

## Channegowda vs Umesh.K.L on 8 August, 2018

IN THE COURT OF THE XX ADDL.CHIEF  
METROPOLITAN MAGISTRATE AT BENGALURU CITY

Dated this the 8th day of August 2018

PRESENT: KALPANA.M.S.,  
B.Sc., LL.M.,  
XX ADDL. C.M.M. Bengaluru.

C.C.No.29383/2014

Complainant : Channegowda  
S/o Late Byse Gowda,  
Aged about 49 years,  
R/at: 7th Cross,  
Tigaralapalya,  
Andrahalli Main Road,  
Vishwanidam Post,  
Bengaluru - 560 091.

Vs.

Accused : Umesh.K.L.  
R/at: No.3,  
Lolappa Garden, J.P.Nagar,  
6th Phase, 6th Cross,  
Bengaluru.

Offence complied of : U/S. 138 of N.I. Act.,

Plea of accused : Pleadged not guilty

Final Order : Accused is Convicted

Date of Order : 08-08-2018

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C.C.29383/2014

### JUDGMENT

The complainant has filed this complaint under section 200 of code of criminal procedure read with section 142 of the Negotiable Instruments Act ( in short referred as "N.I. Act") against the accused alleging that, he has committed the offence.

02. The sum and substance of the complaint, is as follows;

The accused is friend of complainant and well known to him since 2008. The Complainant, accused and his friends are jointly doing the business in the name and style of M/s Harsha Fashions. Accused has incurred some business loss in the year 2012 and 2013. At that time, the accused requested the complainant for hand loan of Rs.4,00,000/-. Considering the request of accused, complainant paid Rs.3,00,000/- to accused in the second week of December 2013 and he agreed to repay the said loan within three months. After several demands and requests, towards discharge of his liability, accused has issued a cheque bearing No.000016 dated 16.04.2014 for Rs.3,00,000/-, drawn on Kotak Mahindra Bank Ltd., No.10/7, Umiya Landmark, Lavelle Road, Bengaluru. Complainant presented the said cheque for encashment through his banker i.e., UCO Bank and the said cheque returned with an endorsement "Insufficient Funds", dated 25.04.2014. Again, at the request of accused, Complainant represent the said cheque for encashment through his banker and the said cheque returned with an endorsement "Payment Stopped by Drawer". Thereafter, complainant got issued legal notice on 17.06.2014 to accused. Accused neither replied the notice nor paid the cheque amount. Hence, this complaint.

03. On filing of complaint, this court has taken cognizance for the offence punishable under section 138 of Negotiable Instrument Act, sworn statement of complainant was recorded. Being satisfied that there are prima-facie materials to proceed against accused, summons was issued. After appearance, accused enlarged on bail and plea was recorded as per section 251 of Cr.P.C. Accused has stated the defence that he lodged the complaint regarding misplacing of cheque.

04. Learned Counsel for complainant prays to treat sworn statement as examination-in-chief and to consider the documents marked as Ex.P.1 to 14. Statement under section 313 of Code of Criminal Procedure recorded. Accused examined himself as DW.1 and marked the documents as Ex.D.1 to 3.

05. In this case, the evidence on record shows that summons trial procedure was adopted instead of summary trial. As per the judgment passed by Supreme Court reported in 2014 Cr.L.J. 1953, in a case of Mehsana Nagarik Sahakari Bank Limited V/s. Shreeji CAB Company Limited and others, conducting Denova trial does not arises.

06. Heard the Learned Counsel for complainant and accused. Perused the written arguments filed on behalf of the complainant and accused, citations and materials on record.

07. The points that arise for my consideration are as follows;

#### POINTS

1. Whether the complainant proves that, accused issued cheque for Rs.3,00,000/- towards discharge of his liability, which was returned unpaid on presentation and also not complied the notice issued by the complainant and thereby committed an offence punishable under section 138 of Negotiable Instruments Act?

## 2. What Order?

o8. My answer to the above points is as follows;

1. Point No.1: In the Affirmative

2. Point No.2: As per final order for the following;

### REASONS

o9. POINT No.1: Complainant has filed this complaint alleging that accused has committed offence under section 138 of N.I. Act. He pleads and asserts that, towards discharge of his liability, accused has issued a cheque for Rs.3,00,000/-, drawn on Kotak Mahindra Bank Ltd., No.10/7, Umiya Landmark, Lavelle Road, Bengaluru.. The said cheque came to be dishonoured on presentation. Complainant has issued notice within time stipulated, calling upon the accused to pay the amount covered under cheque. In spite of service of notice, accused has not paid the amount within 15 days, which gave rise cause of action to file this complaint. He further relied on the documents from Ex.P.1 to 14. This witness was subjected to cross examination.

10. In this scenario, let us scrutinize the documents relied by complainant in order to examine the compliance of statutory requirements envisaged under section 138 of N.I. Act. Ex.P.1 is cheque dated 16.04.2014, Ex.P.2 and 3 are bank endorsements, Ex.P.4 is legal notice dated 17.06.2014, Ex.P.5 is postal receipt, Ex.P.6 Postal cover, Ex.P.7 is certified copy of orders in LAC No.24/1987, Ex.P.8 to 12 and 14 are rental agreements, Ex.P.13 is bank pass book of Complainant. This complaint came to be filed on 30.07.2014. A careful scrutiny of the documents relied by the complainant goes to show that, statutory requirements of section 138 of N.I. Act is complied with and this complaint is filed within time. Thus, complainant relied on the statutory presumptions enshrined under section 118 read with section 139 of N.I. Act.

11. No doubt, the said presumptions of law are rebuttable in nature. The accused can take probable defence and rebut the presumption available to the complainant. Let us examine whether accused has successfully rebutted the presumptions of law. It is the specific defence of the accused that, Complainant is stranger to him. There is no transaction between him and the Complainant. He never issued cheque in question to the Complainant for discharge of liability. He came to know about the misuse of cheque by unknown person through the bank authorities. Immediately, he had given complaint to the Commissioner of Police in Bengaluru City regarding missing of cheque leaves including the cheque in question. The Complainant is close friend of ex-partner of the accused by name V.Gangadhar. The Complainant has misused the cheque in question at the instigation of said Gangadhar. Accused states that, he is not liable to pay any amount to the Complainant as alleged in the complaint. Accused further contends that, no notice was served on him. On these contentions, accused sought for dismissal of the complaint. To endorse the same, accused examined himself as DW.1 before the court and relied on the documents from Ex.D.1 to 3. Ex.D.1 is reconstitution deed dated 25.01.2011, Ex.D.2 is copy of the complaint to police commissioner and Ex.D.3 is copy of the complaint to Bank Manager of Kotak Mahindra Bank. This witness was subjected to cross



16. Further, Section 27 of the General Clauses Act postulates that, postal article sent to the correct address of the addressee shall be taken as valid service. It is also to be noted that, accused has not placed any materials to show that legal notice was actually not served with or he is nowhere responsible for non service of notice by leading cogent evidence. Accused has liberty to prove the same through cogent evidence as laid down in the decision of the Hon'ble Apex Court reported in AIR 1999 SC 3762 - K.Bhaskaran V/s Sankaran Vaidyan Balan. In view of the matter, this contention of the accused regarding non service of notice holds no water.

17. It is further defence of the accused that, Complainant has misplaced cheque leaves of the accused. As far as this contention is concerned, a conjoint reading of the defence evidence and the cross examination of Complainant, it is clear that, this defence taken by the accused is also inconsistent. More elaborately, it was suggested to Complainant in the course of cross examination that, the ex- partners of accused by name Harish and Gangadhar have taken the cheque belongs to the accused during existence of partnership and misused the same to file this false complaint through Complainant. From this part of suggestions posed to the Complainant, it could be inferred that accused himself has handed over the disputed cheques to his ex-partners during the existence of partnership between them.

18. Per contra, in the defence evidence, accused contends that, those disputed signed blank cheques were misplaced and to that effect complaint was lodged with the police as well as stop payment intimation was issued to his banker. These two versions of the accused is self contradictory.

19. Nevertheless, if at all accused had issued his cheques to his ex-partners namely Harish and Gangadhar, he would have certainly taken any action to get back those cheques after dissolution of the partnership. But no documents are placed to show the action taken by the accused to get back the cheques handed over to the said partners. As such, it is difficult to accept this defence. As far as contradictory defence of the accused about misplacement of the cheques is concerned, for that also, no suitable action was taken by the accused immediately after alleged misplacement of the cheques. For better appreciation, the relevant portion of the evidence of DW.1 is reproduced as under;

"F YÀæPÀgÀtzÀ «ZÁgÀ w½zÀ £ÀAvÀgÀªÀÀ «ªÁçvÀ ZÉPÀÌ£ÀÄß  
zÀÆgÀÄzÁgÀjAzÀªÀÄgÀ½ YÀqÉAiÀÄ®Ä PÁ£ÀÆ£Ä PÀæªÄÄ  
vÉUÉzÀÄPÉÆAr®è. zÀÆgÀÄzÁgÀgÀ «gÀÄzÀÝ,ÀA\$AzÀsYÀlÖ YÉÇ°Ã,ï  
oÁuÉAiÄ°è zÀÆgÀÄ PÉÆqÀ®Ä vÉÆAzÀgÉ EgÀ°®è."

The complaint lodged with the police as per Ex.D.2 and stop payment instructions as per Ex.D.3 was issued after presentation of the disputed cheque for encashment. It appears that, these acts attributable to the accused are after thought to avoid future consequences of dishonour of the cheque in question.

20. Further, accused admits the rental agreement at Ex.P.14, which was confronted in the cross examination. The Complainant contends that, accused has handed over the disputed cheque as well as Ex,P.14 rental agreement at the time of availing loan from the Complainant. Though, accused denied this suggestion, but not placed satisfactory explanation about the possession of his rental

agreement by the Complainant. As such, the contentions of the Complainant that Ex.P.14 as well as disputed cheque was handed over by the accused at the time of availing loan is more probable.

21. Further, to show his financial capacity, Complainant has produced bank pass book as Ex.P.13 and contends that he received Rs.9,91,000/- as compensation towards land acquisition. Further, Complainant has produced rental agreements from Ex.P.8 to 12 to show that he is owning residential premises and leased out the same in favour of various tenants. No doubt, these rental agreements are pertaining to the year 2015. However, it could not be ruled out that in the year 2013 - 14 also those properties were leased out in favour of tenants. No rebuttal evidence is placed by the accused to counter these documents. These documents establishes financial capacity of the Complainant.

22. As far as proof of existence of legally enforceable debt is concerned, it is profitable to refer the decision of larger bench of the Hon'ble Apex Court reported in Rangappa Vs. Mohan reported in AIR 2010 SC 1898 = 2010 AIR (SCW) 2946, Wherein their lordships pleased to observe that, "In the light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by section 139 of the Act does indeed include the existence of the legally enforceable debt or liability".

In view of the law laid by three judges bench of Hon'ble Apex Court, the presumption enshrined under section 139 of the N.I. Act is extendable to the existence of legally enforceable debt. Accused has not placed cogent material to rebut the said presumption. As such, this contention of the accused holds no water.

23. As far as the contention of the accused that, cheque in question issued to his ex-partners is concerned, it is relevant to refer the decision reported in 2004 (3) KCCR 1816- L. Mohan V/s Mohan Naidu, it is held that;

"When once, the issue of cheque and the signature of it is admitted, court has to presume that the cheque has been issued for discharging the debt or liability. The burden of proof shifts on the accused to prove that there was no liability/debt or that the cheque was issued to a different person.

In this case, the accused has taken the defence of stolen cheque. He contends that blank signed cheque belongs him was misused by the Complainant at the instigation of his ex-

partner. At the cost of repetition, it is worth to note that except putting suggestions to the complainant and reasserting defence in the affidavit filed in lieu of examination-in-chief, the accused has not placed cogent and acceptable evidence to prove his defence.

24. From the overall consideration of the evidence on record it is forthcoming that, accused has not taken probable defence to rebut the statutory presumption. Mere denial is not sufficient to discharge

the onus shifted on accused. To fortify this opinion, it is proper to refer the decision reported in, 2001 CRI.L.J. 4647, in a case of Hiten P.Dalal V/s. Bratindranath Banerjee, wherein it is held that;

"(B) Negotiable Instrument Act ( 26 of 1881), Ss.139, 138- Dishonour of cheque-

Presumption that cheque was drawn for discharge of liability of drawer- Is presumption of law- Ought to be raised by Court in every case- Rebuttal evidence- Nature- Mere plausible explanation is not sufficient- Proof of explanation is necessary.

Evidence Act (1 of 1872), Ss .114, 101-

104."

Further in another decision reported in, 2017(2) A.K.R. 527, Arjun Vs.E.Shekar, it is held that, S. 138, 139- Presentation of lawful consideration- Rebuttal of - Burden of proving that cheque has not been issued for any debt or liability - is on accused -

mere plausible explanation not sufficient to disprove complainant's case.

From the gist of the ratio laid down in the above decisions, it is clear that, burden shift on the accused to rebut the statutory presumption through cogent evidence, which is not discharged by the accused in the present case.

25. The accused has taken a vague defence and not placed cogent evidence to prove the same. This aspect is discussed in detail in a decision reported in, 2014(4) AKR 98 between Sripad Vs.Ramadas M.Shet, Criminal Appeal No.2689 of 2009, wherein it is held that;

"Negotiable Instrument Act (26 of 1881), Ss.138,139, 118- Dishonour of cheque-

Acquitted-Validity-Cheque issued by repay loan amount to complainant, was dishonoured-Specific defence -However, accused failed to rebut initial presumption under sections 118 and 119- Mere distorted version or mere taking up defence by It means that he is not liable to pay any amount- Are not sufficient to put back the burden on to the complainant- Acquittal of accused- Not proper."

The ratio laid down in the cited decision is squarely applicable to the facts on hand.

26. In this case plea of the accused was recorded as per section 251 of Cr.P.C. Accused pleaded not guilty. As per section 251 of Cr.P.C. accused has to state about his defence. Here, except pleading not guilty accused has not stated his defence at the time of recording plea. As per the decision reported in AIR 2014 SC 2528 (Indian Bank Association V/s Union of India), Crl. Petition No.8943/2010 M/s.Mess Transgare Pvt V/s Dr .R. Parvathareddy and in Rajesh Agarwals case, Wherein, it is held that; " Accused cannot simply say " I am innocent " or " I pleaded not guilty ". The proposition of law laid down in the aforesaid decision is squarely applicable to the facts and circumstances of this case.

As such, it cannot be taken that accused has rebutted the presumption of law enshrined under section 139 and 118 of N.I. Act, by mere pleading not guilty.

27. From the discussion made supra, it is clear that, accused has neither taken probable defence nor taken steps to prove the same. To put it other way, accused has not taken and proved probable defence to rebut the presumption of law available in favour of the complainant, envisaged under section 118 read with section 139 of N.I. Act. Accordingly, the case of the complainant is believable. Complainant has proved that, accused has intentionally not maintained sufficient amount in his account to honour the disputed cheque. Hence, this point No.1 under consideration is answered in the affirmative.

28. POINT NO.2: In view of the reasons stated and discussed above, the complainant has proved the guilt of the accused punishable under section 138 of N.I. Act. It is worth to note that, the offence is of the nature of civil wrong. Hence, it is proper to award sentence of fine, instead of awarding sentence of imprisonment. Hon'ble Supreme Court of India in a decision reported in, (2015) 17 SCC 368, in a case of H.Pukhraj Vs. D.Parasmal, observed that, having regard to the length of trial and date of issuance of the cheque, it is necessary to award reasonable interest on the cheque amount. Considering all these aspects, this court proceed to pass the following;

ORDER

Acting under section 255 (2) of  
Criminal Procedure Code, accused is

hereby convicted for the offence punishable under section 138 of Negotiable Instrument Act and sentenced to pay fine of Rs.4,25,000/- (Four Lakh Twenty Five Thousand Rupees only). In default thereof accused shall undergo simple imprisonment for 2 (Two) months.

Acting under section 357(1) (b) of code of criminal procedure, it is ordered that, Rs.4,20,000/- (Four Lakh Twenty Thousand Rupees only), there from shall be paid to the complainant as a compensation, remaining fine amount of Rs.5,000/- ( Five Thousand Rupees only) is defrayed to the state for the expenses incurred in the prosecution.

The bail bond of the accused stands cancelled.

Office to supply the copy of this  
Judgment to the accused immediately on  
free of cost.

{Dictated to the stenographer, transcribed and computerized by her, corrected and then signed by me and then pronounced in the open court on this 8th day of August 2018}.

KALPANA.M.S.) ( XX ACMM, Bengaluru.



ANNEXURE List of witnesses examined on behalf of complainant:

P.W.1 Channegowda List of documents produced on behalf of complainant:

Ex.P.1	Cheque
Ex.P. 1(a)	Signature of the accused
Ex.P. 2 & 3	Bank endorsement
Ex.P. 4	Copy of the legal notice
Ex.P. 5	Postal receipt
Ex.P. 6	Postal cover
Ex.P. 7	Certified copy of orders in LAC No.24/1987
Ex.P. 8 to 12 and 14	Rental agreements
Ex.P.13	Bank pass book of Complainant

List of witnesses examined on behalf of accused:

D.W.1 Umesh List of documents produced on behalf of accused:

Ex.D.1	Reconstitution deed dated 25.01.2011
Ex.D.2	Copy of the complaint to police commissioner
Ex.D.3	Copy of the complaint to Bank Manager of Kotak Mahindra Bank

XX A.C.M.M.,  
Bengaluru.