

## S.Vilwanathan vs Swetha.L D/O Late Lakshman on 1 April, 2019

IN THE COURT OF THE LX ADDITIONAL CITY CIVIL &  
SESSIONS JUDGE, BENGALURU  
(CCH-61)

Dated this the 1st day of January, 2019

:Present:

Sri Vidyadhar Shirahatti, LL.M  
LX Addl. City Civil & Sessions Judge,  
Bengaluru.

Crl. A. No. 1341/2017 & Crl.R.P.No.793/2017,

APPELLANT S.Vilwanathan, S/o Shanmugam,  
(In Crl.A.1341/2017) Aged about 53 years, R/at No.51/A,  
Railway Quarters, Yeshwanthpura,  
Bengaluru.  
(By Sri.Anil.S. Adv )

VS.

RESPONDENT Swetha.L D/o Late Lakshman, aged  
(In Crl.A.1341/2017) about 25 years, R/at No.89/92,  
Chikkabazar, Shivaji Nagar,  
Bengaluru.  
(Sri Parashuram, Adv)

PETITIONER Swetha.L D/o Late Lakshman, aged  
(In Crl.R.P.793/17) about 25 years, R/at No.89/92,  
Chikkabazar, Shivaji Nagar,  
Bengaluru.  
(Sri Parashuram, Adv)

VS.

RESPONDENT S.Vilwanathan, S/o Shanmugam,  
(In Crl.R.P.793/17) Aged about 53 years, R/at No.51/A,  
Railway Quarters, Yeshwanthpura,  
Bengaluru.

(By Sri.Anil.S. Adv )  
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### COMMON JUDGMENT

All these Crl.A.No.1341/2017 and Crl.R.P.No.793/2017  
are arising out the same impugned judgment of conviction  
and sentence passed in C.C.No.15831/2016, dt.1/9/2017 for  
offence punishable u/s 138 of N.I.Act on the file of XV

3. In this Criminal revision petition filed u/Sec. 397  
of Cr.P.C., by the petitioner/complainant, being aggrieved by  
the judgment of conviction and sentence passed in  
C.C.No.15831/2016, dt.1/9/2017 for offence punishable u/s  
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138 of N.I.Act on the file of XV ACMM, Bengaluru and prays  
to set aside the impugned judgment and enhance the  
sentence and fine imposed on the accused.

5. The brief facts leading to this appeal/revision petition can be stated as under:-

acknowledgment for having receipt of Rs.34 lakhs and returning of Rs.1 lakhs and issued two post dated cheques for Rs.17 lakhs each. The accused failed to keep up his assurance and promise. When the said cheques were presented for encashment it was dishonoured for the reasons 'insufficient funds '. Then the complainant got issued legal notice to the accused who neither replied the notice nor repaid the cheque amount.

6. Then the complainant presented the complaints under section.200 of Cr.P.C., for offence under Sec.138 of Negotiable Instruments Act. Learned Magistrate took cognizance and registered the case against the accused for offence punishable u/Sec. 138 of Negotiable Instruments Act and secured the presence of accused who after appearance, pleaded not guilty. Then the complainant examined herself as PW1 and one C.Janakiram as PW2 and got marked

documents as per Ex.P.1 to Ex.P.14. After recording of  
statement of accused under Sec.313 of Cr.P.C., the accused  
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neither examined any witness nor produced any documents  
on his behalf.

7. The learned Magistrate on hearing the arguments  
on both sides, found the accused guilty and proceeded to  
convict the accused for offence u/s. 138 of Negotiable  
Instruments Act and sentenced him to undergo simple  
imprisonment for a term of 18 months and also liable pay a  
fine of Rs.34,00,000/- and in default of payment of fine  
amount, the accused shall undergo S.I. for a period of three  
months. Besides, the trial Court awarded compensation of  
Rs.33,95,000/- out of the fine amount to the complainant  
acting u/s.357 of Cr.P.C., by passing the impugned judgment  
dt.1/9/2017.

8. This judgment of conviction and sentence which  
is now under challenge by the appellant/accused on the  
following grounds:-

The impugned judgment of conviction and sentence  
passed by the trial court is opposed to the settled principles  
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of law, facts and probabilities of the case. The court below  
without giving an opportunity to the appellant to cross

examine the other witness in order to elicit the truth from the witness, have posted the case for 313 statements and recorded the statement and passed the judgment. The learned Magistrate failed to consider the financial capacity of the complainant to pay the huge amount. Learned Magistrate failed to consider that, during the cross examination the complainant had admitted that, she does not know other 6 members personally, and she alone had adduced her evidence. The complainant does not make out a prima facie case. Hence, the impugned judgment is liable to be set aside and appellant is liable to be acquitted. The accused was liable to pay the said admitted amount. Therefore, judgment is liable to be set aside. The impugned judgment of conviction is unsustainable and not tenable in the eye of law. Hence, prayed to set aside the impugned judgment of conviction and to acquit the accused by allowing the appeal.

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9. In the revision petition, the complainant contended that, the court below has erred in awarding a meager sentence on the accused and hence, impugned order suffers from serious legal infirmities and as such interference of the court is essential. He further contended that, the court below convicting the accused only to an extent of cheque amount including forfeiture of Rs.5000/- to the State expenses incurred to the prosecution in the case, which is unjustified

and requires to be modified by this court by imposing the fine by doubling the cheque amount. and there was no reason for the court below to inflict sentence less than the cheque amount. The accused has enjoyed the cheques amount since 2014, but the court below ignored this aspect and convicted the accused for the cheque amount only by ignoring the latest amendment on this aspect under the N.I.Act to impose fine amount by doubling the cheques amount which is caused to the injustice, otherwise, complainant and six others will be put to great hardship. Hence, impugned judgment is liable to be reconsidered by

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this court. He further contended that judgment is contrary to Sec.138 of N.I.Act. which provides for imposition of sentence equal to the cheque amount or it may be extended to twice the cheque amount. The reasons are not properly assigned by the court below. Hence, he prays to set aside the impugned judgment and enhance the fine and sentence imposed on the accused.

10. After filing of this appeal, notice duly served on the respondent who made his appearance through a counsel. The trial Court records, have been secured.

11. Heard arguments of learned counsel for appellant and respondent.

12. Perused the records.

13. In the light of the contentions taken up in the memorandum of appeals, the common points that arise for my determination are as follows;

- 1) Whether the impugned judgment of conviction is opposed to the settled  
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principles of law, facts and probabilities of the case?

- 2) Whether the procedure adopted by the learned Magistrate in convicting the accused is against to criminal jurisprudence?
- 3) Whether there are any grounds to enhance the fine amount?
- 4) Are there any grounds to interfere with the order of conviction and sentence?
- 5) What order?

14. My findings on the above points are as follows:  
Point No.1 : In the Affirmative  
Point No.2 : In the Affirmative  
Point No.3 : In the Negative  
Point No.4 : In the Affirmative  
Point No.5 : As per final Order

REASONS

15. Point Nos.1 to 4:- All these points are taken together for discussion for the sake of convenience and to avoid repetition of facts.

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16. I have carefully gone through the contents of appeal memo, trial Court records and the impugned

judgment.

17. It is pertinent to note that, the complainant has filed the CrI.Revision Petition being aggrieved by the impugned judgment of conviction and sentence and prays to enhance the fine amount. It is important to note that, instead of filing the Criminal Appeal u/Sec.372 of Cr.P.C, the complainant has filed revision petition. No doubt the complainant has invoked the wrong provision. In my view, for mere technicality, justice should not suffer. In this regard, I would like to rely upon the judgment relied by the Hon'ble High Court of in LAWS (GAU) 2013 843 Gauhati in Solem Khan V/s Md.Abdul Naser, Baharul Khan, wherein it is held that, as per the provision of Sec.401(5) and 399(2) which deals with the power of the High Court and the Sessions court respectively to convert a criminal revision petition to the

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petition for appeal. Hence, I would to convert the revision petition into the criminal appeal u/Sec.372 of Cr.P.C.

18. It is the specific case of the complainant that accused received a sum of Rs.34,00,000/- from the complainant and six other in order to provide D group employee in the Railway department under Minister Quota and when he failed to keep up his promise, for repayment of the said amount issued the cheques in question i.e., Ex.P.1 and Ex.P.2. It is the further case of the complainant that since



the cheques which were issued by the accused came to be bounced back as insufficient funds, the accused is liable to be convicted for offence punishable u/Sec. 138 of Negotiable Instruments Act.

19. On the other hand, it is defense set up by the accused that the complainant has failed to prove her case and she has not produced any documentary evidence in proof of lending of Rs.34 lakhs. It is further defense taken up by the accused that, complainant does not the other six

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members personally and she has alone had adduced her evidence and no other persons have been made parties to the case and also have not adduced their evidence. He further taken contention that, he has not taken amount of Rs.34,00,000/- from the complainant and hence, he is not liable to pay the said cheque amount.

20. Keeping in view the rival contentions of both the parties, I have carefully gone through the evidence let in by both the parties to answer the points in controversy.

21. Obviously, the burden is on the complainant to prove that the cheques in question were issued towards discharge of legally recoverable debt or liability. In this regard, the complainant examined herself as PW1 who in her

evidence has reiterated the averments of the complaint and got marked original cheque, memo issued by the bank, receipt, copy of legal notice, postal receipt, postal acknowledgements letter issued by the Postal department, acknowledgments of CBI as per Ex.P.1 to 14.

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22. The complainant mainly relied upon the letter alleged to have executed by the accused at Ex.P11. On perusal of Ex.P.11 it is clear that accused has admitted the he has received Rs.34,00,000/- from the complainant and other in order to secure the job to the complainant and others in Railway Department as D group employees. I have carefully going through the said agreement. On perusal of the said agreement, it creates doubt that whether the said agreement is void and legally enforceable debt.

23. In this regard, I am supported by an authority reported in 2018(4) AKR 379 in the case of R.Parimala Bai V/s Bhaskar Narasimhaiah, wherein Hon'ble High Court of Karnataka held as under:-

(A) Negotiable Instruments Act (26 of 1881),  
Ss.138, 139-Dishonour of cheque - Legally recoverable debt- Money given to accused by complainant for obtaining job for his son- Amounts to entering into void contract by complainant himself which is prohibited S.23 of Contract Act- Cheque issued by accused as repayment of such amount - Not a legally enforceable debt- Taking of cognizance against the accused violate

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constitutional liberty of accused - proceedings against the accused, liable to be quashed.

24. On perusal of the above said authority it becomes amply clear that, if on the basis of void contract and particularly if the consideration is illegal, and consideration is for immoral or illegal purposes or which is against the public policy, then the whole transaction becomes void, the consideration paid in such contract becomes an illegal consideration and when it is said it is illegal or unlawful consideration it cannot be at any stretch of imagination called as a legally recoverable debt.

25. Here in this case, the complainant mainly relied upon Ex.P.11 letter to prove that, Ex.P.1 and Ex.P.2 cheques are issued for illegally recoverable debt. On perusing Ex.P.11 is clearly discloses that, the complainant paid amount of Rs.34,00,000/- to the accused in order to secure the job the complainant and six other in order to provide D group employee in the Railway department under Minister Quota, by writing letter at Ex.P.11, the accused has  
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issued Ex.P.1 and 2. Hence, it is clear that complainant had entered into void contract which is prohibited by Sec.23 of Contract Act, because the complainant paid Rs.34,00,000/- to the accused in order to secure job the complainant and six other in order to provide D group employee in the Railway

department under Minister Quota, which amounts to entering into void contract by complainant himself, which is prohibited by Sec.23 of Contract Act. So when the contract is void and prohibited u/Sec.23 of Contract Act, for repayment of such amounts not a legally enforceable debt. Therefore, when there is no legally recoverable debt, the question of taking cognizance does not arise at all. Hence, herein this case, the learned Magistrate taking of cognizance against the violation of constitutional liberty of accused. On this ground itself, the impugned judgment of conviction deserves to be set aside, without touching merits of the case.

26. Having regard to all these facts and  
circumstances of the case, I am of the considered view that  
the learned Magistrate grossly erred in taking the cognizance

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and proceeding against the accused. As such, there are reasonable and sufficient grounds to interfere and set aside the impugned judgment of conviction and sentence passed by the trial court. The judgment of conviction and sentence passed by the trial court is opposed to the principles of law and procedure. Further it is relevant to note that, when this court has formed the opinion that, there is no legally enforceable debt the question of enhancing the fine amount does not arise at all. Therefore, revision petition filed by the petitioner/complainant deserves to be dismissed. As such,

the circumstances warrant that by setting aside the judgment of conviction and sentence, the matter needs to be set aside by acquitting the accused. With these observations, the appeal deserves to be allowed. Accordingly, I answer point No.1, 2 and 4 in the affirmative and 3 in the Negative.

27. Point No.5: In view of my findings on point No.1 to 3, I proceed to pass the following:-

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ORDER

The appeal filed by appellant u/Sec.374(3) of Code of Criminal Procedure is hereby allowed.

The impugned judgment of conviction passed by the XV ACMM, Bengaluru, in CC No.15831/2016 dt.1/9/2017 is hereby set aside.

Consequently, the accused is acquitted u/Sec.138 of N.I.Act.

Therefore, the revision petition filed by the petitioner/complainant is hereby dismissed.

The trial court is hereby directed to refund the amount to the accused, if any deposited.

Send a copy of this judgment to the lower Court along with LCR forthwith.

Office is hereby directed to keep the original of this judgment in Crl.A.No.1341/2017 and copy shall be thereof in Crl.R.P.No.793/2017.

\*\*\* (Directly dictated to Stenographer on computer, thereafter corrected and then pronounced by me in the open court on this the 1st day of April, 2019) (Vidyadhar Shirahatti) LX Addl.City Civil & Sessions Judge, Bengaluru.

& Crl.R.P.793/2017 Common Judgment/Order pronounced in the open court. Vide separately ORDER The appeal filed by appellant u/Sec.374(3) of Code of Criminal Procedure is hereby allowed.

The impugned judgment of conviction passed by the XV ACMM, Bengaluru, in CC No.15831/2016 dt.1/9/2017 is hereby set aside.

Consequently, the accused is acquitted u/Sec.138 of N.I.Act.

Therefore, the revision petition filed by the petitioner/complainant is hereby dismissed.

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(Vidyadhar Shirahatti) LX Addl.City Civil & Sessions Judge, Bengaluru.

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