

Was Called Upon To Give Evidence vs Issued Cheques In His Favour on 4 June, 2018

IN THE COURT OF THE V ADDL. SMALL CAUSES JUDGE
& 24th ADDL. CHIEF METROPOLITAN MAGISTRATE
Court of Small Causes, Mayo Hall Unit, Bangalore
(SCCH-20)

C.C.No.35656/2010

Present: Smt.A.G. Shilpa,B.A., LL.B,
V Addl. Small Causes Judge,
& XXIV A.C.M.M.

Dated this the 4th day of June, 2018

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|---------|--|---|
| 1. | Sl.No. of the case | C.C. No.35656/2010 |
| 2. | The date of Institution | 19.05.2010 |
| 3. | The date of
commencement of the
evidence | 12.11.2010 |
| 4. | Name of the Complainant | Bharath Sharma,
S/o Peethambhara Sharma,
Aged about 25 years
No.3, Maszid Street,
Y.G.Palya, Austin Town,
Bangalore - 560047.

(By Pleader Sri.N.P.Kallesh
Gowda, Adv.,) |
| 5. | Name of the Accused : | Sri.Gangadharaiah,
S/o Dasappa,
Aged about 35 years,
Respondent@ Bidanapalya
Honnasandra Post,
Nelamangala Taluk
Bangalore Rural Dist.

(By Pleader Sri.Nataraju.B, Adv.) |
| 6. | The offence complained of | Under Sec.138 of N.I. Act. |
| | or proved | |
| 7. | Plea of the accused on his Pleaded not guilty
examination | |
| 8. | Final Order | Accused is Acquitted |
| 9. | Date of such order | 4.06.2018 |
| SCCH-20 | 2 | CC 35656/2010 |

JUDGMENT

This is a complaint filed by the complainant against the accused for the offence punishable U/Sec.200 of Cr.PC praying to punish accused for the offence punishable U/sec., 138 of the Negotiable Instruments Act., 1989.

2. Brief averments of the complaint are as under:

It is submitted that the accused and his father had approached complainant for hand loan of Rs.1,00,000/- for domestic purposes i.e., improvement of land situated at Basavenahalli, Village, Solur Hobli, Magadi Taluk, Bangalore Rural, bearing Sy.No: 89/2 and Complainant paid a sum of Rs.1,00,000/- on 22/01/2009 and in turn the father executed a receipt (Affidavit) on Stamp paper for having received amount of Rs.1,00,000/- and on the same day executed General Power of Attorney and also deposited the document pertaining to the Property Survey No: 89/2 i.e., RTC, Encumbrance and certified copy of Mutation while taking loan. The accused and his father assured the complainant to repay the amount within 11 months along with interest and accused signed the documents dated: 22/01/2009 along with his father as the witness.

The complainant stated that the accused and his father did not pay the amount and upon demand on behalf of his father, the accused issued Three cheques for Rs.5,000/- each dated: 26.10.2009, 26.11.2009 and 26.12.2009 bearing No: 680908, 680909 and 680910 respectively drawn on Vijay Bank KR Puram in favour of the complainant towards the interest and requested to present the cheque in the month of March 2010 and in the 1st Week of April 2010, further the accused issued another cheque for Rs.1,00,000/- dated: 6.04.2010 bearing No.186675 drawn on SBI Dooravaninagar, Bangalore, towards principal and promised if all the Cheques presented the same will be honored.

The complainant submitted that he presented four cheques issued by the accused on 9/4/2010 at State Bank of Hyderabad, Austin Town, Bangalore and all the four Cheques got dishonored with an endorsement "Insufficient Fund" dated: 13/4/2010. The Complainant received the endorsement from the bank on 13/4/2010 and the complainant issued legal notice to the Accused on 21/4/2010, by RPAD and certificate of posting as contemplated under Section 135 of NI Act.

The Complainant submitted that the legal notice issued by the complainant sent through RPAD was served on the Accused on 24/4/2010, but accused neither replied nor paid the amount. Hence, this complaint.

3. On the basis of the complaint, cognizance of offence was taken and the complaint was registered. Then, sworn statement of the complainant was recorded. After hearing the counsel for the complainant, the court found sufficient material to issue process against the accused for the offence punishable U/s 138 of the Act. Accordingly, this criminal case was registered against the accused for the said offence and issued summons to the accused. The accused has appeared before court through his counsel and he is enlarged on bail. Then, substance of accusation was read over and

explained to the accused. He has pleaded not guilty. Hence, the complainant was called upon to give evidence.

4. During evidence, the complainant has examined himself as PW.1 and examined one witness as PW-2 got marked documents as Ex.P1 to Ex.P18. Then, statement of accused was recorded. The accused has examined himself as DW-1 and got marked documents as Ex.D1.

5. Heard the arguments and perused the record.

6. Now the points arise for my consideration are:

1. Whether the complainant prove that accused issued cheques in his favour towards discharge of legally enforceable debt and it is dishonored for insufficient funds, thereby failed to pay the cheques amount within time inspite of service of demand notice?

2. What order?

7. My findings are:

POINT NO.1 : In Negative.

POINT NO.2 : As per final order.

REASONS

8. Point No.1:- The PW1 has filed evidence affidavit reiterating the complaint averments and narrated that accused had borrowed hand loan of Rs.1,00,000/- for the improvement of his land situated at Basavenahalli Village, Solur Hobli, Magadi Taluk, Bangalore Rural, bearing Survey No: 89/02 and complainant paid a sum of Rs.1,00,000/- and in turn the father of the accused Mr.Dasappa executed receipt (affidavit) on Stamp Paper for having received the amount of Rs.1,00,000/- and on the same day executed General Power of Attorney and also deposited the documents pertaining to the property Survey No: 89/02 i.e., RTC, Encumbrance and Certified copy of the Mutation Register. While taking loan the accused and his father assured the complainant to repay the amount within 11 months along with interest and the accused signed the document dated: 22/1/2009 along with his father as witness. Subsequently accused and his father instead of paying the interest and amount and after demand, the accused on behalf of his father issued Three cheques for Rs.5000/- each dated: 26/10/2009, 26/11/2009 & 26/12/2009 Ex.P.1, Ex.P.3 & Ex.P.5 respectively towards interest and on 1st week of April 2010, the accused issued another cheque for Rs.1,00,000/- dated:

6/4/2010 Ex.P.7 and promised the complainant that all cheques will be honored. But when complainant presented the four cheques on 9/4/2010 at State Bank of Hyderabad, Austin Town, Bangalore were dishonored as "Insufficient Funds" dated:

13/4/2010. Therefore, complainant issued legal notice to accused on 21/4/2010 both by RPAD and COP which was served on accused on 24/4/2010 for which accused neither replied nor paid the amount.

The Ex.P.9 legal notice dated; 21/4/2010 , Ex.P.10 Postal receipt & Ex.P.11 postal acknowledgement by Smt Mariamma mother of accused is exhibited towards deemed service of notice. The Ex.P.12 is Certificate of posting. The section contemplates a notice in writing and COP is valid for the purpose of section 138.

The PW1 has produced the documents Ex.P.14 RTC, Ex.P.15 Encumbrance, Ex.P.16 Mutation Register Extract, Ex.P.17 General Power of Attorney and Ex.P.18 Affidavit to support the transaction. The immovable property titled documents pledged with the complainant related to Ancestral property of the Accused and after death of his grand father the same devolved to the father of the Accused Mr. Dasappa.

9. Upon reading the General Power of Attorney, the father of the Accused acquired the property by partition and complainant obtained General Power of Attorney from Mr.Dasappa for formed sites, its sale, negotiations, registration etc and other law full acts. In General Power of Attorney it is not mentioned about accused and his father borrowed a loan of Rs.1,00,000/- from the complainant on 22/1/2009. From the evidence, it is learnt the PW1 is filing Income Tax within pre - determined due date. In respect to this transaction, documents are not forthcoming for declaration of loan to Income Tax. It is the law that an individual who lends money for interest is taxable. It is not case in this complaint loan is given to family members or friend. The loan to family members or friend is usually un-secured, terms and conditions are undefined or hazy. Moreover such a loan is usually interest free. In order to avoid loosing of money, people practice taking promissory note or detailed loan agreement and both are valid documents. Sometimes cheques are collected and promissory note are kept simply on record. The loan agreement is drawn on Stamp paper, notarized and many clauses are put as parties agreed. Definitely this transaction is not a gift from family member for tax free. Interest free loans are non taxable for both lender and borrower. It is complicated only when there is provision for payment of interest as the lender will have to pay the tax on the interest earned. Loan for improvement of land to site is not eligible for tax benefits. The complainant has collected General Power of Attorney, Property documents, cheques towards principle and interest, acknowledgement of money for security purpose. Lending a loan for interest and gains should be declared to HM Revenue and customs on self assessment tax return or inform local tax office.

10. The PW1 got General Power of Attorney drafted near Mayohall. Mr. Dasappa affixed his thumb impression to the documents. He is an illiterate, therefore it is implied that all the clauses in Ex.P.17 & 18 must be inducted by complainant. Initially, the PW1 asserted that he lent Rs.50,000/- each to accused and his father to hold both vicariously liable. It is alleged Mr. Dasappa executed an affidavit acknowledging Rs.1,00,000/- loan agreeing to pay interest. The payment of Rs.50,000/- each to complainant or accused is not at all forthcoming in the documents. Complainant had also deposed that he paid Rs.1,00,000/- to them by way of cash. However the accused denied the entire transaction.

It is pertinent to note that the complainant is an utter stranger to accused and his father. They are neither family members nor friends or relatives. Without any Acquaintance or relationship, the complainant lent loan of Rs.1,00,000/- to accused for interest. As a caution the rate of interest is not mentioned in the documents, but Ex.P3 & P5 are collected towards interest.

11. The PW2 Nemichandh @ Nemiram, Uncle of complainant had introduced accused and his father to complainant in 2009 and complainant without knowing the accused and his father became ready to advance loan of Rs.1,00,000/- with interest and obtained unregistered General Power of Attorney Ex.P.17, Affidavit Ex.P.18 and property documents Ex.P.14 to P16 as security towards the loan. A time is also fixed for repayment i.e., 11 months and interest payable monthly.

12. The PW2 deposed that he knew accused's father Mr. Dasappa for the past 15 years. He knew accused as Auto rickshaw driver and introduced them to the complainant. According to PW2, the Accused and his father, complainant and his father, himself were present for transaction and loan was given at complainant's house. In that event, it creates doubt that PW2 is neither a party nor witness to Ex.P.17 or Ex.P.18. Yet, Ex.P.18 was produced from PW2 custody. The PW2 deposed that he does not remember the date of transaction. His evidence is not cogent and reliable.

13. The General Power of Attorney Ex.P.17 and affidavit Ex.P.18 are attested by the witnesses Mr.Gangadhar and Mr. Muniraju. The complainant did not choose to examine these witnesses, in order to prove the transaction. Moreover, cheques are not mentioned in the Ex.P.17 General Power of Attorney or Ex.P.18 affidavit. Affidavit Ex.P.18 read deposit with complainant all title deeds as security. It is also mentioned in the affidavit about the execution of the General Power of Attorney by Mr.Dasappa in favour of complainant which will be cancelled only after the repayment.

The DW1 deposed that the alleged agreement in respect to the land does not belong to him and he did not issue any cheque and he does not know about the agreement. He denied the signatures on four cheques and deposed that he came to know the case only after the police came to him with the warrant, even other wise, all the property documents are at present in the name of his father, but he cannot examine his father as he is not in Good terms with him. It may also somewhere reflect , whether accused is bonafide?

14. It is settled law laid down in the case of Suraj Lamp & Industries Pvt.Ltd., through Director V/s. State of Haryana and Another (2009) 7 Supreme Court Cases 363 : (2009) 3 Supreme Court Cases "Civil" 126 held as follows :

Registration Act 1908 was enacted with intention the providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This achieved by requiring compulsorily registration of certain types of documents and providing for consequences of non registration. Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It is case publicity and public exposure to documents thereby preventing forgery and frauds in regard to transactions and execution of documents.

Registration provides information to people who may deal with property, as to the nature and extent of the rights or persons may have, affecting that property. It enables people to find out whether any particular property with which they are concerned, has subjected to any legal obligations or liability. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by regarding them, where people may see regard and enquire and ascertain what the particulars are and as far as land is concerned, what obligations exist with regard to them. It enquires that every person dealing with immovable property can rely with confidence upon statement contains in registration (Maintain under the said act) as a fully and complete Account of all transactions by which title of the property may be affect and secure extracts/copies duly certified.

Thereafter, it becomes clear that in order to curb malpractice, tax evasion, loss of revenue, concealment of black money etc., produced to sale agreement General Power of Attorney will insisted of required compulsorily registration".

As in this case the Ex.P.17 is not registered, which again is not free from the doubt of fraud or forgery. Further as read out in Affidavit Ex.P.18 the transaction is type of mortgage by title deeds as security. The General Power of Attorney and the affidavit seems to be made simultaneously and avoid accounts of funds.

15. The PW1 depose that he is not a money lender.

But I find he is educated B.Com., Graduate, prudent man doing business. He pursues Event Management Business and his office is his home at Austin Town. He is not aware of any transaction above 20,000/- Rupees must be made by the way of cheque. Though he is holding the Account in the Bank, using cheques for Money Transaction, he assert that he paid Rs.1,00,000/- huge amount by cash which he had at his house.

16. Section 5 of the Karnataka Money Lender's Act 1961 provides Money Lender to obtain licence. No person shall carry on the business of money lending in the State except in accordance with the terms of conditions of licence (and, after the commencement of the Karnataka Money Lenders (Amendment) Act, 1985, except of payment of security deposit as provided in Section 7(a).

Here is case, the complainant at the instance of his uncle PW2 gets ready to advance loan of Rs.1,00,000/- for interest to the accused and his father on basis of Ex.P.1, P3, P5, P17 & P18, security.

Definitions - Section (2) "business of money-lending"

means the business of advancing loans whether or not in connection with or in addition to any other business;

(3) "capital" means a sum of money which a money-lender invests in the business of money-lending;

(4) "xxxx (5) "xxxx (6) "interest" includes the return to be made over and above what was actually lent, whether the same is charged or sought to be recovered specifically by way of interest or otherwise, but does not include any sum lawfully charged by a money-lender for or on account of costs, charges or expenses in accordance with the provisions of this Act, or any other law for the time being in force;

(7) "licence" means a licence granted under this Act;

(8) "licence fee" means the fee payable in respect of a licence;

(9) "loan" means an advance at interest whether of money or in kind, and includes any transaction which the Court finds in substance to amount to such an advance, but does not include,--

(a) a deposit of money or other property in a Government Post Office Bank or in a 1[Karnataka Government Savings Bank] or in any other bank or in a company or with a co-operative society;

(b) a loan to, or by, or a deposit with, any society or association registered under the 1[Karnataka] Societies Registration Act, 1960 (1[Karnataka] Act 17 of 1960);

(c) a loan advanced by Government or by any local authority authorised by Government;

(d) a loan advanced by a co-operative society;

(e) an advance made to a subscriber to, or a depositor in, a Provident Fund from the amount standing to his credit in the fund in accordance with the rules of the fund;

(f) a loan to or by an insurance company as defined in the Insurance Act, 1938 (Central Act IV of 1938);

(g) a loan to or by a bank;

(h) an advance of not less than three thousand rupees made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881 (Central Act XXVI of 1881) other than on the basis of a promissory note;

(i) except for the purposes of sections 26 and 28,--

(i) a loan to a trader;

(ii) a loan to a money-lender who holds a valid licence; or

(iii) a loan by a landlord to his tenant for financing of crops or seasonal finance of not more than fifty rupees per acre of land held by the tenant;

(10) "money-lender" means,--

(i) an individual; or

(ii) xxxx

(iii) xxxx

(iv) xxxx

(a) carries on the business of money-lending in the State; or For the recovery of the debt due by any by his creditor by obtaining documents which otherwise compulsorily registerable and when money lending incurred payment of security deposit as provided under Section 7(a), in order to avoid the security deposit, the registration fee, Stamp Duties and Tax, the complainant has acted in contravention of the provisions under Karnataka Money Lenders Act 1961 which attracts penalties under Section 39 of the Karnataka Money Lenders Act 1961.

In the said circumstances, the debt is not recoverable on the basis of cheques alone. The Ex.P.1, Ex.P3, Ex.P.5 were issued towards interest and Ex.P.7 issued towards the principle. The accused though could not prove that these cheques were lost, or he did not produce the relevant police documents for lodging missing information to police, further he does not answer, the possession of the cheques with the complainant, it is apparent that these cheques were issued by accused as security. This seems to me money for gain and documents in contravention of law to avoid registration fee, Stamp fee, professional fee and Tax. It is true that the accused has issued these cheques, may be a surety on behalf of his father. The words, "Whether any cheque" and "other liability" take care of the liability of Guarantor also.

17. Be that as it may, if this type of transaction is entertained by filing a complaint the object of legislation will be defeated. The money lenders will plunge to lend small loan example Rs.1,00,000/- , create documents for higher valuable immovable properties and control the helpless and illiterate, and doing business without licence and not following the conditions of money lending business, affect is infringement of the Act. There is a need to deter illegal money lending practices. Otherwise, the object of the Act to protect innocent debtors will be defeated. Law provides contravention of the provision of money lenders act must be dealt vigorously to prosecute under section 39 of the Karnataka Money Lenders Act 1961. Under the above said facts and circumstances, it can be held that, the complainant does not establish legal enforceable debt. Hence, I answered point No.1 in the Negative.

18. Point No.2:- In view of my findings on Point No.1, I proceed to pass the following:

ORDER The complaint u/s 200 of Cr.P.C.

is hereby dismissed without compensation and cost.

By acting u/s. 255(1) of Cr.P.C.

the accused is not guilty and thereby acquitted.

The bail bond of accused stands cancelled.

(Dictated to the Stenographer, transcribed by him, corrected by me and then pronounced in open court on this day of 4th June 2018) (A.G.SHILPA,) V ASCJ & XXIV ACMM, Court of Small Causes, Mayo Hall Unit, Bangalore.

Annexures Witnesses examined for Complainant:

P.W.1 Sri Bharath Sharma

P.W.2 Nemichandh & Nemiram

Documents marked for Complainant:

Ex.P.1 to Ex.P.7 - Four original Cheques

Ex.P.1(a) to Ex.P.7(a) - Signatures of the accused Ex.P.8 - Bank Return Memo Ex.P.9
- Legal Notice Ex.P.10 - Postal receipt Ex.P.11 - Postal Ack., Ex.P.12 - UCP receipt
Ex.P.13 - Election ID Ex.P.14 - RTC Ex.P.15 - Encumbrance Ex.P.16 - Mutation copy
Ex.P.17 - General Power of Attorney Ex.P.18 - Affidavit Witnesses examined for
defence:

DW1 : Gandhar

Documents marked for defence:

Ex.D.1 copy of the RTC

(A.G.SHILPA,)
V ASCJ & XXIV ACMM,
Court of Small Causes,
Mayo Hall Unit, Bangalore.