

## **S/O Late Hanumanthaiah vs Name Of Advocate For : Sri.Hbm on 26 November, 2016**

IN THE COURT OF THE XLI ADDL.CHIEF METROPOLITAN  
MAGISTRATE BANGALORE CITY

DATED THIS THE 26th DAY OF NOVEMBER, 2016

PRESENT; SRI.A.SAMIULLA, B.Sc. LL.B,  
XIX Addl SCJ & MACT.

1. Sl. No. of the Case. : C.C.No.12838/13
2. The date of commission of offence. : 18/1/13 date of dishonour of cheque.
3. Name of the Complainant. : Sri.Thamanna,  
S/o Late Hanumanthaiah,  
51 years,  
R/at No.136, 5th main,  
6th cross, Balajinagara,  
Channammanakere  
Achchukattu, Bangalore-85.
4. Name of the Accused. : Sri.Rajendra Kumar @ Raju,  
S/o Sridhara, 28 years,  
R/at Renuka Nilaya  
No.10/30, 12th cross, 4th main,  
BSK III Stage,  
Srinivasanagara,  
Bangalore-85.
5. The offence complained of or proved. : U/S 138 of  
N I Act, 1881.  
SCCH 17 2 CC 12838/13
6. Plea of the Accused. : Pleaded not guilty.
7. Final order. : Accused is convicted.
8. Date of such order. : 26.11.2016.
9. Name of Advocate for accused. : Sri.KVM
10. Name of Advocate for complainant. : Sri.HBM

### **J U D G M E N T**

Complaint is filed u/S 200 of CrPC for the offences punishable u/S 138 & 142 of Negotiable Instruments Act, 1881.

2. The say of complainant is that, he and accused are family friends. On 12th day of July, 2008 the accused availed loan of Rs.4,00,000/- from him to meet domestic problems agreeing to repay it with interest at the rate of one per cent per month and on same day he executed loan agreement in the presence of witnesses. Thereafter he failed to pay the interest and also the amount as agreed upon in spite of repeated requests. Accused evaded the payment on one or the other pretext. Believing his words, he waited for payment. On 1.5.11 the accused approached him and expressed his financial difficulties and sought some more time and thereby executed consent deed in the presence of witnesses to repay the said amount within a year from 1.5.11. After stipulated period he demanded him to pay the amount, after several demands he issued a cheque bearing No.392952 dated 5.12.12 for Rs.6,00,000/- drawn on ING Vysya Bank, Hassan in favour of complainant to discharge the principal loan amount of Rs.4,00,000/- with agreed interest @ one per cent per month.

3. On presentation of said cheque at Corporation Bank, BSK 3rd stage, Padmanabha Nagara, Bangalore, it was dishonoured on 18.1.13 for the reason account closed. Thereafter legal notice dated 15.2.13 through RPAD and courier was issued. Notice through courier was served on him on 21.2.13. Notice sent through RPAD to the accused, neither served acknowledgment nor the unserved cover returned, hence a complaint was made to the postal authority on 21.3.13. Notice sent to the correct address of the accused is deemed service. Accused neither replied the notice nor paid the amount. Wherefore, the complainant prays to take suitable action against the accused by filing this complaint on 1.4.13.

4. Having received the complaint in PCR 6797/13, the Predecessor in office took cognizance of the offence and having satisfied with the prima facie allegations, issued process to the accused. In response to it, accused appeared and obtained bail. Accused denied the accusation and offered to make defence.

5. To drive home the guilt of accused, the complainant examined himself as Pw.1 and documents Ex.P1 to 11 were marked. Witness was examined as Pw.2. After closure of evidence of complainant, the statement of accused u/S 313 CrPC was recorded. Accused denied the incriminating circumstances and offer to make defence. Accused examined himself as Dw.1 and documents Ex.D-1 to 6 were examined. Witness Sri.Predeep Kumar was examined as Dw.2 and documents Ex.D7 to 13 were examined.

6. Heard arguments from both sides. Complainant and accused filed written arguments.

7. Following points arise for consideration. Point-1: Whether complainant proves beyond doubt that, the accused issued a cheque dated 5.12.12 for a sum of Rs.6,00,000/- drawn on ING Vysya Bank Limited, Hassan Branch in order to discharge legally enforceable debt and on presentation of said cheque it returned for want of funds and despite receiving the notice, accused failed to make payment within stipulated time and thereby committed an offence punishable u/S 138 of NI Act?

Point-2: What order?

8. Answer to the above points is as follows;

Point-1: Affirmative;

Point-2: As per final order for the following:

### REASONS

9. Point-1: This Court already issued process to the accused and in response to it, accused appeared and proceeds with the trial, as such there is no need to go back again to reconsider the compliance of provisions of Section 138 of NI Act.

It is pertinent to note that, whenever a private complaint is filed seeking prosecution of the accused for an offence punishable under Section 138 of N.I. 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 rebuttal 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.

10. Learned advocate for complainant argued that, the complainant satisfied all the ingredients to attract the offence u/S 138 of NI Act. It is argued that the accused admitted the issuance of cheque and signature on the cheque, as such initial presumption to be raised in favour of complainant.

11. On the contrary learned advocate for accused argued that, the accused denied the very transaction and existence of legally recoverable debt, which is utterly failed to establish by the complainant. It is argued that the defence raised by the accused is a probable one, thereby the statutory presumption raised in favour of the complainant stands rebutted and burden shifts on the complainant, who failed to discharge the shifted onus.

12. In the backdrop of settled principles coupled with the submissions made by the learned counsels and the decisions relied; let us scan the proof made available by the parties to unmask the truth regarding the said contentions.

13. In cross-examination of Pw.1 at para 3, it is suggested that Ex.P10 is falsely created on a blank signed paper, he denied it. At page 4 it is suggested that the father of accused has chit fund transaction with the complainant and in that context he gave the cheque of his son towards security purpose and the same has been misused by the complainant, he denied it.

14. In cross-examination of Pw.2 at page 5, it is suggested that, Ex.P10 (loan agreement) is falsely created by using blank stamp paper, he denied it.

15. The accused (Dw.1) in examination-in-chief at page 2 stated that, in the month of June or July 2008 his father took his signed blank cheque and also signed blank stamp paper to furnish the same for security purpose to take chit fund amount from a private chit and the complainant has misused them.

16. The Dw.2, father of accused in examination-in-chief stated that, at the time of giving chit fund amount the complainant insisted to give a blank cheque, at that time he gave a signed blank cheque belong to his son, apart from cheque he also gave a blank stamp paper signed by his son. He also stated that in the month of July 2008 he gave signed blank cheque and stamp paper to the complainant.

17. The evidence supra manifest that the cheque in question belongs to the accused and it bears his signature and it was placed in the hands of complainant (accused version of passing of cheque into the hands of complainant will be discussed later). Since the accused admits the issuance of cheque and his signature on cheque, the initial presumption, as envisaged under Section 139 of NI Act is to be raised in favour of the complainant, thus the cheque in question is issued for discharge of legally recoverable debt. It is for the accused to rebut the said presumption. Learned advocate for the accused argued that the presumption is only in respect of cheque issued for discharge of any debt or other liability but not for the existence of legally recoverable debt. To strengthen his contention he places reliance on a decision reported in 2008 AIR SCW 738 (Krishna Janardhan Bhat v/s Dattatraya Hegde), wherein the Hon'ble Apex Court held that, existence of legally recoverable debt is not a matter of presumption under Section 139 of NI Act. This contention is not sustainable for the simple reason that in the case of Rangappa V/s Mohan Kumar (2010 AIR SCW 2946) the Hon'ble Apex Court held that the presumption mandated by Section 139 of this Act does indeed include the existence of legally enforceable debt or liability. (Observation to contrary in Krishna Janardhan Bhat was overruled).

18. It is significant to note that the specific defence raised by the accused is that, in the month of July 2008 his father took signed blank cheque and stamp paper to give them for the purpose of security of chit fund amount taken from the complaint and subsequently the complainant misused the same and filed this case.

19. It is pertinent to note that the complainant issued statutory notice as contemplated under Section 138 of N.I. Act intimating the accused about the dishonour of cheque demanding him to pay the amount. Said notice is served on accused. (Accused disputed the service of notice, which will be considered in later stage). At the moment the service of notice depicts that it is the first opportunity for the accused to deny the transaction projected by the complainant by issuing tenable reply if really such transaction has never taken place and the complainant has misused the signed blank cheque given by his father for the purpose of security of chit fund amount. But for the reasons best known to the accused he choose to keep silent instead of suitably replying the notice, which is always expected from an ordinary prudent man. This silence on the part of accused goes against him and results in drawing adverse inference.

20. Let us consider the various contentions raised by the accused to unmask the truthfulness of said contention and to ascertain whether any of those contentions holds the ground to say that the defence raised is a probable one, thereby accused rebutted the presumption raised in favour of the complainant.

21. First, accused contended that he has no acquaintance with the complainant. But the father of accused i.e., Dw.2 in cross-examination stated, he knew the complainant from 10 to 12 years. He had taken chit fund amount from the complainant on 3 to 4 occasions. He stated that he informed his son that the cheque and stamp paper is required for the chit fund amount. In cross-examination at page 6 the Dw.1 stated that he enquired his father during 2008 to 2013 about the blank signatures taken by him. All these facts falsify the contentions of accused that he has no acquaintance with the complainant.

22. Second, accused contended that in the month of June or July his father took a blank signed cheque and stamp paper for the purpose of giving them as security to obtain chit fund amount and after receipt of summons from the Court he came to know that the complainant has misused the said documents.

23. In cross-examination at page 4 the Dw.1 stated that, after he came to know about the misutilization of his signed blank cheque and stamp papers he has not issued any notice to the complainant. The Dw.2 in examination-in-chief stated that after closure of chit fund he requested the complainant to return the blank signed cheque and stamp paper, which he assured to return but did not do so.

24. In cross-examination at page 4 the Dw.2 stated that he know the complainant from 10 to 12 years and 3-4 times he took chit fund amount from him and at that time the complainant not demanded any documents. He stated that chit fund started in the year 2007 and he does not remember the month and there were 30 members, chit fund amount was Rs.30,000/- and the duration was 30 months with an installment of Rs.1,000/- per month. He stated that he has not taken any document from the complainant regarding payment made for chit fund but the complainant has maintained a book and made entries about the payment. He stated that he is not having any document to show that the complainant was running chit fund business. He has not taken any endorsement regarding the submitting of signed blank cheque and stamp paper. Previous chit amount were Rs.20,000/- and Rs.30,000/-, which he has taken and at that time the complainant not demanded for any documents. Chit fund was closed 7-8 months after July 2008. He stated that he has not given any notice to the complainant to return the documents and he does not remember whether any application was given to bank for closure of account. He states that no complaint is filed in Police Station against the complainant for the return of documents.

25. It is worth to note that first of all the accused failed to demonstrate that the complainant was running chit fund business. Except the self serving statement absolutely there is no evidence to prove the said fact. They have not examined any other member of chit fund or produced any document. The Dw.2 stated that the complainant has maintained a register regarding payments made towards chit fund. If it is so, why the accused has not taken steps to secure said register is not

explained. The case records reveal that the accused moved an application u/S 91 CrPC seeking direction to the complainant to produce bank account statement and Income Tax returns, but not sought any direction to produce said register. According to Dw.2, chit fund completed 7-8 months after July 2008 i.e., it was completed in the year 2009. Neither, the accused nor his father issued any notice to the complainant to return the cheque and stamp paper and so far they have not initiated any action against him for misutilization of signed blank cheque and stamp paper. No possible explanation is offered for not taking any action.

26. The Dw.1 in examination-in-chief stated that his father asked him to give a blank signed cheque and signed blank stamp paper. Dw.1 not stated that he gave two signed blank cheques. Dw.2 in examination-in-chief stated that, at the time of giving chit fund amount the complainant insisted him to give a blank cheque; due to this he gave his son's cheque. Dw.2 not stated that the complainant demanded him to give signed blank stamp paper. But he stated that apart from cheque he also gave signed blank stamp paper. Till the examination of Dw.2, the accused and his father contended that a single signed blank cheque and stamp paper were given to the complainant. But in further examination-in-chief recorded on 18.2.16 for the first time the Dw.2 stated that two signed blank cheques bearing last two digit numbers 51 and 52 were given to the complainant. It is worth to note that for return of another signed blank cheque no action is initiated till this day.

27. According to accused his father requested him to give a signed blank cheque and signed blank stamp paper, he gave them to his father. This shows that on the same day and at the same time the accused affixed his signatures to said documents. Here, it is not the case of accused on different dates and time the said documents were given to the complainant. Since the documents were signed on same day and time, it is reasonable to expect signatures on said documents from the same pen. Here, on simple comparison of signatures on cheque and stamp paper it is can be said that they were affixed with different pens. By this an inference can be drawn that the said signatures were affixed on different dates. This shows that the contention of accused i.e., he gave signed blank cheque and stamp paper to his father, who in turn gave them to the accused and the same were misused by him are not worth acceptable.

28. The complainant examined one of the attester to the document Ex.P10, who stated about the execution of Ex.P10 by the accused. In cross-examination at page 5 he stated that the signature of complainant on the front page is signed at the time of receiving the amount and the signature on the second page is signed in the year 2011 at the time of agreement. It is suggested that a false document (Ex.P10) is created by misusing the signed blank stamp paper, he denied it. This witness withstood the rigor of cross-examination except one or two minor discrepancies. His evidence in entirety establishes the due execution of Ex.P10 by the accused.

29. It is argued that the Pw.1 in cross-examination stated that the cheque was given on the date of payment of money, which shows that the cheque was given on 12.07.08 and the contention of complainant that the cheque was given on 5.12.12 is a created one. This contention is not tenable because it is a rule of law that the evidence in entirety is to be taken into consideration. The complainant has established the due execution of Ex.P10. If really cheque was issued on 12.07.08 definitely the said fact would have taken a place in the recitals of Ex.P10 executed on 12.07.08. The

case of complainant is that the accused took the amount on 12.07.08 by executing Ex.P10 and subsequently executed a consent deed on 1.5.11 and issued cheque on 5.12.12. If the evidence in entirety including oral and documentary evidence is taken into consideration it can be said that the complainant has clearly establish his contention. Thus a stray sentence would not render the whole case of complainant as an improbable one.

30. It is argued that in Ex.P10 the age of complainant is shown as 51 and 48 years. In cause title of complaint his age is indicated as 51 years. In evidence affidavit his age is mentioned as 53 years. The discrepancies in mentioning the age shows that the Ex.P10 is created in the year 2013 prior to filing of this complaint. This contention is not sustainable because only on the basis of mentioning of different ages, when the fact regarding age of complainant is not in dispute, entire document cannot be doubted and termed as a created one, which is otherwise duly proved.

31. It is argued that the complainant has no source of income to lend such huge amount and this fact manifest the non existence of transaction in question. This contention is not tenable because the Dw.1 and 2 themselves stated that the complainant is running chit fund business. Dw.2 stated that he has taken 3-4 times chit fund amount from the complainant. In cross-examination the complainant stated that he is doing real estate business. In addition to this as stated supra there is presumption that the negotiable instrument is drawn for the legally enforceable debt or liability.

32. It is argued that during the year 2006 to 2009 the accused was residing at Hassan working in a Wind Farm Company, as such question of transacting with the complainant and issuance of cheque does not arise. It is argued that on 5.12.12 the accused was in Chittor attending the marriage of his friend Pradeep Kumar. To demonstrate said fact he relied on documents Ex.D1 to 13 and also examined his friend Pradeep Kumar as DW.3, who stated that they return to Bangalore at 9.00 pm., on 5.12.12. This shows that on 5.12.12 the accused was in Bangalore. The contention supra raised by the accused is not tenable for the reasons that, just because the accused was working in Hassan it can be said that it is impossible to have any transaction in Bangalore, which is situated about 180 km from Hassan. Moreover, his parents are residing in Bangalore. In addition to this his own contention that during the month of June or July he handed over the signed blank cheque and stamp paper to his father shows that he was in Bangalore during loan transaction that took place on 12.07.08.

33. It is argued that no notice was served on the accused as such complaint is not maintainable. This contention is not tenable because the reply (Ex.P8) issued by the postal authority manifest that the notice is duly served on the accused. That apart the Section 114 of Evidence Act enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of General Clauses Act gives rise to presumption that the service of notice has been affected when it is sent to the correct address by register post. In the instant case the address shown in the cause title of complaint and the postal address indicated on legal notice are one and the same. Summons served on the accused on the same address.

It is argued that the cheque returned with a Shara as account closed; as such Section 138 of NI Act is not attracted. This contention holds no water because it is well settled that, if the cheque is returned unpaid with a shara as account closed then also the provisions of Section 138 is attracted.

It is argued that the debt is time barred as such complaint is not maintainable. This contention is not sustainable because the accused by executing Ex.P10 has acknowledged the debt within time, thereby the period of limitation was extended and the debt was not time barred.

Accused relied on decision reported in AIR 2009 SC 1518 (M/s.Kumar Exports V/s M/s.Sharma Carpets), wherein the Hon'ble Apex Court held that the rebuttal evidence need not be by proof of defence beyond reasonable doubt.

Decision reported in 2012 (3) SCCR 2057 (Veeraiah V/s G.K.Madiwalar), wherein the Hon'ble Court held that mere issuance of cheque is not sufficient unless it is shown that said cheque was issued towards discharge of legally recoverable debt, when the financial capacity of complainant is questioned, the complainant has to establish his financial capacity.

Decision reported in (2014) 2 SCC 236 (John K. Abraham V/s Simon C.Abraham and another), wherein the Hon'ble Apex Court stated about pre requisites for drawing presumption u/S 118 R/w Section 139 of NI Act.

Decision reported in 2015 Cri.L.J 912 (K.Subramani V/s K.Damodar Naidu) wherein the Hon'ble Apex Court held that the complainant had no source of income to lend sum of rupees 14,00,000/- to accused, as such he failed to prove that there is legally recoverable debt payable by accused to him.

Decision reported in 2015 (5) KCCR 990 wherein the Hon'ble Court held that, complainant failed to establish existence of legally enforceable debt and accused raised a probable defence.

One cannot dispute the proposition of said decisions. In the case on hand complainant successfully demonstrated the existence of legally recoverable debt and issuance of cheque and his lending capacity. The facts situation on hand facts of cases relied by the accused are different and the decisions relied by him are not helpful to the accused.

Discussion supra manifest that the accused failed to rebut the statutory presumption raised in favour the complainant. Hence, above point is answered in affirmative.

34. Point-2: By virtue of above findings Court proceeds to pass the following:

O R D E R Acting under Section 255(2) of CrPC the accused is convicted for the offence punishable under Section 138 of Negotiable Instruments Act, 1881.

He is sentenced to pay fine of 6,05,000/- rupees in default of payment of fine the accused shall undergo simple imprisonment for a period of six months.



Out of fine amount Rs.6,04,000/- shall be payable to the complainant as compensation and Rs.1,000/- to be appropriated to State towards prosecution expenses.

Bail bonds stands cancelled.

Office is directed to supply a free copy of judgment to the accused forthwith.

(Dictated to the Stenographer, transcribed by her, corrected and then pronounced by me in open Court on this the 26th day of November, 2016.) (A.SAMIULLA) XLI ACMM & XIX ADL.SCJ, BANGALORE.

ANNEXURE Witnesses examined on behalf of the Complainant:

PW.1 : Sri.Thamanna.  
PW2: Sri.Gopal.

Witnesses examined on behalf of the accused:

DW.1: Sri. Rajendra Kumar S.  
DW.2: Sri. A.Sridhar  
DW.3: Sri. Pradeep Kumar

Documents marked on behalf of the Complainant:

Ex.P.1 Cheque  
Ex.P.1(a) Signature of the Accused  
Ex.P.2 Return Memo  
Ex.P.3 Legal Notice  
Ex.P.4 Postal Receipt  
Ex.P.5 Courier Receipt  
Ex.P.6&7 Letters to the Postal Department  
Ex.P.8 Reply given by the Postal Department

Ex.P.9 Postal Envelope  
Ex.P.10 Loan Agreement Letter  
Ex.P.11 Complaint

Documents marked on behalf of the Accused:

Ex.D.1 Employment Offer letter  
Ex.D.2 Appointment letter  
Ex.D.3 Salary break up dated 1.5.12.06  
Ex.D.4 Relieving letter dated 29.04.09

Ex.D.5      Bank account my salary of Hassan  
Ex.D.6      Marriage invitation card of Pradeep Kumar  
Ex.D.7      Certificate of Registration of Hindu Marriage  
Ex.D.7a & 8 Photographs (2)  
Ex.D.9      CD  
Ex.D.10     Receipt  
Ex.D.11&12 DVD  
Ex.D.13     Receipt.

(A.SAMIULLA)  
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