

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

SATURDAY, THE 21ST DAY OF NOVEMBER 2015/30TH KARTHIKA, 1937

CRL.A.No. 2414 of 2009 ()

AGAINST THE ORDER/JUDGMENT IN CrI.L.P. 963/2009 of HIGH COURT OF KERALA
DATED 12-11-2009

&

AGAINST THE JUDGMENT IN CRA 133/2006 of SESSIONS COURT,
THRISSUR, DATED 25-08-2009

APPELLANT(S)/PETITIONER/RESPONDENT/COMPLAINANT:

E.GOPINATHA KURUP,
S/O.RAYARAPPA KURUP, PROPRIETOR, M/S.SASTHA MOTORS,
GURUVAYOOR ROAD, POONKUNNAM, THRISSUR,
REP. BY POWER OF ATTORNEY HOLDER, P.BALAGANGADHARAN,
S/O.ARAVINDAKSHAN NAIR, SALES SUPERVISOR,
M/S.SASTHA MOTORS

BY ADVS.SRI.M.GOPALAKRISHNAN NAMBIAR
SRI.DEEPAK

RESPONDENT(S)/APPELLANT/STATE AND ACCUSED:

1. STATE OF KERALA
REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.

2. M.H.ABOOBACKER, S/O.HYDROSS,
PUNNAYOORKULAM, CHAVAKKAD TALUK, THRISSUR.

R1 BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS
R2 BY ADV.SRI.K.SHIBILI NAHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26.10.2015
ALONG WITH CRA. 2415/2009, CRA. 2420/2009 & CRA. 2459/2009, THE COURT
ON 21-11-2015 DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

[C.R.]

Crl. Appeal Nos.2414/2009, 2415/2009,
2420/2009 and 2459 of 2009

Dated this the 21st day of November, 2015

JUDGMENT

Second respondent in Crl.Appeal Nos.133/2006, 127/2006, 129/2006 and 131/2006 on the file of the Sessions Court, Thrissur, is the appellant in all these appeals. All these cases were arising out of four private complaints filed by the appellant against the 2nd respondent alleging commission of offence under Section 138 of the Negotiable Instruments Act (hereinafter called the 'Act').

2. The common case of the complainant in all these cases was that, the complainant is the proprietor of M/s.Sastha Motors Guruvayoor and he was the authorized distributor of petroleum products of M/s.British Petroleum. The accused was appointed as talkist by the complainant for the area of Guruvayoor and Punnapra to distribute Tata B.P. Lube products as per agreement dated 17.08.1998. Accused used to purchase

lube products from the complainant on credit basis. As per the accounts, there was an amount of ₹3,45,277.81 was due from the accused to the complainant and in discharge of those liabilities he had issued Exts.P2 and P5 for ₹50,000/- each with date 15.11.1999 and 15.12.1999 respectively. Ext.P12 cheque for ₹25,000/- dated 14.09.1999 and Ext.P15 cheque dated 4.11.1999 for ₹37,707.30, Ext.P22 cheque dated 15.03.2000 for ₹50,000/- and Ext.P29 cheque dated 15.01.2000 for ₹50,000/-, Ext.P32 cheque dated 15.02.2000 for ₹50,000/- drawn on Corporation Bank Ltd., favour of the complainant.

3. In spite of letters dated 20.12.1999, 04.01.2000 and 01.02.2000 by which he was asked to settle the accounts on or before 09.02.2000, since the accused had not paid the amount, Ext.P2 and P5 cheques were presented and the same were dishonoured for the reason account closed evidenced by Ext.P3 and P6 dishonour memos and the same was intimated to the complainant by their banker vide Ext.P4 and P7 intimation letters. Complainant issued Ext.P8 notice dated 02.03.2000 vide Ext.P9 postal receipt to the accused intimating the dishonour

and demanding payment of the amount. The accused received the same evidenced by Ext.P10 postal acknowledgment. He had sent Ext.P11 reply notice containing false allegations. Since he did not pay the amount, he had committed the offence punishable under Section 138 of the Negotiable Instruments Act. So the complainant filed a complaint on the basis of the above two cheques under Section 138 of the Act, which after enquiry was taken on file as CC.No.30/2001 on the file of the Judicial First Class Magistrate Court-II, Thrissur.

4. He had presented Ext.P12 and P15 cheques dated 14.09.1999, 04.11.1999 for ₹25,000/- and 37,707.30 respectively and the same were also dishonoured for the reasons payment stopped by the drawer vide Ext.P13, P16 cheque returned memo and the same were intimated to the complainant by their banker vide Ext.P14 and P17 intimation letters. The complainant issued Ext.P18 notice in respect of those two cheques dated 02.03.2000 vide Ext.P19 postal receipt demanding payment and intimating dishonor, which were received by the accused evidenced by Ext.P20 postal

acknowledgment. He had sent Ext.P21 reply notice denying the liability and alleging false allegations. Since he had not paid the amount, the complainant filed another complaint on the basis of those two cheques before the Judicial First Class Magistrate Court-II, Thrissur, which was taken on file after enquiry as C.C.No.37/2001 on the file of that court.

5. Complainant presented Ext.P22 cheque dated 15.03.2000 for ₹50,000/- for collection and the same was dishonoured for the reason payment stopped by the drawer evidenced by Ext.P23 cheque returned memo and the this was intimated to the complainant by their banker vide Ext.P24 intimation letter. They sent Ext.P25 notice dated 06.04.2000 vide Ext.P26 postal receipt and the same was received by the accused evidenced by Ext.P27 postal acknowledgment. The accused sent Ext.P25 reply notice reiterating the contentions raised by him in the earlier cases. Since the accused had not paid the amount, the complainant filed another complaint before the same court which after enquiry had taken the case on file as C.C.No.38/2001.

6. The complainant presented Ext.P29 cheque for

₹50,000/- dated 15.01.2000 and Ext.P22 cheque for ₹50,000/- dated 15.02.2000 and the same were dishonoured for the reason payment stopped by the drawer evidenced by Ext.P30 and Ext.P33 dishonour memos and the same were intimated to the complainant by their banker vide Ext.P31 and P34 intimation letters respectively. The complainant issued Ext.P35 notice dated 02.03.2000 vide Ext.P36 postal receipt intimating the dishonour and demanding payment of the amount and the same were received by the accused evidenced by Ext.P37 postal acknowledgment. In this case also the accused issued Ext.P38 reply notice reiterating the same allegations made by him in the other cases. So the complainant filed another complaint before the same court which after enquiry was taken on file as C.C.No.242/2001.

7. When the accused appeared before the court below, in all these cases, the particulars of offence were read over and explained to him he pleaded not guilty. Accused filed a petition in C.C.30/2001 seeking joint trial of C.C.37/2001, 38/2001 and 242/2001 along with C.C. 30/2001 and the same

was allowed and evidence was recorded in C.CNo.30/2001. In order to prove the case of the complainant PWs 1 and 2 were examined and Exts.P1 to P41 was marked on their side. After closure of the complainant's evidence, the accused was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the complainants evidence. He had further stated that he had entered into an agreement dated 17.08.1998 with complainant undertaking to distribute the articles of the complainant and at that time several cheques were obtained as security apart from obtaining ₹2,00,000/- as cash security. Whenever amounts paid, the cheques will be returned and in fact he had paid more than ₹3,40,000/- from 17.08.1998 till 31.03.1999 and there was no transaction thereafter between the complainant and the accused and there is no amount due as such and he is prepared to pay the balance amount if any found on settlement of accounts and the amounts covered by the cheques were not due and the cheques were not intended to be presented for discharge of any liability. Though no oral evidence was

adduced on his side, Exts.D1, D2, D2(a) to (c), D3 and D4 were marked on his side through PWs 1 and 2. After considering the evidence on record, the trial court found the accused guilty in all these cases and convicted him there under and sentenced him to undergo imprisonment till rising of the court and also to pay a compensation of ₹1,00,000/- to the complainant, in default to undergo simple imprisonment for three months under Section 357(3) of the Code of Criminal Procedure in C.C.No.30/2001 and sentenced him to undergo imprisonment till rising of the court and also to pay a compensation of ₹63,000/- to the complainant, in default to undergo simple imprisonment for three months under Section 357(3) of the Code of Criminal Procedure in C.C.No37/2001 and further sentenced to undergo imprisonment till rising of court and also to pay a compensation of ₹50,000/-, in default to undergo simple imprisonment for three months under Section 357(3) of the Code of Criminal Procedure in C.C.No.38/2001 and further sentenced to undergo imprisonment till rising of the court and also to pay a compensation of ₹ 1,00,000/-, in default to undergo simple imprisonment for three

months under Section 357(3) of the Code of Criminal Procedure in C.C.242/2001. Aggrieved by the same, the accused filed Crl.Appeal No.131/2006, 129/2006, 133/2006 and 127/2006 respectively before the Sessions Court, Thrissur and the Sessions Judge by a common judgment allowed the appeals setting aside the order of conviction and sentence passed by the court below and acquitted the accused holding that the complainant had failed to prove his case. Aggrieved by the same, the above appeals were filed by the appellant/complainant in the lower court. Since all these appeals were arising out of a common judgment on the basis of common evidence and disposed of by common judgment by the trial court as well as the appellate court, this court is also disposing of the appeals by a common judgment.

8. Counsel for the appellant Sri.Deepak, representing Sri.M.Gopalakrishnan Nambiar submitted that the reason given by the court below for acquitting the accused is not proper. The court below found fault in the manner in which the entries were made in Ext.P41 accounts ledger and

difference in the entries in Ext.P41 and Ext.D4 account extracts in relation to the transaction of the accused with the appellant company. This was explained by PW2 and that aspect has not been considered by the court below. Further, the accused had no case that he had given a blank signed cheque and that has been misused. There is no dispute regarding the entries made in the cheque, signature in the cheque and the date mentioned in the cheque. Further, it will be seen from the accounts that more than the amount covered by the cheques are really due from the accused to the complainant. In order to attract section 138 of the Act, it is not necessary that the accused must issue cheque for the entire amount. He can even issue cheque in partial discharge of his liability. In this case, the amount covered by the cheque is less than the amount due to the complainant from the accused as per the accounts. Further, the amount mentioned is the amount arrived at after deducting the security deposit of Rs.Two lakhs given by the accused at the time of granting dealership to him. The accused had not rebutted the presumption by adducing proper

evidence. So, the court below was not justified in acquitting the accused. Even if cheques were issued as security, there is nothing wrong for the complainant to use those cheques, if the amount has not been discharged. He had relied on the decision reported in **T.Vasanthakumar v. Vijayakumari** (2015 (2) KLJ 850) in support of his case.

9. On the other hand, Sri. Shibili Naha, counsel appearing for the second respondent submitted that the evidence adduced on the side of the complainant is not sufficient to prove that the cheques were issued in discharge of a legally enforceable debt which in existence at the time of issuance of the cheque. Further, the date of issuance of the cheques were not mentioned in the complaint. It will be seen from the documents produced by the accused that the cheques were issued long ago and thereafter payments were made, which was in a way admitted by PW1. The cheques issued in respect of future liability will not be deemed to have been issued in discharge of a legally enforceable debt. He had relied on the decisions reported in **Indus Airways Pvt.Ltd (M/s.) and**

Others v. M/s. Magnum Aviation Pvt.Ltd (2014 (2) KHC 320) and **Kamala v. Vidhyadharan** [2007 (3) KLT 861 (SC)] and also submitted that the burden on the accused is not heavy as in the case of complainant to prove the case. He can even prove his case by preponderance of probabilities and as such, the lower court was perfectly justified in accepting the defence of the accused and rightly held that the complainant had failed to prove that the cheques were issued in discharge of a legally enforceable debt. Further, the documents produced cannot be said to be certified copy of computer print out as required under section 65B of the Evidence Act. So, the appellate court was perfectly justified in acquitting the accused and the finding does not call for any interference.

10. Before going to the facts of the case, let me consider the provisions of the Act and also precedents on this aspect. Section 138 of Act reads as follows:

138. Dishonour of cheque for insufficiency, etc., of funds in the account:-

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability is returned by the bank unpaid either because of the amount of money standing to the credit of that account is insufficient to

honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation:- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability".

11. It is clear from the section that in order to attract an offence under section 138 of the Act the complainant has to prove that;

- i. There exists any legally enforceable debt or other liability payable by the accused to the complainant.
- ii. The accused had issued the cheque in discharge of whole or part of such liability.
- iii. The cheque must be issued from the account maintained by him in the bank.
- iv. The cheque must be presented within the period of validity of the cheque.

v. It must be dishonoured for the reason of insufficiency of funds or not arranged for.

vi. The complainant issues notice within 15 days of receipt of intimation of dishonour from the bank.

vii. The accused had not paid the amount within 15 days of receipt of notice.

12. These things have to be pleaded and proved by the complainant in order to attract an offence under section 138 of the Act. There is a presumption under section 139 of the Act, which reads as follows:

139. Presumption in favour of holder:- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability”.

13. It is clear from the section that unless contrary is proved by the accused, the court shall presume that holder of the cheque received the cheque of the nature referred to in section 138 for the discharge of whole or part of any debt or other liability.

14. In the decision reported in **Kumar Exports v. Sharma Carpets** [2009 (1) KLT 197 (SC)] the Hon'ble Supreme Court while considering the presumption under sections 139 and 118 of the Act held that :

“The use of the phrase “until the contrary is proved” in S.118 of the Act and use of the words “unless the contrary is proved” in S.139 of the Act read with definitions of “may presume” and “shall presume” as given in S.4 of the Evidence Act, makes it at once clear that presumption to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over. The accused in a trial under S.138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the notice in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant, and, thereafter, the presumptions under Ss.118 and 139 of the Act will not again come to the complainant's rescue”.

15. In the decision reported in **Rangappa v. Mohan** [2010 (2) KLT 682 (SC)], three Judges Bench of the Supreme Court had considered the scope of presumption under section 139 of the Act and held that:

“Presumption mandated by S.139 does indeed include the existence of legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan

Bhat v. Dattatraya Hegde [2008 (1) KLT 425 (SC)] may not be correct. This is of course in the nature of 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. However, there can be no doubt that there is an initial presumption which favours the complainant. S.139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While S.138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under S.139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by S.138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under S.139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. Accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own".

16. Further in the same decision, it has been observed that:

"Ordinarily in cheque bouncing cases, what the courts have to consider is whether the ingredients of the offence enumerated in S.138 of the Act have been met and if so, whether the accused was able to rebut the statutory presumption contemplated by S.139 of the Act. With respect to the facts of the present case, it must be clarified that

contrary to the trial court's finding, S.138 of the Act can indeed be attracted when a cheque is dishonoured on account of 'stop payment' instructions sent by the accused to his bank in respect of a post-dated cheque irrespective of insufficiency of funds in the account".

17. In the decision reported in **Indus Airways' case** (cited supra), it has been observed that:

"In order to attract an offence under section 138 of the Act, drawal of cheque in discharge of existing or past adjudicated liability is sine qua non for bringing an offence under S.138. Cheque in the nature of advance payment indicates that at the time of drawal of cheque, there **was no existing liability and then no offence is made out.**"

18. In the decision reported in **Kamala's case** (cited supra), it has been observed that :

"The Act contains provisions raising presumption as regards the negotiable instruments under S.118(a) of the Act as also under S.139 thereof. The said presumptions are rebuttable ones. Whether presumption stood rebutted or not would depend upon the facts and circumstances of each case. Standard of proof in discharge of the burden in terms of S.139 of the Act being of preponderance of a probability, the inference therefore can be drawn not only from the materials brought on record but also from the reference to the circumstances upon which the accused relies upon. The burden of the proof on the accused is not as high as that of the prosecution"

19. In the decision reported in **Joseph Sartho v. Gopinathan Nair** (2008(4) KLT 509), it has been held that:

"A portion of the amount covered by cheque was repaid. Hence the whole amount of debt or liability was lesser than the amount represented by the cheque. So if the cheque for such an amount was dishonoured, same will not be an offence under S.138".

20. It is clear from the above decisions that there is an initial presumption in respect of issuance of cheques in favour of the holder of the cheque that it was issued in discharge of whole or part of the debt or other liability and court shall presume such fact unless contrary is proved by the accused. Further, existence of debt in respect of which also presumption is available, but it is a rebuttable presumption and the accused can even raise a defence of nonexistence of liability, if he is able to prove by preponderance of probabilities that there is no possibility for liability or debt as claimed by the prosecution, then presumption is rebutted and the burden shifts to the complainant to prove existence of liability and once presumption is rebutted, then there is no question of relying on presumption in favour of the complainant arises. If the complainant is not able to prove his case, then the prosecution must fail. The standard of proof expected from the accused is not as high as in the case of proving the case by the prosecution. It must be proved by the complainant that the cheque was issued in respect of an adjudicated liability or

past liability and not in respect of a liability to be incurred in future. With this principles in mind, the case in hand has to be considered on the basis of the evidence adduced by the parties and also to consider whether the reasoning given by the appellate court are probable and possible so as to exonerate the accused from the criminal liability under section 138 of the Act or to reverse the findings and conviction passed by the court below and whether that requires interference at the hands of this Court. Further, this Court has to consider while reversing the order of acquittal as to whether the view taken by the court below is also possible on the basis of evidence and it cannot be said to be perverse or not sustainable and mere possibility of alternate view on the basis of evidence alone is not sufficient to reverse the order of acquittal passed by the court below.

21. The case of the complainant in the complaint was that the complainant was the authorized distributor for petroleum products of M/s. British Petroleum and they appointed the accused as their stockist to distribute Tata BP

Lube Products in the area of Guruvayur and Kunnampulam as per agreement dated 17.8.1998 and, according to them, the accused used to purchase articles on credit basis and an amount of Rs.3,45,277.81Ps was found due from the accused and in discharge of that liability, the accused had issued Exts.P2 and P5 cheques for Rs.50,000/- each both dated 15.11.1999 and 15.12.1999 respectively, Ext.P12 cheque dated 14.9.1999 for Rs.25,000/-, Ext.P15 cheque dated 4.11.1999 for Rs.37,707/-, Ext.P22 cheque dated 15.3.2000 for Rs.50,000/- and Ext.P29 cheque dated 15.1.2000 for Rs.50,000/- and Ext.P32 cheque dated 15.2.2000 for Rs.50,000/-, all drawn on Corporation Bank, Kunnampulam branch in favour of the complainant. The complainant had not presented those cheques but had issued Ext.D1 letters dated 20.12.1999, 4.1.2000 and 1.2.2000 requesting to settle the accounts and pay the amount and lastly by letter dated 1.2.2000 they asked the accused to settle the account on or before 9.2.2000. Since the accused did not pay the amount, they presented the cheques and they were dishonoured for the reason 'payment stopped by the drawer' and

thereafter statutory notice was issued calling upon the accused to pay the amount and the accused sent reply notices in all the cases denying his liability to pay the amount. He had also contended in the reply notice that apart from the cash security of Rs.2 lakhs deposited at the time of executing Ext.D1 agreement, several cheques were given as security for supply includes on credit and as and when the supply is made, either they will encash the cheque or on payment, cheque will be returned. The cheques were never issued with an intention to present the same at any point of time and it was not intended to be given in discharge of any liability or existing debt as well. So the case of the accused in the reply notice was that the cheques were never issued in discharge of any liability, but it was deposited as security for the credit transaction between the parties.

22. It is also in a way admitted by both parties that, after 31.3.1999 there was no transaction between the complainant and the accused. In spite of that, it was not mentioned in the complaint as to when these cheques were

issued on settlement of accounts as claimed by the complainant. So in order to prove the case of the complainant, the complainant has to establish settlement of accounts as on the date on which the cheques were issued by the accused though as post dated cheques for different amounts on different dates. But no such averment was made in the complaint as to when the accounts were settled and when the cheques were issued by the accused either in the complaint or at the time when Pws 1 and 2 were examined on the side of the complaint to prove their case. It will be seen from the evidence of PWs 1 and 2 that they have no direct knowledge about the transactions. It was admitted by both parties that it is on the basis of Ext.D1 agreement entered into between the complainant and the accused that the accused was appointed as stockist for the complainant concern. It was also admitted that at the time when Ext.D1 alleged agreement was executed, the accused had deposited Rs. 2 lakhs as cash security. It was also agreed that the articles will be supplied on 30 days credit basis.

23. In Clause 9 of the agreement, it was mentioned

as follows:

“9.i. The goods shall be despatched to you on 30 days credit. In the event the company has allowed you to make payment by cheque and any cheque is dishonoured on presentation for any reason whatsoever:

a. You shall be liable for all costs, charges and expenses incurred by us together with interest at the rate of 24% per annum from the date of the cheque till payment.

b. The facility of forwarding your cheque along with your purchase order shall be withdrawn forthwith.

c. You shall immediately make the full payment by Demand Draft, Pay Order or Cash including Bank Charges.

ii. You shall also be liable for all consequences in respect of Dishonour of cheques as provided in the Negotiable Instruments Act (as amended from time to time).

iii. You undertake and agree to make payment of all monies payable by you from time to time, strictly in accordance with the terms of payment as provided herein.

iv. Without prejudice to our right as provided hereinunder or otherwise, it is hereby expressly agreed between the parties that the aforesaid conditions is the essence of the contract and that the neglect, failure or omission by you to make payment of any amount or part thereof as above or otherwise under this agreement, shall entitle us without prejudice to any other recourse in law:

(1) to stop further despatch of the said products until payment in respect of all earlier supplies is made in full by you; (2) to require you to make all future purchases by Demand Draft/cash payment; (3) To terminate forthwith this agreement”.

24. So it is clear from Clause 9 that at the time when purchase order is made, a cheque also can be given along with purchase order and that will be presented and withdrawn. It is seen from the evidence of PW1 that, transaction with the accused during the relevant time was handled by one Dinesh,

Assistant General Manager. Regarding the issuance of the cheque, the evidence of PW1 was as follows:

“എന്നാണ് ചെക്കുകൾ കൊടുത്തത് എന്നറിയില്ല. 04/08/99 ൽ ആണ് ചെക്കുകൾ കൊടുത്തത് എന്നു പറഞ്ഞാൽ നിഷേധിക്കാൻ പറ്റില്ല. 04/08/1999 വരെ വാദിയും പ്രതിയും ആയുള്ള ഇടപാടിലെ outstanding balance Ext.P39 പ്രകാരം 4 ലക്ഷത്തി എൺപത്തി ഏഴായിരം രൂപയോളം വരും. 17/08/99 ൽ പ്രതിയുമായുള്ള കരാർ അവസാനിച്ചു. കരാർ പൂർത്തമാകാൻ ശ്രമം കമ്പനി നടത്തിയിരുന്നു. 04/09/99 ൽ അന്ത്യായത്തിൽ പറയുന്ന ചെക്കുകൾ എല്ലാം കമ്പനിയിൽ ഉണ്ടായിരുന്നു.”

and this was supported by the letters sent by the complainant as Ext.D2 series.

25. It is also admitted by PW1 that from 4.8.1999 to 31.8.1999, an amount of Rs.89,934/- was received from the accused. Further, when a suggestion was given as to whether from 14.9.1999 to 30.9.1999 the accused had given Rs.1,54,594/-, he had only stated that without tallying with the accounts, it is not possible for him to say. Further, when a suggestion was given to the effect that from 4.8.1999 to 31.12.1999, an amount of Rs.3,42,943/- was paid by the accused, PW1 had stated that it is not possible to say without tallying with the accounts. Further, it was brought out in the evidence of PW1 that there were some discrepancies in Ext.P39 accounts extract produced by the complainant and

Ext.D4 accounts extract served to the accused and this was admitted by him as well. There were some discrepancy in the date of entry of the accounts as well. It is also seen from the evidence of PW1 that within three months from 4.8.1999, the accused had issued stop memo to the bank and it was knowing that stop memo was issued that the cheques were presented by the complainant. It is also seen from the evidence that even after 4.8.1999, there were transactions between the complainant and the accused and certain amounts were paid by the accused.

26. Though PW2 was examined on the side of the complainant, his evidence is also not helpful to prove the date on which the accounts were settled and the cheques were issued. If really, the accounts were settled and the accused has in discharge of that liability issued the disputed cheques, then that should have been specifically mentioned in the complaint especially when the accused had sent reply notice when the dishonour of cheques were intimated to him and demanded payment of the amount. Even in the reply notice, according to him, the amounts mentioned in the cheques were not really due

from him and he was prepared to pay the balance amount, if any, on settlement of accounts, but no steps were seen taken by the complainant to settle the accounts as claimed by the accused in his reply notice before filing the complaint. There is no evidence also adduced from the side of the complainant that such an attempt was made and accused was convinced about the existing liability for the amount covered by the cheques as per the accounts as well.

27. If cheques were issued long ago and certain payments were made thereafter and those amounts were credited in the accounts, then it cannot be said that the amounts covered by the cheques were really due at the time when the cheques were presented. It is for the complainant to prove that the amounts covered by the cheques were not really settled and subsequent payments were made not towards those amounts covered by the cheques. Further, it will not be seen from either Ext.P39 or Ext.D4 statement that amount of Rs.2 lakhs given by the accused as security was also adjusted as according to the complainant, the cheques were issued after

settlement of accounts. This will not be seen from the account maintained by the complainant as well. Further, it is seen from Exts.P39 and P41 that it was only a computer print out of the ledger extract and there was no certificate appended to those statements as required under section 65B of the Indian Evidence Act so as to make those accounts admissible in evidence. There was no signature of the person, who certified the same, and the seal of the complainant concern was put not beneath the certificate so as to make the certificates issued by the competent person to make the documents admissible in evidence under section 65B of the Indian Evidence Act. So under the circumstances, Exts. P39 and P41 cannot be said to be admissible documents as it was not certified as required under section 65 B of the Indian Evidence Act. So under the circumstances, the appellate court was perfectly justified in coming to the conclusion that on the basis of the accounts produced by the complainant, it cannot be said that the complainant had proved that the amounts covered by the cheques were really due.

28. Further, it will be seen from the evidence that the cheques were issued long ago and even thereafter there were transactions between the complainant and the accused and accused was making payments more than the amount covered by the cheques in question and neither PW1 nor PW2 had denied these aspects and in spite of production of Exts.P39 and P41, they were not able to explain that the amounts covered by the disputed cheques were still due and no amount was paid towards the amount covered by the cheques subsequent to the issuance of the cheques. So it is clear from the evidence that the cheques were not issued in discharge of any adjudicated liability or existing debt and the amount covered by the cheques as on the date of issuance of the cheque was really due even at the time when the cheques were presented for encashment. So, all these things will go to show that the cheques were not issued by the accused as claimed by the complainant and it was never intended to be presented for encashment and those cheques were presented without consent of the accused when there was dispute arose between them regarding the actual

amount due and without ascertaining the actual amount due by proper adjudication, it cannot be said that the complainant had established that the cheques were issued in discharge of any existing liability or debt and the amounts were really due as on the date of presentation of the cheque so as to attract an offence under section 138 of the Act against the accused.

29. Since these aspects were not properly established by the complainant and those things can be considered only in appropriate proceedings by proper adjudication, the appellate court was perfectly justified in coming to the conclusion that the accused had rebutted the presumption under section 139 of the Act and his case is probablise that the amounts covered by the cheques are not really due and the cheques were not issued as claimed by the complainant and the complainant had not proved his case beyond reasonable doubt and thereby he had failed to establish that offence under section 138 of the Act has been committed by the accused and rightly given that benefit to the accused and acquitted him of the charge levelled against him giving him the

benefit of doubt. The view taken by the appellate court on the basis of the evidence cannot be said to be perverse or not possible and it cannot be said that the accused had not rebutted the presumption under section 139 of the Act so as to interfere with the order of acquittal passed by the appellate court and reverse the findings of the appellate court and convict the accused as claimed by the complainant. There is no dispute regarding the dictum laid down by the Apex Court in the decision reported in **Vasanthakumar's case** (cited supra) and considering the facts of these cases. It is not applicable to the facts of these cases as the accused has rebutted the presumption of preponderance of probabilities. So the appellate court has correctly considered the evidence and rightly came to the conclusion that the complainant had failed to prove his case and the accused had rebutted the presumption and rightly acquitted him in all these cases and the findings in all these cases do not call for any interference. So these appeals lacks merit and the same are liable to be dismissed.

In the result, all these appeals fail and the same are

hereby by dismissed. The order of acquittal passed by the appellate court against the accused hereby confirmed.

Office is directed to communicate a copy of this judgment to the concerned court at the earliest.

Sd/-

K. RAMAKRISHNAN, JUDGE.

//True Copy//

P.A. to Judge

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