IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 9TH DAY OF NOVEMBER, 2023

BEFORE

THE HON'BLE MR JUSTICE S RACHAIAH

CRIMINAL APPEAL NO. 2000 OF 2022 (A)

BETWEEN:

R PRAMOD
S/O V N RAMAKRISHNAIAH
AGED ABOUT 34 YEARS
R/AT NO.222 'A' MAIN
I CROSS, MURALI HOTEL STREET
BHYRAWESHWARANAGARA
MAGADI MAIN ROAD
SUNKADAKATTE
BANGALORE – 560 091.

…APPELLANT

(BY SRI. M K SANDEEP FOR
SRI. B ROOPESH, ADVOCATE)

AND:

GANGADHARAIAH
S/O GANGAPPA
AGED ABOUT 54 YEARS
R/AT NO.23, 3RD MAIN
3RD CROSS, JNANAJYOTHI NAGAR
ULLAL ROAD
BENGALURU – 560 056.

…RESPONDENT

(BY SRI.SURESH D.DESHPANDE, ADVOCATE)

THIS CRL.A FILED U/S.378 OF CR.P.C PRAYING TO SET ASIDE THE IMPUGNED JUDGMENT OF ACQUITTAL DATED 01/10/2022 PASSED IN CRL.A.NO.858/2019 BY THE LIX ADDITIONAL CITY CIVIL AND SESSIONS JUDGE (CCH-60) AT BENGALURU AND ETC.,

THIS CRIMINAL APPEAL HAVING BEEN HEARD THROUGH PHYSICAL HEARING / VIDEO CONFERENCING HEARING AND RESERVED ON 18.08.2023 BEFORE THE PRINCIPAL BENCH AT BENGALURU BENCH, COMING ON FOR PRONOUNCEMENT OF JUDGMENT, BEFORE THE DHARWAD, THROUGH VIDEO CONFERENCING, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

1. This appeal is filed by the complainant being aggrieved by the judgment and order of acquittal dated 01.10.2022 in Criminal Appeal No.858/2019 on the file of LIX Additional City Civil and Sessions Judge (CCH-60), Bengaluru.

2. The rank of the parties in the Trial Court henceforth will be considered accordingly for convenience.

Brief facts of the case:

3. It is the case of the complainant that the accused approached him for financial assistance on 14.09.2015 and requested him to make payment of Rs.20.00 lakhs for his domestic problems. The complainant and his family members considering the said need advanced the said amount in cash to the accused. The accused at the time of availing the said loan had agreed to repay the same within six months. In the first week of April 2016, the complainant demanded him to repay the said amount, at that time, the accused sought for two months time to repay the said amount. When the complainant demanded the accused to repay the said amount, the accused issued two cheques for a sum of Rs.10.00 lakhs each and instructed the complainant to present the cheques for

encashment. When those cheques were presented for encashment, the cheques were returned with a shara as 'funds insufficient'. Notice was issued and brought to the knowledge of the accused about dishonour of cheques on 13.07.2016. The notice was returned with a shara as "door lock, intimation delivered, not claimed". Therefore, a complaint came to be lodged by the complainant before the jurisdictional Magistrate.

4. To prove the case of the complainant, the complainant examined himself as PW.1 and got marked 29 documents as Exs.P1 to P29. On the other hand, the accused examined himself as DW.1 and got marked Exs.D1 to D5. The Trial Court after appreciating the oral and documentary evidence on record, convicted the accused and sentenced him to pay fine amount of Rs.20.00 lakhs and in default of the same, he is ordered to undergo simple imprisonment for one year. In an appeal filed by the accused, the Appellate Court allowed the appeal and set aside the judgment of conviction and order of sentence passed by the Trial Court. Hence, this appeal.

5. Heard Sri.M.K.Sandeep, learned counsel appearing on behalf of Sri.B.Roopesh, learned counsel for the appellant

and Sri.Suresh D.Deshpande, learned counsel for the respondent.

6. It is the submission of the learned counsel for the appellant that the Appellate Court failed to take note of the transaction and recorded the acquittal which is perverse and illegal and it is also against the evidence on record both oral and documentary. Hence, the same is liable to be set aside.

7. It is further submitted that the complainant had lent amount in the month of September, 2015 and the source of lending the said amount has also been explained in the evidence of the complainant. The mother of the complainant Smt.Sukanya had possessed site in Srigandadakaval and another site at Banashankari 6th Stage. A site at Srigandadakaval was sold on 03.07.2014 as per the sale deed which is marked as Ex.P8 and another site situated at Banashankari sold on 26.08.2015. The amount which generated through the sale deed executed in favour of two persons has lent to the accused. It is also further stated that the complainant was working as contractor by profession and the agreement of construction has been produced and marked as Ex.P12. The said agreement discloses that the amount of

Rs.36,25,000/-. Thereby the complainant establishes the financial capacity.

8. It is further submitted that once the execution of the cheques and the signatures are admitted, the presumption has to be raised in favour of the complainant that the said cheques were issued for consideration. The Appellate Court failed to take note of the transaction and recorded the acquittal which is perverse, illegal and the same is liable to be set aside.

9. It is further submitted that the accused had to rebut the presumption by leading cogent evidence. However, the accused has not raised any probable defence to rebut the presumption. Such being the fact, the Appellate Court failed to take note not only the transaction but failed to appreciate the law on the N.I. Act properly. As a result, the impugned judgment is passed, which is required to be set aside.

10. To substantiate his contention, the learned counsel for the appellant relied on the following judgments:

1. Tedhi Singh Vs. Narayan Dass Mahant[1].
2. T.Vasanthakumar Vs. Vijayakumari[2].

[1] (2022) 6 SCC 735
[2] (2015)8 SCC 378

3. Suresh Balakrishna Vs. Mahadev Ningappa Piragi[3].
4. Chuni Lal Vs. Indira Seth[4].
5. S.R.Muralidhar Vs. Ashok.G.Y[5].

Making such submission, the learned counsel for the appellant prays to allow the appeal.

11. Per contra, the learned counsel for the respondent/accused vehemently justified the judgment and order of acquittal passed by the Appellate Court and submitted that mere possession of the cheques is not sufficient to justify the loan transactions. The complainant has to prove his case beyond all reasonable doubt that he had lent such huge amount, when the accused denied the transactions. The findings of the Appellate Court in respect of the transactions are absolutely correct. The complainant has not disclosed as to when the loan was advanced and where the said amount was generated has not been explained by the complainant. Such unexplanation resulted in drawing the adverse inference and the order of acquittal passed by the Appellate Court is proper. Such findings are appropriate and interference with the said findings may not be warranted.

[3] LAWS(KAR)-2011-2-76
[4] LAWS(HPH)-2016-11-5
[5] ILR 2001 KAR 4127

12. In respect of his contention, the learned counsel for the respondent relied on the following judgments of the Hon'ble Supreme Court:

1. Basalingappa Vs. Mudibasappa[6].
2. John K.Abraham Vs. Simon C.Abraham and another[7].
3. Tummala Verateswar Rao v. State of Andhra Pradesh[8]
4. Kulwinder Kaur alias Kulwinder Gurcharan Singh v. Kandi Friends Education Trust & others[9].
5. K.Prakashan Vs. P.K.Surenderan[10].

Making such submission, the learned counsel for the respondent prays to dismiss the appeal.

13. Having heard the learned counsel for the respective parties and also perused the findings of the Appellate Court, it is appropriate to refer to the preposition of law before adverting to the facts of the case. In the case of **BIR SINGH v. MUKESH KUMAR[11],** paragraph No.18, 20, 24 and 33 reads thus:

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[6] AIR 2019 SC 1983
[7] (2014) 2 SCC 236
[8] (2014) 2 SCC 240
[9] AIR 2006 SCC 1333
[10] 2008(1)DCR 151 SCC
[11] (2019) 4 SCC 197

*"**18.** In passing the impugned judgment and order dated 21-11-2017, the High Court misconstrued Section 139 of the Negotiable Instruments Act, which mandates that unless the contrary is proved, it is to be presumed 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. Needless to mention that the presumption contemplated under Section 139 of the Negotiable Instruments Act, is a rebuttable presumption. However, the onus of proving that the cheque was not in discharge of any debt or other liability is on the accused drawer of the cheque.*

***20.** Section 139 introduces an exception to the general rule as to the burden of proof and shifts the onus on the accused. The presumption under Section 139 of the Negotiable Instruments Act is a presumption of law, as distinguished from presumption of facts. Presumptions are rules of evidence and do not conflict with the presumption of innocence, which requires the prosecution to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law and presumptions of fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact as held in Hiten P. Dalal.*

24. *In K.N. Beena v. Muniyappan, this Court held that in view of the provisions of Section 139 of the Negotiable Instruments Act read with Section 118 thereof, the Court had to presume that the cheque had been issued for discharging a debt or liability. The said presumption was rebuttable and could be rebutted by the accused by proving the contrary. But mere denial or rebuttal by the accused was not enough. The accused had to prove by cogent evidence that there was no debt or liability. This Court clearly held that the High Court had erroneously set aside the conviction, by proceeding on the basis that denialsaverments in the reply of the accused were sufficient to shift the burden of proof on the complainant to prove that the cheque had been issued for discharge of a debt or a liability. This was an entirely erroneous approach. The accused had to prove in the trial by leading cogent evidence that there was no debt or liability."*

33. *A meaningful reading of the provision of the Negotiable Instrument Act, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces the evidence to rebut the presumption that the cheque had been issued for payment of debt or in discharge of a liability. It is immaterial that the cheque may have been filled by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the*

penal provisions of Section 138 would be attracted"

14. It is also relevant to take note of the dictum of the Hon'ble Supreme Court in the case of ***KISHAN RAO v. SHANKARGOUDA***[12]**,** paragraph Nos. 18 to 22 read thus:

> *"**18**. Section 139 of the 1881 Act provides for drawing the presumption in favour of holder. Section 139 is to the following effect:*
>
> *"**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.*
>
> ***19**. This Court in Kumar Exports v. Sharma Carpets, had considered the provisions of the Negotiable Instruments Act as well the Evidence Act. Referring to Section 139, this Court laid down the following in paras 14, 15, 18 and 19: (SCC pp. 519-20)*
>
> *"14. Section 139 of the Act provides that 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.*
>
> *15. Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable), and (3) "conclusive presumptions" (irrebuttable).*

[12] (2018) 8 SCC 165

The term "presumption" is used to designate an inference, affirmative or disaffirmative of the existence of a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof".

18. Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over."

20*. This Court held that the accused may adduce evidence to rebut the presumption, but mere denial regarding existence of debt shall not serve any purpose. Following was held in paragraph 20 (Kumar Exports v. Sharma Carpets):*

"20....The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist..."

21*. In the present case, the trial court as well as the Appellate Court having found that cheque contained the signatures of the accused and it was given to the appellant to present in the Bank of the presumption under Section 139 was rightly raised which was not rebutted by the accused. The accused had not led any evidence to rebut the aforesaid presumption. The accused even did not come in the witness box to support his case. In the reply to the notice which was given by the appellant the accused took the defence that the cheque was stolen by the appellant. The said defence was rejected by the trial court after considering the evidence on record with regard to which no contrary view has also been expressed by the High Court.*

22. *Another judgment which needs to be looked into is Rangappa vs. Sri Mohan, 2010 (11) SCC*

441. A three Judge Bench of this Court had occasion to examine the presumption under Section 139 of the Act, 1881. This Court in the aforesaid case has held that in the event the accused is able to raise a probable defence which creates doubt with regard to the existence of a debt or liability, the presumption may fail. Following was laid down in paragraphs 26 and 27:

"26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat, (2008) 4 SCC 54, may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.

27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard or proof."

15. It is also relevant to take note of the judgment of the Hon'ble Supreme Court in the case of ***TEDHI SINGH*** stated supra, paragraph No.8 read thus:

> ***"8.*** *It is true that this is a case under Section 138 of the Negotiable Instruments Act. Section 139 of the NI Act provides that court shall presume 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. This presumption, however, is expressly made subject to the position being proved to the contrary. In other words, it is open to the accused to establish that there is no consideration received. It is in the context of this provision that the theory of "probable defence" has grown. In an earlier judgment, in fact, which has also been adverted to in Basalingappa [Basalingappa v. Mudibasappa, (2019) 5 SCC 418 : (2019) 2 SCC (Cri) 571] , this Court notes that Section 139 of the NI Act is an example of reverse onus (see Rangappa v. Sri Mohan [Rangappa v. Sri Mohan, (2010) 11 SCC 441 : (2010) 4 SCC (Civ) 477 : (2011) 1 SCC (Cri) 184]). It is also true that this Court has found that the accused is not expected to discharge an unduly high standard of proof. It is accordingly that the principle has developed that all which the accused needs to establish is a probable defence. As to whether a probable defence has been established is a matter to be decided on the facts of each*

case on the conspectus of evidence and circumstances that exist."

16. In addition to the above cited judgments of the Hon'ble Supreme Court, now it is relevant to take note of the dictum of the Hon'ble Supreme Court in the case of ***BASALINGAPPA v. MUDIBASAPPA***[13], paragraph No.25 reads thus:

"25. We having noticed the ratio laid down by this Court in the above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:

25.1. Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

25.2. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof a for rebutting the presumption is that of preponderance of probabilities.

25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record

[13] (2019) 5 SCC 418

by the parties but also by reference to the circumstances upon which they rely.

25.4. That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.

25.5. It is not necessary for the accused to come in the witness box to support his defence."

17. On careful reading of the dictum of the Hon'ble Supreme Court, it makes it clear that the presumption under Section 139 of the N.I Act provides that Court shall presume that the holder of a cheque received the cheque of the nature referred to in Section 138 of the N.I Act for the discharge, in whole or in part of any debt or other liability. The burden lies on the accused to rebut the presumption. The probable defence raised by the accused would be a matter to be decided on the facts of each case and the circumstances that existed.

18. After considering the legal proposition in respect of the N.I. Act, now it is relevant to take note of the facts of the case. Admittedly, the notice has not been received by the accused and there is a shara on the returned legal notice that door lock, unclaimed etc. It is settled principles of law that if the notice is issued to the correct address of the accused and if

the notice is not able to serve due to the reasons assigned in the said shara, it is deemed that the notice is served to the accused in terms of Section 27 of General Clause Act read with Section 114 of the Indian Evidence Act. Moreover, the accused has not disputed that he was not residing in the said address.

19. Be that as it may, let me go through the evidence of PW.1 especially the defence taken by the accused in the cross-examination of PW.1. PW.1 cross-examined on 05.07.2018. PW.1 has been subjected to lengthy cross-examination and the accused tried to elicit the financial capacity and the transaction and also denied that the cheques in dispute were issued to the complainant. It is the case of the accused that there were transactions between the father of the complainant and him. In the said transactions, father of the complainant had received five cheques from the accused and two cheques from the wife of the accused. The present case is filed at the instance of the father of the complainant and one more case filed through Thimmegowda at the instance of the father of the complainant. The complainant denied the contention of the accused that the cheques were issued to his father and his father got the complaint filed through the complainant. The complainant further denied that he was not

able to earn the amount stated in the cheques or not having the capacity to lend such huge amount and he foisted a false case in order to gain wrongfully. The complainant denied the same and substantiated his contention and transaction. On careful reading of the entire cross-examination and also questioning his financial capacity, nothing has been elicited to rebut the presumption.

20. The accused examined himself as DW.1. In his evidence, he took contention that the cheques were issued to the father of the complainant. The father of the complainant filed a case through his son. In the cross-examination, a specific question was put to DW.1 that whether it is possible to say when five cheques were issued to Sri.Ramakrishnaiah who is the father of the complainant, he did not answer the same. Whether such denial is sufficient to rebut the presumption is the moot question to be decided. In the case of *Kishan Rao* stated supra, it makes it clear that to rebut the presumption under Section 139 of the N.I. Act, mere denial regarding the existence of debt shall not be serve any purpose. However, the accused has to raise probable defence which require to create a doubt with regard to the existence of debt or liability. On considering the proposition of law, the stand taken by the

accused in his evidence and also in the cross-examination of PW.1 that there was seven cheques issued to the father of the complainant as a security for transactions having been made between them appeared to be untrue and not proved. If the defence taken by the accused is not acceptable obviously the presumption prevails upon the failure of the defence.

21. In the light of the observation made above, I proceed to pass the following:-

ORDER

(i) The criminal appeal is allowed.

(ii) The judgment and order dated 01.10.2022 passed in Crl.A.No.858/2019 by the LIX Additional City Civil and Sessions Judge (CCH-60), Bengaluru is set aside.

(iii) The judgment and order dated 12.03.2019 passed in CC No.19510/2016 by the XXII Additional Chief Metropolitan Magistrate, Bengaluru, is confirmed.

(iv) The Registry is directed to send the record along with the copy of the judgment to the Trial Court forthwith.

(v) The Trial Court is directed to take necessary steps to secure the presence of the accused to execute the sentence after the appeal period gets over.

Sd/-
JUDGE

UN
List No.: 1 Sl No.: 26