THE HON'BLE SRI JUSTICE B. SIVA SANKARA RAO

-

CRL.A. MP. No. 1142 of 2014

-

IN/AND

-

CRIMINAL APPEAL No. 1179 of 2008

JUDGMENT:

The appellant-complainant (S.V.M. Reddy) seeks to assail the acquittal judgement in favour of the accused (G.N. Raju) dated 14.02.2008 passed by the learned IV Additional District & Sessions Judge, Visakhapatnam in Criminal Appeal No.97 of 2005 by reversing the conviction judgement dated 28.11.2005 passed by the learned Chief Metropolitan Magistrate, Visakhapatnam, in the private complaint case C.C.No.776 of 2002 for the offence punishable under Section 138 of the Negotiable Instruments Act (for brevity 'the Act').

2. The case of the complainant was that on request of the accused, on 22.11.2001, he lent Rs.1,50,000/- to the accused covered by original of Ex.P1-promisory note and later for the demands, the accused issued (Ex.P1) cheque No.145153, dt.09.07.2002 for Rs.1,50,000/- towards part payment of the amount due under the pronote, that when the complainant presented the cheque, same was returned dishonoured, vide Ex.P3 memo dt.06.10.2002 and Ex.P9 cheque return register extract, that complainant, therefore, got Ex.P4 legal notice dt.11.10.2002 issued and the accused received the same and acknowledged by Ex.P5 (Exs.P8 & P9-postal receipt and certificate of posting), kept quiet, with no payment and with no reply. Hence, the complaint.

3. The case after recording sworn statement of complainant taken cognizance and the accused who appeared before the Court pursuant to the summons and after supply of case copies under Section 207 of the Code of Criminal Procedure (for

brevity, “The CrPC.”), when questioned on substance of accusation under Section 251 of the CrPC., he pleaded not guilty.

4. On behalf of the complainant during the course of trial, complainant was examined as PW1, with two more witnesses PWs.2 & 3 and got marked Exs.P1 to P5 & P9 supra and also the Exs.P6 & P8 copy of account of accused and complainant with respective banks in proof of dishonour of the cheque and Ex.P7 authorisation of the bank manager for the witness to depose.

5. After the evidence on the side of the complainant was complete, the accused was examined under Section 313 of Cr.P.C. He denied the incriminating material put to him. The evidence adduced by accused in defence is of the attestor of the pronote as DW1, his wife as DW2 and also deposed self as DW3 and placed reliance upon Exs.D1 & D2.

6. Appreciating the evidence, both oral and documentary, the trial Court held the accused guilty and convicted and sentenced him to undergo rigorous imprisonment for one year and to pay fine of Rs.5,000/- with default sentence of simple imprisonment for one month. It was on appeal by the accused impugning the trial Court`s conviction judgement, the 1st appellate Court set-aside the conviction judgement and acquitted the accused. Impugning the same, present criminal appeal is filed by the complainant.

7. The contentions in the grounds of appeal as well as the submissions of the learned counsel appearing for the appellant are that: the lower appellate Court`s acquittal judgement reversing the trial Court`s conviction judgement is contrary to law, weight of evidence and probabilities of the case, that the lower appellate Court failed to see that when there is nothing to say the debt how not legally enforceable and once proved the debt and issuing of cheque for the same and also the presumptions in regard to the cheque issued was for the legally enforceable debt to rebut by accused, Court below went wrong in acquitting the accused with no basis in saying the accused could prove that the cheque was not for consideration, but

obtained as security by complainant and failed to return after settlement of accounts for amount borrowed fallen due by wife of accused to the complainant from evidence of DWs.1 to 3 and Exs.D1 & D2, also went wrong in not appreciating the evidence on record of the borrowals by wife of accused and by accused are independent transactions and the evidence of DWs. 1 to 3 also proving the same and accused admittedly issued the cheque and could not rebut the presumption from said evidence on record and hence to allow the appeal by setting aside the acquittal judgement of the lower appellate Court and to restore the conviction judgement of the trial Court.

8. Pending the appeal, the appellant filed the Crl.A.MP. No. 1142 of 2014 to receive as additional evidence the decree and judgement against the accused and in favour of the complainant in the suit filed based on the Ex.P1 pronote in O.S. No.1601 of 2004, dt.10-11-2006.

9. The learned counsel appearing for the respondent-accused, on the other hand, represents that it was a clear case of misuse of cheque obtained as security by complainant and failed to return after settlement of accounts for amount borrowed fallen due by wife of accused to the complainant that could be proved from evidence of DWs.1 to 3 and Exs.D1 & D2 and the lower appellate Court was right in its reasoned conclusions to reverse the trial Court`s conviction judgement and for this court there is nothing to interfere and there are no merits in the appeal, that the trial courts conviction judgement was the outcome of mis-reading of evidence and mis-application of law and there are no grounds to receive the additional evidence and hence to dismiss the appeal by confirming the lower appellate Court`s acquittal judgement supported by reasons for reversal of the trial courts conviction judgement.

10. Perused the material on record with reference to the rival submissions on facts and law. The parties are being referred for sake of convenience as arrayed before the trial court as accused and complainant.

11. Now the points that arise for consideration are:

(1). Whether there is no legally enforceable debt to make liable the accused for the offence under Section 138 of the NI Act as held by the lower appellate Court in its acquittal judgement reversing the trial Court`s conviction judgement, and if not the same is unsustainable to set-aside and with what findings?

(2). Whether there are any grounds to receive the additional evidence sought to be adduced by the complainant appellant?

(3). To what result?

12. In re. Point Nos.1&2: As point Nos.1 & 2 are interrelated to decide from any need of additional evidence also to be decided with reference to other merits in the facts, to avoid repetition of facts both the points are taken up together to decide for sake of convenience.

12(A). Before advert to the merits of the matter, it is beneficial to quote; the provisions incorporated in Chapter XVII of the N.I. Act make a civil transaction to be an offence **by fiction of law and with certain (rebuttable) presumptions that shall be drawn**. Sections.138 to 142 are incorporated in the N.I.Act, 1881 as Chapter XVII by the Banking Public Financial Institutions and Negotiable instruments Laws (Amendment) Act,1981 (66 of 1988) which came into force w.e.f.01-04-1989 and the N.I.Act was further amended by Act,2002 (55 of 2002) which came into force w.e.f.06-02-2003 incorporating new sections 143 to 147 in this Chapter XVII and further some of the existing provisions not only of the Chapter XVII but also of other Chapters amended to overcome the defects and drawbacks in dealing with the matters relating to dishonour of cheques.

12(B). The object and intention of these penal provisions of Chapter XVII (Sections 138–147), in particular, Sections 138 & 139 (besides civil remedy), are to prevent issuing of cheques in playful manner or with dishonest intention or with no mind to honour or without sufficient funds in the account maintained by the drawer in Bank and induce the Payee/Holder or Holder in due course to act upon it. The remedy available in a Civil Court is a long drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee. Since a cheque that is dishonoured may cause uncountable loss, injury or inconvenience to the Payee due to the latter's unexpected disappointment, these provisions incorporated are in order to provide a speedy remedy to avoid inconvenience and injury to the Payee and further to encourage the culture of use of cheques and enhancing credibility of the instruments as a trustworthy substitute for cash payment and to inculcate faith in the efficacy of Banking operations - **GOA PLAST (PVT.) LTD. Vs. CHICO URSULA D'SOUZA.**

12-(C). To fulfill the objective, the Legislature while amending the Act has made the following procedure:

In the opening words of the Section 138 it is stated: "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**,---------, such person **shall be deemed to have committed an offence** and shall, **without prejudice to any other provision of this Act (See Sec.143)**, be punished ----. Provided, nothing contained in this section shall apply unless,-(a), (b); and (c) Explanation---(supra)."

"(i) Under Section 138 a deeming offence is created **by fiction of law**.

(ii) An **explanation** is provided **to Section 138** to define the words **"debt or other liability" to mean a legally enforceable debt or other liability."**

(iii) In Section 139, a presumption is ingrained that the **holder of the cheque received** it in discharge of debt or other liability.

(iv) Disallowing a defence in Section 140 that drawer has no reason to believe that cheque would be dishonoured.

(v) As per Section 146(new section) the production of **the Bank's slip or Memo with official mark** denoting that the cheque has been dishonoured **is prima facie evidence** for the Court to presume the fact of dishonour of such cheque unless such fact is disproved by the accused.

12 (D). Further the provision for issuing notice within fifteen days (amended as thirty

days by the amended Act, 55 of 2002, w.e.f.06-02-2003) under section 138 after dishonour is to afford an opportunity to the Drawer of the cheque to rectify his mistakes or negligence or in action and to pay the amount within fifteen days of receipt of notice, failing which the drawer is liable for prosecution and penal consequences.

12(E). <u>Reasonability of cause for non-payment is not at all a deciding factor. Mensrea is irrelevant. It is a strict liability incorporated in public interest.</u>

12(F). Availability of alternative remedy is no bar to the prosecution

12(G). In the words-where **any** cheque, the word any suggests that for whatever reason **if a cheque is drawn** on an account maintained by him with a Banker in favour of another person **for the discharge of any debt or other liability**, <u>the</u> <u>**liability cannot be avoided in the event of the cheque stands returned by the Banker unpaid**</u>**.**

12(H). **In Suman Sethi v. Ajay K. Churiwal and Another**, it was held of the legislative intent as is evident from Section 138 of the Act that, if for the dishonoured cheque demand is not met within 15 days of the receipt of the notice, the drawer is liable for conviction. If the cheque amount is paid within above period or before the complaint is filed, the legal liability under Section 138 ceases to be operative and for the recovery of other demands such as compensation, costs, interest etc. separate proceedings would lie. If in a notice any other sum is indicated in addition to the amount covered by the cheque that does not invalidate the notice.

12(I). In **K.N.Beena Vs. Muniyappan & Another** at paragraph 7, it was observed: In this case admittedly the accused has led no evidence except some formal evidence. The High Court appears to have proceeded on the basis that the denial of averments in his reply dated 21.5.1993 were sufficient to shift the burden of proof on to the complainant to prove that the cheque was issued for a debt or liability. This is an entirely erroneous approach. The accused had to prove in the trial, by leading cogent evidence, that there was no debt or liability. The accused not having led any evidence could not be said to have discharged the burden of proving that the cheque was not issued for a debt or liability.

12(J) No doubt, this approach of accused has to lead cogent evidence during trial in rebutting the presumptions and in proof of his defence, is explained by Apex Court in **Narayan Menon V. State of Kerala** as follows:

12(K) The Apex Court in **Narayan Menon** (supra) held that once the complainant shown that the cheque was drawn by the accused on the account maintained by him with a banker for payment of any amount in favour of the complainant from out of that account for its discharge and the same when presented returned by the Bank unpaid for insufficiency of funds or exceeds arrangement, such person shall be deemed to have been committed an offence under Section 138 of N.I. Act. What Section 139 of the Act speaks of the presumption against the accused to rebut is the holder of a cheque received the cheque of the nature referred in Section 138 of the Act for discharge of debt. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon. Accused need not enter into the witness box and examine other witnesses in support of his defence. Accused need not disprove the prosecution case in its entirety. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man".

12-(L) There are presumptions (besides the general presumptions under the Indian Evidence Act) specially provided in respect of a negotiable instrument under Section 118 clauses (a) to (g) of the Act and for the dishonour of cheque relating to criminal liability under 139 and apparently a legal fiction though strictly not as per the Explanation to Section 138-of the Act, for the purpose of this section, “debt or other liability” means a legally enforceable debt or other liability.

> Section 118: Presumptions as to negotiable instruments - Until the contrary is proved, the following presumptions shall be made:
>
> Clause (a) of consideration - that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed,

negotiated or transferred for consideration. (b) to (g)----"

> Section 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. Presumptions both under Sections 118(a) and 139 of the Act are rebuttable in nature.

12(M). What would be the effect of the expressions ‘May Presume’, ‘Shall Presume’ and ‘Conclusive Proof’ has been considered by the Apex Court in **Union of India (UOI) v. Pramod Gupta (D) by L.Rs. and Ors**., in the following terms: It is true that the legislature used two different phraseologies "shall be presumed" and "may be presumed" in ------ but the same would not mean that the words "shall presume" would be conclusive. The meaning of the expressions "may presume" and "shall presume" have been explained in Section 4 of the Evidence Act,1872, from a perusal whereof it would be evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus, the expression "shall presume" cannot be held to be synonymous with "conclusive proof. In terms of Section 4 of the Evidence Act, whenever it is provided by the Act that the Court shall presume a fact, **it shall regard such fact as proved unless and until it is disproved.**

12(N). The Apex Court in the later expression in **KUMAR EXPORTS PVT. LTD. V. SHARMA CARPETS** held in this regard that- presumptions that applied among clauses (a) to (g) of Section 118 also, like the presumption under Section 139 of the Act, as per Section 4 of the Evidence Act, are the rebuttable presumptions for which the burden is on the accused. However, to rebut the presumptions if a case is made out by accused either by pointing out from the case of the complainant including very documents and cross-examination or by examining any person and need not be always by coming to witness box(as laid down in Narayan Menon(supra) and **Krishna Janardhan Bhat v. Dattatraya G. Hegde.**

12(O) Further, as per the expression of the Apex Court in **RANGAPPA vs. MOHAN (3-Judges Bench)** paras-9 to 15 referring to GOA PLASTS (supra), KRISHNA JANARDHAN BHAT (supra) by distinguishing at para-14 saying the observation in KRISHNA JANARDHAN BHAT (supra) of the presumption mandated by Section

139 does not indeed include the existence of a legally enforceable debt or liability is not correct, though in other respects correctness of the decision does not in any way cause doubted; by also referring to **Hiten P. Dalal v. Bratindranath Banerjee** holding at paras-22 and 23 therein of the obligation on the part of the Court to raise the presumption under 138, 139 and 118 of the N.I. Act, in every case where the factual basis for raising the presumption has been established since introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused, as a presumption of law distinguished from a presumption of fact as part of rules of evidence and no way in conflict with presumption of innocence and the proof by prosecution against the accused beyond reasonable doubt, but for saying to rebut the accused can discharge the burden showing reasonable probability of non-existence of the presumption of fact and to that proposition, the earlier expression in **Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pyarelal** para-12 showing the burden on the accused is to bring on record by preponderance of probability either direct evidence or by referring to circumstances upon which he relies, rather than bare denial of the passing of the consideration; apparently that does not appear to be of any defence, to get the benefit in discharge of the onus against, also held referring the **M.M.T.C. Ltd. and another v. Medchl Chemicals & Pharma (P) LTD** that where the accused able to show justification of stop payment letter even from funds are there, but no existence of debt or liability at the time of presentation of cheque for encashment to say no offence under Section 138 of the N.I. Act made out in discharge of the burden. It was concluded referring to the above, including of **Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm & Ors** paras-14 and 15 that the initial presumption lays in favour of the complainant and Section 139 is an example of a reverse onus clause, which has been included in furtherance of the legitimate objection of improving the credibility of the negotiable instruments. While Section 138 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. 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 and the test of proportionality should guide the construction and interpretation of reverse onus clause and the accused cannot be expected to discharge an unduly high standard or proof and in the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a

persuasive burden to discharge by preponderance of probabilities by raising creation of doubt about the existence of a legally enforceable debt or liability to fail the prosecution and for that the accused can rely on the material submitted by the complainant also in order to raise such a defence and he may not need to adduce any evidence of his own.

12(P) It was also observed in para-15 that the accused appear to be aware of the fact that the cheque was with the complainant, further-more the very fact that the accused has failed to reply to the statutory notice under Section 138 of the Act leads to the inference that there was merit in the complainant's version. It was also held by this court way back in **Chapala Hanumaiah Vs. Kavuri Venkateshwarlu** that having received and acknowledged the statutory legal notice after dishonour of cheque, non-giving of reply to said legal notice, improbablises the defence version, as any prudent person under the said circumstances should have, but for no defence to reply.

12(Q) If at all, there is any payment including part payment or adjustment to be considered for deduction while enforcing the amount covered by the dishonoured cheque for its consequences, the burden is on the accused as per settled law to prove said discharge or adjustment. In this regard, in **M/s. Thekkan and Company vs. M. Anitha,** it was held by the Kerala High Court that nothing precludes the Court under Section 138 of the Act for taking into account prior payments made before the presentation of the cheque or before receipt of notice in deciding whether the amount due under the cheque has been fully paid, if not for continuing the prosecution. In another expression of same High Court in **R. Gopikuttan Pillai vs. Sankara Narayanan Nair** also it was held that accused is bound to prove payment of entire amount within 15 days of receipt of notice and any part payment made before or after notice cannot absolve liability from the criminal prosecution under Section 138 of N.I. Act and thereby the trial Court went wrong in acquitting the accused for part payment made and not of the entire due under the cheque.

12(R). The non examination of a material witness to the case or non-filing of a material document is fatal to the case of the complainant vide decisions in C.Antony Vs. K.G.Raghavan Nair and Narayan Menon (supra).

13. From above legal position, coming to decide on the facts from oral, circumstantial and documentary evidence, how far it is proved the case of the complainant and from drawing of presumptions and inferences if any, how far rebutted by accused concerned:

13 (A). Ex.P1 is the promissory note executed by the accused in his own handwriting in favour of the complainant on 22.11.2001 for Rs.1,50,000/- including by mentioning date and amount. Ex.P2 is the cheque for Rs.1,50,000/- dated 09.07.2002. The cheque is undisputedly routed from the bank account of the accused and given to the complainant and the same is also undisputedly returned dishonoured. Now, coming to the core of contention that the pronote and cheque were given by the accused in favour of the complainant only as a security for settlement of the account for the amount borrowed by the wife of the accused from the complainant and whether the accused could establish the same from his evidence as DW3, besides the evidence of DW1-attestor of pronote and also of his wife DW2 with reference to Ex.D1 and D2 receipts issued by Pw1 for Rs.1,72,000/- on 21.11.2001. One is by PW1 and the other receipt is by wife of PW1 by name Rajeshwari. It is to say there is no dispute regarding Ex.P2 cheque and its issue and its dishonour and the same is routed from the account of the accused in favour of the complainant. Then there is presumption as held by the Apex Court in **RANGAPPA** (supra) not only under Section 118 of the NI Act and the same is supported by consideration and duly issued on date and any amount and in the name of it was issued, but also for a legally enforceable debt or other liability under Section 139 read with 138 of the NI Act and the burden is on the accused to rebut. The trial Court held that the accused could not rebut the presumptions supra whereas the lower appellate Court held reversing the trial Court conviction judgment that the accused was able to rebut the presumption from the evidence on record. The trial Court observed that as per the attestor of pronote DW1, he was present at the time of settlement took place between the complainant and wife of accused in connection with other criminal case in C.C.No.52 of 2001. In C.C.No.52 of 2001 (in some cases in the High Court judgment it is referred as 252 of 2001 and in the appellate Court as

52 of 2001), the wife of the accused was the accused who is DW2 in this case. She deposed that in the course of settlement of the said criminal case between herself and the complainant her husband who is the accused herein DW3 issued Ex.P2 cheque and after that they paid the amount of Rs.1,50,000 plus Rs.1,72,000/- for withdrawal of cases by the complainant and even the said amounts received by the complainant and his wife evidenced by Exs.D1 and D2 having promised to return failed to return Ex.P1 pronote and Ex.P2 cheque. Neither DWs.1, 2 or 3 stated the date of settlement. If it is on the date covered by Ex.D1 and D2 these receipts were dated 21.11.2001; whereas Ex.P1 pronote was dated 22.11.2001 a day subsequent to the said settlement of the case of the wife of the accused between the accused and complainant. The question of return of the pronote dated 22.11.2001 and cheque dated 09.07.2002 for the settlement on 21.11.2001 (to say prior to the date of the executing of pronote and giving of cheque), the said settlement stated taken place does not arise, but for if at all it is a positive case of accused that the pronote and cheque were given (post dated) for a future date at the compulsion of complainant and the said giving is even if earlier to the settlement dated 21.11.2001. That is not the positive defence of the accused much less of DWs.1, 2 or 3 evidence in this regard. That was ignored by the lower appellate Court. It is also important to note what DW1 deposed is that, the pronote was executed at the time of settlement as security to discharge the debt due to the complainant by wife of the accused and he was present and attested which is Ex.P1 in saying there is no separate condition thereunder, and after entire amount paid by wife of accused, then the accused and wife asked the complainant to return the pronote and the cheque. Complainant did not return. DW2 wife of accused also deposed in same lines saying PW1 promised to return the pronote, yet he has not done so. Undisputedly, at the time of so-called settlement, Exs.D1 and D2 receipts were obtained and therein there is no whisper at all about the cheque and pronote if Ex.P1 and P2 already issued by accused in favour of complainant for those are required to be returned and if un-traced to say they could not be returned. It is not even the case of payment made and no receipt insisted. In fact receipts obtained and if really that version is correct, it could have found place in the receipts. Admittedly, neither the accused nor his wife after the so-called settlement under Exs.D1 and D2 receipts to the complainant and his wife viz. 21.11.2001 including in settlement of C.C.No.52 of 2001, no legal notice was issued much less addressed a letter to return the Ex.P1 pronote and Ex.P2 cheque. The same even not asked by accused to return much less by his wife. If at all his version

is true apart from what is observed supra. They could have insisted to obtain separate receipts of the same are not received and to receive after tracing and to at least mention in Ex.D1 and D2.

It is important to note that the lower appellate Court in the judgment paragraph 17 observed that the defence of the accused of the case in C.C.No.52 of 2001 filed by the complainant against wife of accused that was settled and the settlement amount due paid receipts obtained and at that time as security the cheque and pronote obtained from the accused stated not traced and not returned and by misusing the cheque and pronote the false claim is made and from that even the presumptions under Section 138, 139 even can be drawn in favour of the complainant that could be rebutted by the accused by his positive evidence, not only from the evidence of himself (DW3) and of his wife DW2 and the attestor of pronote DW1 (an independent witness) who knows the accused for the last 20 years and there is nothing to disbelieve DW1's evidence equally (DW2) merely because DW2 is wife of the accused. Further PW1 also admitted about the settlement of the case in C.C.No.52 of 2001 filed against the wife of the accused and receipt of money in that case. Though in the first instance, he deposed of only Rs.1,50,000/-, on 21.11.2001 received from wife of accused and nothing more by him or his wife much less total Rs.3,22,000/- when confronted with Exs.D1 and D2 receipts. He admitted all the said amount Rs.1,50,000/- and Rs.1,70,000/- received by him and from the veracity of his evidence, the evidence of DWs.1 to 3 appreciated from that particularly of DW1 not even inimical witness to the complainant being attestor to the pronote and importantly saying there is no consideration passed under Ex.P1 pronote and it is only by settlement between the complainant and accused and wife of accused and there the pronote and cheque Ex.P1 and P2 respectively obtained and later wife of accused even paid under Ex.D1 and D2; Ex. P1 and P2 were not returned. In fact, lower appellate Court having so observed failed to take note of the important facts as to when the Exs.P1 and P2 were executed by the accused and is the dates on which Exs.P1 and P2 bear are not correct, if so, what is the positive evidence of the accused either from his mouth as DW3 much less of his wife DW2 apart from attestor of Ex.P1 of DW1. As stated supra, the so-called settlement of the amount due by the wife of the accused to the complainant and the settlement of the C.C.No.52 of 2001 against the wife of the accused and in saying as if the Exs.P1 and P2 were earlier obtained from the accused by complaining to say prior to 21.11.2001 what made not to so mention in Exs.D1 and D2 receipts about pronote and cheque already obtained from the accused by complainant and not returned stating not traced. It is also for the other reason that for the Ex.P4 legal notice issued by the complainant to the accused dated 11.10.2002 of the Ex.P2 cheque dated 09.07.2002 returned dishonoured on 05.10.2002 under Ex.P3. The accused admittedly received notice under Ex.P5 postal acknowledgement dated 21.610.2002 and failed to reply. DW3 also admitted in cross examination in this regard. As held by the Apex Court in **RANGAPPA** (supra) para 15, that enhanced the credibility to the case of complainant on its trustworthy to rely; same is also held by this Court in **CHAPALA HANUMAIAH** (supra) that any prudent person, but for no defence to the legal notice contents, under Section 3 of the Evidence Act, supposed to give reply and the non-giving of reply substantiates the notice averments.

The lower appellate Court, without appreciating these important aspects, attached importance to PW1 cross examination testimony of initially not admitted about Ex.D1 Rs.1,72,000/- and Rs.1,50,000/- Ex.D2 and after confrontation he admitted both. The appreciation of evidence of a witness is not only of what is deposed with reference to the factual back ground but also the attending and circumstances and a witness cannot be totally disbelieved merely because there is some exaggeration in the deposition. As *falsus in uno is not falsus in utero.*

From this background the additional evidence is also to serve as additional piece of evidence to support the case of either side. In the civil suit covered by Ex.P1 pronote date decreed on 10.11.2006 with reference to the evidence of the complainant as PW1 and Ex.A1 pronote and Ex.A2, office copy of legal notice therein and evidence of DWs.1 to 3 herein, the cheque dishonour case as DWs.3, 2 and 1 therein with reference to two receipts Exs.D1 and D2 as Ex.P2 and P3 and the copy of complaint in C.C.No.52 of 2001 and proceedings in C.C.No.52 of 2001 and proceedings in C.C covered as Exs.B1 and B4; the trial Court in the civil suit observed that attestor to the pronote DW3 (DW1 in the criminal case) deposed in his cross examination that the defendant (accused herein) borrowed the amount with interest from the complainant to pay 36% per annum and it is defendant that informing him that in his absence the wife from the plaintiff (complainant) and DW2 wife of the defendant also stated in her cross examination that her husband (defendant) and the complainant were having financial transaction previously. DW1-

the defendant also admitted in the cross examination that the promissory note was executed between him and the complainant.

Therefore, the two receipts Exs.B2 and B3 in relation to C.C.No.52 of 2001 are separate transactions between the wife of the defendant and complainant and nothing to do with the pronote transaction between the complainant and defendant. As also discussed supra in this appeal, the two transactions are independent and nothing to do with Ex.P2, and to that extent the said suit decreed and judgment and observations therein also relevant as additional evidence for the effective disposal of the appeal within the scope of Section 391 Cr.P.C. and hence the additional evidence can be received. The certified copy of the judgment being the public document between the parties *inter se* no further proof of the same is required for marking as additional evidence on behalf of the appellant/complainant in the Criminal appeal as Ex.P10. Accordingly, the same is received and marked. Accordingly the point No.1 is answered holding that the conviction judgment of trial Court is sustainable and of the lower appellate Court is unsustainable.

It was held by the apex Court in SOMNATH SARKA VS. UTPAL BASU MALLICK that the Act not contemplated grant of compensation but envisages imposition of fine not exceeding twice the amount of dishonoured cheque and out of said fine amount, the complainant be compensated under Section 357 Cr.P.C. and that *'unlike for other forms of crime, the punishment here (insofar as the complainant is concerned) is not a means of seeking retribution, but is more a means to ensure payment of money. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque."*

14. Having regard to the above and from the submission by the appellant/complainant of the endeavour is to recover the amount of compensation from out of fine or otherwise, rather than sentencing the accused to jail, while restoring the Conviction Judgment of the trial Court, modified the sentence from one year Rigorous Imprisonment and fine of Rs.5,000/- with defaule sentence of one month, the accused is sentenced to undergo Simple Imprisonment till rising of the day and to pay a fine of Rs.2,00,000/- and out of which an amount of Rs.1,80,000/- shall be paid to the complainant towards compensation and the remaining amount of Rs.20,000/- has to be paid towards fine to the State. It is thereby directed the learned

Magistrate to secure the presence of accused of warrant to undergo the sentence in that open Court and also to cause recover the fine amount under Section 431 read with Section 421 of Cr.P.C. by issuing warrant levying the fine, and if the accused failed to pay within one month from today, he is liable for default sentence of three months Simple Imprisonment as per Sections 65 to 68 read with 53(6) I.P.C.

It is needful to say that as civil suit based on Ex.P1 pronote for part of which the Ex.P2 cheque amount is covered is decreed in favour of complainant as plaintiff against the accused as defendant since marked in the appeal as Ex.P10 and in the event of recovery of the amount in the criminal case covered by the present appeal under Section 421, of Rs.1,80,000/- compensation concerned that is to be adjusted, for payment of balance while under execution by civil Court for recording part satisfaction under Order XXI Rule 1 and 2 CPC after such recovery. Equally, if the civil Court decree executed and recorded full satisfaction, this amount of Rs.1,80,000/- being part of it is unrecoverable under Section 421 Cr.P.C. Otherwise, the enforcement and recovery under Section 421 Cr.P.C. by the Magistrate is not a bar from the civil Court decreed the suit under execution shown if any pending.

15. Accordingly, the criminal appeal is allowed.

Miscellaneous petitions, if any pending in this appeal, shall stand closed.

B. Siva Sankara Rao, J

-

<u>Appendix of evidence in appeal</u>

<u>Documents marked by the Court</u>

Ex.P.10: Certified Copy of judgment in O.S.No.1601 of 2004,dated

10.11.2006.

B. Siva Sankara Rao, J

23rd January, 2015

KSM