

Sri.Naveed Pasha vs Smt.Shaheen Taj on 17 October, 2016

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C.C.No.11814/14 J

IN THE COURT OF THE XVI ADDITIONAL CHIEF METROPOLITAN
MAGISTRATE, BENGALURU CITY

Dated: This the 17th day of October, 2016

Present: Smt. Saraswathi.K.N, B.A.L., LL.M.,

XVI Addl.C.M.M., Bengaluru City.

JUDGMENT U/S 355 OF Cr.P.C.,

Case No. : C.C. No.11814/2014

Complainant : Sri.Naveed Pasha,
S/o.Late.Siraj Ahmed,
Aged about 32 years,
R/at.No.17, 3rd Cross,
8th Main Road, 3rd Block,
East Jayanagar,
Bengaluru-11.

(Rep. by
Sri.B.L.Narasimhachar, Adv.,)

- Vs -

Accused : Smt.Shaheen Taj,
W/o.Shabbir Pasha,
Aged about 42 years,
R/at.No.19/20,
8th C main road,
New Gurappanapalya,
Bengaluru-29.

(Rep. by Sri.Dharmapal.,
Adv.,)

Case instituted : 01.2.2014
Offence complained : U/s 138 of N.I. Act
of
Plea of Accused : Pledged not guilty

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C.C.No.11814/14 J

Final Order : Accused is acquitted
Date of order : 17.10.2016

JUDGMENT

The Complainant has filed this complaint against the Accused for the offence punishable u/Sec.138 of the Negotiable Instruments Act.

2. Briefly stated the case of the Complainant is that, the Accused is the younger sister of his late father and in view of this relationship, the Accused approached and requested him to pay a sum of Rs.5,00,000/- as hand loan for the purpose of purchasing the property in Bengaluru, in the month of August-2013. At the time of borrowing the said amount, the Accused promised him that she would return the said amount within three months from the date of taking the money from him. But even after the lapse of three months, the Accused did not care to discharge the hand loan taken from him. In this regard he had approached the Accused on several occasions and requested her to return the money borrowed to purchase the house property in Bengaluru.

3. It is further stated by the Complainant that on 20.12.2013, the Accused issued a cheque bearing No.862574 for a sum of Rs.5,00,000/-, drawn on the Punjab and Sind Bank, Bannerghatta, Bengaluru, in his favour, for discharging the hand loan taken by her in the month of August-2013. Thereafter as per the request of the Accused, when he presented the said cheque for encashment through his banker, it was returned with an endorsement "Funds Insufficient" as per Bank Memo dated 21.12.2013.

4. Thereafter he got issued the legal notice dated 2.1.2014 to the Accused through RPAD and through courier. Even though the said notices have been delivered to the Accused, she has neither replied to the notice nor repaid the amount covered under the cheque.

5. The Complainant submits that, the dishonour of the cheque by the Accused has been malafide, intentional and deliberate. Feeling aggrieved by the conduct of the Accused, he has filed the present complaint praying that the Accused be summoned, tried and punished in accordance with Sec.138 of the Negotiable Instruments Act.

6. The Complainant has led the Pre-summoning evidence on 08.05.2014. Prima-facie case has been made out against the Accused and she has been summoned vide order of the same date.

7. The Accused has appeared before the court on 20.10.2014 and she has been enlarged on bail. The substance of the accusation has been read over and explained to her, to which, she has pleaded not guilty and claimed to be tried.

8. In his post-summoning evidence, the Complainant examined himself as PW-1 and in his affidavit, he has reiterated the complaint averments. In support of his oral evidence, PW-1 has relied upon Ex.P1 to P11, which are as follows:-

Ex.P1 is the cheque, in which, the signature is identified by P.W.1 as that of the Accused as per Ex.P1(a), the Bank memo as per Ex.P2, the office copy of the legal notice as per Ex.P3, the Postal Receipt as per Ex.P4, the courier receipt as per Ex.P5, 2 returned postal covers as per Ex.P6 and 7 respectively, the Complaint as per Ex.P8 and the signature on the complaint as per Ex.P8(a), the pass book of Srikari Finance as per Ex.P9, the two rent agreements as per Ex.P10 and 11 respectively.

Ex.D1 to D-5 which have been marked through PW-1 are as follows:-

Ex.D1 to D3 are the certified copies of the pronotes, Ex.D4 is the certified copy of the acknowledgement and Ex.D5 is the certified copy of the statement.

9. The Statement of Under Sec.313 of Cr.PC has been recorded on 25.01.2016.

10. In her defence evidence the Accused has examined herself on oath U/Sec.315 of Cr.PC as DW-1 and during her evidence before the court she has deposed that she knows the Complainant, who is her Nephew. She has further deposed that she was in need of Rs.8,00,000/- which she had availed from the Complainant, in respect of which, he harassed her and therefore she repaid the said amount of Rs.8,00,000/- along with an interest of Rs.1 lakh in the presence of four persons by selling her house. According to her, at the time of she availing Rs.8,00,000/- from the Complainant, she had issued two signed blank cheques, signed bond paper and a Pronote in his favour and at the time of repaying Rs.9,00,000/- to him, the Complainant returned to her only the coloured photocopies of the said documents, which he had collected from her and as the Complainant is her relative, at that time, she had not verified the said documents. According to her, the said coloured photocopies of the documents which were returned to her by the Complainant are as per Ex.D1 to D3 and two months thereafter, the Complainant had not asked her anything and thereafter she received notice from the complainant and at that time, when she showed the documents returned by the Complainant to her Advocate, he informed to her that, the said documents were not the original documents, but they were the coloured photocopies. DW-1 has further deposed that, on the basis of her two cheques, the Complainant has got filed a cheque bounce case against her on the basis of one among the said two cheques for Rs.10,00,000/- before the Court by the 15th ACMM through his friend Shaik Imran and on the basis of the other cheque, the present case has been filed by him. She has further deposed that, in this regard, she lodged a complaint against Complainant before the Tilaknagar Police Station, in which, the Complainant avoided to sign before the police, on the pretext that, he had chest pain and on the next day, he gave statement before the police as per Ex.D5. She has further deposed that, as per Ex.D6, she has been acquitted in the case filed against her by the friend of the Complainant Shaik Imran by the 15th ACMM Court, Bengaluru and as such she is not liable to pay any amount to the Complainant and accordingly prayed for the dismissal of the complaint.

11. The Accused has been cross-examined by the learned counsel for the Complainant. In her cross-examination, no doubt DW-1 has admitted that, she is a house wife and that the cheque in question relates to her account and the signature on it is her signature, which is in English language. She has further admitted the suggestion that as per Ex.P4, it is stated that she has repaid Rs.9,00,000/- to the Complainant on 20-12-2013. However, she has denied that the cheque in question has been issued by her to the Complainant towards the repayment of the balance amount, which she owed to the Complainant on 20.12.2013. She has further admitted the suggestion her bank account relating to the cheque at Ex.P1 is still in operation, but she has denied that as per her instructions, when the said cheque was presented for encashment, it got bounced for the reason of "Funds Insufficient".

12. With regard to her address, it is admitted by DW-1 that her husbands' name is Shabeer Pasha and her residential address shown in the legal notice and in the complaint is correct. She has further

admitted that, as per Ex.D4, she has given statement before the Tilaknagar Police that she has availed loan from the Complainant. However she has denied the suggestion that likewise she has also availed loan from Imran, Jafrulla, Prasanna and Sardar and when all of them came near her house and sought for the return of the loan amount, she was not in her house. In this regard, the explanation given by D.W.1 is that the said persons had locked her house and her house gate and therefore she lodged a complaint only against the Complainant before the MICO Layout Police Station, but she has denied that in the said complaint a "B" report has been filed by the police.

13. With regard to the cheques at Ex.P1 and Ex.D1, it is admitted by DW-1 that, the cheque numbers of both Ex.P1 and D1 are different, but according to her, the complainant had returned only the coloured photocopied cheque to her and she has admitted that there would be difference between the original cheque and the photocopied cheques. However she has denied the suggestion that as she knew that the present case would be filed against her, she had obtained coloured photocopy of the cheque at the beginning itself and she has admitted that she has not produced the coloured photocopy of the cheque at Ex.P1. Similarly it is admitted by DW-1 that, in Ex.D1, except her address and signature, no other details have been written and that the said document also does not contain the name, the address and the signature of the Complainant. DW-1 has denied the suggestion that the contents of Ex.P1 cheque and Ex.D3 i.e. pronote and consideration receipt dated 27.07.2013 has been got written by her through her son and she has denied that she has issued the said documents by mentioning the old date in which she has signed and got written her address.

14. According to DW-1, she can produce the documents to show that she has repaid the amount to the Complainant, out of the sale proceeds of her house and though she had undertaken to examine the purchaser of her house property, she has failed to examine any such person as a witness before the Court.

15. During the further course of cross-examination of D.W- 1, it is suggested to her by the counsel for the Complainant that, she had availed loan from the Complainant for the purpose of getting released her property's mortgaged documents, which has been denied by her and immediately it is suggested to her that she has got released her property documents by availing loan from the Complainant and Sardar and that she has given the said documents as a security to the Complainant.

16. With regard to the financial capacity of the Complainant D.W-1 has pleaded ignorance to the suggestion that the Complainant has got the capacity of arranging Rs.3 to 5 lakhs within a day, but she has denied that, apart from the cheque amount, she is still liable to pay Rs.1 lakh to him. Similarly DW-1 has denied the suggestion that, she has not repaid Rs.9 lakhs to the Complainant and therefore for the same reason, she is not able to say as to in whose hands she has paid the said amount of Rs.9 lakhs.

17. Heard the arguments of both the sides and perused the materials on record.

18. The learned counsel for the Complainant has prayed for the conviction of the Accused on the ground that the Complainant has fulfilled all the ingredients of Sec. 138 of the N.I.Act and he has also proved his financial capacity. It is further argued that the Accused has admitted her loan

transaction with the Complainant and the Complainant has claimed only the part amount from the Accused, as the remaining balance amount has been paid by the Accused. Similarly the Complainant admits the part payment made by the father of the Accused and that the Accused took back her original property documents and in the legal notice, only the amount claimed by the Complainant from the Accused is demanded and that the Accused had taken loan even from the other persons. It is further argued that, in the transaction relating to the case, the certified copy of the judgment which is at Ex.D6, the Complainant stood as surety to the loan transaction between the Accused and his friend Imran and during the cross-examination of the Complainant, the Accused states that the Complainant gave the coloured photocopies of her documents, but she says that the Complainant returned the photocopies in the presence of four witnesses, but she has failed to examine any of such witnesses before the Court. It is further argued that the Complainant has replied to the notice issued by the concerned police and it is admitted by the Complainant that the Accused has repaid Rs.9 lakhs on 20.12.2013 and there is every possibility of the Accused getting the photocopies of the documents only to cheat the Complainant and in the case in C.C.No.4671/2014, filed against the Accused by one Shaik Imran, the Accused was acquitted only because of the reason that, the Complainant of the said case could not prove his financial capacity before the Court and it is further argued that Ex.D3 is a created document. It is lastly argued that the presumption U/s.1s18 R/W. 139 of the N.I.Act is in favour of the Complainant and therefore the Accused deserves to be convicted.

19. On the Contrary, the learned defence counsel has argued for the acquittal of the Accused on the ground that, the issuance of the cheque as well as its execution may be admitted and even the transaction between the parties is admitted, but the defence of the Accused is that the Complainant paid only Rs.8 lakhs to the Accused and not Rs.15,00,000/-. It is also argued that the financial capacity of the Complainant is seriously disputed. There is contradiction with regard to the purpose of the loan, as in the complaint, it is pleaded by the Complainant that the Accused approached him seeking financial assistance of Rs.5,00,000/- for the purpose of the purchase of the property in Bengaluru. However, in the cross-examination of the Accused, the Complainant has come up with a version that, the Accused availed loan from him for purchasing an apartment on Hebbal road and subsequently he has come up with a contrary version that the Accused availed loan from him and his friend Sardar for the purpose of getting released her property documents from Punjab and Sind Bank. It is also argued that, though the relationship between the parties is admitted, it is proved by the Accused that the said relationship was not cordial. It is further argued that the Complainant has failed to plead about the alleged lending of Rs.15,00,000/- lakhs as well as, the mode in which he arranged the said amount of Rs.15,00,000/- and for the first time during his cross-examination, the Complainant has come up with a version that, he arranged the said amount by way of rent advance, loan from Srigiri Finance, loan from his friend Siraj, loan from his brother and loan from his friend Prabu. This claim of the Complainant is also unsupported by any pleading and that the Complainant has failed to examine any such persons as witnesses so as to prove his claim. It is further argued that, there is also contradiction about the date of the issuance of cheque in question by the Accused to the Complainant and the Accused has already repaid Rs.9 lakhs in place of Rs.8 lakhs to the Complainant and therefore she is not liable to pay any amount to the Complainant. It is lastly argued that as the Complainant has utterly failed to prove the existence of the legally enforceable debt, the Accused deserves to be acquitted.

20. I have considered the submissions and perused the record carefully.

21. Sec.138 of the Negotiable Instruments Act has been enacted to lend credibility to the financial transactions.

The main ingredients of the offence under Section 138 Negotiable Instruments Act are:-

(i) Drawing up of a cheque by the Accused towards the payment of the amount of money, for the discharge, in whole or in part, of any debt or any other liability;

(ii) Return of the cheque by the bank as unpaid;

(iii) The drawer of the cheque fails to make the payment of the said amount of money within 15 days of the receipt of the notice under the proviso (b) to Section 138.

22. The Explanation appended to the Section provides that, the "debt or other liability" for the purpose of this Section means a legally enforceable debt or other liability.

23. Apart from this, Sec. 139 of the Negotiable Instruments Act lays down a presumption in favour of the holder of cheque in the following terms:-

"It shall be presumed, unless the contrary is proved, that:-

The holder of a cheque received the cheque, of the nature referred to in Sec. 138, for the discharge, in whole or in part, of any debt or other liability".

24. Also, Sec. 118 of the Negotiable Instruments Act states, "Until the contrary is proved, the following presumptions shall be made:-

(a) 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;"

25. Thus, the Act clearly lays down the presumptions in favour of the Complainant with regard to the issuance of the cheque by the Accused, towards the discharge of his liability in favour of the Complainant.

26. Under the scheme of the Act, the onus is upon the Accused to rebut the presumptions in favour of the Complainant by raising a probable defence.

27. Such being the legal position, it would be pertinent to refer to the defences raised by the Accused to rebut the presumptions in favour of the Complainant in this case.

28. The first defence of the Accused is that, though she has not disputed her relationship with the Complainant, as well as her financial transaction with him and also the fact that the signature on the cheque in question is her signature, it is her specific defence that, she had availed a loan of only Rs.8 lakhs from the Complainant, who is her nephew and not Rs.15 lakhs as claimed him. Further according to her, at the time of borrowing the said loan, she had issued her two signed blank cheques, an On demand pronote to the Complainant, for the purpose of security of the said loan and she has repaid the said loan of Rs.8 lakhs along with interest of Rs.1 lakh and at that time, instead of returning her original documents, the Complainant returned only the coloured photocopies of the cheques and the on Demand Pronote issued by her. In this regard, it is the defence of the Accused that she did not verify about the genuineness of the said documents given to her by the Complainant as he was closely related to her. Therefore, according to the Accused, even after she repaid the entire loan amount of Rs.8 lakhs, together with interest of Rs.1 lakh, the Complainant has filed the present false case against her, apart from getting filed another false case against her through his friend one Shaik Imran in C.C.No.4671/2014, in which she has been acquitted as per Judgment at Ex.D6.

29. No doubt, the initial presumption U/s.139 of the N.I.Act has to be raised that the cheque in question has been issued by the Accused in favour of the Complainant towards discharge of his or her liability. However, the said presumption is rebuttable in nature and it is for the Accused to rebut the said presumption by leading direct or probable evidence. In the present case, it is alleged by the Accused that, the Complainant has been falsely claiming the cheque amount from her and he has also instigated his friends to file such false cases against her.

30. In such circumstance, the burden is upon the Complainant to prove before the Court that, he has advanced a loan of Rs.15 lakhs to the Accused as alleged by him. However, it could be seen that, neither in the legal notice at Ex.P3 nor in the complaint nor in his affidavit, the Complainant has pleaded having allegedly lent the loan of Rs.15 lakhs to the Accused. It is for the first time during his cross-examination that too after it was suggested to him by the learned defence counsel that, the Complainant has admitted about the filing of C.C.No.4671/2014 by his friend Shaik Imran against the Accused for a sum of Rs.10 lakhs. But in this regard, it is claim of the Complainant that, he was appearing before the Court of the 15th A.C.M.M. along with his friend Shaik Imran, because of the fact that, he was a surety to the loan transaction of Rs.10 lakhs to the Accused. According to the Complainant, he had got lent Rs.10 lakhs to the Accused through Shaik Imran.

31. With regard to his alleged lending of Rs.15 lakhs, for the first time, the Complainant in his cross-examination has come up with a version that, he has lent a total sum of Rs.15 lakhs to the Accused by way of three installments of Rs.5 lakhs each in July and August-2013. He has further deposed that he has arranged the said amount by way of arranging the amounts received from his mother, by availing loan from Sri. Giri Finance, by availing loans from his friends Siraj and Prabhu and also from his brother. Though initially the Complainant had not produced the documents to show that he had arranged the said amounts through the aforesaid sources, subsequently he has produced the documentary evidence as per Ex.P9 to P11, which are the Passbook and rental agreements respectively. Interestingly it is pertinent to note that, it is admitted by PW-1 himself that, the rental agreement at Ex.P10 is not in his name and it is executed by one Maqbool, as the landlord of the said property. Similarly PW-1 has claimed that he had availed hand loan from his

friend Siraj as per Ex.P11 in July 2013 and he has repaid the same to him in three installments from the date of borrowing the said loan. It may be true that the Complainant might have availed loan from the said Siraj as per Ex.P11, but there is no proof to show that the Complainant had availed the said loan only for the purpose of his in turn lending the said amount to the Accused. Similarly, even the document at Ex.P9, which is the pass book pertaining to the weekly payment of Rs.10,000/- made by the Complainant to the Srikari finance goes to show that, he has opened the said account on 21.07.2013 and the last payment has been made by him on 05.01.2014. However, though PW-1 has claimed that he has cleared the said loan by way of paying Rs.10,000/-per week to the said Srikari finance, it is pertinent to note that there is no mention in the said document that the said loan had been availed by him only for the purpose of paying the said amount to the Accused. Similarly even if the documents at Ex.P9 to P11 are believed to be true so as to prove the claim of the Complainant, it is admitted by PW-1 himself that, as per Ex.P9 to P11 he has arranged only Rs.5.5 lakhs and claims that he has lent the said amount of Rs.5.5 lakhs to the Accused between July and August-2013. But this is contrary to what deposed by P.W.1 in his earlier cross-examination on 13.08.2015, wherein he has claimed that, he has lent Rs.5 lakhs to the Accused on 15.07.2013. No doubt, it is possible that, due to loss of memory, the Complainant might have stated in his earlier cross-examination that, he has lent Rs.5 lakhs to the Accused in July 2013 and subsequently came up with a version that he has lent Rs.5.5 lakhs to the Accused between July and August-2013, however, this is again contradictory to the claim of the Complainant, as initially, he has claimed that he has lent Rs.5 lakhs to the Accused between 10.8.2013 to 20.8.2013. Similarly it is admitted by P.W-1 that, he has not stated either in his legal notice or in his complaint that he has lent Rs.15 lakhs to the Accused. This is a material omission since it touches the very claim of the Complainant so as to believe his version. Similarly at one place, P.W.1 claims that he has not collected any documents from the Accused for having allegedly lent Rs.15 lakhs, but immediately he says that the Accused had issued her house documents and took back the same with an assurance that she would repay the said amount immediately to him. This also raises a serious doubt about the case of the Complainant.

32. Now coming to the alleged transaction between the parties, with regard to the time of his alleged lending of the amount to the Accused, though the Complainant has claimed that at the time of his alleged lending of loan to the Accused, his uncle Jafrulla Khan was present, he has failed to examine the said person to substantiate his claim. Similarly when the Complainant has claimed that he has arranged Rs.15 lakhs by way of availing loans from his friends' viz., Siraj, Prabhu and also from his brother, he has neither produced documents to substantiate the same, except the documents at Ex.P11 nor examined any of those persons before the Court. No doubt, when the Accused herself has admitted the financial transaction with the Complainant for Rs.8 lakhs, it does not mean that the financial capacity of Complainant so as to have allegedly lent Rs.15 lakhs is admitted by the Accused. Moreover the Complainant has claimed that he had got lent Rs.10 lakhs to the Accused through his friend Shaik Imran and he in turn has lent Rs.15 lakhs to the Accused. In this regard, when the discussion in the Judgment at Ex.D6 with regard to the purpose of the loan by the Accused with Shaik Imran is considered by the Court, even in the said case, it was claimed by the said Complainant that he had lent Rs.10 lakhs to the Accused for the purchase of property in Bengaluru. However, even the said Complainant failed to prove the advancement of any such loan to the Accused. No doubt, the said Judgment is not binding on this Court. However, it could be relied upon in order to know the manner in which the Accused has been implicated in this type of cheque

bounce case in collusion with his friend.

33. Even otherwise, if the case of the Complainant that he has allegedly advanced Rs.15 lakhs to the Accused is believed, then, it is pertinent to note that, the Complainant has failed to prove the purpose for which, he has allegedly advanced such loan to the Accused. In this regard, in his cross-examination, the Complainant has deposed that the Accused availed loan from him for purchasing an apartment on Hebbal Road, but he has not seen the apartment and he also does not remember as to if the Accused has purchased any such apartment or not. This type of answer given by the Complainant goes to show that he has been so ignorant and it is highly impossible to believe his version that he would have lent Rs.15 lakhs to the Accused without even confirming the purpose for which he had advanced the said amount to her. Similarly it is elicited from the mouth of PW-1 that he does not know the house address of the Accused situated at Gurappanapalya and that he was not going to the house of the Accused and that the husband of he Accused has been suffering from Paralysis since several years and that he had seen the husband of the Accused about 6 to 7 months back only in the Court. This also clearly goes to show how the relationship between the parties was strained and in such circumstance, it is highly impossible to believe the claim of the Complainant about his alleged lending of Rs.15,00,000/= to the Accused. Similarly nothing prevented the Complainant from pleading about his alleged lending of loan of Rs.15 lakhs by him to the Accused, if really, he had advanced such huge amount to her. Though, it is admitted by the Complainant that the Accused has repaid Rs.9 lakhs to him, he claims that, she is still due to pay Rs.6 lakhs to him. In this regard, the documentary evidence at Ex.D1 to D3 clearly goes to show that the cheque at Ex.D1 and D2 with the serial No.862573 and the cheque at Ex.P1 with it's number 862574 clearly substantiates the defence version of the Accused that she had issued he cheque in question in blank in favour of the Complainant. Similarly, the claims of the Complainants of this case as well as that of C.C.No.4671/2014 that both of them had advanced hand loans to the Accused to purchase the property in Bengaluru are identical and further the serial wise cheques issued in both the cases further corroborates the defence version of the Accused.

34. The Next defence raised by the Accused is that, there is contradiction in the case of Complainant with regard to the date of the issuance of the cheque in question by the Accused in his favour.

35. As per the complaint averments and as well as in his affidavit, the Complainant claims that the Accused issued the cheque in question to him on 20.12.2013. However, in his cross- examination, P.W-1 has deposed that, the Accused has first repaid Rs.9 lakhs to her and one day after the repayment of the said amount of Rs.9 lakhs, she issued the cheque in question in his favour. However, as per the recitals of Ex.D4, it is stated that, a sum of Rs.9 lakhs has been repaid by the Accused to the Complainant on 20.12.2013. The cheque is dated 21.12.2013. That means, if the version of the Complainant that the Accused has issued the cheque in question one day after the repayment of the said amount Rs.9 lakhs is accepted, then this also amounts to a serious contradiction with regard to the date of the issuance of cheque. In this regard, even in Ex.D5, which is admittedly the statement given by the Complainant before the Tilaknagar Police, he has admitted that the Accused has repaid Rs.9 lakhs to him on 20.12.2013, though, in the said statement, he claims that, in addition to Rs.9 lakhs, the Accused is liable to pay the balance of Rs.6 lakhs to him. Therefore, as rightly pointed out by the learned defence counsel, this is also a serious contradiction

in the case of the Complainant.

36. No doubt, during the cross-examination of the Accused, it is elicited from her mouth that, she has not produced any documents to show that, she has repaid the Rs.9 lakhs and also to show that, she had Rs.9 lakhs from out of the sale proceeds of her house, these suggestions are totally irrelevant, in view of the fact that, the Complainant himself has admitted the receipt of Rs.9 lakhs from the Accused. Therefore, the claim of the Complainant that, the Accused has failed to repay Rs.9 lakhs to him and that she has not examined any witnesses, in whose presence, she claims to have repaid Rs.9 lakhs in favour of the Complainant, even the said suggestions are totally baseless and irrelevant in view of the fact that the repayment of Rs.9 lakhs by the Accused is admitted by the Complainant himself throughout the proceedings.

37. It is further pertinent to note that, though D.W-1 has been cross-examined at length by the learned counsel for the Complainant, the entire evidence available on record clearly goes to show that the Complainant has suppressed the material facts and has come up with inconsistent stands during the course of his cross-examination before the Court and moreover he has also come up with a new version that he has lent Rs.15 lakhs to the Accused without there being any pleading about the same earlier. Similarly, even though the Complainant has placed on record materials so as to prove his financial capacity, they are not sufficient to come to the conclusion that he had the financial capacity for having allegedly lent Rs.15 lakhs to the Accused.

38. Therefore, the overall appreciation of the evidence placed on record goes to show that, the defence of the Accused is probable and sufficient to rebut the presumption available in favour of the Complainant U/s.118 and 139 of the N.I.Act and moreover there is absolutely no material produced by the Complainant to prove the source through which he arranged the alleged loan amount of Rs.15 lakhs.

39. In support of his arguments, the learned counsel for the Complainant has placed reliance upon the following decisions:-

1. In K.N.Beena Vs., Muniyappan and another, reported in AIR 2001 SC 2895;
2. In K.Bhaskaran Vs., Sankaran Vaidhyan Balan, reported in AIR 1999 SC 3762;
3. In Surjit Singh Vs., State of Punjab and another, reported in AIR 2011 (NOC) 323 (P & H);
4. In S.A.Suryanarayana Vs., M.S.Developers, reported in 2013(1) AKR 252;
5. In Sripad Vs., Ramadas M.Shet, reported in (2014) 4 AKR 98.

40. On the other hand, the learned Defence Counsel has also relied upon the following decisions:-

1. In K.Subramani Vs., Damodar Naidu, reported in 2014 (4) KCCR 3661 SC;

2. In Shivamurthy Vs., Amruthraj, reported in 2008 (4) KCCR 2477;

3. In Sammetra Srihari Vs., State of Andhra Pradesh r/by Public Prosecutor and another, reported in 2014 ACR 1003 (HYD);

4. In Kapadvanj Peoples Co-operative Bank Ltd., Vs., Jayantibai Talasaji Marawardi and another, reported in 2013 ACD 598 Guj;

5. In Navneetdas Narayandas Barshikar Vs., Bacchubhai Mulji Tanna and another, reported in 2012 ACD 62 (Bom);

6. In M/s. Pakdhane Cement House Vs, Ramesh S.Deshmukh, reported in 2012 ACD 1158 (Bom);

7. In Moti Urban Co-operative Bank Ltd., Bijya Damiya Vasave, reported in 2011 ACD 497 (Bom);

8. In Sanjay Kumar Kedia Vs., Ramavatar Bagadia, reported in 2013 ACD 881 (Patna).

41. I have carefully gone through all the decisions relied upon by the learned counsels representing both the sides.

42. However from the overall materials available on record, it goes to show that, the Complainant has failed to prove the existence of he legally enforceable debt, under the cheque in question and in this regard this Court placed reliance upon the following decisions:-

1. In Smt.H.R.Nagarathna Vs., Smt.Jayashree Prasad, reported in 2009(4)Kar.L.J.26, wherein it has been held that:-

"From the complaint averments it is clear that the complainant failed to prove lending the existence of legally enforceable debt not proved beyond reasonable doubt".

2. In S.Thimmappa Vs., L.S.Prakash, reported in 2010(5) KCCR 3397, wherein it has been held that:-

" It is the drawee of the cheque to prove the existence of debt or liability".

3. In Krishna Janardhan Bhat Vs., Dattatreya G.Hegde, reported in 2008 AIR SCW 738, wherein it has been held that:-

"Existence of the legally recoverable debt is not a matter of presumption U/s.139".

4. In Rajendra Pangam Vs., Paresh B.NaiK and others, reported in Laws (BOM) 2015 (4) 39., in the said case there was no evidence forthcoming so as to prove the alleged lending of amount by the complainant therein and there was also no evidence to show that the complainant was having sufficient amount so as to support the loan of Rs.75,000/- somewhere in June 2008. In such circumstance the Hon'ble High Court of Bombay has allowed the appeal and restored the judgment of acquittal.

5. In Rangappa Vs., Mohan, reported in (2011) 1 SCC 184, wherein it has been held that:-

"Even in the present case the standard of proof for raising the presumption U/s.139 of the N.I. Act by the accused is that of "Preponderance of Probabilities" and therefore if the accused is able to raise an probable defence, which creates doubts about the existence of a legally enforceable debt or liability, the presumption can fail".

6. In S.K.Mittal Vs., Saree Mahal Reg, reported in 2012 (2) DCR 384, wherein it has been held that:-

"The standard of proof to discharge the burden shifted on the accused to rebut the presumption raised by the court U/s.139 of the N.I. Act is not the same as upon prosecution to prove the case".

7. In Veerayya Vs., G.K.Madivalar, reported in 2012(3) KCCR 2057, wherein it has been held that:-

" When the complainant failed to prove that he had bank balance as claimed by him on the date he has alleged to have advanced the loan and his civil suit was dismissed as not proved and mere issuance of cheque is not sufficient, unless it is shown that the said cheque was issued towards the discharge of a legally recoverable debt and when the complainant's financial capacity is questioned, he has to establish his financial capacity".

8. In M/s.Adithya Alkalods Ltd., and others Vs., NCC Finance Ltd., and another, reported in 2001 CrI.L.J.1858, wherein it has been held that:-

" Mere non-reply to demand notice is no ground to convict the accused in such circumstances."

9. In Ramdas Vs., Krishnanand, reported in 2014(3) Crimes 291, where in it has been held that:-

"When the complainant's financial capacity is denied and disputed, it become a relevant factor".

10. In John K.Abraham Vs., Simon.C, reported in AIR 2014 SCW 2158, wherein it has been held that:-

" In the facts of the said case that, when the complainant is not sure as to who wrote cheque nor aware as to when and where the existing transaction took place, for which the cheque was issued by the accused, it amounts to defects in the evidence of the complainant and raises a serious doubt in the case of the complainant".

11. In Shiva Murthy Vs., Amruthraj, reported in ILR 2008 KAR 4629, wherein it has been held that:-

" Before considering the conduct of the accused to find out as to whether or not he has been able to rebut the statutory presumption available U/s.139, the court ought to consider the existence of the legally enforceable debt. It is only after satisfying that the complainant has proved the existence of the legally enforceable debt or liability, the courts could have proceeded to draw presumption u/s.139 of the N.I.Act and thereafter find out as to whether or not the accused has rebutted has rebutted the said presumption".

43. In view of the aforesaid reasons and discussions, I proceed to pass the following:-

ORDER By exercising the power-conferred u/s 265 of Cr.P.C., the Accused is hereby acquitted of the offence punishable u/s 138 of the Negotiable Instruments Act.

Her bail bond and surety bond stands cancelled.

(Dictated to the Stenographer, transcript thereof is computerized and print out taken by him, verified and then pronounced by me in the open Court on this the 17th day of October, 2016).

(SARASWATHI.K.N), XVI Addl.CMM., Bengaluru City.

ANNEXURE

1. List of witnesses examined on behalf of the Complainant:

PW.1 : Naveed Pasha

2. List of documents exhibited on behalf of the Complainant:

Ex.P-1	: Original Cheque;
Ex.P-1(a)	: Signature of the Accused;
Ex.P-2	: Bank memo;
Ex.P-3	: Copy of the Legal Notice;
Ex.P-4	: Postal receipt;
Ex.P-5	: Courier receipt;
Ex.P-6 & 7	: Postal covers;
Ex.P-8	: Original complaint;
Ex.P-8(a)	: Signature of the Complainant on Ex.P8.

Ex.P-9 : Pass Book;
Ex.P-10 & 11 : Rental Agreements.

3. List of witnesses examined on behalf of the Accused:

DW-1 : Shaheen Taj

4. List of documents exhibited on behalf of the Accused:

Ex.D-1 & 2 : Certified copies of the cheques;

Ex.D-3 : Certified copy of the On Demand
Pronote;
Ex.D-4 : Certified copy of the FIR;
Ex.D-5 : Certified copy of the Statement;
Ex.D-6 : Certified copy of the Judgment.

(SARASWATHI.K.N),
XVI ACMM, Bengaluru City.