

# Mr B Shivaram vs Mr M V Venkatesh on 3 February, 2015

**Author: R.B Budihal**

**Bench: R.B Budihal**

1

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 3RD DAY OF FEBRUARY 2015

BEFORE

THE HON'BLE MR. JUSTICE BUDIHAL R.B.

CRIMINAL APPEAL No.743/2010

BETWEEN:

Mr B Shivaram  
S/o Boraiah  
Aged about 47 years  
"Raghavendra Hotel"  
Shobhashri Vasavi  
No.319/9, Opposite to B.H.E.L.,  
Mysore Road  
Bangalore-560 026. .. APPELLANT

(By Sri. B R Deepak, Adv. for  
M/s B R Deppak & Associates)

AND:

Mr M V Venkatesh  
S/o M V Venkatappa  
Aged 46 years  
Occ: Clerk at Syndicate Bank  
R/o No.88, 2nd Main Road  
6th Cross, Kengeri Branch  
Kengeri Satelllite Town  
Bangalore. .. RESPONDENT

(By Sri. Srinivas R, Adv.  
For B & S Associates)

2

This criminal appeal is filed under Section 378(4)

Cr.P.C praying to set aside the aforesaid impugned judgment and order dated 30.06.2010 passed by the XV Addl. C M M, Bangalore in C.C.No.16364/2009 acquitting the respondent/accused for the offence punishable under Section 138 of N.I. Act.

This appeal having been heard and reserved for orders, coming on for pronouncement of judgment, this day, the Court delivered the following:

#### JUDGMENT

This is the appeal preferred by the complainant being aggrieved by the judgment and order dated 30.6.2010 passed by the XV Addl. CMM Court, Bengaluru City in C.C. No.16364/2009.

2. Brief facts of the appellant-complainant's case before the trial court is that respondent-accused availed the sum of Rs.3.00 lakh from the complainant in October 2008 for his urgent needs and towards repayment of the said amount, the respondent-accused issued a cheque in favour of the complainant for the sum of Rs.3.00 lakh dated 14.3.2009 drawn on Syndicate Bank Gandhinagar Branch, Bengaluru. The complainant presented the cheque for encashment through his banker State Bank of Mysuru, Mysore Road, Bengaluru and it was dishonored with endorsement 'insufficient funds' and 'account dormant'. The complainant issued a legal notice as per Ex.P.6 through his Counsel by RPAD calling upon the respondent-accused to pay the amount of cheque. In spite of service of notice, the respondent-accused had failed to pay the amount stated in the cheque. Hence, the complainant filed a complaint under Section 200 Cr.P.C. before the trial court. As per the summons, the respondent-accused appeared before the court and trial was held. Ultimately, the trial court by its judgment has, considering the oral and documentary evidence, i.e., the evidence of P.Ws.1 and 2 and the documents Exs.P.1 to P.11 and Ex.D.1, acquitted the accused holding that the complainant has failed to prove the case against the respondent-accused. Being aggrieved by the same, the appellant-complainant has preferred the preset appeal on the grounds that the trial court has not applied its mind properly while passing the impugned judgment and order. It has failed to take note of the documents furnished by the appellant-complainant at the time of evidence which clearly indicates the deliberate intention of the respondent-accused in issuing the cheque and committing a crime as per Section 138 and 142 of the Negotiable Instruments Act, (for short 'the Act') beyond any reasonable doubt. The reasons adopted by the trial court for acquitting the respondent-accused are erroneous. The trial court has ignored that the respondent-accused has utterly failed to rebut the presumption raised under Section 139 of the Act. The trial court has also neglected to consider several judgments of the Hon'ble Supreme Court and of this Court while passing the judgment. The judgment is based on conjectures and surmises and it needs perusal of the entire case records to set aside the judgment and to convict the respondent-accused. Hence, the appellant-complainant sought to allow the appeal.

3. Learned counsel appearing for the appellant- complainant, during the course of the arguments, made submission that issuance of the cheque and the signature on the cheque has been admitted by the respondent-accused and hence, there is initial presumption as per Sections 118(a) and 139 of the

Act in favour of the complainant and this aspect has been totally misconstrued by the trial court. It is also his submission that unless and until, the accused has rebutted the said presumption with cogent and satisfactory materials, the complainant is not suppose to explain the sources of income and his financial capacity to advance loan of Rs.3.00 lakh to the accused. Even then, the complainant, in his evidence before the trial court, has stated on oath that the amount reserved for complainant's daughter's marriage was given to the accused. It is also submission of the learned Counsel that merely, the ground that the complainant has failed to pay the installments to the bank to repay the loan amount borrowed from the bank itself is not sufficient to come to the conclusion that he was not having financial capacity to advance loan of Rs.3.00 lakh to the respondent-accused. The learned Counsel submitted that even though notice was served, the respondent-accused has not sent any reply to the said notice. The evidence on record were wrongly interpreted and wrongly appreciated by the trial court. Hence, submitted that the judgment and order under appeal is illegal. The learned Counsel further submitted that there was no property dispute between the accused and the complainant's side and otherwise, the accused could have filed a suit. The bank statement relied upon by the accused is helpful to the complainant himself. Hence, submitted to allow the appeal and set aside the judgment and order. In support of his contention, learned counsel for the appellant has relied upon the following decisions filed along with memo dated 14.1.2015.

1. 2007 Vol.5.S.C 264 (Kamal S Vs. Vidhyadharn M J)
2. ILR 2008 KAR 643 (M/s Q-Soft System & Solutions (P) Limited Vs. H.N. Giridhar
3. ILR 2006 KAR 4672 (J. Ramaraj Vs. Hiyaz Khan)
4. JT 2002 Vol.6 S.C 119 (I.C.D.S. Ltd. Vs. Beena Shabeer and Anr.)
5. ILR 2000 KAR 2855 (B. Harikrishna Vs. Macro Links Private Limited and Another)
6. CRL. APPL. NO. 1349/2010 (H.C) (Shashikala T Vs. Usha S Prabhakar)
7. CRL.APPL.NO.518/2006(S.C) (Krishna Janardhan Bhat Vs. Dattatraya G Hegde)
8. (2000) 7 Kant.L.J.185 (Devi Tyres, Bangalore Vs. Nawab Jan)
9. 2004(3) KCCR SN 200 Cr.P.C. (Ghaziahad Development Authority Vs. Balbir Singh)
10. 2002(3) KCCR 2008 (Smt. Bhavani Vs. D.C. Doddarangaiah and Another

4. Per contra, it is the contention of learned counsel appearing for the respondent-accused that the evidence of P.W.2, during the course of cross examination, shows that her daughter's age was 18 years and when the alleged transaction took place, her daughter was aged 17 years. Hence, he submitted that, this itself improbablise the contention of the appellant-complainant that he was having Rs.3.00 lakh for the marriage of his daughter. The learned counsel also submitted the financial capacity of the appellant-complainant has been properly appreciated by the trial court and

there is material on record that the complainant himself is a defaulter in making the regular payment of installment to the bank wherein he borrowed the loan. Hence, he submitted that the trial court has rightly appreciated the evidence, both oral and documentary, and rightly acquitted the respondent accused. There is no illegality in the case. Hence, submitted to dismiss the appeal. In support of his contention learned counsel appearing for the respondent-accused has relied upon the following decisions filed along with the memo dated 14.1.2015:

1. CrI.Apl. No.2402/2014 (SC) (K Subramani Vs. K Damodara Naidu)
2. 2014 AIR SCW 2158 (John K Abraham Vs. Simon C Abraham and another)
3. 2014 (3) Crimes 291 SC (Sanghian Pandian Rajkumar Vsl. Central Bureau of Investigation and another with Balkrishnan Rajendraprasad Chaubey Vs. Central Bureau of Investigation and another.)
4. (2010) 11 SCC 441 (Rangappa Vs. Sri Mohan)
5. I have perused pleadings of the parties, oral evidence of P.Ws.1 and 2 and D.W.1 and also the documents produced in the case by both sides. I have also perused the decisions relied upon by counsel on both sides which are referred above.
6. Let me refer to the relevant portion in the oral evidence of the witnesses. P.W.1 is the appellant-

complainant. In his affidavit, by way of examination of chief, P.W.1 has reiterated the averments made in the complaint filed under Section 200 of Cr.P.C. before the Magistrate Court. In the evidence, he has stated that accused, who is his brother-in-law, had approached him for financial assistance of Rs.3.00 lakh during the 2nd week of October 2008 to meet his urgent needs and as such, he paid the same as hand loan. The accused assured him to repay the same within six months and after the lapse of six months, the accused did not turn up to pay back the amount. On the persistent demand and request made by the complainant, the accused issued a cheque bearing No.077696 dated 14.3.2009 for Rs.3.00 lakh drawn on Syndicate Bank, Gandhinagar Branch, Bengaluru towards discharge of the legally liable debt. The complainant presented the cheque through his banker State Bank of Mysuru, Mysuru Road Branch, Bengaluru. But the same was returned unpaid with shara 'funds insufficient' on 16.4.2009. Then, he issued legal notice through RPAD and UCP. The registered notice sent to the residential address returned unserved with a shara 'intimation delivered returned to sender' on 22.5.2009 and the notice sent by RPAD to the bank address, for which the complainant had not received the acknowledgement. Then, he made the complaint to the concerned post office on 22.6.2009 and the postal authority gave an endorsement that the said notice has been served on the accused on 16.5.2009. The notice sent under UCP has been acknowledged by the accused between 15.5.2009 and 20.5.2009. Even after receipt of the notice, the accused neither paid money nor replied. P.W.1 has produced the cheque as per Ex.P.1 and identified the signature of accused as Ex.P.1(a). He has also identified the bank endorsement Ex.P.2, office copy of the legal notice Ex.P.3, postal receipts at Exs.P.4 and 5, the returned cover and

the notice in the said cover at Ex.P.6 and envelope at Ex.P.6(a) and UCP receipt Ex.P.7, the letter addressed to the postal authority at Ex.P.8, reply by postal authority at Ex.P.9 and another letter from the postal authority at Ex.P.10.

7. In the cross examination, P.W.1 has deposed that the accused is his brother in law. P.W.1 married Shobha, the sister of accused. He has deposed that he was running Raghavendra Refreshment at Mysuru Road in the year 2008. But for the last one year, he has closed it. To purchase the said building, he borrowed loan of Rs.12.00 lakh from Syndicate Bank, Shivajinagar Branch. Ex.D.1 is the account extract in respect of the said loan. He has not yet completely discharged the said loan. He has admitted as true that as he has not paid the loan installments regularly and number of times, the bank imposed penalty on interest. When he was asked as to whether he was having Rs.3.00 lakh in the year 2008 and whether he will produce the documents in that regard, he answered that he has to see. However, he has voluntarily deposed that the amount of Rs.3.00 lakh, which was kept in his house for the purpose of his daughter's marriage, was given to accused. He has admitted as true that he was not regularly paying the installment amount to the Syndicate Bank. But he had offered explanation that as he was receiving the rent amount lately, he was not regular in payment of installment amount. The installment amount was Rs.11,000/- per month. He denied the suggestion that when he was running the Raghavendra Refreshment, he had also borrowed loan from private persons apart from the bank loan to discharge the same. He denied the suggestion that he obtained the blank signed cheques from the accused in order to repay the loan borrowed for himself. He admitted that he has filed the complaint after the death of his mother- in-law. He denied the suggestion that after the death of his mother-in-law, as there was difference of opinion arose between the respondent-accused and his sister (complainant's wife), taking undue advantage of the cheque, he filed the present case. He admitted as true that in the said cheque, the contents were written in different ink. He denied the suggestion that as the accused gave the signed blank cheque, he himself has filled it and on the basis of the same, he filed the present case. When he gave the amount of Rs.3.00 lakh to the accused, he has not received any document from him so also he cannot say on what date, he gave the amount of Rs.3.00 lakh to the accused and on what date, the accused gave the cheque to him.

8. The wife of the complainant is also examined in this case as P.W.2. In her affidavit by way of examination in chief, P.W.2 has reiterated the averments made in the complaint. When she was cross examined, P.W.2 has deposed that her husband filed complaint after the demise of her mother. There is a building at Rajajinagar belonging to her mother. But she has denied the suggestion that she has filed litigation claiming share in the said property. Her daughter's age is 18 years. She is studying in II PU. She has further deposed that she is not having the document to show that she was having Rs.3.00 lakh in the house. She has also deposed that she does not know on what date the accused gave the cheque to her husband. They have not yet discharged the loan at Syndicate Bank. They have not obtained the documents on the day when they gave money to the accused. She has denied the suggestion that herself and her husband were not having financial capacity to advance Rs.3.00 lakh. She denied the further suggestion that for running the hotel business, herself and her husband have borrowed loan from some private companies. She has also denied the suggestion that as the accused is her brother and to obtain loan from private persons, they obtained signed blank cheques as security. She denied further suggestion that they have not advanced

Rs.3.00 lakh to the accused and in turn, the accused has not issued cheques in their favour.

9. The accused was also examined before the Court as D.W.1. In the affidavit, by way of examination in chief, D.W.1 has contended that he has not borrowed any amount from the complainant and he has not issued the disputed cheques to discharge any legally enforceable liability. In the year 2008, the complainant started hotel Raghavendra Refreshment and at that time, the complainant was in need of finance from banks as well as private financiers. The complainant has taken finance of Rs.12.00 lakh from Syndicate Bank, Bengaluru and also raised financial assistance of Rs.3.00 lakh from the private financiers. At the time of raising loan from the private financiers, the complainant told him that the said financiers were demanding a signed blank cheque of a government servant as security. The complainant requested him to give two signed blank cheques in order to give the same to the private financiers from whom he has taken the loan. As the complainant was his brother in law, in order to help him, he gave two signed blank cheques bearing Nos.077696 and 077697 drawn on Syndicate Bank, Gandhi Nagar, Bengaluru and bonds. The complainant assured that the cheques would be returned back after he clears the loan amount taken by him. D.W.1 has also contended that his mother expired in the year 2008 and there was difference between himself and his sister i.e., wife of the complainant regarding share of the property of his mother. For this reason, the complainant filled up the cheques and presented the same without his knowledge. The contents of the disputed cheques were not written by him. In the cross examination, D.W.1 has deposed that about four years back, the complainant purchased the property at Mysuru Road and from 19.9.1996, the complainant is running the hotel in the said building. He has further deposed that as he is working in a bank, he knew not to give the signed blank cheques. At the time of giving those two cheques, he had not enquired the complainant as to from whom the complainant was borrowing loan. Ex.D.1 is obtained from the bank. He admitted as true that the complainant has let out the first floor of the building for residential purpose and even he has let out three shops on rental basis. He denied that from the said let outs, the complainant is getting Rs.35,000/- - Rs.40,000/- per month. He denied the suggestion that in order to cheat the complainant, he has taken the false contention. He has also denied that he issued the cheques for discharge of the debt amount to the complainant. He has further stated that there are eight children to his mother and they have not filed civil suit claiming share in the property of his mother. In connection with the family property, there is difference between himself and his sister. He denied the suggestion that in order to discharge the loan amount, he had obtained Rs.3.00 lakh loan amount from the complainant. He received the legal notice, but he has not replied the same. The signatures on the disputed cheques are his signatures.

10. Perused the oral evidence of the parties and also the materials in the case. D.W.1-accused, in his evidence, has admitted that signatures, on the cheques, he issued, are his signatures and that, he has handed over those cheques to the complainant. But, according to D.W.1, since the complainant obtained loan of Rs.3.00 lakh from the private financiers, on the request of the complainant, he gave those two cheques to complainant as security for the loan. In view of these facts and circumstances of the case, initial presumption under Sections 118(a) and 139 of the Negotiable instruments Act would arise in favour of the complainant that the said instruments were issued by the accused for consideration to discharge legally enforceable debts. This presumption is rebuttable presumption. So, D.W.1-accused by placing the cogent and acceptable materials can rebut the said presumption.

In this connection, it is not only sufficient for the accused to offer some explanation by way of defence, but he has to prove it. The standard of proof is preponderance of probabilities and absolute proof beyond all reasonable doubt is not required. It is the contention of the accused that the complainant had borrowed loan of Rs.12.00 lakh from the bank to purchase the Raghavenfra Refreshment building and he was paying installments on the said loan and monthly installment was Rs.11,000/-. It has also come on record, during the course of cross examination of P.W.1-complainant that as the complainant was not regular in making the payment of installments as per the time schedule, the bank imposed penalty interest on him. It has further come on record that in the year 2008, the complainant paid the installment amount only to the extent of 8,948/- p.m. This material prima facie goes to show about the financial capacity of the complainant. When that is so, the complainant has to show that he was having amount of Rs.3.00 lakh in the year 2008 so as to give the same to the accused by way of loan. When a person is not able to pay the bank installments regularly, in spite of imposing penalty interest, naturally, it goes to show that he was not having sufficient amount with him. The complainant, in his evidence, has voluntarily stated that he was having Rs.3.00 lakh in his house to perform the marriage of his daughter and the said amount was given to the accused. But when P.W.2-wife of the complainant was tested in the cross examination, which was recorded in the year 2009, she has deposed that her daughter was studying in PUC and she was aged 18 years. So it goes to show that when the alleged transaction of advancing loan and receiving the cheques took place, the daughter of the complainant was aged 17 years. This material also probabilise the defence of the accused.

11. Regarding the contention that the amount of Rs.3.00 lakh was kept in the house of the complainant, for the first time, that too voluntarily, P.W.1 in his evidence has deposed that he kept the said amount in his house. But, he had not mentioned the said fact specifically either in the legal notice or in the complaint filed before the magistrate court. The relationship of the complainant and the accused is admitted. It is also an admitted fact that the own sister of the accused was given in marriage to the complainant. So naturally, there would be trust and confidence between the parties. It is true that the accused admitted his signatures on the two cheques but he has disputed borrowing of Rs.3.00 lakh and issue of the cheques in discharge of the said amount. During the course of evidence, it has come on record that the other writings in the cheques are in different ink. Considering all these materials on record, the trial court has rightly come to the conclusion that the complainant was not at all having financial capacity to advance Rs.3.00 lakh to the accused and ultimately, acquitted by the accused by dismissing the complaint.

12. In view of these facts and circumstances and also the evidence produced by both sides during the course of trial and also by way of pleadings, the decisions relied upon by learned counsel for the appellant-complainant will not come to the aid and assistance of this case. The materials would show that the accused has rebutted the presumption by way of preponderance of probabilities. Therefore, the contention of the appellant-complainant that he had advanced Rs.3.00 lakh to the respondent-accused and in discharge of the said loan, the accused had issued two cheques cannot be accepted. I do not find any illegality in the judgment and order of the trial court and there are no valid and justifiable grounds to interfere with the same. No merits in the appeal and it is accordingly dismissed. The judgment and order judgment and order dated 30.6.2010 passed by the XV Addl. CMM Court, Bengaluru City in C.C. No.16364/2009 is hereby confirmed.

Sd/-

JUDGE Cs/-