

## Shivakumar vs B.M.Somashekarappa on 31 December, 2020

IN THE COURT OF THE JUDGE COURT OF SMALL  
CAUSES AND A.C.M.M, AT BENGALURU

Present: Abdul Khadar, B.A., LL.B.,  
JUDGE, Court Of Small Causes,  
Bengaluru.

Dated this the 31st day of December 2020

C.C. No:20926/2015

Complainant: Shivakumar  
S/o late Banashettappa,  
Aged about 65years,  
No.13, R.S.C. Complex,  
Rammannapet,  
Jumma mazid Road,  
Bengaluru- 560002.

(By Sri.M.Sreerama Reddy-  
Advocate)

-Vs-

Accused : B.M.Somashekarappa  
S/o B.M. Mruthyunjayappa,  
Aged about 61 years,  
No.17, 15th Cross,  
3rd Main Dollars Colony,  
High R.M.V., 2nd Stage,  
Bengaluru-94.  
Also at:  
B.M.Somashekarappa  
S/o B.M. Mruthyunjayappa,  
Beemasamudra,  
Opp. to Eashwara Temple &  
State Bank of India,  
Chitradurga District-577520.

(By Sri.Keerthi Prasad D.C.-  
Advocate)

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### JUDGMENT

The complainant has filed the private complaint under Sec.200 of Cr.P.C., against the accused for having committed an offence punishable under Sec.138 of Negotiable Instruments Act.

2. According to the complainant, that the accused was absolute owner of the property bearing Flat No. A□, ground floor measuring 1053 Sq. feet, Super built up area RCC roof with concrete block wall and vitrified flooring having dining, two bed rooms, building known as M/s. Vignesh Habitat constructed on property No.18, New No.35, of Kodigehalli village, Yelahanka Hobli, Bengaluru

North Taluk. The complainant was purchased the above said property from the accused for a total sale consideration of Rs.18,50,000/- under a registered sale deed dated 12.09.2012 and he came to know that the very same property sold by the accused in favour of one Devendraiah, under registered sale deed dated 21.11.2011. On an enquiry with the accused, the accused agreed to return the sale consideration received by him to the complainant and entered into agreement dated 27.05.2015 and also issued cheque bearing No.161399 dated 27.05.2015 for Rs.18,50,000/- drawn on State Bank of India, Gokula extension, Bengaluru. The complainant presented the said cheque for encashment through his banker, Textile Co-operative Bank Ltd., Main Branch, Bengaluru and the said cheque was dishonoured for the reason as "Funds Insufficient" on 07.07.2015. Immediately the complainant intimated regarding the SCCH-3 CC: 20926/2015 dishonor of cheque to the accused, but he failed to pay the amount covered under the cheque. The complainant got issued a legal notice to the accused through RPAD to the accused on 25.07.2015 demanding him to pay the cheque amount within 15 days from the date of receipt of notice. The notice sent to the both addresses of the accused, were returned with shara as "party is out of station"

on 30.07.2015, the accused neither sent any reply nor paid the amount under the cheque. Accordingly, he has filed the present complaint to take action against the accused in accordance with law.

3. Being satisfied with the complaint averments, this Court has taken cognizance and after recording sworn statement being satisfied with the prima facie case, issued summons to the accused compelling his appearance. Accused appeared through his counsel before this Court and got enlarged on bail. Substance of accusation was read over to the accused. Accused pleaded not guilty for the offence punishable u/s.138 of NI Act. Hence, this Court called upon the complainant to prove his case.

4. In support of the case, the complainant himself examined as P.W.1 and got marked 11 documents as per Ex.P1 to P11 and Ex.D.1 and D.2 got marked on confrontation. After closure of evidence of Complainant the accused was examined as contemplated u/s 313 Cr.P.C and his statement was recorded. The accused has denied all the incriminating circumstances appearing in the evidence. Himself examined as DW-1 got marked 2 SCCH-4 CC: 20926/2015 documents at Ex.D.3 and D.4 on his behalf. After closure of evidence of complainant and accused, the case was posted for arguments on merits.

5. I have heard the arguments canvassed by both counsels and perused the materials available on record.

6. The points that would arise for my determinations are:

1. Whether the complainant proves that the cheque bearing No.161399 dated 27.05.2015 for Rs.18,50,000/- drawn on State Bank of India, Gokula extension, Bengaluru, has been issued by the accused towards discharge of his legal liability and failed to make good to the Complainant after its dishonor and issue of legal notice

within the stipulated period and thereby accused has committed the offence Punishable U/s. 138 of the NI Act?

2. What order?

7. My findings to the above points is as under:

Point No.1 : In the Affirmative Point No.2 : As per final order below For the following:

REASONS Point No.1 :

8. It is pertinent to note that, whenever a private complainant is filed seeking prosecution of the accused for an offence punishable under Section 138 of Negotiable Instrument SCCH 5 CC: 20926/2015 Act, if the issuance of cheque and the signature on the cheque is accepted and admitted by the accused, an initial presumption has to be raised by the Court in favour of the complainant, that the cheque in question was issued towards legally recoverable debt or liability. Of course, this presumption is rebuttable presumption. Such rebuttable evidence has to be placed before the Court by the accused. It is well known that, the accused can rebut the said legal presumption either by cross examination of complainant or by leading evidence. The complainant himself examined as PW.1 filed affidavit by way of chief examination has reiterated the versions of complaint. I would not like to reproduce the same to avoid repetition of facts since the complainant has explained the details of complaint averments in chief examination. The complainant produced 11 documents at Ex.P1 to P.11.

9. So far as the document is concerned Ex.P1 is the cheque bearing No.161399 dated 27.05.2015 for a sum of Rs.18,50,000/- drawn on State Bank of India, Gokula extension, Bengaluru. Ex.P1(a) is the signature of the accused. Ex.P2 is the counter file. Ex.P3 is the Bank endorsement issued by the Textile Co-operative Bank Ltd., Main Branch, Bengaluru on 07.07.2016, wherein the aforesaid cheque was dishonoured with a shara as "Funds Insufficient". Ex.P4 is the legal notice dated 25.07.2015, wherein the complainant demanded for repayment of money of Rs.18,50,000/- from the accused within 15 days from the date of receipt of notice. Ex.P5 & 6 are the postal receipts, in which the SCCH 6 CC: 20926/2015 notice has been sent by RPAD to the address of accused, shown in cause title. Exs.P7 & 8 are the unserved postal covers. Ex.P7(a) & 8(a) are the contents of Exs.P7 & 8. Ex.P9 is the sale deed dated 12.09.2012, wherein it appears that the accused was sold the property bearing Old No.18, New No.35 formed in assessment No.33, Khata No.582 measuring east west southern side 143 ft and northern side 133 ft and north south 64 ft. situated at Kodigehalli Village, Yelankha Hobli, Bangalore North Taluk in favour of complainant under registered sale deed for a total sale consideration of Rs.18,50,000/- Ex.P10 is the Sale deed dated 21.11.2011 wherein the accused was sold the aforesaid property in favour of Devendraiah M. for a total sale consideration of Rs.40,50,000/- Ex.P11 is the agreement dated 27.05.2015 entered between complainant and accused wherein accused had agreed to return the total sale consideration amount of Rs.18,50,000/- received by him from the complainant and issued cheque bearing No. 161399 dated 27.05.2015 drawn on SBI Gokula Branch in favour of complainant. Ex.P11(a) is the signature

of accused. Ex.P11(b) is the signature of complainant. According to the learned counsel for the complainant, when the issuance of cheque and his signature are admitted, then the presumption as required under Section 139 of N.I. Act comes to the aid of the complainant and it is the turn of the accused to explain or rebut the said presumption by raising a probable defence.

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10. In this regard, the court has to see whether the accused has been successful in rebutting the presumption through cross-examination of PW and his evidence. In support of his defence, the accused cross examined PW in length, but nothing has been elicited from his mouth to show that the consideration does not exist as alleged by the complainant under Ex.P1. During the course of cross examination of PW, he deposed that he is doing Saree business since 30 years. Since from 2009, he is having Bank account at Indian Bank and Textile Co-operative Bank and even now he also having two accounts. He paid income tax from 2009-2012 and he is ready to produce the income tax returns. He denied that contents stated in para of Ex.P4 notice dated 25-7-2015 is false. He admits that he has not stated how he paid money to the accused as per para 3 of Ex.P9. PW deposes that he had money with him due to sale of property at Akkithimmanahalli and he paid the same to the accused by way of cash. PW deposes that he do not know more than of Rs.20,000/- should be paid through cheque. PW deposes that he knows the accused since 2010 through the proprietor of Vijayalakshmi Silks & Sarees by name Gupta. The Gupta told him that the accused has kept the apartment for sale. The Gupta had shop at Avenue Road, Jumma Mazid Road. In the same building, Indian Bank is also situated. He denied that he is doing money lending as well as real estate business and also doing cheque discounting business since many years. He denied that since 2003-04 through the accused he has opened Indian Bank account No.410092119. He denied that, he took one signed blank SCCH 8 CC: 20926/2015 cheque book from the accused and he was filling the cheques as per his whims and fancy of the Co-operative Bank and receiving the amount through cheque discounting without presenting cheques for collection and by this way, he was making use of the accused account. He denied that as per Ex.P9, there are 20 flats and himself and accused were doing real estate business and preparing the related papers of that flats. He denied that he was selling the flats to the working peoples who borrows loan to purchase flats, himself and Umadevi were sharing the loan themselves. Ex.P11 was got written by the accused on 27-5-2015. He denied that he took blank signed papers from the accused during the transaction period of 2013-2014. The PW.1 further deposed that the gift deed papers of accused wife Kalpana were pledged with him. He denied that during the year 2003-2004 the accused borrowed loan of Rs.7,50,000/- and at that time, he took 14 SBI blank signed cheques from him Ex.P11 was created for the purpose of this case. He admits that there is difference of ink and writings of Ex.P1. He denied that himself has filled the contents of Ex.P1 and he himself written the Ex.P2 challan on 4-7-2015. He denied that every year he is doing the business of purchase of property and as per Ex.P10 he himself did property transaction through accused to Devendraiah. He admits that he himself prepared Ex.P9 sale deed. He denied that he knows that the flat was sold to Devendraiah but by threatening the accused he got executed Ex.P9.

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11. In his further cross examination, PW1 deposed that since 2010 he purchased the flat from the accused. He admits that generally, before purchasing site and house, one will take legal opinion. Witness volunteers that he contacted one Advocate Anand and took the written opinion from him. He denied that even he knows that the flat was registered in the name of Devendraiah in the year 2011 through Encumbrance certificate by threatening the accused he got executed Ex.P9. He denied that on 18.5.2010 he entered sale agreement with the Matamma Reddy in respect of two apartments and in that document he signed as an witness. Witness volunteers that agreement has been cancelled, on confrontation of document the witness identified his signature which is marked as Ex.D1. PW1 deposes that he issued two cheques to the accused in respect of purchase of flat and the same were identified by PW1 was marked as Ex.D2. He denied that he has not paid amount in respect of purchase of flat but he lent loan and with regard the same, he entered an agreement with Matamma Reddy as security. He denied that he took blank cheques and empty signed blank papers from the accused and after that, he cancelled the agreement at Ex.D1. He denied that his mobile numbers 7483336695 and 7892933177 shows in the caller ID as Financial. He denied that the notice was not served on the accused and he willfully has sent the notice of accused to some other address. He denied that in order to get Rs.7,50,000/- from the accused has misused the cheque which was issued as security to file this false case against him.

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12. Admittedly, in the cross examination of complainant, the accused has not elicited from his mouth to show that there is no existence of legally recoverable debt payable by the accused to the complainant. It is the defence of the accused that, the complainant has made use of the blank signed cheques which were given in the year 2010 as security with regard to getting loan to him. His some flats were not sold since long in Bhadrappa Layout and the complainant came forward to get loan on those flats. To get the loan in Indian Bank, Avenue Road Branch, he opened an account. To get loan, the complainant told him there must be some transaction, otherwise, the bank will not sanction loan. Therefore, the complainant took 25 blank signed cheques from him by stating that if we do some transaction, the bank will lend loan and he made use of said cheques to file this false case against him without returning them. The evidence of PW.1 and the documents at Ex.P9 and 11 itself shows that, complainant has paid amount through cheques from his account to the accused in respect of purchase of flat and the accused without the knowledge of complainant sold the said property to Devendraiah M. as he agreed to return the sale consideration amount to complainant and to discharge the said liability accused had issued Ex.P1 cheque under Ex.P11 agreement. On perusal of cross examination it is quite clear that the accused has admitted his legal liability towards the complainant for an amount of Rs.18,50,000/- Ex.P1 cheque came to be issued consequent upon execution of Ex.P11 thereby raising the presumption as elucidated in Sec. 139 and 118 of the N.I. Act SCCH9 11 CC: 20926/2015 supra. The accused does not deny his signature on the cheque, there is always a presumption in favour of the complainant that a legally enforceable debt or liability exists. It is the accused to rebut such presumption in evidence which he has failed to do. Moreover the accused had never questioned the financial capacity of the complainant during the trail. On careful appreciation of the evidence of the complainant and accused there is no disputes with regard to the cheque and signature belongs to the accused and the signature is marked as Ex.P1(a). Hence, it can be held that, the complainant has proved the provision of section 118 & 139 of the N.I. Act. As

per Section 118 of N.I. Act, the presumption available regarding consideration, as to the, date and also holder or holder in due course of cheque. When the Complainant presented the cheque it implies that it was given to him by the accused. This presumption has to be rebutted by the accused by adducing the defense evidence. So the burden is on the accused to rebut the presumption.

13. So, it is an admitted fact of issuance of cheque by the accused. The cheque contains the signature of accused. It is the main contention of the accused that the complainant misused the cheque which was given as security to get loan on his flats and the loan was not sanctioned, then in the year 2010, the complainant gave loan through cheque of Rs.7,50,000/- by deducting interest at 20%. Then, in my opinion question arises that as it is a matter of the year 2015, why the accused has not lodged complaint against SCCH 12 CC: 20926/2015 Complainant for misusing of cheque by him. Even, after receipt of summons/demand notice, the accused has not taken any legal action against the complainant for misuse of cheque.

14. The learned Counsel for the Complainant has argued that the accused is absolute owner of the property bearing flat No. A1, ground floor measuring 1053 Sq. feet, Super built up area RCC roof with concrete block wall and vitrified flooring having dining, two bed rooms building known as M/s. Vignesh Habitat constructed on property No.18, new No.35, of Kodigehalli village, Yelahanka Hobli, Bengaluru North Taluk. The complainant was purchased the above referred property from the accused for a total sale consideration of Rs.18,50,000/- under a registered sale deed dated 12.09.2012 and he came to know that the very same property sold by the accused in favour of one Devendraiah under registered sale deed dated 21.11.2011. On an enquiry with the accused, the accused agreed to return the sale consideration received by him to the complainant and entered into an agreement dated 27.05.2015 and also issued cheque bearing No.161399 dated 27.05.2015 for Rs.18,50,000/- drawn on State Bank of India, Gokula extension, Bengaluru and when it presented for encashment which came to be dishonoured for the reason as "Funds Insufficient" on 07.07.2015. Further argued that during the course of cross examination the accused admitted that he has issued the cheque in question, which is subject matter of the sale deed. The accused admitted the fact that the above cheque is SCCH 13 CC: 20926/2015 belonging to him and his account. Hence the complainant has proved that the accused has issued the cheque towards discharge of liability. The said cheque was presented for encashment within stipulated time from the date of issuance and the said cheque was bounced for funds insufficient and the notice was issued on him but he failed to clear the cheque amount. Hence prayed that, the accused is liable for punishment and for payment cheque amount out of fine. Now, the question is whether Ex.P.1 cheque was issued towards discharge of liability. In the present case on hand the accused himself has admitted towards discharge of the amount he issued cheque in question in favour of complainant. Admitted facts need not be proved under section 58 of Indian Evidence Act. The conduct of the parties has to be considered if really the accused has not issued the cheque for legal recoverable debt and the accused could have launched criminal proceedings against the complainant but accused not taken any legal action against the complainant till today.

15. It is settled law that a cheque whether issued for repayment of a loan or as security makes little difference u/s 138 of the act in the event of dishonor legal consequence will be same without distinction when once issue of cheque is proved a presumption u/s 139 of the act would arise with

regard to the considerations.

16. On perusal of appreciation of the oral testimony of the accused it can be held that entire defense taken by the accused SCCH ¶ 14 CC: 20926/2015 regarding issuance of cheque is admitted. Therefore, when there is an evidence of complainant regarding issuance of cheque and it's dishonor on presentation, when there is no defence evidence to rebut the presumption available u/s.118 & 139 of the Act.

17. The statutory presumption under Sec.139 of N.I. Act explains initial presumption infavour of the producer of an instrument. It says court shall presume that one instrument is handed over infavour of another person only for the purpose of recover of existed debt. Therefore, the statutory presumption explained under Sec.139 of N.I. Act always provides presumption infavour of the complainant. But, it does not mean that the statutory presumption cannot be rebutted. The said presumption can be rebutted at the strength of strong oral and documentary evidence. Let us see the attempt of the accused to rebut the evidence of complainant.

18. To defeat the case of the complainant, accused himself examined as DW ¶, wherein he deposed that, he knows the complainant since 2000 through Jagadish Gupta. The complainant is doing real estate, cheque discount as well he helps the others in getting loans from the banks. His flats were unsold at Bhadrappa layout and Jagadish Gupta introduced the complainant stating that he will get loan on the flats. That time, the complainant opened his account in Indian Bank, Avenue Road Branch. That time, complainant took 25 blank signed cheques from him by stating that if we do some transaction by discounting the cheques, the SCCH ¶ 15 CC: 20926/2015 bank will lend loan easily. DW ¶ deposes that the loan was not sanctioned, then in the year 2010, the complainant gave loan through cheque of Rs.7,50,000/¶ by deducting interest at 20%. He could not repay the loan borrowed by him to the complainant. DW ¶ deposes that the complainant made plan that the Devendraiah had IT papers, through him they can get loan, through that loan , half loan to the complainant and half loan to him and in that connection, on 21 ¶ 1 ¶ 2011 the sale deed was executed in favour of Devendraiah. Towards security of loan, complainant took gift deed of his wife and taken signature of his wife on Rs.2/¶ blank stamp papers. Then made an agreement to sell of two flats for security infavour M. Reddy and took SBI three blank signed cheques from him. The Devendraiah was sanctioned loan of Rs.20,87,000/¶ out of that, they gave Rs.2,70,000/¶ to him and complainant and Devendraiah took Rs.9 lakhs each and for the said loan, the complainant was guarantor. Devendraiah agreed to clear the loan within six months but without repaying the same, he absconded by vacating the premises. DW ¶ deposes that the bank started to harass the guarantor for repayment of loan and in this connection, the complainant asked him to register in his favour in respect of flat in question registered earlier in the name of Devendraiah to take loan in the Co ¶ operative Bank to clear the loan of SBI borrowed by Devendraiah on 12 ¶ 9 ¶ 2012. DW ¶ deposes when he demanded to return of documents, without returning the same they have cancelled the old agreement. In case, the complainant wants to return those documents, he should give SCCH ¶ 16 CC: 20926/2015 blank signed cheques and he took four blank signed stamp papers and 14 SBI cheques. DW ¶ deposes that even though the there is no due from his side, without returning the documents, the complainant threatened him to file case against his wife. He has filed false case against him by misusing the cheques given as security to borrow loan. He got marked Ex.D.3 and

D.4. Hence, prayed to dismiss the complaint. Despite of grant of sufficient opportunities, the accused not tendered himself for cross examination to the complainant and hence the evidence of DW.1 is discarded and posted the case for arguments.

19. The conduct of the parties has to be considered in the back ground and circumstances of the case from the admitted facts from the mouth of accused it can be held that the accused is only for the name sake and the accused is a beneficiary of the said agreement, hence, it can be held that the cheque was issued for legally recoverable debt. The evidence of PW□ is clearly shows that except denying suggestion he has not produced any contra documents to show that he has not received the cheque in question amount from complainant.

20. In this regard I relied a decision reported in AIR 2019 SC 1876 in the case of Rohitbhai Jivanlaa Patel V/s State of Gujarat and another It is held that once presumption of existence of legally enforceable debt drawn in favour of complainant, onus is shifted on accused□ Unless onus is discharged by accused that preponderance of probabilities are tilting in his SCCH□ 17 CC: 20926/2015 favour. Doubt on case of complainant cannot be raised for want of evidence regarding source of funds for advancing loan to accused.

2. AIR 2018 SC 3601 In the case of T.P. Murugan (Dead) Thi. LRs V/s. Bojan It is held that once a cheque has been signed and issued in favour of the holder, there is statutory presumption that is issued in discharge of a legally enforceable debt or liability. This presumption is a rebuttal one, if the issuer of the cheque is able to discharge the burden that it was issued for some other purpose like security etc.

3. AIR 2015 SC 2240 in the case of T.Vasantha Kumar v. Vijayakumari (LAWS(SC) 2015 4 79 in the case of T.Vasantha Kumar v. Vijayakumari) wherein is held that Dishonour of cheque□ Appeal against acquittal□ cheque As well a signature on it not disputed by accused respondent□ presumption under S.139 would be attracted□ Story brought out by accused that cheque was given to complainant long back in 1999 as a security to a loan; the loan was repaid but complainant did not return security cheque - is unworthy of credit, apart from being unsupported by any evidence□ Mere printed date on cheque by itself cannot be conclusive of fact that cheque was issued in 1999□ Order of High in acquitting accused is erroneous and set aside.

21. No doubt the accused has clearly admitted his cheque and his signature on Ex.P1, but he disputed that, he has not issued the cheque in question to the complainant with regard to clear the SCCH□ 18 CC: 20926/2015 amount paid by the complainant in respect of purchase of flat. The evidence of DW□ clearly shows that no legal action has been taken by the accused against complainant to show that cheque in question was not issued by him to the complainant but the complainant been misused to file this false case against him which was given as security to get loan from the Co□operative bank to clear the loan of SBI bank. There, itself the accused has failed to raise the probable defence. The deposition of DEW□ is reproduced as under::

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ª À i Á r¹ P É Æ q À Ä v É Û Ä É É A z À Ä E A r A i À Ä É ï " Á å A P ï, Cª É É À È å g À , É Û ± Á É A i À Ä ° è



SÁvÉAiÄÄÉÄÄß vÉgÉ¹zÄÝgÄÄ. ,ÄzÄj "ÁâAPiÉÄ°è ªÄªªÄ°ÁgÄ ªÄiÁqÄ"ÉÄPÄÄ JAzÄÄ ÉÄÉÄUÉ °ÉÄ½zÄÝgÄÄ. DÉÄAvÄgÄ 25 SÁ° ,Ä» ªÄiÁrzÄ ZÉPÄÄIÜÄ¼ÄÉÄÄß ÉÄªBAzÄ ÉÄÉÄß ªÄªªÄ°ÁgÄÄ°è ªÄÄÄ ZÉPÄÄÉÄÄß r,ÈÌAmi ªÄiÁr ªÄªªÄ°ÁgÄ vÉÆÄj¹zÄgÉ "ÁâAPiÉÄªÄgÄÄ ÉÆÄÉi ªÄÄAdÆgÄÄ ªÄiÁqÄÄvÄÜgÉ JAzÄÄ YÄqÉçzÄÝgÄÄ...."

The deposition of DW□ shows that the complainant had paid the money to the accused in respect of purchase of flat and due to already registration of the same flat to one Devendraiah in the year 2011 itself and when the complainant demanded the accused to return of amount which was paid to the accused and towards discharge of his liability, he issued the cheque in question to the complainant .

22. However the claim of the accused is that, the complainant misused the cheque which was given as security to get loan on his flats which were not sold, but the loan was not SCCH□ 19 CC: 20926/2015 sanctioned, then in the year 2010, the complainant gave loan through cheque of Rs.7,50,000/□by deducting interest at 20%. He could not repay the loan borrowed by him to the complainant. DW□ deposes that the complainant made plan that the Devendraiah had IT papers, through him they can get loan, through that loan, we can share the same and accordingly half loan was taken by the complainant and half loan to him and in that connection, on 21□1□2011 the sale deed was executed in favour of Devendraiah.

The evidence of DW□ is reproduced as under:□.....,ÄzÄj "ÁâAPiÉÄ°è ÉÆÄÉi ªÄÄAdÆgÄUÄ°è, D PÁgÄt |gÄâç ÉÄÉÄUÉ gÄÆ.7.50@PÄè °ÄªªÄÄß 10 wAUÄ½UÉ ±ÉÄ.20gÄ §rØAiÄÄAvÉ □æ"i 2010gÄ°è ,Ä@ªÄV 2 ZÉPiÜÄ¼Ä ªÄÄÆ@PÄ ±ÉÄ.20 §rØ ªÄÄÄjzÄÄPÉÆAqÄÄ PÉÆnÖzÄÝgÄÄ. ,ÄzÄj °ÄªªÄÄß YÄÇtªÄV ªÄÄgÄÄYªÄw ªÄiÁqÄ@Ä DUÄ°è. zÉÄªÄÄzÄªAiÄÄªªUÉ Ln YÉÄYÄgÄi EzÄÝ PÁgÄt CªÄjUÉ ÉÆÄÉi ªÄÄAdÆgÄUÄÄvÉÜ CªÄgÄ ªÄÄÆ@PÄ ÉÆÄÉi ªÄiÁr¹zÄgÉ CªÄjUÉ CzÄsð °ÄªªÄÆ ÉÄÉÄUÉ CzÄsð °Äª JAzÄÄ ªÄiÁvÄvÄÄÜ. çB21-11- 2011gÄ°è D ,ÄÄSÄzÄs zÉÄªÄÄzÄªAiÄÄªªÉÄ°É,ÄjUÉ ÉÄªBAzÄ PÄªAiÄÄ YÄvÄæ ªÄiÁr¹PÉÆlÖgÄÄ. 2010gÄ°è YÄqÉzÄ ÉÆÄÉi ,ÄÄSÄzÄs "ÄszÄævÉUÄV ÉÄÉÄß YÄwß °É,ÄjÉÄ°èzÄÝ zÄÉÄYÄvÄæ °ÄUÄÆ gÄÆ.2gÄ SÁ° "ÄÄqí YÉÄYÄgi ªÉÄÄÉ ÉÄÉÄß YÄwßAiÄÄ ,Ä» YÄqÉçzÄÝgÄÄ. DÉÄAvÄgÄ JA. gÉrØ JÉÄÄßªÄªjUÉ PÄªAiÄÄzÄ PÄgÄgÄÉÄÄß 2 YsÄèmiÜÄ¼Ä ªÉÄÄÉ "ÄszÄævÉUÄV ªÄiÁr¹PÉÆArzÄÝgÄÄ. J,ï.©.L. « 3 SÁ° ZÉPÄÄIÜÄ¼ÄÉÄÄß |gÄâç ÉÄªBAzÄ YÄqÉçzÄÝgÄÄ. zÉÄªÄÄÄzÄªAiÄÄÉÄ°É,ÄjUÉ gÄÆ.20,87,000/- ,Ä@ ªÄÄAdÆgÄVvÄÄÜ. D YÉÈQ ÉÄÉÄUÉ gÄÆ.2,70,000/- PÉÆlÄÖ, vÄÁ gÄÆ.9 @PÄè °ÄªªÄÄß |gÄâç °ÄUÄÆ zÉÄªÄÄzÄªAiÄÄªª ElÄÖPÉÆAqÄgÄÄ. ,ÄzÄj ,Ä@PÉl |gÄâç eÄ«ÄÄÉÄÄzÄgÄgÄVzÄÝgÄÄ. ZÉÄªÄÄzÄªAiÄÄ 6 wAUÄ¼Ä°è ,ÄzÄj ,Ä@ ªÄÄgÄÄYªÄw ªÄiÁqÄÄªÄzÄV M|àPÉÆArzÄÄÝ ªÄYÄ,ÄÄi PÉÆqÄ°è, ªÄÄÉÉ SÁ° ªÄiÁr HgÄÄ ©lÄÖ °ÉÆÄzÄgÄÄ. "ÁâAPiÉÄªÄgÄÄ D ,ÄÄSÄzÄs eÄ«ÄÄÉÄzÄªjUÉ vÉÆAzÄgÉ PÉÆqÄ@Ä YÄægÄÄ©ü¹zÄgÄÄ. D ,ÄÄSÄzÄs |gÄâç ÉÄÉÄUÉ ,ÄzÄj YsÄè ªÄi ªÉÄÄÉ EÉÉÆBAzÄÄ PÄªAiÄÄ YÄvÄæ §gÉzÄÄPÉÆr, PÉÆÄ DYÄgÉÄnªi "ÁâAPiÉÄ°è SCCH□ 20 CC: 20926/2015 ,Ä@ YÄqÉzÄÄ ,ÄzÄj ªÉÄÄ°ÉÄ ,Ä@ wÄgÄÄªÄ½ ªÄiÁqÄÄvÉÜÉÉ JAzÄgÄÄ. F »AzÉ ªÄiÁrPÉÆAqÄ CVªªÉÄÄÉÄß gÄzÄÄÝ ªÄiÁrzÄgÄÄ JAzÄÄ ÉÄÄrAiÄÄªªvÄÜgÉ. YÄvÄæ ªÄYÄ,ÄÄi PÉÆqÄ"ÉÄPÄzÄgÉ SÁ° ZÉPÄÄIÜÄ¼ÄÉÄÄß PÉÆqÄÄªAvÉ °ÄUÄÆ YÄvÄæPÉl ,Ä» ªÄiÁr PÉÆqÄÄªAvÉ °ÄÉÄ½ gÄÆ.2AiÄÄ 4YÉÄYÄgiÜÄ½UÉ ,Ä» YÄqÉzÄgÄÄ °ÄUÄÆ J,ï©LÉÄ 14 ZÉPÄÄIÜÄ¼ÄÉÄÄß YÄqÉzÄgÄÄ. ...."

The say of accused is presumed to be true and then there was no impediment to the accused to issue stop payment instructions at the earlier point of time to his banker. Further what impediment was there to the accused to take legal action against the complainant. Therefore the contradiction in the version of the accused with regard to the issuance of the cheque in dispute by him to the complainant also gives rise to series doubts with regard to his defence. Accused has not made out any probable defence so as to shift the burden on the complainant. Accused has failed to establish his defence that, cheque was misused by the complainant which was given by him to get loan from the cooperative Bank to clear the loan of SBI. It is well settled law that, rule of presumption of innocence of accused cannot be applied with same rigour to offence U/s 138, particularly where presumption is drawn that holder received the cheque for discharge, the debt or liability. Thus, accused has failed to rebut the presumption arise in favour of the complainant under Sections 118(a) and 139 of N.I. Act.

23. On perusal of the entire evidence on record, it reveals that, cheque was presented to the bank for encashment which came to be dishonored as "Funds insufficient" and notice was issued to the accused was returned with a shara party is out of SCCH<sup>2</sup> 21 CC: 20926/2015 station. So far as non service of legal demand notice is concerned I am of the view that complainant has been able to connect the accused to the address mentioned in the legal demand notice and therefore mandatory presumption of law available U/s 27 General Clauses Act, will apply and the deemed service of notice has to be accepted. Needless to emphasis that if any accused wants to contend that she or he has not received the legal demand notice, such accused is at liberty to make the payment of cheque within 15 days from the service of summons as held by the Hon'ble Apex Court in the case of C.C. Alavi Haji V/s Palapetty Muhammed and another reported in (2007)6 SCC

555. In such circumstances it can be safely believe that the complainant has been able to establish his story and the accused has failed to establish his stand. The accused has admitted cheque belongs to his account and his signature on Ex.P1, it is sufficient to hold that the complainant has proved the existence of debt under Ex.P1 by the accused. Thus it clearly goes to show that since the accused had issued the cheque in question to the complainant towards repayment/discharge of lease amount owed to the complainant.

24. Now, the question that arises that whether the issuance of cheque in question by the accused to discharge the liability of him to the complainant comes under the purview of Sec.138 of N.I. Act or not. It is settled law that in order to draw the presumption under Sec.118 read along with 139 of N.I. Act, the burden was SCCH<sup>2</sup> 22 CC: 20926/2015 heavily upon the complainant to have shown that he had paid the cheque amount to the accused in respect of purchase of flat owned by the accused, that the issuance of the cheque in support of the said repayment was true and that the accused was bound to make the payment as had been agreed while issuing the cheque infavour of the complainant.

25. It is well settled law that under Sec. 138 of N.I. Act., once the cheque is issued by the drawer, a presumption under Sec. 139 of the N.I. Act in favour of holder would attracted. Sec. 139 creates a statutory presumption that, a cheque received in the nature referred to under section 138 of N.I. Act is for the discharge in whole or in part of any debt or other liability. The initial burden lays upon the

complainant to prove the circumstances under which the cheque was issued in his favour and that the same was issued in discharge of a legally enforceable debt. It is further accused to adduce evidence of such fact and circumstances to rebut the presumption that such debt does not exist or that the cheque is not supported by consideration. Considering scope of the presumption to be raised under sec. 139 of Act and the nature of evidence to be adduced by the accused to rebut the presumption in Kumar Export V/s Sharma Carpets (2009)2 SCC 513 the Hon'ble Supreme court in paras (14-15) and paras (18-20) held as under

"14 Sec. 139 of Act provides that, it shall be presumed unless the contrary is proved that the holder of cheque received the SCCH-9 23 CC: 20926/2015 cheque of the nature referred to in Sec. 138 for the discharge, in whole or in part of any debt or other liability".

"15 Presumption are devices by use of which the courts are enabled and entitled to produced or issue notwithstanding that there is no evidence or insufficient evidence. Under the Evidence Act all presumption must come under one or the other class of the three class mentioned in the act, namely (1) May presume (rebuttable), (2) shall presume (rebuttable), 3) conclusive presumptions (irrebuttable). The term presumption used to designate an inference, affirmative or disaffirmative of the existence of a fact, conveniently called the presumed fact drawn by a judicial tribunal by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to satisfaction of the tribunal presumption literally means taking as true without examination of proof."

"18. Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden SCCH-9 24 CC: 20926/2015 on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists."

"19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed

and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over."

"20. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may SCCH 25 CC: 20926/2015 adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea 15 that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act." [underlining added]."

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26. On bare perusal of above decision it appears that, mere raising a doubt without cogent evidence with respect to the circumstances will not discharge presumption under section 139. Issuer of the cheque can rebut that presumption by adducing credible evidence that the cheque was issued for some other purpose like security for loan. In the present case by the examining himself as PW.1, the complainant has discharged the initial burden cast upon him, that the cheque was issued for return of sale consideration amount which was borrowed from the complainant under Ex.P9 sale deed. With the examination of PW.1, the statutory presumption under Sec. 139 of the Act arises that the cheque was issued by the accused for the discharge of any debt or other liability in whole or in part. It is for the accused to adduce evidence to prove that the cheque was not supported by consideration and that there was no debt or liability to be discharged by him. The defence relied upon by the accused do not

create doubt about the advancement of loan and the existence of a legally enforceable debt for which the cheque was issued. The oral and documentary evidence adduced by the complainant are sufficient to prove that, it was a legally enforceable debt and that, the cheque was issued to discharge the legally enforceable debt. The evidence adduced by the accused is not sufficient to rebut the presumption under section 139 of the Act. Thus, the story brought by the accused is unworthy of credit. Apart from being unsupported by any evidence.

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27. The oral and documentary evidence available on record are clear and categorically established all the ingredients of Section 138 of N.I. Act and also proved the fact that the accused had issued the cheque in question in favour of the complainant towards the discharge of legal liability and the said cheque was dishonoured and then the accused failed to pay the amount of cheque within 15 days from the date of service of the demand notice. Hence, the dishonor of the cheque in question is clearly attracts the penal provision of Section 138 of the N.I. Act and the complainant has proved the guilt leveled against the accused for the offence P/u/s Section 138 of the N.I. Act. The accused has utterly failed to rebut the presumption under Sec.138 of N.I. Act infavour of the complainant. Hence, the complainant is entitled for benefit of statutory presumption as contemplated under Sec.139 of the Act. I did not find any informalities or contradictions elicited to render her evidence incredible. Therefore, the testimony of PW-1 inspires confidence to believe and to act upon the evidence of PW.1 and the documentary evidence at Ex.P1 to P11 are consistence, corroborative and supporting to each other and in accordance with the case of the complainant and which leads me to conclude that the complainant has proved beyond reasonable doubt against the accused for the alleged offence punishable under Sec.138 of N.I. Act. Accordingly, I answer Point No.1 in the Affirmative.

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CC: 20926/2015

Point No.2:

28. In view of my above discussions and findings on Point No.1, I proceed to pass the following:

ORDER – Acting under Section 255[2] of Cr.P.C, the accused is hereby convicted for the offence Punishable U/s. 138 of the N.I. Act.

– The accused shall pay fine of Rs.20,00,000/- In default of payment of fine amount, the accused shall under go Simple Imprisonment for six months. – Out of the amount so realized, the accused shall pay a sum of Rs.19,90,000/- to the

Complainant as compensation, as provided U/s.357 Cr.P.C. The ] remaining amount of Rs.10,000/□shall go to the State.

– The bail bond of the accused is hereby stand cancelled.

The cash security amount of Rs.10,000/□deposited by the accused is hereby forfeited to state.

– Office is directed to furnish free copy of this judgment to the accused.

(Dictated to the Stenographer directly over computer, typed by her, corrected and then pronounced by me in the open court on this the 31st day of December 2020.) (Abdul Khadar) Judge , Court of Small Causes, & XXVI ACMM, Bengaluru.

ANNEXURE List of Witnesses examined on behalf of complainant:

PW -1	Shivakumar	
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List of Documents marked on behalf of complainant:

Ex.P1	Cheque
Ex.P1(a)	Signature of accused
Ex.P2	Counter file
Ex.P3	Bank Endorsement
Ex.P4	Legal Notice
Ex.P5&6	Postal receipts
Ex.P7&8	Unserved postal cover
Ex.P7(a)& 8(a)	Contents of Ex.P7 &8
Ex.P9	Sale deed dated 12.09.2012
Ex.P10	Sale deed dated 21.11.2011
Ex.P11	Agreement
Ex.P11(a)	Signature of accused
Ex.P11(b)	Signature of complainant

List of Witnesses examined on behalf of accused:

DW -1	Somashekar
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List of documents marked on behalf of accused:

Ex.D1	Agreement of sale dated 18.05.2010
Ex.D2	Bank Pass book
Ex.D3	Aadhaar card of accused
Ex.D4	Bank Pass Book

(Abdul Khadar)  
Judge, Court of Small Causes,  
& ACMM, Bengaluru.