

Aged About 28 Years vs Aged About 24 Years on 30 January, 2020

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IN THE COURT OF XIV ADDL. CHIEF METROPOLITAN
MAGISTRATE, MAYO HALL, BENGALURU

DATED THIS THE 30th DAY OF JANUARY, 2020

PRESENT

Sri. K. GURUPRASAD, B.A., LL.B (Spl.)
XIV ADDL. C.M.M., BENGALURU

CASE NO	C.C. NO.51624/2019
COMPLAINANT	SRI. RAKESH BABU. R S/o. Late Ramaiah Reddy Aged about 28 years, No.233, R.B. Complex, Nanga Reddy Colony, Krishna Reddy Layout, Jeevanbheemanagar, Bengaluru - 560 017.
ACCUSED	SRI. H.G. KIRAN KUMAR S/o. Govinda Shetty H.K Aged about 24 years, No.192, Hoodi Main Road, Opp : Swamy Vivekananda Ashrama, Mahadevapura, Bengaluru - 560 048.
OFFENCE PLEA OF THE ACCUSED FINAL ORDER	U/s.138 of Negotiable Instruments Act Pleaded not guilty Accused is convicted

(K. GURUPRASAD)
XIV ADDL. C.M.M., BENGALURU

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JUDGMENT

The present complaint is filed under Sec.200 Cr.PC for the offence punishable under Section 138 of Negotiable Instruments Act.

2. It is the case of the complainant that, the accused and his father H.K. Govinda Shetty who were known to the complainant, approached the complainant for loan and availed hand loan of Rs.9 lakhs from the complainant and assured to repay the same within three months along with interest @ 2%

per month from the date of loan. They also executed loan agreement on 8.8.2018 in favour of complainant. Towards said liability, the accused issued a cheque bearing No.562976 for Rs.4,50,000/- dtd.8.11.2018 drawn on State Bank of India, Hoodi branch, Bengaluru in favour of the complainant. When the complainant presented the said cheque for collection to his banker i.e Canara Bank, Hennur branch, Bengaluru, the said cheque came to be dishonoured with bank endorsement "account closed" on 13.12.2018. When the complainant got issued legal notice to the accused on 27.12.2018 calling upon the accused to pay the cheque amount, the said notice was served on the accused on 28.12.2018. The accused has failed to pay the cheque amount in spite of service of said notice and as such, the accused is guilty of the offence punishable under Section 138 of N.I. Act. Hence this complaint.

3. After filing of this complaint, cognizance was taken for the offence punishable U/s.138 of N.I. Act. Sworn statement of the complainant was recorded. This court was satisfied as to prima facie case made out by the complainant for issuance of the summons. Accordingly, criminal case was registered against the accused and summons was ordered to be issued.

4. In pursuance of court process issued by this court, the accused appeared through his counsel and got enlarged on bail. Thereafter plea was recorded. The accused pleaded not guilty and claimed for trial.

5. In order to prove his case, the complainant himself examined as CW.1 (PW.1) and got marked Ex.P1 to P9 and closed his side of evidence. Thereafter, statement of the accused U/s.313 of Cr.PC was recorded. The accused denied incriminating materials in the evidence of complainant as against him. Then the accused examined himself as DW.1 and got marked Ex.D1 and D2 and closed defence side of evidence.

6. Heard both sides. Perused the complaint, evidence on record and court records.

7. The following points arise for my consideration and determination;

1) Whether the complainant proves that the accused has issued a cheque in question in discharge of legally enforceable debt or liability as contended by him?

2) Whether the complainant further proves that the accused committed the offence punishable under Section 138 of Negotiable Instruments Act?

3) Whether the complainant is entitled for the relief's as prayed in the complaint?

4) What Order?

8. The above points are answered as under;

Point No.1 to 3	: In affirmative,
Point No.4	: As per the final order, for the following.....

REASONS

9. Point Nos. 1 and 2: Since these two points are inter linked and to avoid repetition they are taken together for discussion.

10. As regard to limitation to file this complaint, Ex.P2 is cheque dated 8.11.2018 drawn on S.B.I, Hoody branch, Bengaluru in favour of the complainant. Ex.P3 is cheque return memo dated 13.12.2018 issued by Canara Bank, Hennur branch, Bengaluru. Ex.P4 is copy of legal notice dtd.27.12.2018 got issued by the complainant to the accused. Ex.P5 is the postal window receipt issued by postal department for having sent Ex.P4 notice by registered post. Ex.P6 is postal acknowledgement signed for having received Ex.P4-notice sent by registered post on 28.12.2018.

11. No doubt, the accused has disputed and denied that Ex.P4-notice is served on him and that Ex.P6 postal acknowledgement bears his signature. However DW.1 has admitted during cross-examination that his address shown in cause title of the complaint and also in Ex.P4-notice is his correct address and that any notice sent by registered post to him will reach him. DW.1 has also admitted that the summons issued by this court in this case at the same address has been served on him. Therefore it is clear that Ex.P4-notice is sent by registered post at the correct address of the accused. As per Sec.27 of General Clauses Act when notice is issued by registered post at correct address, the said notice is presumed to have been served on the addressee. The burden of rebutting said presumption is on the person who disputes service of said notice. But in the present case on hand, the accused has not adduced any evidence on record to show that Ex.P4-notice is not received by him or that he is unaware contents of said notice. Hence, it can be concluded that Ex.P4-legal notice is duly served on the accused.

12. Therefore, it is clear from Ex.P2 to P6 that when the complainant presented Ex.P2-cheque to his banker, the same came to be dishonored with shara dtd.13.12.2018 as "account closed" and that when the complainant got issued Ex.P4-notice by registered post on 27.12.2018, said notice was served on the accused on 28.12.2018. In other words, when the complainant presented the cheque in question within three months from the date of said cheque, the said cheque came to be dishonored and that when the complainant got issued statutory notice U/s.138 of N.I. Act within 30 days from the date of intimation of dishonour of said cheque, it was duly served on the accused. Hence, the present complaint filed on 7.2.2019 i.e after expiry of 15 days from the date of receipt of said notice and within 30 days thereafter is well within time.

13. As regard to legally enforceable debt or liability, in 2010 (11) SCC 441 - (Rangappa Vs Sri. Mohan), it is held that;

" The presumption mandated by Sec.139 of the Act includes a presumption that there exists a legally enforceable debt or liability. This is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, herein, there can be no doubt that there is an initial presumption which favours the complainant" "when an accused has to rebut the presumption under Section

139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the presumption can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own".

14. If the facts and circumstances of this case are considered in light of above said principles of law, it is clear that DW.1 has admitted on page 4 of his cross-examination that Ex.P2-cheque is drawn on his bank account and that it bears his signature as per Ex.P2(a). Therefore, statutory presumption arises U/s.139 of N.I. Act in favour of the complainant that Ex.P2-cheque is issued in discharge of debt or liability. The burden of rebutting the said presumption by probable defence is on the accused.

15. It is the case of the complainant that the accused and his father H.K. Govinda Shetty together availed hand loan of Rs.9 lakhs from the complainant on 8.8.2018 and jointly executed Ex.P1-loan agreement in favour of the complainant and issued post dated cheque as per Ex.P2, which came to be dishonored. On the other hand, it is defence of the accused that neither himself nor his father availed any loan from the complainant nor issued Ex.P2- cheque towards repayment of said loan. It is specific defence of the accused that when accused and his father were in need of money for marriage expenses of sister of accused, the complainant assured the accused and his father in August 2018 to help them to get loan on the condition to give commission @ 10% and also obtained blank signed cheques from the accused and his father and blank signed stamp paper and thereafter misused the same and created Ex.P1-loan agreement and Ex.P2-cheque and filed this false complaint against the accused and another false complaint in C.C. No.51250/2019 against his father Govinda Shetty as per Ex.D1 and D2.

16. On careful perusal of evidence on record, it is clear that the defence of the accused is not probable nor does it inspire confidence of this court. It is because, DW.1 has deposed that one Shivakumar who is common friend of complainant and accused disclosed to the accused that the complainant would help to get loan and accordingly the accused approached the complainant in August 2018. The complainant has specifically contended that said Shivakumar is fictitious and imaginary person created by the accused to put-up false defence. If the said Shivakumar had really introduced the complainant to the accused for purpose of helping the accused to get loan for marriage expenses of sister of accused, the evidence of said Shivakumar would have lend support and corroboration to the defence of the accused. However, the accused has not examined said Shivakumar in support of his defence. When Dw.1 was asked during cross-examination regarding said Shivakumar, suprisingly DW.1 replies that he does not know where said Shivakumar resides now. DW.1 has tried to explain that said Shivakumar was previously in rented house in neighbourwood of house of accused and that as he has left rented house, he does not know where said Shivakumar resides at present and as such the accused cannot examine said Shivakumar in this case. DW.1 has further deposed that he does not know since when said Shivakumar was residing in the rented house near house of accused and when said Shivakumar shifted his house. If Shivakumar had really been friend of accused residing in neighbourwood, the accused would have definitely been

well aware fact as to since when Shivakumar is residing in the said house and when said Shivakumar shifted the house and where the Shivakumar is presently residing. Therefore, the very fact that DW.1 has pleaded ignorance regarding these basic important facts, lead to conclusion that DW.1 is avoiding to disclose details of said Shivakumar. This in turn supports the claim of the complainant that said Shivakumar is fictitious and imaginary person. These circumstances raise serious doubt regarding defence of the accused.

17. Secondly, the evidence of DW.1 is vague and devoid of necessary details. No doubt, DW.1 has deposed that the complainant assured the accused and his father to help them to get loan and took blank signed cheques and blank signed stamp paper from the accused and his father. However it is not clear from the evidence of DW.1 as to from which bank or financial institution or money lender, the complainant assured to help to get such loan. It is also not clear how much loan amount the accused and his father wanted for marriage expenses of sister of accused and what loan amount, the complainant assured to help to get. The date on which the accused and his father approached the complainant for the said purpose is also not disclosed in the evidence of DW.1. Moreover, though DW.1 has deposed that the complainant demanded commission @ 10% from the accused and his father, the said fact was not put by way of suggestion to CW.1 during cross-examination. In absence these material details, it is not safe to rely upon defence of the accused.

18. Thirdly, DW.1 has deposed in his examination-in- chief that the complainant took two blank signed cheques of Corporation Bank of father of the accused and two blank signed cheques pertaining to joint bank account of himself and his father in Karnataka Co-operative Bank. However it is pertinent to note that Ex.P2-cheque in this case is cheque drawn on S.B.I., Hoody branch and not the cheque drawn on Corporation Bank nor cheque drawn on Karnataka Co- operative Bank. DW.1 in the present case has not deposed that the complainant took blank signed cheque of S.B.I., Hoody branch for the purpose of helping to get loan. This contradiction regarding name of the bank, whose cheque is alleged to have been given in blank to the complainant raises serious doubt regarding the defence of the accused.

19. Fourthly, it is clear from Ex.P4 to P6 that when the complainant got issued Ex.P4 notice by registered post to the accused, the said notice was served on the accused . No doubt, it is clear from Ex.P6 that a person by name Madhu has signed on the Ex.P6-postal acknowledgement.

PW.1 has deposed on page 9 of his cross-examination that one Madhu who is sister of accused has signed on the postal acknowledgement. Even DW.1 has deposed during cross- examination that one Madhumitha is his sister and that his sister stays in the house and does not go to job. Therefore it can be concluded that Ex.P4-notice is received by the sister of accused and that accused is well aware of contents of Ex.P4-notice. It is pertinent to note that even though the accused was well aware of the contents of Ex.P4-notice, the accused has not got issued any reply notice to complainant, denying any loan transaction between himself and complainant and issuance of Ex.P2-cheque for repayment of said loan. Any prudent person in place of accused under similar circumstances would have promptly got issued reply notice to Ex.P4-notice putting up his defence and denying any loan transaction between himself and complainant. However the accused has failed to do so and thereby lost an opportunity to put-up his defence at the earliest, by issuing reply notice

to Ex.P4. Further the accused has also not lodged any police complaint against the complainant, alleging misuse of Ex.P2-cheque. This inaction on the part of the accused to issue reply notice to Ex.P4 and lodge police complaint against the accused raises serious doubt regarding the prosecution case.

20. Fifthly, DW.1 has deposed during examination-in- chief that when himself and his father Govinda Shetty received summons from court, he approached the complainant regarding said summons and that the complainant replied that he would withdraw the complaint, if sum of Rs.5 lakhs is given to him. However DW.1 has deposed on page 6 of his cross-examination that there was no discussion between himself and complainant after he received summons from the court in this case and that he has never asked the complainant, why the complainant filed such false complaint against him. Thus it is clear that there is material contradiction in the statements of DW.1 regarding the fact as to what DW.1 did after he received summons from this court in this case. This contradiction in turn leads to reasonable suspicion regarding defence of the accused.

21. Sixthly, the complainant has produced Ex.P1 which is copy of loan agreement dtd.8.8.2018 executed by accused and his father Govinda Shetty in favour of complainant. It discloses that the accused and his father availed hand loan of Rs.9 lakhs from the complainant and agreed to pay interest @ 2% per month on the said loan. Ex.P1 also discloses that the accused and his father executed On Demand Promissory Note for Rs.9 lakhs in favour of the complainant. Ex.P1 also discloses that the present accused issued Ex.P2 post dated cheque while said Govinda Shetty issued cheque drawn on Corporation Bank, Mahadevapura branch towards repayment of said loan. No doubt, the accused has seriously disputed execution of Ex.P1-loan agreement and contended that signatures of himself and his father were taken on blank stamp paper for the purpose of helping to get loan. However it is clear from Ex.P1-loan agreement that the said loan agreement was also signed by two witnesses by name Sampath Kumari and H.V. Nirmala. DW.1 has deposed during cross-examination that one Sampath Kumari is his mother. Even though DW.1 has denied the suggestion that the signature of Sampath Kumari appears on Ex.P1-loan agreement is that of his mother, PW.1 has categorically deposed during cross- examination that the mother of accused and mother of PW.1 were also present at the time of execution of Ex.P1-loan agreement and signed on the loan agreement as witnesses. This very fact of the mother of accused being present at the time of execution of Ex.P1-loan agreement and having signed as witness, supports and corroborates claim of the complainant and goes against the defence of the accused that signatures of accused and his father were taken on blank stamp paper. Moreover, though the accused received Ex.P4-notice, he has not issued any reply notice denying execution of loan agreement. Therefore, the execution of Ex.P1-loan agreement is sufficiently proved by the complainant, which supports the case of the complainant and disproves the defence of the accused.

22. Counsel for the accused has argued and contended that the complainant has no financial capacity to lend huge amount of Rs.9 lakhs and that the complainant has not proved source of funds for lending such huge amount. In this regard counsel for the accused relied upon decisions in 2015 (1) SCC 99 and 2014 (2) SCC 236.

23. However the complainant has produced Ex.P7 which is bank statement pertaining to bank account of complainant in Canara Bank, Hennur branch, Bengaluru. It shows that the sum of Rs.2,54,745/- was credited on 4.8.2018 towards loan from Muthoot Finance and subsequently a sum of Rs.2,55,000/- was withdrawn on 8.8.2018. PW.1 has deposed during cross-examination that he had taken gold loan from Muthoot Finance 4 to 5 days prior to loan transaction and that the said amount was withdrawn and paid to the accused and his father on 8.8.2018. This statement of PW.1 is corroborated by documentary evidence of Ex.P7-bank statement. Further the complainant has also produced Ex.P8 which is bank statement of bank account of complainant in S.B.I., Jeevanbheemanagar, Bengaluru. It discloses that the complainant has withdrawn a sum of Rs.2,45,000/- from the said bank account through cheque on 8.8.2018. PW.1 has also deposed on page 6 of his cross-examination that he had sufficient amount in cash with him on the date of lending of the loan. In view of above said oral and documentary evidence on record, the complainant has sufficiently proved source of funds for lending loan to the accused and his father. Even otherwise since the accused has utterly failed to prove his defence, the complaint cannot fail merely because the complainant has failed to prove his financial capacity and source of funds to lend loan amount, as held in 2019 SCC online SC 389 - (Rohitbhai J. Patel Vs The State of Gujarat and another). In the present case on hand, above said principle is applicable because the accused has utterly failed to prove his defence that Ex.P2- cheque was given in blank to the complainant for the purpose of helping to get loan. Therefore the accused cannot be acquitted only on the ground that the complainant has failed to produce documentary evidence to prove source of funds for lending entire loan of Rs.9 lakhs. Hence contention of counsel for the accused cannot be accepted and the two decisions relied upon by the counsel for the accused are not helpful to the accused.

24. The counsel for the accused argued that the complainant has not produced Promissory Note alleged to have been executed by accused and his father. The accused has further contended that the complainant has utterly failed to prove the existence of legally enforceable debt or liability. It is further argued that the complainant has not explained why interest amount is not claimed in this case. It is further argued that Ex.P1-loan agreement is doubtful document and it is clear from said document that the contents of said document are type written after obtaining signature and LTM of accused and his father. It is therefore argued that the accused is entitled for acquittal. In this regard counsel for accused has relied upon decisions in (2008) IV SCC 54, ILR 2014 KR 6572, (2006) VI SCC 39, ILR 2008 KAR 4629, 2001 CRI. L.J. 1585, LAWS (KAR) 2013 172, ILR 2008 KAR 4629, (2009) 2 SCC 513, (2010) 2 Kant L.J. 284, AIR 2008 SC 278 AND LAWS (BOM) 2013 7 295 (Crl. A. No.5717/2010).

25. However above said arguments of counsel for the accused cannot be accepted, because the accused has utterly failed to prove his defence that Ex.P2-cheque came in the custody and possession of the complainant as the same was handed over to complainant in blank to enable the complainant to help to get loan. On the other hand, the complainant has proved the execution of Ex.P1-loan agreement to the satisfaction of the court. Therefore the contentions of the accused cannot be accepted and the case of the complainant cannot be doubted. The above said decisions relied upon by the counsel for the accused are not helpful to the accused.

26. In view of my above discussion, I am of considered opinion that the accused has utterly failed to prove or probabalize his defence and thereby to rebut the statutory presumption available in favour of the complainant. It clearly appears from the evidence on record that defence of the accused is only an afterthought without any basis. Unless and until the accused rebuts the statutory presumption with convincing and cogent evidence, burden cannot be shifted on the complainant. As discussed above, the complainant has placed sufficient materials on record to establish his contention in this case. The evidence on record is sufficient to accept the case of the complainant that accused had issued cheque in question towards discharge of legally enforceable debt or liability and the complainant has proved all the requirements of Sec.138 of N.I. Act, so as to constitute the offence against the accused. Therefore, I answer Point Nos.1 & 2 in affirmative.

27. Point No.3: As discussed in connection with Point Nos.1 & 2, the complainant has proved his case as to commission of the offence punishable U/s.138 of N.I. Act by the accused. The punishment prescribed for the said offence is imprisonment for a period which may extend to two years or with fine. Considering the facts and circumstances of this case, nature, year of the transaction, nature of the instrument involved, provisions of Sec.117 of N.I. Act, cost of litigation and the rate of interest proposed by Hon'ble Supreme Court in 2012 (1) SCC 260 (R.Vijayan Vs Baby), etc., this court is of the considered view that it is just and desirable to impose fine of Rs.5,00,000/- and out of the said amount a sum of Rs.5,000/- has to be remitted to the State and the remaining amount of Rs.4,95,000/- is to be given to the complainant as compensation as provided U/s.357(1) of Cr.PC and accordingly Point No.3 is answered in Affirmative.

28. Point No.4: For the reasons discussed in connection with Point Nos.1 to 3 this court proceed to pass the following.....

ORDER Acting under Section 255(2) of Cr.PC accused is hereby convicted for the offence punishable under Section 138 of Negotiable Instruments Act. The accused shall pay a fine of Rs.5,00,000/- for the offence punishable U/s.138 of N.I. Act. In default of payment of fine amount, the accused shall under go simple imprisonment for a period of six months.

By exercising the power conferred U/s.357(1) of Cr.PC., out of total fine amount of Rs.5,00,000/-, a sum of Rs.4,95,000/- is ordered to be paid to the complainant as compensation and Rs.5,000/- is ordered to be remitted to the State.

The bail bond of the accused stands cancelled. The cash security deposited by the accused is ordered to be continued till expiry of the appeal period.

Supply the free copy of this judgment to the accused forth with.

(Dictated to the stenographer, transcript thereof, computerized and print out taken by him is verified, corrected and then pronounced by me in open court on this the 30th Day of January, 2020) (K. GURUPRASAD) XIV A.C.M.M., Bengaluru ANNEXURE Witnesses examined for the complainant:

CW.1 : Mr. Rakesh Babu .R

Witnesses examined for the defence:

DW.1 : Mr. Kirankumar .G

Documents marked for the complainant:

Ex.P1 : Loan Agreement copy
Ex.P2 : Cheque
Ex.P2(a) : Signature of the accused
Ex.P3 : Bank endorsement
Ex.P4 : Legal notice
Ex.P5 : Postal receipt
Ex.P6 : Postal acknowledgement
Ex.P7 : Account statement of Canara Bank
Ex.P8 : Account statement of S.B.I
Ex.P9 : Statement of Account

Documents marked for the defence:

Ex.D1 : Certified copy of PCR No.51129/19
Ex.D2 : Certified copy of Affidavit

(K. GURUPRASAD)
XIV A.C.M.M., BENGALURU