IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH

DATED THIS THE 16TH DAY OF DECEMBER, 2022

BEFORE

THE HON'BLE MR. JUSTICE ANIL B. KATTI

CRIMINAL APPEAL NO.200106/2020

BETWEEN:

Sri Karibasappa
S/o Anaveerappa Telasanga,
Age: 61 Years, Occ: Business (Electrical),
R/o Telsanga Electricals
Meenaxi Chowk,
Vijayapura-586101.

... APPELLANT

(BY SRI D.P. AMBEKAR, ADVOCATE)

AND:

Sri Mallikarjun
S/o Shankareppa Heralagi,
Age: 57 Years, Occ: Service,
C/o Banagar Galli, Jorapur Peth,
Vijayapura-586101.

... RESPONDENT

(BY SRI SHIVANAND V. PATTANASHETTI, ADVOCATE)

This Criminal Appeal is filed under Section 378(4) of Cr.P.C., praying to set aside the judgment and order of acquittal dated 06.07.2020 passed in Criminal Case No.1527/2012 by the II Addl. Civil

Judge and JMFC-II, at Vijayapura and convict the respondent-accused for the offences punishable under Section 138 of Negotiable Instruments Act.

This appeal having been heard through Physical Hearing/Video Conference and reserved for Judgment on 08.12.2022, coming on for pronouncement of Judgment this day, the Court delivered the following:

JUDGMENT

1. The appellant/compiainant is challenging the judgment of acquittal passed by II Additional Civil Judge & JMFC-II, Vijayapura in C.C.No.1527/2012, dated 06.07.2020 for the offence under Section 138 of Negotiable Instruments Act (hereinafter referred to as 'N.I. Act').

2. The parties to the appeal are referred with their ranks as 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 on 07.02.2010 accused has approached the complainant and requested to give hand loan of Rs.2,00,000/-, which was required for his contract work. The complainant has gave Rs.2,00,000/- on assurance of accused that he will return the same within 9 months. The accused in order to discharge the said debt has issued Cheque bearing No.130702 dated 07.12.2010 drawn on Alahabad Bank, Vijayapura. The complainant presented the said Cheque for collection on 27.01.2011 and the same was dishonoured for want of sufficient funds vide bank endorsement dated 28.01.2011. On intimating the said fact to the accused, the accused has requested to represent the Cheque after 20 days. The complainant has represented

the Cheque on 28.02.2011 through his Banker State Bank of India, Treasury Bank, Vijayapura. The same was again dishonoured with endorsement of insufficient funds vide memo of Bank dated 01.03.2011. The complainant has issued Demand Notice on 14.03.2011. The wife of accused has received the notice on 16.03.2011. However, the accused has neither replied to the notice nor paid the money covered under the Cheque. The complaint is filed on 29.04.2011.

4. In response to the summons, the accused has appeared through counsel and contested the case. The complainant in order to prove his case relied on the oral evidence of PW1 and the documents as per Exs.P1 to Ex.P6. The accused has examined himself as DW1 and relied on the document as per Ex.D1. The Trial Court after

having heard the arguments of both sides has acquitted the accused from the charge leveled against him for the offence under Section 138 of N.I. Act.

5. The appellant/complainant has challenged the correctness and legality of the said judgment of acquittal contending that non-mentioning of date as to when money was given cannot be fatal to the case of complainant. The Trial Court was not justified in doubting the loan transaction by invoking Section 269-SS of Income Tax Act and committed serious error in recording the finding that it is not legally enforceable debt. The accused has never questioned financial capacity of complainant in lending the money. The claim of accused that Cheque as per Ex.P1 was given as security and there was no cause of action brought on record during the course of cross-

examination of PW1 is not supported by any evidence on record. The approach and appreciation of oral and documentary evidence by the Trial Court is contrary to law and evidence on record. Therefore, prayed for allowing the appeal and to convict the accused for the charge leveled against him.

6. In response to the notice of appeal, respondent has appeared through his counsel.

7. The trial Court records have been secured.

8. Heard the arguments of both sides.

9. The appellant/complainant in support of his oral evidence about issuance of Cheque by accused for legally enforceable debt, has relied on the Cheque as per Ex.P1 dated 07.12.2010. The complainant has presented the said Cheque on

27.01.2011 and the same was dishonoured with an endorsement as 'insufficient funds' vide Bank intimation dated 28.01.2011. On intimation of the said fact, on request of accused, complainant has represented the Cheque after 20 days on 28.02.2011. The same was again dishonoured as 'insufficient funds' vide Bank intimation dated 01.03.2011 at Ex.P3. The complainant has issued Demand Notice dated 14.03.2011 at Ex.P5. The same is served to the wife of accused on 16.03.2011 at Ex.P6. The accused has neither replied to the notice nor paid the amount covered under the Cheque. The complaint came to be filed on 29.04.2011. If the above referred documents are perused and appreciated with the oral testimony of PW1 then it is evident that the complainant has discharged his initial burden of proving the fact that accused

has issued the Cheque in question at Ex.P1 for lawful discharge of debt. The Trial Court also has recorded its satisfaction of complainant having discharged his initial burden of proving the fact that the Cheque - Ex.P1 is issued by accused for lawful discharge of debt.

10. The Trial Court has held that:- (1) the Demand Notice is not served to accused; (2) there is material alteration in the Cheque - Ex.P1; (3) the date as to when money was given has not been stated in the complaint; (4) the debt is time barred; (5) the transaction is hit by Section 269-SS of Income Tax Act; and (6) the Cheque in question as per Ex.P1 was issued by accused as security for the loan of Rs.50,000/-. On such finding concluded that accused has successfully rebutted the presumption available in favour of complainant in terms of Sections 118 and 139 of

N.I. Act, by probablizing his defence to disprove the initial presumption available in favour of complainant.

11. The Trial Court by relying on the decision of Hon'ble Supreme Court reported in 2008 (4) SCC Page No.54, Krishna Janardhan Bhat vs. Dattatraya G.Hegde, has held that Section 139 of N.I. Act merely raises a presumption that the Cheque was issued in favour of the holder of Cheque and the presumption cannot be extended that it was so issued for lawful discharge of debt or other liability. This decision has been overruled in the subsequent decision reported in (2010)11 SCC Page No.441, Rangappa vs. Sri Mohan, wherein it has been observed and held that, when issuance of Cheque with the signature of accused on the account maintained by him is proved then it will

have to be held that initial burden has been discharged that the Cheque in question was issued for lawful discharge of debt. Therefore in view of this decision, the finding of the Trial Court that Section 139 of N.I. Act merely raises a presumption about issuance of Cheque in favour of holder of the Cheque and same presumption cannot be extended for discharge of any debt or other liability cannot be legally sustained.

12. The onus now shifts on the accused to prove by way of rebuttal evidence that the Cheque in question as per Ex.P1 was not issued for any lawful discharge of debt. The accused apart from relying on cross-examination of PW1 has lead his own evidence as DW1 and relied on the document as per Ex.D1.

13. The first contention of the accused is that Demand Notice - Ex.P5 is not duly served to accused and signature appearing on Ex.P6 - acknowledgment card is not his signature. The Demand Notice - Ex.P5 is posted to the residential address of the accused where he ordinarily resides. The said notice is served as per Ex.P6 - acknowledgment. It is true that signature of accused is not appearing on Ex.P6. One S.M. Haralgi has received the notice on 16.03.2011. It is not the case of accused that S.M. Haralgi is not his family member, who resides with him. The accused during the course of cross-examination has admitted that his wife's name is Sudha and she is residing with him. However, accused has denied that he has two wives by name Sudha and Shweta. It is pertinent to note that accused has not denied

that the signature appearing on Ex.P6 is not that of his wife. It is only contended that his signature is not appearing on Ex.P6. However, the fact remains that one S.M. Haralgi, who is the wife of accused, has received the notice. The accused has admitted in his cross-examination that he is permanent resident of Banagar Galli of Vijayapura. In terms of Section 27 of the General Clauses Act, 1897, meaning of service by post is where any (Central Act) or regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression served or either of the expressions give or signed or any other expression is used, then unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter

containing the document, and, unless the contrary is proved, to have been effected at the time which the letter would be delivered in the ordinary course of post. Therefore, when the Demand Notice - Ex.P5 is posted to the correct address and same is received by family member of the accused and in the absence of any contrary evidence, it will have to be held that there is deemed service of notice.

14. The trial Court in Para Nos.27 to 29 has observed and held that, there is material alteration in the Cheque - Ex.P1 and in terms of Section 87 of N.I. Act is void document, which cannot be legally enforced. The said proviso is subject to those of Sections 20, 49, 86 and 125 of N.I. Act. Where the payee is the holder of bills of exchange and is not willing to part with the same unless the entire amount covered by

the bills is realized and the bills are subsequently dishonoured, it is not open for the drawer to institute suit for compensation against the acceptor after bills are dishonoured. On perusal of the Cheque in question - Ex.P1, it would go to show that there is overwriting in showing the year '2010' i.e., the 2nd figure. The bank has not refused to honour the Cheque on account of overwriting figure '0' in showing the year of Ex.P1 as material alteration. On the other hand, the Cheque - Ex.P1 is dishonoured for want of sufficient funds in the account of accused. Looking to the evidence of accused, it would go to show that he has issued the Cheque as security for loan availed from the complainant in the year 2006-07. Whereas, the Cheque - Ex.P1 is issued on 07.12.2010, the date on which, complainant claims that the accused has issued

the Cheque for lawful discharge of debt. Therefore, in my opinion, the alleged alteration in overwriting the '2nd figure' while showing the year does not amount to material alteration, which can render the Cheque as invalid, more particularly, when the Bank has not refused to honour the Cheque on the alleged alteration in showing the year.

15. The 3rd contention is that it is not pleaded in the complaint or in the affidavit evidence, the date as to when money was given to the accused. It is stated in Para 2 of the complaint that accused has approached complainant on 07.02.2010 and requested him to give loan of Rs.2,00,000/-. The date of payment of money is very much mentioned in the complaint. It has been elicited in cross-examination of PW1 as to when accused approached the complainant for seeking loan.

The complainant has stated that accused was asking for money from 01.02.2010, but he has paid the money on 07.02.2010. There is no any legal requirement to plead as to the date on which accused approached the complainant for seeking money. The date on which the payment made is material and that has to be pleaded, which has been done by the complainant in the complaint averments.

16. The 4th contention of the accused is that debt should be acknowledged within period of limitation and the claim of complainant is time barred. The trial Court in terms of Section 19 of Limitation Act, having raised doubt about amount due to complainant in 2010 has held that the debt is time barred. The complainant has pleaded that accused has taken money from him on 07.02.2010, agreeing to pay within 9

months. The accused has issued Cheque dated 07.12.2010 in discharge of the debt availed on 07.02.2010. The complaint is filed on 29.04.2011. It is true that compiainant has admitted in his cross-examination that accused has given his Cheque at the time of taking money as security. It means that accused has given post dated Cheque for discharge of the debt taken on 07.02.2010. The date mentioned in the Cheque - Ex.P1 is material to give effect for realization of money covered under the Cheque. Therefore, presentation of Cheque within a period of 6 months in terms of Section 138(a) of N.I. Act, which was reduced to 3 months as per the RBI Notification with effect from 01.04.2012 will have to be read as 'presentation of Cheque within a period of 6 months or 3 months with effect from 04.04.2012

is from the date on which it is drawn or within the period of its validity, whichever is earlier'. In the present case the Cheque - Ex.P1 is issued on 07.12.2010 i.e., prior to the amendment and period of 6 months is applicable in this case. The Cheque is presented for collection within the stipulated time. The issuance of post dated Cheque was under consideration before the Hon'bie Supreme Court in the decision reported in 2019 Criminal Law Journal page 3227 (SC) Bir Singh vs. Mukeshkumar, wherein it has been observed and held that:-

> "The proposition of law, which emerges from the judgments referred to above is that the onus to rebut the presumption under Section 139 that the Cheque has been issued in discharge of debt or liability is on the accused and the fact that the Cheque might be post dated does not absolve

> the drawer of a Cheque of the penal consequences of Section 138 of N.I. Act."

In the present case also, though the post dated Cheque was delivered by accused on 07.02.2010 mentioning the date as 07.12.2010, the said Cheque has been presented within the statutory period of time covered under Section 138(a) of N.I. Act. Therefore, there is no question of debt being time barred and the contrary finding recorded by the trial Court cannot be legally sustained.

17. The 5th contention is that the amount covered under the Cheque as per Ex.P1 is in excess of Rs.20,000/- and the same is in violation of Section 269-SS of Income Tax Act. The Trial Court has recorded the finding by invoking Section 269-SS of Income Tax Act, that the loan

transaction covered under the Cheque as per Ex.P1 is in excess of ₹20,000/- and the transaction should have been evidenced through account payee Cheque only. Secondly, the loan transaction must be shown in the Income Tax Returns. On these grounds, the Trial Court has held that the Cheque in question as per Ex.P1 was not issued for any legally enforceable debt.

18. The constitutional validity of Section 269-SS of Income Tax Act was called in question before the Hon'ble Supreme Court in the case reported in (2002) 6 SCC Page No.259, Assistant Director of Inspection Investigation vs. A.B.Shanti, wherein it has been observed and held that:-

> "The object of introducing Section 269-SS was to ensure that a taxpayer should not be allowed to give false explanation for his unaccounted money, or if he has

> given some false entries in his accounts, he should not escape by giving false explanation for the same. During search and seizures, unaccounted money is unearthed and the taxpayer would usually give the explanation that he had borrowed or received deposits from his relatives or friends and it is easy for the so-called lender also to manipulate his records later to suit the plea of taxpayer. The main object of Section 269-SS was to curb this menace. As regards the tax legislations, it is a policy matter, it is for Parliament to decide in which manner the legislation should be made. Of course, it should stand the test of constitutional validity."

The Hon'ble Supreme Court having so observed negated the contention of appellants that taking a loan or receiving a deposit is a single transaction wherein a lender and barrower are involved and by the impugned section the

barrower alone is sought to be penalized and the lender is allowed to go scot-free.

19. The proviso 269-SS only prescribes the mode of taking or accepting certain loans, deposits and specified sum. The said proviso would speak to the effect that no person shall take or accept from any other person (herein referred to as the depositor). Mode of taking any loan or deposit or any specified sum, otherwise than by an account-payee Cheque or account or accepting payees and draft or use of electronic clearing system through a bank account. The proviso was inserted in the Income Tax Act debarring person from taking or accepting from any other person any loan or deposit otherwise than by account payee cheque or account payee bank draft, if the amount of such loan or deposit or the aggregate amount of such loan or deposit is

₹10,000/- or more. The amount of ₹10,000/- was later revised as ₹20,000/- with effect from 01.04.1989. The said proviso does not prohibit for giving or lending loan, it is only taking and acceptance is prohibited. The acceptance of loan by way of cash in excess of ₹20,000/- may attract panel provision in terms of Section 271-D. Whether the provisions of Section 269-SS of the Income Tax Act 1961, disentitles the plaintiff from filing recovery suits was directly under consideration by the coordinate bench of this Court in the decision reported ILR 2007 Kar 3614 - Mr. Mohammed Iqbal vs Mr. Mohammed Zahoor, wherein it has been held that:-

> "The main object introducing the provisions of Section 269-SS of the Income Tax Act is to curb and unearth black money. But the Section does not

> declare the present transaction which is brought before the court illegal, wide and unenforceable."
>
> (Emphasis supplied)

This Court while recording the said finding has taken note of the decision of Apex Court in Assistant Director of Inspection Investigation referred above. In para 7 of the said judgment concluded that in the light of the observations of Apex Court, it cannot be said that Section 269-SS only provided for the mode of acceptance payment or repayment in certain cases so as to counteract evasion of Tax. Section 269-SS does not declare all transactions of loan, by cash in excess of ₹20,000/- as invalid, illegal or null and void, while as observed by the Apex Court, the main objection of introducing the provisions was to curb and unearth black money. To construe Section 269-SS as a competent enactment

declaring as illegal and enforceable all transactions of loan, by cash, beyond ₹20,000/- in my opinion cannot be countenanced. It is true that the said decision has been rendered in a Civil suit for recovery of money, but the principle of law with regard to the effect of Section 269-SS of Income Tax Act holds good. Therefore, in view of the principles enunciated in the above referred decisions, the finding of the Trial Court that the transaction involved leading to issuance of cheque in question as per Ex.P1 which is contravention of Section 269-SS of Income Tax Act has become unenforceable debt and by virtue of the same, the presumption in favour of complainant stood rebutted cannot be legally sustained.

20. Lastly, it is contended by the accused that he had taken loan of Rs.50,000/- from the

complainant during 2006-2007. In order to discharge the said debt along with interest has repaid an amount of Rs.2,50,000/- by way of Alahabad Bank DD dated 30.11.2009. The accused has issued undated Cheque as a security. The complainant even after receiving money did not return the Cheque in spite of demand made by accused even after lapse of 5 to 6 months. The complainant has stated that the Cheque is not traced and engaged in marriage of his son. In support of such contention, accused relied on his own evidence as DW1 and the admission of PW1 during the course of his cross-examination.

21. The accused during the course of his evidence, has reiterated the above referred facts and claimed that complainant has misused the Cheque and filed false complaint. It is true that

complainant during the course of his cross-examination has admitted that accused issued the Cheque as a security for the money received by him. The accused has claimed that he had taken loan of Rs.50,000/- from the complainant during 2006-2007 and he has repaid the said loan amount with interest amounting to Rs.2,50,000/- by way of DD drawn on Alahabad Bank Ltd., dated 30.11.2009. The accused has contended that as a security for this transaction has issued signed Cheque, which complainant has misused the same and filed false complaint against him.

22. The accused has to establish the nexus between alleged taking loan of Rs.50,000/- and the issuance of signed Cheque as a security for the said transaction. Otherwise, accused cannot take the advantage of complainant admitting

that he has received the Cheque as a security as referred above. The onus is on the accused to prove that he has issued signed blank Cheque as a security for the loan of Rs.50,000/-, which he claims to have repaid with interest amounting to Rs.2,50,000/- by way of DD dated 30.11.2009 drawn on Alahabad Bank.

23. The accused has not given any particulars as to when he has availed the loan of Rs.50,000/- from the complainant and agreed to repay the same with interest. The agreed rate of interest is also not deposed by accused during the course of his evidence. Looking to the claim of accused that he has availed loan of Rs.50,000/- during 2006-2007 and he has repaid the same on 30.11.2009 with interest amounting to Rs.2,50,000/- as per the account statement at Ex.D1, the maximum period approximately

would be about 3 years. If the maximum interest at the rate of 25% per annum on Rs.50,000/- is calculated, then it works out to Rs.12,500/- per annum and for 3 years, at the most it may works out to Rs.37,500/-. The maximum interest on Rs.50,000/- for 3 years may come to Rs.87,500/-. It is for the accused to offer reasonable explanation as to how the interest on Rs.50,000/- works out to Rs.2,00,000/- within a period of 3 years. In the absence of any reasonable explanation of paying such an exorbitant interest on the alleged loan of Rs.50,000/- totally amounting to Rs.2,50,000/-, it cannot be accepted that the accused has probalized his defence that he has issued the Cheque - Ex.P1 as security for the loan of Rs.50,000/-. The trial Court was swayed away by the eye-wash explanation offered by accused

in the form of evidence of DW1 and Ex.D1 and has wrongly accepted rebuttal evidence to disprove the presumption available in favour of the complainant in terms of Sections 118 and 139 of N.I. Act.

24. The learned counsel for the accused in support of his contention that judgment of acquittal cannot be interfered by the appellate Court, where the two views are possible and the one favouring the accused has to be accepted relied the latest decision of the Hon'ble Supreme Court in Crl.A. No.410-411/2015 - Ravi Sharma vs. State (Government of NCT of Delhi) dated 11.07.2022, wherein it has been observed and held that:-

> "While dealing with an appeal against acquittal by invoking Section 378 of Cr.P.C., the appellate Court has to consider whether the trial Courts view

> can be turned as possible one, particularly, when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the appellate Court has to be relatively slow in reversing the order of the trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened, but only strengthened. Such a double presumption that enurs in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters."

There cannot be any dispute with regard to proposition of law laid down by the Hon'ble Supreme Court in the said decision. The appellate Court in terms of Section 386(a) of Cr.P.C., has to re-appreciate the evidence on record, reverse such order and direct that further enquiry be made, or that the accused be

re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law. In the above referred decision of Hon'ble Supreme Court also, it has been only held that the appellate Court should be cautious in appreciating the evidence, where the appeal is against the judgment of acquittal, since the accused is enjoying the benefit of double presumption of innocence. In the present case, the accused by way of rebuttal evidence has failed to probablize his defence to disprove the statutory presumption available in favour of the complainant in terms of Sections 118 and 139 of N.I. Act. The failure of the accused to place rebuttal evidence or the defence being found to be not legally sustainable in law, then it will have to be held that the complainant has proved the

charge leveled against the accused for the offence under section 138 of N.I. Act.

25. The question now remains is imposition of sentence. Looking to the facts and circumstances of the case, if the accused is sentenced to pay fine of ₹2,00,000/- in default of payment of fine shall undergo imprisonment for three months is imposed would meet the ends of justice. Consequently, proceed to pass the following:

ORDER

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

The judgment of acquittal passed by II Additional Civil Judge & JMFC-II, Vijayapura in CC No.1527/2012 dated 06.07.2020 is hereby set aside.

The accused is convicted for the offence under Section 138 of N.I. Act and sentenced to pay fine of ₹2,00,000/- in default of payment of fine shall undergo imprisonment for three months.

The Registry is directed to send the copy of judgment and the Trial Court Records to the Trial Court.

Sd/-
JUDGE

Sbs*