Vivek Bikkarnakatte vs Ajay Kharbanda on 31 August, 2020

BEFORE THE LXVI ADDL.CITY CIVIL & SESSIONS
JUDGE, BENGALURU CITY.
(CCH-67)

DATED: This the 31 st day of August, 2020

PRESENT
Smt. K.KATHYAYANI, B.Com., L.L.M .,
LXVI Addl.City Civil & Sessions Judge,
Bengaluru.

Criminal Appeal No.954 of 2019

Appellant: Vivek Bikkarnakatte,
S/o Sri.Rajendra Kumar,
Aged about 41 years,
D.No.1-24/1, Panama House,
Kuloor Kavoor Road,
Panjimogaru, Mangaluru - 575 013.
(By Sri.S.Rajashekar, Adv.)

/Vs/

Respondent : Ajay Kharbanda,
S/o Sri.Sudarshan Kumar,
Aged about 47 years,
R/at No.312, Prestige Penta,
Eva Mali, No.60, Brigade Road,
Bengaluru 560 025.
(By Sri.Murthy Dayananda Naik,
Adv.)

JUDGMENT

The appellant/accused has preferred this appeal against the respondent/complainant under Section 374(3) of Cr.P.C. being aggrieved by the judgment of conviction Crl.A.No.954/2019 passed in CC.No.14703/2017 dated 26.03.2019 by the learned XII ACMM, Bengaluru.

2. For the sake of convenience, the ranks of the parties are retained as they are before the learned Magistrate Court.

3. The brief facts of the case are that;

a) The complainant has come up with the complaint that the accused being acquainted with him, had borrowed Rs.25,00,000/- as hand loan on 20.09.2016 by executing on demand promissory note and agreed to repay the same with interest at 5% p.m. on or before 30.10.2016.

b) The accused failed to repay the said amount even after completion of stipulated period and on repeated requests and demands made by him, on 07.03.2017, the accused issued the cheque bearing No.973388 drawn on South Indian Bank Ltd., Krishna Towers, Lady Hill, Mangaluru for a sum of Rs.31,87,500/-.

c) When the said cheque was presented for encashment, the same came to be dishonoured with the endorsement that "insufficient funds" on 08.03.2017.

Crl.A.No.954/2019

d) In spite of issuance of legal notice dated 14.03.2017, the accused instead of complying with the demand made in the notice, has issued the reply notice on 28.03.2017. Hence, the complaint.

4. The trial Court record reveals that the complaint was filed on the file of XX ACMM, Bengaluru and as per the Notification No.ADM-1/19/2017 dated 20.11.2017, the case was transferred to the Court of XII Additional Small Causes Judge and XII ACMM, Bengaluru.

a) On receipt of the complaint, the learned Magistrate was pleased to record the sworn statement of the complainant wherein the complainant has produced 8 documents at Ex.P-1 to 8.

b) On satisfaction of the sworn statement and the documents produced by the complainant, the learned Magistrate has taken cognizance and issued summons to the accused.

c) The accused appeared through his counsel and was enlarged on bail.

Crl.A.No.954/2019

d) Plea of the accused was recorded for the offence punishable under Section 138 of the NI Act for which he has pleaded not guilty.

e) The sworn statement of the complainant was treated as his chief evidence. In addition, to the documents, he has produced along with his sworn statement, the complainant has produced one more document at Ex.P-9. Got examined one witness by name Sri.S.V.Harish Babu as PW-2 and closed his side.

f) Statement of the accused under Section 313 of Cr.P.C. was recorded, wherein the accused denied all incriminating evidence against him and in support of his defence, he himself has stepped into the witness box as DW-1. Got exhibited no documents and got examined no other witnesses as well as closed his side.

g) After hearing both sides on merits of the case and on going through the evidence on record, the learned Magistrate has passed the impugned judgment convicting the accused for the offence punishable under Section 138 of the NI Act and sentenced accordingly.

Crl.A.No.954/2019

5. Being aggrieved by the above judgment of conviction, the accused has approached this Court with the following grounds;

a) The impugned judgment is wrong, contrary to law and also against to the evidence on record.

b) The trial Court has failed to appreciate the simple fact that the complainant did not have Rs.25,00,000/- and has specifically contended that he availed hand loan from PW-2 and thereafter paid the same to the accused.

c) The complainant has specifically contended that he was not doing any financial activities and it is the case of the complainant that he has lend Rs.25,00,000/- and towards discharge of the said amount with interest the cheque in question has been issued. This contention is contrary to the stand taken by the complainant and the same is not considered by the trial Court.

d) The complainant has not produced any documents to show that he had sufficient money to pay the alleged loan amount.

e) The trial Court has failed to appreciate the fact that the complainant has not shown the said transaction in his Crl.A.No.954/2019 income tax returns though the said amount is a large amount. It is relating to unaccounted money. It is well settled principles of law that the Courts cannot come to the rescue of a person who claims that he has lent the unaccounted money and the same is not considered by the trial Court.

f) The trial Court has failed to appreciate the simple fact that he has rebutted the presumption available under law. The entire transactions are in relation to the appointment of complainant as Chief Executive Officer of Panam Nature Fresh Corporation.

g) The complainant has admitted in his cross examination that Ex.P-8 is in relation to the other transaction and not relating to the payment in question claimed by him. In spite of the same, the trial Court by ignoring admission has mechanically proceeded to pass the impugned order which requires to be set aside.

h) The trial Court has failed to appreciate the evidence of PW-1 and PW-2 in its proper perspective. Their admissions have not been considered by the trial Court.

Crl.A.No.954/2019

i) The trial Court has failed to consider the fact that the complainant tried to improve his case after completion of cross examination of PW-1 by adducing the evidence of PW-2.

j) The complainant himself had availed loan from PW- 2 and then paid the same to accused, and this version cannot be believed in view of the settled principles of law laid down by the Hon'ble Apex

Court.

k) The trial Court has failed to consider the fact that he has rebutted the presumption available under Sections 118 and 139 of NI Act and that there was no existence of legally recoverable debt.

l) The trial Court has failed to appreciate Ex.P-8 in its proper perspective. The complainant has specifically admitted that Ex.P-8 is in relation to the share transfer and also with regard to his appointment as CEO. The details of Ex.P-8 clearly show that the said transaction is relating to the payment of Jayashree and Rajiv and not relating to the complainant and the accused. This aspect of the matter has been given a go bye by the trial Court.

Crl.A.No.954/2019

m) The admissions on the part of PW-2 with regard to non production of documents to substantiate his contention regarding availability of property and sufficient source of income to pay Rs.25,00,000/- to PW-1 has not been considered by the trial Court.

n) Apart from the same PW-2 is not paying any income tax since he is an agriculturist, whereas PW-2 has contended that his father in whose name the agricultural property are standing is paying the income tax. This aspect is not considered by the trial Court.

o) The trial Court has failed to consider his evidence as DW-1 and has given importance to one stray sentence in the evidence to convict him. It is settled principles of law that the evidence will have to be considered as a whole and not in pieces. The trial Court is not justified in giving importance to the stray sentence with regard to non visiting of the complainant to his office and convicting him especially when the complainant has failed to prove the case beyond reasonable doubt.

p) The trial Court has not assigned any reasons much less any cogent reasons for not accepting the judgments Crl.A.No.954/2019 relied upon by him and only on the basis of assumption and presumptions, has mechanically proceeded to pass the impugned order of conviction which requires to be set aside. Hence, prayed to allow the appeal in the interest of justice and equity.

6. In response to the due service of notice from this Court, the complainant/respondent put his appearance through his counsel.

7. Secured the trial Court record.

8. Heard both the sides on merits of the case. In support of his arguments, the counsel for accused/appellant has relied on the following decisions and produced the online printouts thereof.

1) 2015(1) SCC 99,

2) 2018(4) SCC 54,

3) 2014(2) SCC 236,

4) 2009(4) Mh.LJ 155 and the judgment passed in

5) Crl.Appeal No.173/2016 on 23.02.2018 by the Hon'ble High Court of Karnataka, Bengaluru.

a) On the other hand, the counsel for the complainant/respondent has relied on the following decisions and also produced online printouts thereof.

1) AIR 2019 SUPREME COURT 1876 and

2) 2020 SCC OnLine KER 1750.

Crl.A.No.954/2019

b) He has also relied on the following decisions on which he has relied on before the trial Court.

1) (2019) SCC OnLine SC 138,

2) AIR 2018 SC 3601 and

3) (2018)8 SCC 165.

9. On the basis of the grounds made out, following points are arisen for my determination.

1) Whether the accused/appellant proves the grounds urged by him in support of this appeal?

2) Whether the impugned judgment requires interference by this Court?

3) What Order?

10. My findings on the above points are answered in;

```
1) Point No.1         : Partly Affirmative.
2) Point No.2         : Affirmative.
3) Point No.3         : As per final order for the
                        following reasons.

                    REASONS
```

11. POINTS Nos.1 AND 2:- Since the findings on point No.2 is consequential to the findings on point No.1, these points are taken together for consideration.

12. The trial Court record demonstrates that it is the case of the complainant that the accused had

raised hand loan of Rs.25,00,000/- from him by executing a demand Crl.A.No.954/2019 promissory note agreeing to repay the same together with interest at 5% per month on or before 30.10.2016, but did not adhere to the promise. However, on repeated requests and demands made by him and towards the discharge of the above loan and the interest accrued thereon, the accused had issued the cheque in question.

13. On the other hand, the defence is that the complainant had approached him at his office ie.., Panama Nature Fresh (P) Ltd., during 2016 and entered into the business with him; approached him to appoint him/the complainant as CEO of the above company; pursuant to the mutual discussions, an agreement came to be entered into between them; there was two months time to finalize the agreement conditions, during which, he came to know about the pendency of various civil and criminal cases against the complainant; as such, a decision was taken to cancel the agreement to appoint the complainant as CEO of the company.

a) In the above period, the compliant had obtained a cheque as security towards bringing the investment to the company and misused the same with an intention to make Crl.A.No.954/2019 unlawful gain. The complainant had intended to purchase 25% of the share of the company and in order to bring the investors, the complaint had obtained the cheuqe so as to secure such investment. But, without bringing any investors, the complainant has misused the cheque by filing the same as per his whims and fancies.

14. So, it is clear that it is the case of the complainant that the cheque in question was issued towards discharge of the loan and the interest accrued thereon and on the other hand, it is the defence that it was issued towards the security to bring the investors to the company which was misused by the complainant.

15. The one more defence taken by the accused is that the complainant had no financial capacity to lend the alleged loan of Rs.25,00,000/-.

16. It is well settled proposition of law that the statutory presumptions under Sections 118 and 139 of the NI Act are in favour of the complainant and it is the accused who is required to bring in the cogent and corroborative piece of evidence to rebut it. Mere denial of existence of legally recoverable debt by the accused will not Crl.A.No.954/2019 serve his purpose. If the accused succeeds in letting in the cogent and corroborative piece of evidence, then, the onus shifts on the complainant to prove his case that the disputed cheque was issued towards the discharge of legally recoverable debt.

17. The trial Court record demonstrate that to prove his case, the complainant in support of his oral evidence, apart from the oral evidence of PW-2 has let in the documents at Ex.P-1 to 9 wherein Ex.P-1 is the cheque. There is no dispute with regard to the fact that the cheque at Ex.P-1 belongs to the bank account of the accused and it bears his signature.

18. Even it is in the chief affidavit evidence of the accused/DW-1 that the complainant had obtained the cheque at Ex.P-1 for the security purpose and misused the same by filling it as per his whims and fancies, there is no cross examination to the complainant on behalf of the accused with regard to

filling up of the contents of cheque at Ex.P-1.

19. So, in view of the admitted fact that the cheque at Ex.P-1 belongs to the bank account of the accused and it Crl.A.No.954/2019 bears his signature, the presumptions under Sections 118 and 139 of NI Act are of course in favour of the complainant and it is the accused who is required to rebut the said statutory presumptions by letting in cogent and corroborative evidence.

20. In this regard, the learned counsel for the complainant has relied on the decisions reported in;

a) AIR 2018 SUPREME COURT 3601 (between T.P.Murugan (Dead) Thr. Lrs. V. Bojan V. Posa Nandhi Re. Thr. POA Holder, T.P. Murugan v. Bojan in Criminal Appeal Nos.950 - 951 of 2018 arising out of SLP (Crl.) Nos.10111 - 10112 of 2014 decided on 31.07.2018 before their Lordships Rohinton Fali Nariman and Ms.Indu Malhotra, JJ.) wherein he has drawn my attention to the observations of the Hon'ble Apex Court that;

Negotiable Instruments Act (26 of 1881) Ss 118, 138, 139 -

.....

2.7 the respondent contended that the signed blank Promissory Note was issued by him in favour of N.R.R. Finances Investments Pvt. Ltd. Under a hire-purchase agreement for purchasing a lorry on loan basis. The said Promissory note was not issued in favour of the appellant- complainants. The Promissory Note was filled up by DW.2 Mahesh, an employee or N.R.R. Investments, after the signatures of the respondents were obtained on the same.

Crl.A.No.954/2019 .....

8. We have heard Senior Counsel for both parties, and perused the record. Under Section 139 of the NI Act, once a cheque has been signed and issued in favour of the holder, there is statutory presumption that it is issued in discharge of a legally enforceable debt or liability. This presumption is a rebuttable one, if the issuer of the cheque is able to discharge the burden that it was issued for some other purpose like security for a loan.

9. The appellants have proved their case by overwhelming evidence to establish that the two cheques were issued towards the discharge of an existing liability and legally enforceable debt. The respondent having admitted that the cheques and Pronote were signed by him, the presumption under Section 139 would operate. The respondent failed to rebut the presumption by adducing any cogent or credible evidence. Hence, his defence is rejected.

....."

b) 2018 Supreme Court Cases 165 : 2018 SCC OnLine SC 651 (between Kishan Rao V. Shankargouda in Criminal Appeal No.803 of 2018 decided on 02.07.2018 before their Lordships Dr.A.K.Sikri and Ashok Bhushan, JJ.) wherein he has drawn my attention to the observations of the Hon'ble Apex

Court that;

A.Debt, Financial and Monetary Laws - Negotiable Instruments Act, 1881 - .....

> "....
>
> 20. This Court held that the accused may adduce evidence to rebut the presumption, but mere denial regarding existence of debt shall not serve any purpose. The following was held in para 20: (Sharma Carpets, SCC p. 520) Crl.A.No.954/2019 "20. ..... The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the Court need not insist in every case that the accused should disprove the non- existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. ..."

21. In the present case, the Trial Court as well as the Appellate Court having found that cheque contained the signatures of the accused and it was given to the appellant to present in the Bank, the presumption under Section 139 was rightly raised which was not rebutted by the accused. The accused had not led any evidence to rebut the aforesaid presumption. The accused even did not come in the witness box to support his case. In the reply to the notice which was given by the appellant, the accused took the defence that the cheque was stolen by the appellant. The said defence was rejected by the Trial Court after considering the evidence on record with regard to which no contrary view has also been expressed by the High Court.

22. Another Judgment which needs to be looked into is Rangappa v. Sri Mohan. A three-Judge Bench of this Court had occasion to examine the presumption Under Section 139 of the 1881 Act. This Court in the aforesaid case has held that in the event the accused is able to raise a probable defence which creates doubt with regard to the Crl.A.No.954/2019 existence of a debt or liability, the presumption may fail. Following was laid down in paras 26 and 27: (SCC pp.453-

54) ....."

c) AIR 2019 SUPREME COURT 1876 (between Rohitbhai Jivanlal Patel v. Stte of Gujarat and another in Criminal Appeal No.508 of 2019 arising out of SLP (Crl.) No.1883 of 2018 decided on 15.03.2019 before their Lordships Abhay Manohar Sapre and Dinesh Maheshwari, JJ.) wherein he has drawn my attention to the observations of the Hon'ble Apex Court that;

(A) Negotiable instruments Act (26 of 1881), Ss.138, 139 - .....

".....

14. So far the question of existence of basic ingredients for drawing of presumption Under Sections 118 and 139 the NI Act is concerned, apparent it is that the accused appellant could not deny his signature on the cheques in question that had been drawn in favour of the complainant on a bank account maintained by the accused for a sum of Rs. 3 lakhs each. The said chques were presented to the Bank concerned within the period of their validity and were returned unpaid for the reason of either the balance being insufficient or the account being closed. All the basic ingredients of Section 138 as also of Sections 118 and 139 are apparent on the face of the record. The Trial Court had also consciously taken note of these facts and had drawn the requisite presumption. Therefore, it is required to be presumed that the cheques in question were drawn for consideration and the holder of the cheques i.e., the complainant received the same in discharge of an existing debt. The onus, therefore, shifts on the accused - appellant to establish a probable defence so as to rebut such a presumption.

Crl.A.No.954/2019 .....

16. On the aspects relating to preponderance of probabilities, the accused has to bring on record such facts and such circumstances which may lead the Court to conclude either that the consideration did not exist or that its non-existence was so probable that prudent man would, under the circumstances of the case, act upon the plea that the consideration did not exist. This Court has, time and again, emphasized that though there may not be sufficient negative evidence which could be brought on record by the accused to discharge his burden, yet mere denial would not fulfill the requirements of rebuttal as envisaged Under Section 118 and 139 of the NI Act. This Court stated the principles in the case of Kumar Exports (AIR 2009 SC 1518, Para11) (supra) as follows:

"20. The accused in a trial Under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is

probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a Crl.A.No.954/2019 prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may like wise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections118 and 139.

.....

17. In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant. The aspect relevant for consideration had been as to whether the accused-appellant has brought on record such facts/material/circumstances which could be of a reasonably probable defence.

18. In order to discharge his burden, the accused put forward the defence that in fact, he had the monetary transaction with the said Shri Jagdishbhai and not with the complainant. In view of such a plea of the accused- appellant, the question for consideration is as to whether the accused-appellant has shown a reasonable probability of existence of any transaction with Shri Jagdishbhai? In this regard, significant it is to notice that apart from making certain suggestions in the Cross-examination, the Crl.A.No.954/2019 accused-appellant has not adduced any documentary evidence to satisfy even primarily that they had been some monetary transaction of himself with Shri Jagdishbhai. Of course, one of the allegations of the appellant is that the said stamp paper was given to Shri Jagdishbhai and another factor relied upon is that Shri Jagdishbhai had signed on the stamp paper in question and not the complainant.

....."

21. The other side has not disputed the principles rendered in the above decisions which are well settled proposition of law.

22. As noted above, it is the defence of the accused that he has issued cheque for the security purpose which was misused by the complainant. To prove the above defence and to rebut the statutory presumptions, it is stated in para No.3 of the chief affidavit evidence of the accused/DW-1 that the complainant approached him at his office i.e. Panama Nature Fresh Office (P) Ltd during 2016 to enter into the business with him and approached to appoint him/the complainant as Chief Executive Officer of the above company.

23. It is also in the same para i.e., para No.3 of his chief evidence that in pursuant to mutual discussion, they entered into an agreement and there was two weeks time Crl.A.No.954/2019 for finalizing the agreement conditions. In the meanwhile, since he came to know about pendency of various civil and criminal cases against the complainant, a decision was taken to cancel the agreement of appointing the complainant as CEO of the company.

24. It is also in his chief affidavit at para No.4 that during the above period, entering into the understanding, the complainant had obtained a cheque as security to bring the investment to the company. But, without brining investors, he misused the cheuqe by filling the same as per his whims and fancies.

25. In his cross examination, the accused has admitted the suggestion that for the first time, before the Court, he has stated the above alleged facts at para No.4 of his chief affidavit evidence which were not stated either in his reply notice or anywhere else. He has also admitted the suggestion that he has not produced any document to substantiate the alleged transactions stated in para No.3 of his chief affidavit.

26. It is apparent on the face of the reply notice at Ex.P-6 that there is no whisper with regard to the alleged Crl.A.No.954/2019 facts the accused has stated in para No.4 of his chief affidavit i.e., his defence that the complainant has obtained the cheque for the security purpose to bring the investment/investors to the company.

27. So far the transactions between the accused and the complainant with regard to the post of CEO of the company the accused has stated in his chief affidavit at para No.3, they found place in para No.3 of the reply notice at Ex.P-6. Of course, there is no documents produced by the accused with regard to the said transactions.

28. However, in his cross examination, to the question that he agreed to bring investors for Rs.20 crores to Panama Corporation Limited, the complainant has answered that the accused intended to appoint him to bring investors to his/accused's company and to the question that after bringing the investors, he/the complainant intended to become CEO of the company, he/the complainant has answered that the accused intended him/the complainant to become CEO. He has denied the suggestion that agreeing to bring the investors Crl.A.No.954/2019 to the company, he/the complainant had received the cheque from the accused.

29. So, from the above evidence, it can be safely concluded that whoever might have been intended, but the fact remains that there was some transactions between the accused and the complainant with regard to bringing the investors to the company and the complainant becoming CEO of the company.

30. In his cross examination, the complainant has also denied the suggestion that in the year 2016, he had agreed to purchase 20% shares of the above company. However, Ex.P-8 which is the e-mail correspondences demonstrate that there were mail communications with regard to transfer of 21% of shares of the above company in the name of the accused. Hence, it can be safely concluded that there were transactions between the accused and the complainant with regard to the transfer/purchase of the shares of the above company.

31. But, to substantiate his present defence, the accused has to let in the evidence that the complainant had obtained the cheque for the security purpose. As noted Crl.A.No.954/2019 above, even there is some evidence that the accused was agreed to bring the investors to the company, there is no evidence with regard to the complainant receiving the cheque at Ex.P-1 for the security purpose to bring the investors. Thus, the present defence of the accused that the cheque was issued for the security purpose fails.

32. The one more defence of the accused is about the financial capacity of the complainant to lend the alleged loan of Rs.25,00,000/-. The trial Court record demonstrates that in the complaint at para No.3 in the middle, it is stated that the complainant had paid loan amount sought by the accused i.e., Rs.25,00,000/- in cash which he had with him. The same is reiterated in his sworn statement which was later treated as his chief evidence.

33. But, it is in his cross examination that since the accused approached for loan, he raised loan from his one of the friends who does agriculture and advanced to the accused. He has not produced any document to show the said loan of Rs.25,00,000/- he has alleged to be raised from his friend.

Crl.A.No.954/2019

34. PW-2 is the said friend from whom the complainant alleged to be raised the loan of Rs.25,00,000/-. He has filed his chief affidavit evidence wherein he has stated that he is an agriculturist having 16 acres of Farm land situated in Sy.Nos.101 and 102 of Madde Village, Pavagada Tauk, Tumkur District. There are coconut, mango and tamarind grown in their farm and he has sufficient agricultural income to the tune of around 10,00,000/- per year and he has a cash in hand of around a crore of rupees at a given point of time.

35. It is also in his chief affidavit evidence that during the month of September-2016, he had paid a sum of Rs.25,00,000/- to the complainant in cash which the complainant had borrowed from him on the pretext that he had to organize cash to one of his friends.

36. It is in his cross examination that Sy.Nos.101 and 102 of Madde Village of Pavagada Taluk were purchased by his father and they are in the name of his father. They are totally 8 children to his

father and all of them have right over the above lands and they are not yet partitioned.

Crl.A.No.954/2019

37. It is also in his cross examination that there are 400 coconut trees and 500 mango trees in the said lands, by which they have income of Rs.10,00,000/- per year. They require Rs.2,50,000/- towards the agriculture expenses. They are not sharing the income of the said lands and the income is on his hand, but all his brothers have right over the said income.

38. He has also deposed that he has not produced any documents to show that the above lands are in the name of his father. There is no document in respect of payment of tax to the said lands. He has not produced any document to substantiate the alleged payment of Rs.25,00,000/- he has made to the complainant.

39. It is also in his cross examination that the complainant has not yet repaid the said loan amount of Rs.25,00,000/-. At this stage, he has voluntarily deposed that the complainant has stated that some amount has to come and he will pay.

40. So, from the above evidence of the complainant and his witness/PW-2, it is clear that;

Crl.A.No.954/2019

a) There is no document in respect of the alleged loan of Rs.25,00,000/- received by the complainant from PW-2.

b) The alleged amount of Rs.25,00,000/- paid by PW- 2 is out of the alleged income of the agricultural lands which are alleged to be purchased by his/PW-2's father and stand in his father's name over which, all the 8 children of the father of PW-2 have right.

c) PW-2 has not produced any documents to substantiate his version that the above lands were purchased by his father and stand in the name of his father.

41. As noted above, in support of his case, the complainant has produced totally 9 documents wherein Ex.P-1/the cheque, Ex.P-6/the reply notice and Ex.P-8/the e-mail correspondences are already discussed above. The rest of the documents are Ex.P-2/the return memo, Ex.P- 3/the office copy of the legal notice, Ex.P-4/postal receipt and Ex.P-5/the postal acknowledgment. There is no dispute with regard to the above documents.

42. Ex.P-7 is the alleged promissory note. The accused has disputed his signature over it. But, to Crl.A.No.954/2019 substantiate the denial, apart from his oral evidence, the accused let in nothing. However, it is the arguments of his counsel that since in the present case, the important document is the cheque and the accused is not disputing the same, he has not chosen to meet the document at Ex.P-7/the promissory note, which holds some force.

43. The next and the last document is Ex.P-9/the whatsapp messages between the accused and the complainant. There is no cross examination to the complainant with regard to Ex.P-9. In the course of arguments in this appeal, the counsel for the accused has stated that the messages at Ex.P-9 do not demonstrate that they pertain to the present loan.

44. The trial Court in paras Nos.24 and 25 at pages Nos.17 to 19 of the impugned judgment, has clearly observed that in view of the defence of the accused that the complainant and PW-2 have not produced any supportive documents with regard to the source of income, the complainant has to produce cogent and corroborative evidence and hold the case in favour of the complainant relying on the whatsapp messages at Ex.P-9.

Crl.A.No.954/2019

45. In the course of arguments, the counsel for the complainant has furnished the list of important messages at Ex.P-9 on which he relies on to support the case of the complainant which are extracted here below;

Sl. No.	Page No.	Message and time	Messages
1	25	1st message 9:23 a.m.	GM Vivek, This is remind you that tom we have to meet and settle the payment.
2.	27	1st message 12:51 p.m.	Hi Vivek What time will u come with amount. I have to plan for return accordingly.
		3rd message 2.13 p.m.	Vivek, u have been just telling me like this for more than 5 times. Tom u will say next day, how long ....
3.	28	1st message 3:37 p.m.	Vivek what ever u r doing is not good. I trusted u.
		3rd message 3:44 p.m.	You know by doing this I have lost faith in everybody. I know no one in the world is worth trusting Vivek. Because of you I am loosing my relation in family. What wrong did I do that I should keep chasing you for the money you borrowed. Is this honesty. U think if u help someone and he keeps telling u every day new story.
4.	29	5th 3:45 p.m.	This is my chance to pay you or I am left with no messages option. Without getting the money I don't want to meet you.
5.	30	1st 3:45 p.m.	I am in worst situation in my life. So I waiting like messages dog from past 2 days in Hassan.
		4th message 3:47 pm.	Vivek, I know but when U took this loan, u said u will sell the crop and pay
6.	31	8th message	Vivek, U sell something and arrange pls. I can't take anymore. Really I am in a bad situation.

7. 32 2nd message I thought of selling one vehicle which I have to pay Crl.A.No.954/2019 3:50 pm. you. But bank loan is so much on its and they have marked Npa and I will not get one lakh from it.

8. 33 3nd I love you brother. Don't speak like this. If I get messages3: money I thought of giving you 1 crores apart from 54 p.m. this loan I had taken.

9. 35 2nd Vivek, pls get the money tom. That's all. Thx.

messages 3.54 p.m.

10. 36 Full Have saved the mail you sent me after reading my Messaage journey of life. I don't want to hurt you bro. I cannot 7:59 p.m. even face you. I am not in a good position. Only for my kids I want to be alive brother. Otherwise would have committed suicide.

11. 37 Full Vivek, Message Somehow I had this feeling that you reply negative 12:19 pm. for return of the amount. People who lend money will not sit and listen to stories. You should have thought about all this before taking the money. Because of you today I am in trouble and god knows this is going to be hard to handle. Pls. don't tell me to raise money again because I will not be able to talk to anyone because of this experience. I will tell you when to come and meet me tom, hopefully by noon or so. We have to find some way out of this mess first. Will tell you when to come.

12. 39 1st message That, pls try. If you cannot that's your wish. But you 11:20 a.m. can take my cut in that and we can close my loan which I had borrowed from you. Otherwise I need to wait until I get money in my hand which ppl are promising me. I don't know why they are waiting. But money is coming.

13. 43 Full I have made other arrangements. Tomorrow morning Message a bank holiday I am getting the payment on 10:05 a.m. Thursday. Thursday late evening of Friday morning I will clear your dues in total. This is the commitment and you can give it to the Financier and I will not fail this time and payment is all arranged. So Thursday late evening or Friday morning before 10 am you will have the cash with you. That's the commitment I will not fail. You can promise the financier.

14. 50 1st message Also give me your bank accounts so I can transfer Crl.A.No.954/2019 11:25 a.m. the funds of 35 after the process with the bank.

15. 51 2nd message Vivek, R u returning the loan money tom?

8.48 pm. 2nd message I will be reaching mlore on Thursday I have some 9.11 a.m. deposit and other declarations to be done. They are not authorising any transactions till I authorise and till 31st I would be not doing any outwards transactions. I will transfer soon has a do the formalities with the bank. Friday or Saturday will do the transfer.

16. 52 5th message Send me the account details.

8.02 a.m. 6th message So I transfer the money in parts to you via RTGS. 9.02 a.m.

17. 53 4th message U didn't have time to meet me or even call because 9.08 a.m. U got money and a rich man now. Everyone is same Vivek and u r not different.

18. 54 2nd message You have helped me and I thank you for that funds you arranged. I will pay it and clear it step by step making

19. 55 1st message You have helped me and I thank you for that funds 9.13 a.m. you arranged. I will pay it and clear it step by step making necessary entries. I have time to meet you. But I have things and farming operations to start and getting guidance from ppl who are supporting me unconditionally. So I am middle of few things to I could not meet. You are a brother to me because you helped me. I am you made me stay with you. So I will not forget all that.

20. 60 5th message Vivek, 6.33 U should take this matter first and then do other things. I am suffering because of delay from you. Do U understand this. Why can't you pay and finish and do whatever u want.

21. 61 2nd message If U have in bank just pay off and why are u making 6.34 p.m. me suffer to help you.

3rd message How many times have you promised and failed. 6.35 p.m. What is all this. See all your messages and talk.

These people want me to pay them.

Crl.A.No.954/2019

22. 65 1st message Vivek, I did not ask you for the money for last few 10.32 a.m. days thinking u will get back to me yourself. But I don't see that happen. U have put me into financial trouble and now don't even care about returning the loan. Is this the way Vivek.

2nd message I never thought u would be such a person. I didn't 10.35 a.m. have money, just to help u in your bad situation I got you loan. Spent lot of time and energy to plan for you. I know all that is waste and u think only about yourself and money and nothing else.

23. 67 3rd You did due deligence which is of no use. Some message. investment banker work which was again a waste.

You promised you would get big money to the company and you could not do that as well. You have helped me by giving 25 lakhs and I am happy about it and it will be paid to you. We have he

24. 68 2nd Only on genuine transaction we can transfer you.

message. Do wait for few days we will do it. In the mean time think of an alternative for the documentation which we can show while we transfer. All the funds raised is by my own capacity and and I am happy about it.

25. 69 2nd message We would clear your dues and would be happy about 11.37 a.m. the transaction with you z thanks.

26. 73 6th message Vivek just tell me about the money.

11.56 a.m. 7th message Ok I need a day time to say 12.39 p.m.

27. 75 2nd message Every time U say the same thing. I have waited for 5.37 p.m. 4 months, instead of me asking u, you should be calling and paying me immd. This is what everybody did to me and I told u how people do after taking money. U said u are honest and will never cheat me. I actually wanted to change my car and u told me something but now I don't

28. 76 1st message need anything from you Vivek. Just give me the 5.37 p.m. money with interest and cost. I have lost faith in everybody after this. It's true and very sad.

29. 77 1st ..... Because you have given me in cash I cannot do message. the .....

30. 85 2nd message Hi my brother good morning. I did not feel bad. I am Crl.A.No.954/2019 7.13 a.m. just sad because I could not take care of give back in time because of the situation.

I will do the needful and shall update you bro. You take care and have a good weekend with family. See you soon.

31. 86 2nd message I really not done anything intentionally. Because I 11.54 a.m. am in no position to do things for you these days because I was all controlled by ppl.

32. 89 2nd message Good Morning bro today I will update you about the 9.36 a.m. exact payment and other possibilities.

33. 90 1st message Sure bro. I know, But without answer from this 9.47 a.m. bloody dept I can't answer you. Because this time if I give you a date it will happen on that day. All the formalities of use of funds will be discussed and penalties and fines would be told today and when we can use the funds also will be told today. So I shall intimate you today late evening.

34. 91 Full Today meeting got finished. Tomorrow morning file Message getting ready for tax payments and stuff. I will be 6.07 P.M. late today. I will meet you and explain tomorrow or day after. Some money they want to take it into PM fund and remaining some tax payments and remaining they will let us use from march. Until money going to pm fund we can't use our funds. So tomorrow they will do the division. More things I can't type because they are personnel. I am I'll meet you and speak tomorrow.

35. 93 5th message And thanks for your great help of helping me. It will 8.23 a.m. be given back to you. I don't want your any money.

36. 94 1st message Vivek, one simple question for u. Are you returning 12.45 p.m. the money in this month or not .... I know u r busy and will be more busy later so I don't want to bother you. I regret getting the loan to you honestly. 2nd message Till Feb I can't do anything, money can be only 12.57 p.m. given by Feb end.

37. 97 5th message The car was a gift for me because I am taking care 9.40 a.m. of lot of things of some really big ppl. 80% funds are moved abroad and that's safe. 20% is here in India and solving that and right now I don't have anything. I will do it soon. I need 10 to Crl.A.No.954/2019

38. 99 1st message Vivek, 11.17 a.m. I came back from the hospital.

Pls tell me about the money urgently.

39. 103 2nd message Vivek, just tell me about the return of money, it's 8.18 a.m. been enough now.

40. 105 1st message I don't need anyone's money.

8.20 a.m. 2nd message Now I can't until they do freeze my account. 8.20 a.m. 3rd message Oh got it ...

8.21 a.m. I always new that u are the type who only take money and never return.

41. 106 4th message Very soon it will be given to yourself 8.22 a.m. 5th message And thanks for your great help of helping me. It 8.23 a.m. will be given back to you. I don't want your any money.

46. So, if the above messages are taken in a nut shell, prima facie it supports the case of the complainant. As noted above, there is no cross examination to the complainant by the accused with regard to Ex.P-9. Hence, it can be safely concluded that the accused is not disputing the whatsapp messages at Ex.P-9.

47. Moreover, in the course of arguments in this appeal, the counsel for the accused has simply submitted that those messages do not reflect the present transaction i.e., the alleged loan of Rs.25,00,000/- alleged to be lent by the complainant to the accused.

Crl.A.No.954/2019

48. But, there is no pleading or proof with regard to any other loan transactions between them. On the other hand, it is important to note that in the message at Sl.No.23 in the above list i.e., the 3 rd message in page No.67, the amount referred is Rs.25,00,000/- and in the message Sl.No.14 i.e., the 1st message at page No.50, the amount referred is 35 i.e., (if the entire messages at Ex.P-9 are taken in a nut shell, the amount referred is in lakhs and in crores, not in thousands, hence, it can be safely

concluded that) lakhs.

49. In the back ground of the above pleadings and evidence on record, if the grounds urged by the accused in support of the present appeal are taken into consideration, the connected grounds urged by the accused are;

a) The trial Court has failed to appreciate the simple fact that he has rebutted the presumption available under law.

b) The entire transactions are in relation to the appointment of complainant as Chief Executive Officer of Panam Nature Fresh Corporation.

Crl.A.No.954/2019

c) The complainant has admitted in his cross examination that Ex.P-8 is in relation to the other transaction and not relating to the payment in question claimed by him.

d) In spite of the same, the trial Court by ignoring admission has mechanically proceeded to pass the impugned order which requires to be set aside.

e) The trial Court has failed to appreciate Ex.P-8 in its proper perspective.

f) The complainant has specifically admitted that Ex.P-8 is in relation to the share transfer and also with regard to his appointment as CEO.

g) The details of Ex.P-8 clearly show that the said transaction is relating to the payment of Jayashree and Rajiv and not relating to the complainant and the accused.

h) These aspects of the matter have been given a go bye by the trial Court.

50. But, as noted above, even the accused is successful in letting the evidence that there were some transactions between him and the complainant with regard to transfer of shares of the above company in the name of Crl.A.No.954/2019 the the complainant, appointment of the complainant as CEO to the said company and the complainant agreeing to bring the investors to the company, he has failed to let in the cogent and corroborative evidence to substantiate his defence that the complainant had obtained the cheque at Ex.P-1 as the security to bring the investors and thus, to rebut the statutory presumptions available to the complainant under Sections 118 and 139 of NI Act. Accordingly, the above connected grounds hold no water.

51. The other connected grounds urged by the accused in support to this appeal are that;

a) The trial court has failed to appreciate the simple fact that the complainant did not had Rs.25,00,000/- and has specifically contended that he availed hand loan from PW-2 and thereafter paid the same to the accused.

b) The complainant has not produced any documents to show that he had sufficient money to pay the alleged loan amount.

c) The trial Court has failed to appreciate the evidence of PW-1 and PW-2 in its proper perspective. Their admissions have not been considered by the trial Court.

Crl.A.No.954/2019

d) The trial Court has failed to consider the fact that the complainant tried to improve his case after completion of cross examination of PW-1 by adducing the evidence of PW-2.

e) The complainant himself had availed loan from PW-2 and then paid the same to accused, and this version cannot be believed in view of the settled principles of law laid down by the Hon'ble Apex Court.

f) The admissions on the part of PW-2 with regard to non production of documents to substantiate his contention regarding availability of property and sufficient source of income to pay Rs.25,00,000/- to PW-1 has not been considered by the trial Court.

g) The trial Court has failed to consider the fact that he has rebutted the presumption available under Sections 118 and 139 of NI Act, and that there was no existence of legally recoverable debt.

52. In support of these grounds, the counsel for accused has relied on the decisions reported in;

a) (2015) 1 Supreme Court Cases 99 (between K.Subramani Versus K.Damodara Naidu in Criminal Crl.A.No.954/2019 Appeal No.2402 of 2014 arising out of SLP (Crl.) No.6197 of 2014 decided on 13.11.2014 before their Lordships V.Gopala Gowda and Chockalingam Nagappan, JJ.) wherein he has drawn my attention to the observations of the Hon'ble Apex Court that;

> "Debt, Financial and Monetary Laws - Negotiable Instruments Act, 1881-.....
>
> .....
>
> 9. In the present case the complainant and the accused were working as Lecturers in a government college at the relevant time and the alleged loan of Rs.14 lakhs is claimed to have been paid by cash and it is disputed. Both of them were governed by the Government Servants' Conduct Rules which prescribes the mode of lending and borrowing. There is nothing on record to show that the prescribed mode was followed. The source claimed by the complainant is savings from his salary and an amount of Rs.5 lakhs derived by him from sale of Site No.45 belonging to him. Neither in the complaint nor in the chief-examination of the complainant, is there any averment with regard to the sale price of Site No.45. The sale deed concerned was also not produced. Though the complainant was an income tax assessee he had admitted in his evidence that he had not shown the sale of Site No.45 in his income

tax return. On the contrary the complainant has admitted in his evidence that in the year 1997 he had obtained a loan of Rs.1,49,205 from LIC. It is pertinent to note that the alleged loan of Rs.14 lakhs is claimed to have been disbursed in the year 1997 to the accused. Further the complainant did not produce bank statement to substantiate his claim. The trial Court took into account the testimony of the wife of the complainant in another criminal case arising under Section 138 of the NI Act in which she has stated that the present appellant-accused had not taken any loan from her husband. On a consideration of entire oral and documentary evidence the trial Court came to the Crl.A.No.954/2019 conclusion that the complainant had no source of income to lend a sum of Rs.14 lakhs to the accused and he failed to prove that there is legally recoverable debt payable by the accused to him.

10. In our view the said conclusion of the trial Court has been arrived at on proper appreciation of material evidence on record. ....

....."

b) The judgment passed by the Hon'ble High Court of Karnataka, Bengaluru in CRIMINAL APPEAL No.173/2016 between Sri.V.Puttaraju Versus Sri.Prasannakumar C., on 23.02.2018 by his Lordship Ravi Malimath J., wherein he has drawn my attention to the observations of the Hon'ble High Court of Karnataka that;

"THIS CRIMINAL APPEAL IS FILED UNDER SECTION 378(4) OF THE .....

.....

6. A sum of Rs.10,00,000/- has been paid in cash. The presumption of issuing cheque with regard to legally enforceable debt has been rebutted by the accused. The complainant in order to show the Court that he has a source of income to lend Rs.10 lakhs in cash has produced various documents. Ex.P11 is the salary slip of his brother-in-law. The salary in terms of Ex.P11 is in a sum of Rs.20,771/-. Ex.P12 is the salary slip of his brother. As per Ex.P12, the income of his brother shows Rs.8,111/- per month; he left the Company and his one time settlement was at Rs.42,761/-. Exs.P13 to P15 are the salary slips said to have been belonged to his sister. Ex.P16 is the license issued by concerned APMC Authority in favour of the complainant. Therefore, he contended that Crl.A.No.954/2019 these documents are sufficient to prove that he has cash of Rs.10 lakhs.

7. There is no income of the complainant. He seeks to rely on the income of his brother-in-law and sister to show that he has Rs.10 lakhs. His brother-in-law has a monthly income of Rs.20,770/-. His brother has an income of Rs.8,111/- per month and he left the job. Even though their salaries are taken into consideration, without any expenses, he can never ever have had Rs.10 lakhs in cash, even assuming for a while that the entire salary of both of these persons is given in totality to the

complainant. Therefore, by any stretch of imagination, it is hard to expect that the complainant was in possession of Rs.10 lakhs.

....."

53. In the present case on hand, as noted above, as per the complaint averments, the alleged loan amount was paid by cash which the complainant had with him. On the other hand, in his cross examination, he has stated that he has raised loan from one of his friends who does agriculture and lent to the accused. He does not name the said friend in his cross examination and later got examined PW-2 to substantiate his evidence in the cross examination that he raised loan from his friend and lent it to the accused.

54. So, it appears to the mind of a prudent man that if really, the complainant had borrowed the money from PW-2 and lend it to the accused, definitely, it is a material Crl.A.No.954/2019 fact required to be pleaded and in such a circumstances, PW-2 is a material witness whose name is required to be stated in the list of witnesses in support of the complaint.

55. But, the name of PW-2 finds no place in the list of witnesses filed by the complainant. The witnesses shown in the list are (1) the complainant himself, (2) Sri.Sreenivasa Gupta, S.V. and the Managers of both the banks i.e., the bank presented the cheque and the bank issued the endorsement.

56. Admittedly, there is no document on record with regard to the alleged loan advanced by PW-2 to the complainant and also with regard to the alleged source of income of PW-2 to lend such a huge amount of Rs.25,00,000/- to the complainant.

57. PW-2 even has deposed that he is not an income tax assessee and his father is an income tax assessee, he has not produced any documents in that regard. So, prima facie it appears that there is some force in the ground raised by the accused that there are no documents produced either by the complainant or PW-2 in support of the source of income of PW-2 to lend such a huge amount Crl.A.No.954/2019 to the complainant and the ground that the complainant has improved his version in the course of evidence.

58. But, it is also important to note that as noted above, there is no cross examination with regard to the whatsapp messages at Ex.P-9 which demonstrate the conversations between the accused and the complainant with regard to settlement of loan.

59. As noted above, even the counsel for the accused has submitted that the messages at Ex.P-9 do not pertain to the present loan transaction, there is no pleading and proof with regard to any other loan transactions between the parties.

60. On the other hand hand, as noted above, the amount mentioned in the 3rd message at page 67 is Rs.25,00,000/- i.e., the loan amount lent by the complainant to the accused and the amount referred in the 1st message at page No.50 is Rs.35,00,000/- i.e., the amount assured to transfer

from the accused to the complainant.

61. Hence, in view of the admissions by the accused in the above whatsapp messages at Ex.P-9, the grounds Crl.A.No.954/2019 urged by the accused that the complainant had no source of income to lend Rs.25,00,000/- to the accused and he has rebutted the presumptions in that regard hold no water and the principles rendered in the above decisions are not applicable to the case on hand.

62. Moreover, with regard to the present grounds, it is the arguments of the counsel for the complainant that the complainant has no initial burden to prove his financial capacity. First time in his cross examination, the accused has raised objections with regard to the financial capacity of the complainant to lend the money and immediately, the complainant disclosed the source of income and got examined PW-2.

63. In support of his above arguments, he has relied on the decision reported in 2020 SCC Online Ker 1750 :

> (2020) 3 KLT 340 (between Sunitha Versus Sheela Antony and Another in Criminal Revision Petition No.600 of 2019 decided on 20.05.2020 before his Lordship R. Narayana Pisharadi, J.) wherein he has drawn my attention to the observations of the Hon'ble High Court of Kerala at Ernakulam that;

Crl.A.No.954/2019 "The revision petitioner is the accused ....

28. In my view, the crux of the decisions referred to above is the following: The complainant has no obligation, in all cases under Section 138 of the Act, to prove his financial capacity. But, when the case of the complainant is that he lent money to the accused by cash and that the accused issued the cheque in discharge of the liability, and if the accused challenges the financial capacity of the complainant to advance the money, despite the presumption under Section 139 of the Act, the complainant has the obligation to prove his financial capacity or the source of the money allegedly lent by him to the accused. The complainant has no initial burden to prove his financial capacity or the source of the money. The obligation in that regard would arise only when his capacity or capability to advance the money is challenged by the accused.

64. So, the above observations are prima facie in support of the arguments of the counsel for the complainant that there is no initial burden on the complainant to prove his financial capacity.

65. In the above decision, the counsel for the complainant has also relied on the observations that;

> ".....
>
> 29. In the present case, the accused had challenged the financial capacity of the complainant to lend an amount of Rs.4,50,000/-. The complainant gave evidence regarding the source of the money lent by her to the accused and the courts below have found that such evidence is reliable and acceptable. Moreover, it is a case in

> which accused admits that she had borrowed an amount of Rs.2,90,000/- from the complainant. In such circumstances, the plea of the accused that the Crl.A.No.954/2019 complainant had no financial capacity to advance the money, is only to be rejected.
>
> ....."

66. On the other hand, to distinguish the applicability of the above facts to the case on hand, the learned counsel for the accused has relied on the observations in the above decision that;

> "....
>
> 22. While considering the financial capacity of the complainant to lend the money it is to be kept in mind that she had not advanced the amount of Rs.4,50,000/- to the accused in lump. In this context it is significant that the accused has admitted that she had borrowed a total amount of Rs.2,90,000/- from the complainant on different dates. In other words, the plea of the accused is that the complainant had financial capacity to lend Rs.2,90,000/- but she had not the capability to advance an amount of Rs.4,50,000/-. The appellate Court has dealt with this plea in the following manner:
>
> ....."

and argued that in this case, his defence is that the complainant had no financial capacity. He did not accept receipt of any portion of the alleged loan and his defence is total denial of the fact of lending loan if any. Hence, the above observations are not applicable to the facts of the case on hand.

67. As noted above, the accused has denied the alleged loan transaction and has specifically contended Crl.A.No.954/2019 that the disputed cheque was issued for the security purpose. However, as noted above, the accused has failed to prove that the cheque was issued for the security purpose and the whatsapp messages at Ex.P-9 are not disputed by him. Thus, the distinction made by the counsel for accused cannot be accepted and the observations at para No.29 in the above decision on which the counsel for complainant has relied on are in his support.

68. With regard to the burden of the complainant to prove the financial capacity, the counsel for the accused has relied on the decision reported in (2014) 2 Supreme Court Cases 236 (between John K. Abraham Versus Simon C. Abraham and another in Criminal Appeal No.2043 of 2013 arising out of SLP (Crl.) No.9505 of 2011 decided on 05.12.2013 before their Lordships S.S.Nijjar and F.M.Ibrahim Kalifulla, JJ.) wherein he has drawn my attention to the observations of the Hon'ble Apex Court that;

> "Debt, Financial and Monetary Laws - Negotiable instruments Act, 1881 - .....

.....

Crl.A.No.954/2019

9. It has to be stated that in order to draw the presumption under Section 118 read along with Section 139 of the Negotiable Instruments Act, the burden was heavily upon the complainant to have shown that he had the required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced was true and that the accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant.

....."

69. As noted above, in the present case on hand, the whatsapp messages at Ex.P-9 are in support of the complainant with regard to the present loan transaction. Hence, the accused has failed to establish his grounds that the accused had no financial capacity to lend the money and he has rebutted the statutory presumptions available to the complainant in that regard.

70. The other grounds urged by the accused in support of his appeal are that;

a) The trial Court has failed to consider his evidence as DW-1 and has given importance to one stray sentence in the evidence to convict him. It is settled principles of law that the evidence will have to be considered as a whole and not in pieces. The trial Court is not justified in giving importance to the stray sentence with regard to non Crl.A.No.954/2019 visiting of the complainant to his office and convicting him especially when the complainant has failed to prove the case beyond reasonable doubt.

b) The trial Court has not assigned any reasons much less any cogent reasons for not accepting the judgments relied upon by him and only on the basis of assumption and presumptions, has mechanically proceeded to pass the impugned order of conviction which requires to be set aside.

71. There is no quarrel with regard to the settled proposition of law that the evidence will have to be considered as a whole and not in pieces. But as noted above, the accused has failed to rebut the presumptions in favour of the complainant by letting in the cogent or credible evidence in support of his defence and thus, above grounds are not sustainable.

72. One more ground urged by the accused is that the complainant has specifically contended that he has not doing any financial activities and it is the case of the complainant that he has lend Rs.25,00,000/- and towards discharge of the said amount with interest the cheque in Crl.A.No.954/2019 question has been issued. This contention is contrary to the stand taken by the complainant and the same is not considered by the trial Court.

73. As per the complaint averments admittedly the loan he has lent is hand loan but, in the very next sentence in the complaint it is averred that the accused has agreed to repay the same together with

interest at 5% p.m. Hence, it cannot be said that the stand taken by the complainant is contrary.

74. Moreover, there is no bar for an individual to collect the interest on the amount he has lent. But, if he is doing money lending business, then of course with necessary license. In the present case on hand, it is not the case of any of the parties to the proceedings that the complainant was/is a money lender. Thus, the above ground urged by the accused holds no water.

75. The other ground urged by the accused in support of this appeal is that the trial Court has failed to appreciate the fact that the complainant has not shown the said transaction in his income tax returns though the said amount is a large amount. It is relating to unaccounted Crl.A.No.954/2019 money. It is well settled principles of law that the Courts cannot come to the rescue of a person who claims that he has lent the unaccounted money and the same is not considered by the trial Court.

76. In support of the above ground, the counsel for accused has relied on the decisions reported in;

a) The judgment passed by the Hon'ble High Court of Karnataka, Bengaluru in CRIMINAL APPEAL No.173/2016 between Sri.V. Puttaraju Versus Sri.Prasannakumar C., on 23.02.2018 by his Lordship Ravi Malimath J., wherein he has drawn my attention to the observations of the Hon'ble High Court of Karnataka that;

> "THIS CRIMINAL APPEAL IS FILED UNDER SECTION 378(4) OF THE .....
>
> .....
>
> 8. Here is a case where a man has an unaccounted cash of Rs.10 lakhs. He has violated the law and is in possession of this unaccounted money. When he has violated the law, he cannot seek protection of law to protect the very same unaccounted cash that he has by violating the law. Therefore, the trial Court was justified in rejecting his compliant and acquitting the accused. .....
>
> ....."

b) (2009) 4 Mh.L.J. 155 (between Sanjay Mishra Vs. Kanishka Kappor @ Nikki and another in Criminal Crl.A.No.954/2019 Application No.4694 of 2008 decided on 24.02.2009 before his Lordship A.S.Oka, J.) wherein he has drawn my attention to the observations of the Hon'ble High Court of Bombay that;

> "(a) Negotiable instruments Act, SS. 138 Explanation and 139 - .....

.....

7. It is true that merely because amount advanced is not shown in Income Tax Return, in every case, one cannot jump to the conclusion that the presumption under Section 139 of the said Act stands rebutted. There may be cases where a small amount less than a sum of Rs.20,000/- is advanced in

cash by way of loan which may be repayable within few days or within few months. A complaint may not show the said amount in the Income Tax Return as it is repayable within few days or few months in the same financial year. In such a case the failure to show the amount in the Income Tax Return may not by itself amount to rebuttal of presumption under section 139 of the said Act. If in a given case the amount advanced by the complainant to the accused is a large amount and is not repayable within few months, the failure to disclose the amount in Income-Tax return or Books of Accounts of the complainant may be sufficient to rebut the presumption Under Section 139 of the said Act.

8. In the present case, the amount was allegedly advanced in September, 2004. The amount is a large amount of Rs.15 lakhs. This is a case where not only that there is a failure to disclose the amount of loan in the Income Tax Return of the applicant till the year 2006 but there is a categorical admission on the part of the applicant that the amount was an "unaccounted" amount.

.....

15. The Apex Court has held that the laws relating to the said Act are required to be interpreted in the light of the object intended to be achieved by it despite there being Crl.A.No.954/2019 deviation from general law..... The provision of section 138 cannot be resorted to for recovery of an unaccounted amount. A cheque issued in discharge of alleged liability of repaying "unaccounted" cash amount cannot be said to be a cheque issued in discharge of a legally enforceable debt or liability within the meaning of explanation of section 138 of the said Act. Such an effort to misuse the provision of Section 138 of the said Act has to be discouraged.

....."

77. The other side has not disputed the principles rendered in the above decisions.

78. In the present case on hand, admittedly, the amount involved is a huge sum of Rs.25,00,000/- and including the interest, the cheque at Ex.P-1 is for Rs.31,87,500/-.

79. In his cross examination, the complainant has specifically admitted that he has not shown the present transaction in his income tax returns.

80. As noted above, even PW.2 has stated that he is not an income tax assessee, he has deposed that his father is an income tax assessee but has not produced any documents in that regard. Hence, prima facie the principles rendered in the above decisions are applicable to the case on hand as it is evident on record that the amount involved in this case is unaccounted amount.

Crl.A.No.954/2019

81. The other grounds urged by the accused in support of this appeal are that;

a) The trial Court has not assigned any reasons much less any cogent reasons for not accepting the judgments relied upon by him and only on the basis of assumption and presumptions, has

mechanically proceeded to pass the impugned order of conviction which requires to be set aside.

b) The trial Court has failed to consider the fact that he has rebutted the presumptions available under Sections 118 and 139 of NI Act, and that there was no existence of legally recoverable debt.

82. The trial Court record demonstrates that the accused has relied on para No.8 of the judgment in Crl.Appeal No.173/2016 and the decision reported in 2009 Cri.l.J. 3777 : 2009(4) MH.LJ 155 i.e. the decisions observed above on the unaccounted money which is not a legally enforcible amount and protection cannot be sought under law to protect an unaccounted money.

Crl.A.No.954/2019

83. But, the impugned judgment demonstrates that those decisions were not taken into consideration and thus, the above grounds urged by accused are sustainable.

84. In the course of arguments the counsel for accused has also urged a ground that under the Income Tax Act, any transaction involving an amount more than Rs.20,000/- be through cheque only .

85. In support of his above arguments, he has relied on the decision reported in (2008) 4 Supreme Court Cases 54 (between Krishna Janardhan Bhar Versus Dattatraya G. Hegde in Criminal Appeal No.58 of 2006 decided on 11.01.2008 before their Lordships S.B.Sinha and H.S.Bedi, JJ.) wherein he has drawn my attention to the observations of the Hon'ble Apex Court that;

> "B. Negotiable Instruments Act, 1881 - Ss.138 & 139- Dishonour of cheque - Presumption against accused - Rebuttal of Mode of - Necessary considerations by Court..... No indication as to any business transaction between them - Complainant failed to produce any books of accounts or any other proof to show that he got so much money from Bank - Courts below failed to notice that ordinarily in terms of S.269 - SS, Income Tax Act, any advance taken by way of loan of more than Rs.20,000/- had to be made by an account payee cheque only - considering the peculiar fact a circumstances of the case, held, Courts below approached the matter on wrong application of the legal principles to fact situation of the Crl.A.No.954/2019 case. - Hence, conviction and sentence set aside - Criminal trial - Evidence Act, 1972, SS. 101, 103, 4 and 3.
>
> ....."

86. The other side has not disputed the above proposition of law.

87. In the present case on hand, admittedly the amount involved is Rs.25,00,000/-. Hence, the above decision is applicable to the case on hand.

88. The one more ground urged by the accused is that the impugned judgment is wrong, contrary to law and also against to the evidence on record.

89. As noted above even the accused has failed to establish his defense that he has issued the cheque at Ex.P-1 towards the security purpose and the accused had no financial capacity to lend the alleged loan amount of Rs.25,00,000/- and thus, failed to rebut the statutory presumptions in that regard, he is successful in establishing that the amount involved in this case is an unaccounted money and thus, not legally enforceable debt and accordingly, the complainant cannot seek for protection of the said unaccounted money. Hence, this ground is sustainable.

Crl.A.No.954/2019

90. From the above observations, in view of the accused establishing his grounds that the amount involved in this case is an unaccounted money which is not legally enforceable and thus, the complainant cannot seek protection of such an unaccounted money which has to be lent through only by cheque, point No.1 is answered partly in affirmative. Thus, the impugned judgment needs to be intervened. Accordingly, point No.2 is answered in affirmative.

91. POINT No.3:- For the reasons discussed above, I proceed to pass following order.

ORDER The present Criminal Appeal filed by the appellant/accused under Section 374(3) of Cr.P.C. is hereby allowed.

In the result, the judgment of conviction and sentence passed by XXII Addl. Small Causes Judge and XII ACMM., Bengaluru in CC.No.14703/2017 dated 26.03.2019 is hereby set aside.

Consequently, the accused is acquitted for the offence punishable under Section 138 of NI Act and the bail bond as well as the surety bond executed by him and on his behalf shall stand canceled.

Crl.A.No.954/2019 Send back the TCR along with the copy of this judgment forthwith to the trial Court.

(Dictated to the Judgment Writer directly on computer, corrected by me and then pronounced in the open Court on this the 31st day of August, 2020).

(K. KATHYAYANI), LXVI Addl.CC & SJ, Bangalore.

Crl.A.No.954/2019 59 Both the parties and their respective counsels are absent.

The Order is pronounced in the open Court (vide separate Order).

ORDER The present Criminal Appeal filed by the appellant/accused under Section 374(3) of Cr.P.C. is hereby allowed.

Crl.A.No.954/2019 1 In the result, the judgment of conviction and sentence passed by XXII Addl. Small Causes Judge and XII ACMM., Bengaluru in CC.No.14703/2017 dated 26.03.2019 is hereby set aside.

Consequently, the accused is acquitted for the offence punishable under Section 138 of NI Act and the bail bond as well as the surety bond executed by him and on his behalf shall stand canceled.

Send back the TCR along with the copy of this judgment forthwith to the trial Court.

LXVI Addl.CC & SJ, Bengaluru