THE HON'BLE SRI JUSTICE B. SIVA SANKARA RAO

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CRIMINAL APPEAL No. 1138 of 2006

JUDGMENT:

The appellant-complainant (K.S.R. Murthy) seeks to assail the acquittal judgement in favour of the accused (Goli Upender Reddy) dated 26.08.2004 passed by the learned Special Judge for Economic Offences-cum-VII Additional Metropolitan Sessions Judge, at Hyderabad in Crl.R.P.No.114 of 2004 by reversing the conviction judgement dated 02.04.2004 passed by the learned VI Metropolitan Magistrate, Hyderabad, in the private complaint case C.C.No.370 of 2000 for the offence punishable under Section 138 of the Negotiable Instruments Act (for brevity 'the Act').

2. The case of the complainant was that accused used to visit the office of the complainant where he used to work as a Junior Advocate. The accused approached the Senior Counsel of the Complainant for financial assistance to avoid auction sale of his mortgaged house. On approaching of the accused and his Senior Advocate to extend financial assistance, the complainant issued cheque for Rs.22,000/- in favour of the accused and the accused encashed the same. Similarly, the complainant issued another cheque for Rs.22,000/- on 28.10.1999 to the accused and the same was encashed by the accused. On demand by the complainant for repayment of the amounts, the accused issued cheque bearing No.20111 dated 10.11.1999 (Ex.P1) for Rs.44,000/- drawn on Charminar Cooperative Bank Limited, Saidabad Branch towards discharge of the said debt. The complainant presented the cheque on 15.03.2000 for realisation, but the said cheque was returned dishonoured for reason "insufficient funds" along with a cheque return memo (Ex.P2) dated 16.03.2000. The complainant got issued a legal notice on 20.03.2000 (Ex.P3). Ex.P4 is the postal receipt under certificate of posting. Ex.P5 is the return cover. Exs.P6 to P10 are account opening form, copy of ledger, cheque book A/c No.1586, true copy extract of cheque bearing No.280611 and true copy of extract of cheque bearing No.280601

respectively. The accused 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 P10. On behalf of the accused, the accused was examined as DW1, and got marked Ex.D1 – certified copy of plaint in O.S.No.2 of 2002, and Ex.D2 – Loan application form of Laxmi Narasimha Swami Cooperative Urban Bank.

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.

6. Appreciating the evidence, both oral and documentary, the trial Court held the accused guilty and convicted and sentenced him to undergo imprisonment for three months. It was on revision by the accused impugning the trial Court`s conviction judgement, the lower revision 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/complainant are that: the lower revision 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 revision 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, and the lower revision Court ought to have seen that once the signature on the cheque is accepted by the accused, automatically the presumption comes into effect, and the lower appellate Court ought to have seen that Exs.P9 and P10 clearly establish the legally enforceable debt, and hence to allow the appeal by setting aside the acquittal judgement of the lower revision Court and to restore the conviction judgement of the trial Court.

8. The learned counsel appearing for the respondent-accused, on the other hand, represents that the lower revision 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 besides no merits of the appeal the appeal against revision won't lie, 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 revision 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 revision Court in its acquittal judgement reversing the trial Court`s conviction judgement, and if not the same is unsustainable to set-aside subject to maintainability of the appeal or any power to take it as proceeding under Section 482 Cr.P.C. and with what findings?
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> *(2). To what result?*

12. In re. Point No. 1:

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(A). 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-(B). 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 (C). 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(D). <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(E). Availability of alternative remedy is no bar to the prosecution

12(F). 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(G). **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(H). 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:
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> 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)----"
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> 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 cheque dated 10.11.1999 for Rs.44,000/- which is the cheque routed undisputedly from the account of the accused. It is the case of the complainant that the accused was a client of the senior advocate by name Subramaniam to whose office the complainant was attached as junior advocate and the accused was a client in a mortgage suit where the property pursuant to the mortgage decree brought to sale and to avert the sale, the accused wanted money from the complainant and the senior advocate also suggested for the same to provide financial assistance to the accused and accordingly the complainant lent Rs.22,000/- to the accused by cheque and another cheque for Rs.22,000/- and the accused encashed both the cheques including the last one dated 28.10.1999 and it is in discharge of the amounts for the demands, the accused issued Ex.P1 cheque dated 10.11.1999 for Rs.44,000/- from his account with Charminar Cooperative Bank Limited, Saidabad branch. As per the complainant, when the cheque was presented on 15.03.2000, the same was returned dishonoured on 18.03.2000 for insufficiency of funds vide Ex.P2 cheque return memo and he issued Ex.P3 legal notice dated 18.03.2000 vide certificate of posting-Ex.P4 and the registered letter returned is Ex.P5, the accused since managed, and for no payment made and no reply given, is liable for the offence under Section 138 of the Negotiable Instruments Act, 1881.

PW2 is the Branch Manager of Charminar Cooperative Bank Limited, Saidabad Branch, where the accused got the account; and PW3 is the Record Keeper in Prudential Bank, Chikkadpally Branch, wherefrom the cheque when presented was returned dishonoured. Those are covered by Exs.P6-statement of account, Ex.P7-copy of ledger and Ex.P8-cheque book, Account No.1586 with cheque book facility, Ex.P9-true copy of the cheque (Ex.P1) and Cheque No.280611 to show the cheque issued by the complainant in favour of the accused was encashed. The defence of the accused is that he did not receive any amount and did not receive any cheque from the complainant and nothing due and there is no legally enforceable debt.

PW3 is a Record Keeper in the Presidential Bank, where the complainant got the account. PW3 deposed that two cheques Exs.P9 and P10 were issued by PW1 to the accused and the same were honoured resulting in payment of cash and in the cross-examination of PW3, it was elicited by the accused that those two cheques are bearer cheques. In the cross-examination, PW3 deposed that those two cheques bear attestation of the accused on its reverse side to prove that their cheques were encashed by the accused. The accused as DW1 came to witness box and supplied certified copy and loan application form of Laxmi Narsimha Swamy Cooperative Urban Bank of which the plaint copy shows O.S.No.2 of 2002 was filed on the file of Senior Civil Judge, Bhuvanagiri, which is marked as Ex.D1 while examining the accused would clearly show that PW1 deposed falsehood since the said witness has clearly admitted that on 01.07.1999 the said promissory note was executed and whereas the cheque i.e. Ex.P1 bears the date as 10.11.1999. It is a suit between complainant and the accused herein and the complainant averred in the plaint that the accused executed a demand promissory note for Rs.90,000/- on 01.07.1999. It is the suggestion to PW1 by the accused that he in collusion with the counsel of the accused who is senior to the complainant, by name Subramaniam, cause opened the bank account in Charminar Cooperative Bank and ultimately deposited the blank cheque issued by him by fabricating the same which is Ex.P1 and the cross examination of PW2 in this regard show said advocate Subramaniam introduced the accused herein for opening of the said account. It is the contention of the accused therefrom that there is manipulation and misuse. The trial Court held that there is nothing from advocate introducing the accused in opening his bank account as a relation to the disbelieving of the accused issued the Ex.P1 cheque in favour of the complainant, from also the said pronote plaint averments, and that the accused did not even give reply to the notice issued by the complainant. It is therefrom the trial Court convicted the accused whereas the first appellate Court in reversing the same observed that there is showing encashment of two cheques issued by complainant in favour of the accused each for Rs.22,000/- and Ex.P1 is shown issued in favour of the complainant by the accused drawn from his account. The same when presented returned dishonoured followed by legal notice that was returned unserved. However, coming to the defence of the accused, it is said advocate Subramaniam introduced the accused in opening the bank account in their branch and said Subramaniam is senior to the complainant and also the counsel for the accused in the case. And the evidence of PW1 shows that they played personal role in opening the account in the name of accused. PW2 stated that there are only two transactions in the account opened by the accused; one is covered by the cheque case and other is in reference to the closure of account. It is but for the two transactions, nothing more that creates doubt regarding the genuineness of the transactions and the evidence of PW3 shows that Exs.P9 and P10 two cheques that were issued by the complainant in the name of accused were encashed. But they are not bearer cheques and there is nothing to show who encashed and thereby in the circumstances it cannot be said there is legally existing debt due by the accused to the complainant and there is misconduct. It is also observed that the accused came to the witness box as defence witness and there is no application under Section 315 Cr.P.C filed by the accused seeking permission and O.S.No.2 of 2002 filed before Senior Civil Judge, Bhuvanagiri, for recovery of the amount based on pronote dated 01.07.1999 by complainant against the accused and if that is taken into consideration it shows total Rs.90,000/- was the amount lent by the complainant to the accused. PW1's evidence shows that he has advanced an amount of Rs.90,000/- to the accused by way of instalments on specific dates and of amounts. However, he failed to furnish the specific dates and amounts lent to the accused, but for stated that he paid the amount of Rs.90,000/- in the months of August, 1999 and September, 1999. PW1 was cross-examined on the amount covered by the two cheques issued in favour of the accused and all that creates any amount of doubt regarding the lending, and giving of Ex.P1 cheque for the same by the accused. It is also observed by the lower revision Court that a perusal of the returned registered cover of the notice issued to the accused shows from the cover that, there is no door number with street number mentioned. As seen from Ex.D1 that he got issued a legal notice addressed to his place of employment address returned with the reason 'no such person' even though he is very much working in the printing press. The address in the Ex.D1 plaint shows that the defendant is working in the printing press, Kalasiguda, Hyderabad, that shows the Ex.P5 registered notice cover not addressed to the place where the complainant is working. It was instead, the Ex.P5 was addressed to Bhuvanagiri address without mentioning the door number and street number, and thereby there is no service of notice which is mandatory. Even there is nothing to presume constructive service or presumption of service and it is the duty of the complainant to establish due service and thereby for no legal notice statutorily required, it is a fit case for acquittal.

Now coming to correctness of said conclusions of the lower revision Court, in fact the record shows that the address of the accused is Bhuvanigiri village, Bhuvanagiri mandal, Nalgonda district. Even in the complaint, at the same address he is shown residing at Meena Nagar, Bhuvanagiri, Nalgonda district. It is not the case of the accused that he is not residing at Bhuvanagiri. As per the Apex Court's expression in **C.C.ALAVI HAJI** (3-judges bench), in case notice sent under Section 138, proviso (b) and (c) of the Negotiable Instruments Act, not served; when the complaint averments show notice sent to the correct address that is suffice to say compliance of the mandatory requirement and it is for the drawer to rebut the presumption of service by showing he had no knowledge of the notice or address mentioned is incorrect and even then, the course open to the drawer whether he claims not received the notice sent by post, after received copy of complaint case with summons, he can within 15 days of receipt of summons make payment of the cheque amount and on that basis can submit to the Court that the complaint be rejected. Without that, he cannot contend that there was no proper service of notice.

It is by virtue of the same, the accused cannot take any defence apart from lower revision Court went wrong in its observation as if no statutory presumption of service of notice. Certificate of posting service even there with proof of sending by certificate of posting. Further, when the accused admittedly is resident of Bhuvanagiri. Now coming to the other aspects, once there is evidence of PW3 showing Ex.P9 and P10 cheques issued by the complainant in favour of the accused and that was for the amounts borrowed from him and that were shown encashed and there is signature on the reverse side of the cheques also of the payee in proof of encashment deposed by PW3 even those were bearer cheques it is for the accused to explain why he signed on the reverse side of the cheques for encashment. Once these two cheques were encashed by the accused covered by Exs.P9 and P10, there is nothing for the lower revision Court to say merely because these are the bearer cheques that cannot be said encashed by the accused. In fact when the accused signed on the reverse side of the cheque for the contents received it proves encashment by accused and then it is for the accused to call for the slip as to who presented the cheque and who received the amount, if somebody on behalf of the payee of the cheques received and the accused did not. Once that is the consideration for giving of Ex.P1 cheque for Rs.44,000/- by the accused in favour of the complainant, it is for the accused to rebut the presumptions under Sections 139 and 118 of the NI Act. For that what all he speaks is there is a suit for recovery of pronote debt between the complainant and accused covered by Ex.D1 in O.S.No.2 of 2002 and the amount therein is Rs.90,000/- and that is not correlating to the present case. That is in the evidence of complainant PW1 in his cross-examination explaining that the cheque amount is also part of that. If that is the case, even the suit is decreed and the cheque offence is proved and it is only in the course of recovery that can be sought for adjustment. Even it is shown by the accused that his account is cause opened by Advocate Subramaniam in opening the account and complainant happened to be Junior Advocate of Subramaniam and when it is the case of complainant that for the amount due by the accused for payment. For these, the lower revision Court's judgment is unsustainable to reverse the trial Court judgment. In fact the trial Court convicted the accused to undergo three months simple imprisonment by giving set-off for the period already undergone against which only a revision is maintainable as per Section 376(b) Cr.P.C. which says, "*notwithstanding anything contained in Section 374 that against Metropolitan Magistrate Courts, appeal lies to the Court of Session under Section 374(3) where the sentence of imprisonment is for a term not exceeding three months or fine not exceeding Rs.2,000/- or both, no such appeal lies in such petty cases and only revision is the remedy and it is therefrom the lower appellate Courts the revision CRP 114 of 2004 filed and maintained."* Once such is the case to maintain appeal under Section 378(4) it speaks that it is an appeal against the order of acquittal passed in any case instituted upon complaint and the application made today by the complainant if the High Court grants Special Leave to Appeal from such order of acquittal. Here there is no difference between lower revisional Court's Judgment to lower appellate Court's Judgment in maintaining appeal under Section 378(4) as contended by the counsel for the complainant/appellant (revision respondent) as the bar like one contained under Section 397(3) is not there to maintain the appeal under Section 378(4) apart from Section 378(4) to be read with Section 378(1) & (3) Cr.P.C. Further, if the appeal even otherwise not maintainable, the same can be taken as a proceeding under Section 482 Cr.P.C. and accordingly taken to subserve the ends of Justice within the inherent powers of this Court.

Having regard to the above, the maintainability of the proceeding cannot be imputed since taken otherwise under Section 482 Cr.P.C. From that, for there is no illegality or impropriety in the trial Court's Conviction Judgment for the lower revision Court by sitting against and in reversing the Conviction Judgment of the trial Court, went wrong in acquitting the accused for the reasons supra, the acquittal Judgment is set aside and the Conviction Judgment of the trial Court is restored, but for to modify the sentence.

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."* 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 by restoring the trial Court's Conviction Judgment, however by modifying the Sentence of three months Simple Imprisonment, to undergo Simple Imprisonment till rising of the day (by giving set off if undergone under Section 428 Cr.P.C) and to pay a fine of Rs.75,000/- and out of which an amount of Rs.65,000/- shall be paid to the complainant towards compensation and the remaining amount of Rs.10,000/- has to be paid towards fine to the State. Accordingly the point is answered.

POINT No.2:

In the result by setting aside the acquittal Judgment of the lower revision Court and by restoring the Conviction Judgment of the trial Court, the appeal is allowed, but however the sentence of 3 months Simple Imprisonment is modified to sentence till rising of the day (with right to set off) and to pay fine of Rs.75,000/- of which Rs.65,000/- as compensation to the complainant and remaining Rs.10,000/- to the State. It is thereby directed the learned Magistrate to secure the presence of accused on warrant to undergo the sentence in that open Court (if not entitled to set off) and also to cause recover the fine amount under Section 421 of Cr.P.C. by issuing warrant levying the fine, and if the accused failed to pay within three months from today. Further, the accused 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 needless to say that as civil suit based on Ex.D1 pronote is decreed in favour of complainant as plaintiff against the accused as defendant since exhibited and marked for reference as Ex.P11 in the appeal and in the event of recovery of the amount in the criminal case covered by the present appeal under Section 421, of the Rs.65,000/- compensation concerned, that is to be adjusted (for payment of balance) by civil Court recording part satisfaction under Order XXI Rule 1 and 2 CPC after such recovery. Otherwise the enforcement and recovery under Section 421 Cr.P.C. by the Magistrate is not a bar for that civil Court decree under execution shown if any pending.

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

Dr. B. Siva Sankara Rao, J

23rd January, 2015

KSM