₹1,00,000/-, the complainant has presented the cheque said to have been given by the accused which was for a sum of ₹2,00,000/-. Since, even according to the complainant (PW-1), the period for repayment of the alleged loan was fifteen days, the date of presentation of the cheque was much earlier to the repayment becoming due. Therefore, a serious doubt arises in the case of the complainant regarding the loan transaction.

17. Secondly, as observed above, though the legal notice at Exhibit P-4 mentions the loan amount as a sum of ₹2,00,000/- , but, the complainant (PW-1) in her cross-examination as PW-1, has specifically stated that the loan given to the accused was for a sum of ₹1,00,000/-. No where she has stated as to how come for a loan of a sum of ₹1,00,000/- which was repayable in fifteen days, the loanee could bring a cheque for repayment of a sum of ₹2,00,000/, that too, duly filled by him at the time of avilment of the loan. The evidence of PW-1 nowhere gives any

answer to this doubt, which doubt arises by a reading of the evidence of the complainant (PW-1).

18. Thirdly, it is not the case of the complainant that the alleged loan was attracting any interest payable by the accused to the complainant. Thus, the alleged loan said to have been availed by the accused was repayable by him in fifteen days and only the principal amount without any interest thereupon was required to be repaid. In such an event, how come the accused bring a cheque as pre-prepared for double the amount of the alleged loan amount and hand it over to the complainant simultaneously while availing the alleged loan, has remained un-answered by the complainant.

19. Lastly, according to the complainant, the date of the loan was 6<sup>th</sup> or 7<sup>th</sup> September 2010. The date of the cheque at Exhibit P-1 is 06-09-2010. The date of filing of the private complaint in the Trial Court is admittedly 16-11-2010, which means, within two months ten days of the alleged loan, the complainant has filed a private complaint under Section 200 of the Code of Criminal Procedure, 1973, against the accused, alleging the offence punishable under Section 138 of the N.I. Act

against him. However, the complainant as PW-1 in her cross-examination dated 07-06-2012, has stated that, since one year prior to the filing of the complaint against the accused, she was demanding from the accused for the repayment of the loan amount. She has also stated that, on several occasions, she was asking the accused to make the repayment of the loan, however, the accused has denied that he has issued any cheque to her (complainant) and stated that she can do whatever she wants. If the said statement of the complainant that she was demanding the loan amount from the accused since about one year prior to the filing of the complaint is taken, then, the entire case of the complainant falls to the ground on its own, as demanding the payment of the loan amount which loan is said to have been given on 06-09-2010 cannot be made about ten months prior to the loan transaction. This makes it very clear that, somehow after securing the cheque at Exhibit P-1, which was signed by the accused, the complainant had misused the same and filed the present case.

20. The above conclusion that the complainant has not approached the Court with clean hands further gains support from the evidence of DW-1, who has in his evidence reiterated

the defence taken up by him in the cross-examination of the complainant (PW-1) and has stated that, his elder sister by name Smt. Devamma and his brother-in-law – Sri. Dodde Gowda had chit business and financial transaction with the accused. In that connection, in July-2004, they had obtained a blank, but duly signed cheque from the accused and had given the same to the complainant as a security for their transaction. The said fact was told to him by none else than his sister and brother-in-law at a later stage. Though the said statement of the accused (DW-1) was denied in his cross-examination, still, the various discrepancies, material variations in the evidence of PW-1 makes the defence of the accused as probable and thus making out a case on preponderance of probabilities in his favour, the accused could able to successfully rebut the presumption formed in favour of the complainant.

21. However both the Trial Court as well the Sessions Judge's Court have failed to notice this aspect and they were carried away only with the statement of the complainant (PW-1) and the documents marked by her from Exhibits P-1 to P.7(a) and held the accused guilty of the alleged offence, which finding

of the Trial Court and the Sessions Judge's Court is perverse and erroneous, as such deserves to be set aside.

22. In the light of the above, the alleged financial incapacity of the complainant to lend the loan as canvassed by the learned counsel for the petitioner/accused would not come to the forefront. However, a reading of the evidence led by the parties, more particularly of PW-1 would go to show that, she joined by her husband is running a Provision Store wherein she could able to make out a savings of a sum of ₹2,000/- per month and that, she also has got income from her mother's house in the form of sharing the lease amount of Mango garden being maintained by her mother, has remained specifically un-disputed and un-denied. From that evidence, though it can be inferred that the complainant had financial capacity to lend such a huge sum to the accused, still, the alleged financial capacity would not make out a case for her against the accused, proving the alleged guilt of the accused for the offence punishable under Section 138 of the N.I. Act.

23. Since as analysed above, the accused could able to successfully rebut the presumption formed in favour of the

complainant and as the complainant could not able to prove the alleged loan transaction with the accused, it has to be held that, the complainant has failed to prove the alleged guilt against the accused. Thus, the interference at the hands of this Court in the impugned judgments is warranted.

Accordingly, I proceed to pass the following:-

**ORDER**

[i] The Criminal Revision Petition is **allowed**;

[ii] The impugned judgment of conviction and order on sentence dated 31-08-2016, passed by the Principal Civil Judge and Judicial Magistrate First Class, at Bhadravathi, in C.C.No.4134/2010, holding the accused guilty of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him with imprisonment for a period of three months and to pay a fine of ₹2,75,000/-, and in default of payment of fine, to undergo simple imprisonment for a period of fifteen days, is **set aside**;

Consequently, the judgment passed by the IV Additional District and Sessions Judge, Shimoga,

sitting at Bhadravathi, dated 01-12-2018, in Criminal Appeal No.5023/2016, modifying the judgment of the Trial Court is also **set aside**.

[iii] The accused – Sri. Dodde Gowda, S/o. Mudde Gowda, Aged about 60 years, MPM Employee, Fire Department, Paper Town, Bhadravathi, Pin:-577 302, is acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

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

**Sd/-  
JUDGE**

BMV\*