

**IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH**

DATED THIS THE 30TH DAY OF NOVEMBER, 2022

BEFORE

THE HON'BLE MR. JUSTICE ANIL B. KATTI

CRIMINAL APPEAL NO.200005/2021

BETWEEN:

RAJKUMAR S/O. HARISINGH PAWAR,
AGE: 40 YEARS, OCC: GOVERNMENT EMPLOYEE,
R/O: C/O. SUBHASH PAWAR, PLOT NO.101,
NEAR LAXMI TEMPLE, TILAK NAGAR,
KUSNOOR ROAD,
KALABURAGI-585 103

... APPELLANT

(BY SRI CHAITANYAKUMAR CHANDRIKI, ADVOCATE)

AND:

GHODKE AKASH S/O. MOHAN,
AGE: 40 YEARS, OCC: MALE STAFF NURSE
MALE TRAUMA WARD,
SRI CHATRAPATI SHIVAJI MAHARAJ
GENERAL HOSPITAL (CIVIL HOSPITAL),
SOLAPUR,
STATE: MAHARASHTRA - 413 003

... RESPONDENT

(BY SRI LIYAQAT FAREED USTAD, ADVOCATE)

This Criminal Appeal is filed under Section 378(4) of Cr.P.C., praying to set aside the impugned order and judgment of acquittal dated 12.10.2020 passed by the IV Addl. Civil Judge & JMFC at Kalaburagi in C.C.No.309/2018 acquitting the respondent/accused for the offence punishable under Section 138 N.I. Act.

This appeal having been heard through Physical Hearing / Video Conference and reserved for Judgment on 27.10.2022, coming on for pronouncement of Judgment this day, delivered the following:

JUDGMENT

1. The appellant-complainant is challenging the judgment of acquittal passed by the IV Additional Civil Judge, JMFC, Kalaburagi in C.C. No.309/2018 dated 12.10.2020 for the offence under Section 138 of Negotiable Instruments Act.
2. The parties to the appeal are referred with their ranks assigned in the trial Court for the sake of convenience.
3. The factual matrix leading to the case of complainant can be stated in nutshell to the effect that the accused has borrowed a sum of Rs.8,00,000/- on 28.03.2016

for his family legal necessity and to discharge the debts. In order to repay the said amount, the accused has issued Cheque bearing No.640276 dated 27.06.2017 for a sum of Rs.8,00,000/- drawn on Bank of Maharashtra, Solapur Branch. The complainant had presented the said Cheque for realization through his Banker - Bank of India, Super Market Branch, Kalaburagi. The said Cheque was dis-honoured with an endorsement of Bank for insufficient fund on 28.06.2017. The complainant has issued Demand Notice on 19.07.2017 and the same is duly served to the accused on 24.07.2017. The accused has neither tendered Cheque amount nor replied to the said notice within the stipulated time. Therefore, the complaint is filed on 06.09.2017 for the offence under Section 138 of Negotiable Instruments Act, (Hereinafter referred to as '*N.I. Act*' for short).

4. In response to the summons, the accused has appeared before trial Court and contested the case. The trial Court after having heard the arguments of both sides and on perusal of documentary evidence has acquitted the accused for the offence under Section 138 of N.I. Act.
5. The appellant-complainant has challenged the said acquittal order passed by the trial Court contending that the trial Court has not properly appreciated the evidence on record and blindly accepted the rebuttal evidence of accused, as a result recorded erroneous finding to acquit the accused. The finding of the trial Court that the Bank Statement as per Ex.P7 belongs to the complainant and the Bank Statement of his wife as per Ex.P8 does not reflect the withdrawal of money from 26.03.2016 to 28.03.2016 is against the evidence on record. The complainant has paid cash of Rs.8,00,000/- by drawing the money from Bank and

the same is evidenced from the Bank Statement of his wife as per Ex.P8. Therefore, the findings recorded by the trial Court are not based on the legal evidence on record. Therefore, prayed for allowing the appeal and to convict the accused in accordance with law.

6. In response to the notice of appeal, the accused has appeared through his counsel.
7. The trial Court records have been secured.
8. Heard arguments of both sides.
9. The complainant has alleged in the complaint and during the course of his evidence has deposed to the effect that accused has borrowed loan of Rs.8,00,000/- on 28.03.2016. The complainant has given the said amount by cash. The accused has assured to repay the same on or before 28.11.2016. In order to repay the said loan amount, the accused

has issued Cheque bearing No.640276 dated 27.06.2017 as per Ex.P1. The said Cheque, on its presentation was bounced for want of sufficient funds in the account of accused as per return Memo at Ex.P2 and Bank Challan as per Ex.P3. The complainant has issued Demand Notice as per Ex.P4, the same is duly served to the accused on 24.07.2017 as per Ex.P6. The accused in spite of due service of notice has neither paid the amount as demanded in the notice, nor replied to the same. The trial Court on appreciating the said evidence on record and by drawing presumption in terms of Sections 118 and 139 of N.I. Act, has rightly held that complainant has discharged initial burden of proving the fact that the Cheque in question as per Ex.P1 was issued for lawful discharge of debt.

10. The trial Court for the reasons recorded in Para 15 to 25 has recorded a finding that the accused has

successfully placed rebuttal evidence to disprove the case of complainant that the Cheque in question as per Ex.P1 was issued for lawful discharge of debt. The trial Court has held that:

- (1) There is no transaction in between 26.03.2016 to 28.03.2016 as per Bank Statement at Exs.P7 and P8;
- (2) Cheque was issued as security for the loan of the wife of accused;
- (3) No any amount is mentioned in Ex.P4 - Demand Notice; and
- (4) No legally enforceable debt.

The appellant-complainant has contended that these findings recorded by the trial Court are not based on the legal evidence on record.

11. The complainant in the complaint has pleaded to the effect that on 26.03.2016, the accused had demanded

loan of Rs.8,00,000/-. The accused being the friend and having faith has agreed to give hand loan of Rs.8,00,000/-. The complainant on 28.11.2016 had been to Solapur for his personal work and has given Rs.8,00,000/- to the accused. The complainant has never pleaded that he has paid the said amount by withdrawing the money from his Bank Account. However, it has been elicited in the cross-examination of PW1 that he has withdrawn the money from State Bank of India, Temple Road Branch, Hyderabad. The complainant has produced the Bank Statement of himself and that of his wife. The complainant has never stated that he has withdrawn the money from his Bank Account. Therefore, the non-withdrawal of money from the Bank Account of complainant as per Ex.P7 during the relevant period *i.e.*, 26.03.2016 to 28.03.2016 cannot be a ground to hold that the

accused has no source of income to advance loan of Rs.8,00,000/- to the accused.

12. It is pertinent to note that the complainant-PW1 during the course of his examination-in-chief has produced the Bank Statements of himself and that of his wife as per Exs.P7 and P8. Otherwise there was no reason for the complainant to produce the Bank Statement of his wife as per Ex.P8. It means the complainant-PW1 wants to establish by the Bank Statement of himself as per Exs.P7 and P8 that he had sufficient source of income to pay hand loan of Rs.8,00,000/-. On careful perusal of the Bank Statement as per Ex.P8 belongs to the wife of complainant, it would go to show that she was having sufficient money in her account. It is not necessary that money has to be withdrawn in between the period from 26.03.2016 to 28.03.2016. The complainant has stated that he has paid the money by

cash to the accused. Looking to the Bank Statement of complainant as per Ex.P7 and that of his wife as per Ex.P8, it can be said that the complainant has sufficient source of income to lend the money.

13. The complainant has issued Demand Notice on 19.07.2017 as per Ex.P4. The said Demand Notice is duly served to the accused as per Ex.P6. The accused in spite of service of Demand Notice has neither replied to the said notice nor paid the Cheque amount. The accused by answering the Demand Notice would have made foundation by questioning the financial capacity of complainant in giving loan of Rs.8,00,000/- to the accused. The accused has neither replied to the notice issued by the complainant as per Ex.P4 nor offered any explanation during the course of his 313 Cr.P.C. statement. In this context it is useful to refer the latest decision of Hon'ble Supreme Court in the case of ***TEDHI SINGH Versus***

NARAYAN DASS MAHANT reported in **(2022) 6 Supreme Court Cases 735**, wherein it has been observed and held that when the complainant gives his evidence, unless a case is set up in the reply notice to the statutory notice sent, that the complainant did not have the wherewithal, it cannot be expected of the complainant to initially lead evidence to show that he had the financial capacity. However, the accused has right to demonstrate that the complainant in a particular case did not have the capacity and therefore, the case of the accused acceptable which he can do by producing independent materials, namely; by examining the witnesses and by producing documents, by pointing out to the material produced by the complainant itself, or through the cross-examination of the complainant. It has been further held that the accused is not expected to discharge an unduly high standard of proof. All which

the accused needs to establish is a probable defence. In the present case the accused wants to probablise his defence during the course of cross-examination of PW1. In view of the reasons recorded above, it has been observed and held that complainant by virtue of Bank Statements as per Exs.P7 and P8 has established that he had financial capacity to lend the money to accused. The complainant has never pleaded in the complaint nor deposed in his evidence that he has withdrawn the money from the Bank in between 26.03.2016 to 28.03.2016 and paid to the complainant. What has been elicited in the cross-examination of PW1 is that he has withdrawn the money from State Bank of India, Temple Road Branch, Hyderabad. It has not been elicited in the cross-examination that on which date or between which period and from whose Bank Account, has withdrawn the money. The complainant to show that he has

sufficient source of income has produced the Bank Statement as per Exs.P7 and P8 and for generating the money to pay to the accused. Therefore, the finding of the trial Court that there is no entry in the Bank Statement Account of complainant as per Exs.P7 and P8 no any transaction of withdrawal of money was entered from 26.03.2016 to 28.03.2016 cannot be a ground to hold that the complainant has no financial capacity to lend the money covered under the Cheque as per Ex.P1.

14. The second defence of the accused is that the Cheque in question as per Ex.P1 was issued as a security for the loan of his wife with the complainant. It has been elicited in the cross-examination of PW1 that wife of accused had taken loan of Rs.2,50,000/- and receipt was executed for the said transaction. Out of the said amount there was balance of Rs.80,000/- and to recover the same, the present false complaint is filed.

The accused has not lead any defence evidence, nor his wife was examined to prove the fact that the accused has issued the Cheque as per Ex.P1 as a security for the loan availed by his wife. There is also no any explanation as to the wife of accused having loan transaction of Rs.2,50,000/- with complainant and there was balance of Rs.80,000/- and at the instance of his wife the accused has issued the Cheque as a security for the balance amount of Rs.80,000/-. The accused has not made any such foundation by replying to the Demand Notice issued by the complainant as per Ex.P4. The accused has also not offered any explanation during the course of his statement under Section 313 Cr.P.C. The wife of the accused would have been the best witness to prove the said fact. However, for the reasons best known to the accused, has not chosen to examine his wife to substantiate the above referred fact. The

accused has not produced any particulars as to when the loan was availed by his wife from the complainant and on what date the Cheque was issued as a security to establish the nexus between issuance of Cheque as per Ex.P1 by the accused and loan availed by wife of accused. Therefore, in the absence of any evidence on record, the defence of accused that Cheque in question as per Ex.P1 was issued as a security for the loan availed by the wife of accused cannot be accepted.

15. The accused has contended that Cheque amount is not mentioned in the Demand Notice as per Ex.P4. In terms of Section 138(b) the Demand Notice has to be issued within a period of 30 days from the date of receipt of Bank intimation in writing. This rider has been complied. The notice as per Ex.P4 contains all the relevant particulars regarding the dishonour of Cheque as per Ex.P1 issued by the accused. The

complainant has demanded the payment of money covered under the Cheque as per Ex.P1 by stating that the same is bounced for want of sufficient funds in the account of accused. Therefore, non-mentioning of Cheque amount for making demand to pay the Cheque amount cannot be accepted as a ground to hold that there is no any demand to pay the Cheque amount as required in terms of Section 138(b) of the N.I. Act.

16. The accused has also contended that there was no legally enforceable debt. When the complainant has discharged his initial burden in terms of Sections 118 and 139 of N.I. Act, then burden shifts on the accused to prove that there was no any existence of legally enforceable debt. The materials that have been brought on record during the course of cross-examination of PW1 cannot be accepted as sufficient evidence to disprove the presumption available in

favour of complainant in terms of Section 139 of N.I. Act. Therefore, where the accused fails to probablise his defence by way of rebuttal evidence, it will have to be held that in view of statutory presumption in terms of Section 139 of N.I. Act, the Cheque in question was issued for lawful discharge of debt has to be accepted. The trial Court has not properly appreciated the evidence on record and blindly accepted the defence of accused as referred above in the cross-examination of PW1 without there being any evidence to disprove the presumption available in favour of complainant in terms of Section 139 of N.I. Act. Therefore, in my opinion the trial Court has committed error in acquitting the accused. In view of the reasons recorded above, it is held that the accused has committed the offence under Section 138 of N.I. Act.

17. The question now remains is about the imposition of sentence on accused in terms of Section 138 of N.I. Act. The offence under Section 138 of N.I. Act is punishable with imprisonment which may extend to 2 years or with fine which may extend to twice the amount of Cheque or with both. The Court has to exercise judicial discretion in imposing the sentence by keeping in mind the facts and circumstances of the case, nature of transaction and other attending circumstances. Looking to the facts and circumstances of the case, coupled with the material evidence on record, in my opinion if the accused is sentenced to pay fine of Rs.8,00,000/- and in default to undergo Simple Imprisonment is ordered will meet the ends of justice. Consequence, I proceed to pass the following:

ORDER

The appeal filed by the appellant-complainant is hereby allowed.

The judgment of acquittal passed by the IV Additional Civil Judge and JMFC, Kalaburagi, dated 12.10.2020 is hereby set aside.

The accused is convicted and sentenced to pay a fine of Rs.8,00,000/- and in default to undergo Simple Imprisonment for the offence under Section 138 of N.I. Act.

The Registry to transfer records along with copy of this judgment to the trial Court.

**Sd/-
JUDGE**

SBS*