HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

CRIMINAL APPEAL Nos.1074 OF 2009 AND 1581 OF 2009

COMMON JUDGMENT

The self same complainant, Taliyat Antony Jose, who maintained the two private complaints in C.C. No.393 of 2003 and 394 of 2003 respectively against the accused V.Subaschandra Bose, based on dishonor of the two cheques said to have been issued by the accused in favour of the complainant, one cheque bearing No.418932, dated 15.12.2002, issued for Rs.90,000/- (Ex.P.1 in C.C. No.393 of 2003) and another cheque bearing No.418931, dated 25.10.2002, issued for Rs.32,500/- (Ex.P.1 in C.C. No.394 of 2003), for part discharge of the amount borrowed by the accused on 16.09.2002 for Rs.1,30,000/-. When the cheques presented, they were returned, dishonoured covered under Ex.P.2 – cheque return memo, and from the statutory notice issued by the complainant to the accused covered under Ex.P.3 – legal notice, dated 29.03.2003, served on the accused under Ex.P.4 – acknowledgments, in both the cases respectively, and having received the notice, the accused failed to pay and not even chose to reply, hence the respective complaints. After recording the sworn statements of the complainant in both the cases separately, the complaints were taken cognizance and pursuant to the summons, the accused appeared before the Judicial Magistrate of First Class, Kodad, (hereinafter referred as trial court), thereby he was supplied copies of documents and was questioned, he pleaded not guilty and claimed to be tried and thereform the parties were put to trial separately in both the cases. In proof of the said two private complaint cases, on behalf of the complainant, himself came to the witness box as P.W.1 and cause examined one more witness, Nagubandi Mohan Rao, stated to be mediator between the complainant and accused and is also an attestor to the mutual agreement, dated 01.12.2002. During the course of evidence, Exs.P.1 to P.6 in both the complaint cases respectively were marked on behalf of the complainant, of which Ex.P.1 is the respective cheques, Ex.P.2 cheque return memos, Ex.P.3 is the legal notice, Ex.P.4 is the acknowledgment of accused, Ex.P.5 is the undertaking letter and Ex.P.6 is the common agreement letter between the complainant and accused dated 01.12.2002 for payment of the said Rs.1,30,000/- before end of December, 2002. The Ex.P.6 further speaks on failure to pay the lumpsum by December, 2002; it is from the January, 2003 till January, 2004 to pay at Rs.13,000/- per month, including interest @ 3% per month on the amount due and any of the two monthly installments at such rate failed in payment by the accused to the complainant, the complainant can enforce the cheques issued by the accused for its recovery and also for Civil and Criminal liability and Ex.P.5 is the letter, dated 30.05.2003, executed by the accused in favour of the complainant by mentioning that the amount of Rs.1,30,000/- due to the complainant in the presence of G.Suresh, in the dispute raised agreed by the accused to pay by 2004 - March end, failing which to take legal recourse by the complainant. It is after said evidence of the complainant was completed in both the complaint cases, the accused was examined under Section 313 Cr.P.C. by bringing to his notice the entire incriminating evidence and truth of which denied by him. It is from the said evidence of P.Ws.1 and 2 with reference to Exs.P.1 to P.6 respectively tested by cross-examination by the accused from no independent evidence adduced by the accused, by closure of respective evidence and arguments in the two complaint cases; the learned Magistrate, by the two impugned separate judgments, dated 25.04.2007, in C.C. 393 of 2003 and C.C. No.394 of 2003, acquitted the accused.

02. It is impugning the said two acquittal judgments, the present separate appeals maintained with the contentions in the grounds of appeal in common by the unsuccessful complainant before the trial court that, the trial court gravely erred in rejecting the evidence of the complainant and in acquitting the accused; that the impugned judgments are contrary to law, weight of evidence and probabilities of the case; that the trial court misread the evidence as if there were contradictions between the evidence of P.Ws.1 and 2 and failed to

see that the amount due by the accused to the complainant is proved and the cheques issued also proved and there was not even reply given to the statutory notice and hence to set aside the acquittal judgments and to convict the accused by allowing the two appeals as per Law. Learned counsel for the appellant reiterated the same in the course of arguments.

03. Whereas, it is the contention of learned counsel for the accused in the two appeals that for this Court while sitting in appeal against the double presumption one is from the general presumptions of innocence of accused that is confirmed by the respective acquittal judgments supra; there is nothing to interfere for the complainant did not approach the Court with clean hands and the case is a false claim proved from the cross-examination of P.Ws.1 and 2 with regard to the inconsistency in the evidence on the material aspects and hence, to dismiss both the appeals, confirming the acquittal judgments of the trial court.

04. As the parties in both the cases are one the same and the cheques issued by the accused are out come of single borrowal of the amount due in dispute and also covered by Exs.P.5 and P.6 common understanding letter between the parties and letter of accused respectively for the amounts due original filed in one case and photo copy in another case, both the appeals are taken up together for common hearing and disposal.

05. Perused the material on record.

06. Now the points that arise for consideration are:

i. Whether the cheque bearing No.418932, dated 15.10.2002, issued for Rs.90,000/- and the other cheque bearing No. 418931, dated 25.10.2002, issued for Rs.32,500/- not issued by the accused in favour of the complainant and if issued, whether those are not for any legally enforceable debt or other liability?

ii. Whether the trial court's acquittal judgments respectively are unsustainable and requires interference by this court to set aside the same and if so with what conclusion?

iii. To what result?

Point No.i and ii:

7-(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.

7-(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. v.**

CHICO URSULA D'SOUZA.

7-(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.

7-(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.

7-(E). 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.

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

7-(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**, the **liability cannot be avoided in the event of the cheque stands returned by the Banker unpaid.**

7-(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.

8-A. 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.

8-AA. 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** .

8-B. 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".

8-C. 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.

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) vs. Pramod Gupta (D) by L.Rs.**, 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, <u>thus, the expression "shall presume" cannot be held to be synonymous with "conclusive proof.</u> <u>In terms of Section 4 of the Evidence Act, whenever it is provided by the Act that the Court shall presume a fact,</u> <u>**it shall regard such fact as proved unless and until it is disproved.**</u>

The Apex Court in its later expression in **KUMAR EXPORTS PVT. LTD. vs. 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 vs. Dattatraya G. Hegde.**

8-D. 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.

8-E**.** 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.

8-F(i)**.** 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.

09. From the above settled propositions of law, coming to the facts that are already covered, but for at the cost of repetition of any material facts, undisputedly the cheques Ex.P.1, dated 15.10.2002, for Rs.90,000/- (marked in C.C. No.394 of 2003) and the other cheque, dated 25.10.2002, for Rs.32,500/- (marked in C.C. No.393 of 2003) bearing Nos.418932 and 428931 were rooted from the account of the accused and the cheques are bearing the signature of the accused. The cross-examination of P.Ws.1 and 2 by the accused shows the son of the accused filled the contents of Ex.P.1 – cheques supra respectively, Ex.P.2 – memo respectively in the two cases, dated 20.03.2003, for the two cheques presented by the complainant for collection through Nagarjuna Grameena Bank, and the same were returned, dishonoured due to insufficient funds. Ex.P.3 is the

statutory notices issued by the complainant, which the accused admittedly received and acknowledged under Ex.P.4 - registered postal acknowledgments shows the postal stamp dated 04.04.2003 of the said notice was dated 29.03.2003 and undisputedly the accused did not issue any reply for the said legal notice even in both the notices mentioned that on 16.09.2002 the accused borrowed Rs.1,30,000/- for his business needs, in the legal notice, the word '5' corrected as 'three' and putting the initial by the advocate for the complainant, and issued the respective cheques (1) bearing No.418932, dated 15.10.2002, for Rs.90,000/- and (2) bearing No.418931, dated 25.10.2002, for Rs.32,000/-; towards part discharge and the cheques when presented on 10.03.2003, they were returned dishonoured on 20.03.2003, with an endorsement of dishonor as insufficiency of funds and thereby demanded to pay within (15) days failing which to take legal recourse. There is a cross-examination of P.W.1 by the accused from the complainant mentioned Rs.1,30,000/- borrowed by the accused on 16.09.2002 whereas in the notice it is mentioned as Rs.1,50,000/- and not Rs.1,30,000/- as to which the word 'five' is corrected as 'three' and PW.1 clarified at the instance of the accused that Rs.1,30,000/- mentioned in the complaint is correct. The trial court taken this as a point of inconsistency and uncertainty about the so called amount lent to the accused. In fact, whether there is much inconsistency therefrom or not to decide; it is important to draw attention to Exs.P.5 and P.6. Ex.P.6 is the original letter executed between the complainant and accused, dated 01.12.2002, it is on Rs.50/- non judicial stamp paper and another white paper with telegu typed matter as common understanding letter and the stamp was purchased in the name of the accused and from the stamp vendor that was sale bearing No.8946, dated 16.11.2002 and the contents of the common understanding letter of both the parties reveals that it is the joint agreement between the complainant and the accused and complainant's avocation mentioned as business and of the accused also business as proprietor of Sri Srinivasa Battery Works, Kodad, and that first party, who is the complainant, and second party that is the accused, that for business and family purpose of the second party, first party lent Rs.1,30,000/- to repay with interest at 3% per month and the second party in favour of the first party for the amount lent later issued four cheques drawn on Andhra Bank, Kodad Branch, saying he was not in a position to pay entire amount at a time and requested for time and therefrom there was the understanding arrived regarding payment of the said amount Rs.1,30,000/- with interest, by that month end i.e. December, 2002, else to pay total amount in installments commencing from January, 2003 till January, 2004 @ Rs.13,000/- per month by every month end and after two monthly installments, for any reason not paid by the accused to the complainant @ Rs.13,000/- per month, the complainant can use cheques issued by the accused for the amounts in favour of the complainant to take civil as well as criminal recourse. Ex.A.6 – original documents show Nagubandi Mohan Rao - P.W.2 is the sole attestor. In fact, the original document marked in C.C. No.393 of 2003 and photo copies of which marked in C.C. 394 of 2003 as Ex.P.6 therein also which is self same document photo copy, however, a perusal of the documents produced before the trial court show one of the photo copy filed under Ex.P.6 original page 2 there is no signature of attestor. It is pointed out by the learned counsel for the accused – respondent to the two appeals that, the so-called P.W.2 is an attestor, subsequently figured by signing from the complainant misused blank signed papers of the accused with him by cause Telugu typed the contents to his suiting.

10. In fact, it is not even the suggestion by the accused to P.W.1 that Ex.P.6 document telugu typed contents were subsequently cause filled by the complainant by misusing the empty signed papers of the accused with the complainant. There was no such contention even in the course of arguments before the trial court raised for, nothing reflected on the arguments of the counsel for accused before the trial court in that line. Importantly as referred supra the stamp was purchased by the accused in his name from the stamp vendor on 16.11.2002 and the common understanding letter between the

accused and the complainant was dated 01.12.2002. The accused did not explain unless he executed the common understanding agreement, dated 01.12.2002, as to how the stamp paper purchased by him on 16.11.2002 went to the hands of the complainant with his signature, in blank, so also page 2 of Ex.P.6 another white paper with his signature. A perusal of Exs.P.1 and P.2 not even showing any adjustment between the lines of the contents on blank signed papers, it substantiates the contention of the complainant that there is a typographical mistake mentioned in Ex.P.3-legal notice as Rs.1,50,000/- instead of Rs.1,30,000/- in the numerical that is even corrected by counsel for the complainant from ‘five’ as ‘three’ by making Rs.1,30,000/- . Apart from which, Ex.P.5 is the own hand written letter of the accused in favour of the complainant with his signature and initial put by him on 30.05.2003 for no dispute of the contents of not written by him even by the accused, which reads that the accused fallen due to the complainant for Rs.1,30,000/- and through the elders including one G.Suresh, there was understanding between both, as per which the accused want to pay entire amount by March 2004, if he failed to pay, complainant can take recourse. The accused did not dispute Ex.P.5 original undertaking letter exhibited in C.C. No.393 of 2003 and its photo copy exhibited in C.C. No.394 of 2003. From this background, with reference to Exs.P.1 to P.6 supra coming to the evidence in chief examination of complainant as P.W.1 he deposed that the accused is proprietor of Sri Srinivasa Auto Works and he acquainted with him, borrowed Rs.1,30,000/- for his business expenses on 16.09.2002, to repay the same for demand issued the respective two cheques - Ex.P.1 in two cases referred supra and later executed by the accused Ex.P.6 - agreement on 01.12.2002 along with him to repay in installments and later he presented the cheques for collection, the same returned dishonored for insufficient funds and even he issued notices respectively, demanding to repay, the accused received and acknowledged and failed to repay and reply even within 15 days time after receipt of notice, hence the accused is liable for punishment. He also placed reliance upon another undertaking letter of accused covered under

Ex.P.5, dated 30.05.2003 supra. In the cross-examination, P.W.1 deposed that he mentioned in the complaint what is the amount (Rs.1,30,000/-) borrowed by the accused and not the amount of Rs.1,50,000/- mentioned in the notice Ex.P.3. He deposed that without waiting up to March 2003 as agreed by the accused under Ex.P.5, he filed these complaint cases respectively. It is important to note from the cross-examination, even Ex.P.5 - undertaking letter given by the accused discussed supra with his own hand writing is not disputed by the accused but for saying as per the letter Ex.P.5, dated 30.05.2003, executed by him there is a time for payment of the amount till March, 2004 and without waiting till then, he filed these complaint cases as referred supra. Ex.P.2 – cheque return memos were dated 20.03.2003, and Ex.P.3 statutory notices respectively issued by the complainant was dated 29.03.2003 and served on the accused as referred supra under Ex.P.4 dated 04.04.2003, it is to say even by the time, the statutory notice under Ex.P.3 served on the accused under Ex.P.4 respectively, the time fixed to pay before March, 2003 end even expired, having received the notice, undisputedly, the accused even was demanded to pay, failed to pay, nothing more is required. Thus from the above, the complainant has established the case against the accused for dishonor of the cheques. In the further cross-examination of P.W.1 by the accused, P.W.1 deposed that the son of the accused filled the respective Ex.P.1 cheque blanks and two months after the respective cheques, the accused executed Ex.P.6 as referred supra, Ex.P.1 – cheques, dated 15/25.10.2002 and Ex.P.6 on 01.12.2002. He did not even dispute the execution jointly by the complainant and accused and the Ex.P.6, letter, dated 01.12.2002 on the stamp of Rs.50/- purchased by the accused, dated 16.11.2002. Thus the accused having not disputed Ex.P.1 to P.6 and also as referred supra suggested that complainant filed the complaint cases without waiting till March end 2003, even as referred supra by the time Ex.P.3 legal notice served on the accused, even expired March, 2003 end and even 15 days time therefrom given to pay; there was no payment. Thereby, even it cannot be contended as premature filing of the complaint cases against the accused before the end of March, 2003. It is brought in the cross-examination of P.W.1 that, it is not mentioned in Ex.P.6 about the numbers of four cheques issued by the accused. In fact, in Ex.P.6 even from that cross-examination admittedly mentioned that the four cheques issued by the accused in favour of the complainant, though cheque numbers not mentioned. The answer further by P.W.1 was that, of the four cheques besides Ex.P.1, two more cheques were given blank to him. It shows the fairness of the complainant for nothing suppressed and also substantiates the genuineness of Ex.P.5 - letter executed with own handwriting in favour of the complainant, dated 30.05.2003, and the common understanding letter between them dated 01.12.2002 to pay before 2004, January. In fact, Ex.P.6 speaks, if any, two installments not paid, the complainant is entitled to enforce the cheques as per Ex.P.6. No doubt, as referred supra, after Ex.P.3 – statutory notice, dated 29.03.2003, served on the acused under Ex.P.4, dated 04.04.2003, the accused again issued letter, dated 30.05.2003 in favour of the complainant to pay the amount with interest by 2004 March end and in fact by the date of the letter, dated 30.05.2003, the cause of action accrued and the complainant filed the private complaints before the Court, since the private complaints filed on 05.05.2003 itself and the Ex.P.5 - letter was executed subsequently i.e. on 30.05.2003. It is to say, once there is a failure to pay within 15 days time after service of notice, under Section 138 (b) and (c) of the Act, there is accrual of cause of action to file complaint within one month and the complaint shall be filed under Section 142 of the Act within the period of expiry. When Ex.P.5 - letter executed by the accused was subsequent to the cause of action accrued, that will not stop. It is not even the case of the accused that subsequently any payment made by him. Even if at all it was the case of subsequent payments that will not come in the way of maintainability of the complaint for criminal liability of accused, but for to give deduction of the amounts paid.

11. Coming to the further cross-examination of P.W.1 by accused, he

denied the suggestion that Ex.P.1 – cheque respectively is no way concerned with Ex.P.6 – letter. Even from that the accused admits his execution of Ex.P.6 - letter, which is an understanding letter executed between them. He denied the suggestion of Ex.P.3 is no way concerned with Ex.P.1. No doubt, as pointed out there might be a typographical mistake in the deposition instead referring Ex.P.5 as Ex.P.3. Because Ex.P.3 is notice for dishonour of cheque and Ex.P.5 is the letter, dated 30.05.2003, executed by the accused referred supra. He denied the suggestion that the accused is not liable to pay any amount. P.W.1 deposed that he is running tea stall in Kodad and denied the suggestion he has no capacity to lent Rs.1,30,000/- to accused. He deposed that he has no movable or immovable property. He denied the suggestion that the accused never borrowed any amount from the complainant. He denied the suggestion that he used to supply tea to the shops. He also denied the suggestion that the accused has no need to borrow amounts from him and the cheques respectively are not belong to accused and he is deposing falsely. That is the only cross-examination of P.W.1 and even from that the accused admits Exs.P.6 and P.5 and his signatures on Ex.P.1 - cheques which are rooted from his account and its dishonour and there is no suggestion even of it is not his son that filled the contents of Ex.P.1 respectively they were issued by the accused. Even the same is positively deposed by P.W.1 in cross-examination by the accused, amount borrowed and due Rs.1,30,000/- is also positively brought in his cross-examination. Ex.P.3 – notice admittedly received in Ex.P.4 and not even reply given by the accused. When such is the case and even P.W.2's evidence is of any little inconsistency, for what he chosen to depose as mediator for Ex.P.6 - letter between the accused and complainant, dated 01.12.2002, from what was pointed out in one of the photo copy of the letter, which is part of the Court record, his signature as attestor is not there to show that he might subsequently figured as attestor before its filing in Court therefrom to ignore the evidence of P.W.2 in toto. When Exs.P.5 and P.6 admittedly executed by the accused in favour of the complainant reiterating the amount of

Rs.1,30,000/- due, the trial court went wrong in acquitting the accused.

12. From this, even coming to the evidence of P.W.2 what he deposed is, he was present when the letter – Ex.P.6 between the complainant and accused executed, as mediator. In his cross-examination he deposed that son of accused filled Ex.P.1 - cheques respectively. Those facts not stated by P.W.2 in-chief but for the accused borrowed Rs.1,30,000/- and issued cheques later and also executed pro-note. The same was elicited by the accused from his cross-examination. Regarding the pro-note, no doubt, the complainant did not speak anything, however, that does not belie the case of complainant but for at best exaggeration from the evidence of P.W.2 of as if there is a pro- note. Even P.W.2 in the cross-examination deposed that he was not scribe of the so- called pro note and was not even present for saying any pro-note executed and he does not even remember the cheque numbers and the cheuqes issued by the accused to complainant so also the respective dates of the cheques, one is for Rs.90,000/- and the other is for Rs.32,500/- given for the amount borrowed Rs.1,30,000/- and denied the suggestion that the accused has not issued the cheques and is not liable for the amount and no panchayat was held and he is deposing falsehood. However, again, it is suggested to P.W.2 by accused that he has to pay at Rs.13,000/- per month from the agreement, and he is deposing falsehood. There is another suggestion of P.W.1 is running tea stall and no capacity to lend. In fact, that suggestion also no way belie the case of the complainant as the Rs.1,30,000/- borrowal not only admitted in Ex.P.1 - cheques respectively but also, undisputedly, in Ex.P.6 letter and, undisputedly, Ex.P.5 - letter with own handwriting of accused. Even from this evidence, for the cheques rooted from the account of accused for the amounts due to the complainant and even for statutory notice, no reply was given by the accused, though burden of him to rebut under the reverse onus clause. There is nothing in rebutting the case of the complainant or rebutting the presumptions against the accused under reverse onus

clause and therefrom suffice to say that the accused having not even chosen to come to witness box much less to explain under what circumstances, if he did not issue cheques, admittedly, with his signature in favour of the complainant that cause filled by him through his son, went to the hands of the complainant. The arguments propounded before the trial court by counsel reflected in the trial court's judgment as if the tea boy stolen the cheques from shop of accused. Is it believable, if those cheques were lost and stolen by any tea boy without giving any complaint to police the accused kept quiet. That also substantiates the cheques were issued by the accused, they were rooted from the account, undisputedly, from the case of P.W.1 coupled with Exs.P.1 to P.6 in substantiating the same and from the presumptions under Section 118 and 139 of the Act also in favour of the complainant, that could not be rebutted by the accused under the reverse onus clause. Thus the trial court went wrong in acquitting the accused. The accused is therefore liable for conviction for the dishonour of cheques which are issued by the accused in favour of the complainant for the amounts due, for the legal enforceable debt. Accordingly, point No.i is answered.

13. In the result, both the appeals are allowed, the judgments in C.C. No.393 of 2003 and in C.C. No.394 of 2003 respectively passed by the Judicial Magistrate of First Class, Kodad, on 26.04.2007, are set aside. Accused found guilty for the offence under Section 138 of the Act. For appearance of the accused for hearing on sentence posted to 06.02.2015.

Dr. B. SIVA SANKARA RAO, J

Dt.30-01.2015

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<u>Dt. 20.02.2015</u>

14. Accused present and heard the accused on quantum of sentence and compensation/ fine. Heard the complainant also. Following the expression of 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 under go a jail term, there is little available as remedy for the holder of the cheque."*

15. 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, the accused is sentenced to undergo Simple Imprisonment till rising of the day and to pay a fine of Rs.1,50,000/- of which Rs.20,000/- shall go to the Government and the balance amount of Rs.1,30,000/- which the complainant is entitled towards compensation and the accused is directed to pay or deposit the same within one month from today. The accused since present and submitted to undergo the imprisonment till rising of the day in this Court same is recorded with no need for the lower Court to enforce the same further. Regarding the fine amount at the request of accused for payment of obtaining DD for Rs.1,30,000/- in the name of complainant and Rs.20,000/- as compensation to the State within fifteen (15) days, post on 06.03.2015 to hand over the same in open Court else to direct the lower Court to levy and recover u/s 421 Cr.P.C.

Dr.B.SIVA SANKARA RAO, J

Dt. 20.02.2015

knl

06.03.2015

16. As the amount is not deposited as directed by this Court on 20.02.2015 i.e., obtaining DD for Rs.1,30,000/- in the name of complainant and Rs.20,000/- as compensation to the State, the trial Court is directed to enforce u/sec.421 of Cr.P.C. by warrant for levy and recovery of the amount, if he failed to pay or deposit before the trial Court, on or before 20.03.2015.

Dr.B.SIVA SANKARA RAO, J

Dt. 06.03.2015

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