

Sri. Vasanthkumar vs Mr. Ramakantha.K on 18 January, 2021

IN THE COURT OF THE LXIII ADDL.CITY CIVIL &
SESSIONS JUDGE (CCH-64) AT BENGALURU.

Dated this Monday the 18th day of January 2021

P R E S E N T :- Sri. B.VENKATESHA B.Sc., LL.B.,
LXIII ADDL.CITY CIVIL & SESSIONS
JUDGE, BENGALURU CITY.

Crl.A.No.2621/2019

Appellant : Sri. Vasanthkumar,
S/o Hanumanthaiah,
Aged about 50 years,
R/at No.138, 15th Cross,
2nd Phase, Geleyarabalaga,
Mahalakshmipuram,
Bengaluru - 560 086.
(By Sri. M.N. Madhusudhan, Adv.,)

-V/s-

Respondent : Mr. Ramakantha.K,
S/o Late K. Seetharama,
Aged about 68 years,
R/at No.88, P.F. Layout,
1st Main, 6th Cross,
Vijayanagara, Bangalore - 73.

(By Sri Janekere C Krishna Adv.,)

JUDGMENT

The appellant has filed this appeal U/Sec.374 of Cr.P.C. against the respondent challenging the judgment and sentence order dated 04.12.2019 passed in Crl.A.2621/2019 C.C.No.19039/2019 on the file of Court of XXIII ACMM, Bangalore. The appellant is the accused and that respondent is the complainant before the trial court. Therefore, for the sake of convenience, the parties to this appeal are herein afterwards referred with their ranks before the trial Court.

2. The brief facts as set out in the Memorandum of Appeal are that the complainant has filed complaint under Section 200 Cr.P.C alleging that the complainant and accused are friends. During December 2011, the accused had requested the complainant for hand loan of Rs.25 lakhs for his business and personal problems. The complainant has paid the said sum of Rs.25 lakhs to the accused through cheques bearing No.553761 dated 18.01.2012 for Rs.8 lakhs, cheque bearing No.553784 dated 21.01.2012 for Rs.7 lakhs and another cheque bearing No.554309 dated 21.01.2012 for Rs.8 lakhs, in all Rs.25 lakhs. All the cheques were drawn on Vijaya Bank, Kumble Branch, Kasargod. The accused has promised to the complainant that he will re-pay the said loan amount within six-months. After expiry of 6 months, the complainant has demanded the accused to repay the loan amount, but accused on one or the other reason took time and finally has issued 4 post dated cheques bearing No.038710 dated 01.04.2019 for Rs.8 lakhs, cheque bearing No.038712 dated

02.05.2019 for Rs.5 Crl.A.2621/2019 lakhs and another cheque bearing No.038713 dated 15.05.2019 for Rs.4 lakhs, in all Rs.17 lakhs. All the cheques are drawn on Allahabad Bank, Rajajinagar Branch, Bangalore, in favour of the complainant. When the complainant has presented the said four cheques through his banker State Bank of India, Vinayaka Layout Branch, Bengaluru on 27.05.2019, the said cheques were returned to him unpaid with an endorsements dated 28.05.2019 due to "Funds Insufficient". In spite of issuance of legal notice and its service, the accused has failed to repay the loan amount. He gave untenable reply. Therefore, it was alleged that the accused has committed the offence punishable under Section 138 of N.I.Act.

3. The Trial Court has registered the said complaint as C.C.19039/2019 and has issued summons to the accused. In pursuance to service of summons, the accused has appeared before the Trial Court. He was enlarged on bail. He has pleaded not guilty of the offence punishable under Section 138 of N.I.Act. Therefore, the complainant was examined as P.W.1 and that he got admitted 16 documents as Ex's.P.1 to Ex.P.16 and closed his side of evidence. No evidence adduced on behalf of the accused.

4. After hearing the arguments of both sides, considering the facts and circumstances of the case as well as the evidence placed, by means of impugned judgment Crl.A.2621/2019 dated 04.12.2019, the trial Court has found that the accused is guilty of the offence punishable under Section 138 of N.I.Act. Therefore, the Trial Court has convicted the accused by way of imposing fine of Rs.17,00,000/- and that in default of payment of fine, the Trial Court has directed the accused to undergo simple imprisonment for a period of two years. Out of fine, Rs.16,90,000/- shall be paid to the complainant as compensation and balance amount of Rs.10,000/- to the State. The trial Court in the impugned judgment has held that the complainant has proved the guilt of the accused. The accused has failed to dis prove the case of the complainant by placing a probable defence evidence. The trial Court also has opined that the accused has failed to rebut the presumption raised in favour of the complainant.

5. Being aggrieved by the impugned judgment and sentence order of the Trial Court, the accused has preferred this appeal contending that there is no legally enforceable debt that payable by the accused to the complainant. In the complaint and in his evidence, the complainant has clearly admitted that he has paid the alleged amount in the year 2012. After lapse of 7 years, a false complaint has been lodged by the complainant. The trial Court, has not looking into the nature of the complaint, has convicted the accused. The Presiding Officer of the trial Court was on leave on Crl.A.2621/2019 20.11.2019. The bench clerk has given date to the said case on 14.12.2019. On the said date lok-adalath was scheduled. Junior advocate for accused have gone to the lok-adalath on 14.12.2019. At that time they came to know that the impugned judgment was passed on 04.12.2019 without giving sufficient opportunity to cross examine the complainant. The complainant has not paid any money to the accused. Therefore the accused has no liability to pay any amount to the complainant. On 13.09.2019 the accused has appeared before the trial Court and obtained bail. Thereafter within a span of 3 days the trial Court has passed the impugned judgment. The trial Court has come to a wrong conclusion. Therefore the impugned judgment is not maintainable either on facts or on law. Therefore, he has sought to set aside the impugned judgment and sentence order of the Trial Court. He has sought for his acquittal of the offence punishable under Section 138 of N.I.Act.

6. After service of notice of this appeal, the complainant has put his appearance through his counsel. Trial Court record has been secured. Heard the arguments of the learned Counsels appeared for the appellant. The learned Counsel for the respondent fails to submit his arguments in spite of reasonable time provided.

7. Perused the contents of Memorandum of Appeal, impugned judgment and sentence order and the evidence Crl.A.2621/2019 placed before the Trial Court with reference to aforesaid case law.

8. The points that arise for my consideration are as under:

1. Whether the Trial Court has erred in giving reasonable opportunity of hearing to the accused to defend him as contended?
2. Whether the Trial Court has erred in properly appreciating the evidence placed before it, with reference to the facts and circumstances of this case?
3. Whether the impugned judgment and sentence order warrants interference by this Court?
4. What Order ?

9. My findings on the above points are as under:

Point No.1 :- As in the Affirmative, Points No.2 & 3 :- As in the Affirmative, Point No.4 :- As per the final order, for the following:

REASONS

10. Point No.1 : The main contention of the accused is that the trial Court has not afforded sufficient opportunity to him to put forth his defence. Therefore, record of the trial Court is perused. Sworn statement of the complainant filed Crl.A.2621/2019 at PCR stage on 14.08.2019 and that it was treated as PW.1 and the documents filed along with the complaint are marked as Ex'.P.1 to P.16. After his release on 30.09.2019 on bail, the accused has not filed application under Sec.145(2) of N.I.Act seeking permission to cross examine the complainant (PW.1). Therefore, the trial court has posted the case for defence evidence without recoding the statement of accused U/Sec.313 Cr.P.C. Thereafter, on 18.10.2019, the counsel for the accused has filed application U/Sec.145(2) of N.I.Act and U/Sec.311 of Cr.P.C for recall of PW.1 for cross examination. The said applications were allowed on 19.10.2019. On 03.12.2019, PW.1 was present, But, the accused and his counsel are absent. Therefore, on the said date, the trial Court has passed order that the cross examination of PW.1 is taken as Nil and has issued the NBW to the accused. On 04.12.2019 also the accused was absent. The trial Court without hearing the arguments of both sides, by invoking Sec.353(6) of Cr.P.C has pronounced the impugned judgment and sentence order.

11. Sec.353(6) Cr.P.C provides that, if the accused is not in custody he shall be required by the Court to attend to hear the judgment pronounced except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or the accused is CrI.A.2621/2019 acquitted. In this case personal attendance of the accused has not been dispensed. Accused has not been acquitted. Therefore, invoking Sec.353(6) Cr.P.C to the proceedings of this case is not a correct view. Order sheet is not discloses that the trial Court has heard the arguments of both sides or of the complainant. So, it is clear that the trial court has not accorded reasonable opportunity to the accused to cross examine the PW.1 or to say his defence. Therefore, I answer aforesaid Point No.1 as in the Affirmative.

12. Points No.2 & 3 : These points are interlinked with each other. Therefore, these points are taken up together for joint consideration to avoid repetition of facts. Before the Trial Court, PW.1 (Complainant) was not cross examined for accused. Statement U/Sec.313 of Cr.P.C. also has not been recorded. To its conclusion that the accused is guilty of the offence punishable U/Sec.138 of N.I.Act, the Trial Court has opined that the accused has fails to rebut the presumption U/Secns 118 & 139 of N.I.Act. Therefore, the Trial Court has opined that the complainant has established his case. Main ground of the accused in this appeal is that the Trial Court has not accorded opportunity to the accused to cross examine the PW.1 and to say his statement as per Sec.313 of Cr.P.C. As stated supra, the Trial Court has not afforded reasonable time to the accused to say his defence. This Court has analyzed the impugned CrI.A.2621/2019 judgment as well as the evidence placed before the Trial Court. In the oral evidence of PW.1, he has deposed his side of evidence by way of reiterating almost all the facts as averred in the complaint once again.

13. Ex's.P.1 to P.3 the cheques dated 01.04.2019, 02.05.2019 and 16.05.2019 are issued for Rs.8,00,000/-, Rs.5,00,000/- and Rs.4,00,000/- respectively drawn on Allahabad Bank, Rajajinagar Branch, Bangalore City are all discloses that the said cheques are all issued in favour of the complainant. Ex's.P.4 to P.6 banker's memos dated 28.05.2019 respectively of State Bank of India, Vinayaka Layout Branch, Bangalore City discloses that the Allahabad Bank through S.B.I, has returned the Ex's.P.1 to P.3 cheques to the complainant stating the said cheques are not honored due to "Funds Insufficient". So, it is clear that, the complainant has presented the said cheques for collection within 6 months from 01.04.2019, 02.05.2019 and 16.05.2019. Ex.P.7 copy of the legal notice dated 14.06.2019 discloses that within 30 days from 28.05.2019, the complainant got issued the legal notice to the accused by stating about dishonour of the said cheques due to "Funds Insufficient" and has requested him to make payment of the amount covered under the said cheques within 15 days from the date of receipt of the said notice. Ex's.P.8 to P.11 postal receipts dated 14.06.2019 discloses CrI.A.2621/2019 that the legal notice marked at Ex.P.7 has been sent to the accused through registered speed post to his addresses. Ex's.P.12 and P.13 speed post acknowledgments discloses that the legal notice has been served to the accused on 20.06.2019. Reply notice marked at Ex.P.14 supports the service of the said legal notice. In the reply notice, he has denied that he availed loan of Rs.25,00,000/- from the complainant. He has contended that the said cheques were issued in connection with business related transactions. The complainant has misused the said cheques. This complaint was presented on 18.07.2019. So, it is clear that the complainant has filed this complaint within the period of 30 days after expiry of 15 days from 20.06.2019. So it is clear that the trial court has not committed any error or ignored any legal

aspects in registering the said complaint as criminal case against the accused for trial of the said offence.

14. The another main contention of the accused is that the trial Court has not recorded his statement U/Sec.313 of Cr.P.C. Recording of statement of accused was not dispensed and that the judgment was pronounced on 04.12.2019. As stated supra, the accused has shown that the trial Court has not accorded reasonable opportunity to him to put forth his case.

15. Proviso Clause of Sec.313(1) of Cr.P.C provides that CrI.A.2621/2019 "in a summons case where the court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause b of Sec.313(1) of Cr.P.C". Section 262/1 of Cr.P.C provides that "the procedure specified in this code for the trial of summons case shall be followed in a trials under chapter 21 of Cr.P.C". Order sheet of trial court is not discloses that the trial court has dispensed with personal attendance of the accused before it at the time of the trial of this case. It is true that trial U/Sec.143 is summary trial. It is for non- appearance of the accused, her statement under Sec.313 Cr.P.C., has not been recorded. Why he was absent before the trial Court for his examination under Sec.313 Cr.P.C has not been properly explained by the accused. In view of non dispensation of personal attendance of the accused during trial, dispensation of recording statement of the accused is not a correct view. In fact, no such dispensation order was passed. Recording of statement is mandatory.

16. The Hon'ble Apex Court, in CrI.Appeal No.546/2011 MD Sukur Ali v/s State of Assam, disposed on 24.02.2011 by relying case laws of Supreme Court of United States reported in 287 US 45 (1932), 372 US 335 (1963) and 430 US 387 (1977) and Hon'ble Apex Court reported in AIR 2011 SC 308, 2008(9) SCC 542, 2005(11) SCC 412 and AIR 1978 SC 597 respectively has held that CrI.A.2621/2019 "In the absence of a counsel, for whatsoever reasons, the case should not be decided forthwith against the accused but in such a situation the Court should appoint a counsel who is practicing on the criminal side as amicus curiae and decide the case after fixing another date and hearing him"

The Hon'ble Apex Court has further held that "

If on the next date of hearing the Counsel, who ought to have appeared on the previous date but did not appear, now appears, but cannot show sufficient cause for his non-appearance on the earlier date, then he will be precluded from appearing and arguing the case on behalf of the accused. But, in such a situation, it is open to the accused to engage another counsel or the Court may proceed with the hearing of the case by the counsel appointed as amicus curiae."

The Hon'ble Apex Court has further held that "if the criminal case (whether a trial or appeal or revision) is decided against accused in the absence of a Counsel, there will be violation of Article 21 of the Constitution".

17. On the aforesaid dates, it is clear that the accused or his counsel were absent before the trial Court. Order CrI.A.2621/2019 sheet of the trial Court is not clear that the learned counsel for the

accused has submitted his arguments for accused. It is clear that trial Court has disposed of the said criminal case in the absence of Counsel appeared for accused. Hence, it is clear that the trial Court has failed to appreciate the evidence placed before the Court in a proper way. Therefore, the trial Court has erred in passing the impugned judgment and conviction order. In the ends of equity and justice, one more opportunity can be provided to the accused to cross-examine the PW-1 and to adduce his side of evidence. As stated supra, why the accused was absent before the Trial Court on the aforesaid dates is not properly explained. Therefore, for his negligence, some cost is to be imposed. The impugned judgment and sentence order passed by the trial Court is liable to be set-aside. Therefore, I am of the opinion that there were grounds to interfere with the impugned judgment and sentence order passed by the trial Court. Therefore, matter requires to be remitted back to the trial court. Therefore, I answer the aforesaid points No.2 & 3 as in the Affirmative.

18. Point No.4: In view of the above discussion and the findings on points No.1 to 3, I proceed to pass the following:

Crl.A.2621/2019 ORDER Appeal filed by the appellant/accused is hereby allowed on payment of cost of Rs.10,000/- of the complainant. Cost amount shall be paid to the complainant or deposited before the trial court within one month from this date. This judgment shall be operative only when the accused has deposited the cost amount within one month from this date.

The judgment and order of conviction passed against the accused in judgment and sentence order dated 04.12.2019 passed in C.C.No.19039/2019 on the file of Court of XXIII ACMM, Bangalore is hereby set-aside. [Matter is remanded back to the trial court for fresh disposal from the stage of cross- examination of PW-1. The trial court shall pronounce the judgment after recording statement of the accused as per Sec.313 Cr.P.C. The Trial Court shall also follow the procedure as prescribed by the Hon'ble Apex Court in a case law as stated in Crl.Appeal No.546/2011 MD Sukur Ali v/s State of Assam, disposed on 24.02.2011(Referred in para 13 of this Crl.A.2621/2019 judgment).

Without expecting prior notice, both parties shall be present before the trial Court on 01-03-2021 at 11.00 a.m without fail.

The trial court shall make effort to dispose of the said case as early as possible.

Send back trial Court record with copy of this Judgment.

(Typed by the Stenographer on my dictation, the transcript revised and then pronounced by me in open court on this Monday the 18th day of January 2021).

(B.VENKATESHA) LXIII ADDL.CITY CIVIL & SESSIONS JUDGE, BENGALURU 16
Crl.A.2621/2019 Crl.A.2621/2019 18.01.2021 Case called in the Open Court.

Applt. By : MNM. Adv., Judgment is pronounced in the Open Resp. By : JCK.Adv., Court, (vide separate judgment kept in For Judgment. file).

Appeal filed by the appellant/accused is hereby allowed on payment of cost of Rs.10,000/- of the complainant. Cost amount shall be paid to the complainant or deposited before the trial court within one month from this date. This judgment shall be operative only when the accused has deposited the cost amount within one month from this CrI.A.2621/2019 date.

The judgment and order of conviction passed against the accused in judgment and sentence order dated 04.12.2019 passed in C.C.No.19039/2019 on the file of Court of XXIII ACMM, Bangalore is hereby set-aside.

Matter is remanded back to the trial court for fresh disposal from the stage of cross-examination of PW-1. The trial court shall pronounce the judgment after recording statement of the accused as per Sec.313 Cr.P.C. The Trial Court shall also follow the procedure as prescribed by the Hon'ble Apex Court in a case law as stated in CrI.Appeal No.546/2011 MD Sukur Ali v/s State of Assam, disposed on 24.02.2011(Referred in para 13 of this judgment).

Without expecting prior notice, both parties shall be present before the trial Court on 01-03-2021 at 11.00 a.m without fail.

The trial court shall make effort to CrI.A.2621/2019 dispose of the said case as early as possible.

Send back trial Court record with copy of this Judgment.

LXIII A.C.C.& S.J., Bangalore.