

She Presented The Cheque For Encashment ... vs Issued Untenable Reply On 13.03.2019. ... on 20 November, 2020

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CC.6843/2019 (J)

IN THE COURT OF THE XV ADDL CHIEF METROPOLITAN
MAGISTRATE AT BANGALORE CITY.

Dated this the 20th Day of November-2020

Present: Lokesh Dhanapal Havale. B.A.L.L.B.,
XV Addl.C.M.M., Bangalore.

Judgment U/s.355 of the Cr.P.C. 1973.

1.Sl.No.of the case	CC.No.6843/2019
2.Name of the Complainant:	YASHODHA G., W/o.Gopala.A., Aged about 38 years, Residing at No.D-69, 2nd Main Road, Palace Guttahalli, Bengaluru-560 003.
3.Name of the accused:	Sri.P.BHASKAR REDDY, S/o.Venkatarami Reddy, Aged aboutd 48 years, Residing at No.176, 4th Main, 3rd Cross, NGEF Layout, Sanjayanagar, Bangalore-560 094.
4.The offence complained of :	U/s.138 of Negotiable Instruments Act.
5.Plea of the accused:	Pleaded not guilty.
6.Final Order:	Acting U/s.255(2) Cr.P.C., accused is Convicted.
7.Date of final Order	20.11.2020.

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This complaint is filed U/Sec.200 of Cr.P.C. against the accused

for the offence punishable U/Sec.138 of the Negotiable Instruments Act, 1881.

2. The facts in brief are as under:-

The complainant and the wife of the accused by name Smt.Sujatha are well known to each other and accused is well known to her through his wife. The accused requested the complainant in the first week of February-2017 for financial assistance. The accused took loan of Rs.3,00,000/- on 13.02.2017 from the complainant. The said amount was given to the accused by pledging her jeweleries at Sona Bankers in the presence of wife of the accused Smt.Sujatha. The accused agreed to repay the amount within two years along with interest @ 12% per annum and at the time of taking loan the accused executed on Demand Promissory Note and Consideration receipt dated 13.02.2017. Even after several requests the accused did not repay the amount and instead issued a cheque bearing No.909987 dated 31.01.2019 for a sum of Rs.3,00,000/- drawn on State Bank of Mysore, Malleshwaram Branch, Bengaluru-560003 in favour of the complainant. She presented the cheque for encashment on 31.01.2019 through her account in Vijaya Bank, Palace Guttahalli branch, 3 CC.6843/2019 (J)

Bengaluru-560 003 and it was dishonored with a shara "Funds Insufficient" on 01.02.2019. She issued the legal notice to the accused on 18.02.2019 and it was served on 20.02.2019. Thereafter the accused issued untenable reply on 13.03.2019. Hence prayed to punish

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the accused and compensate the complainant. After receiving the notice
the accused neither replied nor paid the loan amount within 15 days.

3. After the institution of the complaint, cognizance has been taken and the case has been registered as PCR No.3716/2019. The sworn statement of the complainant has been recorded and on the basis of sworn statement and other materials on hand the criminal case has been registered against the accused and summons was issued to him. In response to the service of summons the accused appeared through his learned counsel and got enlarged on bail. The prosecution papers supplied to the accused and the substance of accusation for the offence punishable U/s.138 of Negotiable Instruments Act was read over to the accused. He pleaded not guilty and claimed to be tried.

4. During trial the complainant examined as PW-1 and got marked Ex.P.1 to P.8. The statement of the accused U/s. 313 of Cr.P.C.
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was recorded. The accused lead defence evidence and examined as DW-1 and got marked Ex.D.1 to D.9.

5. I have heard the argument of both learned counsels and perused the entire materials. The following points would arise for my consideration.

1. Whether the complainant proves that the
Accused issued the cheque bearing

No.909987 for Rs.3,00,000/- drawn on State Bank of Mysore, Malleshwaram Branch, Bengaluru in his favour towards the discharge of legally enforceable debt/liability and on its presentation for encashment, it was dishonored with an endorsement of "Funds Insufficient" in the account maintained by the accused and the accused has not paid the amount even after 15 days from the date of service of notice on him and thereby accused committed an offence punishable U/Sec.138 of N.I. Act, 1881 ?

2. Whether the accused rebuts the presumption U/s.139 of N.I.Act?

3. What order?

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6. My answers to the above points are as under.

Point No.1 : In the Affirmative

Point No.2 : In the Negative

Point No.3 : As per final order for the following;

REASONS

7. Point No.1 & 2:- The points are taken together for discussion to avoid repetition of facts and evidence. At this juncture, it is necessary to go through the provisions of N.I.Act before proceeding further. The provisions under Section 118(a) and 139 of the Act., 1881 are extracted and they reads thus;

"118. Presumptions as to negotiable instruments. - Until the contrary is proved, the following presumptions shall be made:-

(a) of consideration - that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted,

indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration.

(b) as to date:- that every Negotiable Instrument bearing date was made or drawn on such date;

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"139. Presumption in favour of holder.-

It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

8. On plain perusal of the provisions under Section 118(a) and 139 of the N.I.Act., as extracted herein above, it can be seen that initially the presumptions constituted under these two provisions favour the complainant. However, it is open to an accused to raise a defence to rebut the statutory presumptions. An accused can raise a defence, wherein the existence of legally enforceable debt or liability can be contested.

9. It is also well established that an accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has constitutional rights to maintain silence. Standard of proof on part of the accused and that of the prosecution in a Criminal case is different. The prosecution must prove the guilt of an accused beyond all reasonable doubts, the

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standard of proof so as to prove a defence on the part of an accused is

"Preponderance of probabilities".

10. Under the light of above extracted provisions of the Act, I have perused the oral and documentary evidence on record. In order to prove his case the complainant examined himself as PW.1 and got marked Ex.P.1 to P.7, and Ex.P.5(a) to P.5(d) and Ex.P.8 were marked during the cross-examination of DW-1. The Ex.P.1 is the cheque dated 31.01.2019 for Rs.3,00,000/- and Ex.P.1(a) is the signature of the accused on the cheque. Ex.P.2 is the Bank endorsement dated 01.02.2019, which was issued with a Shara "Funds Insufficient". Ex.P.3 is the office copy of the statutory notice dated 18.02.2019. Ex.P.4 is the Postal receipt for having been sent the statutory notice to the accused through registered post. Ex.P.5 is the On Demand Promissory Note with consideration receipt dated 13.02.2017 executed by the accused in favour of the complainant at the time of availing loan. Ex.P.6 is the reply notice dated 13.03.2019 issued by the accused. Ex.P.7 is the original Pawn Ticket issued by Sona Bankers in favour of the Pawner/Complainant in respect of the Rs.3,00,000/- given on the basis of golden articles measuring to 170 grams pawned with them. Ex.P.8 is

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the Postal acknowledgement for having served statutory notice on the accused.

11. I have perused the exhibits on which the complainant has placed her reliance. On plain perusal of the exhibits, it is clear that the

cheque at Ex.P.1 dated 31.01.2019 was presented through the Bank within its validity for encashment and the Bank issued endorsement as per Ex.P.2 on 01.02.2019 with a shara "Funds Insufficient". The complainant issued statutory notice dated 18.02.2019 as per Ex.P.3 within time from the date of receipt of Bank Memo. The notice was served on the accused on 20.02.2019 as per Ex.P.8. The accused issued reply notice dated 13.03.2019 as per Ex.P.6. Further the accused also admitted the service of notice during his cross-examination and also admitted the acknowledgement at Ex.P.8. The complaint has been filed on 19.03.2019, which is within limitation. Therefore, the documents on record clearly show that the complainant has complied the ingredients of Section 138(a) to (c) of the N.I.Act. Therefore the presumptions U/s.118 and 139 of the N.I.Act arise in favour of the complainant. The presumptions are rebuttable and the burden is on the accused to rebut the presumptions. It is to be borne in mind that once the issuance of cheque is proved, the presumption that arises under the aforesaid

section is only in respect of the fact that the cheque was issued for legally enforceable debt/ liability and there is heavy burden on the complainant to prove that there is actual existing debt or liability. Once it is proved, the onus shifts on the accused to rebut the same by raising probable defence and proving it relying on the evidence of the complainant or by leading his direct evidence.

12. It is the specific defence of the accused that he had never

borrowed any amount as alleged by the complainant much less a sum of Rs.3,00,000/- on 13.02.2017. The alleged cheque bearing No.909987 dated 31.01.2019 drawn on State Bank of Mysore, Malleshwaram Branch, Bengaluru-03 is false, fabricated and created as State Bank of Mysore merged with State Bank of India with effect from 01.04.2017 and the cheques of State Bank of Mysore became invalid with effect from 31.03.2018. Therefore, there is no legally recoverable debt. It is also the specific defence of the accused that his wife and the complainant are friends. He was doing National Highway work of Hosapete to Chitradurga from January-2018 to February-2019. He used to keep the blank signed cheques in the house for the purpose of household expenses and other necessities. He used to give signed blank On Demand Promissory Note and consideration receipt to the suppliers

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of materials and when he pays the amount, he used to take back the same and keep in the house. The complainant used to come to his house. The complainant took six blank cheques from his house and misused them. He also took other probable defences to demolish the case of the complainant stating that he never had the necessity of borrowing loan and in turn the complainant has borrowed the loan from his wife; the writings on the cheque and On Demand Promissory Note do not belong to him. The complainant has no financial capacity to pay the alleged loan amount and there is difference in writings and the ink.

13. The complainant/PW-1 filed affidavit in lieu of her

evidence and reiterated complaint averments. In the cross-examination she denied all the suggestions made by the counsel for the accused and deposed pertaining to the facts averred in the complaint. It is undisputed fact that the complainant and the wife of the accused by name Smt.Sujatha are well known to each other and therefore the complainant and accused are well known to each other. The accused also stated the said fact in his defence evidence. The counsel for the accused in order to elicit that the complainant has no financial capacity to pay the loan amount at relevant point of time, asked several

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questions and also made suggestions but the complainant clearly deposed that she gave the amount after pawning the gold articles belonging to her. It is further argued that the complainant has not examined the pawn broker to prove the pawn ticket and failed to show as to what was the rate of interest of the pawn. It is evident from Ex.P.7, which is original pawn ticket produced before the Court for its inspection, that the complainant pawned her golden articles weighing 170 grams on 13.02.2017 in the Sona Bankers and obtained an amount of Rs.3,00,000/- on the date of the transaction. On perusal of the conditions on the back of the pawn ticket, it is clear that the interest rate shall not exceed the 14% PA. It shows that the maximum interest rate applicable for the pawn is 14% PA. There is no contrary evidence on record to disbelieve the pawn ticket.

14. It is further argued that the complainant has been residing in rented house and she changed the house as it is evident from her cross

examination. She has not produced the rental agreement. The amount obtained from pawning the gold was adjusted to the advance amount of changed rented house. He further argued that inference may be drawn that the amount of pawn was adjusted to advance amount as the PW.1 withheld the rental agreement. On perusal of the cross examination of
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PW.1, it is clear that the complainant resided at the previous address from 2016 to 2018. In her cross examination dated 16.09.2019, she clearly stated that she changed the house exactly 1 year 4 months prior to the said date (the date of cross-examination). It shows that she changed the rented house in the year 2018. The transaction in this case alleged to have taken place on 13.02.2017 and the date of pawn is also the same. Therefore it can not be presumed that the said amount was adjusted towards advance amount as PW.1 withheld the rental agreement. The accused has not adduced any evidence to show that there was no pawn and EXP.7 is not reliable or the amount of pawn was adjusted to some other transaction other than the transaction in this case. Therefore the argument of the counsel for the accused that the complainant has no financial capacity to lend the money at the relevant point of time is not acceptable.

15. In order to prove his defence the accused examined himself as DW-1 and got marked Ex.D.1 to D.9. Ex.D1 to D.3 are the acknowledgements of Income Tax returns for the year 2015-16 to 2017-18. The said documents were produced to show his contract

business has turn over in lakhs and his total taxable income every year is more than Rs.11,00,000/- during the year 2015-16 as per Ex.D.3,
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more than Rs.12,00,000/- during the year 2016-17 as per Ex.D.2 and more than Rs.13,00,000/- during the year 2017-18 as per Ex.D.1. The documents were produced to show that he is financially sound and he has no necessity to borrow loan from the complainant. Ex.D.4 to D.9 are the documents pertaining to the approved work order obtained from the company of Larsen and Toubro Ltd, construction. The said documents show that the work orders are between 2018 and 2019. The said documents were produced to show that he was working on the Highway Project between January-2018 and February-2019. It was elicited in the cross examination of PW.1 that the accused has his own house and car; her husband runs tea stall at rented premises in Palacegattahalli on rent of Rs.500/- per month and they live in rented house. However, during the cross-examination of the accused by the counsel for the complainant it was elicited that his permanent residence is at Bengaluru and he used to come occasionally to Bengaluru and he has no documents to show that he resided in Hosapete permanently on account of Highway Project from January-2018 to February-2019. Further the accused being the government contractor, it is in the common course of business that the contractor has to invest his money first and he has to claim it later on. It was further argued that the loan transaction was not depicted in Income
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Tax Return of the accused but it is left to the accused to either show the

loan transaction or not in his own Income Tax Return and the complainant has no role in it. There is no straight jacket formula that the person having the sufficient source of income would never avail loan. Moreover it is so common in the business of contractor that the contractor needs urgent money for his work and for the said reason he takes loan from the bank or hand loan can not be ruled out. It is stated that the accused is government contractor. Such being the case, in case of the government contracts, the contractor has to invest first and claim the amount later. On the other hand the complainant proved her financial capacity by producing the pawn ticket. Therefore the argument of the counsel for the accused that he may be financially sound may be acceptable but he has no necessity of borrowing the loan amount is not acceptable.

16. The counsel for the accused cross-examined the PW-1 in length in respect of the defence that the complainant took blank signed cheque and On Demand Promissory Note from the house of the accused taking advantage of the friendship with his wife. However, nothing was elicited from the mouth of PW-1 in support of the defence of the accused. He also made several suggestions in that regard but PW-1

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denied all the suggestions made by the counsel for the accused. Mere taking the defence is not sufficient but the accused has to discharge his burden of proving his defence by adducing cogent evidence. The accused neither able to shake the evidence of complainant nor adduced any evidence to prove his defence. Therefore the argument of the

counsel for the accused that the blank signed cheques were taken by the complainant from the house of the accused is not acceptable. Moreover, during the cross-examination of DW-1 by the counsel for the complainant he stated that he has not taken any legal action against the complainant for the alleged act of the complainant of taking the blank cheques and Promissory Note from his house without his consent (i.e. theft) even after the receipt of legal notice issued by the complainant. Further there is nothing mentioned in the reply notice at ExP.6 issued by the accused to the complainant about the loss of blank cheques and Promissory Note from his house much less they were taken by the complainant and misused by her. The accused also admitted that the said fact has not been stated in his reply notice. When it was suggested to accused that the complainant was not in possession of any other documents except one cheque at ExP.1 and the DP note at ExP.5, the accused has neither specifically answered the said suggestion in tune with his defence of loss of 6 cheques nor denied it

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but merely answered that she might have possessed only one cheque and DP note. It shows that the accused has knowledge about the same. Therefore the defence of the accused is not tenable.

17. It was argued that there are no witnesses to show that she lent amount to the accused on the alleged date. For the reason that no witnesses have been examined to show that loan was given to the accused, the claim of the complainant can not be rejected outrightly more particularly when she has proved that she arranged the amount,

which was lent, by pawning her gold articles on the same day and she had also taken On demand Promissory note in respect of the amount lent apart from the cheque in question. Moreover, the accused admitted the signatures on the cheque and Promissory note. Therefore the presumption arises in favour of the complainant. The admission attracts the ratio laid down by the Hon'ble Supreme Court of India in its decisions reported in 2011 (11) SCC 441 - Rangappa V/s Mohan and 2015 (8) SCC 378 - T.Vasanthakumar V/s.Vijayakumari. The ratio is that the cheque shall be presumed to be for consideration unless and until the court forms a belief that the consideration does not exist or considers the non-existence of consideration so probable that a prudent

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man ought under such circumstances act upon the supposition that it does not exist.

18. The accused also took defence stating that the complainant has manipulated the cheque, and the writings on the cheque and promissory note differ and the ink too. It is admitted by the accused that he signed the cheque in question. He disputed the name and details on the cheque and promissory note. It was elicited in the cross examination of PW.1 that there is change of writings and ink in the On Demand Promissory Note at ExP.5 and that the pen used for signing the document is different. It was argued that the name on the ExP.5 is altered, which amounts to material alteration. The alteration alleged is that the letter G in DP note and insertion of A in consideration receipt.

The accused also disputed the date on the cheque at ExP.1. However such aspects have no bearing on the case because as per the presumption U/s.118(b) of N.I.Act every Negotiable Instrument bearing a date was made or drawn on such date and as per Section 20 of the N.I.Act, if the person signs and delivers Negotiable Instrument and it is left incomplete and thereby he authorizes the holder to complete the Negotiable Instrument and thereby he is liable for the amount mentioned in the Negotiable Instrument. It is also not the case of the

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accused that the ExP.5 was executed to some other person other than the complainant. There is no specific defence in respect of the same. The name of complainant Yashodha is written clearly and letter G was overwritten. Such being the case, the accused has to prove that there is another person by the same name to whom it was given and the complainant has altered the same to her personal gain. This not being the case, the question of material alteration does not arise. It is merely a mistake in writing or clerical error by the person who wrote the ExP.5. It is admitted fact that signatures on the ExP.5 belong to the accused and they were marked during his cross examination. Therefore, the defence of the accused is not tenable. Further in view of the Judgment rendered by the Hon'ble Supreme Court of India in its Criminal Appeal No.230-231 of 2019 - Bir Singh V/s.Mukesh Kumar also the above defence is not tenable. The para No.38 and 40 of the said Judgment are extracted and the paragraphs reads thus:-

38. If a signed blank cheque is voluntarily presented to a payee, towards some

payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was

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not in discharge of a debt or liability by adducing evidence.

40. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.

In the case on hand no evidence was brought on record to show that the cheque was not issued for the discharge of debt or liability and the promissory note was not executed in respect of any debt or liability. Therefore the argument of the counsel for the accused is not tenable. It was also argued that there were no attesting witnesses to Exp.5 and it is not valid. This argument is also not acceptable as the promissory note is not compulsorily attestable document.

19. The counsel for the accused strongly argued that accused has not taken any steps to prove that the six cheques and on demand promissory note were stolen and they have been falsely fabricated and created, as the cheque itself is invalid as the cheques of the SBM are

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invalidated after its merger with SBI after 31.03.2018. The counsel for the complainant argued that the cheques of the SBM are now also

being honoured if the balance in the account of the drawer is sufficient to honour the cheque. There is no evidence on record to show that the cheques of SBM were invalidated after the alleged date. Further he has not proved that the cheques are being dishonoured for the reason of invalidity of SBM cheques after its merger with SBI. It is clear that as per version of the complainant the cheque was issued on the date mentioned in it. It is to be presumed as per the provision of section 118 (b) of NI Act that every Negotiable Instrument bearing a date was made or drawn on such date. Such being the case, the accused has neither handed over the cheques to the SBI Bank after merger of SBM Bank with the SBI Bank nor obtained the new cheque book. He stated in his evidence that he has not taken new cheque book from SBI. Therefore the accused should not be allowed take the shield of invalidity of SBM cheques after its merger with SBI, to escape from the liability of payment.

20. It was elicited in the cross examination of PW.1 that she has not told about the interest of 12% to her counsel and she has admitted that she has not stated about it in the notice and affidavit. It

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was argued that the counsel for the complainant inserted it to extract money. The argument is not tenable for the simple reason that the complainant may not have told the counsel but she would have shown the documents, out of which the pawn ticket is one. As per the pawn ticket at Exp.7, the interest charged should not exceed 14 % per annum. The complainant stated in her evidence that the accused

assured her of releasing the gold articles by paying the principal and interest in respect of pawn. Despite her above admission, the aspect of interest @ 12% P.A. is clearly stated in her notice as well as evidence affidavit. Therefore it can be presumed that the interest mentioned in the complaint is the interest charged on the loan amount of pawn.

21. PW.1 admitted in her cross examination that she did not know about the business or work of the accused and she did not know that the accused is government contractor. On the basis of the said admission, it was argued that the accused was stranger to the complainant. It is not acceptable for the simple reason that the accused admitted the fact that complainant is the friend of his wife and she used to come to his house.

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22. For the reasons mentioned herein above, it is crystallized that the accused has utterly failed to prove that there was no existence of legally enforceable debt between him and the complainant at the given point of time and he has not at all issued the instant cheque towards the discharge of legally enforceable debt of Rs.3,00,000/-. Under the circumstances, it can be gathered that, the accused failed to rebut the statutory presumptions U/s.118(a) & (b) and 139 of the N.I.Act. Accordingly the accused is found guilty for the offence punishable U/s.138 of the N.I.Act. Hence, I proceed to answer the point No.1 in Affirmative and Point No.2 in the Negative.

23. Point No.3 : In view of the reasons assigned on Point No.1

and 2, I proceed to pass the following:-

ORDER

As per the provisions of Sec.255(2) Cr.P.C. the accused is hereby sentenced for the offence punishable u/s.138 of NI Act, 1881. The Accused shall liable to pay fine of Rs.3,10,000/-(Rupees Three Lakhs Ten Thousand Only). On deposit of fine amount the complainant is entitled for compensation of Rs.3,05,000/-(Rupees Three Lakhs Five Thousand only). The remaining balance amount of Rs.5,000/- is to be forfeited to the State.

23 CC.6843/2019 (J) In default of payment of the fine amount accused shall undergo simple imprisonment for three months.

The personal bond executed by the accused is hereby stands cancelled and cash surety of Rs.3,000/- furnished by the accused shall be refunded to him after expiry of appeal period.

Copy of the judgment shall be furnished to the accused at free of cost.

(Dictated to the Stenographer, transcript thereof is computerized and printout taken by him, is verified and then pronounced by me in Open Court on this the 20 th day of November 2020.) (Lokesh Dhanapal Havale) XV Addl. CMM., Bangalore.

24 CC.6843/2019 (J) ANNEXURE Witnesses examined for the Complainant: PW.1 Yashodha.G. Documents marked for the Complainant: Ex.P.1 Cheque.

Ex.P.1a Signature of the accused.

Ex.P.2	Bank endorsement.
Ex.P.3	Legal Notice.
Ex.P.4	Postal Receipt.
Ex.P.5	D.P.Note & Consideration Receipt.
Ex.P.6	Reply Notice.
Ex.P.7	Golden Articles Pawn Receipt.
Ex P.8	Postal Acknowledgement.
Ex.P.8(a)	Signature.
Ex.P.5a to P.5d	Signatures of accused.

Witnesses examined For Defence: DW Bhaskar Reddy Documents marked for Defence: Ex.D.1 to D.3 Income Tax returns for the years 2015 to 2017.

Ex.D.4 to D.9 Six Work orders of L & T Company (Lokesh Dhanapal Havale) XV Addl. CMM., Bangalore.