

Dr.Jitendra Kumar vs Mr.Muzammil Pasha on 19 April, 2018

IN THE COURT OF LVII ADDL. CHIEF METROPOLITAN
MAGISTRATE, MAYO HALL UNIT, BENGALURU

- : PRESENT :-

PADMA PRASAD, BA (Law), LLB.

LVII ADDL. CHIEF METROPOLITAN MAGISTRATE,
BENGALURU.

DATED THIS THE 19TH DAY OF APRIL, 2018.

C.C.No.52916/2017

COMPLAINANT

: Dr.Jitendra Kumar
S/o Mr.Dharmichand
Aged about 48 years
Residing at No.17
Tambuchetty Road
Cox Town,
Bengaluru - 560005.

.Vs.

ACCUSED

: Mr.Muzammil Pasha
S/o Late. Mohammed Abdul Haj
Aged about 48 years
R/at No.30 & 30/1
Wheeler Road, 2nd Cross,
Cox Town Bengaluru - 560 005.

JUDGMENT

The complainant filed this complaint against the accused for the offence punishable under Section 138 of Negotiable Instruments Act.

2. The complaint case in nutshell is that the accused is a close family friend of the complainant since many years. The complainant is having implicit faith with the accused and trusted the accused. The complainant claims that the accused approached him for a hand loan of Rs.50,00,000/- for his financial crises and to meet certain domestic issues. The complainant also claims that the accused issued a cheque bearing No.045235 for Rs.5,00,000/- dtd:12.01.2015 drawn on Canara Bank, Madhavanagara Branch, Bengaluru towards the discharge of part debt vide a memorandum of understanding dtd:17.09.2012. When the complainant presented the said cheque for encashment, that has been dishonoured with bank endorsement stating "Funds Insufficient". The complainant further claims that the accused agreed to repay Rs.50,00,000/- to the complainant with 9% interest p.a. Accordingly issued a post dated cheque bearing No.045236 dtd:12.01.2015 for Rs.5,00,000/- drawn on Canara Bank, Madhavanagara Branch towards the part payment. When the complainant presented the said cheque that has been returned without encashment with bank memo dtd:27.01.2015 stating "Funds Insufficient". Thereafter the complainant caused a legal notice to the accused on 20.04.2015 that has been served on 27.02.2015. The accused inspite of the service of the

notice, failed to comply with the notice. Hence, filed this complaint.

3. After filing the complaint, sworn statement of the complainant has been recorded and on perusing the materials on record i.e., cheque, bank endorsement, legal notice and documents for having been caused the notice to the accused, the court has been taken the cognizance of offence and issued summons to the accused.

4. In response to the summons, the accused appeared through his counsel and he was on court bail. Plea has been recorded; accused pleaded not guilty and claimed to be tried.

5. To prove the case, the complainant got examined himself as P.W.1 and got marked documents at Ex.P.1 to P.7.

6. On closure of complainant side evidence, the accused statement has been recorded under Sec.313(1)(b) of Cr.P.C., by placing the incriminating evidence appeared against the accused that are denied by the accused.

7. The accused in support of his defense examined himself as D.W.1 wherein he made out a case that there is no transaction whatsoever between him and the complainant. The accused claims that his brother Dr.Mohsin Pasha is also a Doctor by profession and he know the complainant through his said brother. The accused totally disputed the borrowing of any money from the complainant. The accused specifically claimed that there is a money transaction between the complainant and his brother Dr.Mohsin Pasha. The complainant has forcibly taken 14 to 15 cheques from him. The accused disputed the service of legal notice and the notice has been sent to the wrong address. The accused also claimed that he has not signed any memorandum of understanding. The accused further claims that he has signed the document that has been already filled up and told him to sign. The accused claims that out of friendship he has signed the said document. Further, the accused also claims that the complainant told him that he is not trusting his brother and accordingly asked him to issue the cheques and also got marked document at Ex.D.1 and 2.

8. On the basis of above, the point for consideration is that;

"Whether the complainant has proved that the accused has committed the offence punishable under Sec.138 of Negotiable Instruments Act?"

9. Heard the arguments and perused the materials on record. On that basis my finding on the above point is in the "Affirmative" for the following;

REASONS

10. The specific case of the complainant is that the accused is a close family friend of the complainant since many years. The complainant is having implicit faith with the accused and trusted the accused. The complainant claims that the accused approached him for a hand loan of Rs.50,00,000/- for his financial crises and to meet certain domestic issues. The complainant also

claims that the accused issued a cheque bearing No.045235 for Rs.5,00,000/- dtd:12.01.2015 drawn on Canara Bank, Madhavanagara Branch, Bengaluru towards the discharge of part debt vide a memorandum of understanding dtd:17.09.2012. When the complainant presented the said cheque for encashment, that has been dishonoured with bank endorsement stating "Funds Insufficient". The complainant further claims that the accused agreed to repay Rs.50,00,000/- to the complainant with 9% interest p.a. Accordingly issued a post dated cheque bearing No.045236 dtd:12.01.2015 for Rs.5,00,000/- drawn on Canara Bank, Madhavanagara Branch towards the part payment. When the complainant presented the said cheque that has been returned without encashment with bank memo dtd:27.01.2015 stating "Funds Insufficient". Thereafter the complainant caused a legal notice to the accused on 20.04.2015 that has been served on 27.02.2015. The accused inspite of the service of the notice, failed to comply with the notice. Hence, filed this complaint.

11. The accused in support of his defense examined himself as D.W.1 wherein he made out a case that there is no transaction whatsoever between him and the complainant. The accused claims that his brother Dr.Mohsin Pasha is also a Doctor by profession and he know the complainant through his said brother. The accused totally disputed the borrowing of any money from the complainant. The accused specifically claimed that there is a money transaction between the complainant and his brother Dr.Mohsin Pasha. The complainant has forcibly taken 14 to 15 cheques from him. The accused disputed the service of legal notice and the notice has been sent to the wrong address along with financial capacity of complainant to advance the loan. The accused also claimed that he has not signed any memorandum of understanding. The accused further claims that he has signed the document that has been already filled up and told him to sign. The accused claims that out of friendship he has signed the said document. Further, the accused also claims that the complainant told him that he is not trusting his brother and accordingly asked him to issue the cheques and also got marked document at Ex.D.1 and 2.

12. The complainant in order to prove his case examined himself as P.W.1 by filing evidence affidavit wherein he stated in consonance with the complaint case. The complainant also produced documents at Ex.P.1 to 7. Ex.P.1 is the cheque, Ex.P.2 is the bank endorsement, Ex.P.3 is the O/c of the legal notice, Ex.P.4 and 5 are the postal acknowledgment and postal receipt for having been sent and served the notice to the accused, Ex.P.6 is the memorandum of understanding, Ex.P.7 is the sale agreement. The accused also examined himself in support of his defense as D.W.1 and got marked documents at Ex.D.1 and 2. The specific defense of the accused that he has not borrowed any money from the complainant but the money has been advanced to his brother by the complainant. As the complainant was not in good faith with the brother of the accused. The complainant got obtained the memorandum of understanding and cheque of this accused as a security for the loan availed by the brother of accused. Hence, issuance of the cheque and signature in the cheque is admitted fact. The cheque has been dishonoured for want of funds in the bank account of the accused. The cheque has been presented for encashment from the date of cheque within its validity, legal notice has been issued in time and even the complaint has been filed in time. Hence, the initial presumption under Sec.139 of N.I.Act certainly can be drawn in favour of the complainant that the accused issued the cheque in favour of the complainant towards the discharge of legally enforceable debt.

13. When the complainant made out a case to draw initial presumption under Sec.139 of N.I.Act, the burden totally shifts on the accused to prove the contrary or give a rebuttal evidence or at least he has to make a probable defense so that the complaint case can be disbelieved.

14. In order to attract the offence under Sec.138 of N.I.Act, the complainant has to comply statutory requirements contemplated under Section (a) to (c) of 138 of N.I.Act that includes the service of notice. The accused claimed that he has not received any notice. It is the specific case of the accused that the notice has been sent to wrong address. If it were so, the burden is on the accused to show his correct address. The accused either during the cross-examination of complainant or during his evidence has not made out what is his correct address. The address stated in the complaint cause title, legal notice reads as; R/at No.30 & 30/1 Wheeler Road, 2nd Cross, Cox Town, Bengaluru - 560 005. Now, it is to be considered that whether the said address is the proper and correct address of the accused. The accused has not given any particulars of his address before the court. The complainant has produced the memorandum of understanding at Ex.P.6. The signature of accused in the said memorandum of understanding Ex.P.6 not in dispute. The address of accused stated in said memorandum of understanding is the identical to the address stated in legal notice and in the complaint. It is relevant to note that the accused during the trial confronted one notice issued by the complainant at Ex.D.1 and thereby claimed that during the pendency of the case, the complainant caused one more notice regarding the bouncing of cheque from Raichur. Whatever the contention by the accused one thing is certain that the complainant has received one more legal notice from the complainant during the pendency of this case and thereby admitted the service of notice. The address stated in Ex.D.1 notice also reads as; "R/at No.30 & 30/1 Wheeler Road, 2nd Cross, Cox Town, Bangalore". Therefore, it is clear that whatever the notice sent to the address stated in Ex.D.1 will serve on the accused. If Ex.D.1 can be delivered to the accused certainly the notice Ex.P.3 also served on the accused. Apart from that the notice sent to the accused not returned on the reason that address is not correct but that has been returned by someone in the address stated therein. Therefore, it is clear that the complainant caused the legal notice to the correct address and the notice is duly served on the accused. Hence, the contention of the accused that no notice served on him cannot be accepted.

15. The other contention raised by the accused is that the complainant has no financial capacity to lend the loan. The said contention would have been accepted if the complainant has relied only on Ex.P.1 cheque but in the case on hand the complainant also claimed that the accused has executed the memorandum of understanding at Ex.P.6 regarding the transaction and as per said document, this complainant has advanced Rs.50,00,000/- to the accused. Of course it is claimed by the accused that the transaction stated in memorandum of understanding Ex.P.6 is between the complainant and his brother. Even if it were so, the accused is indirectly admitting that the complainant has the money with him and advanced to his brother. Apart from that the accused himself claimed that the complainant is a money lender and he has advanced Rs.1 Crore to the brother of accused. All these facts sufficiently establishes the fact that the complainant has the capacity to advance the money as claimed in the complaint. Apart from that as per Section 121 of N.I.Act, the accused is estopped from disputing the money lending capacity of the complainant.

16. As already stated earlier, the complainant in order to prove his case, much relied on the Ex.P.6 memorandum of understanding. The signature of the accused in the said memorandum of understanding is not disputed. Of course it is claimed by the accused that the signature has been forcibly obtained. The said memorandum of understanding clearly discloses that the said memorandum of understanding has been executed on 17.09.2012 by the accused. The stamp paper used for preparing the said document clearly shows that the said stamp paper also brought by the accused himself. The said document prima-facies shows that the accused has borrowed Rs.50,00,000/- from the complainant and agreed to repay the same with interest at the rate of 9% p.a. as well as installments as stated in condition No.2(a) to (d). In the said memorandum of understanding at condition No.3 it is also stated that the accused has issued the cheques as a security for the aforesaid amount. The said document certainly probablise the case of the complainant that the accused has borrowed money from the complainant as claimed in the complaint. It is relevant to note that the accused not disputed the execution of memorandum of understanding at Ex.P.6. Even issuance of the cheque is also not in dispute. It is the claim of the complainant that the cheque involved in this case has been issued towards the part payment of loan borrowed by the accused.

17. When the complainant made out prima-facie case to draw presumption under Sec.139 of N.I.Act, the burden shifts on the accused to prove the contrary. As the burden shifts on the accused to prove the contrary, the accused himself examined as D.W.1. The accused made out a specific case in his evidence is that there was some transaction between the complainant and his brother namely Dr.Mohsin Pasha and the accused further claims that the complainant has taken cheques forcibly from the accused in connection with the aforesaid transaction. It is specifically claimed by the accused that the complainant has taken 14 to 15 cheques from him. The entire defense evidence nowhere discloses that he has disputed the Ex.P.6 memorandum of understanding. Under what circumstances he has executed the memorandum of understanding is also not explained by him. It is also relevant to note that there is no material on record to show that there is any transaction between the complainant and brother of the accused. Further, if at all the transaction between the complainant and brother of the accused, certainly there is no necessity for the accused to execute the memorandum of understanding at Ex.P.6 as well as issuance of bundles of cheques. Of course if at all the accused stood as a surety, he might have issued 1 or 2 cheques but certainly it is not necessary for him to give a bundle of cheques. Apart from that if at all the transaction is between the complainant and brother of the accused, certainly the brother of the accused would have been made as a party to the memorandum of understanding or he would have chosen to examine his brother in support of his case. There is no material on record to show that this accused is not in good terms with his brother so that his brother may refuse to give evidence in his behalf. At this juncture, it is also relevant to note that the complainant during his cross-examination claimed that the accused has issued 50 cheques in his favour. The accused not disputed the said fact. Of course during his evidence claimed that he has issued only 14 to 15 cheques. It is relevant to note that as per condition No.3 at memorandum of understanding it has been stated that the cheque has been issued for the security for the repayment of money. As per memorandum of understanding, the accused agreed to repay the loan of Rs.50,00,000/- in 50 installments of Rs.1,00,000/- each. Hence, the case of the complainant that the accused has issued 50 cheques is quite probable.

18. It is also relevant to note that the accused is a BE Graduate. Even according to him, he has issued 14 to 15 cheques as a security in a transaction between complainant and his brother. The accused totally disputed the borrowing of any money from accused. Inspite of that he has not issued any stop payment instructions to his banker or lodged any complaint against the complainant with allegation that the complainant has forcibly taken the cheques from him. The accused has taken contradictory contentions in the case. In one stretch he has claimed that signatures and cheques have been obtained forcibly but in another stretch he claimed that memorandum of understanding and cheques have been obtained or issued to the complainant as a security in a transaction of his brother. Even if it is accepted that the cheque have been issued as a security, certainly these cheques can be enforced as the accused himself agreed for the payment of money in case his brother failed to repay the amount. Even on that count, the defense of the accused cannot be accepted.

19. As already stated earlier, the accused disputed the borrowing of money and claimed that the transaction is between the complainant and his brother. If it were so, there is no necessity for the accused to make a payment of money in installments to the complainant. In this context it is useful to refer the cross-examination of P.W.1 at page No.7, wherein it is elicited from the mouth of the complainant that;

"wAUÀ½UÉ ªÄÄÆªÀvÄÄÛ ,Á«gÀzÄAvÉ DgÉÆÄ'ÄiÄÄ £À£ÀUÉ °ÀtªÀ£ÄÄß
ªÄrgÄÄvÁÛgÉ. JµÄÄÖ wAUÀ¼ªªÄgÉUÉ ªÄrgÄÄvÁÛgÉAzÄÄ £À£ÀUÉ
£É£ÀgÄÄªÄÄ¢®è".

20. It is relevant to note that the aforesaid suggestions or answers have been elicited from the mouth of complainant during his cross examination. Subsequently it is not denied by accused that he has not at all or never paid Rs.30,000/- p.m. to the complainant. If at all he has not borrowed any money from the complainant, there is no necessity for the accused to elicit such fact from the mouth of complainant. Even the said fact also discloses that it is the accused who has borrowed money from the complainant and issued the cheque.

21. According to Ex.D.2 the complainant has issued the stop payment instructions to his banker as on 03.02.2015. The cheque has been presented for encashment prior to that and even the bank memo has been issued as on 27.01.2015. As such after knowing the fact that the cheque has been bounced this accused has issued stop payment instructions. If really this accused has given a cheques as a security or he has issued a cheques he would have issued stop payment instructions immediately as he has the knowledge of issuance of cheques in favour of the complainant. It is relevant to note that the accused has produced only the letter issued by the bank but he has not produced any document to show that what is the reason given by him to the bank to issue a stop payment instructions. Why the accused has not produced the copy of the letter submitted by him to the bank or what is the reason given by him to the bank is without any explanation. Under such circumstances, certainly it can be inferred that the issuance of stop payment instructions is an after thought.

22. It is relevant to note that the signature of the accused in a memorandum of understanding is not in dispute and even the execution of said document is not in dispute. When the documents have

been marked in the presence of accused without any objection by the accused certainly the accused cannot be permitted to deny the execution of said document in view of the principles laid down by Hon'ble Supreme Court in a case reported in; ILR 2004 Kar 183. In a case of Narbada Devi Gupta .Vs. Beerendra Kumar Jaiswale and another held that "Proof of document - Evidence Act. Sec.17, 61 and 62 - proof of contents of documents - Mere production and marking of document as exhibit not enough - Execution has to be proved by admissible evidence - But where documents produced are admitted by the signatories there and marked as exhibits held No further burden to lead additional evidence to prove writing and its execution survives. Hence, it has to be accepted that after the borrowing the money as claimed by the complainant this accused has executed the Ex.P.6 memorandum of understanding as on 17.09.2012 and issued the cheques as a security for payment. Apart from that there is no material on record to show that the complainant has the habit of advancing the money to the others and obtaining the documents from others. Apart from that the accused being a BE Graduate and prudent man cannot be expected to sign at blank document. Further, the accused certainly not a fool or so much innocent so that he can sign any document without going through the document or he do not know the consequence of signing blank document. Further what is the compelling reasons for him to sign the document at Ex.P.6 or issuance of cheque in favour of the complainant is not satisfactorily explained. Hence, it has to be accepted that the Ex.P.6 memorandum of understanding has been executed by the accused in favour of the complainant when he has borrowed loan from the complainant.

23. One more contention raised by the accused is that the cheque has been issued long back and the cheque has not been presented for encashment within statutory prescribed period of 3 months as notified by the RBI. It is true that there is a material on record to show that the cheque has been issued as a security. The contention of issuing a cheque for security itself discloses that the accused himself authorized the complainant to use the cheque in the event he fails to make the payment. The very object of either issuing the cheque for security or obtaining the cheque for security itself discloses that in the event there is a failure to make the payment then, the person who issues the cheque as a security is authorizing the holder of the cheque to enforce the cheque. Hence, the said contention cannot be accepted.

24. In view of these facts, the other discrepancies found in the complaint case that the complainant has not filed the Income Tax Returns or he has issued the notice to the accused in connection with the other cheques from Sindhanoor of Raichur District or the Ex.P.7 has been created certainly will not make any difference in the complaint case. It may be true that the first 4 pages of the Ex.P.1 sale agreement may be a color Xerox paper but that does not make any difference particularly when Ex.P.6 clearly discloses the advancing of loan that has been admitted by the accused. Therefore, for the aforesaid reasons the principle laid down in a CrI.Appl.No.2402/2014 in a case of K.Subramani .Vs. Damodar Naidu certainly not applicable to the facts of this case. Hence, certainly there is no water in the defense taken by the accused. Therefore, for the aforesaid reasons this court is of the humble opinion that the complainant proved his case beyond reasonable doubt.

25. In this case, the complainant has claimed compensation. As per Section 357 of Criminal Procedure Code and as per the ruling reported in; 2001 Cri.L.J. 950 (SC), (Pankajbai Nagibai Patel V/s State of Gujarath), the court can award compensation and there were no limits for the same. As

such, the court has to consider how much compensation could be awarded in this case. As per Section 80 of Negotiable Instruments Act, the interest at 18% P.A. can be granted when there is no agreed rate of interest. As per the proved facts of the case, the accused has issued cheque towards the legally enforceable debt, the accused has issued a cheques dated 12.01.2015 per Ex.P.1 and thus, the accused has to pay interest on the cheque amount from the date of cheque and so, the accused has to pay interest for about 3 year 3 months till this date. If the interest is calculated at 18% P.A. to the cheque amount for the above period, certainly, the complainant is entitled for the suitable compensation to the cheque amount as per Section 80 of Negotiable Instruments Act. The cheques amount in this case is Rs.5,00,000/- and if the interest is calculated for 39 months, the accused shall pay the interest to the complainant at 18% P.A. that amounts to Rs.2,92,500/-. The case is pending nearly about 3 years as such if the cost of Rs.1,500/- is added to the compensation, it will comes to Rs.7,94,000/-(Cheque amount is Rs.5,00,000/-, interest is Rs.2,92,500/- and cost Rs.1,500/-). Hence, this court is of the humble opinion that in all the complainant is entitled for compensation amount of Rs.7,94,000/-. Further as per the ruling reported in 2000 Cri.L.J 1793(b) SC - (State of Karnataka V/s Krishnappa) wherein it is held that while imposing sentence, the courts are expected to properly operate sentence system, it should be impose such sentence for code offence which serve as detention of commission of like offences by others - Socio economic status, prestige, race, caste or creed of accused or victim are irrelevant considerations in sentencing policy. Hence, in this case also, if the accused is punished with simple imprisonment for one year and pay compensation to the complainant. Anyhow the object of Sec.138 of N.I.Act is to have accountability in the business transaction and the intention of the complainant is only to get his money back. The complainant certainly not interested in sentencing the accused for any imprisonment. Further, the offence is punishable with imprisonment or fine. Anyhow the object of Sec.138 of N.I.Act is to have accountability in the business transaction and the intention of the complainant is only to get his money back. The complainant certainly not interested in sentencing the accused for any imprisonment. Further, the offence is punishable with imprisonment or fine. Hence, in this case after awarding the compensation certainly imposing of fine to the accused is sufficient sentence.

26. As per the ruling reported in 2002 Cri.L.L. 1003, SC (Suginthi Suresh Kumar V/s Jagadishan). Where in it is held at page no.1005, at para 5 that:

"In the said decision this court reminded all concerned that it is well to remember the emphasis laid on the need for making liberal use of Section 357(3) of the Code. This was observed by reference to a decisions of this Court in 1988 (4) SCC 551 Hari Singh v. Sukhbir Singh. In the said decision this court held as follows:

"The quantum of compensation may be determined by taking into account the nature of crime, the justness of the claim by the victim and the ability of accused to pay.

If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also very depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by installments, may also be given. The court may enforce the order by imposing sentence in default."

27. In view of the aforesaid precedent of Hon'ble Apex Court, if the accused is ordered to further imprisonment of a year in default to pay the compensation will make the ends of justice. Accordingly I answer the above point in "Affirmative". In the result, following;

ORDER Acting under Section 255(2) of Cr.P.C., the accused is hereby convicted for the offence punishable under Sec.138 of N.I.Act and sentenced him to pay a fine of Rs.5,000/-. In default to pay the fine amount the accused shall undergo simple imprisonment for 3 months.

Acting under Section 357 of Cr.P.C., the compensation is awarded and the accused shall pay compensation of Rs.7,94,000/- to the complainant. In default to pay compensation, the accused shall undergo simple imprisonment of a period of 1 year.

Office to furnish free copy of this judgment to the accused forthwith.

(Dictated to the Stenographer, transcript thereof is corrected and then pronounced by me in the open court on this the 19th day of April, 2018) (PADMA PRASAD), LVII ACMM, BENGALURU.

ANNEXURE

1. Witnesses examined on behalf of Complainant:

P.W.1 : Dr.Jitendra Kumar
2. Documents marked on behalf of complainant:
Ex.P.1 : Cheque
Ex.P.1(a) : Signature of the accused
Ex.P.2 : Bank Return Memos
Ex.P.3 : O/c of the legal notice dtd:13.10.2016
Ex.P.4 : Postal acknowledgement
Ex.P.5 : Postal Receipt
Ex.P.6 : Memorandum of Understanding
dtd:17.09.2012
Ex.P.7 : Sale Agreement

3. Witnesses examined on behalf of Accused:

D.W.1 : Mr.Muzammil Pasha

4. Documents marked on behalf of Accused:

Ex.D.1 : Letter dtd:05.08.2017
Ex.D.2 : Bank Letter dtd:11.08.2017

(PADMA PRASAD)
LVII ACMM, BENGALURU.