THE HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL APPEAL No.1618 of 2009

JUDGMENT:

The appellant-complainant seeks to assail the order of acquittal dated 28.06.2001 passed by the learned X Metropolitan Magistrate, Secunderabad, in the private complaint case C.C.171 of 1998 filed by said complainant under Section 138 of the Negotiable Instruments Act (for brevity 'the Act').

2) The unsuccessful complainant of C.C.No.142/2008 which is a case under Section 138 of Negotiable Instruments Act on a private complaint maintained against the accused based on Ex.P.2-cheque said to have been issued by the accused in favour of the complainant for Rs.75,000/- dated 28.02.2008 for the amount borrowed covered by Ex.P.1-hand letter executed by the accused, scribed by P.W.2 and also attested by P.W.3 and when the cheque presented for collection the same was returned dishonoured covered by Exs.P.3 and P.4 presentation and return memo and therefrom when complainant issued registered notice to the accused, the same was returned unclaimed under Ex.P.6 return cover and Exs.P.7 to P.12 are the address proof of the accused covered by study certificates, tax receipts for the address of accused, land recovery passbook issued by Share Micro Finance Limited in the name of accused and voters list and that the accused neither paid nor issued reply and therefrom maintained the complaint and the same after taken cognizance when accused was served with the summons appeared and examined under Section 251 Cr.P.C., he pleaded not guilty and in the course of trial on behalf of the complaint, three witnesses supra i.e. complainant besides scribe and attestor of Ex.P.1 hand letter were examined and Exs.P.1 to P.12 referred supra exhibited. After evidence of complainant, the accused was examined under Section 313 Cr.P.C. and he denied case of the prosecution and incriminating evidence against him. On behalf of the accused, he came to the witness box as D.W.1 and Exs.D.1 to D.21 are the

documents placed reliance of which Exs.D.1 to D.19 are the cheque bearing Nos.319661 to 319667 and 319669 to 319680 (Ex.P.2 cheque is in between covered by 319668) and Ex.D.20 is the voter identity election commission card and Ex.D.21 is the ration card issued by the Mandal Revenue Officer, Cherukupalli. It is after said evidence and on hearing both sides, the trial Court held that the accused could rebut the presumptions available against him by preponderance of probability and cannot be found guilty and acquitted by judgment dated 11.06.2009 in C.C.No.142/2008.

3) It is impugning the same, present appeal is filed with contentions of the complainant-appellant in the grounds of appeal as well as the oral submissions by the learned counsel in support of it that the trial Court went wrong in holding that there is an expert opinion saying Ex.P.1 handwritten receipt originally for Rs.5,000/- in figures, there is interpolation subsequently by adding ‘7’ making Rs.75000/- and used the cheque though there is no such legally enforceable debt or other liability covered by Ex.P.1 and there is a material alteration and even the expert is not examined, the same is not fatal as the Court can compare and thus said conclusions of the trial Court are erroneous and unsustainable, hence, to set aside the acquittal judgment of the accused and to convict the accused finding guilty for the offence under Section 138 N.I. Act. Whereas, it is the contention of the learned counsel for the respondent No.1-accused that against the double presumption, one is of the general presumption of innocence till guilt is proved and the other strengthened by the acquittal judgment of the trial Court; for this Court while sitting in appeal there is nothing to interfere with the reasoned conclusions of the trial Court and hence to dismiss the appeal.

4) Perused the material on record.

5) The parties are being referred as arrayed before the trial Court.

6) Now the points for consideration are :

1) whether the accused did not borrow Rs.75,000/- under

Ex.P.1, did not issue Ex.P.2 cheque for the same in favour of the complainant and there is a material alteration interpolating '7' before the numerical '5000' making '75000' and if not the trial Court's acquittal judgment is unsustainable and requires interference by this Court and with what observations?

2) To what result?

POINT No.1:

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 the 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***[1].

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.

10-(D). Further the provision for issuing notice within thirty days 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

10-(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.**

8(A) The Apex Court in ***NARAYAN MENON v. STATE OF KERALA***[2] 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(B) The presumption that further applied among clauses (a) to (g) of Section 118 of N.I. Act also, like the presumption under Section 139 of the Act, as per Section 4 of the Evidence Act, is a rebuttable presumption for which the burden is on the accused, however, to rebut the presumption 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 vide decision in ***KUMAR EXPORTS PVT. LTD. V. SHARMA CARPETS***[3].

8(C) Further, as per the expression of the Apex Court in ***RANGAPPA vs. MOHAN***[4] (3-Judges Bench) paras-9 to 15 referring t o ***Goa Plast's case*** (supra), ***KRISHNA JANARDHAN BHAT v. DATTATRAYA G. HEGDE***[5] 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***[6] 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 nonexistence of the presumption of fact and to that proposition, the earlier expression in ***BHARAT BARREL & DRUM MANUFACTURING COMPANY v. AMIN CHAND PYARELAL***[7] 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***[8] 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***[9] 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(D) It was also observed in para-15 that the accused appear to be aware of the fact that the cheque was with the complainant, furthermore 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 ***Chapala Hanumaiah Vs Kavuri Venkateshwarlu***[10] 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.

9) From the above propositions of law, coming to the factual matrix, Ex.P.2-cheque routed from the account of the accused is not in dispute, even Ex.P.2 cheque bearing No.319668 is co-relating to remaining unused cheque leaves 20 in number of the account of accused covered by Exs.D.1 to D.7 with serial numbers 319661 to 319667 and Exs.D.8 to D.19 with serial numbers 319669 to 319680. So far as the cheque is concerned, there is no interpolation of any figures or words of Rs.75,000/- and the signature of the accused in the cheque is also not in dispute. The only thing to be considered is whether the accused did not issue the cheque, if issued, is it proved that it was not issued for any legally enforceable debt or the loan liability from the burden is on the accused under the reverse onus clause as held by the three Judge's Bench expression of the Apex Court in ***Rangappa*** (referred supra) explaining the proposition in ***Krishna Janardhan Bhatt*** (referred supra).

10) From this now coming to the evidence on record, Ex.P.5 is the Registered legal notice issued by the complainant to the accused. The contents of the notice dated 05.03.2008 reads that the accused

borrowed Rs.75,000/- on 05.04.2007 for his business purpose, executed a hand letter (Ex.P.1) on the same day in favour of the complainant, to repay with interest at 24% per annum on demand and subsequently after several demands he issued the cheque bearing No.319668 dated 25.02.2008 (Ex.P.2) for said Rs.75,000/- and the same when presented for collection on next day i.e. 26.02.2008, returned dishonoured on 01.03.2008 (Exs.P.3 and P.4 presentation and return memos) and thereby demanded to pay within fifteen days after receipt of the notice, failing which to take recourse under the provisions of the Negotiable Instruments Act and make him liable for consequences. Ex.P.6 is the unclaimed return notice and the endorsement on Ex.P.6 shows it was on 06.03.2008 endorsed as 'enquiry' and on 07.03.2008 as 'intimation served'. The address on the notice Ex.P.6 is 'Dasari Murali Krishna S/o.Guruvaiah, vegetable wholesale & retail shop, Infront of Ravi Basava Pochamma Shopping Complex, Market Area, Tenali-1'. The postal endorsement is very clear that even intimated it was not claimed or received and therefrom returned.

11) Ex.P.5 notice sent by registered post is covered by registered receipt of even date 05.03.2008 and the enquiry and intimation was on 06.03.2008 and intimation served on 07.03.2008 and the postal endorsement as unclaimed was on 07.03.2008. Once intimation served and unclaimed, it is a sufficient service to draw presumption of due service under Section 27 of the General Clauses Act and Section 114 of the Indian Evidence Act. Further more, coming to the address of the accused mentioned on the notice is the correct address or not; the said notice returned as unclaimed and not as no such person resides there. The Exs.P.7 and P.8 are the School Study Certificates of the two sons of the accused Murali Krishna saying native of Tenali and the children are studying there at Haritha Bala Kuteer in the year 2008-2009. Ex.P.9 is the e-seva tax receipt in the name of the accused for the property tax paid at Tenali for the D.No.7-26-15/1.

Ex.P.10 is the Share Microfin Limited loan recovery passbook in the names of D.Prasanna and Murali Krishna (accused) mentioning their address at Market Area, Tenali, and the purpose of loan taken was for his vegetable business to repay with interest at 15% per annum. It shows the accused was doing business at Tenali in Tenali Market Area, which is a vegetable business from the above. Further, Exs.P.11 and P.12 are the voters list relevant pages of the voters list of 2009 for Tenali Assembly Constituency, Tenali Town showing the name of D.Murali Krishna S/o.Guruvaiah with serial no.500, D.No.7-26-15 of Tenali Town, Ganganammapet, Tenali Municipality, and name of D.Prasanna W/o.Murali Krishna also shown at the same D.No.7-26-15, Tenali Town with voter serial no.787. It is to say even the accused was voter of Tenali town with door number 7-26-15 and doing business in vegetables in the Market of Tenali, Tenali Town of Tenali Municipality that is established.

12) As referred supra, Exs.D.1 to D.19 are the unused cheques in the cheque book with 20 leaves of accused among which Ex.P.2 cheque is with serial number 319668 of the cheque book commencing from 319661 to 319680. The complainant in support of his version that the accused avoided the notice deposed with reference to the above documents as P.W.1 and also that the accused borrowed Rs.75,000/- and executed Ex.P.1 hand letter on 05.04.2007 and later in discharge of the same on demands, issued the Ex.P.2 cheque on 25.02.2008. In cross examination of P.W.1 by accused, he deposed that he is doing food catering business and accused is a friend of him for the past 15 years and accused is doing vegetable business and accused is resident of Tenali and is residing at Ganganammapet, Tenali Town, which is his own. He denied the suggestion that accused is a resident of Cherukupalli and not Tenali. In fact what is referred supra among Exs.P.7 to P.12 substantiated the factum of accused is a resident of Ganganammapet, Tenali Town. It is further deposed by P.W.1 that accused took the amount for his business purpose (vegetable

business) and Ex.P.1 was issued by accused and accused got written the same by his friend by name Kota Ravi and said Ravi owns jewellery shop and in his presence Ex.P.1 was got written by accused and except signature the remaining hand writing on Ex.P.1 is that of said Ravi. He denied the suggestion that accused put the date 05.04.2007 and the amount Rs.5000/- on Ex.P.1 and remaining contents were got filled by complainant with the help of said Ravi. Even that suggestion taken into consideration, P.W.2 is the scribe of entire contents including the words on Ex.P.1 letter of Rs.75000/- in the presence of accused. Apart from it, in the further cross examination P.W.1 deposed that date underneath the signature of accused was put by accused i.e. 05.04.2007. He further deposed that jewelry building owner (P.W.3 A.V.Muralidhar Rao) attested Ex.P.1, the accused put the signature in Telugu on Ex.P.1 and in English on Ex.P.2. He also deposed that accused got filled Ex.P.2 with said Ravi and except signature on said cheque-Ex.P.2, the remaining hand writing is that of Ravi P.W.2. P.W.1 further deposed in his cross examination that he got issue notice to the business address of accused and did not issue notice to the residential address of the accused. He deposed that the notice addressed to the accused at his place of business was not received by him. He denied the suggestion that the accused is working in a rice mill at Cherukupalli and he had no knowledge regarding notice. He also denied the suggestion that complaint is not maintainable. He also denied the suggestion that the accused lost Ex.P.2 cheque and taking advantage of finding of Ex.P.2, he (complainant) foisted the present case against the accused. He deposed that there is no documentary proof to show that accused is residing at Tenali. He denied the suggestion that accused received only Rs.5,000/- and Ex.P.1 is a fabricated one and he is doing money lending business. Even from the said suggestions of the complainant is doing money lending business, got means to lend.

13) P.W.2 K.Ravi Kumar got examined by P.W.1-complainant

deposed that he scribed Ex.P.1 letter on 05.04.2007 at the instructions of accused and after completion of scribing of the Ex.P.1 by him, the accused signed on it and received Rs.75,000/- from the complainant in his presence and subsequently on 25.02.2008 the accused got issued the cheque-Ex.P.2 for Rs.75,000/- to the complainant in discharge of said debt and as per the instructions of the accused he got filled the said cheque and after he filled the contents, accused signed on it and handed over the cheque to the complainant. In the cross examination, P.W.2 deposed that he is doing gold business and both PW.1 and accused are known to him and they are his customers and it is at the request of accused, he scribed the Ex.P.1 hand letter on 05.04.2007 at his shop and at that time payment was also made in his presence and in the presence of P.W.3 owner of the building who also witnessed the transaction and it is the accused that called him and except signature on Ex.P.1 remaining writing on Ex.P.1 is that of him (P.W.2) and the attestor signed after accused signed and P.W.1 complainant is not doing money lending business and denied the suggestion that P.W.1 is doing money lending business and the P.W.2 is one of his debtors. He denied another suggestion also that P.W.1 and himself are engaged in money lending business and accused borrowed only Rs.5,000/- from P.W.1 and numerical '7' was inserted before '5000' and made the figures as '75000' instead of '5000'. He also denied the suggestion that except the date 05.04.2007 and amount of Rs.5,000/- and also the date underneath the signature, remaining hand writing is that of him and said amount of Rs.5,000/- were written by accused and numerical '7' was added before '5' making it 75,000 though accused did not borrow the said amount or no transaction took place in his presence. It is not even suggested to P.W.2 by accused that he did not scribe Ex.P.1 in his presence or at his request. Therefrom, the evidence of P.W.1 is corroborated by evidence of P.W.2 of what the accused borrowed from the complainant was Rs.75,000/- and not Rs.5,000/-

14) P.W.3 is the attestor. Even in the cross examination of P.W.3 by accused, he deposed that he is doing gold business and accused asked him to attest Ex.P.1 and accused used to come even to the P.W.2 frequently and thereby known to him also and the accused is residing at Tenali and doing vegetable business though he cannot say the place of residence of accused and he does not know whether the accused is residing at Arumbaka near Cherukupalli and other details of accused and he does not know whether PWs 1 and 2 together are doing money lending business. He deposed that his shop was situated by the side of shop of P.W.2 and by the time of the transaction under Ex.P.1 the accused, PWs 1 and 2 and himself were present and after putting signature by accused he attested and denied the suggestion of after putting of signatures, P.W.2 drafted Ex.P.1. Even from these suggestions drafting of Ex.P.1 by P.W.2 is in the presence of complainant-P.W.1 and P.W.3 attestor to it and the accused that also substantiates the evidence of PWs 1 to 3 from said suggestions by accused of the said hand letter was executed by accused by receiving the amount. P.W.3 further deposed that accused put the figures as to the amount and denied the suggestion that no transaction took place in his presence and he is deposing falsehood. In fact, this suggestion is running contra to the earlier suggestion of after putting their signatures P.W.2 drafted there the Ex.P.1. Exs.P.11 and P.12 are exhibited through P.W.1 by recall on 19.05.2009 which are voter list referred supra saying the accused and his wife are residents of Tenali Ganganamma street.

15) In the cross examination further P.W.1 deposed that accused is residing at the said door number referred in Exs.P.11 and P.12 along with his wife and he issued the notice to said address of accused and witness again says to the shop of accused at Tenali and the same is the residential address of the accused in Exs.P.11 and P.12 is furnished by them and also the shop address for the loan availed and denied the suggestion of by the time of filing of the

complaint, the accused was residing at cherukupalli and not at Tenali. Even from said evidence, the accused did not dispute said Tenali address of him and doing business at Tenali but for saying residing at Cherukupalli. To say that the accused is resident of Cherukupalli and not at Tenali, the accused placed reliance upon only the study certificates issued by St.Joseph Public School, Cherukupalli, of the year 2007-2008 of his two sons and the voter identity card of accused covered by Ex.D.20 saying in the year 2003 January, he was shown as voter of Cherukupalli with door No.6-46B and the same was even of the year 2003 and not of 2007-2008. There is nothing from the accused among Exs.D.1 to D.21 to show that he is residing at Cherukupalli by the time Ex.P.5 notice issued and returned unclaimed under Ex.P.6 i.e. during March, 2008. In fact, the Apex Court in ***C.C.Alavi Haji vs. Palapatty Muhammed***[11] held that the presumptions under Section 27 General Clauses Act and 114 Evidence Act of due service of the statutory notice issued under Section 138 of the

N.I. Act applies and it is for the drawer where he claims as not received. Once the notice sent by post even not received having received copy of complaint with summons, he can within 15 days of receipt of summons in the criminal case make payment of the cheque amount and on that basis submit to the Court that complaint be rejected as the purpose of the notice is to make payment. If not, he cannot contend that there was no proper service of notice. Having regard to the above, the accused cannot dispute service of notice pursuant to the above expression of the Apex Court (three judges bench) in ***Haji case*** (referred supra).

16) Coming to the so called Ex.P.2 cheque issued by the accused, in fact as held in ***Rangappa case*** (referred supra)

para 15 and also in ***Chapala Hanumaiah case*** (referred supra), the non-giving of reply notice leads to adverse inference against the claim of accused and substantiates the case of the complainant. Apart from it, in this case, the evidence of PWs 1 to 3 is consistent regarding the accused borrowed from the complainant-PW1 of Rs.75,000/- in their presence and issued the Ex.P.1 receipt as discussed supra, the scribing and giving of Ex.P.1 in the presence of PWs 1 to 3 would establish so far as borrowal of Rs,75,000/-. Before coming to Ex.P.2 cheque even coming to Ex.P.1 borrowal what accused stated is he received only Rs.5,000/- and before number '5' number '7' was added making it '75000'. In fact, there are not only figures but also numerical writing and in Telugu it is written as '____' in words. As above evidence is clear that Ex.P.1 receipt was scribed by P.W.2 in the presence of accused and it is thereafter he signed by putting the date, his version of only writing Rs.5,000/- and putting date and the remaining were later written even taken for argument sake, it may not be correct, when he borrowed Rs.5000/- and instead of 75000/- he mentioned only Rs.5000/- and '7' is added and written 75000/- in words also in Telugu; then there is no possibility much less to say there is any material alteration and the defence of the accused that he borrowed only Rs.5000/- and not Rs.75000/- is untenable.

17) Leave it as it is, the Ex.P.2 cheque was admittedly issued from the account of the accused. His defence in suggestion to P.W.1 is that he lost Ex.P.2 cheque and the same was misused. Having of the other cheque leaves, it is impossible to believe he lost the particular middle cheque leaf out of the cheque book leaves which are filed by him and marked as Exs.D.1 to D.19 and thus it is impossible to believe his version of his signed cheque lost from the middle of the cheque book leaving while other leaves are there with no signatures and even un-used according to him from Exs.D.1 to D.19 referred supra. Apart from it, if really he lost the signed cheque, he could have issued a letter to the bank to stop payment or given a police complaint and could not have kept quiet.

18) Even intimated, he failed to receive the registered legal

notice, since unclaimed from the sufficient service and the non-giving of reply also adds strength to the case of the complainant and doubts the credibility of such version of the accused. From this coming to the evidence of accused, his other version is that he borrowed Rs.5000/- and not Rs.75000/- that may not be given credence as referred supra and in his cross examination he deposed that his sons are studying in Ganganammapet, Tenali, Haritha Bala Kuteerthat admission is sufficient to say he is also resident of Tenali as minor sons are studying at Tenali and the so called certificates of sons studying at Cherukupalli covered by Exs.D.22 and D.23 are proved false therefrom also and for his saying that he previsously worked as a clerk in a Rice Mill there is no documentary evidence much less to say he is not doing vegetable business and even in his affidavit he did not mention that working as a clerk but alleged a private employee for which also there is no basis and in the cross examination he further deposed that he is doing paddy business. Further he deposed that his father and paternal grand fathers used to do vegetable business at the vegetable market and they got property at Ganganammapet, Tenali and the house at D.No.7-25-16 belongs to him that fell to his share. The same also substantiates the complainant's case of accused is resident of Tenlai and doing vegetable business at Tenali. He also deposed that he took Rs.20,000/- from Share Micro Finance, Tenali, in 2007 and that cover also shows his address as doing vegetable business at Tenali. That also substantiates the registered notice address from his admission of Ex.P.10-loan recovery passbook as doing vegetable business at Tenali Market with shop.

19) Coming to Cherukupalli address, he deposed that his brother-in-law i.e. sister's husband, was MPTC and though he denied the suggestion that they also created another voters identity card list there to caste their votes to his brother-in-law; same probablises from above evidence. He denied the suggestion of having received Rs.75000/- and executed the Ex.P.1, deposing falsehood as if

received only Rs.5000/- or there was interpolation by adding ‘7’ before ‘5’. Coming to his version of he lost Ex.P.2 cheque leaf, in his cross examination he deposed that he can not say when he lost Ex.P.2 and he did not report to Police and not even intimated to the bank, though denied said version is false version introduced having issued the Ex.P.2 cheque duly filled through P.W.2 for discharge of the amount due to the complainant. Thus, Ex.P.2 cheque issued by accused to the complaint from his account is proved for the said amount of Rs.75,000/- that also proved from the evidence of PWs 1 to 3 including from the said cross examination version of him and also from non-giving of reply. In this back ground, no credence can be given to the version of the accused of what he borrowed Rs.5000/- and not Rs.75000/- under Ex.P.1 and as to ‘7’ is interpolated before ‘5’. In fact, as discussed supra, even for argument sake, he mentioned only Rs.5000/- and not mentioned ‘7’, even it is written by PW.2 where there is a clear wording of Rs.75000/- in Ex.P.1 that is not the case of the accused that it was subsequently written, the said version of accused of interpolation or material alteration is false. The trial Court totally ignored these important aspects. Thus, the acquittal judgment of the trial Court is unsustainable as it is proved from the evidence of the complainant that the accused borrowed Rs.75,000/- under Ex.P.1 and when issued Ex.P.2 cheque undisputedly routed from his account with his signature in drawing the presumption that it was issued for legally enforceable debt. In view of the expression of the Apex Court in ***Rangappa (referred supra)*** holding that the contra expression in ***Krishna Janardhan Bhat (referred supra)*** of no presumption under Section 139 is not correct. Thus, the accused is found guilty. Accordingly, the Point No.1 is answered.

POINT No.2

20) In the result, the acquittal judgment of the trial Court is set aside and the accused is found guilty for the offence punishable under

Section 138 of N.I. Act.

21) For hearing of the accused on quantum of sentence posted to dt.22.12.2014.

Dr. JUSTICE B. SIVA SANKARA RAO

sur

23.01.2015

Evenafter affording opportunity given to the accused failed to attend, hence taken as heard. Following the expression of the Apex Court in ***SOMNATH SARKA Vs. UTPAL BASU MALLICK***[12] 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."*

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.1,00,000/- of which Rs.10,000/- shall go to the Government and the balance amount of Rs.90,000/- which the complainant is entitled towards compensation and the accused is directed to pay or deposit the same within four weeks from the date of receipt of copy of this Judgment. It is thereby directed the learned Magistrate to secure the presence of accused on warrant to undergo the sentence in that open Court and also to cause recover the fine amount under Section 431 read with Section 421 Cr.P.C by issuing warrant levying the fine with default sentence of three months Simple imprisonment as per Sections 65 to 68 read with Section 53 (6) IPC.

____

Dr.B.SIVA SANKARA RAO, J

23.01.2015

knl

---

[1] AIR 2003 SC 2035

[2] (2006)3 SCC 30

[3] (2009) 2 SCC 513

[4] AIR 2010 SC 1898

[5] AIR 2008 SC 1325

[6] AIR 2001 SC 3897

[7] AIR 1999 SC 1008

[8] AIR 2002 SC 182

[9] AIR 2008 SC 2898

[10] 1971 (1) An.W.R. 65

[11] 2007 (6) SCC 555

[12] 2014 (1) ALT Crl.1 145