In Crl.Appeal Sri Indrakumar N vs In Crl. Appeal Sri Keshavamurthy S on 3 April, 2017

IN THE COURT OF THE LIX ADDL.CITY CIVIL
& SESSIONS JUDGE, BANGALORE CITY
(CCH-60)

Dated this the 3rd day of April 2017
PRESENT
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Sri B. B. Jakati, B.A., LL.B., (Spl.)
LIX ADDL.CITY CIVIL & SESSIONS JUDGE,
BANGALORE CITY

Crl. Appeal No.207/2016
&
Crl.Revision Petition No.239/2016

Appellant in Crl.Appeal and Respondent in Crl. Revision Petition:	Sri Indrakumar N., Aged about 45 years, S/o Nanjappa R/at No.686/03 OMBR Layout, D. Banaswadi,. Opp BDA Water Tank Bangalore - 560 043. (Represented by Sri Jaya Prakash, Advocate)
	-Vs-
Respondent in Crl. Appeal and Petitioner in Crl. Rev.Petition:	Sri Keshavamurthy S., Aged about 40 years, S/o Shamanna G. R/at No.105, 2nd Cross, Muneshwara Nagar, Pattegarapalya, Vijayanagar, Bangalore - 560 079. (Represented by Sri Mahesh S.N., Advocate)

COMMON JUDGMENT

The Criminal Appeal No.207/2016 has been filed under Section 374(3) of Cr.P.C. challenging the judgment of conviction

and order of sentence recorded in C.C.No.27370/2014 dated 04.01.2016 on the file of XVIII ACMM, Bengaluru City.

2. The Criminal Revision Petition No.239/2016 is also preferred against the same judgment of conviction and order of sentence challenging the inadequate punishment imposed by the learned magistrate.

3. The appellant in Criminal Appeal No.207/2016 and respondent in Criminal Revision Petition is the accused and respondent in Criminal Appeal and petitioner in Criminal Revision Petition is the complainant. Same ranks would be referred to hereinafter for the sake of convenience.

4. The essential facts required for disposal of the Criminal Appeal and Criminal Revision Petition are as under:

The complainant filed complaint under Section 200 of Cr.P.C. against the accused for the offence under Section 138 of N.I.Act making allegation that he had given hand loan of Rs.15,00,000/- to the accused on 31.03.2012. The accused on the very day issued three post-dated cheques bearing No.935818 dated 11.07.2014, cheque No.,935819 dated 18.07.2014 and cheque No.935820 dated 25.07.2014 each for Rs.5,00,000/- drawn on Canara Bank GKVK Bank, U.A.S. Campus, Bengaluru in favour of the complainant. The complainant presented the cheques before his banker i.e. S.B.I. Magadi Road Branch, Bengaluru and

the first and the third cheque returned on 03.09.2014 and the 2nd cheque returned on 05.09.2014 with endorsement "Funds In-sufficient". The complainant issued legal notice on 12.09.2014 through registered post and inspite of service of notice, the accused not paid the cheques amount and hence, the complainant filed complaint on 01.10.2014. The accused appeared through his counsel after service of summons before the Court below. The accused has denied the allegation of the complainant and claims to be tried.

5. Thereafter, the complainant in order to establish the guilt of the accused examined himself as P.W.1 and got marked documents at Ex.P.1 to P.12.

6. The accused was examined under Section 313 of Cr.P.C. by the trial court. The accused denied the incriminating evidence and in support of his defence, he is examined as DW.1 and examined Venugopala as DW.2. He has not produced any documentary evidence. The DW.2 not submitted for his cross-examination.

7. The trial court after considering the material on record held that the accused issued three post-dated cheques in favour of the complainant in order to discharge his legally enforceable debt and those cheques came to be dishonoured as "Funds Insufficient". It has been held that the accused not paid the cheque amount inspite of receipt of notice and thereby committed the

offence under Section 138 of N.I.Act. Accordingly, the trial court has convicted the accused for the offence under Section 138 of N.I.Act and sentenced to pay fine of Rs.15,30,000/- and in default directed to undergo Simple Imprisonment for one year. The trial

court acting under Section 357(1)(b) of Cr.P.C. directed to pay compensation of Rs.15,00,000/- out of fine amount to the complainant. Against this judgment of conviction and sentence, the accused has preferred the appeal and dissatisfied with the quantum of sentence the complainant has filed the Criminal Revision Petition for enhancement of sentence of fine. Since both cases are arising out of same judgment, I have taken both cases for common disposal.

8. The learned counsel for the accused has argued that the trial court has discarded the deed of loan agreement at Ex.P.11 produced by the complainant rightly. Then also the trial court without there being any material on record to show the financial capacity of complainant came to wrong conclusion that the complainant had financial capacity to lend loan of Rs.15,00,000/-. He has argued that the cheques produced at Ex.P.1 to P.3 are themselves do not prove the legally enforceable debt and the complainant has not proved that the cheques have been issued by the accused for enforceable debt. He has argued that the accused was serving as Scientist, drawing salary of Rs.1,25,000/- per

month and he had 13 flats in his own name and therefore, there was no necessity for him to take loan of Rs.15,00,000/-. He has argued that he had given cheques at Ex.P.1 to P.3 to Venugopal for sale of 13 flats owned by the accused and those cheques have been misused by the complainant and therefore, there was no legally enforceable debt under the cheques. On these main grounds, the counsel for the accused has contended that the trial court has wrongly convicted the accused and prayed to set aside the order of conviction and sentence.

9. In support of his arguments he placed reliance on the decision reported in ILR 2008 Karnataka 4629 {Shiva Murthy V/s. Amruthraj}.

10. On the other hand, the learned counsel for the complainant has argued that the accused in his evidence has admitted taking of loan of Rs.1,00,000/- from the complainant and thereby admitted the acquaintance in between the complainant and the accused. He has argued that lending of Rs.1,00,000/- by the complainant to the accused which has been admitted by the accused in his evidence itself is sufficient to prove that the

complainant had sufficient funds to lend the loan. He has further argued that there is a presumption under Section 139 of N.I.Act to the cheques at Ex.P.1 to P.3 and such presumption has not been

properly rebutted by the accused. On these main grounds he justified the judgment of conviction passed against the accused. However, he has argued that the punishment imposed on the accused is insufficient and he prayed to enhance the fine amount to the extent of twice of the cheque amount.

11. On the basis of the submissions made by the parties and the material evidence on record, the following points arise for my consideration :

1. Whether the complainant established that the accused has issued the cheques at Ex.P.1 to P.3 in order to discharge any debt or other liability in favour of the complainant?

2. Whether the punishment imposed by the trial court on the accused in the form of fine is inadequate?

3. What Order?

12. My finding to the above points are as under:-

POINT No.1:- In the Affirmative

POINT No.1:- In the Negative

POINT No.3:- As per final order,

for the following:-

REASONS

13. POINT No.1 :- The accused initially denied all the allegations made against him. But during the evidence, more particularly in the examination-in-chief the accused has admitted

that he had acquaintance with the complainant and he had borrowed loan of Rs.1,00,000/- by executing the Promissory Note. This admission is unequivocal and it is made by the party himself and therefore, it is admissible. This admission of the accused is sufficient to hold that there was acquaintance between the accused and the complainant when the alleged transaction took place.

14. The accused in his evidence and also in the cross-examination of P.W.1 not seriously disputed drawing of cheques at Ex.P.1 to P.3 by him. On the other hand, there is ample evidence on record that the cheques at Ex.P.1 to P.3 were drawn by the accused and he had account in Canara Bank, GKVK Brach, U.A.S.

Campus, Bengaluru in the year 2014. Even the accused has admitted the signatures appearing in Ex.P.1 to P.3. Therefore, the complainant is not required to prove the signature of accused appearing in Ex.P.1 to P.3. Thus, I hold that the evidence on record is sufficient to hold that Ex.P.1 to P.3 were drawn by the accused from his banker and signatures therein belong to the accused. The complainant has produced the endorsement at Ex.P.4 to P.6 and those endorsements issued by the bank are not disputed by the accused. In the endorsements it has been shown that the cheques at Ex.P.1 to P.3 were dishonoured because of "in-sufficient funds" in the account of the accused. The complainant has produced the Office copy of the legal notice at Ex.P.7 dated 12.09.2014 issued to the accused along with postal receipt at

Ex.P.8 and acknowledgement at Ex.P.9. Ex.P.10 is the reply notice given by the accused on 01.10.2014. Therefore, the notice at Ex.P.7 is not in dispute. The complaint has been filed on 01.10.2014. Therefore, the complaint has been filed well within the limitation prescribed under the provisions of N.I.Act, which has not been disputed by the accused.

15. According to the accused he never received loan of Rs.15,00,000/- from the complainant and in fact he had acquaintance with Venugopal and Venugopal was the mediator at the time of purchasing 13 flats and in that connection he had given the cheques at Ex.P.1 to P.3 in the hands of Venugopal and those cheques have been misused by the complainant. This is the major defence taken by the accused to contend that the cheques at Ex.P.1 to P.3 were not issued to discharge debt or legally enforceable liability.

16. The complainant in order to discharge the initial burden of proving the fact that the cheques at Ex.P.1 to P.3 were issued for legally enforceable debt has relied upon the agreement dated 31.03.2012 said to be executed by the accused which is produced at Ex.P.11. This document has been discarded by the trial court on the ground that the signature of the accused found in bottom, right-hand side of first page and bottom and left-hand side in the second page and it appears to be created one. Whether such finding is sustainable under law has to be looked into.

17. In Ex.P.11 there is a photograph of the accused and such photograph has been admitted by the accused. In Ex.P.11 it has been shown that for interior decoration to the flats purchased by the accused, the accused received loan of Rs.15,00,000/- from the complainant and by receiving such amount issued three post-dated cheques produced in Ex.P.1 to P.3. The accused in his cross-examination not specifically denied his signature at Ex.P.11 and he avoided to categorically admit such signature. If the entire cross-examination of DW.1 is looked into, one can find out that even though the signature belong to the accused, the accused avoided to admit such signatures appearing in Ex.P.11. Therefore, the evidence of P.W.1 and the statements extracted in the cross-examination of DW.1 are sufficient to hold that the accused has put his signatures on Ex.P.11.

18. In the first page the signature of the accused is appearing in bottom and right-hand side. In the second page also the signature of the accused is appearing in bottom and on left-hand side. According to the trial court the matter has been typed after obtaining the signature. But on perusal of the document it is

found that observation made by the trial court about creation of Ex.P.11 is totally erroneous. Ex.P.11 can be appreciated on another angle. Ex.P.11 - Stamp paper was purchased on

31.03.2012 at 1.03 P.M. This stamp paper has been purchased in the name of accused and purpose for purchasing the Stamp paper has been shown as loan agreement. Even in Ex.P.11 the name of the complainant has been shown as second party. Therefore, on 31.03.2012 the stamp duty used for Ex.P.11 was purchased by showing the name of the complainant and the accused. If really the accused wanted to give the Stamp paper to Venugopal, he would have shown the name of second party as Venugopal and not the complainant. the Stamp paper has been purchased on 31.03.2012 itself and on the very day the agreement has been written. Therefore, the date of purchase of stamp duty, name of the parties to the document shown at the time of purchasing the stamp paper including the purpose for which the stamp duty was purchased clearly show that the accused and the complainant entered into loan agreement produced at Ex.P.11. The contents of Ex.P.11 has been proved by the complainant. Even though there is witness to this document, the complainant has not examined the

witness. But the loan document is not compulsorily attestable document. Ex.P.11 can be proved in accordance with Section 67 of Evidence Act. Therefore, I hold that the evidence of P.W.1 is sufficient to prove Ex.P.11. Thus, the finding of the trial court in discarding Ex.P.11 is not sustainable under law.

19. The complainant has produced NOC given by Fortuna Construction India Pvt. Ltd., at Ex.P.12 dated 19.08.2011. Under

this document which was issued in the name of accused, it has been shown that there was agreement between the accused and the Company and totally 13 flats have been allotted to the share of accused. This document is sufficient to hold that the accused was the owner of 13 flats constructed in Indraprastha Layout, Ramamurthy Nagara Main road, Banaswadi, Bengaluru. This document is not disputed by the accused. Even the accused has not disputed acquiring 13 flats from the Private Limited Company. Therefore, Ex.P.12, the evidence of P.W.1 and the evidence of DW.1 are sufficient to hold that as on 19.08.2011 the accused became the owner of 13 flats.

20. Ex.P.10 is the reply notice given by the accused on 01.10.2014 through his advocate. In Para No.3 of the reply the accused has categorically stated that Venugopal is known to him and the accused requested Venugopal to provide some financial assistance to meet his necessities. This statement is made by the accused himself and now he is estopped from denying this statement in Ex.P.10. Therefore, the reply notice at Ex.P.10 itself indicates that the accused was in financial crisis and he requested Venugopal for financial help. His own document shows that his contention that he was a Scientist, drawing handsome salary and there was no necessity to raise loan are all false. Therefore, there is answer to the allegation of accused through his own document produced at Ex.P.10. The trial court has rightly rejected the evidence of accused in this regard.

21. By producing Ex.P.10 to P.12 and the cheques at Ex.P.1 to P.3, the complainant is able to discharge his initial burden to prove the fact that the cheques at Ex.P.1 to P.3 were issued by the accused in his favour to discharge legally enforceable debt.

22. The Hon'ble Supreme Court In the decision reported in AIR 2010 SC 1898 (Rangappa V/s. Mohan) has held that presumption under Section 139 of N.I.Act is available to the effect that the holder of the cheque received the cheque for discharge in whole or in part of any debt or other liability. Such presumption is rebuttable presumption. The accused can rebut such presumption by leading the evidence and such evidence has to be tested on the principles of preponderance of probabilities.

23. In the decision relied upon by the accused, the Hon'ble High Court of Karnataka has held that only after satisfying that the complainant has proved the existence of legally enforceable debt or liability, the Court could proceed to draw the presumption under Section 139 of N.I.Act. This principle has been laid down based on the decision of Hon'ble Supreme Court reported in 2008 AIR SCW 738 (Krishna Janardhan Bhat V/s. Dattatraya G. Hegde). Such judgment has been reconsidered by the Hon'ble Supreme Court in the matter of Rangappa V/s. Mohan. Therefore, the decision in Rangappa V/s. Mohan prevails over the

principles in the case reported in ILR 2008 Karnataka 4629.

Therefore, I hold that the decision relied upon by the accused is not helpful to his case.

24. In view of the presumption available to Ex.P.1 to P.3, the accused is required to rebut such presumption by leading evidence and such evidence has to be scrutinized on the principles of preponderance of probabilities. The accused has taken the first defence that he had no financial necessity to take the loan from the complainant. This defence of the accused is not sustainable for the reason that he himself admitted in his examination-in-chief that he availed loan of Rs.1,00,000/- from the complainant. Even he has admitted in Ex.P.10 about his financial crisis by stating that he requested Venugopal for financial help. Therefore, such defence is not proved by the accused in accordance with law.

25. The second defence taken by the accused is that the cheques at Ex.P.1 to P.3 were given to Venugopal and those cheques were misused by the complainant. In order to prove this defence, the accused approached Venugopal to give his evidence and accordingly Venugopal has given his examination-in-chief as DW.2. But Venugopal not submitted himself for cross-examination.

When the witness not submitted for cross-examination, no evidentiary value has to be attached to the examination-in-chief of

such witness. Therefore, there is no evidentiary value of the examination-in-chief of DW.2. The trial court wrongly referred such evidence which is not sustainable under law. To that extent the finding of the trial court has to be interfered and accordingly such finding referring the evidence of DW.2 is discarded. So, the accused has not established giving of Ex.P.1 to P.3 in the hands of Venugopal. During the course of arguments, the learned counsel for the accused has submitted that for the sale of 13 flats, the accused had given cheques at Ex.P.1 to P.3. When the owner was selling the flats, there was no necessity to give any money or cheques to the middlemen. Therefore, the contention taken by the accused that the cheques were given to middlemen for sale of flats cannot be accepted. Therefore, I hold that even the accused has failed to prove this second contention taken to rebut the presumption available to Ex.P.1 to P.3.

26. The third contention taken by the accused is regarding the financial capacity of the complainant to pay loan of

Rs.15,00,000/-. Whether there is any substance in this defence has to be looked into. The P.W.1 in his cross-examination has admitted that he was having business of sale of Saris and in such business he sustained loss in 2012 and therefore, he closed the shop. In the cross-examination he has stated that Tirumala Silk Shop was run by partner and he is one of the partners. He states that at the time of dissolution of partnership Firm he received a

sum of Rs.18,00,000/- and that amount has been used for payment of loan to the accused. The complainant has not produced any records to show the existence of partnership Firm, its dissolution and receipt of Rs.18,00,000/- at the time of dissolution of the partnership Firm. Therefore, there are no records produced by the complainant to show the receipt pf Rs.18,00,000/- after disoolution of partnership firm. Thus, the trial court has rightly disbelieved such evidence of the complainant.

27. In the evidence of P.W.1 the accused has demonstrated that complainant was having the business and such business was closed in the year 2012. The alleged transaction took place in the year 2012. When the complainant has got closed

his business in the year 2012, necessary inference that can be made is in respect of some amount from the closure of the business. Even though the complainant has admitted that he sustained loss in the business, it does not mean that he has not received any amount at the time of dissolution of partnership Firm or from his business in the year 2012. Therefore, some weightage has to be given to the evidence of P.W.1 that he had business and from the business he was having financial capacity in the year 2012. Apart from that, the complainant has produced Ex.P.11 agreement executed by the accused. That agreement and the oral evidence of P.W.1 clearly establish that the complainant had financial capacity to give loan of Rs.15,00,000/- to the accused.

For these reasons I hold that the accused not rebutted the presumption available to Ex.P.1 to P.3 through probable defence. Considering all these aspects of the matter, I hold that the accused issued the cheques at Ex.P.1 to P.3 in order to discharge legally enforceable debt under Ex.P.11. When those cheques are dishonoured and the accused not paid the cheque amount inspite of receipt of notice, the act of the accused amounts to an offence

under Section 138 of N.I.Act. Accordingly I answer this point in the Affirmative.

28. POINT NO.2:- Section 138 provides punishment for dishonour of cheque. If the accused is found guilty for the offence under Section 138 of N.I.Act, the court can impose punishment with imprisonment for a term which may extend to two years or with fine which may extend to twice the amount of cheque or with both. The punishment prescribed under Section 138 of N.I.Act is the maximum punishment. There is no minimum punishment prescribed under Section 138 of N.I.Act. The discretion has been given to the Court to impose lesser punishment. By exercising such discretion, the trial court has sentenced the accused to pay fine of Rs.15,30,000/- and ordered to pay fine of Rs.15,00,000/- to the complainant as compensation. When the trial court by using the discretion imposed the fine of Rs.15,30,000/-, looking to the facts and circumstances of the case, I am of the opinion that such sentence shall not be interfered. I do not find that the fine imposed

by the trial court is inadequate and hence, there is no necessity to

enhance the fine or the default sentence. Accordingly, I answer this point in the Negative.

29. POINT NO.3: - After going through the material evidence on record and the findings recorded by the trial court, I do not find any grounds to set-aside the judgment of conviction and order of sentence passed by the trial court. Accordingly, I proceed to pass the following:

ORDER

The Criminal Appeal filed under Section 374(3) of Cr.P.C. and Criminal Revision Petition filed under Section 397 of Cr.P.C. are hereby rejected. The judgment of conviction and order of sentence passed in C.C.No.27370/2014 dated 04.01.2016 by learned XVIII ACMM, Bangalore is confirmed.

Crl.Rev.Petition No.239/2016 Send the LCR with copy of the Judgment to the trial court. (Dictated to the Judgment-writer, transcribed by her, corrected, signed and then pronounced by me in the open court on this the 3rd day of April 2017).

(B.B. Jakati) LIX Addl. C.C. & Sessions Judge, BANGALORE CITY.

Crl.Rev.Petition No.239/2016