

(By Sri.K.S.Bheemaiah, Advocate)

RESPONDENT/
APPELLANT : - Versus -
Sangana Gouda B Patil
S/o Basanagowda Patil,
Aged about 40 years,
Residing at No.601/42,
1st Floor, 4th Main, 1st Cross,
MES Road, Muthyalanagar,
Bangalore - 560 054.

(By Sri.N.G.Sreedhar., Advocate)

JUDGMENT

Crl.Apl.469/2015 is preferred by the appellant/ accused under Sec.374(3) Cr.P.C. challenging the judgment passed by the XIII Addl. Chief Metropolitan Magistrate, Bangalore City, in C.C.6126/2014 dated 02-03-2015, wherein he has been convicted for the offence punishable under Sec.138 Negotiable Instruments Act and sentenced to pay fine of Rs.7,67,000/- and in default of payment of fine shall undergo simple imprisonment for six months.

3 Crl.Apl.469/2015 & Crl.Apl.542/2015

2. Crl.Apl.542/2015 is preferred by the appellant/complainant under Sec.372 Cr.P.C. challenging the judgment passed by the XIII Addl. Chief Metropolitan Magistrate, Bangalore City, in C.C.6126/2014 dated 02-03- 2015, for modifying the sentence to pay the compensation to him in respect of cheque amount in full instead of part of the cheque amount.

3. The above appeals arise out of the judgment passed by the XIII Addl.Chief Metropolitan Magistrate Court, Bengaluru in C.C.6126/2014 dated 02-03-2015, so they are clubbed and disposed off by this common judgment.

4. The appellant in Crl.Apl.469/2015 is the accused and respondent in the said Appeal is the complainant. Appellant in Crl.Apl.542/2015 is the complainant and respondent in the said Appeal is the accused before the trial court. For the sake of convenience, rank of parties is referred to as stood before the court below.

5. The brief facts leading for disposal of these appeals are as follows:

4 Crl.Apl.469/2015 & Crl.Apl.542/2015 It is the case of the complainant that, he and accused are neighbours residing in the same area, they are friends.

The accused was posing himself as a dealer in dealing with supply of natural sand jelly and Cement to M/s. Birla Ultra Tech RMC Company (Ready Mix Cement) for the last 10 years. It is further case of the complainant that, apart from that, accused told him that he has rented Two Innova Cars and one Indica Car for the last 5 years and he is having very good business. It is the case of complainant

that he was working in a Company called Kirloskar Batteries Pvt. Ltd., Bengaluru. He told the accused that his Company is under the verge of closure and he intending to take voluntary retirement and he is receiving the money. It is the case of complainant that, accused has offered him to join his business and further told that M/s Birla Ultra Tech RMC Company requires one more Car i.e., Maruthi Ertiga (diesel) and promised him that he would help him to purchase the said Car and to lend it on hire to the said Company, so that he can earn Rs.38,000/- per month. It is the case of complainant that, when he has not shown any interest to invest in the said business, the accused 5 Crl.Apl.469/2015 & Crl.Apl.542/2015 persuaded him and stated that he has already booked a Maruthi Ertiga Car and offered him to be a partner in the said business by investing 50% of the amount and share the profit of 50% each. It is the case of complainant that, he has agreed the offer of the accused by trusting him on good faith and he has paid Rs.5,17,000/- to the accused. He has paid Rs.2,50,000/- by way of cash on 29-12-2012, he has paid a sum of Rs.50,000/- by way of cash on 31-12- 2012, he has paid a sum of Rs.90,000/- by way of cash on 01-01-2013, paid a sum of Rs.50,000/- by way of cheque on 04-01-2013, paid a sum of Rs.58,500/- by way of cash on 16-01-2013, paid a sum of Rs.8,500/- by way of cash on 09-01-2013. It is the case of complainant that, e-stamp worth Rs.500/- was purchased in the joint name of the complainant and the accused. It is the case of complainant that, the accused has not purchased the Car and not delivered the same to the Company of the accused and he has cheated him saying that the Car was delivered from the Company and it was taken by his Manager.

6. It is further case of the complainant that the accused with an intention to cheat him who had taken 6 Crl.Apl.469/2015 & Crl.Apl.542/2015 voluntary retirement from his Company, has further requested him to invest Rs.6,00,000/- in the sand business run by him. For that also, he has paid Rs.6,00,000/- by way of cheque dated 14-02-2013 and agreed that the Company will pay Rs.2,000/- per day for supply of Sand. The accused has not paid any rent regarding supply of sand to him and cheated him. It is the case of complainant that, accused has totally taken Rs.11,17,000/- from him and not paid the rent for supply of Car, so he has requested the accused to repay the amount taken by him and accused for due repayment of the said amount has issued cheque bearing No.714053 dated 20-08-2013 for Rs.11,17,000/- drawn on ICICI Bank, Malleshwaram Branch, Bengaluru. It is the case of the complainant that, he has presented the said cheque for encashment within limitation, the said cheque dishonoured for insufficient funds in the account of the accused. Thereafter, it is intimated regarding dishonour of the cheque, notice was duly served on the accused. The accused has not repaid the cheque amount. Thereafter, he has lodged the complaint before the trial court within limitation and 7 Crl.Apl.469/2015 & Crl.Apl.542/2015 thereby accused has committed the offence punishable under Sec.138 of N.I.Act.

7. After complainant has lodged the private complaint before the trial court, it has taken cognizance of the offence and recorded sworn statement of the complainant. The trial court after finding that there is prima-facie case against the accused, case has been registered in C.C.6126/2014 for the offence punishable under Sec.138 N.I. Act and accused was summoned to appear before the court. Accused in pursuance of the summons appeared before the trial court through his counsel and he has been enlarged on bail. The copy of the complaint and other documents filed along with the complaint furnished to the accused. Thereafter, the trial court has framed accusation under Sec.251 Cr.P.C. for the offence punishable under Sec.138 of Negotiable Instruments Act and read-over the

same to accused. Accused pleaded not guilty and claimed to be tried and thereafter case is posted for complainant's evidence.

8. The complainant in order to prove the guilt of the accused got examined himself as PW.1. Complainant in 8 Crl.Apl.469/2015 & Crl.Apl.542/2015 support of his case produced 18 documents and got them marked as Ex.P1 to Ex.P18 and closed his side. Thereafter, the trial court has recorded Sec.313 Cr.P.C. statement of accused to enable him to explain incriminating circumstances appearing against him in the prosecution witnesses. Accused denied the statement in toto and further stated that he has defence evidence.

9. The trial court heard the arguments advanced by the counsel for the complainant and accused in length and posted the case for judgment. On 02-03-2015 the trial court has passed the judgment and convicted the accused for the offence punishable under Sec.138 of Negotiable Instruments Act and ordered to pay fine of Rs.7,67,000/- to accused and in default of fine accused shall undergo simple imprisonment for six months.

10. The appellant/accused in Crl.Apl.469/2015 being aggrieved by the judgment and order passed by the trial court in C.C.6126/2014 dated 02-03-2015 came in appeal on the following among other grounds;

The judgment passed by the trial court is erroneous, illegal and perverse. The trial court has erred in not 9 Crl.Apl.469/2015 & Crl.Apl.542/2015 considering the fact that there is no legally enforceable debt under the alleged cheque. The trial court has erred in not considering the fact that complainant has failed to prove that the alleged cheque is issued for legally recoverable debt. The trial court has not appreciated the oral and documentary evidence placed by the complainant and arrived at a wrong conclusion. The trial court has not considered the fact there is no crystallization of liability to the extent of alleged amount of the cheque. The trial court has not considered the fact that the appellant/accused has repaid Rs.1,65,000/- and the said amount has to be deducted from the principle amount as PW.1 in his cross- examination admitted that he has not received the said amount towards interest. The trial court has not considered the fact that the complainant has imagined and unregistered Partnership venture with accused which alleged venture is illegal for want of registration and more importantly Sec.69 of the Indian Partnership Act, 1932 debars a partner of an unregistered partnership, venture from approaching the Court of Law, seeking relief against another partner under Sec.69(1) of the Act, *ibid*. What is 10 Crl.Apl.469/2015 & Crl.Apl.542/2015 not otherwise possible in law before the Civil Court, the complainant cannot approach Criminal Court under the grab of proceedings on dishonour of cheque against the alleged partner. On these grounds and others, the appellant/accused prayed for allowing the appeal and to set aside the sentence and acquitting him for the offence under section 138 of N.I. Act.

11. The appellant/complainant in Crl.Apl.542/2015 being aggrieved by the sentence of awarding fine amount to the tune of Rs.7,67,000/-, which is part of the cheque amount came in appeal on the following among other grounds;

The trial court has committed error in awarding fine amount lesser than the cheque amount. When the trial court came to the conclusion that the accused has committed the offence under Sec.138 of Negotiable Instruments Act, awarding fine amount lesser than the cheque amount is erroneous one. The trial court has concluded that the complainant/appellant has proved his case and thereafter awarded the fine which is lesser than the cheque amount is erroneous one. On these grounds 11 Crl.Apl.469/2015 & Crl.Apl.542/2015 and main others, the appellant/complainant prayed for modifying the sentence and awarding the fine in respect of the cheque amount in full.

12. These appeals are presented before the Hon'ble City Civil & Sessions Judge, Bengaluru, it is registered as Criminal Appeal No.469/2015 and Crl. Appeal No.542/2015 and made-over to this court for disposal according to law. After the receipt of the records this court has issued notice to the respondents in both the cases and the respondents in both the cases appeared through their counsel. Thereafter the LCR's were secured and they are before the court.

13. Heard the arguments advanced by the counsel for the appellant and counsel for the respondent in length.

14. The points that arise for my determination in Crl.Apl.No.469/2015 are as under:

1. Whether the trial court has committed any error in appreciating the oral and documentary evidence on record?

2. Whether the trial court has committed any error in holding that Ex.P1-cheque is issued for legally recoverable amount of Rs.7,62,000/-?

12 Crl.Apl.469/2015 & Crl.Apl.542/2015

3. Whether the trial court has committed any error in concluding that accused has committed the offence under Sec.138 of Negotiable Instruments Act?

4. Whether the interference is necessary in the impugned judgment and sentence under appeal from this court?

5. What Order?

The points that arise for my determination in Crl.Apl.No.542/2015 are as under:

1. Whether the appeal preferred by the complainant/appellant for modification of sentence is maintainable

2. What Order?

15. After hearing the arguments and perusal of documents placed before me, my findings to the above points are as follows:

Findings in Crl.Apl.469/2015:

Point No.1 to 4 : In the Negative;

Point No.5 : As per final order

Findings in Crl.Apl.542/2015:

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Crl.Apl.469/2015 &
Crl.Apl.542/2015

Point No.1 : In the Negative;

Point No.2 : As per final order

for the following;

REASONS

16. POINT No.1 IN CRL.APL.542/2015:

The respondent in Crl.Apl.542/2015 has contended that the appellant has preferred the appeal for modification of sentence passed by the trial court and the appeal is not maintainable before this court. The appellant/complainant has to prefer the appeal before the Hon'ble High Court of Karnataka. The counsel for the appellant in Crl.Apl.No.542/2015 has contended that in view of the insertion of proviso to Sec.372 Cr.P.C. as per Act No.5 of 2009 which is came into force from 30-12-2009 "the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for lesser offence or imposing inadequate compensation, as such appeal shall lie to the Court to which an appeal ordinary lies against the order of conviction of such Court." So this court is competent to entertain and decide the appeal preferred by the complainant for modifying the sentence.

14 Crl.Apl.469/2015 & Crl.Apl.542/2015

17. The counsel for the respondent in Crl.Apl.No.542/2015 has contended that the complainant under Sec.138 of Negotiable Instruments Act cannot be equated to the victim as stated in proviso to Sec.372 of Cr.P.C. So the complainant under Sec.138 of Negotiable Instruments Act is not entitled to prefer an appeal before this court. The counsel for the respondent in Crl.Apl.No.542/2015 has relied upon the order passed by our own Hon'ble High Court of Karnataka in Crl.Petition No.6072/2014 dated 24-02-2015 (Case: M/s Hill Range Power Project Developers and others Vs. M/s Acciona Wind Energy Private Ltd.), wherein the short point for consideration before the Lordships of our own Hon'ble High Court is "Whether appeal can be maintained

against the judgment of acquittal for offence punishable under Sec.138 of Negotiable Instruments Act before the jurisdictional Sessions Court under proviso to Sec.372 of Cr.P.C.?" and the Lordships have clearly held as under;

"In my considered opinion, a person under the complaint U/s 138 of N.I. Act cannot be termed as 'Victim' defined U/s 2(wa) Cr.P.C. The proviso to Section 142 N.I. Act reads as under:

15 Crl.Apl.469/2015 & Crl.Apl.542/2015 "142. Cognizance of offences -

Notwithstanding anything contained in the Code of Criminal Procedure 1973 (2 of 1974) -

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque,

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the provision to section 138;

(Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period). Hence, Crl.Apl.No.542/2015 preferred by the complainant is not maintainable. Hence, for the above discussions, I answered the above point No.1 in Crl.Apl.No.542/2015 in the NEGATIVE.

18. POINTS No.1 TO 4 IN CRL.APL.469/2015:

The above points are inter-connected, hence they are taken up for discussion together in order to avoid repetition.

It is the case of the complainant that he and accused were neighbours residing in the same area as tenants since last 4 years. It is the case of complainant that, accused 16 Crl.Apl.469/2015 & Crl.Apl.542/2015 knowing that he is taking voluntary retirement and he is receiving the money, asked him to invest for the purchase of Maruthi Ertiga Car and the said Car has to be hired to M/s. Birla Ultra Tech RMC Company. He told the accused that he is not interested in investing the money and for that accused has told that he will receive Rs.38,000/- rent per month if invested for the said Car and hires the Car to the Company and he has not accepted the offer, for that accused told that he is investing money for purchase of Maruthi Ertiga Car and asked him to contribute 50% of the amount and they can share 50% of the hired amount per month and he has paid Rs.5,17,000/- to the accused.

Further it is the case of the complainant that thereafter accused requested him for investing in the sand business in his Company and he will receive the amount of Rs.2,000/- per day and he has

invested Rs.6 lakhs as per the say of the accused and accused has taken the said money, for some period accused has given rent and thereafter he has stopped and thereafter he came to know that the accused has not purchased any Maruthi Ertiga Car and not given same to the Company, no sand business 17 Crl.Apl.469/2015 & Crl.Apl.542/2015 is there and thereafter he has requested the accused to repay the amount invested by him and for that accused has issued the cheque for Rs.11,17,000/- drawn on ICICI Bank, Malleshwaram Branch dated 20-08-2013, he has presented the same for encashment within limitation, the same dishonoured, he has intimated regarding dishonour of cheque to the accused and called upon him to pay the cheque amount, accused has not paid the cheque amount, thereafter he has issued legal notice to the accused, notice was duly served, accused has given false reply, accused has not paid the cheque amount, thereafter he has lodged the complaint before the trial court within limitation and thereby accused has committed the offence under Sec.138 of Negotiable Instruments Act.

19. The defence of the accused in the reply notice given by him and in the cross-examination of complainant's witnesses that he has borrowed hand loan of Rs.7,40,000/- from the complainant in the months of January and February-2013, he has repaid Rs.5,40,000/- to the complainant, he has paid interest to the tune of Rs.1,65,000/-, he has to pay the balance amount of Rs.2 18 Crl.Apl.469/2015 & Crl.Apl.542/2015 lakhs only. The complainant has not given Rs.5,17,000/- for purchase of Car. Complainant has not given Rs.6 lakhs for sand business. Complainant is doing money lending business and he has availed loan of Rs.7,40,000/-, out of that he has repaid Rs.5,40,000/- and balance remained is only Rs.2 lakhs. He has given the cheque as per Ex.P1 for security of loan amount of Rs.7,40,000/- and it was agreed that cheque has to be repaid when he clears the entire loan. The complainant has misused the cheque given for security purpose and lodged false complaint. Complainant in order to prove his case, examined himself as PW.1 and PW.1 has reiterated the averments of the complaint in the examination-in-chief. Complainant has stated that he has paid Rs.5,17,000/- for purchase of Maruthi Ertiga Car, he has also paid Rs.6 lakhs for sand business, the accused has not purchased the Ertiga Car and not given for hire to his Company, no sand business is in existence and he came to know regarding the same after some time and he has requested for repayment of the amount and accused has given the cheque as per Ex.P1, he has presented the same and same has been dishonoured thereafter he has 19 Crl.Apl.469/2015 & Crl.Apl.542/2015 issued legal notice, intimated regarding dishonour and called upon the accused to pay the cheque amount within limitation, accused has not paid the cheque amount thereafter he has lodged the complaint before the trial court within limitation, thereby accused has committed the offence under Sec.138 of Negotiable Instruments Act.

20. The counsel for the accused has cross-examined PW.1 and PW.1 has admitted that accused has not purchased any Maruthi Ertiga Car. Further PW.1 has admitted that no Sand business is there, he has enquired and he came to know that the accused has not invested any money in the sand business in the Company named M/s. Birla Ultra Tech RMC Company. Further PW.1 has stated that he is not knowing the actual price of the Car and stated that he has given Rs.5,17,000/- as part of his amount for purchase of Car to the accused. Further PW.1 has admitted that he is not having any document to show that Car was purchased. Further PW.1 has stated that he has paid his share for purchase of Car from 29-12-2012 till 16-01-2013 and further stated that he has paid Rs.3,77,000/- by cash and Rs.1,40,000/- by one cheque 20 Crl.Apl.469/2015 & Crl.Apl.542/2015 and another

Rs.1,40,000/- by another cheque. PW.1 has admitted that from September-2013 till December-2013 accused has transferred Rs.19,000/- per month to his account. Further PW.1 has stated that the accused has paid the said amount towards the rent of the Car.

21. Complainant has produced the cheque drawn on ICICI Bank, Malleshwaram Branch dated 20-08-2013 for Rs.11,17,000/- which is at Ex.P1. In the present case, it is the specific case of the accused that he has availed loan of Rs.7,40,000/- from the complainant in the month of January and February-2013 and he has given Ex.P1- cheque for security purpose. The accused has not disputed that Ex.P1-cheque is the cheque from the cheque leaf book issued to him by his Banker. Further accused has not disputed his signature on Ex.P1-cheque. The burden is on the accused to show that Ex.P1-cheque is given for security of the loan availed by him from the complainant. Complainant has produced endorsement issued by the Bank which is at Ex.P2 and Ex.P2 discloses that Ex.P1- cheque was presented for encashment within limitation and the same dishonoured for insufficient funds. Complainant 21 Crl.Apl.469/2015 & Crl.Apl.542/2015 has produced office copy of legal notice issued by him to the accused dated 16-12-2013 which is at Ex.P3 and Ex.P3 discloses that the complainant given legal notice as per Ex.P3 within limitation and called upon the accused to pay the cheque amount within 15 days from the receipt of notice. The complainant has produced the acknowledgment card for receipt of Ex.P3-Notice to the accused which is at Ex.P4 and Ex.P4 discloses that Notice sent as per Ex.P3 is duly served to the accused. The complainant has produced the reply given by the accused to Ex.P3 which is at Ex.P5. In Ex.P5, accused has denied that the complainant has paid Rs.5,17,000/- for purchase of Car and paid Rs.6 lakhs for Sand business to him. It is the specific case of the accused in Ex.P6-Reply notice that the complainant is a money lender and he has availed loan of Rs.7,40,000/- from the complainant in the month of January and February-2013 and for the security of the said amount, he has paid Ex.P1-cheque to the complainant, he has repaid Rs.5,40,000/- to the complainant, he is due only Rs.2 lakhs to the complainant, he has also paid Rs.1,65,000/- towards the interest to the complainant. Complainant has 22 Crl.Apl.469/2015 & Crl.Apl.542/2015 misused the cheque given by him for security purpose and filed the present false case. Complainant has denied the recitals of Ex.P5-Reply Notice in toto. Complainant has got marked private complaint lodged by him which is at Ex.P6. Complainant has produced the Bank statement which is at Ex.P7. Complainant has also produced Bank statement of Karnataka Bank belongs to the accused from 01-01-2009 to 31-01-2009 which is at Ex.P8. Bank statement of Deepak Sahakari Bank is at Ex.P9. Bank statement of Yashavanthapura Credit Co-operative Society Bank is at Ex.P10. Bank statement of State Bank of India, Malleshwaram Branch is at Ex.P11. Complainant has produced the letter received by him regarding settlement of loan which is at Ex.P12. Another letter regarding settlement of loan received by him is at Ex.P13. Complainant has produced visiting card of accused which is at Ex.P14. Complainant has produced receipt for purchase of stamp by the accused which is at Ex.P15. Complainant has produced stamp purchased by the accused which is at Ex.P16. Complainant has produced 23 Crl.Apl.469/2015 & Crl.Apl.542/2015 Certificate issued by Kirloskar Company belongs to him which is at Ex.P17.

22. In the present case, accused has specifically denied that complainant has paid Rs.5,17,000/- as half amount for purchase of Maruthi Ertiga Car to him and Maruthi Ertiga Car was purchased in Partnership between him and the complainant. Further accused has specifically disputed that the complainant has invested Rs.6 lakhs in the sand business in a Company and handed-over the

amount of Rs.6 lakhs to him. Complainant has not produced any documentary evidence to show that he has paid Rs.5,17,000/- towards Car in Partnership between him and accused. Further complainant has not produced any documentary evidence to show that he has paid Rs.6 lakhs to the accused for sand business. PW.1 himself has admitted that, after he made payment for purchase of Car and for sand business, he made enquiry and he came to know that accused has not purchased any Car and not given for hire to the Company. Further PW.1 has admitted that accused has not invested any money to Sand business.

24 Crl.Apl.469/2015 & Crl.Apl.542/2015

23. In the present case accused has specifically stated in his reply notice that he has availed loan of Rs.7,40,000/- from the complainant in the month of January-2013 and out of that he has repaid Rs.5,40,000/- and he is arrears of only Rs.2,00,000/-. He has issued Ex.P1-cheque as security of the said amount. In order to prove the same accused has not lead any defence evidence. Accused has not produced any documentary evidence to prove his defence. Further nothing has been made out in the cross-examination of PW.1 so as to help the accused to prove his defence taken. In the present case, complainant has also not produced any documentary evidence to show that he has paid Rs.5,17,000/- for purchase of Maruthi Ertiga Car in Partnership with the accused. Further complainant has not produced any documentary evidence to show that he has paid Rs.6,00,000/- for investing the same in the sand business. In the present case, in the reply notice which is at Ex.P5, accused has admitted that he has availed loan of Rs.7,40,000/- from the complainant. Further accused has contended that out of that, he has repaid Rs.5,40,000/- to the complainant. Complainant has 25 Crl.Apl.469/2015 & Crl.Apl.542/2015 denied the same and burden is on the accused to show that he has repaid Rs.5,40,000/- availed from the complainant and in order to show the same accused has not produced any oral and documentary evidence. PW.1 in his cross-examination admitted regarding the receipt of Rs.1,65,000/- from the accused and it is the contention of the complainant that the said amount is paid in respect of rent of the hired car which is purchased in the partnership and towards the amount received from sand business. It is the contention of the accused in Ex.P5-Reply notice that he has paid Rs.1,65,000/- towards the interest on the loan availed by him from the complainant. Admittedly, accused has admitted that he has availed loan of Rs.7,40,000/- from the complainant. Further complainant has produced documentary evidence to show that he has paid the amount to the accused by cheque. It is the case of accused that he has paid cheque for Rs.5,00,000/- and Rs.1,00,000/- for investment in the sand business to the accused. Further it is the case of the accused that he has paid Rs.1,40,000/- by one cheque and another Rs.1,40,000/- by another cheque towards the purchase of 26 Crl.Apl.469/2015 & Crl.Apl.542/2015 Maruthi Ertiga Car and rest amount is paid by him by cash, the same has been disputed by the accused. Accused in Ex.P5-Reply Notice has clearly admitted that he has availed loan of Rs.7,40,000/- from the complainant and he has repaid Rs.5,40,000/- out of that. Further he has paid interest of Rs.1,65,000/- on the said loan to the complainant which is denied by the complainant.

24. In the present case, it is the defence of the accused that he has availed loan of Rs.7,40,000/- and out of that he has repaid Rs.5,40,000/- and in order to prove the same accused has not produced any oral and documentary evidence and accused has not entered into witness box to prove his

defence. Further accused has not proved his defence in the cross-examination of PW.1 also. Even as per the admission of the accused, it is taken that he has availed loan of Rs.7,40,000/- and repaid Rs.5,40,000/- out of that, accused has to prove the same and in order to prove the same accused has not lead any evidence. Accused has admitted that he has received loan of Rs.7,40,000/- and accused has failed to prove that he has repaid Rs.5,40,000/- to the complainant, so as per the 27 Crl.Apl.469/2015 & Crl.Apl.542/2015 admission of the accused itself, accused is in due of Rs.7,40,000/- to the complainant. Complainant has admitted that, he has received Rs.1,65,000/- and in Ex.P5 accused has stated that he has paid the said amount towards the interest. So, that amount cannot be deducted from the principle loan amount of Rs.7,40,000/-. Accused has taken the specific defence that he has availed loan of Rs.7,40,000/- in the month of January and February-2013 from the complainant and he has repaid Rs.5,40,000/- out of that and balance amount is Rs.2 lakhs only and in order to prove the same accused has not lead any oral and documentary evidence. Further accused has taken the specific defence that Ex.P1-cheque is given for security of loan availed by him from the complainant and in order to prove the same accused has not entered into witness box, so adverse inference has to be drawn against the accused for withholding the best available evidence. Accused has failed to prove that he has repaid Rs.5,40,000/- to the complainant and as per the admission itself accused has contended that he has availed Rs.7,40,000/-, so as per the admission of the accused himself, cheque has to be 28 Crl.Apl.469/2015 & Crl.Apl.542/2015 restricted for Rs.7,40,000/-. The trial court in the judgment has contended that, after deducting the amount paid by the accused to the complainant, the balance amount is Rs.7,62,000/- and trial court has not given any calculation how it has arrived at Rs.7,62,000/-. As per the admission of the accused himself he has availed loan of Rs.7,40,000/- in the month of January- February 2013 and he has paid the interest of Rs.1,65,000/- to the same and accused has failed to prove that he has repaid Rs.5,40,000/-, so loan of Rs.7,40,000/- is there and the trial court has restricted the cheque to Rs.7,62,000/- which is not erroneous. The trial court has directed the accused to pay Rs.7,67,000/- and out of that Rs.7,62,000/- has to be paid to the complainant as compensation. So, looking to the present facts and circumstances, trial court has not committed any error in coming to the conclusion that accused is due to the tune of Rs.7,62,000/- after deducting the amount paid by him. The trial court has not committed any error in appreciating the oral and documentary evidence lead by the parties.

29 Crl.Apl.469/2015 & Crl.Apl.542/2015

25. The counsel for the accused has relied upon the citation reported in 2005 SAR (Criminal) 446 in (Case: State of U.P. Vs. Gambhir Singh and others), wherein the lordship of Hon'ble Supreme Court have held as under;

"It is well settled principle that when two views are reasonably possible, one in favour of the accused must be preferred."

26. In the present case in hand there are no two views. The accused himself has admitted that he has availed loan of Rs.7,40,000/-, accused has failed to prove that he has repaid Rs.5,40,000/- out of that and balance amount is only Rs.2,00,000/-. So, accused is in due of Rs.7,40,000/- as per his own admission in Ex.P5 and trial court has restricted the cheque amount to Rs.7,62,000/- only

which is not erroneous one. The counsel for the accused has relied upon the citation reported in 2013 SAR (Criminal) 123 in (Case: Rev. Mother Marykutti Vs. Reni C. Kottaram and another), wherein the lordship of Hon'ble Supreme Court have held as under;

"No reliable documentary evidence adduced by complainant to hold that a sum of Rs.25 lakhs was due to him warranting executing of cheque-There was 30 Crl.Apl.469/2015 & Crl.Apl.542/2015 no amount legally due to complainant to hold that cheque was issued by appellant in favour of complainant in order to hold that he was a holder of cheque - Appellant sufficiently rebutted the initial presumption as regards the issuance of cheque by preponderance of probabilities-Trial court rightly acquitted the accused/appellant."

27. In the present case in hand, accused himself has admitted that he has availed loan of Rs.7,40,000/- from the complainant and accused has failed to prove that he has repaid Rs.5,40,000/- out of the said amount, so accused was legally due to the tune of Rs.7,40,000/- to the complainant and trial court has restricted the cheque to the tune of Rs.7,62,000/-. So in the present case in hand, the complainant has proved that cheque is issued for legally recoverable debt. The accused has utterly failed to prove the defence.

28. Further counsel for the accused has relied upon citation reported in 2015 SAR (Criminal) 713 in (Case:

Upendra Pradhan Vs. State of Orissa), wherein Hon'ble Supreme Court have held as under;

"A. Appreciation of evidence - Two views present on perusal of evidence and application of law - View which favours 31 Crl.Apl.469/2015 & Crl.Apl.542/2015 the accused should be taken - It has been recognized as a human right by the Supreme Court - It is now well settled that benefit of doubt belongs to the accused - It is further trite that suspicion, however grave may be cannot take place of a proof

- Benefit of doubt must go to the accused as in the event of there being two possible views, the one supporting the accused should be upheld-View which favours the accused should be considered and the opposite view which indicates his guilt should be discarded."

29. In the present case in hand, there are no two views. Accused himself has admitted the availing of loan of Rs.7,40,000/- and accused has failed to prove that he has repaid Rs.5,40,000/- out of it, so accused was in due of Rs.7,40,000/- and the trial court has restricted the cheque amount to the tune of Rs.7,62,000/-.

30. Perusal of the judgment of the trial court clearly goes to show that trial court has appreciated the oral and documentary evidence properly. Trial court has come to the right conclusion that accused has committed the offence under Sec.138 of Negotiable Instruments Act. Further trial court has

rightly concluded that Ex.P1-cheque is issued for legally recoverable debt to the tune of Rs.7,62,000/-. The judgment of the trial court is well 32 CrI.Apl.469/2015 & CrI.Apl.542/2015 reasoned, trial court has not committed any illegality, so no interference is necessary in the judgment of the trial court. Hence, in the result I answered point No.1 to 4 in CrI.Apl. No.469/2015 in NEGATIVE.

31. POINT NO.2 IN CRL.APL.NO.542/2015 AND POINT NO.5 IN CRL.APL.NO.469/2015: In view of my findings on point Nos.1 to 4 in CrI.Apl.469/2015 and point No.2 in CrI.Apl.No.542/2015 and reasons stated therein, I proceed to pass the following:

ORDER The Criminal Appeal No.469/2015 is dismissed with cost.

The judgment of the trial court under appeal in CrI.Apl.No.469/2015 is confirmed.

Send back the LCR's along with the copy of judgment to the trial court.

CrI.Apl.No.542/2015 preferred by the appellant/complainant dismissed holding that the appeal is not maintainable before this court.

The appellant/complainant is at liberty to prefer the appeal before the competent authority.

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CrI.Apl.469/2015 &
CrI.Apl.542/2015

Keep the original of this judgment in
CrI.Apl.469/2015 and copy of it in
CrI.Apl.542/2015.

(Dictated to the Judgment Writer, transcribed by her, corrected, signed and then pronounced by me in the open court on this the 10th day of May 2016).

(SHIVAJI ANANT NALAWADE) LXVIII Addl. City Civil and Sessions Judge, Bengaluru City.