Manjunath vs J.Shankar on 19 April, 2023

KABC010000662020

Presented on : 02-01-2020
Registered on : 02-01-2020
Decided on : 19-04-2023
Duration : 3 years, 3 months, 17 days

BEFORE THE LXVI ADDL.CITY CIVIL & SESSIONS
JUDGE, BENGALURU CITY.
(CCH-67)
DATED: This the 19th day of April, 2023
PRESENT
Sri.S.Nataraj, BAL.,LL.B.,
LXVI Addl.City Civil & Sessions Judge,
Bengaluru.
Crl.A.No.07/2020

Appellant : Manjunath,
S/o Jayaram,
Aged about 33 years,
Working at Chaithanya Graphics,
No.156, 3rd Main Road,
Between 7th and 8th Cross,
Chamarajapet,
Bangalore 560 018.
(By Sri.G.R.Ravichandra Reddy, Adv.)

/Vs/

Respondent : J.Shankar,
S/o late Jairam,
Aged about 54 years,
R/at No.166/1, 2nd Main,
4th cross, Chamarajapet,
Bangalore 560 018.
(By Sri.AN, Advocate.)

JUDGMENT

This is accused appeal under Section 374(3) CrPC challenging the judgment in CC.No.3355/2018 dated 4.12.2019 passed by the Small Causes Judge and XXVI Addl. Chief Metropolitan Magistrate (herein after refereed to as 'trial Court'), wherein the appellant was convicted for the offence;

a) For the offence punishable under Section 138 of NI Act;

b) He is sentenced to pay a fine of Rs.4,00,000/- and in default of payment of fine amount he shall undergo simple imprisonment for six month;

c) The accused is to be paid an amount of Rs.3,90,000/- as compensation to the complainant under Section 357 CrPC. Rs.10,000/- shall be go to State.

2. The appellant is an accused. The respondent is the complainant before the trial Court. For the sake of convenience the parties are referred by their ranks before the trial Court.

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3. The brief facts of the case leading to filing of this appeal are as under:

4. The complainant filed private complaint under Section 200 CrPC against the accused for the offences punishable under Section 138 of Negotiable Instruments Act alleging that the accused is known to the complainant and approached the complainant and borrowed hand loan of Rs.3,00,000/- on 1st week of September 2017. The accused agreed to repay the hand loan within 10 months. Towards repayment of loan amount the accused has issued cheque bearing No.000114 dated 21.5.2018 for a sum of Rs.3,00,000/- drawn on Karur Vysya Bank Ltd., ISRO Layout Branch, Bangalore. On instructions of accused first time cheque was presented on 21.5.2018 it came to be returned as 'funds insufficient' on next day. Subsequently, on request of accused the cheque was represented on 15.7.2018 through his banker Karnataka Bank, Chamarajapet, Bangalore on 16.7.2018 same was also returned as 'funds insufficient'. The complainant got issued legal notice on 06.08.2018 demanding him to pay Crl.A.No.07/2020 the cheque amount within 15 days from the date of receipt of legal notice. The said notice came to be returned as intimation delivered on 9.8.2018. However he has not paid the amount. After competing the formalities, complainant presented the complaint before the trial Court.

5. The trial court after recording sworn statement of complainant by way of affidavit after considering the sufficient material to proceed against the accused ordered summons. On receipt of summons in CC.4355/2018 the accused appeared through his counsel, he was on bail, the accusation was recorded, he pleaded not guilty, claims to be tried.

6. The trial court treated the sworn statement in lieu of chief examination as PW-1, Ex.P-1 to P-8 documents are marked. The accused statement under Section 313 CrPC was recorded. He denied the incriminating material appeared against him. He has examined himself as DW-1 6 documents are marked as Ex.D-1 to D-6. After hearing arguments of both sides, by considering the material on record, the trial court passed impugned judgment Crl.A.No.07/2020 convicted the accused under Section 138 of NI Act and sentenced him to pay a fine holding that the accused failed to rebut the presumption, his defence is not probable that the complainant proved his case.

7. Being aggrieved by the impugned judgment of the trial court the accused preferred the present appeal on various grounds among other that;

8. That the trial Court failed to consider that the complainant has no financial capacity to advance the loan. The trial Court has not considered the cross examination of PW□1 that he is doing auto consultancy business and amount was mobilised through sale of customer car in the month of April 2017, that the car sold by the complainant was on 20.1.2016 that the said amount was utilised for advancing loan to accused in the month of April 2017 is not considered by the trial Court. The trial Court in the impugned judgment has wrongly appreciated that the complainant has financial capacity to advance the loan. But in fact from 1.9.2017 to 12.9.2017 there was no Crl.A.No.07/2020 transaction in complainant bank, he had balance of Rs.3,081/□

9. The trial Court has not considered the that the mandatory legal notice is not served, whereas PW□ 1 in his cross examination has admitted he has sent notice to residential address of accused. But notice was issued to Chaitanya Graphics. The appellant/accused was not working there. The refuse and door lock intimation are false. The trial Court has failed to consider that the accused has not issued a cheque towards discharge of liability. The cheque was issued to one Gajendra Kumar against whom the complaint was filed. That the accused has rebutted the presumption, the trial Court has not considered the said fact and prayed for setting aside the judgment.

10. After registering the appeal notice to respondent was served and he appeared through counsel, trial court records are secured.

11. The counsel for both parties have filed written arguments with citations.

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12. Out of above said facts and circumstances of the case, the points that arose for the due consideration of this Court are;

Point No.1: Whether the trial Court finding that the accused failed to rebut the presumption under Section 118 and 139 of NI Act with probable defence that the cheque in question was not issued for discharge of legally enforceable debt or liability, is justified?

Point No.2: Whether the finding of trial court that the complainant proved that the cheque in question was issued towards of debt, on his presentation dishnoured, thereafter, after issue of statutory notice complainant/accused failed to make payment thereby committed the offence under Section 138 NI Act is justified?

Point No.3: Whether the impugned judgment of trial Court is called for interference?

Point No.4 : What order?

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13. The answer of this Court to the above points are;

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Point Nos.1 & 2 : Not Justified
Point No.3      : Affirmative
Point No.4      : As per the final order for the
                  following reasons.
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REASONS

14. The learned counsel for appellant in his written arguments has contended that as per the appeal memo grounds. The respondent counsel in his written arguments has contended that the trial Court has rightly appreciated that the complainant has advanced the loan, the accused issued a cheque which came to be dishonoured. There is deemed service of notice. The defence of the accused is not probable and failed to prove that the cheque was not issued for discharge of liability. There are no grounds to interfere in the judgment of the trial Court and prayed for dismissal.

15. After considering the submissions of both sides for determination of the point as to whether the trial Court was justified in convicting the appellant/accused for the offence under Section 138 of NI Act, the basic questions to be addressed are;

a) As to whether the complainant/respondent had established the ingredients of Section 118 and 139 of the Crl.A.No.07/2020 NI Act, so as to justify drawing of the presumption envisaged therein?

b) If so, as to whether the appellant accused had been able to displace such presumption and to establish a probable defence, thereby, the onus would again shift to the complainant/respondent?

16. It is useful to take note of Section 118 and 139 of NI Act as follows:

> " 118 Presumptions as to negotiable instruments. □Until the contrary is proved, the following presumptions shall be made:
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> (a) of consideration - that every negotiable instrument was made or drawn for consideration.

And that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration:

> (b) as to date - that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance - that every accepted bill of exchange was accepted within reasonable time after its date and before tis maturity

(d) as to time of transfer - that every transfer of a negotiable instrument was made before its maturity Crl.A.No.07/2020

(e) as to order of endorsements - that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps - that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course -

that the holder of a negotiable instrument is a holder in due course PROVIDED that, where the instrument has been contained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

Section 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."

17. So for as, the question of existence of basic ingredients for drawing of presumption under Sections 118 and 139 of NI Act is concerned, the accused admitted the cheque belongs to him and signature is also belongs to him. The return of cheque for insufficient funds is not in Crl.A.No.07/2020 dispute. The complainant got issued legal notice at Ex.P□3. Through RPAD and speed post to accused address working at Chaitanya Graphics, No.156, 3rd Main Road, 7th & 8th Cross, Chamarajapet, Bangalore 560 018.

Ex.P□4 and 5 are the RPAD postal receipts. Ex.P□6 is the returned RPAD cover as refused. Ex.P□7 another returned speed post cover as door locked intimation delivered. According to accused there is no service of notice. He was not at all working in Chaitanya Graphics for which he relied Ex.D□2 Aadhar card address as follows:

Manjunath J, S/o Jayram, No.81, 1st Floor, 1st Cross, Balaji Layout, Uttarahalli Main Road, Bangalore South, Subramanyapura, Bangalore South.

Ex.D□6 is the letter issued by the Proprietor of Chaitanya Graphics stating that the accused is not working in their Chaitanya Graphics. The learned counsel for the complainant has submitted that the notices returned as refused and intimation delivered are deemed service of notice. He relied a judgment of Hon'ble Telangana High Crl.A.No.07/2020 Court, A Guruswamy Naidu Vs M.Chengaiah dated 5.9.2018

> in Crl.A.834/2006 wherein it is held that ' Once notice has been sent by registered post with acknowledgment due to a correct address, it must be presumed that the service has been made effective.' There is no quarrel about the principle stated therein. The accused in his evidence has stated that he is not working in Chaitanya Graphics. Therefore it is for the complainant to show that the address mentioned in the legal notice is the correct address. Only if the registered post is sent to correct address, then only under Section 27 of General Clause Act, deemed service of notice could be presumed.

18. In the present case PW□1 in his cross examination has admitted that he has sent legal notice to the residential address of accused situated behind Banashankari Temple. But Ex.P□3 legal notice is issued to Chaitanya Graphics. There is no material that the accused on the date of alleged issuance of notice, he was working in Chaitanya Graphics. On the other hand Ex.D□6 disclose he was not working. The accused counsel has relied the Crl.A.No.07/2020 judgment 2010 (3) KCCR 1950 Hon'ble High Court of Karnataka in Amjad Pasha Vs. H.N.Lakshman wherein it is held:

> " It is incumbent upon the complainant to have proved the service of notice on the accused. The notice sent by registered post was not served on the accused. There cannot be deemed service of notice."

a) `Another judgment of Hon'ble Delhi High Court in RL Verma Vs P.C.Sharma in Crl.R.P.438/2017 dated 1.7.2019 in para 34 of the judgment has held:

> " Since the precondition of filing a complaint under Section 138 of NI Act of sending a statutory notice has not been satisfied in the present case, no cause of action arose in favour of complainant to file subject complaint."

19. Thus, in the present case the notice was not served on the accused, notice issued to the Chaitanya Graphics Address is not the correct address of accused. Hence, there is no deemed service of notice. Section 138(b) statutory notice is not duly complied. The Magistrate has Crl.A.No.07/2020 failed to consider these aspects and wrongly held that the notice has duly served.

20. Even otherwise, the accused/appellant to establish a probable defence to rebut presumption he has relied the cross examination of PW□1 and also stepped into witness box and given evidence as DW□1 Ex.D□1 to 6 documents are marked.

21. In Rangappa Vs Mohan (2010) 11 SCC 441 Hon'ble Supreme Court has reiterated and summarised the principles relating to presumptions under Section 118 and 139 of NI Act and rebuttal thereof in the following:

> "26. In the 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 may not be correct. However, this does not

> in any way cast doubt on the correctness of the decision in that case since it is based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttal presumption and it is open to the accused Crl.A.No.07/2020 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.
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> 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 of proof.
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> 28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it Crl.A.No.07/2020 is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities".

Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

22. In view of above said judgment on the aspects relating to preponderance of probabilities, the accused has to bring on record such facts and circumstances, which may lead the Court to conclude either that the consideration did not exist or that its non existence was so probable that a prudent man would under the circumstances of the case act upon the plea that the consideration did not exist. Mere denial would not fulfill the requirements of rebuttal as envisaged under Section 118 and 139 of NI Act. Hon'ble Apex Court in case of Basalingappa Vs Mudibasappa (2019) 5 SCC 418 has Crl.A.No.07/2020 summarised the principles on sections 118 A and 139 of NI Act. It will be relevant to reproduce the same.

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

25.1. Once the execution of cheque is admitted Section 139 of theAct 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 probable defence. The standard of proof 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 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."

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23. In Basavalingappa's case after considering the evidence and material on record held that the accused had raised a probable defence regarding financial capacity of the complainant, the accused was therefore acquitted. The complainant preferred an appeal before High Court reversed the finding of the trial Court and convicted the accused. Hon'ble Apex Court has found that the finding of the High Court regarding financial capacity of the complainant was perverse was not permissible for the High Court to interfere.

24. In the present case, the complainant definite case that the accused approached him for financial assistance of Rs.3,00,000/□and paid the same in the first week of September 2017. The accused specific defence that the complainant has no financial capacity to lend the amount, the accused has no bank balance to pay huge amount.

25. PW□1 in his cross□examination elicited that Gajendra the owner of press is his friend. The accused has approached him for loan in the 1st week of September 2017, on the same week he has advanced the loan.

Crl.A.No.07/2020 However, the complainant has produced Ex.P□8 bank statement wherein it disclose from 1.9.2017 to 13.9.2017 there was no transaction in the account of complainant and he had bank balance of Rs.3081/□ Therefore, in the first week of September 2017 the complainant has no bank balance to pay loan amount of Rs.3,00,000/□ The trial Court has wrongly appreciated Ex.P□8 statement and come to a conclusion that the complainant has sufficient balance in his account. In fact it is contrary to Ex.P□8 entries from 1.9.2017 to 13.9.2017.

26. PW□1 further has stated that he has mobilised the amount out of sale of car of customer and paid to accused. In his further cross□examination it is elicited that the Ex.D□1, B extract confronted to complainant is admitted, it stands in the name of his wife which was sold by him. That car was sold on 20.1.2016 whereas the alleged loan amount was paid in the 1 st week of September 2017. Therefore, it is improbable that out of sale of car of customer with that amount he had paid the amount to the Crl.A.No.07/2020 accused. This circumstances is not properly appreciated by the trial Court.

27. PW□1 in his cross□examination dated 6.2.2019 has stated he is a income tax assessee. For the 2017 assessment year he has filed IT returns. He had not shown the loan amount in his IT returns. Therefore, the very advance of loan to the accused in the first week of September 2019 is doubtful as it is not shown in his IT returns.

28. That apart it is the specific defence of the accused that he has no transaction with the complainant and he was working with one Gajendra Kumar in Karnataka Offset printers and he had borrowed loan which was deducting every month and issued blank signed cheque to Gajendra Kumar and he misused it after resigned from the work. Ex.D□3 is the employees provident fund organisation form issued by Gajendra Kumar wherein it has stated he has resigned from the job on 31.10.2016. PW□1 has also stated subsequently again he has worked in his printers. It is admitted by PW□1 Gajendrakumar is his friend. The Crl.A.No.07/2020 accused after service of summons he has filed a complaint against the complainant and Gajendrakumar on 4.12.2018 at Ex.D□4. PW□1 has admitted that the police called him and Gajendra had enquired. Subsequently, the accused has also filed a private complaint in PCR 2189/2019 against complainant and Gajendra Kumar pending on the file of IV ACMM, Bangalore. No doubt DW□1 in his cross examination has admitted the cheque and signature belongs to him, he has not produced documents to show he has borrowed Rs.1,00,000/□from Gajendra nad issued cheque as security. However, the circumstances brought out on record referred ot herein above, would clearly probabalise that the complainant had no financial capacity to advance the loan, the bank statement does not reflect the amount standing in his account to pay the loan amount, that the amount has been mobilised by selling car is not probable. The complainant has not shown the loan in his income tax returns. The accused immediately after come to know about the alleged cheque filed a private complaint would clearly rebut the presumption.

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29. No doubt, mere admission of issuance of cheque and signature is sufficient to raise presumption. Once through the cross□examination of PW□1 and material averment in the complaint, it is elicited that the complainant has no financial capacity and he has not produced any such material it is one of the circumstances to rebut the presumption. Under similar circumstances, Hon'ble Apex Court in a recent decision in Crl.A.No.1978/2013 Rajaram Vs Muthuchalam dated 18.1.2023 by relying on the judgment of Basavalingappa Vs Mudibasappa has acquitted the accused. The facts of that case that the accused has produced income tax returns of the complainant wherein he has not declared that he had lent Rs.3,00,000/□to the accused, he has not declared the agricultural income in the income tax returns. The trial Court has found that the complainant did not have financial capacity to lend

the money. Therefore, the case of the complainant that he had given a loan to the accused from his agricultural income was found to be unbelievable by the trial Court and doubted the transaction. That the Crl.A.No.07/2020 defence was probable and entitled for benefit of doubt. The said judgment was questioned before Hon'ble High Court, after appreciation reversed the finding of the trial court and convicted the accused against which the accused has filed appeal before Hon'ble Apex court, Hon'ble Apex Court has reversed the finding of the High court and restored the judgment of the trial Court and affirm the finding that the complainant did not have financial capacity to lend the amount. In the present case also the complainant has not produced any other material to show his financial capacity. Under such circumstances, the defence of the accused that he had no transaction with the complainant and cheque was not issued towards discharge of debt and it was issued to Gajendra Kumar as a security for loan is to be accepted as probable.

30. Upon considering the evidence on record, the trial Court is not justified in convicting the appellant by ignoring the material evidence regarding financial capacity of the complainant to lent the amount of Rs.3,00,000/□in Crl.A.No.07/2020 cash. The judgment of the trial Court suffers from perversity and fundamental error of approach, the interference in the judgment is required. The complainant failed to prove the transaction. The accused is entitled for benefit of doubt, as transaction is doubtful. Accordingly, answer point Nos.1 and 2 not justified, point No.3 Affirmative.

31. POINT No.4:□In view of findings given on point Nos.1 to 3, this Court pass the following order.

ORDER Appeal filed by the appellant/accused Stanly Nelson under Section 374(3) of CrPC is allowed.

Consequently the Judgment in CC.No.4355/2018 dated 4.12.2019 passed by Small Causes Judge and XXVI ACMM, Bangalore is set aside.

The appellant/accused is acquitted for the offence under Section 138 of NI Act. The tria Court is directed to refund the fine amount if any deposited by the appellant.

Crl.A.No.07/2020 Office is directed to transmit the record to the trial Court with copy of this judgment. (Dictated to the Judgment Writer directly on computer, corrected by me and then pronounced in the open Court on this the 19th day of April, 2023).

(S.NATARAJ), LXVI Addl.CC & SJ, Bengaluru.

26 Crl.A.No.07/2020 The Judgment is pronounced in the open Court vide separate Judgment with following operative portion.

ORDER The appeal filed by the appellant/accused Stanly Nelson under Section 374(3) of CrPC is allowed.

Consequently, the Judgment in CC.No.4355/2018 dated 04.12.2019 passed by Small Causes Judge and XXVI ACMM, Bangalore is set aside.

The appellant/accused is acquitted for the offence under Section 138 of NI Act. The trial Court is directed to refund the fine amount if any deposited by the appellant.

Office is directed to transmit the record to the trial Court with copy of this judgment.

LXVI Addl.CC & SJ, Bengaluru .