

Sri. Babu.M vs Sri. Keshava Murthy.D on 2 December, 2016

IN THE COURT OF THE XVIII ADDL. CHIEF METROPOLITAN
MAGISTRATE, BANGALORE

DATED : THIS THE 2ND DAY OF DECEMBER 2016

PRESENT: LAKSHMINARAYANA BHAT.K., B.A., LL.B.
XVIII ADDL.C.M.M., BANGALORE
C.C.NO:14598/2015 AND C.C.NO: 33976/2014

Complainant: Sri. Babu.M.,
S/o. Murugesh.,
Aged about 35 years,
Residing at No:5,
1st Main Road, 7th Cross,
Lakshmiddevamma Block,
Ganganagar,
Bangalore - 560 032.

(Represented by Shri.D.S.Girish.,
Advocate)

V/s.

Accused : Sri. Keshava Murthy.D.,
S/o. Dorai Swamy.N.,
Residing at No: 122,
4th Main Road,
Gangappa Block,
Ganganagar,
Bangalore - 560 032.

(Represented by Sri.K.V.Venkatesh.,
Advocate)

Offence complained of: U/s.138 of N.I.Act

Plea of accused in

C.C.No:14598/2015
and
C.C.No:33976/2014 :- Plead not guilty

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C.C.No:14598/2015
and
C.C.No: 33976/2014

Final order in

C.C.No:14598/2015:- Accused is found not guilty

C.C.No:33976/2014 :- Accused is found guilty

Date of order: 2/12/2016

JUDGMENT

The complaint was filed against the accused for the offence punishable under Section 138 of Negotiable Instruments Act (hereinafter in short referred as N.I. Act.).

2. After filing of the complaint, cognizance of the offence was taken. After recording sworn statement, in pursuance of summons, presence of the accused was secured and he was enlarged on bail. The substance of accusation was recorded and the accused pleaded not guilty.

3. To prove the complaint averments, the complainant was examined as P.W.1 and has produced documents marked as per Ex.P.1 to Ex.P.9 in both C.C.No:33976/2014 and C.C.No:14598/2015. The statement of the accused under Section 313 of Cr.P.C was recorded. The accused entered his defence and was examined as D.W.1. He has produced documents marked as per Ex.D.1 and Ex.D.2 in both the and C.C.No: 33976/2014 cases. Both these complaints are filed by the same complainant against the accused and therefore both the matters are taken up together for disposal by way of a common Judgment.

4. Heard the arguments. The learned advocate appearing for the accused has placed reliance on following reported Judgment.

(1) 1998 CrL.L.J. 906 in A.Bhoosanrao V/s.

Purushothamdas Patani and another.

5. After analyzing the averments made in the complaint, oral and documentary evidence placed on record and after hearing the arguments, at this stage the points that arise for my determination are:-

1) Whether the complainant has proved on 14/8/2013 he had advanced Rs.4,00,000/- hand loan to the accused and Ex.P.1 cheque issued by the accused in C.C.No:14598/2015 came to be dishonoured and even after service of notice, the accused had failed to pay the amount and thereby he is guilty of the offence punishable under Section 138 of N.I.Act?

2) Whether the complainant has proved on 15/12/2013 and 29/4/2014 he had advanced Rs.40,000/- and Rs.70,000/- hand loan to the accused and Ex.P.1 cheque issued by the accused in C.C.No:33976/2014 came to be dishonoured and and C.C.No: 33976/2014 even after service of notice, the accused had failed to pay the amount and thereby he is guilty of the offence punishable

under Section 138 of N.I.Act?

3) What order?

6. My findings on the aforesaid points are as under:-

POINT NO.1 : In the Negative, POINT NO.2 : In the Affirmative, POINT NO.3 : As per final order, for the following:-

REASONS

7. POINT NO.1 AND 2:- As per the complaint averments, the complainant and accused are acquainted with each other for the past several years. It is submitted that on 14/8/2013 the accused had borrowed hand loan of Rs.4,00,000/- from the complainant by executing a demand promissory note. It is further stated again on 15/12/2013 the accused had borrowed a sum of Rs.40,000/- and agreed to repay the said amount within six months. At the time of borrowing he has also executed a demand promissory note. That on 29/4/2014, the accused alleged to have borrowed a sum of Rs.70,000/- and agreed to repay the said amount within six months and at the time of borrowing he had executed a loan agreement in favour of the complainant. In the second week of August 2014 the accused alleged to have issued 2 cheques in and C.C.No: 33976/2014 favour of the complainant drawn on Vijaya Bank, Ganaganagar Branch, Bengaluru dated 25/8/2014 for Rs.4,00,000/- and 7/10/2014 for Rs.1,10,000/- in discharge of the aforesaid loan amount. The complainant has presented those cheques for encashment, but as per memo dated 2/9/2014 and 11/10/2014 both the cheque were returned unpaid with an endorsement "Account blocked situation covered in 2125". After dishonour of the cheque, the complainant got issued statutory demand notice to the accused dated 27/9/2014 and 5/11/2014 and after service of notice the accused alleged to have sent an untenable reply. The complainant in his affidavit filed in lieu of examination-in-chief deposed as per the averments made in the complaint.

8. The accused in his defence evidence has admitted for the past 15 years he is acquainted with the complainant. He further submitted in 2006 he had borrowed a sum of Rs.20,000/- from the complainant and at that time deposited 2 blank signed cheques, 2 blank signed demand promissory notes and 2 blank signed stamp papers in favour of the complainant. As per his defence, he has repaid the said amount of Rs.20,000/- to the complainant in 2008. It is further stated after repayment of the loan, the complainant has failed to return the documents obtained at the time of advancement of loan. The accused and C.C.No: 33976/2014 further submitted in 2010 he has again borrowed a sum of Rs.20,000/- from the complainant. After 2 years, he has repaid the said amount along with interest thereon at 10% per month. He has deposed after repayment of the loan the complainant has only returned the loan agreement in respect of the aforesaid transaction, but he has retained the cheque and other documents and assured to return those documents stating they are misplaced. The accused has specifically denied borrowed loan of Rs.40,000/-, Rs.70,000/- or Rs.4,00,000/- as alleged in the complaint. The accused has disputed his liability to make payment of Ex.P.1 cheque amount to the complainant. For the aforesaid reasons he has prayed for dismissal of both these complaints.

9. Before going into the merits of the case, the complainant and accused are acquainted with each other is not in dispute. The accused has specifically admitted Ex.P.1 cheque marked in both these cases relates to his Bank account and also Ex.P.1(a) is his signature. In his oral evidence the accused has deposed in 2006 he had borrowed a sum of Rs.20,000/- from the complainant and in 2008 he has repaid the said amount. The accused further admitted in 2010 again he had borrowed a sum of Rs.20,000/- and in 2012 repaid the said amount with interest thereon at 10% per month. Ex.P.3 in C.C.No:33976/2014 is the statutory demand notice sent on behalf of the complainant after and C.C.No: 33976/2014 dishonour of Ex.P.1 cheque issued by the accused for Rs.1,10,000/-. After service of the said notice, the accused has sent Ex.P.6 reply dated 17/11/2014. In Ex.P.6 reply, the accused in Para No.2 has specifically admitted availed loan of Rs.40,000/- from the complainant on 15/12/2013 by executing a demand promissory note. As per Section 58 of Indian Evidence Act, facts admitted need not be proved. The accused during cross-examination of the complainant or in his defence evidence has not admitted borrowed loan of Rs.40,000/- from the complainant on 15/12/2013.

10. As per the complaint averments, the complainant has advanced loan in 3 installments as shown herein below.

On 14/8/2013 = Rs.4,00,000/-

On 15/12/2013 = Rs. 40,000/-

On 29/4/2014 = Rs. 70,000/-

Total = Rs.5,10,000/-

In all he had advanced Rs.5,10,000/-.

The accused during cross-

examination of P.W.1 and in his oral evidence has challenged the financial capacity of the complainant to advance Rs.5,10,000/- total hand loan amount as contended in the complaint. As per the evidence of the complainant, he is doing Real Estate business and claimed his and C.C.No: 33976/2014 monthly income is Rs.50,000/-. Has further admitted he requires Rs.15,000/- per month for his personal expenses. The complainant has deposed advancement of loan of Rs.5,10,000/- in 3 installments to the accused by way of cash. Therefore, in order to prove passing of consideration in favour of the accused, oral evidence of the complainant and demand promissory note produced by him, there is no other documentary or oral evidence. Ex.P.8 is the loan agreement alleged to have been executed by the accused dated 15/12/2013 when he had borrowed a sum of Rs.40,000/- hand loan from the complainant. As per Ex.P.6 reply produced by the complainant in C.C.No:33976/2014, the aforesaid loan transaction is not in dispute and it is admitted. Ex.P.9 is the loan agreement dated 29/4/2014 alleged to have been executed by the accused when he had borrowed a sum of Rs.70,000/-. Ex.P.8 and Ex.P.9 loan agreement have been prepared in a E-stamp

worth Rs.50/- purchased in the name of the accused on 9/12/2013 and 29/4/2014 respectively. The accused has produced Ex.D.1 loan agreement in C.C.No:33976/2014 and the date of document appears to be 7/1/2010 and the said stamp paper was purchased in the name of the accused on 7/1/2010. As per the recitals of the document, the accused had borrowed loan of Rs.20,000/- from the complainant. As per the defence of the accused, after repayment of the aforesaid loan, the complainant has given back the said document to the accused is more probable.

and C.C.No: 33976/2014 Ex.P.8, Ex.P.9 and Ex.D.1 loan agreement produced by the parties shows at the time of advancement of loan the accused had executed loan agreement in favour of the complainant. The complainant has contended Ex.D.1 document has been created for the purpose of this case. In Ex.P.6 reply dated 17/11/2014, the accused has specifically contended when he had borrowed loan, the complainant had obtained his signature to blank signed demand promissory note, stamp paper and cheques. D.W.1 in his examination-in-chief also deposed he had affixed his signature to blank signed demand promissory note and stamp paper and handed over those documents to the complainant at the time of borrowing loan. During cross-examination of D.W.1 in C.C.No:33976/2014, the accused has denied his signature appearing in Ex.P.7 and Ex.P.8 loan agreement. It is appropriate to mention that the certified copy of those documents were confronted to the witness. During cross-examination in C.C.No:14598/2015, he has admitted his signature appearing in the xerox certified copy of those documents. The witness has forwarded an explanation that at the time he had affixed those signatures, the document was blank. In order to prove Ex.P.8(a) and Ex.P.9(a) are not his signatures, the accused has not taken any legal action or sought to send those documents to hand writing expert. Therefore, from the documentary and oral evidence placed on record and other attending circumstances and admitted facts of the case shows he and C.C.No: 33976/2014 had borrowed loan of Rs.40,000/- from the complainant on 15/12/2013 and Rs.70,000/- on 29/4/2014 is proved.

11. The complainant has not obtained any loan agreement from the accused on 14/8/2013 when he claimed to have advanced Rs.4,00,000/- to the accused the subject matter of loan in C.C.No:14598/2015. In the said proceeding, he has produced Ex.P.6 demand promissory note dated 14/8/2013 executed by the accused for Rs.4,00,000/-. Even though the complainant had advanced huge amount of Rs.4,00,000/-, he has not charged any interest on the loan amount from 14/8/2013 date of advancement of loan till 25/8/2014 date of Ex.P.1 cheque, for a period of one year. During cross-examination, P.W.1 has specifically admitted he is not having any documents to show in August 2013 he was having ready cash of Rs.4,00,000/- in order to advance the said amount to the accused as hand loan. As per the complaint averments, in C.C.No:14598/2015 at the time of borrowing loan, the accused had promised to repay the said amount of Rs.4,00,000/- within one year. Even though before the accused has repaid the said loan amount of Rs.4,00,000/-, the complainant has claimed on 15/12/2013 and 29/4/2014 he has again advanced Rs.40,000/- and Rs.70,000/- to the accused the subject matter of loan in C.C.No:33976/2014. The evidence and other attending and C.C.No: 33976/2014 circumstances shows the claim of the complainant regarding advancement of loan of Rs.4,00,000/- on 14/8/2013 is apparently false and unbelievable. There is every reason at the time of advancement of loan of Rs.40,000/- and Rs.70,000/- as contended in C.C.No:33976/2014, the complainant has obtained 2 blank signed cheques and one blank signed demand promissory note. By misusing those documents, he has filled the instrument

for Rs.4,00,000/- and produced those documents as Ex.P.1 and Ex.P.6 in C.C.No:14598/2015 and claimed advanced loan of Rs.4,00,000/- to the accused on 14/8/2013. In the event the complainant had advanced the said loan, he could have insisted the accused to execute loan agreement. In such circumstances, the accused was required to purchase e-stamp paper in his name to prepare loan agreement similar to Ex.P.8 and Ex.P.9 in C.C.No:33976/2014 and those documents are absent in C.C.No:14598/2015. In order to prove the passing of consideration of Rs.4,00,000/- to the accused on 14/8/2013, the complainant has not produced any other documentary or oral evidence. The complainant has also not produced his Bank account extract or passbook to prove in August 2014 he was having ready cash of Rs.4,00,000/- in order to advance loan in favour of the accused. As per the evidence, the accused is doing cable laying business and the purpose for which the accused appears to have borrowed such a huge amount is not forthcoming from and C.C.No: 33976/2014 the oral evidence of the complainant. A prudent man before advancement of loan ascertains the purpose of borrowing and the financial capacity of the borrower to make repayment within the stipulated period.

12. The accused in his oral evidence has claimed borrowed a sum of Rs.20,000/- each from the complainant on 2 occasions in 2006 and in 2010 and repaid the said amount in 2008 and 2012 respectively. In Ex.P.6 reply, there is a reference regarding advancement of Rs.20,000/- loan and in 2006 the accused had deposited 2 cheques in favour of the complainant as a security. In Ex.P.6 reply, there is no reference regarding repayment of Rs.40,000/- loan borrowed from the complainant on 15/12/2013. Even during cross-examination of the complainant and in his oral evidence the accused has not whispered regarding this aspect. As per Ex.P.2 memo produced by the complainant issued by the Bank, Ex.P.1 cheque in both these cases were dishonoured with an endorsement "Account blocked situation covered in 2125". Ex.P.1 cheque produced by the complainant in both these cases are having consecutive serial numbers 002687 and 002688 drawn on Vijaya Bank, Ganganagar Branch, Bengaluru. The accused has produced Ex.D.2 passbook issued in his favour by the Bank. As per the document, on 27/8/2003 Cheque No: 002681 was presented for encashment issued for and C.C.No: 33976/2014 a sum of Rs.1,116/- and on 20/12/2006 Cheque No: 002684 was presented for encashment which was issued for a sum of. Rs.1,920/-. As per the entries made in Ex.D.2, the accused appears to have not made any transaction in the said account after 21/12/2006, and the balance amount available was only Rs.811/-. In the event the defence of the accused has to be accepted, in the year 2008 and 2010, he borrowed loan of Rs.20,000/- each from the complainant, the aforesaid conduct of the accused shows with an intention to deceive the complainant issued cheques in respect of an account not in operation is more probable. During cross-examination of D.W.1, the accused has specifically admitted he has not given any instructions to the Bank for closure of the account.

13. The accused has admitted service of Ex.P.3 statutory demand notice sent on behalf of the complainant in C.C.No:33976/2014 and after service of notice he has issued Ex.P.6 reply. The notice sent to the accused in C.C.No:14598/2015 was returned with an endorsement "door locked, intimation delivered". It is not the defence of the accused that the address written on Ex.P.5 postal cover is incorrect. Therefore, the notice sent to the accused through registered post is deemed to have been served. As per Section 27 of General Clauses Act, there is a presumption in favour of the complainant regarding service of letter sent and C.C.No: 33976/2014 through registered post. The

accused has failed to rebut the said presumption appearing in favour of the complainant.

14. As per Section 139 of N.I. Act, there is a statutory presumption in favour of the complainant that unless the contrary is proved Court shall presume that the cheque had been issued in discharge of any debt or other liability. It is well settled proposition of law that the burden to rebut the presumption is upon the accused. In order to rebut the said presumption, the accused is expected to place prima facie evidence and to prove his defence by preponderance of probabilities. In C.C.No:14598/2015, the accused has successfully rebutted the presumption appearing in favour of the complainant under Section 139 of the Act. He has shown passing of consideration of Rs.4,00,000/- was highly improbable and unbelievable. The complainant has proved by way of oral and documentary evidence and in view of the partial admission of the accused borrowed Rs.40,000/- the complaint alleged loan transaction in C.C.No:33976/2014. In this regard, I have referred Judgment reported in AIR 2010 Supreme Court 1898 in Rangappa V/s. Mohan case. In Para No.14 of the Judgment Hon'ble Apex Court held, it is a settled proposition that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the and C.C.No: 33976/2014 accused is able to raise a probable defence which creates doubt about existence of legally enforceable debt or liability, the prosecution can fail. The complainant has fulfilled all the ingredients of Section 138 and 142 of N.I. Act in C.C.No:33976/2014. Therefore, my findings on Point No.1 is in the Negative and Point No.2 is in the affirmative.

15. POINT NO.3:- In view of my findings on Point No.1 and 2., the accused in C.C.No:14598/2015 is liable to be acquitted and in C.C.No:33976/2014 he is liable to be convicted for the offence punishable under Section 138 of N.I. Act. Hence, I proceed to pass the following:-

ORDER Acting under Section 255 (1) of Cr.P.C, the accused in C.C.No:14598/2015 is acquitted for the offence punishable under Section 138 of Negotiable Instruments Act 1881. He is set at liberty. The bail bond and surety bonds hereby stands discharged.

Acting under Section 255 (2) of Cr.P.C, the accused in C.C.No:33976/2014 is convicted for the offence punishable under Section 138 of Negotiable Instruments Act 1881. He is sentenced to pay fine of Rs.1,30,000/- (Rupees One Lakh Thirty Thousand Only) and in default shall undergo simple imprisonment for 4 (Four) months.

and C.C.No: 33976/2014 Acting under Section 357 (1) (b) of Cr.P.C, out of the fine amount the complainant is entitled for Rs.1,20,000/- (Rupees One Lakh Twenty Thousand Only) fine amount as compensation.

Acting under Section 357 (1) (a) of Cr.P.C, the balance amount of Rs.10,000/- (Rupees Ten Thousand Only) is defrayed to the State for the expenses incurred in the prosecution.

The original Judgment shall be kept in C.C.No:14598/2015 and the copy shall form part of the record in C.C.No:33976/2014. (Dictated to the Stenographer, transcribed by her, corrected, revised and signed then pronounced by me in the open court on this the 2nd day of December 2016).

(LAKSHMINARAYANA BHAT.K) XVIII A.C.M.M., BANGALORE.

ANNEXURE IN C.C.NO:33976/2014

1) LIST OF WITNESSES EXAMINED FOR THE COMPLAINANT:

P.W.1 : Sri. Babu.M.

2) LIST OF DOCUMENTS MARKED FOR THE COMPLAINANT:

Ex.P.1	:	Cheque No:002688 dated 7/10/2014 for Rs.1,10,000/-.
Ex.P.1(a)	:	Signature of the accused.
Ex.P.2	:	Bank endorsement.
Ex.P.3	:	Office copy of demand notice.
Ex.P.4	:	Postal receipt.
Ex.P.5	:	Postal acknowledgement.

and
C.C.No: 33976/2014

Ex.P.6	:	Reply notice.
Ex.P.7	:	Postal cover.
Ex.P.8 and Ex.P.9	:	2 loan agreements.

3) LIST OF WITNESSES EXAMINED FOR THE ACCUSED:-

D.W.1 : Sri. Keshava Murthy.D.

4) LIST OF DOCUMENTS MARKED FOR THE ACCUSED: -

Ex.D.1 : Hand loan agreement.

Ex.D.2 : Bank passbook.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx ANNEXURE IN C.C.NO:14598/2015

1) LIST OF WITNESSES EXAMINED FOR THE COMPLAINANT:

P.W.1 : Sri. Babu.M.

2) LIST OF DOCUMENTS MARKED FOR THE COMPLAINANT:

Ex.P.1 : Cheque No:002687 dated 25/8/2014
for Rs.4,00,000/- .
Ex.P.1(a) : Signature of the accused.
Ex.P.2 : Bank endorsement.
Ex.P.3 : Office copy of demand notice.
Ex.P.4 : Postal receipt.
Ex.P.5 : Postal cover.
Ex.P.6 : Demand promissory note and
consideration receipt.
Ex.P.7 : Reply notice.
Ex.P.8 and Ex.P.9 : 2 loan agreements.

3) LIST OF WITNESSES EXAMINED FOR THE ACCUSED:-

D.W.1 : Sri. Keshava Murthy.D.

4) LIST OF DOCUMENTS MARKED FOR THE ACCUSED: -

Ex.D.1 : Hand loan agreement.
Ex.D.2 : Certified copy of Bank passbook.

XVIII A.C.M.M., BANGALORE.

and
C.C.No: 33976/2014

(Judgment pronounced in Open Court vide a separate Order) ORDER Acting under Section 255 (1) of Cr.P.C, the accused in C.C.No:14598/2015 is acquitted for the offence punishable under Section 138 of Negotiable Instruments Act 1881. He is set at liberty.

The bail bond and surety bonds hereby stands discharged.

Acting under Section 255 (2) of Cr.P.C, the accused in C.C.No:33976/2014 is convicted for the offence punishable under Section 138 of Negotiable Instruments Act 1881. He is sentenced to pay fine of Rs.1,30,000/- (Rupees One Lakh Thirty Thousand Only) and in default shall undergo simple imprisonment for 4 (Four) months.

Acting under Section 357 (1) (b) of Cr.P.C, out of the fine amount the complainant is entitled for Rs.1,20,000/- (Rupees One Lakh Twenty Thousand Only) fine amount as compensation.

Acting under Section 357 (1) (a) of Cr.P.C, the balance amount of Rs.10,000/- (Rupees Ten Thousand Only) is defrayed to the State for the expenses incurred in the prosecution.

The original Judgment shall be kept in C.C.No:14598/2015 and the copy shall form part of the record in C.C.No:33976/2014.

XVIII A.C.M.M., BANGALORE.