

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 7TH DAY OF AUGUST 2019

BEFORE

THE HON'BLE MR.JUSTICE K. NATARAJAN

CRIMINAL APPEAL NO. 939/2010

Yeshwanth Kumar v/s. Shanth Kumar N.

JUDGMENT

This appeal is preferred by the appellant/complainant being aggrieved by the judgment and order of acquittal dated 05.05.2010 passed by the District and Sessions Judge and Fast Track Court-IV at Bengaluru (hereinafter referred to as 'the first Appellate Court', for short) in Criminal Appeal No.500/2009.

2. The appellant was the complainant and the respondent was the accused before the trial Court. For the sake of convenience, the rankings of the parties are retained.

3. I have heard the arguments of the learned counsel for the appellant Sri. M. R. Mahesh as well as the learned counsel for the respondent Sri. R. D. Pancham.

4. The brief facts of the case of the complainant before the trial Court is that;

The complainant and the accused were known to each other. The accused had borrowed a loan of Rs.1,00,000/- from the complainant in the month of April, 2008 and to discharge the said loan, the accused had issued a cheque (Ex.P2) dated 20.10.2008 for a sum of Rs.1,00,000/- in favour of the complainant. When the cheque has been presented in the bank of the complainant, the said cheque came to be dishonoured with an endorsement (Ex.P3) as 'insufficient funds'. The complainant got issued Legal Notice to the accused through RPAD as well as Under Certificate Of Posting (UCP). The same was served on the accused. The accused neither repaid the loan amount nor gave any reply. Hence the complainant filed a complaint under Section 200 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Cr.P.C.', for short), before the 16th Addl. Chief Metropolitan Magistrate, Bengaluru (hereinafter referred to as 'the trial Court', for short) in C.C.No.1375/2009.

After taking cognizance, learned Magistrate registered a criminal case against the accused and he has been summoned to appear before the Court. The accused pleaded not guilty and claimed to be tried. The complainant got himself examined as PW1 and got marked in all seven documents. The accused, except

cross-examining PW1, not let in any evidence.

After considering the material on record, the trial Court convicted the accused and sentenced him to pay Rs.1,10,000/- as fine and in default, to undergo simple imprisonment for one year and out of the said amount, he was directed to pay Rs.1,06,000/- to the complainant as compensation.

Being aggrieved by the judgment of conviction and sentenced passed by the trial Court, the accused filed an appeal before the first Appellate Court in Criminal Appeal No.500/2009. After hearing the arguments of both sides, the first Appellate Court allowed the appeal filed by the accused by judgment dated 05.05.2010 and set aside the judgment of conviction and sentence passed by the trial Court dated 23.05.2009.

Being aggrieved by the reversal of the judgment and acquitting the accused, the complainant is before this Court.

5. Learned counsel for the appellant/complainant strenuously argued that the accused and the complainant are known to each other. The accused was the Film Producer. For the purpose of producing Cinema, he approached the accused for borrowing money and the complainant gave Rs.1,00,000/- to the accused in April, 2008. The

accused gave assurance to repay the same within 6 months. But he failed to repay. When the complainant approached the accused in October, 2008, the accused gave a cheque for a sum of Rs.1,00,000/- with the assurance that the cheque will be honoured on its presentation. But to the utter surprise of the complainant, when the cheque was presented to the bank, it came to be dishonoured with an endorsement 'insufficient funds'. Though the Legal Notice of the complainant is received by the accused, but he neither replied nor repaid the loan amount. Hence the complainant was constrained to file a private complaint before the Magistrate. The learned counsel further argued that, based upon the evidence on record, the trial Court has rightly convicted the accused, but the first Appellate Court committed an error in acquitting the accused on the basis of the complainant not showing the source of income and also on the ground that, he has no capacity to lend Rs.1,00,000/- to the accused as he was an auto driver, which is not correct. The complainant has stated that, out of his savings as well as out of his retirement benefits of his father, he has paid the said amount. But the same was disbelieved by the first Appellate Court, which is not correct. The presumption available in favour of the appellant has not

been rebutted by the accused by entering into witness box. Merely because there are no documents obtained by the complainant other than the cheque, that is not a ground to dismiss the complaint. Therefore, he prayed for setting aside the judgment of the first Appellate Court and prayed for confirming the judgment of conviction and sentence passed by the trial Court.

6. Per contra, learned counsel for the accused-respondent supported the judgment of acquittal passed by the first Appellate Court and contended that the presumption has been rebutted by way of cross-examination and the accused need not enter into witness box for rebutting the presumption. When the complainant himself is not having capacity or any source of income to lend such a huge amount to the accused and he himself was an auto driver earning Rs.350/- to Rs.400/- per day, out of which he has to pay Rs.150/- per day to the owner of the Auto Rickshaw and he himself was unable to purchase an auto rickshaw, the question of paying Rs.1,00,000/- to the accused is not believable. It is also contended by the learned counsel that the complainant was not able to say on what date he has lent money to the accused. Even it is stated in the cross-examination that he gave the money in April, 2008, but no specific date has been

mentioned and at one stretch he has stated that the amount has been given by him in his house and at another stretch he has stated that he went to the house of the accused and gave the money and no documents were produced before the Court to show the source of income and capacity of the complainant to lend money. Even though the complainant has stated the he is an income tax assessee, but the said amount has not been declared in the income tax returns. It is submitted that the accused has taken a defence that the cheque was given to one Anil and it was taken back and it was lost and the same was misused by the accused. The contention of the accused has been accepted by the first Appellate Court and it has rightly reversed the judgment of the trial Court. When the complainant himself has no capacity to pay the said amount and unable to show the source of income and he himself failed to show that the accused is liable to discharge the legally recoverable debt, the question of entering the accused into the witness box does not arise. In support of his arguments, the learned counsel for the respondent/accused relied upon the judgment of the Hon'ble Supreme Court in the case of K. Subramani Vs. K. Damodara Naidu reported in (2015) SCC 99 and hence the learned counsel prayed to dismiss the appeal.

7. Upon hearing the arguments of both the learned counsel for the parties and on perusal of the records, the points that arise for my consideration are:

- i. Whether the first Appellate Court committed an error in reversing the judgment of conviction and sentence held by the trial Court which call for interference?*
- ii. What order?*

8. The case of the complainant is that, the accused and the complainant are known to each other and the accused being a Film Producer borrowed a loan of Rs.1,00,000/- from the complainant in April, 2008 with the assurance to repay the same within 6 months and he had approached the accused for repayment of loan in the second week of October, 2008 and accused issued a cheque bearing No.115116 dated 20.10.2008. When the same was presented for encashment, it came to be dishonoured on 21.10.2008. He got issued the Legal Notice on 04.11.2008. The same was served on the accused. The accused neither replied to the notice nor repaid the amount. Hence he has filed the complaint. The same is reiterated by the complainant by examining himself as PW1.

9. The complainant has got marked seven documents in support of his case. Ex.P1 is the complaint. Ex.P2 is the cheque. Ex.P3 is the Bank Endorsement. Ex.P4 is the copy of Legal Notice. Ex.P5 is the Postal Receipt. Ex.P6 is the Under Certificate Of Posting acknowledgement. Ex.P7 is the Postal Acknowledgment for having receipt of notice by the accused. The complainant reiterated the averments made in the complaint by examining himself as PW1. Admittedly, except cross-examining PW1 – complainant, the accused has not let in any evidence by entering the witness box and he has also not replied to the Legal Notice in spite of service of the Legal Notice. However, in the cross-examination, the complainant has stated that the accused is his neighbor and they were known to each other for last 10-12 years prior to the transaction and has stated that he is the auto driver and income tax assessee. But he has not declared his income or lending of loan to the accused in his income tax details. He has stated that he is having an income of Rs.20,000/- per month and the said amount was kept by him in his house and not either borrowed from the bank or from anybody. Further he has stated that he gave the loan amount to the accused in his house and immediately again he has stated that he went to the

house of the accused and paid the amount. At the time of paying the amount, no one is present and he has not received any acknowledgement from the accused while paying Rs.1,00,000/-.

10. On perusal of these admissions by the complainant goes to show that, except the oral evidence in respect of lending Rs.1,00,000/- to the accused, there is no other document obtained by him. Further, the complainant being the income tax assessee, he has not declared lending of Rs.1,00,000/- to the accused in his income tax returns. Further, in the cross-examination, he has admitted that he cannot say on which date he gave the money to the accused, but he says only in the month of April. He further admitted in the cross-examination that the accused gave the cheque to him on 21st or 22nd November, 2008, whereas Ex.P2 – cheque shows the date as 20.10.2008, which falsifies the evidence on record. When the cheque has been issued on 21st or 22nd of November, 2008, the question of mentioning the date as October, 2008 does not arise. Apart from that, the complainant has admitted in the cross-examination that he was earning Rs.300-400 per day as auto driver, but he had no licence for driving the auto and he is having only hired auto and he used to pay Rs.150/- per day towards rent to the owner. He

further stated that he do not know the registration number of his auto, which admission of the complainant goes to show that, if really he is running an auto rickshaw on rental basis, he could have mentioned the registration number of the auto and name of the owner of the auto rickshaw. Apart from that he himself could have purchased an own auto, which could not cost more than Rs.1,00,000/- during the year 2008. Hence, the contention of the appellant/complainant that he had Rs.1,00,000/- in his house cannot be acceptable. Even there are no documents produced by him to show that said amount belongs to his father, who received the said amount from his retirement benefits. When he is having so much of amount in his hand, he could have purchased his own auto and he might not have gone to run the auto rickshaw on rent. Apart from that, he has not obtained any receipt or acknowledgement while paying the loan amount to the accused. Even he has stated that he has not charged any interest on the loan amount which is not believable. There is no averment made in the complaint that the accused approached him for the purpose of producing any cinema. He has only stated that he lent hand loan. There is no document forthcoming from the side of the complainant to show that he had source of income and capacity to

lend Rs.1,00,000/- to the accused and he being the income tax assessee, not declared the said income to the Income Tax Authority and no documents were produced in the Court. Apart from that, he has not produced any document to show that he had cash in his possession to lend the same to the accused. Therefore, the contention of the complainant that the accused borrowed the amount and he was unable to pay the amount is not acceptable.

11. Apart from that, in the cross-examination, the complainant has stated the accused gave cheque in November, 2008, but whereas, the cheque date is October 2008. There is clear contradiction between the oral evidence in the cross-examination and documentary evidence. In this regard, the learned counsel for the accused relied upon the judgment of the Hon'ble Supreme Court in the case of K. Subramani Vs. K. Damodara Naidu reported in (2015) SCC 99, wherein at para No.9, it has been held as under:

"9. In the present case the complainant and the accused were working as Lecturers in a Government college at the relevant time and the alleged loan of Rs.14 lakhs is claimed to have been paid by cash and it is disputed. Both of them were governed by the Government Servants' Conduct Rules which prescribes the mode of lending and borrowing. There is nothing on record

to show that the prescribed mode was followed. The source claimed by the complainant is savings from his salary and an amount of Rs.5 lakhs derived by him from sale of site No.45 belonging to him. Neither in the complaint nor in the chief-examination of the complainant, there is any averment with regard to the sale price of site No.45. The concerned sale deed was also not produced. Though the complainant was an income-tax assessee he had admitted in his evidence that he had not shown the sale of site No.45 in his income-tax return. On the contrary the complainant has admitted in his evidence that in the year 1997 he had obtained a loan of Rs.1,49,205/- from L.I.C. It is pertinent to note that the alleged loan of Rs.14 lakhs is claimed to have been disbursed in the year 1997 to the accused. Further the complainant did not produce bank statement to substantiate his claim. The trial court took into account the testimony of the wife of the complaint in another criminal case arising under Section 138 of the N.I. Act in which she has stated that the present appellant/accused had not taken any loan from her husband. On a consideration of entire oral and documentary evidence the trial court came to the conclusion that the complainant had no source of income to lend a sum of Rs.14 lakhs to the accused and he failed to prove that there is legally recoverable debt payable by the accused to him.”

12. In the said case, the Hon'ble Apex Court has also relied upon the judgment of three-Judge Bench in the case of *Rangappa Vs. Sri. Mohan* reported in

(2010) 11 SCC 441 and held that the presumption mandated by Section 139 of the NI Act includes a presumption that there exists a legally enforceable debt or liability and that is a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested.

13. In the case on hand, though the presumption under Section 118 R/w. Section 139 of the Negotiable Instruments Act exists in favour of the complainant, however, the accused is required to rebut the presumption available in favour of the complainant. The accused need not enter into witness box by letting evidence, but he can rebut the evidence of the complainant in the cross-examination. In this case, the accused is disproved the evidence of PW1 in respect of the existence of presumption in favour of the appellant/complainant and legally recoverable debt payable by the accused.

14. Therefore, when the accused/complainant himself is unable to show the source of income and capacity to pay and date of issuance of cheque throw suspicion and cloud in the evidence of the complainant. It is not possible to accept the evidence of the

complainant that there is any legally recoverable debt payable by the accused and he had issued the cheque to discharge the amount to the complainant.

15. The learned counsel for the accused also strenuously argued that, even in the complaint as well as in examination-in-chief there is no clear averments that the complainant actually paid the loan amount to the accused. The same was suggested in the cross-examination and denied by PW1 – complainant. On perusal of the complaint as well as examination-in-chief, it is stated therein that the accused approached him for obtaining the loan and he has agreed to lend the said amount to the accused and he agreed to repay the same. There is contradiction in the averments made in the complaint and in the examination-in-chief. The examination-in-chief of the complainant is extracted as below:

“I submits that, the accused and me we are family friends for last several years and in that acquaintance the accused had approached me, in the month of April 2008, for a financial Assistance, and expressed his financial difficulties and requested me, to lend a hand loan of Rs.1,00,000/- (Rupees One Lakh Only) for a period of 5 to 6 months, and considering the accused friendship I agreed to lent to the accused a sum of Rs.1,00,000/- as hand loan in the month of April,

2008 and the accused at the time of taking the said hand loan had undertook to repay the said amount within 5 months."

16. Even on perusal of the averments made in the complaint as well as examination-in-chief, there is no clear terms of the date he has lent money to the accused. It is only stated that he has agreed to lend to the accused a sum of Rs.1,00,000/- as hand loan in the month of April, 2008 and he has not stated on which date he has actually paid the amount. But he has only stated that, at the time of taking the loan the accused agreed to repay the said amount within six months. Though there may be some discrepancy in forming of sentence, however, there is no clear terms on what date he has paid the amount to the accused. Therefore, on this ground also the complainant is unable to show on what date he has paid the loan amount to the accused. Therefore, the contention of the complainant that he has actually lent the loan and in discharge of the said loan the accused issued the cheque to discharge the legally recoverable debt cannot be acceptable.

17. The first Appellate Court has rightly re-appreciated the evidence on record and accepted the contention of the accused and acquitted the accused, whereas the trial Court has not considered those

aspects in proper perspective. Therefore, I hold that judgment of acquittal passed by the first Appellate Court do not call for interference. Hence I proceed to pass the following order.

ORDER

The appeal filed by the complainant is hereby *dismissed*.

The Judgment and order of acquittal dated 05.05.2010 passed by the District and Sessions Judge and Fast Track Court-IV in Criminal Appeal No.500/2009 is hereby confirmed.

Send a copy of the judgment and LCR to the trial Court forthwith.