

Sri Ayappan M vs Sri. B.Hanumantha Nayak on 16 January, 2023

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CrL. A No.752/2019

KABC010117602019

IN THE COURT OF THE LX ADDITIONAL CITY CIVIL & SESSIONS
JUDGE, BENGALURU
(CCH-61)

Dated this the 16th day of January, 2023

:Present:

Sri Narashimsa M.V., B.Com.,
LX Addl. City Civil & Sessions Judge,
Bengaluru.

CrL. A. No. 752/2019

APPELLANT

Sri Ayappan M,
(Shown as Iyyappan.M. in PCR)
S/o Margabandu
Aged about 40 years,
No.59, 4th Cross, 4th Main,
ITPL Main Road,
Honda City Showroom,
B-Narayanapura,
Bengaluru - 560 016

Also at:
Flat No. 1019,
Door No.579, 4th AB Cross,
Millennium Street,
New Thippasandra,
Opp: Kodandarama Temple
Bengaluru - 560 075.

(Rep by Sri M.K. Ramesh Gowda- Adv)

VS.

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RESPONDENTS:

Sri. B.Hanumantha Nayak
Since dead LRs
1(a) Smt. Sheela S

W/o Late B. Hanumantha Naik
Aged about 39 years,

1(b) Sri Guru Kiran
S/o Late B. Hanumantha Naik,
Aged about 19 years

1(c) Ms. Pragathi H.S
D/o Late B. Hanumantha Naik,
Aged about 17 years

Since minor represented by
Natural Guardian Mother:
Smt. Sheela S (Respondent No.1(a))

All are residing at : No. 12,
2nd Cross, Pipeline Road,
Anjananagara, Vishwaneedam Post,
Bengaluru North,
Bengaluru - 560 091.

(Rep by Sri K.N. Nagesh & associates, Adv)

JUDGMENT

Appellant is accused in CC No. 50143/2017. He has filed this appeal, being aggrieved by the judgment and order of sentence dated 7.3.2019 passed by learned IV Addl. Small Causes Judge and XXX Addl. Chief Metropolitan Magistrate, Bangalore. Learned Magistrate has found appellant/accused guilty of offence punishable under Section 138 of N.I CrI. A No.752/2019 Act, appellant/accused is sentenced to pay a fine of Rs 10,00,000/-, in default to undergo simple imprisonment for six months and appellant/accused is ordered to pay Rs.5,000/- to Court as fine.

2. Brief facts of the case are as under :

The complainant and accused are known to each other from 2015. Complainant is a businessman running a business under the name and style M/s Hanuman Electroplaters, having his business establishment at No.5, 4th Main Road, Sri. M.Vishveshwaraiah Industrial Town, 14 th D Cross, Rajajinagar, Bengaluru - 560 044 and the accused is a home loan Counselor in State Bank of Patiala, Indiranagar Branch, Bengaluru - 560

038.

3. In the year 2016 to improve his business respondent/complainant applied for a business loan of Rs.50,00,000/- with State Bank of Patiala, Indiranagar Branch, Bangalore. Since, accused was a counselor for home loans in the said bank, accused offered to help complainant in this regard. Loan was sanctioned and a sum of Rs.50,00,000/- was transferred to complainant's business current account.

4. Subsequent to receipt of loan amount accused approached complainant on 10.3.2016 and expressed that one of his relative by name Crl. A No.752/2019 S.Mummoorthy and his wife Smt. Meenachi were in urgent need of funds to an extent of Rs.10,00,000/- for the purpose of their real estate business. Accused also pointed out to complainant that he can lend money from the loan amount which was sanctioned to him. At that point of time, accused assured complainant that he will be whole and sole responsible for repayment of amount and further assured to repay the amount within three months from the date of receipt of amount. Complainant obliged and lent to accused amount on 19.3.2016 through cheques. Complainant issued accused three cheques as detailed under:

(a) Cheque bearing No.225299, dated 19.3.2016, for a sum of Rs.3,00,000/- drawn on State Bank of Patiala,Indiranagar Branch, Bangalore and drawn in favour of S. Mummoorthy.

(b) Cheque bearing No. 225300, dated 19.3.2016, for a sum of Rs.3,00,000/- drawn on State Bank of Patala, Indiranagar Branch, Bangalore and drawn in favour of S.Mummoorthy.

(c) Cheque bearing No. 225298, dated 19.3.2016, for a sum of Rs.4,00,000/- drawn on State Bank of Patala, Indiranagar Branch, Bangalore and drawn in favour of S.Mummoorthy.

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5. All three cheques were presented for payment and they have been honoured on 22.3.2016. The said amount has been utilized by accused and his relative Mummoorthy and Meenatchi.

6. Respondent/Complainant approached accused in the month of July 2016 and demanded accused to repay the amount he had lent to his relative on his responsibility. But, accused sought six months more time to repay the loan amount. Again after six months complainant approached accused in the first week of April 2017. But, accused threatened complainant that he will never repay the amount and also told complainant to do whatever he wanted to do.

7. Complainant was shocked by behaviour of accused and the way he spoke to him and he got serious doubts about trust worthiness of accused and without any delay he approached jurisdictional Basaveshwaranagar Police station and lodged a written complaint against accused and his relatives on 9.4.2017, police have registered a case in NCR No. 289/2017 and issued an endorsement to that effect. Police issued a notice to accused based on the complaint and accused appeared before Police on 18.4.2017 and gave a voluntary confession statement admitting the fact that he had indeed borrowed Rs.10,00,000/- from the Crl. A No.752/2019 complainant and also agreed that he would return amount within three months from the date of voluntary statement. Further, in the same statement accused also empowered the complainant to take suitable legal action against him in the event of default from his side to make payment within three months.

8. Thereafter, after three months, complainant again approached accused in the month of July 2017 and demanded him to repay the loan amount as per his voluntary statement. But, accused again refused to repay the loan amount and threatened the complainant of his life and warned him to do whatever he wanted to recover the money from him. With no option left complainant approached the Hon'ble 5th Addl Chief Metropolitan Magistrate and lodged a private complaint in PCR No. 9100/2017 and Hon'ble Court was pleased to refer the matter to jurisdictional Basaveshwaranagar Police station for investigation. Police upon enquiry have found accused guilty of the charges and have registered a case against accused under Sections 420, 506, 425 r/w Section 34 of IPC and FIR was also registered against accused and his relative in Cr. No. 234/2017.

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9. Based on the FIR, Police had started searching for accused, he became aware of the fact and immediately accused approached the complainant on 12th August 2017 and accepted his mischief and the accused took the burden of discharging loan himself and also entered into an MoU with complainant on 12.8.2017 wherein accused has clearly admitted in paragraph 1 that he is only responsible for return of loan amount of Rs.10,00,000/- to the complainant and therefore the accused has issued the complainant three post dated cheques on 12.8.2017 in discharge of liability. The cheques are detailed below:

a) cheque bearing No. 140343, dated 31.8.2017 for a sum of Rs.2,00,000/- drawn on the State Bank of Travencore, CMH Road Branch, Bangalore and drawn in favour of the complainant.

(b) Cheque bearing No.140344, dated 30.10.2017, for a sum of Rs.

4,00,000/- drawn on the State Bank of Travencore, CMH Road Branch, Bangalore and drawn in favour of the complainant.

(c) Cheque bearing No.140345, dated 30.10.2017, for a sum of Rs. 4,00,000/- drawn on the State Bank of Travencore, CMH Road Branch, Bangalore and drawn in favour of the complainant.

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10. The complainant presented the first cheque bearing No. 140343 dated 31.8.2017, for a sum of Rs.2,00,000/- through his banker Vijaya Bank, Rajajinagar Branch, Bangalore 560 010 but to the shock and surprise of complainant, it was returned unpaid for the reason 'funds insufficient' through a cheque return memo dated 4.10.2017. The complainant immediately called the accused on his phone and informed him about the bounced cheque and accused instructed the complainant to re-present the cheque along with the other two cheques which were due on 30.10.2017 and assured that all the three cheques would be honoured this time around.

11. The complainant trusted the accused words and presented all the three cheques on 30.10.2017 through his banker Vijaya Bank, Rajajinagar Branch, Bangalore 560 010 but to the shock and

surprise of complainant all the three cheques were returned to his banker unpaid for the reason 'funds insufficient' through separate cheque return memos dated 1.11.2017. The complainant immediately called the accused on his phone to inform the accused, but, accused did not answer the complainant's calls, complainant tried to meet the accused in person, but accused was inaccessible and deliberately avoiding the complainant for the reasons best known to accused. Hence, the complainant with no CrI. A No.752/2019 other option in sight issued legal demand notice dated 22.11.2007 upon the accused to intimate him about the bounced cheques and also to pay the amount of the bounced cheques.

12. Notice sent by RPAD to accused, to his 2 nd address is duly served on him on 24.11.2017, RPAD acknowledgement sent to first address is returned back to sender with an endorsement 'always absent not found' hence returned to sender, the legal notice sent through Speed post to accused have been delivered on 23.11.2017 and 25.11.2017. Accused has sent a reply notice dated 30.11.2017 to complainant denying all the material facts.

13. Respondent/complainant filed his examination in chief by way of affidavit, through him Ex.P1 to P17 came to be marked, during cross- examination of DW1, Ex.P18 to P20 were marked by confrontation. The incriminating evidence that had appeared against accused/appellant was put to him as required u/S 313 of Cr.P.C. Accused/appellant denied the entire incriminating evidence. Appellant/accused has filed his examination in chief by way of affidavit, through him Ex.D1 to D7 are marked.

14. After hearing both sides and after considering citations produced by both parties before the trial court, learned Magistrate vide CrI. A No.752/2019 Order dated dated 7.3.2019 has found appellant/accused guilty of offence punishable under Section 138 of N.I Act, appellant/accused is sentenced to pay a fine of Rs 10,00,000/-, in default to undergo simple imprisonment for six months and appellant/accused is ordered to pay Rs.5,000/- to State as fine.

15. Aforesaid Judgment and order of conviction is questioned in this appeal on the following grounds:

(1) Impugned Judgment and order passed by Trial court is not sustainable either in law or on facts and it is against to the material on record Hence, the same is liable to be set aside by this Court.

(2) The learned Magistrate has committed a grave error in law in taking cognizance of the case and as such conviction is bad in law.

(3) The learned Magistrate has erred in not accepting the evidence of the appellant and convicted the same is unlawful and injustice.

(4) The court below failed to observe that there is no loan transaction took place between the appellant and the respondent. Even though the court below convicted the appellant is unsustainable.

Crl. A No.752/2019 (5) The court below failed to observe that as per the documents produced by the respondent that, there is a sale transaction took place between the respondent and Smt. Meenatchi, the appellant is only a witness to the said transaction and the respondent is not liable for any transaction between the respondent and said Smt. Meenatchi.D (6) The respondent filed a false complaint before the Basaveshwara Police Station, the said Police has issued NCR. Again the respondent filed a private complaint against to the appellants and others in PCR No. 9100/2017, the file of the 5th ACMM Court at Bengaluru. The Hon'ble Court referred the mater to Basaveshwaranagara Police. The said police registered FIR against appellant and arrested the appellant. Thereafter, by threat complainant and police obtained signature on Memorandum of Understanding and obtained blank signed cheques and released the appellant/accused.

(7) The respondent misused the said documents along with cheques filed the above complaint with a malafide intention and to grab the money.

(8) The police arrested the appellant and obtained the said cheques by force and presented the same for illegal gain.

Crl. A No.752/2019 (9) The court failed to observe that there is no legally enforceable debt, even though court below convicted the appellant, it is illegal and unlawful.

(10) The Court below observed that appellant obtained the said cheques through police by registering the police case, it is not considered by the Court below.

(11) The court failed to observe that the dispute is civil in nature, court below convicted the appellant even in the absence of materials is illegal and unlawful.

(12) Viewed from any angle the impugned judgment and order of conviction passed by the court below is liable to be set aside on the above facts and grounds.

16. After preliminary inquiry, learned magistrate has taken cognizance of offence punishable under section 138 of Negotiable Instruments Act against accused, summons were issued, accused appeared through counsel and was released on bail. Plea of accused has been recorded, accused pleaded guilty not guilty, claimed to be tried.

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17. Along with this appeal, application under Section 389 for stay of the impugned judgment and order of sentence was filed. Vide order dated 30.3.2019, appellant/accused was directed to deposit 20% of the fine amount before the trial court. Perusal of order sheet of trial court discloses that a sum of Rs.2,01,500/- has been deposited by accused/appellant before trial Court.

18. Notice issued to respondent/complainant is served, respondent engaged services of an Advocate, Trial Court records were called for and are received.

19. During the pendency of this appeal respondent/complainant died, his Legal Representatives filed application u/S 302 of Cr.P.C, appellant/accused did not file objections to the said application. Vide orders dated 19.8.2022 application filed u/S 302 of Cr P C by Legal heirs of respondent/complainant was allowed, Appeal memo was amended by appellant/accused. Amended Appeal Memo is filed.

20. Both sides filed written argument, learned advocate for appellant relied upon the following citations:

(1) Certified copy of the orders in Crl. Petition No. 2549/2020 dated 26.9.2022.

Crl. A No.752/2019 (2) Karnataka High Court Judgment in Crl Appeal No. 255/2004 dated 26.3.2009 (3) Kerala High Court in Crl. Petition No. 290/2011 dated 1.6.2011. (4) Karnataka High Court Judgment in Crl. Appeal No. 425/2010 dated 27.2.2018.

(5) Rajasthan High Court Judgment in Crl. Leave to Appeal No. 20/2017 dated 1.8.2017.

(6) Rajasthan High Court Judgment in Crl. Leave to Appeal No. 222/2012 dated 22.3.2017.

(7) 2020(3) KCCR 2373 (8) Punjab & Haryana High Court Judgment in CRM No. A 1786- MA of 2014(O&M) dated 17.7.2018.

(9) Karnataka High Court Judgment in Crl. Appeal No. 2812/2010 dated 4.4.2019 (10) 2010 Crl. Law Journal 1061 (11) 2012(2) AIR Kar R 649 Crl. A No.752/2019 (12) 2001DCR 100

21. Learned advocate for respondent relied upon the following citations:

(1) I.C.D.S. Ltd., Vs. Beena Shabeer & Anr dated 12.8.2002 case No. Appeal (Crl.) 797 of 2002 in Supreme Court of India.

22. Perused the trial court records, citations produced by both sides, evidence recorded by the learned Magistrate and Appeal Memo.

23. The points that arise for my consideration are :-

(1) Whether the appellant/accused has rebutted the presumption under Section 118 & 139 of N.I. Act? (2) Whether the trial court has committed error in appreciating evidence on record ?

(3) What order?

24. My findings to the above points are as follows:

Point No.1 : In the Affirmative.

Point No.2 : In the Affirmative.

Point No.3 : As per final Order for the following:

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25. Point No. 1 & 2:- Since point Nos. 1 and 2 are inter related, they have been taken up together for common discussion.

26. In a nutshell case of respondent/complainant is that as per the directions/request of appellant/accused he gave a loan of Rs.10,00,000/- to Meenatchi and Mummoorthy. They did not repay the said amount, appellant/accused on 12.8.2017 vide Ex.P18 undertook to pay the said amount and thus issued cheques at Ex.P1 to P3, on presentation for payment, those cheques were dishonoured, notice issued u/S 138 of N I Act was duly served on appellant/accused, reply notice vide Ex.P17 was issued given by appellant/accused, there exists a legally recoverable debt .

27. In this first appeal, evidence on record needs to be re- appreciated. Complainant under Section 138 must contain the following ingredients, viz., (I) that there is a legally enforceable debt:

(ii) that the cheque was drawn from account of bank for discharge in whole or in part of any debt or other liability which pre-supposes a legally enforceable debt;

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(iii) cheque so issued had been returned due to insufficiency of funds".

28. PW-1/respondent/complainant has reiterated the entire averments of the complaint in his examination-in-chief. It is necessary to refer to cross-examination of PW1 :

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29. From the above admission made by PW1 it transpires that initially respondent/complainant entered into an agreement to sell with Meenatchi and Mammoorthy.

30. PW1 did not produce the said agreement, during his examination-in-chief, but during cross-examination of DW1, respondent/complainant has put suggestions about the agreements and has confronted Ex.P19 to P20. Ex.P18 is the Memorandum of Understanding, Ex.P19 is the agreement to sell dated 19.3.2016, it was confronted to DW1 during his cross-examination, since DW1 accepted the Crl. A No.752/2019 agreements and stated that he has signed as a witness to the said agreement, it came to be marked. Another agreement dated 10.3.2017 was confronted to DW1,

he accepted it, deposed that he has signed on the agreement dated 10.3.2017 as a witness, it came to be marked as Ex.P20. At this juncture, it is necessary to refer to Ex.P19 dated 19.3.2016, it shows that Meenatchi is the vendor and Rs.10,00,000/- she has been paid by respondent/complainant by way of cheques bearing Nos.225298, 225299 and 225300. These cheques are drawn in favour of M.Mummoorthy . During cross examination of P.W.-1, he is confronted with copies of cheques bearing Nos.225298, 225299 and 225300, respondent/complainant, he accepts them , hence they were marked as Ex.D2 to D4. In legal notice at Ex.P7, there is clear reference to Ex.D2 to D4. Executant of Ex.P19 is Meenatchi, Mummoorthy is not the executant nor he has been shown as vendor in the agreement.

31. Perusal of Ex.P19 further reveals that the cheque numbers, date and name of the Bank have been written in handwriting, colour of ink is blue and other writings found in Ex.P19 are type written. Ex.P20 is dated 10.3.2017 i.e., nearly one year after the date of execution of Ex.P19. The schedule properties mentioned in Ex.P19 and 20 are one and the same.

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32. By confronting Ex.P19 and P20 to D.W.-1, respondent/complainant has accepted that there was an agreement to sell entered into between Meenatchi and himself. It is necessary to note that in Ex.P19 and P20 Meenatchi w/o S. Mummoorthy alone has signed those documents. In Ex.P19 signature of respondent/complainant are found, whereas in Ex.P20 signatures of respondent /complainant is not at all found. It is to be mentioned here that copy of Ex.P19 (Ex D-1) has been confronted to PW1 during his examination by appellant/accused, at that juncture, respondent/complainant accepted the agreement. It is admitted by respondent/complainant as under:

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33. It is admitted by respondent/complainant that vide Ex.D2 to D4 advance sale consideration was paid under the agreement dated 19.3.2016. Thus it is abundantly clear that there was a sale agreement dated 19.3.2016 vide Ex.P19 and a sale agreement dated 10.3.2017 vide Ex.P20 between Meenatchi and respondent/complainant, but the advance sale consideration amount has been paid by cheque to Mummoorthy.

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34. The time for completion of sale agreement agreed upon in Ex.P20, dated 10.3.2017 is two months, which expired on 10.5.2017. Legal notice issued to appellant/accused vide Ex.P7 has been duly served, this fact is evident from Ex.P17, reply notice dated 30.11.2017. In reply notice at Ex.P17, dated 30.11.2017, it is specifically stated as under:

"6. My client states that, your client is posing constant life threats to my client and also high handedly stating that your client has got the support of police and rowdy

elements. Your client forced my client to issue the cheques and execute a document in respect of the amount payable by your client's vendor Smt. Meenatchi and Mummoorthy, who are the permanent residents of Tamilnadu. Your client has entered into a sale agreement with the said Smt. Meenatchi and Mummorrthy. My client has signed the said document as witness with good faith. Your client has falsely stated you that it is a loan agreement and not a sale agreement, but it factually a sale agreement of the land situated at Tamilnadu. The entire dispute is of civil nature. Your client without prosecuting the said vendors is behind by client. Your client is also posing serious life threats through goonda elements and local politicians. My client reserves liberty to sue your client for appropriate relief"

"7. My client states that, the cheque referred by you in your notice have been taken from my client under force and threat. The said amount is not legally recoverable amount. Admittedly during the pendency of private complaint bearing PCR No. 9100/2017 before the V Addl ACMM, your client has obtained the alleged MoU and the alleged cheques. If at all it is a genuine and legal transaction then definitely your client would have opted to done before the Court of Law, but strangely has obtained the said alleged MoU and cheques by force and threat and now issued this notice, which is sustainable under law."

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35. In Ex.P17 Para No. 6 and 7 speaks about the defence of appellant/accused.

36. PW1 in cross-examination has accepted as under:

37. Having deposed so, PW1 confronted Ex.P19 and P20 to DW1 which is diametrically opposite to his earlier stand that Meenatchi and Mammoorthy are strangers to him.

38. Copy of PCR No. 9100/2017 is confronted to PW₁, it was accepted, it came to be marked as Ex.D6. In PCR No.9100/2017, CrI. A No.752/2019 cheques at Ex.D2, D3 and D4 are mentioned. In PCR No.9100/2017 there is also mention about NCR No.289/2017. Para No. 9 of PCR

No.9100/2017 is as under:

"9. The complainant submits that the Complainant does not have any intention to purchase the property situated at Tanjavur. The complainant also feel that a foul has been played by the accused persons and the property as shown in the agreement of sale is in existence or not is not known to the complainant. The accused persons had a common intention to cheat the complainant and make a wrongful gain. The accused persons also threatened the complainant for life."

39. Offences alleged in PCR No.40/2017 against appellant/accused and Meenatchi and Mummoorthy are punishable under Sections 420, 425, 506 r/w 34 of Cr.P.C.

40. Learned counsel for appellant/accused has produced copy of order passed by Hon'ble High Court of Karnataka in Criminal Petition No. 2549/2019 in which appellant/accused is the petitioner. Said petition was filed u/S 482 of Cr.P.C. for quashing entire proceedings in PCR No.9100/2017/CC No.17272/2018. Perusal of the said order discloses that Crl. Petition NO.8984/2018 filed by Meenatchi and Mummoorthy has been allowed. It is necessary to extract para No.6 of the orders passed in Crl. Petition No. 8984/2018, which is as under:

Crl. A No.752/2019 "6. Complainant's case is that the schedule mentioned in the draft agreement is not the property which the petitioners had offered to sell.

Thus, parties are at variance with the description of the property. Further, it is petitioners' case that in paragraph Nos. 2 and 5 of the private complaint, it is stated that complainant was induced to pay a sum of Rs.10,00,000/- to the accused. In paragraph No.9, it is stated that complainant did not have intention to purchase the property in Tanjavur. But, complainants also state the description of property mentioned in the agreement was different than what was offered for sale. Thus, reading of the complaint in its totality shows that matter is civil in nature which has been given the colour of a criminal case.

Resultantly, this petition merits consideration and it is accordingly allowed. All proceedings in CC No. 17272/2018 pending on the file of V Additional Chief Metropolitan Magistrate, Bengaluru are hereby quashed, so far as petitioners are concerned. No costs"

41. Crl. Petition No.2549/2020 has been allowed by Hon'ble High Court Karnataka there by proceedings pending against appellant/accused herein in PCR No.9100/2017 / CC No. 17272/2018 have been quashed. Submission made by respondent/complainant before Hon'ble High Court of Karnataka, in Crl. Petition No. 8984/2018 indicates that property mentioned in draft agreement, is not one which was offered to sell, and respondent /complainant has been induced to part with amount of Rs.10,00,000/-.

42. Sequentially looking at the facts, it transpires that sale agreement at Ex.P19 is dated 19.3.2016, cheques at Ex.D2, D3 and D4 Crl. A No.752/2019 are dated 19.3.2016, the second sale agreement at Ex.P20 is dated 10.3.2017, on 9.4.2017, respondent/complainant has filed complaint before

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45. It is pertinent to note that there is no reference to agreement to sell Ex.P19 dated 19.3.2016 and Ex.P20 dated 10.3.2017 in Ex.P18. It appears that cheques at Ex.D2 to D4 have been mentioned in Ex.P 19 and P20, as well. In Ex.P19,20 cheques at Ex.D to D4 are shown to have been issued towards advance sale consideration for purchase of property by respondent/complainant. On the other hand, in Ex.P18, these cheques are shown as hand loan given to S. Mummoorthy and Smt. Meenatchi. These aspects indicates that respondent /complainant has taken dual stands, to suit his convenience at one breath he says that Rs. 10,00,000/- was Paid as advance sale consideration at another breath says that it is towards loan lent by him. In Ex.P18, it is clearly mentioned that the cheques in question at Ex.P1, to P3 were handed over to respondent /complainant on 12.8.2017 itself.

46. It is the specific contention of appellant/accused that when he went to Basaveshwaranagar Police Station, he was forced to sign several CrI. A No.752/2019 documents and was forced to part with Ex.P1 to P3. Per contra, contention of respondent/complainant is that appellant/accused voluntarily accepted Ex.P18 and gave cheques at Ex.P1 to P3 to respondent/complainant. During cross-examination of PW1 conducted on 27.2.2018, respondent/complainant has deposed as under:

47. During cross-examination of DW1, he has deposed as under:

" 18

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48. It is the contention of appellant/accused that Ex.P1 to 3 and Ex.P8 came into existence under duress and force, it was not read over by Basaveshwaranagar Police. Learned Magistrate in the impugned Judgment has observed that appellant /accused has not initiated any action against respondent/complainant or against the police officials, for having taken cheques and having got the MOU signed by him forcefully. Learned Magistrate has also noted that names of police, who forced him to sign Ex P-18 and Ex P-1 to 3 is not stated by appellant/accused.

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49. IN the written argument filed by respondent/complainant, it is stated that appellant/ accused has obtained anticipatory bail in Crl. Misc. No. 9083/2017 dated 23.11.2017 on the file of 59th Addl. City Civil & Sessions Judge, Bengaluru dated 5.12.2017, appellant/accused has gone to Basaveshwaranagar Police Station, there police official threatening accused/appellant to sign the MoU, to issue cheque by force in favour of complainant/respondent does not arise at all.

50. Ex.D5 is the Charge sheet, which has been filed on 24.12.2017. The said portion of written argument is in quite contrast with the contents of charge sheet at Ex.D5. Column No. 5 of the charge sheet, it is noted as under:

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" The date on which the statement of accused No.3/appellant/accused was recorded, the date on which, 161 statement of Yathish and Devaraj, was recorded is not forthcoming from the records, but it is necessary to note that said Devaraj who is shown as CW5 in charge sheet at Ex.D5 is a witness to Ex.P18 (MoU).

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51. It is the case of respondent/complainant that the loan advanced by him to Mummoorthy and Minatchi is the advance sale consideration paid by him to Mummoorthy and Minatchi in Ex.P19 and P20 was agreed to be returned to him by appellant/accused by execution of Ex.P18 and issuance of Ex.P1 to P3. It is to be noted that a sum of Rs.10,00,000/- vide cheques at Ex.D2 to D4 was paid as a loan transaction, then, appellant/accused is only a witness to the said transaction, if appellant/accused has consented to act as Guarantor, then nothing prevented the respondent/complainant to get document executed in his as favour by appellant/accused as on the date of lending, i.e., 19.3.2016. It is clear admission on the part of PW1 that cheques at Ex.D 2, 3 and 4 are issued to Mummoorthy. It is also clear contention of respondent/complainant that he has not taken any steps against Mummoorthy either for specific performance of the agreement at Ex.P19 or Ex.P 20 or for refund of amount advanced under Ex.D2 to D4. At the cost of repetition, portion of cross-examination of PW1 is extracted hereunder:

"PCR ☐ ☐ ☐ 1 3 18

." This aspect makes it clear Ex.P18 came into possession or custody of Crl. A No.752/2019 respondent/complainant, subsequent to 5.8.2017. At this juncture, it is necessary to note that Ex.P18 is dated 12.8.2017.

52. PW1 has further admitted as under:

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This admission points out that soon after PCR No. /2017 was referred to Basaveshwaranagar Police, accused appeared before Basaveshwaranagar Police, which aspect finds corroboration at Ex.D5 as well. Any money lender would take guarantee or security, when loan is lent by him to borrower at the time of lending of loan itself. If 19.3.2016 on which date Ex.P19 came into existence is treated as the date of lending by respondent/complainant, then it is unbelievable that appellant/accused who was a witness to Ex.P19, assumed responsibility to pay the amount which was borrowed or encashed by S.Mummoorthy.

53. It is necessary to note that after passing of orders in Crl. Petition No. 8984/2018 dated 15.7.2018, respondent/complainant has not taken recourse to civil remedies against Mummoorthy and Meenatchi till date. Further, it is necessary to note that against appellant/accused herein vide orders dated 26.9.2022 passed in Crl. Petition No.2549/2020, proceedings against appellant/accused in PCR 9100/2017, CC No.17272/2018 were Crl. A No.752/2019 quashed as against appellant/accused also. Respondent/complainants are legal heirs of original complainant, they have not initiated any action.

54. Learned Magistrate has convicted the appellant/accused by observing that accused has not taken any action against complainant or police officials. In respect of Ex.P18 , cheques at Ex.P1 to P3.

55. Before this Court advocate for respondent/complainant has referred to the decision of the Hon'ble Supreme Court of India, in the case of I.C.D.S. Ltd., Vs. Beena Shabeer & Anr in Appeal (Crl.) 797/2002. Said facts are not similar to the facts of this case as the said case the debtor and guarantor had executed agreement in favour of the lender, simultaneously, whereas in the present case, appellant/accused is said to have voluntarily taken upon him the liability of repaying the amount payable by Mummoorthy and Meenatchi to respondent/complainant .

56. It is necessary to note that in a decision rendered by Hon'ble Kerala High Court in Crl. P. No. 290/2011, it is observed at para No.7 as under:

"7. As the execution of cheque is not proved in any manner the complainant is not available with the presumption under Section 139 of Negotiable Instruments Act. There is no evidence for the passing of consideration for the execution of cheque. Mere admission of signature in Crl. A No.752/2019 ext. P1 cheque does not prove a legally enforceable debt. The accused deposed that the cheque issued to one Joy, the

plaintiff in O.S. NO. 97/2003 of Sub court, Alapuzha was mis-utilized by the complainant. There is no evidence to rule out the said allegation also. Thus, the prosecution failed to prove the execution of ext. P1 for a legally enforceable debt or liability and the passing of consideration."

57. In this case as well, there is no proof to show that the amount of Rs.10,00,000/- was paid by respondent/complainant to appellant/accused. In fact, it is clear averment on the part of PW1 that he made payment through cheques issued by him at Ex.D2 to D4, they have been encashed by Mummoorthy. In another citation produced by learned advocate for respondent in the case of Vishal Vs. Prakash Kadappa Hegannawar reported in 2020(3) KCCR 2373 Hon'ble High Court of Karnataka has observed as under:

"23. The sum and substance of these judgments of the Hon'ble Apex Court is that there is a presumption under Section 139 of the N I Act which includes a presumption of existing legally enforceable debt or liability. However, such a presumptions rebuttable in nature and once the presumption is rebutted by the accused, the onus shifts on the complainant to prove is case. In the case of Basalingappa Vs. Mudibasappa, it is held that though the signature has been admitted, a presumption shall be raised under Section 139 of the N I act that the cheque was issued in discharge of a legal debt or liability. What has to be seen is if the said presumption is rebutted by way of a probable defence raised by the accused. In my opinion on perusal of the entire evidence and the material documents, it si seen that the accused has raised a probable defence and the burden has shifted to the complainant to prove Crl. A No.752/2019 his financial capacity and the issue of there being any legally recoverable debt".

58. Thus notwithstanding the fact that complainant/accused has admitted that the cheques at Ex.P1 to P3 pertains to account maintained by him, the signature found in Ex.P1 to P3 are belonging to him , the writings in Ex.P1 to P3 have been written by him, due to lack of passing of any consideration or loan prior to 12.8.2017 from respondent/complainant to appellant/accused, to the tune of Rs.10,00,000/- shown in Ex.P1 to P3 cannot be at any stretch of imagination construed as legally recoverable debt. Respondent/complainant in MoU at Ex.P18, agreement to sell at Ex.P19 and P20 has clearly stated that amount of Rs.10,00,000/- lent by him vide cheques at Ex.D2 to D4 is to Mummoorthy and Meenatchi and the said payment has been made through cheques not by cash. In this context, it is necessary to extract portion of cross-examination of PW1, which is as under:

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59. Appellant/accused has raised defence and has rebutted the presumption available u/S 139 of N.I.Act by way of probable defence. Sequence of events that have been taken place from 9.4.2017. The date of filing of NCR No. 289/2017 and filing of the charge sheet at Ex.D5 on 24.12.2017 amply demonstrate that execution of Ex.P18 and issuance of cheques at Ex.P-1, 2 and P3 are during the visit of appellant/accused to Basavesnwaranagar Police Station. Another striking feature is that witness No.1 Devaraj to Ex.P18 has also given statement before Police during investigation in Basaveshwaranagar Police Station Crime No. 234/2017, said witness is not examined before trial Court by respondent/complainant. In view of the forgoing I answer point Nos.1 & 2 in the affirmative.

60. Point No.3: In view of my findings on point Nos.1 & 2, I proceed to pass the following:-

ORDER Appeal filed by Appellant under Sec. 374 (3) of Cr.P.C. is hereby allowed.

Impugned Judgment passed in CC No. 50143/2017, dated 7.3.2019 passed by learned IV Addl. Small Causes Judge Crl. A No.752/2019 and XXX Addl. Chief Metropolitan Magistrate, Bangalore. is hereby set aside.

Appellant/Accused is acquitted for the offences punishable under Sec.138 of N.I.Act.

Rs. 2,01,500 /- deposited by Appellant/Accused before Trial Court on 27.06.2019, is hereby ordered to be returned to Appellant/ Accused.

Send back Trial Court records, with copy of this judgment.

(Dictated to Stenographer, transcribed and typed by him, thereafter corrected and then pronounced by me in the open court on this the 16 th day of January, 2023).

(Narashimsa.M.V.) LX Addl.City Civil & Sessions Judge, Bengaluru.