

Smt.Usha P vs S: Smt.S.M.Rehana on 15 December, 2020

BEFORE THE COURT OF XXIV ADDL. SMALL CAUSES
JUDGE & A.C.M.M. (SCCH-26) AT BENGALURU

DATED THIS THE 15th DECEMBER 2020

PRESENT:

Sri. R.Mahesha, B.A.L, LL.B,
XXIV ADDL. SMALL CAUSES JUDGE
& A.C.M.M.
BENGALURU.

CC.No.4239/2018

Complainant : Smt.Usha P
D/o Parameshwaraiah,
Aged about 37 years,
I Cross, Near RT0 Office,
Upakar Layout,
Bangalore-560 056.

(By Sri.C.R.B., Adv.,)

V/s

Accused/ s: Smt.S.M.Rehana
W/o H.S. Subhan,
Aged about 45 years,
Residing at No.12, II Main,
Annapoorneshwari nagar,
Bangalore-560 091.

(By Sri.S.M.K., Adv.,)

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C.C.NO.4239 OF 2018
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JUDGEMENT

The private complaint filed by the complainant U/s 200 of Cr.P.C., 1973 against the accused for the offence punishable U/s 138 of Negotiable Instrument Act.

2. The sum and substance of the complaint, is as follows:

The accused being well known to the complainant for more than two years, had borrowed a sum of Rs.7,50,000/- from the complainant along with three others Smt.Sujatha Rs.7,50,000/-, Smt.Suguna Rs.5,00,000/- and Smt.Shakunthala Rs.5,00,000/- totally Rs.25,00,000/- on 01-10-2016 for the purpose of domestic

needs and for higher education of her daughter who wanted to study in Singapore. The accused being well known to the complainant had dodged with the complainant without making repayment who had deposited trust in accused had handed over their respective amounts by way of cash including that of the complainant. That pursuant to the consistent demands made by the complainant along with three others the accused had assured the complainant and other three persons named in the loan agreement accordingly issued a cheque dated 15- 05-2018 bearing No.360152 drawn on M/s Canara Bank, Kengeri Satellite town branch, Bangalore for SCCH-26 Rs.7,50,000/- in his favour and other three cheques in favour of other three persons and executed a loan agreement dated 13-03-2018 in favour of the complainant and three others named in the agreement of loan. That as per the loan agreement dated 13-03- 2018 which was duly executed by the accused as a principal borrower of the above said amounts and her husband as a consenting witness along with her daughter, relative and another witness by name Mr.Mohan, executed the said agreement in their presence and issued the said cheque for encashing on or before 20-05-2018. That as per the instructions of the accused and as per the agreement of loan executed by accused and other witnesses the complainant presented the said cheque bearing No.360152 dated 15-05-2018 for Rs.7,50,000/- drawn on M/s Canara Bank, Kengeri Satellite town, Bangalore issued by the accused and complainant presented the same with her banker, but which was dishonored with an endorsement "payment stopped by drawer" in the account. The complainant approached the accused and intimated the same to the accused in person and ultimately the complainant has been constrained to issue legal notice to the accused demanding to make payment. The accused has neither replied to the notice nor has paid the amount to the complainant.

SCCH-26 Hence the complainant has filed this complaint taking action against the accused in accordance with law.

3. On filing of complaint, this court has taken cognizance for the offence punishable under section 138 of Negotiable Instrument Act, sworn statement of complainant was recorded. Being satisfied that there are prima-facie materials to proceed against accused, summons was issued. After appearance, accused enlarged on bail and plea was recorded as per section 251 of Cr.P.C. The accused pleaded not guilty and claim to be tried. The case is posted for evidence.

4. In order to prove the case, the complainant herself examined as P.W.1. Ex.P1 to P11 got marked. Closed the complainant side evidence. Ex.P1. Cheque- it belongs to A/c No.2850101003937 and accused signature marked as Ex.P1a. Ex.P2 - Endorsement- it clear that the complainant presented the cheque for encashment through her banker, after that bank issued an endorsement as " payment stopped by drawer ". Ex.P3 - Legal Notice, it clear that the complainant issued legal notice on 03/08/2018 to the accused to calling upon her to repay the loan amount. Ex.P4 - Postal receipt, it clear that the complainant had issued legal notice to the accused through RPAD.

SCCH-26 Ex.P5- Postal return cover- it clear that after issuance of legal notice, the same was duly returned as Unserved "No such person found in the given address" Ex-P6-hand loan agreement dated 13-3- 2018, between complainant and others by name Smt.Sujatha, Smt.Shakuntala, Smt.Suguna and by accused, accused husband and two witness were signed on Ex-P6, Ex-P7 and 8 are Syndicate Bank pass book of complainant father, Ex-P9-certified copy of the judgment vide CC No.14782/2018, Ex-P10- certified copy of the judgment vide CC No.25118/2018, Ex-P11-certified copy of the judgment vide CC No.34555/2018. On perusal of Ex-P9 to 11, one Smt.Swetha, Smt.Suguna and Smt.Sujatha have been filed complaint against the present accused and present accused was convicted by the competent courts.

5. After closer of the complainant evidence, Sec.313 of Cr.P.C statement of the accused is recorded. The accused denied the incriminating evidence appears against her, for which she denied it is false and submitted that she has not issued cheque. In support of her contention she herself examined as DW.1 and produced Ex-D1 to 9. On perusal of Ex-D1- on 04-02-2016, the branch manager of Canara bank, SCCH-26 Kengeri Satelite town has issued certificate at the request of Smt.Rehana S.M. Ex-D2-bank statement of accused, Ex-D3-account statement of accused, Ex-D4- Itinerary confirmation letter, Ex-D5-Shop rental agreement dt.26-4-2016, Ex-D6-pass book of accused, Ex-D7- Screenshot of WhatsApp messages, Ex-D8 & 9- 65B-certificate.

6. In this case, the evidence on record shows that summons trial procedure was adopted instead of summary trial. As per the judgment passed by Supreme Court reported in 2014 Cr.L.J. 1953, in a case of Mehsana Nagarik Sahakari Bank Limited V/s. Shreeji CAB Company Limited and others, conducting Denova trial does not arises.

7. Perused the record and documents.

8. On the basis of above averments the following points arises for my consideration.

1: Whether the complainant proves that, accused issued cheque for Rs.7,50,000/- towards discharge of her liability, which was returned unpaid on presentation and also not complied the notice issued by the complainant and thereby committed an offence punishable under section 138 of Negotiable Instruments Act?

2. What Order?

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9. My answer to the above points are as under.

Point No.1: In the Affirmative.

Point No.2: As per the final order for the following :

REASONS

10. Point No.1: The provision of Section 101 of the Indian Evidence Act provide that the burden of proof rests on the party who substantially asserts it and not on the party who denies it, in fact burden of proof means that a party has to prove an allegation before she is entitle to a judgment in her favour. Further law U/s 103 of Indian Evidence Act amplifies the general rule of Section 101 that the burden of proof lies on the person who asserts the affirmative of the fact in issue.

11. The burden lies on the complainant to prove the complainant complied with mandatory requirements of Section 138 of NI Act.

The three ingredients of offence U/s 138 NI Act are as under.

1. That there is a legally enforceable debt
2. That cheque was drawn from the account of bank for discharge in whole or in part of any debt or any other liability which presuppose legally enforceable debt SCCH-26
3. That the cheque so issued had been returned due to insufficiency of funds.

The proviso appended to the said section provides for compliance with legal requirements before the complaint/petition can be acted upon by court of law.

Section 118A of NI Act deals with special rule of evidence and stated that, every negotiable instrument act is deems to have been drawn for consideration. Section 139 of NI Act enables the court to presume, unless contrary is proved, that the holder of the cheque received the cheque of the nature referred in Section 138, in whole or in part, of any debt or other liability.

The presumption available U/s 118 and 139 of NI Act is rebuttal in nature, the accused can rebut the same by either entering into the witness box or effectively cross examine the complainant and his witness.

12. It is the case of the complainant that she knows the accused. The accused has received hand loan of Rs.7,50,000/- on 01-10-2016 from the complainant and other friends of complainant for the purpose of domestic need and higher education of her daughter who wanted to study in Singapore. The accused had assured and issued a cheque for repayment of the said amount. On presentation of the said cheque, it returned as "payment stopped by drawer". Afterwards complainant, approached SCCH-26 the accused and intimated the same to accused in person and send a legal notice in writing but same was not get any fruitful. Hence this complaint filed. To prove the said facts, the complainant himself examined as PW-1 and produced documents as Ex-P1 to P11. On behalf of complainant, her father also examined as PW-2. On behalf of the accused, PW-1 and 2 having been cross examined. In the cross examination, PW-1 clearly admitted that, her husband was working as a Head Constable in Halsoor Police station, other friends of the complainant by name Smt.Suguna, Smt.Sujatha and Smt.Shakuntala and their husbands also working in police department in different police stations. She clearly admits that while filing this complaint, she intentionally not mentioned the name of the husband in the complaint. PW-1 contended in the cross examination she is not

residing in police quarters, she is the only daughter to his father, she always uses to reside in the father house. PW- 1 further admits in the cross examination that her father also retired PSI, she clearly admits, she had no documents to show that she had amount of Rs.7,50,000/- on 01-10-2016. But she specifically stated during cross examination that her father was retired in the year 2012, he got his retired benefits, her father voluntarily gifted a sum of Rs.10,00,000/- out of love and affection and other suggestions are put-forth by the accused apathetically SCCH-26 denied. Further PW-1 admitted that, Ex-P1 handed over to complainant on the date of Ex-P6 prepared. Further PW-1 stated during cross examination that, accused herself vacated the address known to her. Therefore legal notice returned as Unserved, she clearly denied the suggestions put by the accused counsel regarding intentionally sent a legal notice to another address in which accused not yet residing at any point of time. Further PW-1 denied the suggestions put by the accused regarding Ex-P6 get the signature of accused by force in the police station and get the blank signed cheques of the accused. The other suggestions put-forth by the accused clearly denied as false and strict to the proof by the accused.

13. The complainant on behalf of her examined her father by name Parameshwaraiah S. S/o Late.Siddappa examined before this court as PW-2, he stated in his chief examination, he know the facts and circumstances of the case, he had given a sum of Rs.10,00,000/- in the month of June 2013 by way of cash, the said amount gifted to his daughter out of love and affection from his retirement benefits as she is the only daughter to him. He produced his bank pass books, same was marked as Ex-P7 and 8. On being cross examined by the accused, he clearly admits that he had no documents to show that he gifted SCCH-26 Rs.10,00,000/- to his daughter by way of cash. He deposed in the cross examination that, he was working in the police department as Reserve Sub-Inspector, he retired in the month of December 2012, he got average sum of Rs.20,00,000/-, at present he stayed with his son, he denied the suggestions put by the accused regarding he had not paid any amount to his daughter.

14. Per contra, to disprove/rebut the case of the complainant, the accused himself examined as DW-1 and produced Ex-D1 to 9. Ex-D1 is the certificate issued by Manager, Canara bank, Ex-D2 is the statement of account, Ex-D3 is the statement of item detail, Ex-D4 is the itinerary confirmation, Ex-D5 is the shop rental agreement, Ex-D6 is the Canara bank pass book of accused, Ex-D7 is the whatsapp messages, Ex-D8 is the CD and Ex-D9 is application filed by accused U/s 65-B of Indian Evidence Act.

15. The accused mainly deposed before this court that she knew the complainant in December 2018 through complainant mother. She asked hand loan from complainant mother, but complainant mother says she had no money, but she assured to give money from daughter. After consulting complainant, she stated that she had no money, but she has gold ornaments, she is SCCH-26 ready to give her gold ornaments, she says if you want money you can pledge in Manipuram gold company and get cash and utilize money for your need. Accordingly accused get gold ornaments of complainant and pledged in Manipuram gold company, Frazer town in the name of accused and get a cash of Rs.1,50,000/- from complainant. The complainant herself introduced her friend by name Shakuntala. The said Shakuntala also handed over her gold ornaments to accused and said gold ornaments pledged in Manipuram gold company at Znanaganga Nagara. The accused get cash of

Rs.1,00,000/- as a loan from Shakuntala. The accused herself pledged her gold ornaments and get Rs.50,000/-. The amount received from Shakuntala was return back by the accused within 15 days, because, the said Shakuntala demanding money for her home ceremony function in her house. The accused received a sum of Rs.50,000/- from one Suguna, she regularly paying Rs.10,000/- per week for Rs.1,00,000/-, she continuously paid upto 3 months. The complainant requested to repay Rs.1,00,000/-, same was returned back by pledging the gold ornaments of accused in Manipuram Gold Company. The said Rs.1,00,000/- transferred to complainant father-in-law's bank account. The complainant again demanding for money, the accused has stated that entire amount paid to complainant and his friends, but complainant is not ready SCCH-26 to hear her words. The complainant and her mother one Devaraj and Chetan, they came to house of accused, they called by J.J.R.Nagara police station, they enquired about loan transactions between complainant and accused, the police people says return back loan and gold ornaments to complainant on temporarily gave your blank cheque, the police people by forcefully gets her signature on two cheques which is kept for chit purpose for a sum of Rs.7,50,000/- and Rs.5,00,000/- and get signature of accused on one document. For the reasons above stated accused prays to acquittal from this case. On being fully cross examined by the complainant unless she denied the suggestions put by the complainant, she did not produced any relevant documents to substantiate the very affidavit averments of the accused. Nothing is elicited in favour of accused.

16. Upon careful scrutinizing rival parties, documents and oral evidence, it depicts that according to the complainant, accused has issued cheque for discharging her liability. On the other hand, the defence taken by the accused she denied liability. It is obvious that though she disputes her liability as claimed by complainant, but she is not disputing the facts that cheque is belongs to her account and its bear signature. So it is settled principle of law in the Negotiable SCCH-26 Instruments Act cases accused admits the facts that cheque belongs to her account and it bear signature of accused, then mandatory presumption U/s 139 of NI Act comes to the aid of complainant and she can rest upon said presumption. The presumption mandated by Section 139 includes a presumption that there exists a legally recoverable debt or liability. Admittedly the complainant had not produced any believable document regarding to show on 15-5-2018, she is having Rs.7,50,000/- and PW-2 also failed to establish from his evidence, he had gifted Rs.10,00,000/- in the month of June 2013 to his daughter out of love and affection by way of cash. Although the complainant get benefit U/s 139 of NI Act as above stated.

17. I have perused the averments made in the complaint and the evidence placed on record by both parties. On perusal of Ex-P1 is the cheque dated 15.5.2018 for Rs.7,50,000/- and Ex.P.1(a) is the accused signature on the cheque, Ex.P.2 is the Bank endorsement dated 13.7.2018, Ex.P.3 is the office copy of statutory notice dated 3.8.2018, Ex.P.4 is the postal receipt, Ex.P.5 is the postal envelope, Ex.P.6 is the original copy of hand loan agreement dated 13.3.2018, Ex.P.7 and 8 are the Syndicate bank pass books of complainant father, Ex.P.9 is the certified copy of the judgment in CC.No.14781/2018 on the file of 22nd ACMM, Bengaluru SCCH-26 which reveals that in the said case, one Smt.Swetha filed private complaint against accused for alleged committed offence U/s 138 of NI Act. The said accused was convicted by the 22nd ACMM on 20-12-2018, Ex.P.10 is the certified copy of judgment in CC.NO.25118/2018 of 15th ACMM which reveals that the present accused has involved in the said case and convicted for the offence punishable U/s.138 of the N.I.Act

and Ex.P.11 is the certified copy of deposition of Smt.Sujatha in CC.No.34555/2018 of 21st ACMM which reveals that the present accused has involved in the said case and convicted for the offence punishable U/s.138 of the N.I.Act.

18. The Ex.P.1 and P.2 which are the cheque and Bank endorsement discloses that the complainant has presented the cheque for encashment purpose well within the time. The Ex.P.3 is the office copy of statutory notice dated 3.8.2018 discloses that the complainant has caused statutory notice within the time limit from the date of dishonor of the cheque. The Ex.P.4 is the postal receipt shows that the complainant has sent statutory notice to the accused through registered post. Ex.P.5 is the postal cover through which complainant has sent statutory notice to the accused at her address as shown in the cause title of the complaint. The postal envelope returned SCCH-26 with a shara that 'No such person found in the given address.

19. The learned counsel for the accused by placing reliance upon the endorsement found on Ex.P.5 and address of the accused shown in Ex.D.1, D.2, D.3 and D.6 has submitted that the accused never resided at the address shown in the cause title of the complaint and statutory notice. Further he submitted that no notice has been duly served on the accused and therefore there was no cause of action on part of the complainant to file this complaint.

20. As per materials the complainant admittedly sent legal notice to the accused at her address shown in the cause title of the complaint in the case on hand the accused has examined as DW-1. It is pertinent to note that the DW-1 in her examination-in-chief nowhere stated that she never resided at the address shown in the cause title of the complaint. Thus, it is crystallized that the accused has admitted address shown in the cause title of the complaint. Under the circumstances it can be held that the complainant has caused statutory notice to the accused at her admitted address. This attracts presumption laid down U/s.27 of the General Clauses Act. For the aforesaid reasons, the defence raised by the SCCH-26 defence party regarding non service of notice on the accused is not at all sustainable and same is hereby rejected.

21. The complainant has placed her reliance upon Ex.P.6 which is the loan Agreement dated 3.3.2018. The complainant by placing reliance upon Ex.P.6 has asserted that the accused has executed the same and she received loan of Rs.7,50,000/- from her. In the case on hand the complainant has produced the Ex.P.6 original copy of loan Agreement. It is significant to note that the DW-1 in her examination-in-chief not at all disputed the Ex.P.6. The undisputed Ex.P.6 proves that the accused borrowed loan from the complainant and has executed Ex.P.6 in favour of the complainant and other friends.

22. The PW-1 in her further cross-examination has stated that the accused herself executed Ex.P.6 and sought sometime for repayment of the loan amount. The PW-1 in her further cross-examination has stated that the accused herself has brought E-stamp paper to write the Ex.P.6. She denied the suggestion that the Ex.P.6 came to be prepared as per her instructions. She also denied the suggestion that she herself brought E-stamp paper in order to prepare Ex.P.6. She also denied that, forcibly accused signature has obtained on Ex.P.6 in J.J.R. Police SCCH-26 Station. This piece of cross-examination of PW-1 shows that the accused admitted execution of the Ex.P.6 for having

receipt of loan of Rs.7,50,000/- from the complainant. As already it has been stated that the DW-1 during her evidence not at all disputed the Ex.P.6. Thus, the undisputed Ex.P.6 comes into the rescue of the complainant.

23. No doubt the DW-1 in her examination-in-chief has stated that forcibly her signatures had obtained on blank paper. In support of this piece of evidence no relevant material is placed on record by the accused she would have caused legal notice to the complainant asking her to return alleged blank signed papers. She would have lodged police complaint against the complainant asking her for return of alleged signed blank papers. In the absence of such action on part of the accused an inference can be drawn that, the accused has executed Ex.P.6 towards the receipt of loan of Rs.7,50,000/- from the complainant.

24. The DW-1 in her further examination-in-chief has spoken that herself, her husband and daughter were took to the police station forcibly and at the instigation of police of J.J.R. Police Station issued four cheques. If at all the thing was so she would have initiated legal action against SCCH-26 concern police. In the case on hand no scrap of evidence has placed on record by the accused to prove her alleged defence that under coercive and undue influence of J.J.R., police has issued alleged four cheques to the complainant. In the absence of trustworthy materials from the accused, I am of the view that the so-called defence is imaginary and there is no merit at all.

25. On perusal of the cross-examination of DW-1 and Ex.P.7 to P.9 produced by the complainant which discloses that accused is habitual borrower. Further it discloses that accused was involved in CC No.14782/2018, 25118/2018, 34555/2018 and wherein she has been convicted for the offence punishable U/s.138 of the N.I.Act.

26. The accused has produced Ex.D.7 to 9. They have not stated particulars of the instrument which was used for recording of voice and whatsapp messages of particular phone number, though they produced 65-B certificate, the above particulars are not furnished properly. Hence, the Ex.D.7 to 9 are not admissible in the evidence.

27. It is evident through evidence narrated herein above that, the accused has issued the cheque in favour of SCCH-26 the complainant towards discharge of legally enforceable debt/liability. As already it has been stated that the accused failed to prove her defence that she has not issued the instant cheque towards the discharge of legally enforceable debt/liability. Accordingly the accused is utterly failed to rebut the statutory presumption as envisaged U/s.118(a) and 139 of the Act. In view of the reasons assigned herein above, I proceed to answer the point No.1 in Affirmative.

28. Point No.2 : In view of the reasons assigned on Point No.1, I proceed to pass the following:-

ORDER By Acting U/s 255(2) of Cr.P.C the accused is hereby convicted for the offence punishable U/s 138 of NI Act.

The accused is hereby sentenced to pay fine of Rs.8,50,000/- (Rupees Eight Lakhs Fifty thousand only) and acting U/s 357(3) of Cr.P.C. out of the total fine amount

payable by the accused a sum of Rs.8,45,000/- shall be payable to the complainant as compensation and remaining amount of Rs.5,000/- shall be defrayed as state expense.

In default of payment of fine the accused shall under go simple imprisonment for a period of 6 months.

SCCH-26 It is further made it clear that if the accused opt to undergo imprisonment, it does not absolve her from liability of paying compensation to the complainant.

Office is hereby directed to supply free certified copy of this judgment to the accused forthwith. (Dictated to the stenographer, directly on the computer, typed by her, thereof is corrected and then pronounced by me in the Open Court on this the 15th December 2020) (R. Mahesha) XXIV Addl. Small Causes Judge, & A.C.M.M. Bengaluru.

ANNEXURE

1. List of witnesses examined for the complainant:

PW-1 : Smt.Usha P.
PW-2 : Parameshwaraiah S.

2. List of documents marked for the complainant:

Ex.P1 : Cheque
Ex.P1(a) : Signature
Ex.P2: Endorsement
Ex.P3 : Copy of Notice
Ex.P4 : Postal Receipt
Ex.P5 : Postal return cover
Ex.P6 : Agreement of hand loan
Ex.P7 & 8: Bank pass books

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Ex.P.9 : Certified copy of the judgment in CC.No.14781/2018 on the file of 22nd ACMM, Bengaluru
Ex.P.10: Certified copy of judgment in CC.NO.25118/2018 of 15th ACMM
Ex.P.11: Certified copy of deposition of Smt.Sujatha in CC.No.34555/2018 of 21st ACMM

3. List of witnesses examined for the accused:

DW.1 : Rehana

4. List of documents marked for the accused:

Ex.D1 : Certificate issued by Canara bank Ex.D2 : Statement of account Ex.D3 : Item detail Statement Ex.D4 : Itinerary confirmation Ex.D5: Rental agreement Ex.D6 : Pass book Ex.D7 : Whatsapp messages copy Ex.D8: CD Ex.D9 : Application filed U/S 65B of Indian Evidence Act (R. Mahesha) XXIV Addl. Small Causes Judge, & A.C.M.M. Bengaluru.