In Sri H.C. Muniyellappa S/O vs Sri Rajanna S/O Late Nyathreddy on 25 July, 2015

IN THE COURT OF THE LIX ADDITIIONAL CITY CIVIL &
SESSIONS JUDGE, BANGALORE CITY
Dated this the 25th day of July 2015

PRESENT
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Sri Deshpande.G.S, B.com. LL.M
LIX ADDL.CITY CIVIL & SESSIONS JUDGE,
BANGALORE CITY

CRIMINAL APPEAL NO.859/2014 AND
CRIMINAL REVISION PETITION NO. 419/2014

APPELLANT IN CRI.APPEAL NO. 859/2014: Sri H.C. Muniyellappa s/o Chittaiah @ Pappanna, Aged about 59 years, Residing at No. 135/10, Doddamma Devi Temple Street, Near Kodandarama Temple, Hulimavu Village, Bannerghatta Road, Bangalore-560 076.

(R/by Sri P.Nehru, Advocate)

-Vs-

RESPONDENT IN CRI.APPEAL NO. 859/2014:: Sri Rajanna s/o Late Nyathreddy Residing at Chandapura village, Attibele Hobli, Anekal Taluk, Bangalore District.
(Represented by Sri CVA, Advocate)

PETITIONER IN CRI.REVISION PETITION NO. 419/2014: Sri Rajanna s/o Late Nyathreddy, Residing at Chandapura village, Attibele Hobli, Anekal taluk, Bangalore District.

(Represented by Sri CVA, Advocate)

RESPONDENT CRI.REVISION PETITION NO. 419/2014: Sri H.C.MUNIYELLAPPA, S/o Chittaiah, No. 135/10, Doddamma Devi Temple Street Kodandarama Temple, Hulimavu Village, Bannerghatta Road, Bangalore-76.

[Represented by P.Nehru, Advocate]

COMMON JUDGMENT/ORDER

The accused being aggrieved by the order of conviction and sentence passed by the XVI Additional CMM Bangalore in the Judgment in C.C.No. 24048/2011 dated 9/7/2014 has filed this appeal under Section 374(3) of Cr.P.C., on the various grounds mentioned in the appeal memo.

2. The complainant being aggrieved by the said Judgement has filed the Crl. Revision Petition under Section 397 of Cr.P.C., stating that, the sentence of fine imposed in the Judgment is inadequate.

3. In this Appeal and Revision petition, the parties will be referred as complainant and accused as stated in the Trial Court, for the sake of convenience.

4. The complainant has filed the private complaint against the accused alleging that, he has committed the offence under Section 138 of N.I.Act. The case of the

complainant in brief is that, the accused has borrowed loan of Rs.6,00,000/- from the complainant on 4/2/2011. Towards discharge of this loan, the accused has issued cheque for Rs.6,00,000/- dated 29/3/2011 to the complainant. The complainant has presented this cheque to the Bank for encashment on 29/3/2011 and same was dishonoured with endorsement that the accused was not having sufficient funds in his account on 31/3/2011. Thereafter, the complainant has issued legal notice to the accused to pay the

cheque amount by RPAD on 13/4/2011. The accused has received the said notice, but has not paid the cheque amount to the complainant. He has replied the said notice on the untenable grounds. Even inspite of issuance of notice, the accused has not paid the cheque amount to the complainant. Therefore, the complainant has filed the private complaint against the accused alleging that, he has committed the offence punishable under Section 138 of N.I.Act.

5. After taking cognizance in the case, sworn statement of the complainant was recorded. Thereafter, summons was issued to the accused. He has appeared in the

case through his advocate and was released on bail. Plea of the accused was recorded.

6. Before the trial court, on behalf of complainant, he himself is examined as P.W.1. The documents produced by him are marked as Ex.P1 to Ex.P7. On behalf of accused, he himself is examined as DW.1. No documents marked on his behalf.

7. After hearing arguments of both sides, the learned Magistrate has convicted the accused for the offence punishable under Section 138 of N.I.Act and sentenced him to pay a fine of Rs.6,00,000/- in default to undergo simple imprisonment for one year for the said offence. It is further held that, the complainant is entitled for the above said amount as compensation under Section 357 of Cr.P.C.,

8. Being aggrieved by this Judgment, the accused has filed the Criminal Appeal under Section 374 (3) of Cr.P.C., The complainant being aggrieved by the said Judgment has filed the Crl.Revision Petition under Section 397 of Cr.P.C.,

9. After issuance of notices, both the parties appeared in the Criminal Appeal and in the Criminal Revision Petition. The records of the trial court are secured.

10. The accused has filed the application under Section 391 of Cr.P.C., seeking permission to adduce additional evidence. The complainant has filed the objection to this IA.

11. Heard arguments of both sides on the appeal and criminal revision petition and on the application filed under Section 391 of Cr.P.C., and perused the records of the trial court. The advocate for the accused has also filed his written arguments. The advocate for the accused submitted that, the trial court has not properly appreciated the evidence on record and has come to the wrong conclusion. The complainant is claiming that, he has paid Rs.6,00,000/- as a loan to the accused. There are no documents except cheque to show that he has paid the said loan to the accused. The said amount is not small amount. No prudent man will lent so much of money without obtaining necessary documents such as On Demand Promissory Note, consideration receipt, agreement etc., But, in the present case, the complainant has not obtained these documents from the accused. This

shows that the complainant has not paid the amount of Rs. 6,00,000/- to the accused. The complainant has not

produced any document to show that he was having capacity to pay the said amount. In the absence of this document, it is not possible to believe the version of complainant. The complainant in the cross-examination has admitted that, he has received the cheque from the accused on 8/3/2009 and he has paid the amount on 4/2/2011 to the accused. This admission supports the version of the accused that the said cheque is not issued to the complainant towards discharge of debt. But, subsequently the complainant again has stated that, he has received the said cheque from the accused on 8/3/2011. This is afterthought. No reliance could be placed to this evidence of the complainant. The handwriting mentioned in the cheque is not of the accused. In the cross-examination, the accused has stated that the said cheque is got filled by the accused through one of the girl. But, subsequently has changed the version and has given different statement. This shows that, the said cheque is not given by the accused towards discharge of the loan. The accused has taken the contention in the case that, the sister of the complainant was looking after the Real Estate office of the accused. At the time of closing the office, the sister of the

complainant has demanded Rs.1,00,000/- from the accused.

He has refused for the same. Therefore, the sister of the complainant has stolen some signed blank cheques of the accused from the office of the accused and handed over the same to the complainant and he has filed the false case against the accused by misusing one of the cheque. The accused has filed the private complaint against the complainant in this regard. The accused has rebut the case of complainant by raising the probable defence. These aspects are not considered by the learned Magistrate. The accused has filed the application to summon the sister of complainant to give evidence on behalf of accused. The learned Magistrate has rejected the said application. Opportunity is not given to the accused to putforth his case. Therefore, the accused has filed the application under Section 391 of Cr.P.C., in the appeal seeking permission to adduce her evidence. The evidence of this witness is essential to decide the appeal. The impugned judgment passed by the learned Magistrate is illegal and not sustainable in law. Hence, the advocate for the accused prayed to allow the application filed under Section

391 of Cr.PC., and also to allow the appeal and to acquit the accused.

12. On the other hand, the advocate for the complainant submitted that, the accused has borrowed loan of Rs.6,00,000/- from him on 4/2/2011. Towards discharge of this loan, the accused has issued the cheque for Rs.6,00,000/-. This cheque was presented to the Bank for

encashment and same was dishonoured with endorsement that the accused was not having sufficient funds in his account. Thereafter, notice was issued to the accused to pay the cheque amount. Even inspite of receipt of notice, the accused has not paid the cheque amount. Therefore, the accused has committed the offence under Section 138 of N.I.Act. The complainant has produced his Bank Pass Book in the appeal. From this it is made out that, the complainant was having Bank balance of Rs.5,25,362/- on 3/2/2011 and he has withdrawn the amount of Rs.5,25,000/- on 4/2/2011. The complainant by including another cash amount of Rs.75,000/- has paid the amount of Rs.6,00,000/- to the accused. The accused is admitting that the said cheque is in respct of his bank account and it bears his signature. There

is a presumption under Sections 118 and 139 of N.I Act that the said cheque was issued towards discharge of debt. It is for the accused to rebut the case of complainant. In the present case, the accused has taken the contention that, the sister of the complainant has stolen some signed blank cheques from the office of the accused and has handed over the said cheque to the complainant and by misusing one of the cheque, the complainant has filed the false case against the accused. After issuance of notice, the accused has replied the said notice. He has not taken this contention in the reply notice. The accused has not given any complaint to the police in

respect of stolen of the said cheque by the sister of the complainant. Even he has not given intimation to the bank for stop payment. This shows that, the defence taken by the accused is false one and afterthought. Said defence is taken for the purpose of avoiding payment of the said amount to the complainant. The accused has filed the private complaint against the complainant after filing the complaint by the complainant. This supports the version of complainant. The complainant has proved that accused has committed the offence u/s 138 of N.I.Act. Therefore, the learned Magistrate

has rightly convicted the accused for the said offence. The sentence of fine imposed on the accused in respect of said offence is not adequate. The learned Magistrate ought to have imposed double the cheque amount as a fine to the accused. Therefore, the sentence of fine imposed to the accused is liable to be enhanced from Rs.6,00,000/- to Rs.12,00,000/- by allowing the Criminal Revision Petition. The application filed by the accused under Section 391 of Cr.P.C., in the appeal is not sustainable in law or on facts. This application is filed with an intention to prolong the case. Hence, the complainant prayed to dismiss the application filed under Section 391 of Cr.P.C., and to dismiss the appeal filed by the accused under Section 374(3) of Cr.P.C., and to allow the Criminal Revision Petition.

13. In view of the rival contentions, the following points

that arise for my consideration in the Appeal and Criminal Revision Petition are as follows :-

1. Whether the complainant proves beyond all reasonable doubt that the accused has committed the offence punishable under Section 138 of Negotiable Instrument Act?

2. Whether the application filed by the accused under Section 391 of Cr.PC., is liable to be allowed?

3. Whether the sentence of fine imposed by the learned Magistrate to the accused in the impugned judgment is inadequate?

4. Whether the impugned judgment is liable to be set aside?

5. What Order?

14. My finding to the above points are as under:-

POINT No.1: In the affirmative;

POINT No.2- In the negative;

POINT No.3:- In the negative;

POINT No.4:- In the negative;

POINT No.4:- As per final order, for the following:-

REASONS

15. POINT Nos.1 TO 3 : The complainant has filed the private complaint before the trial court alleging that the accused has committed the offence under Section 138 of N.I.Act. The case of the complainant in brief is that, the accused has borrowed loan of Rs.6,00,000/- from him on 4/2/2011. Towards discharge of this loan, the accused has

issued cheque for Rs.6,00,000/- dated 29/3/2011 to the
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complainant. The complainant has presented this cheque to the Bank for encashment on 29/3/2011 and same was dishonoured with endorsement that the accused was not having sufficient funds in his account on 31/3/2011. Thereafter, the complainant has issued legal notice to the accused to pay the cheque amount by RPAD on 13/4/2011. The accused has received the said notice, but has not paid the cheque amount to the complainant and thereby the accused has committed the offence under Section 138 of N.I.Act.

16. The complainant/P.W.1 in his evidence has deposed the above said facts. Ex.P1 cheque issued in the name of complainant for Rs.6,00,000/-. In this cheque, signature of the accused is appearing. As per Ex.P2 Bank endorsement, this cheque was dishonoured with endorsement that accused was not having sufficient funds in his account. The complainant has issued legal notice to the accused to pay the cheque amount as per Ex.P3 by RPAD. This notice is received by the accused and has replied the same as per Ex.P6.
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17. There is a presumption under Sections 118 and 139 of Negotiable Instrument Act that the said cheque was issued towards discharge of debt. It is for the accused to rebut the case of complainant. The Hon'ble Supreme Court of

India in the decision reported in AIR 2010 SUPREME COURT

1898, Rangappa vs. Mohan held as under:

> "The presumption mandated by Section 139 of the Act does indeed include the existence of legally enforceable debt or liability. 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 constested. However there can be no doubt that there is an initial presumption which favours the complainant. S. 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 S. 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in 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 accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it 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. 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."

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18. In the present case, the accused has taken the contention that the sister of the complainant has stolen the some signed blank cheques from the Real Estate Office of the accused and has handed over the said cheques to the complainant and he has misused one of the cheques and filed false case against the accused. Accused has not borrowed any money from the complainant and he has not issued said cheque to the complainant towards discharge of debt. After receipt of notice Ex.P3 from the complainant, the accused has replied the said notice to him as per Ex.P6. In this reply notice, the accused has not stated that the sister of the complainant has stolen the said cheque from his office and handed over the same to the complainant and by misusing the same he has filed false case against the accused. If really the sister of the complainant had stolen the said cheque from the office of the accused, he would have stated this fact in his reply notice. He has not given any complaint to the jurisdictional police in this regard. Even he has not intimated the bank to stop the payment. All these aspects show that the said cheque is not stolen by the sister of the complainant from the office of the accused. After filing the private

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complaint by the complainant. The accused had filed one private complaint against the accused and his sister alleging

that the said cheque was stolen from his office. This private complaint was also dismissed. The complainant has produced his bank passbook in the appeal along with memo. From this passbook it is made out that, the amount of Rs.5,25,000/- was withdrawn from the bank on 4/2/2011 at the time of paying the money to the accused. The complainant is saying that by arranging another Rs.75,000/-, he has paid Rs.6,00,000/- to the accused. From the evidence of P.W.1 and Ex.P1 cheque and this passbook entry, it is made out that, the complainant has paid Rs.6,00,000/- to the accused by way of debt and the accused has issued the said cheque to the complainant towards discharge of debt. In view of the above said decision of the Hon'ble Supreme Court of India stated supra, it shall be presumed that the said cheque was issued towards discharge of debt. In the present case, the accused has not rebutted the case of complainant by raising the probable defence. The defence taken by the accused is not acceptable. The evidence of P.W.1 is reliable. In the cross-examination, he has made a stray admission that, he has

received the cheque from the accused on 8.3.2009 instead of 8.3.2011. This does not affect the veracity of the evidence of P.W.1. Subsequently P.W.1 has clarified that the said cheque was received on 8/3/2011. The accused is also contending that the ink which is used to sign the cheque is different from other writings of the cheque. He has not written the other

writings of the cheque. Therefore, he has not issued the said cheque. This contention also cannot be accepted. Once the accused is handed over the signed cheques to the complainant, the complainant has got implied authority to fill up the said cheque to the said amount as per Section 20 of the N.I.Act. The complainant has presented the cheque to the bank for encashment and same was dishonoured with endorsement that the accused was not having sufficient funds in his account. Even after receipt of notice, the accused has not paid the cheque amount to the complainant. Therefore, he has committed the offence under Section 138 of N.I.Act.

19. The accused has filed the application under Section 391 of Cr.P.C., seeking permission to adduce the evidence of the sister of the complainant in the appeal. The

accused in his reply notice has not stated that the sister of the complainant has stolen the blank signed cheque from his office and has handed over the same to the complainant and by misusing the same, he has filed the false case against the accused. Therefore, it is not possible to believe the contention taken by the accused in this regard. Moreover, he has not filed any complaint to the jurisdictional police in this regard. No purpose will be served by examining the sister of the complainant in the appeal. Hence, application filed by the accused under Section 391 of Cr.P.C., cannot be allowed.

20. The complainant has filed the Crl.Revision Petition

stating that, the sentence of fine imposed by the learned Magistrate is not adequate and it is liable to be enhanced. Considering the cheque amount the learned Magistrate has imposed the fine amount of Rs.6,00,000/- to the accused for the offence under Section 138 of N.I.Act. Same is not illegal. The sentence of fine imposed by the learned Magistrate is not liable to be enhanced. Hence, the Crl.Revision Petition filed by the complainant is liable to be dismissed.

21. The complainant has proved beyond all reasonable doubt that the accused has committed the offence under

Section 138 of N.I.Act. The learned Magistrate has properly appreciated the evidence on record and has come to the right conclusion. The learned Magistrate has rightly convicted the accused for the said offence. The impugned judgment is not illegal and as such it is not liable to be set aside. In view of the above said reasons, the contentions of the advocate for the accused cannot be accepted. There is no merit in the appeal. Hence, this appeal is liable to be dismissed. Therefore, points 1 to 3 are answered accordingly.

22. POINT NO.4: - In view of the above discussions and my findings to the points No.1 to 3, I proceed to pass the following:

ORDER

The application filed by the accused under Section 391 of Cr.P.C., is dismissed.

The appeal filed by the accused under Sec.374(3) of Cr.P.C. is dismissed.

The impugned order of conviction and sentence passed by the XVI Additional CMM Bangalore in the Judgment in C.C.No. 24048/2011 dated 9/7/2014 is hereby confirmed. 20 Crl.Appeal 859/2014 & Cri.Revision Petition No. 419/2014 The Criminal Revision Petition filed by the complainant under Section 397 of Cr.P.C., is dismissed.

Keep the copy of the original Judgment in Crl.Appeal No. 859/2015 and copy thereof in Criminal Revision Petition 419/2014. Send the copy of the Judgment along with records to the Lower Court forthwith.

*** (Dictated to the Judgment-writer directly on computer, 'Script' corrected and then pronounced by me in the open court on this the 25th day of July 2015).

(DESHPANDE.G.S.) LIX Addl. C.C. & Sessions Judge, BANGALORE CITY.

21 Crl.Appeal 859/2014 & Cri.Revision Petition No. 419/2014 22 Crl.Appeal 859/2014 & Cri.Revision Petition No. 419/2014 25/7/2015 Common order pronounced in the open Court [vide separate common judgement/order] with the following operative portion:

> The application filed by the accused under Section 391 of Cr.P.C., is dismissed.
>
> The appeal filed by the accused under Sec.374(3) of Cr.P.C. is dismissed. The impugned order of conviction and sentence passed by the XVI Additional CMM Bangalore in the Judgment in C.C.No. 24048/2011 dated 9/7/2014 is hereby confirmed. Keep the copy of the original Judgment in Crl.Appeal No. 859/2015 and copy thereof in Criminal Revision Petition 419/2014.
>
> Send the copy of the Judgment along with records to the Lower Court forthwith.
>
> (DESHPANDE.G.S.) LIX Addl. C.C. & Sessions Judge, BANGALORE CITY.

23 Crl.Appeal 859/2014 & Cri.Revision Petition No. 419/2014 Common order pronounced in the open Court [vide separate common judgement/order] with the following operative portion:

> The Criminal Revision Petition filed by the complainant under Section 397 of Cr.P.C., is dismissed.
>
> Keep the copy of the original Judgment in Crl.Appeal No. 859/2015 and copy thereof in Criminal Revision Petition 419/2014.
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> Send the copy of the Judgment along with records to the Lower Court forthwith.
>
> (DESHPANDE.G.S.) LIX Addl. C.C. & Sessions Judge, BANGALORE CITY.