IN THE COURT OF JUDICIAL MAGISTRATE OF THE FIRST CLASS, AT MANDYA

Dated this the 12th day of December, 2019.

Present:
Kum. H.Sowmyashri B.A. LL.M.,
Judicial Magistrate First Class,
Mandya.

C.C.No. 01/2018

Complainant : Sri. C Kumaraswamy,
S/o Channegowda,
Aged about 48 years,
R/o Hullenahalli village,
Dudda Hobli,
Mandya Taluk and Dist.
(By Sri. NP Mahendra.)

V/S

Accused : Sri. Lingegowda,
S/o Late. Kyathegowda,
Aged about 46 years,
R/o No. 5/4, 1st Main,
8th Cross, RR Layout,
Nagadevanahalli,
Bengaluru.
(By Sri. H Nagaraju.)

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1. Date of filing private complaint	22.11.2017.
2. Offences complained of	U/Sec.138 of N.I. Act.
3. Opinion of the judge.	As per final order.

J U D G M E N T

This judgment arise out of the complaint filed by the complainant under Sec 200 of Cr.P.C against the accused for the offence punishable under Sec.138 of Negotiable Instrument Act and to pass necessary order for the amount of Rs.5,00,000/- (Rupees Five Lakh only) due to the complainant from the accused and to grant such other reliefs.

2. The case of the complainant is that, the accused is well acquainted with complainant, he approached the complainant on 01.08.2017 for a sum of Rs.5,00,000/-for his legal necessity i.e., to meet domestic requirements, to discharge hand loans and also to do hotel business. Considering the well acquaintance, complainant on 08.08.2017, advanced Rs.5,00,000/- to the accused and accused agreed to repay the same within 2 months. After lapse of two months, when complainant demanded for repayment of loan, accused issued post dated cheque dated 10.10.2017 bearing cheque No.529671 for a sum of Rs.5,00,000/- drawn on State Bank of India, SRR Layout, Nagadevanahalli Branch, Bangalore and requested the complainant to present the same. The complainant presented the said cheque through his banker Kaveri Grameena Bank, Shivalli branch, Mandya Taluk for encashment on the same day. But the said cheque was returned on 17.10.2017 with an endorsement "Funds Insufficient". Thereafter, the complainant got issued a legal notice to the accused on 24.10.2017 through registered post

demanding payment of cheque amount. The legal notice sent to accused was duly served on 27.10.2017. In-spite of service of notice, accused failed to make the good of cheque amount. Hence, the complainant constrained to file the present complaint.

3. After filing of the complaint, sworn statement of the complainant was recorded and summons was issued to accused. Accused appeared in pursuance of summons issued to him and was released on bail. Substance of accusation was recorded, read-over and explained to the accused to which he pleaded not guilty and submitted that he has defence to make.

4. At pre-summoning stage itself, complainant was examined as PW1 and got marked Ex-P1 to P5. Since the accused has not moved any application as required U/sec.145(2) of the Act, the matter was posted for defence evidence.

5. The Hon'ble Apex Court in Indian Bank Association & others Vs Union of India,(2014) 5 SCC 590, has issued following directions to all the Criminal Courts in the country dealing with Section 138 cases to strictly follow the below-mentioned procedures for speedy and expeditious disposal of cases falling under Section 138 of the Negotiable Instruments Act.

DIRECTIONS:

1) Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.

2) MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. Court, in appropriate cases, may take the assistance of the police or the nearby Court to serve notice to the accused. For notice of appearance, a short date be fixed. If the summons is received back un-served, immediate follow up action be taken.

3) Court may indicate in the summon that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, Court may pass appropriate orders at the earliest.

4) Court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under Section 251 of Cr.P.C. to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145 (2) for re-calling a witness for cross-examination.

(5) The Court concerned must ensure that examination-in-chief, cross- examination and re-examination of the complainant must be conducted within three months of assigning the case. The Court has option of accepting affidavits of the witnesses, instead of examining them in Court. Witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the Court.

6. As per the above directions of the Hon'ble Apex Court, a summary trial relating to an offence u/s 138 NI Act is to begin from the statement of defence of the accused. Thereafter, matter is to be fixed for defence evidence straightway unless an

application is moved u/s 145 (2) of the Act. If said application is allowed, the accused is given an opportunity to cross-examine the complainant. After recording the cross-examination, the matter automatically goes to stage of defence evidence. There is no stage for recording statement of accused under Section 313 of Cr.P.C.

7. In the present case, as accused failed to move application under Sec 145(2) of the Act, accused was called upon to enter into defence evidence. In-spite of providing opportunity, accused did not step into the witness box, did not choose to lead his side of evidence and remained absent and as such defence evidence was taken as nil.

8. Heard counsel for complainant. Accused failed to present his arguments and as such accused's arguments was taken as nil. Perused the materials placed before the court.

9. The points that arise for my consideration are:

1. Whether the complainant proves that, accused issued cheque bearing No.529671 for Rs.5,00,000/- dated 10.10.2017, drawn on State Bank of India, Nagadevanahalli Branch, Bengaluru towards discharge of the legally recoverable debt or liability and on its presentation the same was dishonoured for 'Funds Insufficient' and in-spite of service of legal notice, accused failed to pay the cheque amount within the statutory period and thereby committed the offence punishable u/Sec.138 of N.I. Act?

2. Whether the complainant has complied with the mandatory provisions of Section 138(a) to (c) of Negotiable Instruments Act?

3. What order?

10. My findings on the above points are as follows:

Point No.1 and 2 : In the **Affirmative.**
Point No.3 : As per final order, for the following:

R E A S O N S

11. **Point No.1:**- The complainant has filed the present complaint u/s.200 of Cr.P.C. stating that the accused has issued a cheque dated:10.10.2017 for Rs.5,00,000/- (Rupees Five Lakh only) drawn on State Bank of India, Nagadevanahalli Branch, Bengaluru in his favour towards repayment of loan amount which the accused had borrowed from him. The complainant in-order to prove his case got examined himself as PW1 and got exhibited original Cheque, Bank Memo, Legal notice, postal receipt and Postal Acknowledgment which were marked as Ex.P1 to Ex.P5 respectively.

12. The question now is whether the cheque in question is belonged to accused and whether the signature of the accused is available in the cheque in question. In this case the complainant, in-order to prove

his case produced the original cheque issued by the accused containing signature of accused on it, which were marked as Ex-P1 and Ex-P1(a) respectively. Therefore, the initial burden of proof regarding issuance of cheque by the accused is proved before this court. Nowhere the accused has disputed his signature in Ex.P1 cheque.

13. Once the execution of cheque in question is proved, the court shall draw presumption available under Sec 139 of NI Act that Ex-P1 has been drawn towards the discharge of legally enforceable debt and is drawn for valid consideration.

Of course, the presumption available is rebutable one.

14. Since the complainant has proved that the said cheque belongs to the accused and bears the signature of the accused, the burden shifts on the accused to prove that how the said cheque came to the hands of the complainant.

15. Though accused appeared and his plea was recorded, he did not file any application as required under Section 145(2) of the Act. The Hon'ble Apex Court in Indian Bank Association Vs Union of India has issued certain directions to be followed by the trial courts in cases falling under section 138 of NI Act. As per the directions of the

Hon'ble Apex Court since accused had not filed any application U/sec.145(2) of the Act, seeking for recall of complainant witness, matter was posted for defence evidence. Even when the matter was posted for defence evidence, accused remained absent and did not choose to lead his side of evidence. Hence, there is no defence by the accused at all.

16. Accused, in-order to rebut the presumption, neither cross examined PW1 nor stepped into the witness box to lead his side of evidence. In the absence of rebutable evidence, the court has to presume that the said cheque was issued to the complainant towards discharge of legal liability. Sec.139 of NI Act is a rebutable presumption and unless and until the contrary is proved, it shall be presumed that, the holder of the cheque has received the cheque of the nature referred to in Sec.138 for the discharge in whole or in part any debt or other liability. Hence, considering the oral and documentary evidence, I am of the opinion that, Ex P-1 cheque has been issued by the accused to the complainant towards discharge of legal liability. Hence, the accused has to make good about the said cheque.

17. Therefore, on perusal of the case file, materials produced before this court, I am of the opinion that the complainant has clearly proved before this court that

Ex.P1 cheque was issued in his favour by the accused towards discharge of legally enforceable debt. The presumption regarding existence of legal liability as provided u/s.139 of N.I. Act is not replaced by the accused by giving rebutable evidence. Hence, point No.1 is answered in the **Affirmative**.

18. Point No.2 : Under section 138 of N.I. Act the offence will complete only if mandatory provisions of Section 138(a) to (c) are complied with. In this case Ex-P1 cheque is dated 10.10.2017 and said cheque was dishonored as per bank memo Ex.P2 dated 17.10.2017. The documents reveal that the cheque has been presented within time from the date of it's issue and legal notice was issued on 24.10.2017 as per Ex.P3. The said notice was duly served through RPAD Ex.P5 on 27.10.2017. Complainant filed present complaint on 22.11.2017. Therefore, I am of the view that the complainant has complied with the mandatory provisions of section 138 (a) to (c) of the Act. Accordingly point No.2 is answered in the **Affirmative**.

19. Point No.3 : The complainant has proved that Ex-P1 cheque was issued by the accused towards discharge of legal liability and said cheque was dishonored by the bank. In-spite of issuance of legal notice Ex-P3, accused has failed to make good to the complainant after receipt of the same by the accused. He has not paid the amount within stipulated period and complainant has complied with mandatory provisions of Section 138(a) to (c) of the Act and since accused having failed to make good to the complainant within stipulated period, he has committed offence punishable under Section 138 of N.I. Act. There is no contra evidence either to overcome Section 118 or 139 of the Act. Hence I am of the opinion that the complainant has proved his case. Accordingly I proceed to pass the following:

O R D E R

Acting under Section 255(2) of Cr.P.C., the accused is convicted for the offence punishable under Section 138 of N.I. Act. In consequence, accused is sentenced to pay fine of **Rs.5,05,000/-** (Rupees Five Lakh and Five Thousand only). In default of payment of fine, accused shall undergo S.I. for six months.

Further it is also ordered that out of the fine amount so realized, a sum of **Rs.5,00,000/-** (Rupees Five Lakh only) shall be paid to the complainant as compensation under Section 357(1) of Cr.P.C. The remaining fine amount of Rs.5000/- shall go to the State.

Bail bond of the accused and that of his surety shall stands cancelled.

(Dictated to the stenographer, transcribed by her, corrected by me and then pronounced in the Open Court on this ***12th day of December, 2019)***

(H. Sowmyashri)
Judicial Magistrate of the First Class,
Mandya.

ANNEXURE

The list of witnesses examined on behalf of prosecution:

PW.1 - Sri. Kumaraswamy.

List of documents marked on behalf of prosecution:

ExP.1 - Cheque.
ExP.1(a) - Signature of accused.
ExP.2 - Bank endorsement/memo.
ExP.3 - Legal notice.
ExP.4 - Postal receipt.
ExP.5 - Postal acknowledgement.

The list of witness examined and documents marked on behalf of defence:

- N I L -

(H.Sowmyashri)
Judicial Magistrate of the First Class,
Mandya.

Judgment pronounced in the open court
(Vide separate Judgment)

<u>O R D E R</u>

Acting under Section 255(2) of Cr.P.C., the accused is convicted for the offence punishable under Section 138 of N.I. Act. In consequence, accused is sentenced to pay fine of **Rs.5,05,000/-** (Rupees Five Lakh and Five Thousand only). In default of payment of fine, accused shall undergo S.I. for six months.

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shall go to the State.

Bail bond of the accused and that of his surety shall stands cancelled.

Copy of this judgment shall be furnished to the accused forthwith.

Issue conviction warrant against the accused.

(H.Sowmyashri)
JMFC, Mandya.