IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 18TH DAY OF AUGUST 2011

BEFORE

THE HON'BLE MR.JUSTICE A.S.PACHHAPURE

CRL.APPEAL NO.115/2011(SJ)(A)

BETWEEN:

ABDUL REHAMAN,
S/O. MOULA SAB,
AGED ABOUT 30 YEARS,
BUSINESMAN,
R/O. K.T.J. NAGARA, 10TH CROSS,
DAVANAGERE. .. APPELLANT

(BY SRI.P. DHANANJAYA, ADVOCATE)

AND

D. KUBERAPPA,
S/O. DASABHOVI,
MAJOR,
R/O. KANIVEBILACHI VILLAGE,
CHANNAGIRI TALUK,
DAVANAGERE DISTRICT. .. RESPONDENT

(BY SMT. AKKAMAHADEVI HIREMATH, ADVOCATE)

CRL.A FILED U/S. 378(4) CR.P.C. BY THE ADVOCATE FOR THE APPELLANT PRAYIN THAT THIS HONBLE COURT MAY BE PLEASED TO SET ASIDE THE JUDGEMENT DATED 29.12.2010 PASSED BY THE II ADDL. SESSIONS JUDGE, DAVANAGERE INCRL.A.NO. 106/2010 - ACQUITTING THE RESPONDENT /ACCUSED FOR THE OFFENCE P/U/S 138 OF N.I. ACT.

THIS CRL.A.COMING FOR HEARING ON THIS DAY THE COURT MADE THE FOLLOWING:

JUDGMENT

The appellant has challenged the acquittal of the respondent for the charge under Sec.138 of the Negotiable Instruments Act, (for short N.I.Act) in the appeal before the first appellate court.

2. Facts relevant for the purpose of this appeal are as under:

The averments by the appellant reveal that the respondent was known to him and for his family necessities, the respondent received an amount of Rs. 1,60,000/- on 10.04.2006 as loan agreeing to repay the said loan with interest at 2% and in 16 monthly installments of Rs. 10,000/- each. As the respondent did not pay the loan amount advanced as agreed upon, the appellant approached the respondent, pursued him and thereby the respondent gave a cheque for Rs. 1,60,000/- on 26.03.2007 by writing the cheque and signing the same in his presence. The said cheque was presented for encashment before the bank and had returned with an endorsement of insufficient funds.

The appellant issued demand notice on 14.07.2007 and though the notice was served, there is no response. In the circumstances, the appellant approached the Trial Court with the complaint under section 200 Cr.P.C to initiate action for the offence punishable under section 138 of the N.I. Act.

3. During the trial, the complainant examined himself as PW1 and got marked documents Ex. P1 to P6. The statement of the respondent was recorded under Section 313 of Cr.P.C. He took the defence of total denial and examined himself as DW1. The Trial Court after hearing the learned counsel for the parties and on appreciation of the material on record, convicted the appellant for the offence under Section 138 of N.I.Act and ordered to undergo imprisonment and to pay a fine of Rs. 4000/-, in default to undergo simple imprisonment for two months and compensation of Rs. 1,90,000/- under Section 357 (3) of Cr.P.C. Aggrieved by the conviction and sentence, respondent preferred an appeal before the Sessions Court and the learned Sessions Judge after hearing the counsel for the parties

and on reappreciation of the material on record, acquitted the respondent for the aforesaid charge vide his judgement dated 29.12.2010. Aggrieved by the acquittal order, the present appeal has been filed.

4. I have heard the learned counsel for the parties. The points that arise for my consideration are :

1. Whether the appellant has made out any ground to warrant interference in the order of acquittal passed by the first appellate court?
2. Whether the application filed under Section 391 of Cr.P.C. deserves to be allowed.

5. So far as the transaction dated 10.04.06 is concerned, perusal of the complaint does not reveal execution of any documents while advancing loan of Rs.1,60,000/- to the respondent. Rather it is necessary for the appellant to establish his financial condition when he is advancing a huge amount of Rs. 1,60,000/-, either a pronote or atleast a receipt could have been taken by the appellant at the time of transaction. No explanation has been offered by the appellant for non execution of the documents on the date of the

transaction. Even other wise, perusal of the allegations in the complaint does not reveal, any document was executed on 10.11.2006 or any documents were deposited with the appellant pertaining to the property of the respondent. So according to the appellant, it was completely oral transaction without the support of any documents.

6. The appellant claims that as the respondent did not repay the amount, as agreed upon, he approached the respondent with request to repay the loan and the respondent is said to have issued a cheque dated 26.03.2007 for Rs. 1,60,000/- written and signed by the respondent on that date drawn on State Bank of India Channagiri. As could be seen from the said cheque dated 26.03.2007, it reveals that the signature of the respondent is in different ink whereas the contents of the cheque are in different ink. Even handwriting of the contents of the cheque are not similar to the handwriting of the signature, thereby an inference could be drawn that the cheque was blank at the time when it was issued to the appellant. Further

more, the averments in the complaint that the cheque was written by the respondent and signed in the presence of the appellant goes contrary to what is seen from the cheque Ex.P1.

7. To raise presumption under Section 139 of the N.I. Act, the appellant has to discharge initial burden by producing convincing and acceptable material on record. But unfortunately, so far as the transaction is concerned, there is no averment in the complaint about any documents having been executed and it is rather difficult to accept the version of the appellant that he advanced 1,60,000/- to the respondent without any document.

8. The learned counsel for the appellant has placed reliance on the decision of the Apex court reported in AIR 2010 Supreme Court 1898 (Rangappa Vs. Mohan) wherein it is stated a post dated cheque was issued towards loan amount. After the expiry of the date mentioned in the cheque, it is presented for encashment and had returned with an endorsement of insufficient funds. In the circumstances, the Apex Court

held that when the contents of the cheque and the signature have been admitted, a presumption arises under section 139 of the N.I Act. But the facts on hand are altogether different. The cheque was not issued towards repayment on the date of the transaction and even though appellant states in his complaint that the cheque was written and signed by the respondent in his presence, the signature and the contents of the cheque rather written in different ink and rather dissimilar. In the circumstances, the decision referred to by the learned counsel is of no help to the appellant.

9. The appellant has filed an application under Section 391 of Cr.P.C. seeking permission to produce the documents dated 27.09.2006 written on a stamp paper worth Rs. 50/- said to have been executed by the respondent and his family members in favour of the appellant. Under this document, it is mentioned that the respondent has received Rs. 1,60,000/- on 10.04.2006 and agreed to repay the loan amount in 16 monthly instalments of Rs.10,000/- and the documents which were deposited pertaining to the landed property

of the respondent were said to have been taken back after executing this document. It is relevant to note that in the complaint there is no allegation that either on the date of transaction or on any subsequent date, the document was executed by the respondent in favour of the appellant. Even with regard to the deposit of title deeds by the respondent, there is no allegation in the complaint. In such circumstances, rather it is improper to accept the application of the appellant filed Under section 391 of Cr.P.C. The appellant did not produce the documents though it was in his custody before the Trial Court, did not make any allegations with regard to the execution of the document in the complaint and even kept quiet without producing the same before the first appellate court. So in the absence of any allegation in the complaint, acceptance of the documents would be improper and is of no help to the appellant.

10. The First appellate court after assigning proper reasons has come to the conclusion that the appellant has not proved the transaction and also the

issuance of cheque Ex.P1, for the reasons stated supra and rightly allowed the appeal of the respondent and granted an order of acquittal.

Under the circumstances, I do not find any merit in this appeal and the application under Section 391 of Cr.P.C. is rejected. Hence, I answer point no.1 in the affirmative and point no.2 in the negative and proceed to pass the following order:

ORDER

Accordingly, the appeal is dismissed. No costs.

Sd/-
JUDGE

csg