Mr. T.M.Mahaboobulla vs Mr. Satish L on 16 November, 2019

SCCH-21 1 CC No.57285/18

IN THE COURT OF THE XVII ADDL. JUDGE, COURT OF SMALL CAUSES & ADDL. CHIEF METROPOLITAN MAGISTRATE, MAYO HALL UNIT, BENGALURU (SCCH-21).

Dated: This the 16th Day of November 2019

PRESENT: Smt. VANI A. SHETTY, B.A. Law L.L.B, XVII ADDL. JUDGE, Court of Small Causes & ACMM, Bengaluru.

C.C. No.57285/2018

Complainant : Mr. T.M.Mahaboobulla,
S/o. Mohammed Fazlulla,
Aged about 45 years,
R/at No.3, 3rd Floor,
2nd Main, Ramaiah Layout,
St.Thomas Town Post,
Bengaluru - 560 084.
M.No.: 9343854230

(By Sri. A.S., Advocate)

V/s.

Accused : Mr. Satish L.,
S/o. Gurumurthy Reddy @ Lakkanna,
Aged about 39 years,
R/at No.5,
Akshay Nagar, 2nd Cross,
2nd Block, Ramamurthy Nagar,
Bengaluru - 560 016.

(By Sri. O.K.H., Advocate)

SCCH-21 2 CC No.57285/18

JUDGEMENT

The accused in this case is tried for the offence punishable under Section 138 of Negotiable Instrument Act 1881, on the complaint of the complainant.

2. The summary of the complainant's case is that:

> The complainant and accused entered into a sale agreement on 09.01.2018 to purchase site No.45, Katha No.45, Serial No.882, situated at Kowdanahalli, K.R.Puram Hobli, Bangalore North taluk, Bengaluru for total sale consideration of

Rs.1,00,00,000/□and out of which, accused received an advance amount of Rs.42,00,000/□by way of cheque for a sum of Rs.10,00,000/□and remaining amount in cash. But, the accused failed to execute the sale deed in favour of the complainant. In discharge of the advance amount paid by the complainant, the accused issued a cheque bearing No.281508 dated 30.04.2018 for a sum of Rs.42,00,000/□drawn on Federal Bank, Banaswadi Branch, Bengaluru, assuring that the cheque would be honored if presented for payment. The complainant presented the said cheque for encashment through his banker in Kotak Mahindra Bank, Kammanahalli Branch, Bengaluru on 11.06.2018. But the said cheque came to be dishonored on the ground of 'Funds insufficient' on 12.06.2018. Thereafter, on 11.07.2018 complainant got issued legal notice by RPAD and Speed post demanding for repayment of the cheque amount within 15 days from the date of receipt of the notice.

The notice sent to the accused through Speed post has been duly served and the RPAD was returned as unserved. The accused has not paid the amount and therefore, this complaint is filed on 09.08.2018.

3. On filing of the complaint cognizance was taken for the offence punishable under section 138 of N.I. Act and sworn statement was recorded. As there was sufficient ground to proceed further, a criminal case has been registered against the accused and he was summoned. The substance of accusation is orally stated to the accused and his plea was recorded. Accused pleaded not guilty and submitted that he has defence to make.

4. In support of the complainant's case, the sworn statement filed by the complainant by way of affidavit during the pre□summoning stage is considered as evidence of the complainant and 7 documents are marked as per Ex.P1 to Ex.P7. The statement of the accused is recorded under Section 313 of Cr.P.C and his answers were recorded. The accused got examined himself as DW.1.

5. Heard the arguments.

6. The points that arise for my consideration are:

1. Whether the complainant proved that accused has committed an offence punishable under Section 138 of N.I. Act 1881?

2. What order?

7. My answer to the above points is as follows:

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Point No.1 :    In the Affirmative,
Point No.2 :    As per final order
                for the following:
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REASONS

8. POINT No.1: In order to constitute an offence

under Section 138 of N.I. Act, the cheque shall be presented to the bank within a period of 3 months from its date. On its dishonor, the drawer or holder of the cheque as the case may be shall cause demand notice within 30 days from the date of dishonor, demanding to repay within 15 days from the date of service of the notice. If the drawer of the cheque fails to repay the amount mentioned in the cheque within 15 days from the date of service of notice, cause of action arises for filing complaint.

9. The sworn statement filed by the complainant during the pre□summoning stage is considered as the evidence of the complainant. In the affidavit, complainant has testified regarding payment of the amount towards purchase of site, issuance of cheque, issuance of demand notice and also failure of the accused to pay the cheque amount. The complainant has produced cheque bearing No.281508 dated 30.04.2018 for a sum of Rs.42,00,000/□drawn on Federal Bank, Banaswadi Branch, Bengaluru, alleged to be issued by the accused as per Ex.P1. Ex.P1 stands in the name of complainant for Rs.42,00,000/. Ex.P2 is the endorsement issued by the bank stating dishonor of Ex.P1 cheque. Ex.P2 shows that Ex.P1 was dishonored for 'funds insufficient'. Ex.P3 is the office copy of legal notice dated 11.07.2018. Ex.P4 is the postal receipts for having sent legal notice to the accused. Ex.P5 is the postal acknowledgment and Ex.P6 is the postal track consignment.

10. In the present case, cheque is dated 30.04.2018. Ex.P2 shows that cheque was dishonored on 12.06.2018. As per Ex.P2, it appears that cheque in question was presented within the period of three months from the date of cheque. The notice was issued within the statutory period of time. The notice issued to the accused was served on 12.07.2018 as per Ex.P6. The service of notice to the accused is disputed by him contending that it was sent to his wrong address. During the cross examination, accused has admitted that he is residing at No.5, Ramamurthy Nagar, Bengaluru. The accused has not produced any documents to show his correct address. Therefore, it is clear that notice was sent to the correct address of the accused. When a notice is sent to the correct address of the accused duly stamped, there is a presumption under section 27 of General Clauses Act that notice has deemed to be effected to the addressee unless and until the contrary is proved. Hence, the service of demand notice deemed to have effected to the accused. The cause of action for filing the complaint arose on 28.07.2018. The complainant has filed this complaint on 09.08.2018 i.e. within 30 days from the date of arisal of cause of action. In this way, the complainant has complied all the mandatory requirements of Section 138 and 142 of N.I. Act.

11. Section 118 of N.I. Act lays down that, until the contrary is proved, it shall be presumed that every Negotiable Instrument was made or drawn for consideration. Section 139 of N.I. Act, contemplates that unless the contrary is proved, it shall be presumed that the holder of the cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole of any debt or liability. In the decision reported in 2001 Crl.L.J. page 4647 (SC) (Hiten P.Dalal -Vs□Bratindranath Banerjee) and in various other decisions of Hon'ble Supreme Court and our Hon'ble High Court, repeatedly observed that in the proceeding under Section 138 of N.I. Act the complainant is not required to establish either the legality or the enforceability of the debt or liability since he can avail the benefit of presumption under Section 118 and 139 of N.I. Act in his favour. It is also observed

that, by virtue of these presumptions, accused has to establish that, the cheque in question was not issued towards any legally enforceable debt or liability. Later in the year 2006, the Hon'ble Supreme Court in the decision M.S. Narayan Menon @ Mani -vs□State of Kerala and another (2006 SAR Crl. 616) has held that, the presumption available under Section 118 and 139 of N.I. Act can be rebutted by raising a probable defence and the onus cast upon the accused is not as heavy as that of the prosecution. It was compared with that of a defendant in civil proceedings. Subsequently, in the year 2008, in Krishna Janardhana Bhat

-Vs□Dattatreya G. Hegde (2008 Vo.II SCC Crl.166) Hon'ble Supreme Court has held that, existence of legally recoverable debt is not a presumption under Section 138 of N.I. Act and the accused has a constitutional right to maintain silence and therefore, the doctrine reverse burden introduced by Section 139 of N.I. Act should be delicately balanced.

12. In the decision, Rangappa - Vs - Mohan (AIR 2010 SC 1898) Hon'ble Supreme has considered this issue and clarified that, existence of legally recoverable debt or liability is a matter of presumption under section 139 of N.I. Act. In para 14 of the judgment the Hon'ble Supreme Court observed as here below:

> "In light of these extracts, we are in agreement with the respondentclaimant 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 (supra) 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. 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 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. As clarified in the citations, the accused can rely on the materials submitted by the complainant and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own. "

13. In view of the above decision, now it is clear that the presumption mandated by Section 139 of N.I. Act does indeed include the existence of legally enforceable debt or liability. It is a rebuttable presumption. It is open to the accused to raise the defence wherein the existence of legally enforceable debt or liability can be contested. For rebutting presumption, the accused do not adduce evidence with unduly high standard of proof but, the standard of proof for doing so with that of preponderance of probabilities. If the accused is able to raise a probable defence, which creates doubt about the existence of legally enforceable debt or liability, the onus shifts back to the complainant. It is also clear for rebutting the presumption accused can rely on the materials submitted by the complainant or his cross□examination and he need not necessarily adduce his evidence in all the cases.

14. In the present case, complainant has complied all the mandatory requirements of Section 138 and 142 of N.I. Act. As per the case of the complainant, accused agreed to sell site No.45, Katha No.45, Serial No.882, situated at Kowdanahalli, K.R.Puram Hobli, Bangalore North taluk, Bengaluru to him for total sale consideration amount of Rs.1,00,00,000/□and received an advance amount of Rs.42,00,000/□i.e. Rs.10,00,000/□through cheque and remaining Rs.32,00,000/□in cash. The complainant has also contended that since accused has failed to execute the sale deed, he issued Ex.P1 cheque for Rs.42 lakhs towards repayment of advance sale consideration amount. On the other hand, accused has contended that since he wanted money for construction of his house, he requested the complainant to lend loan of Rs.15 lakhs through his friend Afraz and on his request, complainant lent Rs.10 lakhs by receiving Ex.P1 blank signed cheque and a blank signed stamp paper which was later converted by the complainant as sale agreement produced at Ex.P7. The accused has admitted the issuance of Ex.P1 cheque and his signature in it. Therefore, the presumption contemplated under section 118 and 139 of NI Act works in favour of the complainant. Now, it is for the accused to rebut the presumption.

15. As already observed above, the defence of the accused is that there was no sale agreement at all and it was loan transaction of Rs.10 lakhs. Admittedly, accused has received Rs.10 lakhs by way of cheque. As per the case of the accused, he has agreed to repay the same in the month of March 2018. It is an admitted fact that even till today, accused has not repaid it. Accused has not given any explanation for not repaying it to the complainant.

16. It is true that an amount of Rs.10 lakhs was only paid by the complainant by way of cheque and remaining amount was stated to be paid in cash. It may be true that complainant should not have ventured to pay such a huge amount in cash. If the amount was paid in cash, it may violates some of the guidelines of income tax authority. But even if there is such violence, the transaction cannot be held invalid. It is important to note that accused has admitted his signature in Ex.P7 sale agreement. Though he has contended that it was obtained in blank, he has not explained under what circumstances he was forced to sign blank stamp paper without insisting for a written loan agreement. The most important aspect is that accused himself has contended that complainant was

introduced through one Afraz. The said Afraz is a witness to Ex.P7 sale agreement. It not the contention of the accused that Afraz is not in good terms with him or he conspires with the complainant. It is also not contended that the complainant had also insisted Mr. Afraz to sign the blank stamp paper. The involvement of Afraz in signing Ex.P7 Sale Agreement speaks in clear terms that Ex.P7 was executed by the accused knowing fully its contents and Afraz had witnessed it. The onus is on the accused to rebut the presumption. Unless the accused is able to raise a probable defence, the complainant need not prove the execution of Ex.P7. Therefore, if there was no passing of consideration, nothing would have prevented the accused from examining Afraz to demonstrate the real transaction.

17. It is also to be noted that in the cross examination, the accused states that he has offered to sell the property involved in Ex.P7 sale agreement. It is an indication of his move and therefore, it can be reasonably inferred that at the time of disputed transaction also accused has offered to sell it and therefore, Ex.P7 Sale agreement came to be executed. The accused is not a lay man. He is a B.Com., graduate and he is stated to be working as sales Manager. Therefore, if complainant had really forged and created Ex.P7 Sale agreement, accused would have reacted strongly either by filing the complaint before the police or by initiating the prosecution before the court. The failure of the accused at least to re□pay the admitted amount of Rs.10 lakhs also affects the credibility of defence. In the evidence, accused has not at all disputed the financial capacity of the complainant to pay an amount of Rs.42 lakhs. Having regard to these aspects, there are no reasons to suspect the transaction as stated in Ex.P7.

18. The learned counsel appearing for the accused has placed reliance on the decision of K.Narayana Nayak vs. Sri.M.Shivarama Shetty (ILR 2008 Kar 3635). In the said case, the borrowing of loan/liability itself was under dispute. On that background, the Hon'ble High Court held that, there was no regally enforceable debt. The learned counsel appearing for the accused has also placed reliance on the decisions of our Hon'ble High Court rendered in the case of Branch Manager, PCA & RD Bank Ltd., Belthangady vs. Suresh Das (2018(4) KCCR 3674) and A.P.Amit Kumar vs. A.P.Manjunath On (Laws(Kar) 2018 3 34). The facts in the above said cases and the present case are totally different. Therefore, the above said decisions are not helpful to the case of the accused.

19. The learned counsel appearing for the accused also placed reliance on the decision reported in AIIR 2009 SC 1518 (M/s. Kumar Exports Vs. M/s. Sharma Carpets) and contended that the cheque was not issued by the accused in discharge of any debt or liability to the complainant. It is a case wherein complainant is proprietor of M/s. Sharma Carpets and contended that it supplied materials to the accused and in discharge of said amount, accused issued cheque. The defence of the accused is that there was no delivery of goods and cheque issued in the form of advance payment for the supply of materials. On that backdrop, it is held that complainant failed to produce the book of accounts or stock register pertaining to the transaction and the official of Sales tax department also deposed that no transaction took place between the complainant and the accused. Considering the said facts, accused is acquitted. Therefore, the facts of present case is totally different from the said case. Hence, the said decision is also not helpful.

20. Learned counsel appearing for the accused also relied on the decision of K.Subramani vs. Damodar Naidu (2015 CCC 001(SC)). In the said case, huge amount of Rs.14,00,000/□were involved and both complainant and accused therein were the lecturers. Under that background, the Hon'ble Supreme Court held that, they were governed by Government Servant conduct Rules which prescribes the mode of lending and borrowing which was not complied. Further, the Hon'ble Supreme Court has held that though the complainant had contended that he had sold site for source of consideration, it was not produced. Hence, the Hon'ble Supreme Court rendered the judgment on the basis of facts of that case. In the present case, the circumstances are different. Therefore, it cannot be made applicable.

21. Learned counsel appearing for the accused also relied upon the decision of Hon'ble Supreme Court rendered in the case of Krishna Janardhan Bhat vs. Dattatraya G. Hegde (2008 AIR SCW 738) which is distinguished by the Hon'ble High Court in the case of Rangappa vs. Mohan. Therefore, the reliance cannot be placed on the ratio laid down in the said decision. Hence, none of the decisions relied by the learned counsel appearing for the accused are helpful to the facts of this case. Under these circumstances, the defences raised by the accused are not probabalised. There are no materials on record to create doubt about the transaction. Hence, the strong presumption contemplated under section 118 and 139 of NI Act is not rebutted.

Therefore, I hold that complainant has proved the guilt of the accused for the offence punishable under Section 138 of N.I. Act. Accordingly, I answer Point No.1 in the AFFIRMATIVE.

22. POINT No.2: Section 138 of N.I. Act empowers the Court to sentence the accused upto two years and also to impose fine which may extend to twice the amount of cheque, or with both. The cheque in question was issued on 30.04.2018 for Rs.42,00,000/□ The complainant was deprived of money that was rightfully due to him for a period more than one and half year. However, having regard to the facts of the case and the amount involved, there are no warranting circumstances to award the sentence of imprisonment as substantive sentence. Directing the accused to pay fine and also awarding compensation to the complainant would meet the ends of justice. But adequate default sentence shall have to be imposed to ensure the recovery of fine imposed to the accused. Therefore, the complainant is required to be suitably compensated as per section 80 and 117 of the Negotiable Instrument Act and also appropriate in default sentence. Having regard to all these fact, I pass the following:

> ORDER Acting under Sec.265 of Cr.P.C, the accused is found guilty for the offence punishable under Sec.138 of N.I. Act and he is sentenced to pay a fine of Rs.44,00,000/□(Rupees forty four lakhs only). In default to pay fine, the accused shall undergo simple imprisonment for a period of six months.

Further, acting under Section 357(1)(b) of Cr.P.C., out of the fine amount, a sum of Rs.43,50,000/□ (Rupees forty three lakhs fifty thousand only) on recovery shall be paid as compensation to the complainant.

The office is directed to supply a free copy of judgment to the accused.

(Dictated to the Stenographer, transcribed and typed by her, same is corrected, signed and then pronounced by me in the open court on this the 16th day of November 2019) (VANI A. SHETTY) XVII ADDL. JUDGE, Court of Small Causes & ACMM, Mayo Hall Unit, Bengaluru.

ANNEXURE List of witnesses examined on behalf of the complainant:

P.W.1 : T.M.Mahaboobulla List of documents marked on behalf of the complainant:

Ex.P.1	:	Cheque
Ex.P.2	:	Bank endorsement
Ex.P.3	:	Legal notice
Ex.P.4	:	Postal receipt
Ex.P.5	:	Speed post receipt
Ex.P.6	:	Postal track consignment
Ex.P.7	:	Sale Agreement

List of witnesses examined on behalf of the accused:

DW.1: : Satish L. List of documents marked on behalf of the accused: Nil.

(VANI A. SHETTY) XVII ADDL. JUDGE, Court of Small Causes & ACMM, Mayo Hall Unit, Bengaluru.

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