

## Mr. G.A.Dinesh Kumar vs Mr.Yeshwanth. B.K on 10 April, 2018

IN THE COURT OF THE XVI ADDITIONAL CHIEF METROPOLITAN  
MAGISTRATE, BENGALURU CITY

Dated: This the 10th day of April, 2018

Present: Smt. Saraswathi.K.N, B.A.L., LL.M.,  
XVI Addl.C.M.M., Bengaluru City.

JUDGMENT U/S 355 OF Cr.P.C.,

Case No. : C.C. No.23138/2015

Complainant : Mr. G.A.DINESH KUMAR,  
S/o. D.S. Anandan,  
Aged about 30 Years,  
R/at No. 2532,  
22nd Main,  
27th Cross,  
Banashankari 2nd Stage,  
Bengaluru - 560 070.

(Rep. by Sri.B.R. Viswanath,  
Adv.,)

- Vs -

Accused : Mr.YESHWANTH. B.K,  
S/o.Sri.Kumar,  
Aged about 27 years,  
R/at No.20/8, 2nd Main,  
7th Cross,  
Ward No.164, Srinivasnagar,  
Vidyapeetha,  
Bengaluru .

(Rep. by Sri.G.K. Varada Reddy,  
Adv.,)

Case instituted : 18/6/2014

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

Plea of Accused : Pleaded not guilty

Final Order : Accused is convicted

Date of order : 10/4/2018

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C.C.No.23138/2015 J

### JUDGMENT

The Complainant has filed this complaint against the Accused for the offence punishable u/Sec.138 of the Negotiable Instruments Act.

2. Briefly stated the case of the Complainant is that, the Accused availed a hand loan for business and legal necessities from him and towards the discharge of the said liability, he has issued a cheque bearing No.306167 dated 19.3.2014 for Rs.1,00,000/= drawn on the State Bank of India,

Banashankari II Stage, Bengaluru.

3. The Complainant has further submitted that, when he presented the said cheques for encashment, the same was returned dishonored as "Funds Insufficient" vide Bank Memo dated 24.3.2014.

4. The Complainant has further submitted that, thereafter he got issued a legal notice to the Accused on 21.4.2014 through RPAD calling upon him to pay the cheque amount within 15 days from the date of the receipt of the said legal notice. Though the said legal notice has been duly served upon the Accused, he has neither replied nor has he paid the cheque amount to him. Hence the present case.

5. The Complainant submits that, the dishonour of the cheque by the Accused has been malafide, intentional and deliberate. Feeling aggrieved by the conduct of the Accused, she has filed the present complaint praying that the Accused be summoned, tried and punished in accordance with Sec.138 of the Negotiable Instruments Act.

6. The Complainant has led his pre-summoning evidence on 22.9.2015 and he has filed his affidavit in lieu of his sworn statement. Prima-facie case has been made out against the Accused and he has been summoned vide the order of the same date.

7. The Accused has appeared before this court on 28.3.2016. He has been enlarged on bail. The substance of the accusation has been read over to him on 2.4.2016, to which, he has pleaded not guilty and has claimed the trial.

8. The Complainant has led his post summoning evidence and he has filed his affidavit, in which, he has reiterated the complaint averments.

9. In support of his oral evidence, P.W.1 has produced and relied upon the documentary evidence as per Ex.P1 to P8 which are as follows:-

Ex.P1 is the cheque, in which the signature identified by P.W.1 as that of the Accused as per Ex.P1(a), the Bank memo as per Ex.P2, the office copy of the legal notice as per Ex.P3, the Postal Receipt as per Ex.P4, the returned Legal notice as per Ex.P5, the returned Postal Envelope as per Ex.P6, the Postal Receipt as per Ex.P7 and the Postal acknowledgment as per Ex.P8.

10. The statement of the Accused as required under Sec. 313 of the Cr.P.C., has been recorded on 21.12.2016. He has denied the incriminating evidence found against him and has chosen to lead his rebuttal evidence.

11. In his rebuttal evidence, the Accused is examined as D.W.1 and he has filed his affidavit, which is received in evidence by this court, as per the decision of our Hon'ble High Court in Afzal Pasha Vs., Mohamed Ameerjan, reported in LAWS (KAR) 2016 (8) 131, by relying upon the directions of the

Hon'ble Apex Court in the case of Indian Bank Association Vs., Union of India and others, reported in 2014 (5) SCC 590.

12. The gist of the defence of the Accused is that, his friend Sandeep was working in the CVK Mind Source Consulting Services Pvt., Ltd., in the year 2010-2011 and he left the said company in the month of December 2011 and he started a new company along with him and his two other friends in the name and style of "4D Technologies Pvt., Ltd.". In the month of February 2012, the former company approached their company and requested them to do the NPR/Data Base Entry work and as such both the companies entered into an agreement on 2.3.2012.

13. It is further deposed by him that as per Clause 13 of the Agreement, the total performance guarantee deposition to be made by the Vendor i.e., their company for Rs.15 Lakhs was 50 Kits out of which initial deposition of Rs.2 Lakhs was given on 7.3.2012 through cheque, while the remaining Rs.13 Lakhs was to be deducted every month at Rs.1 Lakh each for the next 13 months and the said deposit amount was to be reimbursed by the CVK Mind Source once the project was accomplished.

14. It is further deposed by D.W.1 that after the supply of 50 kits to their company, they had issued 6 blank cheques, including the subject cheque towards the security for the above said company and out of the said 6 cheques, 3 cheques were company cheques and 2 cheques belonged to him and one cheque was that of his friend Sandeep and it was agreed that if their company damaged any of the computer kits, they were entitled to recover the damaged kits amount.

15. It is further deposed that after entering into the said agreement, their company worked for a period of 3 months and submitted the work bill to the company, but they did not make the payment to them and as such they stopped the work.

16. It is his defence that the wife of the Complainant by name Sushma who was working in the CVK Mind Source Services Company has made use of the cheques issued by them through her husband/Complainant with active collusion of the authorized signatory of the CVK Mind Source Consulting Company Mr.Venkat.

17. D.W.1 has further deposed that the co-brother of the Complainant by name Rakesh Kumar C S has also misused the cheques of their company and filed two cases against them in C.C.No.10207/2014 and C.C.No.10209/2014, in which they have been acquitted by the court.

18. It is further deposed by him that he does not know the Complainant at all and that the claim of the Complainant in this case as against him is totally false and that he has not issued any cheque to the Complainant as alleged by him and that his cheque, including the subject cheque have been misused by the Complainant through his wife Sushma, which was collected from them by the CVK Mind Source Consulting by it's MD Mr.Venkat and that there is no service of the legal notice on him since the Complainant neither knows him nor his address.

19. In support of his defence version, the Accused has relied upon the following documentary evidence as per Ex.D1 to D24 which are as follows:-

Ex.D1 is the certified copy of the complaint in CC No.10209/2014, Ex.D2 is the certified copy of the sworn statement of the Complainant in C.C.No.10209/2014, Ex.D3 is the certified copy of the chief-examination affidavit of the Complainant in C.C.No.10209/2014, Ex.D4 is the certified copy of the cheque of C.C.No.10209/2014, Ex.D5 is the certified copy of the Bank Memo of C.C.No.10209/2014, Ex.D6 & D7 are the certified copies of the Postal Receipts of C.C.No.10209/2014, Ex.D8 is the certified copy of the legal notice of C.C.No.10209/2014, Ex.D9 is the certified copy of the Postal Acknowledgement of C.C.No.10209/2014, Ex.D10 is the certified copy of the Postal Cover of C.C.No.10209/2014, Ex.D11 and D12 are the certified copies of the complaint of C.C.No.10207/2014, Ex.D13 is the certified copy of the sworn-statement affidavit of the Complainant of C.C.No.10207/2014, Ex.D14 is the certified copy of the chief-examination affidavit of the Complainant of C.C.No.10207/2014, Ex.D15 is the certified copy of the cheque of C.C.No.10207/2014, Ex.D16 is the certified copy of the Bank Memo of C.C.No.10207/2014, Ex.D17 is the certified copy of the legal notice of C.C.No.10207/2014, Ex.D18 is the certified copy of the Postal Acknowledgment of C.C.No.10207/2014, Ex.D19 is the certified copy of the Postal Receipt, Ex.D20 is the certified copy of the returned Postal Cover of C.C.No.10207/2014.

20. D.W.1 has further produced Ex.D21, being the certified copy of the Agreement dated 2.3.2012 that was entered into between their company 4D Technologies and the CVK Mind Source Consulting Services Pvt., Ltd., Ex.D22 is the Notarized copy of the Rental Agreement, Ex.D23 is the affidavit of the Accused under Sec.65 B of the Evidence Act and Ex.D24 is the g- mail conversations between the wife of the Complainant, himself and the MD of the CVK Mind Source Consulting Pvt., Ltd.,

21. D.W.1 has been cross-examined by the learned counsel for the Complainant.

22. The Learned Counsel for the Complainant has addressed his arguments during the course of which he has prayed for the conviction of the Accused on the ground that the cheque and the signature in it has been admitted by the Accused. The only two defences of the Accused is that the wife of the Complainant by name Sushma and Mr.Venkat, the MD of the CVK Mind Source have misused his cheque and that there is no service of the legal notice on him. However except his self serving testimony, there is no proof of defence led by the Accused. The Accused had the knowledge of the fact that his cheques were presented by the Complainant to his bank. The natural conduct of the Accused in not having taken steps against the Complainant or his wife Sushma, though he and his partner Mr.Sandeep Kumar had the knowledge about the fact that their cheques were in the custody of the Complainant or his wife leads to an adverse inference against them. There is no reverse burden discharged by the Accused.

23. It is also argued that, the intimacy between the Accused and the wife of the Complainant is proved through the cross- examination of the Accused. The answers elicited from the Accused in his

cross-examination are sufficient to believe the case of the Complainant. When as per Clause 13 of the document at Ex.D21, Rs.2 Lakhs was paid by the Accused to the MD of the CVK Mind Source, then there was no necessity for the Accused to issue any Post dated cheques or to pay any security deposit of Rs.15 Lakhs at once, since as per the contract at Ex.D21, Rs.1 Lakh was to be deducted in the monthly payment to be made to the Accused.

24. It is also argued that as there is no proof of different addresses of the Accused, the legal notice is deemed to be served on him. There is no certificate of incorporation of produced by the Accused to prove that they are carrying on business in a different address. The judgment of acquittal in another case is not binding on this court.

25. It is also argued that the Agreement at Ex.D21 does not contemplate the payment of any advance amount by the Accused and there is no recital in Ex.D21 about the four cheques of the Accused. There was no impediment to the Accused to enter the four cheques in Ex.D21.

26. Hence it is lastly argued that the Complainant has proved his case beyond reasonable doubt and on the contrary the Accused has failed to come out with a probable defence and as such, the Complainant is entitled to the benefit of the presumptions under Sec.118 and 139 of the N.I.Act. Accordingly, the Accused is liable to be convicted.

27. On the contrary, the learned Defence Counsel has also addressed his arguments, during the course of which, he has prayed for the acquittal of the Accused on the ground that the address of the Complainant of this case and that of C.C.No.10209/14 which is shown in Ex.D1 is the same. As per Ex.D21, the Accused has issued six blank cheques to the CVK Mind Source and the two cheques of the Accused have been misused by the brother-in-law of the Complainant.

28. It is further argued that, there is no date of approach, no quantum of loan and the date of lending and the date of repayment of the loan pleaded by the Complainant in the complaint or in the legal notice. There is no service of the legal notice on the Accused. Except the cheque, there is no document produced by the Complainant to prove the legally payable debt by the Accused in his favour.

29. It is further argued that, the Complainant has failed to prove his financial capacity before the court so as to have lent the loan to the Accused. There is no service of the legal notice on the Accused and no bank documents have been produced by the Complainant and there is no pleading to the effect that the post dated cheques were issued by the Accused. The Accused has been falsely implicated in this case and in three other connected matters. Accordingly he has prayed for the acquittal of the Accused.

30. I have considered the submissions and perused the record carefully.

31. Sec.138 of the Negotiable Instruments Act has been enacted to lend credibility to the financial transactions.

The main ingredients of the offence under Section 138 Negotiable Instruments Act are:-

- (i) Drawing up of a cheque by the Accused towards the payment of the amount of money, for the discharge, in whole or in part, of any debt or any other liability;
- (ii) Return of the cheque by the bank as unpaid;
- (iii) The drawer of the cheque fails to make the payment of the said amount of money within 15 days of the receipt of the notice under the proviso (b) to Section 138.

The Explanation appended to the Section provides that, the "debt or other liability" for the purpose of this Section means a legally enforceable debt or other liability.

32. Apart from this, Sec.139 of the Negotiable Instruments Act lays down a presumption in favour of the holder of cheque in the following terms:-

"It shall be presumed, unless the contrary is proved, that:-

The holder of a cheque received the cheque, of the nature referred to in Sec. 138, for the discharge, in whole or in part, of any debt or other liability".

33. Also, Sec. 118 of the Negotiable Instruments Act states, "Until the contrary is proved, the following presumptions shall be made:-

(a) That every Negotiable Instrument was made or drawn for consideration and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;"

34. Thus, the Act clearly lays down the presumptions in favour of the Complainant with regard to the issuance of the cheque by the Accused, towards the discharge of his liability in favour of the Complainant.

35. Under the scheme of the Act, the onus is upon the Accused to rebut the presumptions in favour of the Complainant by raising a probable defence.

36. It is a well settled position of law that the defence of the Accused, if in the nature of a mere denial of the case of the Complainant will not be sufficient to hold it as a probable defence. The bare denial of the passing of consideration apparently does not appear to be any defence. Something which is probable must be brought on record for getting the benefit of shifting the onus of proving to the Complainant.

37. It is also a well settled position of law that once the cheque is proved to be relating to the Account of the Accused and he accepts and admits the signature on the said cheque, then the initial presumption as contemplated under Sec.139 of the N.I.Act has to be raised by the courts in favour of

the Complainant. The presumption referred to in Sec.139 of the N.I.Act is a mandatory presumption and not a general presumption, but the Accused is entitled to rebut the said presumption. What is required to be established by the Accused in order to rebut the presumption is different from each case under given circumstance. But the fact remains that a mere plausible explanation is not expected from the Accused and it must be more than a plausible explanation by way of rebuttal evidence. The defence raised by the Accused by way of rebuttal evidence must be probable and capable of being accepted by the court.

38. Such being the legal position, it would be pertinent to refer to the defences raised by the Accused to rebut the presumptions in favour of the Complainant in this case.

39. Admittedly there is no dispute with regard to the fact that Further, there is a serious dispute on the part of the Accused with regard to the existence of the transaction in question as well as the acquaintance between the parties. In such circumstance, no doubt, the onus of proving the existence of the transaction in question is shifted in favour of the Complainant. For this purpose, he is required to prove his case beyond reasonable doubt without going room for any doubt in his case. However, it is also clearly a well settled position of law that, the moment the Accused admits his signature on the cheque, the presumption U/Sec.118 of the N.I.Act comes to the aid of the Complainant. However, when there a serious denial of the transaction as alleged by the Complainant the burden of proving the same will be upon the Complainant.

40. In this regard, it is pertinent to note that, the Accused, in the present case has not only raised the technical defence of the non-service of the legal notice on him, but also raised the defence of the non-existence of the legally payable on his part in favor of the Complainant. In such circumstance, the burden of proving the existence of the legally payable debt on the part of the Accused in his favour is on the Complainant. Therefore in the light of the specific defences raised by the Accused in this case, it is necessary to appreciate the evidence on record led by the respective parties in support of their respective claims.

41. At the outset, before considering the matter of merits it is necessary to consider the technical defence of the non-service of the legal notice on the Accused, since the same touches the very maintainability of the complaint.

42. It is pertinent to note that, as per the complaint averments, it is pleaded by the Complainant that the legal notice sent to the Accused was returned with postal shara "ADDRESSEE LEFT" and "INTIMATION DELIVERED" on 23/04/2014 as per Ex.P6.

43. In this regard, during his cross-examination, when the Complainant has been questioned with regard to the service of the legal notice on the Accused, he has denied the suggestion that at the time of causing the legal notice to the Accused, he was not aware of the address of the latter. However, it is elicited from him that, he does not know to the address of the Accused in the year 2011, when the latter was working with his wife. However, the Complainant has claimed that, he had visited the houses of the Accused and his friend/the Accused of CC No.23136/2015 by name Sandeep Kumar M after 2011. He has further deposed before this court that, immediately after the issuance of the

notice, the Accused of C.C.No.23136/2015 vacated from the 1st address shown in the complaint of the said case and that as he knew that his father was working in the Bank of Maharashtra, he caused notice to the working address of the father of the Accused of the said case.

44. Further, it is pertinent to note that, even during his chief evidence, the Accused has reiterated the same defence by claiming that, the legal notice was not served upon him, since the Complainant is not acquainted to him or with his address and the legal notice has been caused to his wrong address with an intention to avoid him from issuing the reply notice.

45. Further, in his cross-examination, it is elicited from the Accused that he has obtained his Aadhar Card in the year 2011 and that he had no impediment to produce the same before this court and that prior to residing in the address shown in the Rental Agreement at Ex.D22, he was residing in his own house in Srinivasnagar. He has further deposed that he could produce his Health Insurance Policy to show that he was residing in the said address. However he has claimed that they have leased out their own house and that he could produce the Lease Agreement to substantiate the same.

46. However D.W.1 has denied that he has created Ex.D22 for the purpose of the present case, but has admitted that he has furnished the address of Srinivasnagar premises while registering the company.

47. However it is pertinent to note that the Accused has relied upon the documentary evidence at Ex.D22 to prove that he was residing in the said address at the relevant point of time and not in the address shown by the Complainant in this case. But it could be observed that the stamp paper in respect of Ex.D22 is purchased on 31.1.2014, whereas the rental agreement said to have been entered into as per the said document is dated 1.12.2013. Moreover the said agreement is said to have been entered into between the land lord and the father of the Accused and it is only the Accused, who is said to have signed as a witness to the said agreement. Therefore this document clearly creates a doubt in the mind of this court about its genuineness. Moreover when the Complainant has seriously disputed the genuineness of the said documentary evidence, the Accused had the onus to prove the same as per law, which he could have done so easily by examining his alleged land lord under Ex.D22.

48. Even otherwise, when the Accused had undertaken to produce his Aadhar card or the Health Insurance Policy to prove his different address, he could have produced the same. However, even subsequent to his cross-examination, the Accused has not produced any documentary proof to show that, he was residing elsewhere at the relevant point of time and not in the address shown by the Complainant in the complaint as well as in the legal notice.

49. Therefore, it could be seen that though as per Ex.P6, the Postal Shara on the envelope is to the effect "ADDRESSEE LEFT", "Return to Sender", as per Sec.27 of the General Clauses Act, there is deemed service of the legal notice on the Accused in view of the absence of proof to the contrary led by the Accused. Therefore, I have no hesitation to hold that the Accused is not entitled to the technical defence of the non-service of the legal notice on him.



50. Now coming to the next defence of the Accused in the light of the documentary evidence at Ex.D21, which is produced by the Accused, as per which, he has claimed that, there was business transaction between his company 4D Technologies Pvt., Ltd., and CVK MIND SOURCE CONSULTING SERVICES PRIVATE LIMITED and it was in respect of the said business transaction that, he had issued totally 6 cheques, including the subject cheque to the M.D of the latter company. No doubt, the documentary evidence at Ex.D21 proves the business transaction between the company of the Accused and the CVK MIND SOURCE CONSULTING SERVICES PRIVATE LIMITED. However, it could be seen that, though Accused has claimed that there is a recital with regard to the alleged issuance of the six cheques by him as security for the performance of the terms of the said agreement, subsequently he has admitted that, there is no mention with regard to the alleged issuance of 6 cheques by him in Ex.D21. Likewise, he also admitted that, there is no subsequent correspondence or communication through mail or in any manner about the alleged issuance of the 6 cheques by him to the said company.

51. In such circumstance, though it is true that, as per Ex.D21, there existed business transaction between 4D Technologies Pvt., Ltd., and CVK MIND SOURCE CONSULTING SERVICES PRIVATE LIMITED, there is no proof to show that the cheque in dispute, along with 5 other cheques came to be issued by the Accused in favour of CVK MIND SOURCE CONSULTING SERVICES PRIVATE LIMITED for security purpose as claimed by him.

52. Therefore, the documentary evidence at Ex.D21, which is relied upon by the Accused himself goes to show that, his defence with regard to issuance of the subject cheque for security purpose in favour of the CVK MIND SOURCE CONSULTING SERVICES PRIVATE LIMITED cannot be accepted by this court.

53. It further pertinent to note that, though the Accused has raised the defence that, the subject cheque, along with 5 other cheques were issued by him to the CVK MIND SOURCE CONSULTING SERVICES PRIVATE LIMITED and that the wife of the Complainant and his father-in-law, were the mediators for the business transaction with M.D.Mr.Venkat for the Agreement as per Ex.D21, in his cross-examination, the Accused has clearly admitted that, he has not made any correspondence with the CVK MIND SOURCE CONSULTING SERVICES PRIVATE LIMITED either through mail or through letter, alleging that, though he had issued the cheque in dispute them, they had misused the same. It is also elicited from the Accused that, he has not caused any notice or lodged any complaint against the CVK MIND SOURCE CONSULTING SERVICES PRIVATE LIMITED and that he has not made any correspondence through any of the modes to wife of the Complainant Sushma alleging that she has misused the cheque in dispute.

54. On the other hand, it is elicited from the Accused that, Sushma and his friend Sandeep Kumar/Accused of C.C.No.23136/2015 and C.C.No.23135/2015 were working together in the CVK MIND SOURCE CONSULTING SERVICES PRIVATE LIMITED from 2010 to December 2011 and that he does not know as to till when, the wife of the Complainant Sushma worked in the said company. Interestingly the Accused has pleaded ignorance to the suggestion that the wife of the Complainant Sushma left the company after his friend Sandeep Kumar quit the company.

55. Even otherwise, when according to the Accused, his 6 cheques, including the present cheque were in the custody of the M.D of the CVK MIND SOURCE CONSULTING SERVICE PRIVATE LIMITED, then, if the said company really had the intention to play fraud on the Accused, then the MD of the said company had every opportunity to present the subject cheque and the other cheques of the Accused in his own name or in the name of his company, instead of handing over the same to the wife of the Complainant/Sushma and through her, to the Complainant. Therefore, even this defence on the part of the Accused cannot be accepted and believed by this court.

56. Now coming the cheque in dispute, though in the cross- examination of the Complainant, it is suggested to him that, he has filled up the contents of the cheque in question, he has answered that, it was filled up, when it was issued to him and that the Accused has filled up the entire contents of Ex.P1, except the date on it, which has been written by him, while presenting the same. Interestingly, when the Complainant has claimed so, there is no further suggestion to the Complainant by denying the said clarification given by him by the Defence Counsel.

57. It is further pertinent to note that, neither in his chief evidence nor in the cross-examination of the Complainant, has the Accused denied the writings in respect of contents of the subject cheque as well as his signature found on it. Therefore this is sufficient to come to the conclusion that the case of the Complainant could be believed by this court.

58. It is interesting to note that, the Accused has also denied his alleged acquaintance with the Complainant by claiming that, the latter is an utter stranger to him. However, throughout the proceedings, the defence of the Accused is that, the Complainant has misused the subject cheque through his wife-Sushma, who was admittedly working in the CVK MIND SOURCE CONSULTING SERVICES PRIVATE LIMITED along with his friend Sandeep Kumar. Though there could be no direct contact between the Complainant and the Accused, when the Accused has repeatedly alleged that the M.D of the CVK MIND SOURCE CONSULTING SERVICES PRIVATE LIMITED viz., Mr. Venkat and the wife of the Complainant - Sushma and her father

- Rajesh have colluded with each other and misused the subject cheque, then the Accused is bound to know the Complainant, who is admittedly the husband of Sushma and the son-in- law of Mr.Rajesh.

59. Moreover, when the Accused has alleged that the office of CVK MIND SOURCES CONSULTING SERVICES PRIVATE LIMITED is situated in Koramangala near the house of the father- in-law of the Complainant, this also leads to an inference that the Complainant is well known to the former (Accused).

60. Likewise, when the Accused has also raised the defence that, the wife of the Complainant - Sushma and her father Rajesh were the mediators for the business transaction as per Ex.D21 with the M.D of the CVK MIND SOURCE CONSULTING SERVICES PRIVATE LIMITED viz., Venkat, this also leads to an inference that the Accused had the knowledge about the family members of Sushma and it is because of the same reason that, he has come up with a defence that the aforesaid persons have allegedly misused his cheque. Therefore the defence of the Accused with regard to the

alleged non-acquaintance between the parties cannot be believed by this court. Therefore this defence theory is also liable to fail.

61. Now coming to the case of the Complainant, in the light of his pleadings and proof, no doubt, as rightly pointed out by the learned Defence Counsel both in the cross-examination of the Complainant as well as in his arguments, there is no pleading either in the legal notice or in the complaint with regard to the date of approach and the date of lending of loan by the Complainant to the Accused.

62. Likewise, the Complainant has also pleaded ignorance with the regard to the details of the nature of business, which was being carried on by the Accused and his friends. But the omission on the part of the Complainant with regard to these details cannot be seriously by this court in view of the fact that, both in the legal notice as well as in the complaint, it is precisely pleaded that the Accused had availed hand loan from the Complainant for the purpose of his business and legal necessities and that it is towards the discharge of the said liability that the Accused is said to have issued the subject cheque in his favour.

Therefore there can be no fault found in the case of the Complainant only because of the fact that there is no mention of the specific date of lending pleaded by the Complainant.

63. Moreover, when the Complainant has claimed in his cross-examination that the Accused had approached him seeking loan of Rs.1,00,000/= from him in the year 2011 and though the Accused has denied the same, the documentary evidence at Ex.D21 goes to show that, as on 7/3/2012, the Accused had deposited only Rs.2,00,000/= towards the initial deposit towards Rs.15,00,000/= as a total performance guarantee deposit and the remaining Rs.13,00,000/= were to be deducted every month as Rs.1,00,000/= for the next 13 months from the date of the said agreement.

64. IN this regard, though the Accused of C.C.No.23136/2015 has claimed in his cross-examination that, they have made the balance payment of Rs.13,00,000/= to the CVK MIND SOURCE CONSULTING SERVICES PRIVATE LIMITED by way of deductions in his monthly bills, the Accused in this case has admitted that their business transaction with the said company could not last long and there is no proof with regard to the alleged payment made by them to the said company to the extent of Rs.13 Lakhs under the Agreement at Ex.D21.

65. Moreover it is elicited from the Accused in this case that he has recorded in his business records with regard to the alleged issuance of the blank cheques by him to the CVK Mind Source and that he has no impediment to produce the same and that there are no documents to show that Sushma/wife of the Complainant has signed as an authorized signatory or as an Associate representing the said company.

66. It is also pertinent to note that the Accused has also failed to produce his bank passbooks to show that he was financially well off during the relevant point of time, which he has claimed so. This fact clearly corroborates the claim of the Complainant that the Accused was in financial need at the relevant point of time.

67. It is interesting to note that the Accused has also claimed that there are documents to show that their company was running loss during the year 2012-2013, but he has denied the suggestion that with an intention to maintain their company, they had availed loans from the individuals. However he has claimed that they have not availed loans either from the banks or the financial institutions in order to meet the expenses of their company. This claim of the Accused cannot be believed to be true, since as per his own admission their company was running under loss. Then in such circumstance, if they had not obtained any loan from the banks or the financial institutions or from the private individuals, then they must show proof to show that they had the independent financial capacity to withstand such losses. But interestingly there is no proof led by the Accused to prove their financial stability at the relevant point of time, despite their company undergoing losses. Therefore this aspect also creates doubt in the defence of the Accused.

68. No doubt, the omission to plead about the details of the transaction is fatal to the case of the Complainant. However when the Complainant has deposed in his cross-examination that, the entries in the cheque are in the hand written of the Accused, while only the date of the cheque is in his hand writing, nothing prevent the Accused from denying the same, when the Complainant had claimed so. But the conduct of the Accused in having remained silent leads to an inference that, he has admitted having made the said entries in the subject cheque. In such circumstance, the assertive claim of the Complainant that, it is the Accused, who has filled up the contents of the subject cheque has remained un-challenged and un-disputed by the Accused.

69. In such circumstance, in the absence of proof to the contrary, the claim of the Complainant that, the Accused has availed loan from the Complainant to the extent of Rs.1,00,000/- by issuing the subject cheque to him, with only the date left blank has been proved by the former beyond reasonable doubt.

70. Likewise, the bare perusal of the cheque at Ex.P1 corroborates the claim of the Complainant that the signature and the contents, except the date in the subject cheque is in one handwriting and in one ink, while only the date is in a different ink and in a different handwriting. This observation also corroborates the claim of the Complainant.

71. It is further pertinent to note that, though the Complainant has been extensively cross-examined to the effect that, he had not collected any document/s from him in the form of an acknowledgment at the time of his leading the loan to the Accused and when the Complainant has claimed that the Accused has issued a cheque to him at that time for security purpose, there is no further suggestion put to him thereby denying the said claim. This also leads to an inference that, the Accused has admitted the issuance of the cheque in favour of the Complainant as on the date of the transaction in question.

72. It could be seen that, the Complainant has been extensively cross-examined even with regard to his financial capacity so as to lend loan to the Accused. Though in this regard, it is claimed by the Complainant that, he is an income tax assessee and that at the time of the transaction in question, he was working in a company by name Kelly Services and drawing an annual income of Rs.6,00,000/=, there is no denial of the said claim by the Accused. Though the Complainant had

very opportunity to produce his Bank statement before this court, there is no denial of the part of the Accused that, the Complainant had neither such annual income nor had he the capacity to lend such loan amount to him. Therefore the non-

production of such documents by the Complainant is not fatal to his case. In view of the same, the defence raised by the Accused that the Complainant had no financial capacity to lend any loan amount to him holds no water. In view of the same this court also no hesitation to come to the conclusion that, only with an intention to escape from his liability, the Accused has come up with all the possible defences available to him under the law, but ultimately failed to prove the same.

73. Further, I have carefully gone through the decisions relied upon by the learned Defence Counsel in support of his arguments. However in the present case, my reasoning is supported with the law laid down by the Hon'ble Apex Court in the case of Rangappa V/s Mohan in Cr.Appel No.1020 of 2010 decided on the 7th of May 2010, in which, it is held that, once the Accused admits the cheque in dispute, with his signature on it, then the bare denial of the passing of consideration does not appear to be any defence. Something which is probable has to be brought out on record for getting the benefit of shifting the onus of proof to the Complainant.

74. Therefore the defence that the Accused has raised in the present case cannot be considered to be a probable defence and as such the statutory presumptions U/sec. 118 and 139 of N.I. Act come in to play in favour of the Complainant as the same has not been rebutted by the Accused even with regard to the materials submitted by the Complainant.

75. Now coming to the quantum of the compensation that should be awarded to the Complainant in this case, admittedly this case is of the year 2015. As a result, I am of the opinion that this is a fit case which deserves the Complainant to be compensated with a fair compensation under Sec. 357(3) of the Cr.P.C., Accordingly, I proceed to pass the following:-

ORDER By exercising the power-conferred u/s 255(2) of the Cr.P.C., the Accused is hereby convicted for the offence punishable u/s 138 of Negotiable Instruments Act.

He is sentenced to pay a fine of Rs.1,25,000/- (Rupees One Lakh Twenty Five Thousand only).

If the fine amount is so collected, Rs.1,20,000/- (Rupees One Lakh Twenty Thousand Only) is ordered to be paid to the Complainant as Compensation and the balance of Rs.5,000/- (Rupees Five Thousand only) is ordered to be adjusted towards cost to the State Exchequer.

In default of payment of such compensation, the Accused shall undergo simple imprisonment for 3 (Three) Months.

His bail bond stands discharged.

Issue free copy of the Judgment to the Accused forthwith.

(Dictated to the Stenographer, transcribed by her and print out taken by her, verified, and then pronounced by me in the open Court on this the 10th day of April, 2018).

(SARASWATHI.K.N), XVI ACMM., Bengaluru City.

## ANNEXURE

### 1. List of witness/s examined on behalf of the Complainant:-

PW.1 : Sri.G.A.Dinesh Kumar;

### 2. List of documents exhibited on behalf of the Complainant:-

Ex.P1	:	Original cheque;
Ex.P1(a)	:	Signature of the Accused;
Ex.P2	:	Bank memo;
Ex.P3	:	Office copy of the Legal Notice;
Ex.P4	:	Postal Receipt;
Ex.P5	:	Returned Legal Notice;
Ex.P6	:	Returned Postal Cover;
Ex.P7	:	Postal Receipt;
Ex.P8	:	Postal Acknowledgment.

### 3. List of witness/s examined on behalf of the Accused:-

DW.1 : Mr.Yeshwanth B K;

### 4. List of documents exhibited on behalf of the Accused:-

Ex.D1 : C/c of the complaint in CC No.10209/2014 Ex.D2 : C/c of the Sworn-Statement affidavit; Ex.D3 : C/c of the Chief-Examination affidavit;

Ex.D4	:	C/c of the Cheque;
Ex.D5	:	C/c of the Bank Memo;
Ex.D6 & D7	:	C/c of the Postal receipts
Ex.D8	:	C/c of the Legal Notice;
Ex.D9	:	C/c of the Postal Acknowledgement;
Ex.D10	:	C/c of the Postal Envelope;

Ex.D11 and D12: C/c of the Complaints of C.C.No.10207/2014; Ex.D13 : C/c of the Sworn-Statement affidavit; Ex.D14 : C/c of the Chief-Examination affidavit;

Ex.D15	:	C/c of the Cheque;
Ex.D16	:	C/c of the Bank Memo;
Ex.D17	:	C/c of the Legal Notice;

Ex.D18 : C/c of the Postal Acknowledgment;  
Ex.D19 : C/c of the Postal Receipt;  
Ex.D20 : C/c of the returned Postal Cover;

Ex.D21 : C/c of the Agreement dated 2.3.2012; Ex.D22 : C/c of the Rental Agreement;  
Ex.D23 : Affidavit under Sec.65 B of the Evidence Act; Ex.D24 : g-mail communications.

(SARASWATHI.K.N), XVI ACMM., Bengaluru City.

10/04/2018 Judgment pronounced in the open court vide separate order ORDER By exercising the power conferred u/s 255(2) of the Cr.P.C., the Accused is hereby convicted for the offence punishable u/s 138 of Negotiable Instruments Act.

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(SARASWATHI.K.N), XVI ACMM, Bengaluru City.