



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28TH DAY OF JULY, 2023

BEFORE

THE HON'BLE MR JUSTICE RAJESH RAI K

CRIMINAL APPEAL NO. 332 OF 2012

BETWEEN

SMT.F. CHANDRA,
AGED ABOUT 54 YEARS,

...APPELLANT

(BY SRI. M.A. SEBASTIAN, ADVOCATE)

AND

SMT. ANITHA,
AGED ABOUT 33 YEARS,
.....

...RESPONDENT

(BY SRI. CHANDRASHEKAR, ADVOCATE)

THIS CRL.A. IS FILED U/S.378(4) OF CR.P.C PRAYING TO SET ASIDE THE JUDGMENT DT.2.2.2012 PASSED BY THE XIV ADDL. CMM., BANGALORE IN C.C.NO.40582/2008-ACQUITTING THE RESPONDENT/ACCUSED FOR THE OFFENCE P/U/S 138 OF N.I. ACT.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 30.06.2023, COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

The complainant, in C.C No.40582/2008 on the file of XIV Addl. CMM, Bengaluru City, has preferred this appeal challenging the judgment and order dated 02.02.2012, whereby acquitting the accused/respondent for the offence punishable under Section 138 of Negotiable Instrument Act, 1981 (for short 'the Act').

2. I have heard the learned counsel for the appellant/complainant and the learned counsel for the respondent/accused.

3. It is the case of the complainant that the accused has presented herself as owner of site bearing No.25 situated at Vijinapura Village, K.R. Puram Hobli, Bangalore East Taluk, and the complainant purchased the same under the sale deed

25.05.2007. Subsequently, the accused executed the registered sale deed in favour of the complainant on 10.09.2007. Later, when the complainant went near the site, one Smt.A.Sadhana obstructed her by claiming that she is an absolute owner of the said property since she purchased the same vide sale deed dated 15.05.2002 from the vendor of the accused. She also stated that she has filed a case in O.S.No.7990/2007 before the City Civil Court, Bangalore against the accused and her husband. The copy of the caveat petition also shown by her. According to her, the accused has sold the same property to the complainant by misrepresenting the facts and without disclosing the defect title of the property. After few days, the complainant came to know the fraud played by the accused and the accused agreed to return the sale consideration. Accordingly, the accused issued the cheque bearing No.208134 dated 15.03.2008 for a sum of Rs.10,00,000/- drawn on Canara Bank, Frazer Town Branch, Bengaluru and promised that she will take back the cheque and pay the cash. Afterwards, the accused did not come forward to pay the cash and therefore, the complainant presented the cheque for encashment through her banker i.e., Karnataka Bank,

Murphy Town, Bengaluru. The said cheque was dishonoured for the reason 'the payment stopped by the drawer'. Subsequently, she issued the legal notice to the accused on 07.08.2008 calling upon to pay the cheque amount within 15 days. The notice was served to the accused and on 21.08.2008, she replied to the legal notice denying her liability. Since the accused failed to make the payment, the complainant filed the complaint before the learned XIV Addl. CMM, Bangalore under Section 200 of Cr.P.C r/w Section 138 of the Act to take cognizance of the offence under Section 138 of the Act and to punish her for the said offence.

4. Before the trial Court, the complainant examined herself as PW.1 so also got marked 12 documents as Exs.P1 to P12. The accused also examined herself as DW.1 and got marked 4 documents as Exs.D1 to D4.

5. The learned Magistrate, after assessment of the oral and documentary evidence on record, acquitted the accused for offence punishable under Section 138 of the Act vide judgment

dated 02.02.2012 as stated *supra*. The said judgment is challenged by the complainant in this appeal.

6. Learned counsel for the appellant/complainant, vehemently, contended that the complainant has fulfilled the requirements envisaged under Section 138 (A to C) of the Act and the accused has admitted the cheque as well as her signature on it. Therefore, a legal presumption exists in favour of the complainant. The trial Court ought to have drawn the said presumption and held that the cheque was issued to discharge legally recoverable debt. He would further contend that the amount mentioned in the cheque is a legally enforceable debt since the accused issued the same to return the sale consideration dated 25.05.2007, for the reason that the accused played a misrepresentation/fraud to the complainant by executing the sale deed of the property which already sold by her vendor to 3rd party. As such, she agreed to return the sale consideration by way of cheque in question. In spite of the same, the accused dishonoured the cheque with an intention to cheat the complainant. He would further contend that the trial

Court totally erred in coming to the conclusion that the transaction relating to the sale of the property is known to the respondent and her husband. However, later the husband of the respondent died during the pendency of the complaint. Learned counsel further contend that the learned trial Judge failed to appreciate the evidence especially the certified copies of the plaint, judgment and decree passed in O.S.No.7990/2007 wherein, the first defendant is the respondent/accused and second defendant is her husband. Having filed the written statement by the husband of the respondent and pleading ignorance in cross-examination by the respondent/accused, it is only with an intention to avoid the liability. He would further contend that as on the date of filing of the complaint, the accused had filed the caveat petition i.e., on 13.07.2007 before executing the sale deed dated 10.09.2007 in favour of the complainant. This clearly shows that the respondent collected the sale consideration from the complainant/appellant by non-disclosing the dispute in title of the property sold to the complainant with an intention to defraud the complainant. As such, he prays to allow the appeal.

7. In support of his contention, learned counsel for the appellant relies on the following judgments:

(i) ***Kesoram Industries and Cotton Mills Ltd. vs. Commissioner of Wealth Tax, (Central) Calcutta*** reported in ***1996 SCR (2) 688***; and

(ii) ***Hiten P.Dalal vs. Bratindranath Banerjee*** reported in ***(2001) 6 SCC 16***.

8. Refuting the above submissions, learned counsel for the respondent/accused would vehemently contend that the judgment challenged under this appeal does not suffer from any perversity or illegality and the same is based on the evidence available on record and the learned Magistrate, after appreciating the evidence available on record and also by perusal of the other documents, rightly acquitted the accused for the offence punishable under Section 138 of the Act. He would further contend that the complainant totally failed to prove the legally recoverable debt as on the date of the cheque and the accused issued the said cheque only as a security, for the reason that she has sold the property bearing house site No.25, Khata

No.1214, situated at Vijnapura Village, K.R. Puram Hobli, Bangalore East Taluk, to the complainant vide sale deed dated 25.05.2007. However, one Smt.A.Sadhana filed a suit in O.S. No.7990/2007 against the complainant stating that the vendor of the accused sold the said land to her. As such, the accused issued the said cheque to the complainant only for security purpose with the understanding that once the suit attained finality/dismissed then the cheque will be returned to the accused. The said aspect was proved in the evidence of PW.1-complainant. By considering the said aspect only, the learned Magistrate acquitted the accused for the charges levelled against her. He would further contend that the ingredients of Section 138 of the N.I. Act do not forth coming/fulfilled in this case. Instead of initiating civil proceeding against the accused for recovery of sale consideration, the complainant presented the cheque for illegal gain. Moreover, the complainant in the cross-examination categorically admitted that the possession of the property has been handed over by the accused to her along with the documents. Further, the sale consideration of the property is Rs.9,50,000/-. In such circumstances, there is no reason to

issue cheque by the accused to the complainant in respect of legally enforceable debt. As such, the learned counsel for the respondent/accused prays to dismiss the appeal.

9. In support of his contention, learned counsel for the respondent/accused relies on the following citations/authorities:

(i) Sri Prakash S/o. Muthappa Reddy vs. Sri Ramanath M.Hegde S/o. Manjunatha K.Hegde reported in ***2020 (2) Kar. L.R. 519;***

(ii) M/s. Sathavahana Ispat Ltd. vs. Umesh Sharma and another reported in ***ILR 2006 KAR 3579;***

(iii) K.S.Nagarajappa vs. Dibbada Kotresh reported in ***2020 (4) KCCR 2540.***

10. I have bestowed my anxious consideration to the submissions made by both the parties so also the documents and evidence available on record including the trial Court record.

11. Having heard the learned counsel for the parties, the only point that would arise for my consideration is:

"Whether the learned Magistrate is justified in acquitting the accused/respondent for the offence punishable under Section 138 of the Act?"

12. On a cursory glance of the evidence available on record so also the documents placed by the parties, it could be seen that the case of the complainant is that the accused sold the house site bearing No.25, Khata No.1214 situate at Vijnapura Village, K.R. Puram Hobli, Bangalore East Taluk, to the complainant by sale deed dated 10.09.2007. Subsequently, one Smt.A.Sadhana obstructed the complainant by claiming that she is the absolute owner of the said property since a sale deed has been executed to her by the vendors of the accused and civil suit has been filed before the City Civil Court, Bengaluru in O.S No.7990/2007 against the accused and her husband. Hence, the said aspect was made known to the accused by the complainant for which, she agreed to return the sale consideration of Rs.9,50,000/- and issued the cheque in question for Rs.10,00,000/-.

13. To prove the said aspect, the complainant/appellant examined herself as PW.1 before the trial Court by way of affidavit wherein, she reiterated the above version. However, by perusal of her cross-examination, it clearly depicts that she categorically admitted that she purchased the property from the accused on 10.09.2007 and before purchasing the said property, she verified all the documents relating to it. Further, she admitted that the accused handed over the possession of the said property and all the documents pertaining to the property. She further admitted that one Smt.A.Sadhana issued a notice to her on 12.07.2007 stating that the property mentioned in the said notice is unconcerned to the property purchased by her from the accused. She also admits in her cross-examination that she asked the accused to give cheque for the security purpose and obtained the same as per Ex.P5. She also admitted that she do not know whether herself or her husband were made as parties in the suit filed by Smt.A.Sadhana and the sale deed dated 10.09.2007 executed by the accused to her is still stands in her name and not yet cancelled. Further, she also admitted

that she has not filed any criminal or civil case against the accused in that aspect of the matter.

14. Admittedly, the complainant paid the sale consideration of Rs.9,50,000/- to the accused in respect of the property she purchased by the accused. As far as the claim of Smt.A.Sadhana is concerned, she filed a separate civil suit and the same is unconcerned to the property purchased from the accused. In such circumstances, the complainant has not suffered any loss from the sale transaction entered by the accused. It is the case of the complainant that the cheque in question was issued by the accused towards repayment of the sale consideration paid by her under the registered sale deed dated 10.09.2007. On careful perusal of the evidence and the documents produced by either party, it could be seen the sale deed executed by the accused in favour of the complainant was not yet cancelled or any such agreement or endorsement entered between the accused and the complainant to the effect of repayment of sale consideration by the accused to the complainant. Hence, there is no reason to issue the cheque by

the accused to the complainant for Rs.10,00,000/-. Moreover, there is no legally enforceable debt due by the accused to the complainant since the right, title and possession of the property remained with the complainant. Such being the case, the complainant totally failed to prove how she suffered loss and also issuance of the cheque by the accused to her for legally enforceable debt. The defence of the accused explained in her evidence that the complainant purchased her property i.e., site No.25 for Rs.9,50,000/- under registered sale deed on 10.09.2007. Afterwards, one Smt.A.Sadhana filed O.S.No.7990/2007 in respect of the same property. Therefore, the complainant requested the accused to give a signed blank cheque for security purpose with a condition that if the said suit is dismissed, the said cheque will be returned. The said evidence laid by the accused is not seriously disputed by the complainant. Even, in the cross-examination also, nothing has been elicited from the accused in respect of the alleged loss sustained by the complainant and the issuance of the cheque in respect of legally enforceable debt.

15. Nevertheless, it is the case of the accused that a sum of Rs.3,50,000/- already paid by her to the complainant after the execution of the sale deed in order to make good the loss sustained by her for conducting the civil case. The said transaction is forthcoming in the bank statement of the accused produced as per Ex.D3. In such circumstances, viewed from any angle, the complainant failed to prove that there was a legally enforceable debt due as on the date of issuance of the cheque.

16. Though the learned counsel for the complainant, vehemently, contended that the complainant has fulfilled all the requirements under Section 138 (A to C) of the Act and the accused has admitted the cheque as well as the signature on it, the legal presumption exists in favour of the complainant in respect of enforceable debt is concerned, the same does not hold much water, for the reason that such initial presumption is rebuttal in nature at any stage of the proceedings in view of the law laid down by the Hon'ble Apex Court in catena of judgments including ***Rangappa vs. Mohan*** reported in **(2010) 11 SCC**

441. The accused can rebut such presumption by way of probable defence.

17. In the case on hand, on careful perusal of the above evidence, the accused rebutted the initial presumption by way of probable defence that the cheque in question was issued as security in respect of the civil dispute pertaining to the site sold by her to the complainant. It is well settled law that to rebut the presumption, standard of proof is that only on touchstone of preponderance of probabilities and not on touchstone of proof beyond all reasonable doubt. In the present case, the accused has put forward such probable defence. As such, it creates doubt about the existence of legally enforceable debt or liability.

18. In the case on hand, by perusal of the evidence and material on record, it is clear that the cheque was issued in respect of uncertain future liabilities as a security cheque. Hence, the same does not attract the provision under Section 138 of the Act.

19. It is settled principle of law that the cheque issued in respect of uncertain future, the liabilities would not attract the provision under Section 138 of the Act. My view is fortified by the judgment rendered by the Co-ordinate Bench of this Court, in the case of ***M/s Sathavahana Ispat Ltd., vs. Umesh Sharma and Another*** reported in ***ILR 2006 KAR 3579.***

(emphasis supplied)

20. The defence taken by the accused that the cheque in question which was received by the complainant as a security appears to be probable. As such, the complainant has failed to prove that the accused was due a sum of Rs.10,00,000/- as on 15.03.2008. From the evidence on record, it cannot be said that the cheque in question i.e., Ex.P5 was issued by accused towards repayment of the sale consideration as claimed by the complainant. The reasons assigned by the trial Court cannot be said to be either perverse or illegal and the trial Court has rightly acquitted the accused for the offence punishable under Section 138 of the Act.

21. Hence, I answer the point raised above accordingly and proceed to pass the following:

ORDER

i. The appeal, being devoid of merit, deserves to be dismissed and accordingly, it is ***dismissed***.

**Sd/-
JUDGE**

HKV/VM