IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 2ND DAY OF DECEMBER, 2020

BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH

CRIMINAL APPEAL No.309/2011

BETWEEN:

MR. MUNIRAJU
S/O. LATE KALLAPPA
AGED ABOUT 44 YEARS
OCC: AUTO DRIVER
R/O KAARAHALLI
YESHWANTHPURA
NELAVAGILU
HOSKOTE TALUK
BENGALURU RURAL DISTRICT. … APPELLANT

(BY SRI. SHIVARAJ N. ARALI, ADVOCATE
FOR M/S. LAW NEST)

AND:

MR. G NAGARAJU
S/O. LATE GOVINDAPPA
AGE 38 YEARS
R/O KURUBARA HALLI VILLAGE
KASABA HOBLI
HOSKOTE TALUK
BENGALURU RURAL DISTRICT. ... RESPONDENT

(BY SRI. ABHINAV R., ADVOCATE FOR
M/S. KUMAR AND KUMAR [ABSENT])

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 378(4) CR.P.C PRAYING THIS COURT TO SET ASIDE THE ORDER DATED

30.11.2010 PASSED BY THE P.O., FTC-V, BENGALURU RURAL DIST., CRL.A.NO.23/09 - ACQUITTING THE RESPONDENT/ ACCUSED FOR THE OFFENCE PUNISHABLE UNDER SECTION 138 OF N.I. ACT AND CONFIRM THE ORDER OF CONVICTION DATED 20.02.2009 PASSED BY THE PRL.C.J., (JR.DN.) AND JMFC, HOSKOTE IN C.C.NO.160/07 AND ETC.

THIS CRIMINAL APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 18.11.2020, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

JUDGMENT

This appeal is filed challenging the judgment of acquittal passed in Crl.A.No.23/2009 dated 30.11.2010 on the file of the Additional District and Sessions Judge, Fast Track Court-V, Bangalore Rural District, Bangalore.

2. The parties are referred to as per their original rankings before the Trial Court as complainant and accused to avoid the confusion and for the convenience of the Court.

3. The factual matrix of the case is that the complainant and the accused are friends. The accused had requested the complainant to lend hand loan of Rs.70,000/- to meet out his urgent financial necessity on first week of October, 2006. The complainant gave an amount of Rs,64,000/- on 15.10.2006 and the accused had promised to repay the said loan

within three months but the accused did not repay the same. However, on repeated requests, the accused issued a self cheque dated 21.01.2007 and when the same was presented, it was dishonoured. The complainant got issued legal notice both to his residential address as well as his office address. That in spite of receiving the notice sent under certificate of posting, the accused did not give any reply and hence the complainant was forced to file complaint. The complainant in order to substantiate his contention he himself examined as PW1 and got marked document Exs.P1 to P8. The trial Court, after recording the evidence of the complainant examined the accused under Section 313 of Cr.P.C. The accused also examined himself as DW1 and got marked Ex.D1. The trial Judge, after considering both oral and documentary evidence convicted the accused vide judgment dated 20.02.2009. Being aggrieved by the same, the accused had preferred an appeal in Criminal Appeal No.23/2009 and in the said appeal, the accused was acquitted vide judgment dated 30.11.2010. Being aggrieved, the complainant has filed this appeal.

4. In the appeal, it is contended that the appellate Court failed to appreciate the fact that both complainant and accused are friends and are known to each other and the accused has admitted his signature at Ex.P1(a). Though accused had taken a defence that the cheque was stolen which was kept in his driving school run by him, the same has not been probabilised and the said defence has been taken for the first time before the trial Court without giving any reply to the legal notice and the same is an after thought defense. It is also contended that no complaint was given by the accused when he came to know about stolen of cheque. The appellate Court also illegally held that the complainant did not prove by documentary evidence that the cheque was written by the accused himself and also failed to draw presumption under Section 139 of the N.I. Act. It is also contended that the appellate Court has observed that the complainant has not demanded interest on the hand loan availed by the accused and as both accused and the complainant were friends, question of concept of collecting interest does not arise and the complainant also has not contended that he lent hand loan for interest. The observations made by the appellate court in paragraphs-12, 14, 17, 25, 39

and 40 are contrary to the facts and also on law and hence, the learned counsel submits that the matter requires interference by this Court.

5. The counsel appearing for the complainant vehemently contends that the accused do not dispute the cheque and the notice sent under certificate of posting was served on him and though notice sent through RPAD to the residential address and also to office address were returned, the accused did not choose to give any reply to the notice of the complainant. The accused has categorically admitted in the cross-examination that the address mentioned in the registered postal covers are correct and the same is not disputed. When such being the case, General Clauses Act is applicable with regard to service of notice. Learned counsel also submits that the appellate Court while acquitting the accused has come to a conclusion that the complainant has not obtained any documents while lending money. The fact that both are friends is not disputed. The defense, of the accused is that the cheque kept in the driving school was stolen and to that effect no probable evidence is available to believe the defence of the accused.

Learned counsel would also submit that the judgment of the Apex Court in the case of **RANGAPPA v. MOHAN** reported in **AIR 2010 SC 1898** is aptly applicable to the case on hand in order to draw presumption that the accused has not disputed his signature on the cheque and also no reply was given to the legal notice. Though the accused has been examined, the statutory presumption under Section 139 of the NI Act has not been rebutted by the accused and also the admission on the part of DW1 has not been considered by the appellate Court in a perspective manner. It is contended that the appellate Court has committed a fundamental error in not considering the presumption and also held that the complainant was not having any source to lend money in favour of the accused is erroneous and hence, it requires interference by this Court. Learned counsel for the respondent inspite of opportunity, did not choose to make his submissions.

6. Having heard the learned counsel for the appellant and the grounds urged in the appeal and also the defence raised by the accused before the trial Court and considering both oral

and documentary evidence, the points that arise for consideration of this Court are:

i) Whether the appellate Court has committed an error in acquitting the accused and whether it requires restoration of the judgment of the trial Court?

ii) What order?

Point Nos.I and I:

7. Before considering oral and documentary evidence, first this Court would like to refer the contents of the complaint. The complaint discloses that the complainant and the accused are good friends and they know each other from past several years. The accused had approached the complainant in the first week of October and requested him to pay hand loan of Rs.70,000/- as he was in financial constraint and hence, the complainant has extended hand loan of Rs.64,000/- on 15.10.2006. The accused had promised to repay the amount within three months. It is also the case of the complainant that he demanded amount on several occasions but the accused did not repay and at the instance of the complainant the accused had issued a cheque dated 25.01.2007 and when the same was

presented, it was dishonoured with a shara 'funds insufficient'. Hence, legal notice was issued and no reply was given by the accused.

8. The complainant in order to substantiate his case, examined himself as PW1 and filed sworn affidavit in lieu of his chief examination reiterating the averments of the complaint. PW1 was subjected to cross-examination. In the cross-examination, it is elicited that the complainant was a tailor and also working as a auto driver. The accused is known to him from last 3 to 4 years in connection with getting driving licence from the driving school run by the accused. He also admits that along with the accused both were running crackers chit and he was working as agent under the accused. He was visiting Sai Enterprises of the accused once in 15 days. It is suggested that he was the Director of Sai Ram Enterprises and the same was denied. It is suggested that in 2006, accused was not having any financial constraints and the same was denied. PW.1 states that he lent amount cash to the accused in the driving school and no other persons were present at that time. PW1 claims that Ex.P1-cheque is in the handwriting of the accused. He

admits that the writing in the cheque is in one ink. It is suggested that the signature is in different ink and the same was denied. It is suggested that the accused used to keep signed blank cheques in his driving school and the same was stolen by the complainant and misused the said cheque and the suggestions are denied.

9. Per contra, the accused examined himself as DW1 by filing affidavit in lieu of chief examination. He has reiterated in his defence that he used to keep blank signed cheques in his driving school and the complainant had stolen the said cheque and filed a false case. DW1 was subjected to cross-examination. In the cross-examination, it is elicited that he is a B.Com graduate. He was residing earlier at Kurubarahalli and now he is residing at Hosakote Town from last two years. He admits that he was running Sai Vidya Driving School at Hosakote, located in Jayashree Hospital building, Old Madras road, Hosakote Town. He admits that he only gave instructions to his counsel to prepare his chief evidence and also admits that in the said affidavit he has sworn to that he is a resident of Kurubarahalli. He also admits that he was running crackers chit

and also admits that he was running the same for a period of two years. He admits that he had acquaintance with the accused from 2004 and also says both of them had opened joint account in the year 2004 but they had not obtain any cheque book except pass book-Ex.D1. He also admits that in the chief evidence he sworn to that a joint account was opened in the Vijaya Bank and he claims that the same is by mistake. He states that he used to keep five signed blank cheques in his driving school as he used to visit RTO office in connection with the driving school. He came to know about stealing of the said cheque only when he received summons from the Court and he admits that he cannot tell which number the cheque was stolen. He did not give any complaint to the police as per the advise of his advocate that not to file complaint since he has already received summons. He also states that since he was not aware of stealing of the cheque he did not inform the Bank. It is suggested that in respect of the residential address and office address, notice was sent to him and the same was denied that the same in not known to him. He admits that the address mentioned in Ex.P8 is correct. It is suggested that notice was sent to his residential address but he has not given reply and he

has also deposed that the notice was not served on him and the same was denied. It is suggested that one Malleshaiah had filed a case against him for bouncing of cheque for an amount of Rs.60,000/- and he denies the same but claims a false case is filed. It is suggested that case in CC No.368/1998 is against him is denied and that he is not aware of the same. It is also suggested that he had borrowed a sum of Rs.25,000/- from one J.A.Nagaraj and he denies the same. It is suggested that J.A.Nagaraj had also filed a case against him in case No.218/2005 and he denies that he is not aware of the same. It is suggested that in the said case one D.L.Somesh is the advocate appearing on behalf of him and the same was denied. Further, in the cross-examination, he admits that his bank account at Vijaya Bank bearing account No.4782. The present cheque Ex.P1(a) also belongs to the said Bank. It is suggested that handwriting in Ex.P1 is in his writing and the same was denied. It is suggested that the handwriting available in Ex.P1-Cheque and also the case pending before the Mallur Court cheque are similar and witness says that he does not know the same. It is suggested that the signature available at Ex.P1(a) and the cheque of the Malur Court are similar and the same was

denied. But, he admits that Ex.P1 and also the cheque of Malur Court pertains to account No.4782 in respect of the Vijaya Bank.

10. Having perused both oral and documentary evidence available on record, it is the specific case of the complainant that he had lent money to the accused on 15.10.2006 and in order to repay the said loan the accused had issued a cheque on 25.01.2007. When the cheque was presented it was dishonoured with a shara 'insufficient funds'. The complainant has relied upon document Ex.P1-cheque. The accused did not dispute his signature available on Ex.P1. The complainant also relied upon Ex.P3-legal notice and the said notice was sent to the residential address of the accused Kurubarahalli and also to his driving school. The complainant relied upon Ex.P4-certificate of posting, RPAD and postal receipt. Exs.P7 and P8 are the registered postal cover in respect of his residential address and also the driving school address.

11. It is important to note that when a notice was sent under UCP as well as registered post, an endorsement at Ex.P7 discloses that the post man had visited for seven days to his residential address and the accused was not found, hence

returned the same. In the cross-examination, DW1 categorically admits that the address mentioned in Ex.P7 is correct and so also the address mentioned in Ex.P8 in respect of his driving school. It is also important to note with regard to service of notice is concerned, the accused made an attempt in his evidence that from last two years he is residing at Hosakote Town. But, in the cross-examination, he categorically admits that in his chief evidence affidavit sworn to that he is residing in the address mentioned at Ex.P7. The said affidavit was filed on 17.01.2009 and hence it is clear that as on the date of filing of the affidavit, he was residing in the address mentioned in Ex.P7 and it is also important to note that in the cross-examination he also admits the address mentioned in Ex.P8 is correct. Hence, it is clear that the accused has made an attempt to depose before the Court that he has not received the notice when the address mentioned in Exs.P7 and 8 are correct and the very same address was furnished by the accused in his affidavit, it is clear that he has deposed falsely before the Court that he has not received the notice on the ground that he is residing at Hoskote. The postal receipt produced by the complainant in terms of Ex.P4, it is clear that notice was sent through UCP. When such

being the case, as rightly pointed out by the learned counsel for the appellant that under the General Clauses Act, the Court can draw inference that notice was served on the accused in respect of both addresses which were sent through UCP even though registered postal covers are returned as he admits both are correct address.

12. Now, coming to the evidence of PWs.1 and 2 and no doubt, PW1 in the cross-examination admits that both are having joint account held in terms of Ex.D1 and the complainant also does not deny the said fact that they were not having joint account. It is important to note that PW1 in the cross-examination admits that they were running crackers chit but he claims that the same was run by the accused and he was only an agent and he had secured 149 members for the said chit business. It is suggested that he was one of the Director and the same was denied. The defence counsel itself suggested to the PW1 that handwriting available in Ex.P1 is written in one ink and the same was admitted but suggested that the signature was in different ink and the same was denied. In the cross-examination, a suggestion was made that he had stolen the

cheque and misused the same and the said suggestion was denied. In order to substantiate the same, the defence of the accused is that the complainant had stolen the cheque but to that effect nothing is elicited. No doubt, it is elicited that both are friends and PW1 was also working as agent in respect of the crackers chit.

13. It is also important to note that in the cross-examination of DW1 regarding transaction is concerned, it is suggested that DW1 used to keep five blank cheques signed since he used to visit RTO office often for his driving school purpose. He admits that he has not given any complaint to police and also did not intimate the bank as he did not know about stealing of the cheque. But, he gave an explanation that he came to know only after received summons from the Court and on the advise of the advocate not given any complaint.

14. Having perused the evidence of DW1, a suggestion was made to the accused whether he had faced several cases on account of dishonour of cheque in respect of one Malleshaiah but he admits that the said Malleshaiah has filed a false case against him. It is also suggested that one J.Nagaraj has also filed a

case against him though he denies in the cross-examination, he categorically admits that Ex.P1 the subject matter of the cheque and the complaint filed against him before the Malur Court cheque are bearing account No.4782 and both the cheques are of Vijaya Bank cheques. Hence, it is clear that though he denies the cases filed against him by Malleshaiah and J.Nagaraj, the admission made by him clearly shows that the evidence of DW1 is not trustworthy not only in respect of his transaction and also in respect of his address. Even though he admits that the address is correct, he contends that he is residing in Hosakote. In support of his claim, he has not produced any documents before the Court that he is residing at Hoskote.

15. It is important to note that when the accused did not dispute the signature available in Ex.P1 and also he has not given any reply notice, it is rightly pointed out by the learned counsel for the complainant that the principles laid down in the ***Rangappa***'s case is applicable to the case on hand. It is also important to note that the court below while convicting the accused had drawn the presumption in favour of the complainant and comes to the conclusion that the statutory presumption was

not rebutted under Section 139 of the NI Act. It is further important to note that the appellate Court while acquitting the accused had given the reason that the complainant had not obtained any document while lending loan. It is also important to note that it is emerged in the evidence that both accused and the complainant are friends and also it is not in dispute that they were running crackers chit and PW1 claims that he was an agent and the accused claims to be one of the Director and no material is placed to that effect. When both are friends, the Court also cannot expect the documents for the transaction. The very observation of the appellate Court that the complainant had not obtained any document is erroneous. It is important to note that cheque is given and hence the said document itself supports the case of the complainant. The accused has to explain how the cheque has gone to the hands of the complainant. No doubt, a defence was raised that the complainant had stolen the cheque and it has to be noted that PW1 has categorically denied the said defence and no explanation is given before the Court why he used to keep five blank cheques signed. No doubt, he was running a driving school; that does not mean that he used to keep signed blank cheques and he has not assigned any reasons

to whom he has handed over the said cheques. The evidence adduced by the accused with regard to stolen of cheque in his driving school cannot be believed.

16. The accused has to lead plausible evidence before the Court and this Court has taken note of the evidence of DW1 that his evidence cannot be believed and the same is not trustworthy and he makes an attempt to give evading answer in the cross-examination in respect of other two cases filed against him for cheque bouncing. Though he denies, he admits that two cases are filed against him in the cross-examination and hence his evidence is not credible. The appellate Court has carried away in a wrong motion that the complainant failed to prove that he lent money and erroneously relied upon the judgment reported in the case of **Shiva Murthy vs. Amruthraj** reported in **ILR 2008 KAR 4629** and has held that the complainant has to prove the existence of legal debt. It is to be noted that the complainant has placed the cheque which has not been disputed by the accused and no reply is given and trial court rightly drawn the statutory presumption under Section 139 of NI Act.

17. I have already pointed out the principles laid down in the ***Rangappa's*** case supra is aptly applicable to the case on hand. The statutory presumption available is in favour of the complainant. The other observation made by the appellate court that when the amount is paid in excess of Rs 20,000/- and the said amount to be paid through cheque only under the Income Tax Act also cannot be accepted. Here, the transaction is between friends and it is categorically admitted that no complaint to the police was given and no intimation was given to the Bank. No doubt, he has given explanation and this Court comes to the conclusion that based on the said cheque, notice was issued and an inference was drawn that notice sent under UCP was served on him and he has not given any reply, complaint or intimation to the Bank. The appellate Court has over-looked the statutory presumption provided under Section 139 of the NI Act even though the accused adduced evidence he did not rebut the evidence of the complainant. The case of the complainant is probable than the case of the accused. The other observation of the Appellate Court that the complainant not claimed the interest and the said observation is also erroneous since it is not the case of complainant that he gave the amount

for interest. Therefore, the appellate Court has committed an error in coming to the conclusion that the accused rebutted the evidence of the complainant and in the cross-examination PW1, nothing is elicited except they are good friends and the complainant was also visiting the driving school of the accused. Hence, the appellate Court has committed an error in reversing the finding of the trial Court without drawing presumption available in favour of the complainant. Therefore, nothing inspires this Court that the evidence led by the accused amounts to rebutting the evidence of the complainant. On the other hand, the very answers of DW1 goes against him and his evidence cannot be believed. The approach of the appellate Court is erroneous and hence, it requires interference by this Court.

18. In view of the discussions made above, I pass the following:

ORDER

(i) The appeal is allowed.

(ii) The impugned judgment of acquittal dated 30.11.2010 passed in Criminal Appeal No.23/2009, is hereby set aside.

(iii) The judgment of the Trial Court dated 20.02.2009 passed in C.C.No.160/2007 is restored.

(iv) The accused is convicted for the offence punishable under Section 138 of the NI Act.

(v) The accused is directed to pay the amount of Rs.1,00,000/- to the complainant within eight weeks from today and in default of the payment of the fine amount, the accused shall undergo simple imprisonment for a period of one year.

(vi) The trial Court is directed to secure the accused if he fails to pay the amount and subject him to serve sentence.

(vii) The Registry is directed to transmit the Trial Court records to the Trial Court forthwith.

Sd/-
JUDGE

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