

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.03.2015

CORAM

THE HONOURABLE MS.JUSTICE R.MALA

Crl.A.No.957 of 2006

Date of reserving the judgment 24.03.2015	Date of pronouncing the judgment 27.03.2015
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N.Sivasamy ... Appellant/ Complainant

Vs.

1. M/s.United Sun Associates,
Rep. By its Partner R.K.Vasu
2. R.K.Vasu
Partner, M/s.United Sun Associates,
17B, 5th Street, Gandhipuram, Coimbatore.
3. K.P.Gangasigamani
Partner, M/s.United Sun Associates,
K.S.doddi, Kothanoor Post, Kollegal.
4. M.Rajkumar,
Partner, M/s.United Sun Associates,
No.7/22, North Street,
Kurumbapalayam Post, Coimbatore.
5. P.Ramamoorthy,
Partner, M/s.United Sun Associates,
10-57 B.Poonthottam,
Sengodagundenpudur, Arasur Post,
Coimbatore.
6. Prakasam,
Partner, M/s.United Sun Associates,
10-57 B.Poonthottam,
Sengodagundenpudur, Arasur Post,
Coimbatore.

.. Respondents

Prayer: Criminal Appeal is filed under Section 378 of Cr.P.C., against the judgment of acquittal dated 03.10.2005 made in C.C.No.560 of 2001 on the file of the learned Judicial Magistrate No.II, Coimbatore.

For Appellant : Mr.Ilanthiraiyan
for M/s.Sai Bharath and Ilan
For Respondents
R1 to R3 : Mr.K.V.Sridharan
for Mr.R.Marudhachalmurthy
R4 to R6 : Mr.P.M.Duraisamy

J U D G M E N T

This Criminal Appeal arises out of the judgment of acquittal dated 03.10.2005 made in C.C.No.560 of 2001 on the file of the learned Judicial Magistrate No.II, Coimbatore.

2.The appellant as a complainant preferred a complaint stating that the first respondent is a firm and the respondents 2 to 6 are the partners of the first respondent firm. To develop the business, the second respondent had borrowed a sum of Rs.4,00,000/- from the complainant on 05.12.1998 and executed a promissory note/Ex.P.10 on behalf of the first respondent firm to repay the same with interest @ 2% per annum. When the appellant demanded the repayment of the amount, the second respondent issued a cheque/Ex.P.1 dated 10.03.2001 for a sum of Rs.4,00,000/- drawn on City Union Bank, Ram Nagar Branch. When the cheque/Ex.P.1 was presented for encashment before the Indian Overseas Bank, Ganapathy Branch, it was returned as "Insufficient Funds" which was evidenced by Ex.P.2/Return memo dated 15.03.2001. Ex.P.3 is the Debit advise. Hence, statutory notice has been issued under Ex.P.4 on 23.03.2001, which was evidenced by Acknowledgment Card/Ex.P.5 to Ex.P.8. Statutory notice sent to the second respondent has been returned, which was evidenced from Postal Cover/Ex.P.9. But the respondents have not repaid the amount. Hence, the appellant/complainant preferred a complaint under Section 138 of the Negotiable Instruments Act against the respondents/accused.

3.The trial Court has taken cognizance of an offence after recording the sworn statement and after following the procedure. Since the accused pleaded not guilty, the trial Court examined P.W.1 and Exs.P.1 to P.9 on the side of the complainant and on the side of the respondents, D.W.1 to D.W.4 were examined and Ex.D.1 to Ex.D.7 were marked. The trial Court after considering the oral and documentary evidence, acquitted the accused for the offence under Section 138 of Negotiable Instruments Act.

4.Challenging the judgment of acquittal passed by the Trial Court, the learned counsel appearing for the appellant would submit that the respondents, who has borrowed Rs.4,00,000/- on 05.12.1998 as per Ex.P.10. To discharge the same, they issued a cheque/Ex.P.1 dated 10.03.2001. When it was presented for encashment, it was returned as insufficient funds as per Return Memo/Ex.P.2 and Debit Advise/Ex.P.3. Hence he issued a statutory notice under Ex.P.4. Since the respondents have not repaid the amount, he preferred a complaint. He would submit that the Trial Court has acquitted the respondents/accused stating that to prove Ex.P.10, promissory note, the attestors have not been examined and hence, Ex.P.10 itself is doubtful. Further, the Trial Court has held that the appellant has not proved that the cheque has been issued for discharging legally subsisting liability. He would further submit that once the issuance of cheque and the signature in the cheque has been admitted, the appellant is entitled to invoke presumption under Sections 118 and 139 of Negotiable Instruments Act that the cheque has been issued for discharging legally subsisting liability. Even though it is a rebuttable presumption, the respondents have not rebutted the presumption. Once the presumption has been rebutted, then only the onus will be shifted to the appellant to prove that the cheque has been issued for discharging legally subsisting liability. But here the presumption under Section 139 of Negotiable Instruments Act has not been rebutted by the respondents. That factum was not considered by the Trial Court. Hence, the judgment of acquittal is perverse and he prays for setting aside the same. To substantiate his arguments, he relied upon the decision reported in 2010 (11) SCC 441 (Rangappa vs. Sri Mohan).

5.The learned counsel appearing for the respondents 4 to 6 would submit that the respondents 4 to 6 are not the partners of the first respondent firm during the relevant point of time and hence, he leave the matter for court consideration.

6.The learned counsel appearing for the respondents 1 to 3 would submit that the Trial Court has rightly held that to prove Ex.P.10, promissory note, no independent witness has been examined. The non examination of attestors is fatal. To substantiate his argument, he relied upon the decisions reported in 2011 CrI.L.J. 552 (Amzad Pasha vs. H.N.Lakshmana).

7.He further submitted that it is the duty of the complainant to prove that he has source of income to lend money. To substantiate his argument, he relied upon the decision reported in 2014 (1) SCC (CrI.) 791 (John K.Abraham vs. Simon C.Abraham and another).

8.For the same proposition, he relied upon the following decisions:

1. 2015 (1) SCC (Cr1.) 576 (K.Subramani vs. K.Damodara Naidu)
2. 2015 Cri.L.J. 1156 (Ramdas vs. Krishnanand)

9.He would also submit that since this appeal is against the judgment of acquittal, unless the judgment of acquittal is perverse, the Appellate Court shall not interfere with the finding of the judgment of acquittal. He would further submit that if two views are possible, the view favouring the accused to be taken into consideration. To substantiate his argument, he relied upon the decisions reported in 2014 (2) SCC 497 (Basappa vs. State of Karnataka) and 2015 (1) SCC 435 (Mahamadkhan Nathekhan vs. State of Gujarat) and prayed for dismissal of the appeal.

10.Considered the rival submissions made by both sides and perused the materials available on record.

11.The appellant herein as a complainant preferred a complaint under Section 138 of Negotiable Instruments Act stating that the second respondent representing on behalf of the first respondent firm executed a promissory note and agreed to repay the same with interest @ 2% per annum. To discharge the same, the second respondent representing on behalf of the first respondent firm issued a cheque/Ex.P.1 dated 10.03.2001. When it was presented for encashment, the same was returned as insufficient funds as per Return Memo/Ex.P.2 and Debit Advise/Ex.P.3. The appellant issued a statutory notice under Ex.P.4. But the amount has not been repaid and then, he preferred a complaint. In paragraph No.7 of the complaint, he has stated that respondents 1 to 3 have filed a false reply/Ex.D.1.

12.The defence raised by the respondents is that the respondents borrowed money from Sivakrishna Finance and Chit Funds Private Limited and at that time, a cheque has been given as security and that has been utilised for the purpose of this case. Once the issuance of cheque and the signature in the cheque has been admitted, the complainant is entitled to invoke presumption under Sections 118 and 139 of Negotiable Instruments Act that the cheque has been issued for discharging legally subsisting liability. It is true that this presumption under Section 139 of Negotiable Instruments Act is rebuttable presumption and the respondents/accused ought to have rebutted the presumption by preponderance of probabilities beyond all reasonable doubt.

13.At this juncture, it is appropriate to consider the judgment of the Hon'ble Apex Court reported in 2010 (11) SCC 441, wherein it was held that the presumption, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 of N.I. Act for the discharge, in whole or in

part, of any debt or other liability. It is appropriate to incorporate the relevant paragraphs, which reads as follows:

"27. Section 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 Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 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.

28. 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 Section 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. As clarified in the citations, the 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."

14. Before going into the facts of the case, this Court has to consider that respondents 4 to 6 have filed the document to show that they are not the partners of the first respondent firm during the relevant point of time. The learned counsel appearing for the appellant would also submit that the respondents 4 to 6 have filed the document at the time of trial, which is marked as Ex.D.5 to Ex.D.7 and proved that they are not the partners. As per Ex.D.7, only the respondents 2 and 3 are the partners of first respondent firm. In such circumstances, I am of the view that the appeal filed against the respondents 4 to 6 is hereby dismissed.

15. Before considering the facts of the case, this Court has to consider the decisions relied upon by the learned counsel appearing

for the respondents.

16.The learned counsel appearing for the respondents relied upon the decision reported in 2014 (1) SCC (Cr1.) 791, wherein in paragraph Nos.6, 8 and 9, it was held as follows:

6.When we examine the case of the respondent-complainant as projected before the learned Chief Judicial Magistrate and the material evidence placed before the trial Court, we find that the trial Court had noted certain vital defects in the case of the respondent-complainant. Such defects noted by the learned Chief Judicial Magistrate were as under:

6.1.Though the respondent as PW-1 deposed that the accused received the money at his house also stated that he did not remember the date when the said sum of Rs.1,50,000/- was paid to him.

6.2.As regards the source for advancing the sum of Rs.1,50,000/-, the respondent claimed that the same was from and out of the sale consideration of his share in the family property, apart from a sum of Rs.50,000/-, which he availed by way of loan from the co-operative society of the college where he was employed. Though the respondent stated before the Court below that he would be in a position to produce the documents in support of the said stand, it was noted that no documents were placed before the Court below.

6.3In the course of cross-examination, the respondent stated that the cheque was signed on the date when the payment was made, nevertheless he stated that he was not aware of the date when he paid the sum of Rs.1,50,000/-.

6.4.According to the respondent, the cheque was in the handwriting of the accused himself and the very next moment he made a contradictory statement that the cheque was not in the handwriting of the appellant and that he (complainant) wrote the same.

6.5.The respondent also stated that the amount in words was written by him.

6.6.The trial Court has also noted that it was not the case of the respondent that the writing in the cheque and filling up of the figures were with the consent of the accused appellant.

8.Keeping the above factors in mind, when we examine the judgment impugned in this appeal, we find that the High Court committed a serious illegality in reversing the judgment of learned Chief Judicial Magistrate. While reversing the judgment of the trial Court, what weighed with the learned Judge of the High Court was that in the 313 questioning, it was not the

case of the appellant that a blank signed cheque was handed over to his son and that even in the cross-examination it was not suggested to PW-1 that a blank cheque was issued. The High Court was also persuaded by the fact that the appellant failed to send any reply to the lawyers notice, issued by the respondent. Based on the above conclusions, the High Court held that the presumption under Sections 118 and 139 of the Negotiable Instruments Act could be easily drawn and that the appellant failed to rebut the said presumption. On that single factor, the learned Judge of the High Court reversed the judgment of the trial Judge and convicted the appellant.

9. It has to be stated that in order to draw the presumption under Section 118 read along with 139 of the Negotiable Instruments Act, the burden was heavily upon the complainant to have shown that he had required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced was true and that the accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant."

But the above citation is not applicable to the present case because as per the decision reported in 2010 (11) SCC 441, wherein it was mentioned as "the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation". Further it was held that the offence made punishable by Section 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. So, considering the same, as per Section 139 unless contrary is proved, it is presumed that the cheque has been issued to discharge in whole or in part of any debt or other liability. So, it is appropriate to incorporate Section 139 of Negotiable Instruments Act, which is 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.

17. He has also relied upon the decisions reported in 2015 (1) SCC 576, wherein in paragraph No.9, it was held as follows:

"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 complainant 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."

But the above citation is not applicable to the facts of the present case because in that case, it was stated that both the accused and the complainant 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. So, it was held that it is not applicable to the present case.

18. He also relied upon the decision reported in 2015 Cri.L.J. 1156, wherein in paragraph No.9, it was held as follows:

"9. We have heard rival contentions of the learned counsel at length. We find from the record that admittedly, the accused appellant deals with sale and purchase of landed properties and the respondent-complainant works as a Lorry Driver under him with a salary of Rs.2,500/- p.m. And Rs.20/- per day towards miscellaneous expenses (bhatta). Admittedly, the Cheque in question was for Rs.5,00,000/- and all the way the

stand of the complainant was that he had given a hand loan of Rs.1,75,000/- to the accused-appellant. We find no material on record in support of the claim of the Page 6 complainant giving hand loan to the accused-appellant. There was also no calculation of account or stipulation of any interest on the alleged loan amount to show as to how the amount of Rs.5,00,000/- was figured, in return of a hand loan of Rs.1,75,000/-, if at all taken by the appellant from the complainant. It is also not on record whether there was sufficient balance amount or not in the bank account of the accused when the Cheque was dishonoured by the Bank. The complainant himself stated in the cross-examination that after the Cheque was returned without payment, he has not made any enquiry with the Bank as to whether sufficient funds were available or not in the account of the accused. In the absence of any authenticated and supporting evidence, we cannot believe that the complainant- respondent who is employed under the appellant-accused, has raised an amount of Rs.1,75,000/- that too by obtaining loan of Rs.1,50,000/- from a Bank, only to give hand loan to his employer. As the complainant himself admitted that his net savings in a year comes to about Rs. 10,000/-, it is not trustworthy that he was in a position to extend hand loan of such big amount to the appellant."

In the above citation, it was stated that a lorry driver/respondent has obtained Rs.1,50,000/- as loan from the bank and paid Rs.1,75,000/- to the appellant, who is his employer. So the Apex Court has held that it is unbelievable. But, here the facts is entirely different and so, the above citation is not applicable to the facts of the present case.

19.Now, this Court has to decide whether the presumption has been rebutted or not? It is true that the presumption has to be rebutted either by way of examining independent witness or by cross examining the prosecution witness. Here the appellant/complainant was examined as P.W.1. P.W.1, in his evidence, mainly focusing upon Ex.P.10/promissory note dated 05.12.1998. A suggestion posed to him that the cheque has been issued to Sivakrishna Finance and Chit Funds Private Limited as security was denied by him. He would submit that even though he maintained the accounts, he has not produced the same. It is true that reply notice has not been marked by P.W.1. But whereas in paragraph No.7 of the the complaint, he has stated as follows:

"the above notice was received by all the partners on various dates, 31.03.2001, 02.04.2001, 03.04.2001, 07.04.2001, 09.04.2001, the notice issued to 1st accused was returned with a reasons and No such address and accused No.1, 2, 3 were send a false

reply."

20. In Ex.D.1/reply notice, it was stated that the respondents have not borrowed any amount from the appellant and the appellant is totally a new person unknown to the respondents. In paragraph No.5 of the reply, it was stated that the cheque has been given to one Kaliswamy, S/o.Krishna Gounder, Managing Director, Sivakrishna Finance and Chit Funds (P) Limited. But admittedly, the said Kaliswamy was not examined. It is appropriate to incorporate paragraph No.5 of Ex.D.1/reply notice, which is as follows:

"5. That our clients further states that no cheque was ever given to your client and the cheque stated in your legal notice above referred along with other blank cheques bearing Nos.49823 and 498239, drawn on City Union Bank Limited and Cheque bearing No.426630 drawn on Federal Bank Ltd., Koundampalayam, Coimbatore along with Blank promotes and Stamp Papers signed by our Clients were obtained as Collateral Security by one viz., Mr.K.Kaliswamy, S/o.Krishna Gounder, Managing Director, Sivakrishna Finance and Chit Funds (P) Limited, Coimbatore and same has been retained by the said Mr.Kaliswamy all these years inspite of all the dues being settled with an ulterior motive to defraud our clients."

21. The second respondent examined himself as D.W.4. It is pertinent to note that according to him, he has settled all the dues but he has not issued any notice to get back the cheque, promissory note and other documents given to Sivakrishna Finance and Chit Funds (P) Limited. On the complaint of the respondent, one Ravichandran, Assistant Manager, City Union Bank, Ram Nagar Branch was examined as D.W.1. In his evidence, D.W.4 has stated that from 01.04.1998, Rajkumar, Ramamoorthy and Prakasam were retired from the partnership firm and they submitted a letter to the Bank, which is marked as Ex.D.5 along with the Dissolution Certificate/Ex.D.6. D.W.2 and D.W.3 were examined to prove that A4 to A6, namely, the respondents 4 to 6 herein are not the partners of the firm. So, the only evidence available is D.W.4, the second respondent herein.

22. D.W.4, in his evidence, has stated that he has not borrowed Rs.4,00,000/- on 05.12.1998. He further submitted that he has given a cheque and promissory note to one Kaliswamy, Managing Director, Sivakrishna Finance and Chit Funds (P) Limited. He further submitted that he is not liable to pay any amount. In his cross examination he has stated that Ex.P.10/promissory note contains his signature and the signature of the third respondent. He has also fairly conceded that he has not given any complaint against the said Kaliswamy. He further submitted that he has not filed any documents and he has not sent any notice to the said Kaliswamy except the copy

of the notice, which is marked as Ex.D.2. He further stated that till 31.03.1998, all the respondents were partners of the partnership firm. He fairly conceded that he has not filed any document to show that the documents were given to the said Kalisamy. So, except the denial from D.W.1, there is no evidence to show that Ex.P.1 and Ex.P.10 has been given to Kaliswamy. He has also fairly conceded that he has not taken any criminal action against the Kaliswamy. So, the cross examination of P.W.1 and the evidence of D.W.1 has not probablises the defence raised by the respondents. No prudent man will kept quite after he discharged the amount due to the Sivakrishna Finance and Chit Funds (P) Limited. But the second respondent, D.W.4, in his cross examination, has fairly conceded that he has not filed nay document to show that copy of Ex.D.2/notice has been sent to the said Kaliswamy.

23.As per the dictum of the Hon'ble Apex Court, mere denial of the suggestion is not sufficient to probablise the defence. So, I am of the view that the respondents 1 to 3 has not probablised the defence that Ex.P.1 and Ex.P.10 has been given as security to the Sivakrishna Finance and Chit Funds (P) Limited. Hence, the presumption under Section 139 of Negotiable Instruments Act has not been rebutted. Unless the presumption under Section 139 of Negotiable Instruments Act has not been rebutted, the onus is not shifted to the appellant/complainant to prove that the cheque has been issued for discharging legally subsisting liability. At this juncture, it is appropriate to consider the decision reported in 2001 (8) SCC 458, wherein it was held that mere denial or rebuttal by accused in the reply to the legal notice sent by the complainant is not enough. Accused had to prove by cogent evidence that there was no debt or liability. It is appropriate to incorporate the paragraph Nos.6 and7, which reads as follows:

"6.In our view the impugned Judgment cannot be sustained at all. The Judgment erroneously proceeds on the basis that the burden of proving consideration for a dishonored cheque is on the complainant. It appears that the learned Judge had lost sight of Sections 118 and 139 of the Negotiable Instruments Act. Under Sections 118, unless the contrary was proved, it is to be presumed that the Negotiable Instrument (including a cheque) had been made or drawn for consideration. Under Section 139 the Court has to presume, unless the contrary was proved, that the holder of the cheque received the cheque for discharge, in whole or in part, of a debt or liability. Thus in complaints under Section 138, the Court has to presume that the cheque had been issued for a debt or liability. This presumption is rebuttable. However the burden of proving that a cheque had not been issued for a debt or liability is

on the accused. This Court in the case of Hiten P. Dalal vs. Bratindranath Banerjee reported in (2001) 6 S.C.C. 16 has also taken an identical view.

7. In this case admittedly the 1st Respondent has led no evidence except some formal evidence. The High Court appears to have proceeded on the basis that the denials/averments in his reply dated 21st May, 1993 were sufficient to shift the burden of proof onto the Appellant/Complainant to prove that the cheque was issued for a debt or liability. This is an entirely erroneous approach. The 1st Respondent had to prove in the trial, by leading cogent evidence, that there was no debt or liability. The 1st Respondent not having led any evidence could not be said to have discharged the burden cast on him. The 1st Respondent not having discharged the burden of proving that the cheque was not issued for a debt or liability, the conviction as awarded by the Magistrate was correct. The High Court erroneously set aside that conviction."

24. It is also appropriate to consider the decision relied upon by the learned counsel appearing for the respondents reported in 2011 Cri.L.J. 552, wherein in paragraph No.11, it was held as follows:

"11. Apart from this technical defect of the complaint, the learned Magistrate has also noticed that the complainant has not placed any evidence to show that he had financial capacity to lend substantial amount of Rs.4,50,000/-. Admittedly, no document evidencing the loan transaction has come into existence. Therefore, the learned Magistrate is justified in holding that the case of the complainant that he had lent Rs.4,50,000/- to the respondent is highly improbable and not acceptable. The learned magistrate has also noticed that according to the complainant, loan amount was paid to the accused to the presence of two persons namely Jakir Hussain and Ramalin-gegowda. However, for the reasons best known to the complainant, none of these witnesses were examined before the learned Magistrate. Therefore, the learned Magistrate has rightly drawn an adverse inference against the complainant. It is also noticed by the learned Magistrate that on the basis of the very cheque, the complainant had filed a civil suit in O.S.No.85 of 2004 on the file of the Civil Judge (Senior Division), Maddur which was later renumbered as O.S.No.68 of 2006 on the file of the Civil Judge (Senior Division), Malavalli. The copies of the plaint, the evidence of the plaintiff therein and the judgment passed in the said suit have been produced by

the accused and marked as Ex.D.4 to D.6.”

But the above citation is not applicable to the facts of the present case because this is not a civil suit and the case is not based on the promissory note. In such circumstances, the non-examination of attester of promissory note is not fatal.

25.He also relied upon the decision reported in 2014 (2) SCC 497 and submits that unless the judgment of acquittal is perverse, the Appellate Court shall not interfere with the finding of the judgment of acquittal. He has taken me through paragraph Nos. 9 to 16, which reads as follows:

“9.The High Court in an appeal under Section 378 of Cr.PC is entitled to reappraise the evidence and conclusions drawn by the trial court, but the same is permissible only if the judgment of the trial court is perverse, as held by this Court in Gamini Bala Koteswara Rao and Others v. State of Andhra Pradesh through Secretary[1]. To quote: (SCC p.639, para 14)

14.We have considered the arguments advanced and heard the matter at great length. It is true, as contended by Mr Rao, that interference in an appeal against an acquittal recorded by the trial court should be rare and in exceptional circumstances. It is, however, well settled by now that it is open to the High Court to reappraise the evidence and conclusions drawn by the trial court but only in a case when the judgment of the trial court is stated to be perverse. The word perverse in terms as understood in law has been defined to mean against the weight of evidence. We have to see accordingly as to whether the judgment of the trial court which has been found perverse by the High Court was in fact so. (Emphasis supplied)

10.It is also not the case of the prosecution that the judgment of the trial court is based on no material or that it suffered from any legal infirmity in the sense that there was non-consideration or misappreciation of the evidence on record. Only in such circumstances, reversal of the acquittal by the High Court would be justified. In K. Prakashan v. P.K. Surenderan[2], it has also been affirmed by this Court that the appellate court should not reverse the acquittal merely because another view is possible on the evidence. In T. Subramanian v. State of Tamil Nadu[3], it has further been held by this Court that if two views are reasonably possible on the very same evidence, it cannot be said that the prosecution has proved the case beyond reasonable doubt.

11.In Bhim Singh v. State of Haryana[4], it has

been clarified that interference by the appellate court against an order of acquittal would be justified only if the view taken by the trial court is one which no reasonable person would in the given circumstances, take.

12. In *Kallu alias Masih and others v. State of Madhya Pradesh*[5], it has been held by this Court that if the view taken by the trial court is a plausible view, the High Court will not be justified in reversing it merely because a different view is possible. To quote: (SCC pp.317-18, para 8)

8. While deciding an appeal against acquittal, the power of the appellate court is no less than the power exercised while hearing appeals against conviction. In both types of appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial court merely because a different view is possible. The appellate court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt. Further, if it decides to interfere, it should assign reasons for differing with the decision of the trial court. (Emphasis supplied)

13. In *Ramesh Babulal Doshi v. State of Gujarat*[6], this Court has taken the view that while considering the appeal against acquittal, the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable and if the court answers the above question in negative, the acquittal cannot be disturbed. To quote: (SCC p.229, para 7)

7. The entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for

reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusions. (Emphasis supplied)

14. In *Ganpat v. State of Haryana and others*[7], at paragraph-15, some of the above principles have been restated. To quote: (SCC p.62)

15. The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly, against an order of acquittal:

(i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.

(ii) The appellate court can also review the trial courts conclusion with respect to both facts and law.

(iii) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.

(iv) An order of acquittal is to be interfered with only when there are compelling and substantial reasons for doing so. If the order is clearly unreasonable, it is a compelling reason for interference.

(v) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed.

15. The exercise of power under Section 378 of Cr.PC by the court is to prevent failure of justice or miscarriage of justice. There is miscarriage of justice if an innocent person is convicted; but there is failure of justice if the guilty is let scot-free. As cautioned by this Court in *State of Punjab v. Karnail Singh* (SCC p.277, para 6)

6. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further

strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence even where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (Emphasis supplied)

16. In this context, yet another caution struck by this Court in Chandrappa and others v. State of Karnataka[9] would also be relevant. (SCC p.432, para 42)

42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, substantial and compelling reasons, good and sufficient grounds, very strong circumstances, distorted conclusions, glaring mistakes, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of flourishes of language to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent

unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court. (Emphasis supplied)"

26. For the same proposition, the learned counsel appearing for the respondents has also relied upon the decision reported in 2015 (1) SCC (Cr1.) 435, wherein in paragraph No.8, it was held as follows:

"8. The crucial issue for consideration, therefore, relates to interference by the High Court in an acquittal rendered by the trial Court. The entire case law on the subject was discussed by this Court in the decision in Chandrappla vs. State of Karnataka wherein it was held as follows: (SCC p.432, para42)

(1) An appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of

his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

It is the obligation of the High Court to consider and identify the error in the decision of the Trial Court and then decide whether the error is gross enough to warrant interference. The High Court is not expected to merely substitute its opinion for that of the trial court only because of the first two principles in the decision referred to above permit it to do so and because it has the power to do so - it has to correct an error of law or fact significant enough to necessitate overturning the verdict of the trial court. The High Court has to exercise its discretion very cautiously, keeping in mind the acquittal of the accused and the rights of the victim."

There is no quarrel over the proposition laid down in the above said citations that the Appellate Court shall not interfere with the finding of the judgment of acquittal unless the judgment of acquittal is perverse.

27. As already stated, the Trial Court has ailed to invoke presumption under Section 139 of Negotiable Instruments Act. Once the presumption under Section 139 of Negotiable Instruments Act has been rebutted by the respondents/accused, then only the onus is shifted to the complainant to prove that the cheque has been issued for discharging legally subsisting liability. But the Trial Court has not considered the same. The Trial Court in its judgment mainly focusing on Ex.P.10/promissory note whereas D.W.4/the second respondent herein himself admitted that Ex.P.10 contains his signature and the signature of the third respondent. In such circumstances, I am of the view that the non-application of legal proposition and also factual mis-appreciation leads to perversity of the judgment. So, the judgment of acquittal passed by the Trial Court is perverse and it is liable to be set aside.

28. As discussed supra, since the issuance of cheque and signature in the cheque is admitted, the appellant is entitled to invoke presumption under Sections 118 and 139 of Negotiable Instruments Act that the cheque has been issued for discharging legally subsisting liability. Even though it is a rebuttable presumption, the presumption has not been rebutted by the respondents/accused. So, the onus is not shifted from the respondents to the appellant. Therefore, the appellant has proved that having fully known that he has no sufficient funds in his account, the respondent has issued the cheque. Hence, the

respondents 1 to 3 are guilty under Section 138 of Negotiable Instruments Act and the judgment of acquittal passed by the Trial Court is hereby set aside.

12. In fine,

- This Criminal Appeal is partly allowed, setting aside the judgment of acquittal dated 03.10.2005 made in C.C.No.560 of 2001 on the file of the learned Judicial Magistrate No.II, Coimbatore.
- The respondents 4 to 6 are acquitted from the charges levelled against them since they are not the partners of the first respondent firm during the relevant time.
- The respondents 1 to 3/accused are found to be guilty under Section 138 of Negotiable Instruments Act and hence, convicted under Section 138 of Negotiable Instruments Act.
- For appearance of the respondents 2 and 3, partners of the first respondent firm, before this Court for questioning of sentence, post this appeal on 08.04.2015.

Sd/-

Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

cse

This matter is having been posted for question of sentence on this Wednesday the 8th day of April 2015 in the presence of Mr.Ilanthiraiyan for M/s.Sai, Bharath and Ilan for the Appellant and of Mr.R.Marudhachalamurthy, Advocate for Respondents 1 to 3 and of Mr.P.M.Duraisamy, Advocate for the Respondents 4 to 6, the court made the following order:

Today, the respondents 2 and 3/Accused 2 and 3 are present before this Court. Since they found guilty for the offence under Section 138 of Negotiable Instruments Act, they are questioned about the question of sentence.

2.Learned counsel for the respondents 1 to 3 submits that the matter was settled and the cheque amount has been paid to the complainant/appellant and hence, he prayed for leniency in imposing sentence.

3.Considering the representation made by the respondents 1 to 3/Accused 1 to 3, instead of imposing sentence to the accused 2 and

3 to undergo imprisonment, this Court is inclined to impose a fine of Rs.5,000/- each and the same have to be paid within a period of one week from today, in default in payment, the respondents 2 and 3 /Accused 2 and 3 shall undergo one month simple imprisonment. Further, the second respondent is directed to pay the fine amount of Rs.5,000/- each for him and also on behalf of first respondent's firm.

Sd/-
Assistant Registrar
Dated:8/4/2015

True Copy

Sub Assistant Registrar

To

1. The learned Judicial Magistrate No.II,
Coimbatore.
2. do thro the Chief Judicial Magistrate
Coimbatore
3. The Record Keeper, Criminal Section,
High Court of Madras

1 cc to Mr.P.M. Duraiswamy, Advocate, Sr. 17412
1 cc to M/s.Sai Bharath and Ilan, Advocate, Sr. 17478
1 cc to Mr.Marudhachalamurthy, Advocate SR 19360

Crl.A.No.957 of 2006

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