Sri.Manish vs Sri.M.Eshwara Reddy on 30 January, 2016

IN THE COURT OF LXVII ADDL CITY CIVIL AND
SESSIONS JUDGE; BENGALURU CITY (CCH.No.68)

PRESENT
SRI.CHANDRASHEKHAR MARGOOR, B.Sc., LL.B.(Spl)
LXVII ADDL CITY CIVIL & SESSIONS JUDGE,
BENGALURU.

Dated this the 30th day of January, 2016.

Crl. Appeal No.1393/2014

APPELLANT : Sri.Manish,
S/o.Late Arunkumar S. Parikh,
50 years,
R/at.No.102, Ground Floor,
II Cross, BTS Drivers Main House,
Opp. Somu Floor Mills,
Syed Mohammed Patel Layout,
Railway Gate Road, RMV II Stage,
Sanjaynagar Post, Bhoopasandra,
Bengaluru-94.
(By Sri.M.V., Advocate)
.Vs.
RESPONDENT : Sri.M.Eshwara Reddy,
S/o.Late Basi Reddy,
No.6, II Cross,
Syed Mohammed Patel Layout,
Railway Gate Road, RMV II Stage,
Sanjaynagar Post, Bhoopasandra,
Bengaluru-94.
(By Sri.J.J., Advocate)

JUDGMENT

This appeal is preferred by the appellant challenging the conviction judgment passed by the learned XV Addl. C.M.M., Bengaluru in C.C.No.5911/2010, dated:15.11.2014.

2. The appellant herein was the accused No.2 and respondent herein was the complainant before the trial court. For the sake of convenience, parties would be referred to by the ranks they were assigned before the trial court.

3. Brief facts of the case of the complainant are as under:

> The complainant and the accused No.2 and his deceased father accused No.1 are well known to each other. Both the accused have approached the complainant during November 2008 and borrowed a loan of Rs.3,00,000/- from the complainant,

agreeing to repay the said amount within six months and when the complainant insisted for repayment of the loan amount, the accused have issued an Account Payee Cheque bearing No.398585, dated:18.05.2009 for Rs.3,00,000/-, drawn on Bank of India, Sanjay Nagar Branch, Bengaluru and the said cheque was signed by both the accused. When the complainant presented the said cheque for encashment on 27.06.2009 through his banker namely Canara Bank, GKVK Branch, UAS Campus, Bengaluru, the said cheque came to be dishonoured with an endorsement as "Funds Insufficient" on 30.06.2009. Hence, the complainant got issued the legal notice, dated:10.07.2009 to the accused through RPAD and UCP and the notice sent under RPAD returned on 18.07.2009 with an endorsement "No such person in this address", however, the notice sent under UCP was duly served on the accused. In spite of service of the legal notice, the accused have neither replied to the said notice nor paid the amount. Hence, the complainant was constrained to file the complaint against the accused under Section 200 Cr.P.C. r/w. Section 138 of N.I.Act.

4. The learned XII Addl. C.M.M., Bengaluru after taking cognizance and recorded the sworn statement of the complainant and registered the case as C.C.No.5911/2010 and issued summons to the accused. Thereafter, the case was transferred to the learned XVII Addl. C.M.M., Bengaluru. The accused appeared before the court and engaged their advocate and they were enlarged on bail. During the pendency of the case, the accused No.1 is reported to be dead and hence, the case against accused No.1 is abated and the case was proceeded against the accused No.2. Thereafter, the case was again transferred to the learned XV Addl. C.M.M., Bengaluru. The learned XV Addl. C.M.M., Bengaluru was recorded the plea of the accused No.2 and the accused No.2 pleaded not guilty and claims to be tried. Thereafter, the complainant was examined himself as P.W.1 and got marked documents Ex.P.1 to P.8. After the closure of the evidence of the complainant, the statement of accused No.2 U/Sec.313 of Cr.P.C., was recorded. The accused No.2 has denied the incriminating evidence of the complainant. The accused No.2 has adduced his evidence as D.W.1 and no documents were got marked on his behalf. After hearing both the sides, the learned Magistrate has convicted the accused No.2 for the offence punishable under Section 138 of N.I.Act and sentenced to pay a fine of Rs.3,10,000/-, in default, to undergo simple imprisonment for a period of six months and also ordered that, out of the fine amount, a sum of Rs.3,05,000/- shall be paid to the complainant as compensation and the balance of Rs.5,000/- shall be forfeited to the State.

5. Being aggrieved by the orders of the trial court, the appellant has preferred this appeal on the following grounds.

(1) The impugned judgment passed by the learned Magistrate is perverse, arbitrary and liable to be set aside ;

(2) The learned Magistrate has failed to appreciate the non-compliance of the statutory requirements as per Section 142(b) of N.I.Act, as there is no proper service of notice on the accused No.2 ;

(3) The cheque in question was issued to the complainant as a security, as he is the tenant under the complainant in order to clear the remaining rental amount to the complainant and after clearing the entire deficit rental amount, the cheque in question was not returned back to him by the complainant ;

(4) The fact regarding issuance of cheque to the complainant as security in clearing the deficit rental amount was reflected in the rental agreement entered into between the parties and there is a failure on the part of the complainant in not producing the said rental agreement before the court, despite having admitted the possession of the said rental agreement ;

(5) The learned Magistrate has wrongly applied the presumption under Section 139 of N.I.Act, against the accused, even though the complainant admits that there is a mention regarding the issuance of cheque in the rental agreement ;

Hence, the appellant has prayed to set aside the impugned judgment passed by the learned XV Addl. C.M.M., Bengaluru in C.C.No.5911/2010, dated:15.11.2014.

6. The respondent put his appearance through his counsel. The lower court records were secured.

7. Heard the arguments of the learned counsel for the respondent.

8. From the above facts, the points that arise for my consideration are as under:

1) Whether the appellant proves that, the notice is not served on the accused No.2 and the ingredients of Sec.138 of N.I.Act are not complied. Hence, the impugned order is erroneous and requires interference of this court?

2) What Order ?

9. My findings on the above points are as follows.

POINT No.1 - In the Affirmative
POINT No.2 - As per final order,
for the following :
REASONS

10. POINT No.1: The learned counsel for the

respondent has vehemently argued that, the accused have availed loan of Rs.3,00,000/- from the complainant during November 2008 and agreed to repay it within 6 months and issued Ex.P.1 Cheque for repayment of the said loan. But, the said Cheque came to be dishonored for the reasons "Funds Insufficient" and the notice was issued to the accused to call upon them to pay the Cheque amount within 15 days. In spite of service of notice, which was sent through UCP, the accused have failed to pay the Cheque amount. Hence, the complainant has lodged the complaint against the

accused under Sec.138 of N.I.Act and the complainant is having capacity to pay Rs.3,00,000/- to the accused and there is a presumption under Sec.139 of N.I.Act that the Cheque Ex.P.1 was issued for discharge of debt or liability. The accused has not rebutted the presumption. Hence, the lower court has rightly convicted the accused for the offence punishable under Sec.138 of N.I.Act by assigning cogent reasons and passed the reasonable sentence against the accused.

11. The complainant has not whispered in the complaint that, the accused are the tenants under him. The complainant has alleged in the complaint that, the accused persons are known to him and the accused No.1 is the father of accused No.2. It is an admitted fact that, the complainant was serving in Agricultural Department and getting salary of Rs.25,000/- p.m. and leased out 2 premises on rental basis and getting the rent in total for Rs.10,000/- p.m. The complainant is a Government Servant. Therefore, he is not supposed to do money lending business. If at all, he intends to do the same, he has to obtain prior permission from his employer. Further, the complainant is a Government Servant has to disclose his Assets and Liabilities every year to his employer and also submit the Income Tax Returns to the concerned department. The alleged transaction alleged to have taken place during November 2008. The annual income of the complainant is a more than Rs.4,00,000/- during that period. Therefore, there was mandatory for the complainant to submit the Income Tax Returns to the Income Tax Department disclosing the lending of loan of Rs.3,00,000/- to the accused. The complainant has not produced the income tax return before the court to show that, he has lent Rs.3,00,000/- to the accused during November 2008. Their Lordship of Apex Court pleased to held in;

AIR 2009 (NOC) 2327 (Sanjay Mishra .Vs. Ms.Kanishka Kapoor @ Nikki and another) "That the failure to disclose the amount in income tax return or books of account of the complainant may be sufficient to rebut the presumption under Sec.139 of N.I.Act. The amount advanced by the complainant to the accused was unaccounted cash amount, it was not disclosed in Income Tax Returns, hence, the liability to repay unaccounted cash amount cannot be said to be legally enforceable liability within the meaning of explanation to Sec.138 of N.I.Act.

12. The complainant has alleged to have lend Rs.3,00,000/- to the accused by way of cash. Though, the complainant has not mentioned in the complaint or in the notice or deposed before the lower court about mode of payment of the said amount to the accused. But, the complainant's counsel has suggested to the accused during cross-examination that, the complainant has lent Rs.3,00,000/- by way of cash during 2008. But, Their Lordship pleased to held in;

AIR 2008 SC 1325 (Krishna Janardhan Bhat .Vs. Dattatraya G. Hegde) "As per Section 269-SS of Income Tax Act, any advance taken by way of loan of more than Rs.20,000/- was to be made by way of account payee cheque only"

13. The complainant has not produced any chit of paper to show that, he was having Rs.3,00,000/- during 2nd week of November, 2008. The accused No.2 has taken up specific defense that, the complainant is not having capacity to pay Rs.3,00,000/- to the accused. The complainant has admitted in the cross-examination that, he is working in GKVK i.e., in Maintenance Department and getting salary of Rs.25,000/-, but the said suggestion was denied by the accused during

cross-examination. The P.W.1 has admitted in the cross-examination that, he was getting Rs.20,000/- p.m. during 2008 and there were 5 family members in his family and his children were prosecuting studies and said entire salary was spent for maintenance of his family, but P.W.1 has denied the said suggestion. He has categorically admitted that, he has not produced any documents before the court that, he was having cash of Rs.3,00,000/- at his hand. But, the complainant has not produced any scrap of paper to establish the same. The accused's counsel has suggested to the P.W.1 that, he was not having Rs.3,00,000/- cash at his hand, but the said suggestion was denied by the P.W.1. Therefore, I am of the considered view that, the complainant has not proved his financial capacity to pay Rs.3,00,000/- to the accused during November 2008 by producing cogent evidence. Their Lordship pleased to held in;

2015 AIR SCW 64 (K.Subramani .Vs. K.Damodara Naidu) "Complainant had no source of income to lend sum of Rs.14 lakhs to accused - He failed to prove that there is legally recoverable debt payable to the accused to him - Acquittal of accused was proper".

14. No doubt, Ex.P.1 Cheque bears the signatures of accused Nos.1 and 2. The accused No.1 has died during pendency of the case before the lower court. The P.W.1 has admitted that, the deceased accused No.1 and accused No.2 are tenants under him and paying rental of Rs.3,500/-p.m. The accused were tenants under the complainant for about 2 years. It is the case of the complainant that, the accused have availed loan of Rs.3,00,000/-from the complainant for urgent business purpose. But, the complainant has shown his ignorance to the question posed by the learned counsel for the accused that what was the business that was alleged to have carried out by the accused. If really, the accused were doing business, the complainant might have aware what was the business that was carried out by the accused, as they were tenants under him for more than two years. The complainant has shown ignorance to the question posed by the advocate for the accused that, when the accused have vacated his house. These all ignorance of the complainant do go to show that, he is not disclosing the true facts before the court and he has not approached the court with clean hands. The complainant has admitted that, the accused have paid 2 years rent at one stretch. When the accused are defaulters in paying the rent to the complainant since 2 years therefore, the complainant version that, he has lent Rs.3,00,000/- to the accused cannot be believable. The complainant has categorically admitted in the cross-examination that, on 14.05.2009, the accused and the complainant have entered in to an agreement with respect to lease and the said agreement is in his custody and there is no impediment/hurdle to the complainant to produce it before the court. The complainant has categorically admitted that, he is in custody of the original agreement executed by the accused along with Ex.P.1 Cheque, which was given as security for the payment of rent. Therefore, the complainant purposely not produced the said agreement before the court as there is recital in the said agreement about giving of Ex.P.1 Cheque. The complainant has misused the said cheque and launched the criminal case against the accused. The said fact was denied by the complainant. If the complainant is fair enough, he should have produced the said agreement before the court to establish that, Ex.P.1 Cheque was not given as security for the repayment of the rent. No doubt, the accused have not moved application under Sec.91 of Cr.P.C. before the lower court and called upon the complainant to produce the same. But, the lower court has observed in its impugned judgment about in action on the part of the accused to call upon the said agreement to prove the defense taken by the accused.

15. Though, there is a presumption under Sec.139 of Cr.P.C., the Cheque was issued by the accused for discharge of the debt. Still, the initial burden on the complainant to prove that, he has lent Rs.3,00,000/- to the accused. Therefore, I am of the considered view that, the complainant has miserably failed to prove that, he was having Rs.3,00,000/- cash in his hand and lent it to the accused during November 2008. The complainant has not specifically mentioned the date of alleged lending of Rs.3,00,000/- to the accused and also the complainant has not stated when the accused have issued the Cheque for repayment of the said Rs.3,00,000/-. The Hon'ble High Court of Bombay in the decision reported in; IV 2007 BC 211 (Santhosh Manikrao Gundale .Vs. Rameshwar Vamanrao Tak & another) and also in 2014 AIR SCW 2158 (John K.Abraham .Vs. Simon C. Abraham & another) pleased to held for drawing the presumption under Section 118 r/w. Section 139 of N.I.Act - Complainant not sure as to who wrote the cheque nor aware as to when and where existing transaction took place for which the cheque was issued by the accused. The complainant did not mentioned the date of advancement of loan in his complaint and the date of issuance of cheque also not mentioned - Advance of loan as alleged by the complainant not proved.

16. The complainant alleged in the complaint that, he got issued the notice dtd:10.07.2009 to the accused and called upon the accused to pay the Cheque amount within 15 days through RPAD and UCP. The RPAD covers are returned with an endorsement as "no such person in this address". But, notice sent through UCP were served on the accused. No doubt, there is a presumption that, if the notice sent to the correct address of the accused wherein, they are residing, it is presumed that, the notice is duly served on the accused. The D.W.1 has categorically admitted that, he is residing in the address shown in the cause title of the complaint, which is 100 meters away from the complainant's house. But, it is the specific case of the accused No.2 that, notice is not served on the accused No.2. The complainant's counsel has suggested to the D.W.1 during the cross-examination that, the notice sent through UCP might have received by his late father i.e., accused No.1 or his another brother. But, the D.W.1 has shown ignorance to the said question. But, the accused No.1 has died during the course of the trial and the case against the accused No.1 is abated. The complainant has to prove that, notice sent to the accused No.2 is duly served on him in order to bring home the guilt against the accused No2. The notice under Sec.142(b) has to be duly served on the accused No.2 to take cognizance under Sec.138 of N.I.Act. It is not the case of the complainant that, the notice sent through UCP was served on the accused No.2 and also the complainant has not alleged in the complaint that, the accused No.2 is evading to service of notice. Their Lordship pleased to held in; 2004(3) Crimes 505 Madras High Court between: S.S.Ummul Habiba, Proprietor, M/s.Alim Auto Supplies v/s. B.Rajendran. Their lordship pleased to held that, "return of postal cover as intimated unclaimed by itself would not amounts to constructive notice when it is not averred in complaint that, accused was evading service".

17. Therefore, I am of the considered view that, the complainant has not complied the ingredients of Sec.138 of N.I.Act. The complainant has failed to prove that, the accused have borrowed Rs.3,00,000/- from him and issued Ex.P.1 cheque for repayment of the said loan. The complainant has also failed to establish that, the notice sent under Sec.142(b) of N.I.Act is duly served on the accused No.2. The non service of notice to the accused No.2 will go to the root of the case i.e., cognizance taken against the accused No.2 itself is not correct. Therefore, I am of the considered view that, the impugned order passed by the lower court is erroneous and hence, it requires

interference of this court. Hence, I answer the Point accordingly.

18. POINT No.2 : In view of the findings on Point No.1, my finding on this point is as per following :

ORDER The Criminal Appeal filed by the appellant is allowed. Consequently, the conviction judgment passed by the Learned XV Addl. C.M.M., Bengaluru, Bengaluru in C.C.No.5911/2010, dated:15.11.2014. is set-aside.

Acting under Sec.255(1) of Cr.P.C. the accused No.2 is acquitted for the offence under Sec.138 of N.I.Act. His bail bonds and surety bonds stand cancelled.

Send back the records to the lower court along with the copy of this judgment.

(Dictated to the Stenographer, transcribed by her, and after corrections pronounced by me in the Open Court on this the 30th day of January, 2016) (CHANDRASHEKHAR MARGOOR) LXVII Addl.City Civil and Sessions Judge, BENGALURU.