THE HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL APPEAL No.980 of 2008

JUDGMENT:

The appellant-complainant by name Marri Sreedevi seeks to assail the judgment of acquittal dated 05.07.2008 passed by the learned Judicial Magistrate of First Class, Dhone, Kurnool district in the private complaint case C.C.140 of 2005 filed by said complainant against the accused persons 1 and 2 (respondents 1 and 2 herein by names Mahaboo Khan and L.Fazulla Khan) for the offence punishable under Section 138 of the Negotiable Instruments Act (for brevity 'the Act').

2. The facts before the trial Court are that both the accused (A.1 and A.2) borrowed an amount of Rs.2,00,000/- on 03.01.2005 with interest at 24% p.a. from the complainant agreeing to repay the same within one month and having failed to repay, the accused persons issued Ex.P.1 cheque bearing No.A/RGB.No.0375828 for Rs.2,00,000/- dated 29.03.2005 in favour of the complainant to discharge their liability and on the same day when the complainant presented the cheque in Rayalaseema Grameena Bank, Dhone, Kurnool district, the same was returned dishonoured on the reason of ‘insufficiency of the funds’ covered by Ex.P.2 cheque return memo, that the complainant issued Ex.P.3 legal notice, dated 04.11.2005 to the accused persons informing dishonour of cheque with a demand to repay the amount but the said covers are managed to be returned unclaimed on 26.04.2005, which constrained the complainant to file the complaint.

3. The accused persons appeared before the Court pursuant to the summons and after supply of case copies under Section 207 of the Code of Criminal Procedure, when questioned on substance of accusation under Section 251 of the Code of Criminal Procedure (for brevity, “The Cr.P.C.”), they pleaded not guilty.

4. On behalf of the complainant during the course of trial besides himself as PW1 cause examined PW2 D.Baban, Bank Manager, and got marked Exs.P.1 to P.3 supra including Ex.P.4 Postal covers and Ex.P.5 postal receipts and on behalf of the accused persons A.1 Mahaboob Khan examined as D.W.1 and got marked Ex.D.1 joint account No.3403 certificate, Exs.D.2 and D.3 Nativity certificates.

5. After the closure of on complainant side, the accused persons were examined under Section 313 of the Cr.P.C. for which they denied the incriminating material put to him.

6. It is from the said evidence, the learned Magistrate with findings that the complainant could not prove her lending amount of Rs.2,00,000/- to the accused persons jointly which is enforceable by law and in discharge of said liability the accused persons have issued the Ex.P.1 cheque in favour of the complainant-P.W.1 and once the complainant failed to establish that she lent money to the accused persons, there is no necessity to go any further into the details service of legal notice to the accused persons with regard to its service or not and thereby acquitted the accused persons.

7. It is attacking the said findings, the present appeal is filed with the contentions in the grounds that the acquittal judgment of Trial Magistrate is contrary to law, that the Trial Magistrate failed to appreciate the respective contentions of the parties and evidence adduced thereon, the trial Magistrate went wrong in acquitting the accused persons, that there are presumption in favour of the complainant and against the accused that could not be rebutted, and thereby sought for setting aside the acquittal judgment and allow the appeal finding the accused persons guilty. Learned counsel for the appellant-complainant reiterated the same during the course of hearing.

8. The contention of the learned counsel appearing for the

respondent-accused persons, on the other hand, that against the double presumption one under general principles of law that is confirmed by acquittal judgment supported by reasons for this Court while sitting in appeal there is nothing to interfere. Hence, to dismiss the petition.

9. Perused the material on record. The parties are hereinafter referred to as they are arrayed in trial Court for the sake of convenience.

10. Now the points that arise for consideration are:

(1). Whether the accused persons did not issue the cheque in favour of the complainant for discharge of legally enforceable debt to make liable for the offence under Section 138 of the NI Act and if so, the trial court's acquittal judgment is unsustainable?

(2). To what result?

Point No.1:

11-(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.

11-(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].

11-(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.

11-(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.

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

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

11-(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.**

12-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".

12-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].

12-C. Further, as per the expression of the Apex Court in RANGAPPA vs. MOHAN[4] (3-Judges Bench) paras-9 to 15 referring to 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 non-existence 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.

12-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, 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**[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.

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. As laid down in C.C. **Alavi Haji v. Palapetty Muhammed**[11], a notice sent to the regular address of the addressee, there is a deemed presumption and even to dispute the notice if the accused paid the amount after service of summons that can be constituted a proper payment not to continue the prosecution. It is not the case of the accused persons herein. Even coming to the notices sent to the addresses of the accused covered by Ex.P.3 notice as per Ex.P.5 postal receipt and Ex.P.4 returned cover, in the cross-examination of P.W.1, she deposed that A.1 is friend of her husband and they(A.1 and A.2) are the brothers and mother of accused also telephoned to her for lending of the amount to the accused and she stated that she did not issue any notice to the accused between 03.01.2005 to 29.03.2005. She deposed that she does not know the addresses of the accused. She deposed that as per the address given by her husband to their advocate, she cause issued the notices and denied the suggestion that the address furnished by her husband to her advocate to issue Ex.P.3 notice is wrong address or the legal notice is not sent to them according to law. Before coming to the other contents of the cheque even coming to the evidence of A.1 as D.W.1, he claimed that he is a resident of Door No.17/7 Pathapet, Dhone since 2002 and P.W.1 is wife of one Govindarajulu and said Govindarajulu is his friend and a political leader. He deposed that he discontinued his degree course. Opposite to his house, there is a house Door No.16-76 that also belongs to him and his mother and brothers who are residing therein and denied the suggestion that house No.17/7 is only the office room of him. The notice issued under Ex.P.3 covered by Ex.P.4 returned cover is to the address of 16-76, Pathapeta, Dhone. He deposed that he does not know whether it is returned as "unclaimed". From this, it is crystal clear that the house No.16-76 is also that of him, his mother and brother. When such is the case, the notice is duly issued to the address and the same from the endorsement shown unclaimed and returned after intimation, presumption of due service can be drawn under Section 27 of the General Clauses Act and under Section 114 of the Indian Evidence Act, and also held by the Apex Court in Alavi Haji (supra). It is not even the case of the accused that they are ready to pay much less paid after service of summons. Thereby they cannot dispute the correctness of the legal notice issued after dishonour of the cheque by intimating the dishonour and demanding to pay.

13-b. Now coming to Ex.P.1 cheque whether issued by the A.1 and A.2-accused persons in favour of the complainant-P.W.1 for the amount due or not is concerned, as referred supra from the evidence of P.W.1 including cross-examination of her and evidence of A.1 –D.W.1, husband of P.W.1 is a friend of A.1 and P.W.1 also deposed that mother of A.1 and A.2 also asked her for lending money to the accused persons from which she lent on 03.01.2005. Coming to issuance of Ex.P.1 cheque on 29.03.2005 for that amount by the accused persons concerned, no doubt, they denied borrowal of the amount on 03.01.2005 and issuance of Ex.P.1 cheque on 29.03.2005. D.W.1 claims that he is customer of Rayalaseema Grameena Bank, Dhone with account No.9403 which is the joint account of him, his brother and mother. He claimed that the bank did not issue any cheque book to them and Ex.P.1 cheque is not issued by them and the signatures are not that of them. In the cross-examination, he stated that bank officials issued certificate in support of the said account which reveals that it is the joint account of him, his brother-A.2 and mother which is covered by Ex.D.1. Exs.D.2 and D.3 are the nativity certificates of him and his brother. It is admitted that, the Ex.D.1 does not contain any fact of non-issuance of cheque book and account with no cheque book facility. In the further cross-examination, D.W.1 denied the suggestion that they borrowed the amount and issued the cheque from their joint account and now trying to avoid liability. In the P.W.1's cross-examination, it is elicited that there is petrol bunk and also own lands with income regarding means of P.W.1 and her husband. The joint account of accused persons and their mother covered by Ex.D.1 as account No.3403 of Rayalaseema Grameena Bank when not in dispute and that shows the cheque routed from that account they opened along with their mother and the evidence of P.W.2-Bank Manager also corroborates the evidence of P.W.1, in this regard from what he deposed that when he worked in Rayalaseema Grameena Bank, Dhone, the complainant is customer of the bank and the accused persons 1 and 2 are also customers of the bank and the Ex.P.1 cheque pertains to their branch and the same was returned dishonoured for the "funds insufficient". In the cross-examination, he deposed that he is deposing from records and that the date of issue of cheque, its presentation and dishobour were on the same day on 29.03.2005 which is for 2 lakhs and they used to verify the cheque for huge amount before return, that as there are no sufficient funds, it is as usual returned and in case of return of cheques, they do not bother to verify the signatures of the drawers and he does not know whether A.1 and A.2 or who among them delivered the Ex.P.1 cheque to the complainant and he cannot say whether the accused issued the cheque or not. There is nothing from the P.W.2's cross-examination also that the Ex.P.2 cheque is not routed from the account of the accused with the

bank where P.W.2 was manager. When it is shown issued and routed from

the account of accused persons, it is for them to dispute genuineness of the signatures on the cheque. When the complainant deposed that it is the accused issued the Ex.P.1 cheque and that was shown routed from their account, it is for them to establish the signature as forged one since P.W.1 deposed of the accused persons issued the cheque. Further on comparison of the signature on Ex.P.1 cheque with the signature in the deposition of accused as D.W.1-A.1 also there is correlation. In fact, when Ex.D.1 letter shows they opened joint account with the bank and the cheque routed from that account and it is not their case including as

D.W.1/A.1 that for any purpose they issued the cheque in favour of the complainant and but for their issuing the cheque does not come to the custody of the complainant for not even the defence that husband of complainant obtained any blank cheque from accused, it establishes that the cheque routed from the account of accused persons and issued by them in favour of the complainant. Even from D.W.1's evidence it shows there is friendship between husband of complainant and accused and not total strangers and P.w.1 evidence also speaks the accused persons are brothers and friends of her husband and mother of accused also telephoned to her for the lending from which she lent. The evidence of P.W.1 also establishes the amounts including by the cross-examination by the accused for having petrol bank and landed properties and income therefrom. Thus, once cheque shown issued by the accused and routed from the account, it substantiates the case of the complainant of the borrowal by the accused, to draw presumptions under Section 118 of the N.I.Act as per Rangappa(supra) besides the notices 'unclaimed' and did not honour and no reply given that also substantiates case of the complainant. The trial Court did not properly advert all these facts in concluding the case though the accused could not rebut the burden of them under the reverse onus clause. Therefore, the trial Court's acquittal judgment is liable to be set aside and the accused are found guilty. Accordingly, this point is answered.

Point No.2:

14. Accordingly, this Criminal Appeal is allowed, setting aside the aacquittal judgment dated 05.07.2008 passed by the learned Judicial Magistrate of First Class, Dhone, Kurnool district in the private complaint case C.C.140 of 2005 and both the accused are found guilty of the offence under Section 138 of the N.I. Act and are convicted accordingly.

15. For hearing of the accused persons on the quantum of sentence post on 23.01.2015.

____
Dr. JUSTICE B. SIVA SANKARA RAO

Date:27.12.2014
Vvr

23.01.2015:

When posted the matter from 27.12.2014 to today by reversing the acquittal judgment of the trial Court finding the accused guilty allowing the appeal for hearing of the accused on sentence, the accused did not appear and thus taken that they have no say. As the cheque - Ex.P.1 issued for an amount of Rs.2,00,000/- dated 29.03.2005 and the case was subsequent to the amendment of the Act, introducing Section 143 with effect from 06.02.2003, which mandates the trial in summary procedure and convert, if necessary, as summons procedure and that was not questioned as irregular much less any prejudice caused thereby, and this provision speaks on conviction, for sentence of imprisonment not exceeding one year and an amount of fine exceeding Rs.5,000/- (without any limit with non-obstante clause irrespective of the provisions of Cr.P.C.) and the bar under Section 29 Cr.P.C. of outer limit of fine of Rs.10,000/- (amended and substituted for Rs.5,000/- by the Cr.P.C. amendment Act of 2006) as was earlier, after this provision Section 143 of the Act introduced thereby of no application. It was also held by 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 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 endeavor is to recover the amount of compensation from out of fine or otherwise, rather than sentencing the accused to jail, the accused are sentenced to undergo Simple Imprisonment till rising of the day and to pay jointly a fine of Rs.2,30,000/-. Out of which, the complainant is entitled for Rs.2,10,000/- and the remaining fine amount of Rs.20,000/- shall go to the State. It is thereby directed the learned Magistrate to secure the presence of accused on warrant to undergo the sentence in the open Court and also to cause recover the fine amount under Section 431 read with Section 421 of Cr.P.C. by issuing warrant levying the fine with default sentence of three months Simple Imprisonment as per Sections 65 to 68 read with 53(6) I.P.C.

Dr. B. SIVA SANKARA RAO, J

23.01.2015
vvr/ksh.

---

[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.145