

Sri. Vijay vs Sri. C Ramaswamy on 28 October, 2015

IN THE COURT OF THE XVIII ADDL. CHIEF METROPOLITAN
MAGISTRATE, BANGALORE

DATED : THIS THE 28th DAY OF OCTOBER 2015

PRESENT: LAKSHMINARAYANA BHAT.K., B.A., LL.B.
XVIII ADDL.C.M.M., BANGALORE
C.C.NO: 2568/2013

Complainant: Sri. Vijay
S/o Late Mutharayappa, 40 Yrs.,
R/a No.650/02,
Lakkanna Building,
Peenya 2nd Block, 1st Stage,
Bangalore-56.

(Represented by Shri.K.Ramachandra,
Advocate)

V/s.

Accused : Sri. C Ramaswamy
S/o Late Chowdappa, 53 Yrs.,
R/a No.535,
Government Hospital Road,
Peenya 2nd Block, 1st Stage,
Bangalore-560 058.

(Represented by Sri.M Subramani,
Advocate)

Offence complained of: U/s.138 of N.I.Act

Plea of accused: Pleaded not guilty

Final order Accused is found guilty

Date of order: 28th October 2015

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CC.No:2568/2013

JUDGMENT

The complaint was filed against the accused for the offence punishable under Section 138 of Negotiable Instruments Act (hereinafter in short referred as N.I. Act.).

2. After filing of the complaint, cognizance of the offence was taken. After recording sworn statement in pursuance of summons, presence of the accused was secured and he was enlarged on

bail. The substance of accusation was recorded and the accused pleaded not guilty.

3. To prove the complaint averments, the complainant was examined as P.W.1 and has produced documents marked as per Ex.P.1 to Ex.P.6. The statement of the accused under Section 313 of Cr.P.C was recorded. Accused entered his defence and was examined as DW.1. He has produced documents marked as per Ex.D1 to D4.

4. Heard the arguments. The Learned Advocate appearing for the accused has relied up on the following judgments.

1.2015(1) DCR 5 (K Subramani Vs. K. Damodara Naidu) 2.2015(1)642 (B Shivaram Vs. MV Venkatesh) 3.2012(1) DCR 385(Shanthi Vs., Mary Sherly) 4.2012(3) KCCR 2057 (Veerayya Vs., GK Madivalar) 5.2010(2) Kar. L. J 284 (B Girish and S Ramaiah) 6.2011(3) KCCR 1825(M/s. United Distributors, Mangalore Vs. Smt. Geetha K Rai) 7.2014(1) DCR 547 (SK Jain Vs., Vijay Kalra) 8.2010 (1)DCR 609 (NI Shaju vs., TK Paulose, thondanala House and Another.) 9.2010(1) DCR PAGE 1(Rajendra Babal Naik Vs., CM Mathew and another) 10.2014(2)SCC 236 (John K Abraham Vs., Simon C Abraham and another) 11.2001 CRI.L.J. 745 (B. P Venkateshulu vs., KP Mani Nayar) 12.2008CRI.L.J. 2955(Rajendraprasad Gangabishen Porwal Vs., Santoshkumar Parasmal Saklecha and Anr.,) 13.2008 CRI.L.J.3411 (K Narayana Nyak V M Shivarama Shetty) 14.2011 CRI.L.J. 552 (Amzad Pasha V. HN Lakshmana).

5. After analyzing the averments made in the complaint, oral and documentary evidence placed on record and after hearing the arguments, at this stage the points that arise for my determination are:-

1) Whether the complainant has proved in June 2011 he had advanced loan of Rs.15,00,000/- to the accused and Ex.P.1 cheque issued by the accused in discharge of the said debt was dishonoured and even after service of notice, the accused had failed to make repayment and thereby he is guilty of the offence punishable under Section 138 of N.I.Act?

2) What order?

6. My findings on the aforesaid points are as under:-

POINT NO.1 : Partly in the Affirmative, POINT NO.2 : As per final order, for the following:-

REASONS

7. POINT NO.1:- As per the complaint averments, the accused is the close friend of the complainant since last several years. The accused alleged to have approached the complainant in June 2011 and demanded hand loan of Rs.15,00,000/- for clearing loans incurred for the construction of the building and for domestic purpose. He had assured to repay the said loan amount within six months. In discharge of the debt, the accused alleged to have issued Ex.P1 cheque in favour of the

complainant dt., 7.3.2012 Drawn on Indian Bank, SSI Peenya Industrial Estate Branch, Bangalore for Rs.15,000,000/-. The complainant claimed to have presented the cheque, but as per Memo dt., 8.3.2012, it was unpaid with an endorsement "Funds Insufficient". The complainant got issued legal notice dated 10.03.2012 calling upon the accused to make payment of the dishonour of the cheque in compliance to Sec.138(b) of Negotiable Instruments Act. Even after service of notice the accused had neither made payment nor sent any reply. The complainant in his affidavit filed in lieu of examination-in-chief deposed as per the averments made in the complaint.

8. The accused in his defence evidence has admitted for the last more than three years he is having acquaintance with the complainant and they were neighbors. As per his specific case admitted that on 10.06.2012 borrowed hand loan of Rs.1,80,000/- from the complainant. He has specifically disputed that the complainant had advanced Rs.15,00,000/- hand loan or in discharge of the said debt, accused had issued the cheque as per Ex.P1 in favour of the complainant. The accused has admitted Ex.P1 cheque pertains to his Bank Account and his signature appearing in the cheque. According to the accused when he had borrowed hand loan of Rs.1,80,000/- from the complainant, he had deposited Ex.P1 blank signed cheque as security for the transaction. It is further submitted after accused came to know regarding dishonour of Ex.P1 cheque he has submitted a petition to the police as per Ex.D1. The accused has disputed his liability to make payment of Ex.P1 cheque amount to the complainant. He has specifically denied the said cheque was issued in favour of the complainant for discharge of any debt or liability. The accused has further admitted his liability to make payment of Rs.1,80,000/- hand loan borrowed from the complainant. For the aforesaid reasons he has prayed for dismissal of the complaint.

9. In proof of advancement of Rs.15,00,000/- hand loan to the accused in the month of June 2011, the complainant has not produced any documentary evidence. In this regard except the contents of Affidavit filed by PW.1 in lieu of his examination-in-chief there is no other documentary or oral evidence is available on record. In Ex.P3 statutory demand notice and complaint averments, the complainant didn't disclosed the date of advancement of loan in favour of the accused except stating it was advanced in June 2011. But the complainant in his Affidavit filed in lieu of examination in chief, it is specifically stated that loan was advanced on 3.6.2011. In Ex.P3 demand notice there is a specific reference in para No.1 that at the time of borrowing loan, accused had executed documents in connection with the loan transaction. Even during the cross-examination, PW.1 specifically claimed accused had executed documents at the time of borrowing the loan and there is no impediment for him to produce those documents. But for the reasons best known to the complainant, he has withheld those documents. During cross-examination the complainant has specifically admitted that accused had executed loan agreement in a stamp paper promising to repay the loan of Rs.15,00,000/- within six months. The complainant not forwarded any satisfactory explanation for non production of those documents. It appears there is inconsistency and contradiction regarding complaint claim of Rs.15,00,000/-, Ex.P1 Cheque amount and alleged loan agreement. Therefore, in order to over come the situation the complainant appears to have withheld those documents is more probable. In this regard adverse inference as required U/s.114(g) of Indian Evidence Act has to be drawn against the complainant. As per the aforesaid provision "the evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it".

10. During the cross of PW.1, the accused had questioned source of income of the complainant and how he had mobilized huge amount of Rs.15,00,000/- loan amount. As per the claim of the complainant, he had advanced Rs.15,00,000/- hand loan to the accused in cash in his house. As per the evidence, at the time of advancement of the loan, wife of the accused and wife of the complainant were also present. During the cross-examination, complainant has admitted in the year 2011 he was doing business and was running ration shop. He further claimed that he is also doing real estate business. In order to prove in 2011, the complainant was having income of Rs.16-17 Lakhs per annum, as deposed in his evidence he has not produced any documentary evidence. The complainant has admitted that he is residing in a rented premises. As per the contention of the complainant his father-in-law had sold immovable property and out of the sale consideration paid Rs.15,00,000/- to the wife of the complainant. But the complainant has failed to produce even the copy of the alleged sale deed or any documents to prove his wife had received Rs.15,00,000/- from her father out of the sale consideration. Even the complainant has not examined his wife or his father-in-law as a witness to substantiate the above contention.

11. As per the contents of Ex.P3 statutory demand notice, complaint averments and Affidavit evidence of the complainant in June 2011, the accused had borrowed loan of Rs.15,00,000/- and promised to repay the said loan amount within six months. As per the contents of Ex.P3 notice when the complainant demanded repayment of the loan amount after lapse of the prescribed period and after repeated requests, accused alleged to have issued Ex.P1 cheque in favour of the complainant dtd., 7.3.2012 for Rs.15,00,000/- loan amount. But during the cross-examination, PW.1 has admitted at the time of borrowing the loan, the accused had issued the Ex.P1 cheque. In the event the accused had issued Ex.P1 cheque at the time of borrowing loan, he could have issued the cheque mentioning the date after six months from the date of transaction probably December 2011. From the date of advancement of the loan 3.6.2011 to the date of Ex.P1 cheque 7.3.2011 there was time gap of more than 9 months. It is surprising to note in spite of this long period of 9 months, the complainant has not charged any interest on the loan amount for the aforesaid period. Therefore, the question arises for determination is whether any prudent man may advance huge amount of Rs.15,00,000/- without charging any interest for more than 9 months is unbelievable. Even though the complainant has claimed accused is his distant relative, he has not disclosed how he is related to him. But the accused in his defence evidence specifically deposed the complainant is not his relative. The evidence of the accused and other attending circumstances shows that the complainant is doing money lending transaction and he had advanced loan of Rs.1,80,000/- to the accused with interest thereon 5% per month. There is every reason to appreciate the case of the accused that at the time of borrowing loan, the complainant had obtained Ex.P1 blank signed cheque as a security for the loan transaction.

12. After service of Ex.P3 Demand Notice sent on behalf of the complainant, the accused issued Ex.P6 Reply Notice to the said notice disputing his liability to make payment of the cheque amount and complaint alleged transaction of Rs.15,00,000/-. During the cross-examination of PW.1, accused disputed his signature appearing in Ex.P1 cheque. But in his oral evidence specifically admitted Ex.P1(a) is his signature. In this regard the accused has also forwarded inconsistent and contradicting defence. Ex.D1 is the statement of the complainant recorded by the Peenya Police. Ex.D2 is the petition submitted by the daughter of the accused Deepa R to the Peenya Police alleging

that the complainant had come near the house of the accused and has threatened with criminal intimidation. In Ex.D2 there is a reference accused had borrowed loan of Rs.1,80,000/- from the complainant with interest thereon at 5% per month. In Ex.D1 there is no reference regarding date of recording statement and it appears Ex.D2 statement was given to the police on 6.3.2012. It appears after the daughter of the accused has forwarded petition to the police as per Ex.D2, complainant filled Ex.P1 cheque for an imaginary amount of Rs.15,00,000/- and on 7.3.2012 presented the cheque for encashment and as per Ex.P2 on 8.3.2012 it was dishonoured.

13.The accused has produced Ex.D3 and D4 Bank Pass Book issued by the Indian Bank, SSI Peenya Industrial Branch, in respect of his Savings Bank Account. Ex.P1 cheque also pertains to the said bank account. Ex.D3 Pass Book contains transaction for the period 14.02.2008 to 28.01.2013. Ex.P1 cheque bearing No.663416 dtd., 7.3.2012 issued for Rs.15,00,000/-. As per the contents of Ex.D3 pass book the other cheques were presented and encashed as shown below:-

DATE	CHEQUE	AMOUNT
30.07.2008	663408	Rs . 1 , 280 / -
26.08.2008	663409	Rs . 1 , 280 / -
23.09.2008	663414	Rs . 14 , 475 / -
27.09.2008	663410	Rs . 1 , 280 / -
03.11.2008	663411	Rs . 1 , 280 / -
07.12.2009	663418	Rs . 3 , 809 / -
07.12.2009	663417	Rs . 3 , 849 / -
07.12.2009	663420	Rs . 3 , 494 / -
07.12.2009	663419	Rs . 3 , 531 / -

As per Ex.D3 cheque bearing No.663417 to 663420 were presented and encashed on 07.12.2009. Therefore, in all probabilities the accused had issued Ex.P1 cheque bearing No.663416 prior to 07.12.2009 is more probable. In the above circumstances, the defence of the accused is that when he had borrowed loan of Rs.1,80,000/- from the complainant deposited Ex.P1 blank signed cheque is more probable. In this regard the oral evidence of DW.1 that on 10.06.2012 he had borrowed loan of Rs.180,000/- is also apparently false. During the cross-examination accused has deposed in August 2011 and June 2012 he had borrowed loan from the complainant. It appears the accused has wrongly stated the date in his evidence because Ex.P1 cheque is dtd., 7.3.2012 and it was dishonoured on 8.3.2012 and in the above circumstances after dishonour of the cheque and issuance of Ex.P3 notice, accused had borrowed loan of Rs.1,80,000/- from the complainant on 10.06.2012 is not probable. In this regard the learned advocate appearing for the accused has failed forward satisfactory

explanation. By producing Ex.D3 and D4 Pass Book, the accused has proved the possibility of he had issued Ex.P1 cheque in favour of the complainant on 7.3.2012 or June 2011 at the time of advancement of loan, it was highly improbable.

14.The complainant during his cross-examination admitted that he is not an Income Tax Assessee and therefore, the legal presumption is to be drawn from the aforesaid admission is for the financial year 2011-12 his income was not exceeding Income Tax limit. In order to prove financial capacity to advance loan of Rs.15,00,000/-, complainant has not produced even his bank account extract. The complaint alleged transaction of Rs.15,00,000/- and the aforesaid income was coming under tax limits. Therefore, the complainant having not paid the income tax or has disclosed the advancement of Rs.15,00,000/- loan to the accused is not legally entitle to recover the amount through the due process of Law.

15.As per Sec.139 of Negotiable Instruments Act there is a presumption in favour of the complainant that unless the contrary is proved Court shall presume that the cheque had been issued in discharge of any debt or liability. Therefore, it is the burden of the accused to rebut the presumption by placing contrary evidence. In order to rebut the presumption the accused is expected to take a probable defence and standard of proof to prove the defence is preponderance of probabilities. In this regard I have relied up on the Judgment of Hon'ble Apex Court reported in AIR 2010 Supreme Court 1898 in Rangappa V/s. Mohan case. In this Judgment the Hon'ble Apex Court has held "The prosecution under Section 138 of N.I. Act the accused had to take probable defence and the degree of proof required is preponderance of probabilities". The accused can take advantage of the inconsistency of the evidence of the complainant to show there was no legally enforceable debt.

I have also relied up on the Judgment of the Hon'ble Apex Court reported in ILR 2009 KAR 1633 in Kumar Exports V/s. Sharma Carpets case. In Para No.20 of the aforesaid Judgment it is held as below:-

"The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumption an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the Court need not insist in every case that the accused should disprove the non- existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, bare denial of the passing of consideration and existence of debt, apparently does not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the Court may either believe that the

consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act".

From the proposition of Law laid down in the aforesaid judgments, facts of the case and evidence placed on record, the complainant has miserably failed to prove advancement of Rs.15,00,000/- hand loan to the accused as on 3.6.2011 and in discharge of the said debt accused had issued Ex.P1 cheque in his favour. The complainant has failed to place any evidence regarding passing of consideration. That on the other hand the accused during the cross-examination of the complainant and in his defence evidence able to create doubt regarding complaint alleged transaction and passing of consideration was absent or highly improbable. The accused in his defence admitted that he had borrowed loan of Rs.1,80,000/- from the complainant and still he has not repaid the said amount. Therefore, as per Sec.58 of Indian Evidence Act, facts need not be proved. The accused since admitted his liability to an extent of Rs.1,80,000/- and Ex.P1 cheque was issued in connection with the said loan transaction he is liable to make payment of the said amount to the complainant. Therefore, for the aforesaid reasons my findings on Point No.1 is partly in the affirmative.

13. POINT NO.2:- In view of my findings on Point No.1, the accused is liable to be convicted for the offence punishable under Section 138 of N.I. Act. Accordingly, I proceed to pass the following:-

ORDER Acting under Section 255 (2) of Cr.P.C, accused is convicted for the offence punishable under Section 138 of Negotiable Instruments Act 1881. He is sentenced to pay fine of Rs.2,00,000/- (Rupees two Lakhs Only) and in default shall undergo simple imprisonment for 6 (Six) months.

Acting under Section 357 (1) (b) of Cr.P.C, out of the fine amount the complainant is entitled for Rs.1,80,000/- (Rupees One Lakh eighty Thousand Only) as compensation.

Acting under Section 357 (1) (a) of Cr.P.C, the balance amount of Rs.20,000/- (Rupees Twenty Thousand Only) is defrayed to the State for the expenses incurred in the prosecution.

(Dictated to the Stenographer, transcribed by him, corrected, revised and signed then pronounced by me in the open court on this the 28th day of October 2015).

(LAKSHMINARAYANA BHAT.K) XVIII A.C.M.M., BANGALORE.

ANNEXURE

1) LIST OF WITNESSES EXAMINED FOR THE COMPLAINANT:

P.W.1 : Sri. Vijay

2) LIST OF DOCUMENTS MARKED FOR THE COMPLAINANT:

Ex.P.1	:	Cheque No:663416 dated 7.3.2012 for Rs.15,00,000/- .
Ex.P.1(a)	:	Signature of the accused.
Ex.P.2	:	Bank endorsement.
Ex.P.3	:	Office copy of demand notice.
Ex.P.4	:	Postal receipt.
Ex.P.5	:	Postal acknowledgement due
Ex.P.6	:	Reply Notice.

3) LIST OF WITNESSES EXAMINED FOR THE ACCUSED:-

DW.1 : Sri C Ramaswamy

4) LIST OF DOCUMENTS MARKED FOR THE ACCUSED: -

Ex.D1	:	Copy of Statement of Complainant.
Ex.D2	:	Copy of Petition
Ex.D3 and D4	:	Bank Pass Book

(LAKSHMINARAYANA BHAT.K)
XVIII A.C.M.M., BANGALORE.