

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 31ST DAY OF JANUARY, 2019

BEFORE

THE HON'BLE Dr. JUSTICE H.B.PRABHAKARA SASTRY

CRIMINAL APPEAL No.855 OF 2010

Sami Labs Limited

v/s.

Mr. M.V. Joseph

JUDGMENT

In the complaint filed by the present appellant under Section 200 of Code of Criminal Procedure, against the present respondent, for the offence punishable under Section 138 of Negotiable Instruments Act, 1881 (hereinafter for brevity referred to as 'N.I.Act '), the learned XII Additional Chief Metropolitan Magistrate, Bengaluru (hereinafter for brevity referred to as trial Court '), in C.C.No.448/2008 pronounced the judgment of acquittal on 08.06.2010. It is against the said judgment of acquittal, the complainant has preferred this appeal.

2. The summary of the case of the complainant in the trial Court is that the accused was under its employment as an Executive Production. While he was in service, he was granted with a housing loan of a sum of ₹ 5,00,000/-which he had agreed to repay with the prevailing rate of interest. After availing the loan the accused resigned from his employment and was relieved from the services on 16.03.2007. Since, he was due in repayment of housing loan to the company, the accused issued a cheque bearing No.645661 dated 21.08.2007 drawn on U.T.I Bank, M.G.Road Branch, Bengaluru, in favour of the complainant company for a sum of\* 5,00,000/-. When the complainant presented the cheque for realisation, the same was returned dishonoured with a shara " insufficient funds ". After that the complainant got issued a legal notice to the accused demanding payment of the cheque. Despite receipt of notice, since the accused failed to pay the cheque amount, the complainant was constrained to institute a case against him for the offence punishable under Section 138 of the N.I.Act.

3. On behalf of the company, one Sri.Shaik Mohamed who is said to be the principal officer/authorised signatory of the complainant was examined as PW1 and documents from Exs.P1 to P5 were marked. The accused got himself examined as DW1 and examined one Sri.Anzar C.A as DW2 and got marked the documents from Exs.D1 to D17. After hearing both side, the trial Court by its judgment dated 08.06.2010 acquitted the accused of the alleged offence. It is against the said judgment of acquittal, the complainant has preferred this appeal.

4. Learned counsel for the appellant in her argument vehemently submitted that when the borrowel of housing loan for a sum of ₹ 5,00,000/-and issuance of cheque as per Ex.P1 and its dishonour as per Ex.P2 and also issuance of notice by the complainant to the accused as per Ex.P3 were not in dispute. The Court below had failed to give the benefit of presumption under Section 139 of the N.I.Act to the

complainant. Learned counsel further submitted that even if it is assumed that the cheque in question was given as a security, still, at the time when the cheque was presented for realisation, the loan was due for its payment. As such, the defence of the accused that the cheque was given as a security is not acceptable. She further submitted that in the absence of cogent materials produced by the accused to show that he has cleared either the entire or part of the loan amount, the defence of the accused that he had repaid a sum of\* 52,500/-also not acceptable.

5. Learned counsel for the respondent in his brief argument submitted that the cheque was not issued on 21.08.2007 which is the date shown on it, but it was given much earlier to it as a security when the housing loan was taken by the accused. Thus, when the cheque was issued as a security and also considerable amount under the alleged housing loan has already been repaid, thereby reducing the alleged liability much lesser than the alleged cheque amount, the action under Section 138 of the N.I.Act would not sustain.

6. PW1 in his examination-in-chief in the form of affidavit evidence has reiterated the contentions taken up by the complainant in the complaint. Though he has denied a suggestion that the cheque in question was not issued by the accused as a security at the time of availment of the housing loan, but he admitted a suggestion as true that the date mentioned on the cheque was through a rubber stamp of their office.He also admitted a suggestion as true that one Sri. Anzar C.A. (DW2) is the Director of the complainant company. He also denied a suggestion as not true that the complainant company owes a sum of 7,00,000/-to the accused towards the arrears of his service benefits and that the entire loan amount has been recovered by the company by withholding the service benefits.

8. The accused in his evidence as DW1 though has admitted of he availing a housing loan of\* 5,00,000/-from the complainant company in the month of October, 2005 but has taken a contention that the said loan was an interest free loan repayable in the installments of 2,500/-per month from out of his salary.It is also his evidence that the cheque in question was given by him to the complainant as a security at the time of sanctioning the housing loan to him.He further stated that from the month of November 2005 onwards, the complainant has started deducting loan installment from his salary.Accordingly, a total sum of 52,500/-has been deducted as on the date of his coming out of the company on 17.03.2007. He also contended that the company owes him a sum of more than 7,00,000/-towards his service benefits.In that regard, he got marked the documents including four pay slips, loan application, the letter said to have been issued by the Director acknowledging the receipt of the cheque in question as a security under different exhibit numbers.

9. DW2 Anzar C.A stating that he was one of the Director in the complainant company from 1991 to July 2007 has stated that at the time a housing loan of\* 5,00,000/-was disbursed to the accused as an interest free loan.However, recoverable in the installment of\* 2,500/-per month from out of the salary of the accused from November 2005.He also stated that from November, 2005 to 2007 recovery at the same rate was made from out of his salary. In the cross examination of this witness DW2, it was tried to elicit that DW2 himself has played fraud with the complainant company and is facing a criminal action initiated by the complainant company.

10. From the summary of the above evidence of the parties, it is not in dispute that a housing loan of a sum of 5,00,000/-was given to the accused by the complainant company in October, 2005, which loan was repayable by the accused in the installments at the rate of ₹ 2,500/-per month from

November, 2005. According to the accused the cheque in question at Ex.P1 was given by him at the time of availing loan by him, as a security. The accused has produced a letter said to have been issued to him by the company, through its Director (DW2) on 21.10.2015 acknowledging the receipt of the cheque in question as a security for the interest free housing loan of 5,00,000/- which was repayable in the installments at 2,500/- per month from out of his salary.

11. The accused has also produced a copy of his reply to the notice of the complainant dated 24.08.2007 and marked it as Ex.D14, wherein also he has stated that the cheque in question was given by him to the complainant company as a security. He has also taken a contention in the very same reply notice that the company has already recovered the housing loan out of his salary and other benefits for which he was entitled.

12. A copy of Ex.D6 is also produced and marked by the accused at Ex. D15. He has also produced a copy of his letter dated 21.10.2005 shown to have been addressed to the complainant company stating that the cheque No.645661 was an undated cheque and was given as a security towards housing loan availed by him. Though the said letter is shown to have been acknowledged by DW2, but, the date mentioned while acknowledging the letter appears to be an anti-date than the main letter at Ex.D17. However, the evidence of DWS.1 and 2 corroborated by the documents at Exs.D6, D15 and also the admission of PW1 in his evidence that the date on cheque at Ex.P1 is put with the rubber stamp of the complainant company would make it to believe that the cheque in question was given by the accused to the complainant company as a security while he availed the housing loan which according to him was in October, 2005.

13. In *Sampely Satyanarayana Rao Vs. Indian Renewable Energy Development Agency Limited* reported in (2016) 10 SCC 458, the Hon'ble Apex Court at Paragraph 11 was pleased to observe as below:

11. The judgment in *Indus Airways* is clearly distinguishable. As already noted, it was held therein that liability arising out of claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself on a par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque there was a debt/liability in praesenti in terms of the loan agreement, as against *Indus Airways* where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liability but as advance for the purchase order which was cancelled. Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan installments which had fallen due those such deposit of cheque towards repayment of instalments was also described as " security " in the loan agreement. In applying the judgment in *Indus Airways*, one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque.

14. From a reading of the said judgment, it is clear that even though the post dated cheque is given as a security towards repayment of the installment of already disbursed loan amount, since the said cheque represents discharge of existing, enforceable debt or liability as the installments had fallen

due on the date of issuance of cheque, the dishonour of such cheque would fall under Section 138 of the Negotiable Instruments Act.

15. In the instant case, admittedly, the housing loan was disbursed to the accused which according to the accused was in the month of October, 2005. However, as contended by the accused in his reply notice at Ex.D14 and in his evidence as DW1 the complainant company has recovered the said housing loan out of his salary and by his other benefits for which he was entitled to. It is also his contention that the repayment of the loan was to start from November, 2005 at the rate of 2,500/- per month and that he has already paid a sum of 52,500/-.

16. Thus, subject to the quantum of alleged repayment said to have been made by him, the fact remains clear that even according to the accused, the repayment of the loan was due. In such a case, when the repayment of the loan amount was shown to be due, the cheque though called as issued as a security would attract Section 138 of the the N.I.Act, once it is dishonoured.

17. A mere fact that the cheque issued as a security would also attract Section 138 of the N.I.Act, once the said cheque returns to the payee as dishonoured by the drawee Banker is also subject to the fact that as on the date of the presentation of the cheque the outstanding liability payable by the drawer of the cheque towards the payee/complainant should be to the extent of cheque amount or more than the cheque amount. This leads to the second contention taken up by the accused as his defence in the trial Court.

18. The accused apart from denying that the cheque in question was issued by him towards repayment of the alleged housing loan had also taken a defence that a substantial portion of the housing loan which according to him is a sum of 52,500/- was already repaid by him. Apart from the accused leading his evidence as DW1 on these lines also got the same reiterated through DW2. In order to show that recovery was being made by the complainant at the rate of\* 2,500/- per month from out of his salary, the accused also got produced his four pay slips for the month of November 2005, April 2006, May 2006 and January 2007 as Exs.D1 to D4 respectively, wherein, it is shown that a deduction towards loan at the rate of 2,500/- per month in each of those months was effected in his salary.

19. The complainant though not disputed the alleged deduction as contended by DW1 and evidenced through Exs.D1 to D4, but contended that the said deducted amount was appropriated towards the interest payable by the accused on the housing loan.

20. In order to show the alleged housing loan as interest free loan the accused apart from leading his evidence also got examined DW2, then Director of the complainant company. Though the complainant questioned the conduct and reliability of the evidence of DW2, but the accused also come up with the documents more particularly Exs.D6 and 15 to show that housing loan was interest free loan. On the other hand the complainant being the custodian of the documents and granter of the loan has not produced any piece of document to show the nature of the housing loan said to have been granted to the accused.

21. Had really the housing loan granted to the accused was repayable together with interest at any particular rate there upon, nothing had prevented for the complainant from producing the relevant document which are supposed to be in its custody. Thus, by withholding the essential material

documents, the complainant has enabled the accused to believe his version that a repayment of a sum of not less than 52,500/-has been made made by by him.When the complainant company is also the author of the salary slips at Exs.D1 to D4 and the said company having generated those pay slips to give to its employees, it could have produced the copies of those salary slips of the accused for the relevant period ie., from November, 2005 to March, 2007 and could have falsified the statement of the accused.No effort in that regard was made by the complainant.Thus, the evidence of the accused as DW1 corroborated by the documents produced by him and by the evidence of DW2 go to show that the deduction towards installment of repayment of the loan made by the complainant company from out of the salary of the accused was towards the repayment of the principle amount of the housing loan only. In that event, as on the date of the cheque at Ex.P1, the outstanding liability of the accused towards the complainant company would not be the cheque amount of 5,00,000/-shown in Ex.P1, but it would be any amount less than the said amount.

22. Section 138 of the N.I.Act makes it mandatory that to attract Section 138 of the N.I.Act, making the dishonour of the cheque as an offence, the issuance of cheque must be as a whole or in part of any debt or other liability.

23. In the instant case, when the housing loan disbursed to the accused in full, was a sum of\* 5,00,000/-and since it is established that a portion of it has already been repaid by the accused or has already been recovered by the complainant company from out of the salary of the accused, then the total outstanding liability would be any sum lesser than the cheque amount. Thus, when any sum issued in the cheque is for an higher amount than the outstanding liability and if that excess amount is also not towards any interest, cost, penalty etc., but remains unexplained, then Section 138 of the N.I.Act cannot be said to be applicable.

24. The trial Court since has appreciated the evidence in the case in its proper perspective and arrived at the conclusion of acquitting the accused from the alleged offence, which conclusion does not warrant any interference at the hands of this Court, I do not find any merit in the appeal.

Accordingly, the appeal stands dismissed as devoid of merits.

The judgment of acquittal passed by XII Additional Chief Metropolitan Magistrate, Bengaluru dated 08.06.2010 in CC No.448/2008 acquitting the respondent herein for the offence punishable under Section 138 of the N.I.Act stands confirmed.

Registry to transmit a copy of this judgment along with the Lower Court Records to the trial Court without delay.