THE HON'BLE SRI JUSTICE B. SIVA SANKARA RAO

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CRIMINAL APPEAL No. 1506 of 2009

JUDGMENT:

The appellant-complainant (Ghani A. Musa) seeks to assail the acquittal judgement in favour of the accused (Mohd. Wahed Ali) dated 09.07.2009 passed by the learned I Additional Sessions Judge, Khammam, in Criminal Appeal No.81 of 2007 by reversing the conviction judgement dated 13.06.2007 passed by the learned II Additional Judicial Magistrate of First Class, Khammam, in the private complaint case C.C.No.239 of 2005 for the offence punishable under Section 138 of the Negotiable Instruments Act (for brevity 'the Act').

2. The case of the complainant was that due to the acquaintance of the accused with the complainant, the accused approached the complainant and requested to advance hand loan to meet his business needs and the complainant lent Rs.40,000/- on 19.07.2003 and Rs.45,000/- on 09.12.2003, and the accused passed receipts in favour of the complainant acknowledging receipt of the above amounts. On demand by the complainant to repay the amounts, the accused issued two cheques bearing Nos.0045880 dated 27.09.2004 for Rs.40,000/- (Ex.P1) and Cheque No.0045879 dated 29.10.2004 for Rs.45,000/- (Ex.P2) drawn on State Bank of Hyderabad, Nelakondapalli branch of Khammam district. On presentation of the said two cheques for collection in ING Vysya Bank on 03.02.2005 by the complainant, the same were returned dishonoured with endorsement "insufficient funds" along with cover note dated 07.02.2005 (Ex.P4) through ING Vysya Bank letter dated 19.02.2005 (Ex.P3). Ex.P5 is the Memo issued by State Bank of Hyderabad, Nelakondapalli Branch to the ING Vysya Bank on 17.02.2005. The complainant got issued a legal notice on 21.02.2005 (Ex.P6) by Registered Post demanding the accused to pay the amount due to him. Ex.P7 is the postal acknowledgement under which the accused received the legal notice. The accused sent a reply notice with false allegations on 08/09.03.2005 (Ex.P8). 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, PWs.1 and 2 were examined and got marked Exs.P1 to P8 supra. No oral or documentary evidence was adduced on behalf of the accused.

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 simple imprisonment for one year and to pay an amount of Rs.1,50,000/- to the complainant under Section 357(3) Cr.P.C., with default sentence of simple imprisonment for three months. It was on appeal by the accused impugning the trial Court`s conviction judgement, the 1st appellate Court, set-aside the conviction judgement and acquitted the accused. Impugning the same, present criminal appeal is filed by the complainant.

7. The contentions in the grounds of appeal as well as the submissions of the learned counsel appearing for the appellant are that: the lower appellate Court`s acquittal judgement reversing the trial Court`s conviction judgement is contrary to law, weight of evidence and probabilities of the case, that the lower appellate Court failed to see that the accused borrowed Rs.85,000/- from the complainant under two cheques dated 19.07.2003 and 09.12.2003, the lower appellate Court ought to have seen that the accused has not entered the witness box and not adduced any oral or cogent evidence to rebut the presumption under Section 139 of the N.I. Act, that the lower appellate Court ought to have seen that the complainant is a senior advocate

practising at Khammam and the defence putforth by the accused that the accused issued the two cheques in question in connection with business, which is non-existent, is not tenable, that the lower appellate Court ought to have seen that the accused issued the two cheques in discharge of legitimate debt and not for any other purpose, that the lower appellate Court erred in holding that it is for the complainant to prove that the cheques were issued by the accused in discharge of debt whereas the accused admitted issuance of the two cheques and it is settled law under Section 139 of the NI Act that it is for the accused to rebut the presumption by adducing the oral and cogent documentary evidence, and hence to allow the appeal by setting aside the acquittal judgement of the lower appellate Court and to restore the conviction judgement of the trial Court.

8. The learned counsel appearing for the respondent-accused, on the other hand, represents that it was a clear case of misuse of cheque obtained as guarantee for the purpose of doing business by complainant and failed to return after disputes arose with regard to finalisation of accounts, the complainant foisted a false case, and the lower appellate court was right in its reasoned conclusions to reverse the trial court`s conviction judgement and for this court there is nothing to interfere and there are no merits of the appeal, that the trial courts conviction judgement was the outcome of mis-reading of evidence and mis-application of law and there are no grounds to receive the additional evidence and hence to dismiss the appeal by confirming the lower appellate Court`s acquittal judgement supported by reasons for reversal of the trial courts conviction judgement.

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

11. Now the points that arise for consideration are:

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

(2). 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."**
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> (iii) In Section 139, a presumption is ingrained that the **holder of the cheque received** it in discharge of debt or other liability.
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> (iv) Disallowing a defence in Section 140 that drawer has no reason to believe that cheque would be dishonoured.
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> (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(I) 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(J) 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(K) 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)----"
>
> 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(L) 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, <u>thus, the expression "shall presume" cannot be held to be synonymous with "conclusive proof.</u> <u>In terms of Section 4 of the Evidence Act, whenever it is provided by the Act that the Court shall presume a fact,</u> **<u>it shall regard such fact as proved unless and until it is disproved.</u>**

12(M) 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(N) 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(O) 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(P) 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(Q). 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). Exs.P1 and P2 routed from the account of the accused and issued in favour of the complainant not in dispute, but for the version of the accused is blank cheque issued as security among two cheques Ex.P1 placed reliance by the complainant as issued by the accused is for Rs.40,000/- dated 27.09.2004, and Ex.P2 cheque for Rs.45,000/- dated 29.10.2004. Ex.P6 is the office copy of the legal notice issued to the accused by the complainant dated 19.02.2005 pursuant to the cheque dishonour memos dated 17.02.2005, that was acknowledged by the accused under Ex.P7. The accused issued reply dated 28.02.2005 which speaks that he did not borrow any amount and nothing is due and no receipts executed by him and no cheques issued by him. He did not in fact even whisper about any blank cheques earlier obtained by the complainant as security. So far as hand loan receipts stated in Ex.P6 notice is concerned, the complainant having whispered nothing in his chief examination muchless in the notice if stolen and lost, only in the course of his cross-examination responded saying those receipts were stolen in the theft occurred. Said version in the cross examination came from him for the first time of the alleged theft and lost the receipts in the theft. Undisputedly, from the lower Court record, there is no any copy of report, if at all any theft taken place exhibited. The trial Court with reference to said evidence on record from that of PW1 complainant with reference to Exs.P1 to P8 (supra) and from the defence of accused in reply of not borrowed, nothing due and alleged hand-loans of Rs.40,000/- and Rs.45,000/- on the respective dates and for which the two cheques Exs.P1 and P2 said to have been issued are not correct and no cheques were issued and no receipts executed. Thus, the hand-loan receipts version propounded in the notice Ex.P6 by the complainant is without even saying so-called receipts were stolen. Accused no doubt did not come to witness box and his version is by suggesting to PW1 in cross-examination the blank cheques issued as security though as per reply notice not borrowed, nothing due and no cheques issued. The Apex Court in NARAYAN MENON (supra) observed that the accused need not disprove in support of his defence version entire case of the complainant but his defence version can be to that extent by preponderance of probability to rebut any presumption against him that can be including from cross examination evidence of the complainant to rely. Same is also the principle reiterated in **KRISHNA**

JANARDHAN (supra) and the principle in **KRISHNA JANARDHAN** deviated in **RANGAPPA** (supra) is to the extent of what was the observation in **KRISHNA JANARDHAN** of there is no presumption without proof of the debt is legally enforceable is not correct; though in respects **KRISHNA JANARDHAN** conclusions arrived on the facts holds good. The accused did not even produce other cheque leaves of his account by summoning through his banker as to when the subsequent cheques were issued by him and in whose favour and when they were encashed he did not whisper how long before these two cheques were issued as security in this regard. The trial Court therefore convicted the accused as stated supra and the first appellate Court particularly with observations in Paras 6 and 7 of the impugned judgment reversed the conviction of the trial Court. The impugned judgment of the lower appellate Court at paras 6 and 7 in this regard speaks that PW1 was even cross examined by the accused saying accused did not borrow Rs.40,000/- and Rs.45,000/- and even it is suggested that the accused did not issue any such receipts, that the complainant was doing business and on finalisation of accounts, the accused was found due Rs.20,000/- and in that regard complainant obtained agreement in respect of 56 sq.yds of site adjoining the house of Nelakondapalli from father of the accused in whose name it stands and the accused is attestor to the said agreement for sale and there is no legally enforceable debt. When said defence of the accused is specific of never borrowed any amount from the complainant, it is for the complainant to prove that the accused borrowed amounts covered by Exs.P1 and P2 cheques and when the complainant pleads that the accused passed the receipts of the borrowal, same not produced and it is only in cross-examination version he came forward saying there is theft and the receipts were stolen in the theft. Coming to Crime No. and giving of report to police, it was suggested to PW1 that accused never passed any such receipt, which PW1 claims to have lost in theft. The lower appellate Court in reversing the trial Court's judgment given importance to the said version of the complainant of there is theft of the receipts issued by the accused in favour of the complainant, saying same is untrue. In fact he filed the cheque case for the dishonour of cheque and the cheques stated issued for the amounts lent and the receipts issued for even for the amounts lent. When cheques are available can it be believed that receipts were stolen. Thereby to that extent there is a probability in the observation of the lower appellate Court to the extent of saying the so-called version of theft for the first time introduced by the complainant in giving answers to the accused for non-filing of receipts said to have been passed by the accused for the borrowal mentioned in his notice. In fact that is suffice to say the version to the extent of passing of receipts for the borrowals may not be correct and receipts theory may be untrue. However, that by itself not falsifies the entire case of the complainant. It is for the fact that the complainant could substantiate his case in saying the accused issued the two cheques for the two respective amounts borrowed and after the same were returned dishonoured for the notice issued, the accused replied by total denials and not even come with a version at any point of time any blank cheques were obtained from him either by the complainant or any other person. In the absence of which any suggestion to PW1 by itself will not serve any purpose to rebut the presumption for the cheques once routed from his account which his signatures. Thus, in the absence of showing that the cheques issued were blank cheques or saying that the cheques issued were in favour of some other persons, the so-called sale agreement not even filed, there is nothing to show that the accused issued blank cheques in relation to the so-called business. Admittedly, there is no business in the name of the complainant who is also a practising advocate on rolls when there is no business in the name of the complainant and the best evidence the accused is supposed to produce is so-called accounts and its finalisation and he is supposed to state the date or month and year when the so-called finalisation of accounts were taken place and what made him to give blank cheques even and why he kept quiet without even seeking for its return. It is to say mere giving of reply or mere giving of suggestion to PW1 will not suffice to discharge the burden on accused even by preponderance of probability. When it is the specific case of complainant that the accused issued the cheques for the amounts borrowed though to the extent of passing of receipts may be an exaggeration from non-filing of receipts and non-filing of proof of theft of receipts or improbability of said version of theft of receipts that does not belie the entire case of the complainant to acquit the accused, that too by sitting in appeal against the conviction judgment of the trial Court, without even any observation of unsustainability or perversity on the part of the trial Court in finding the accused guilty. It is also for the reason that the cross-examination of PW1 by the accused, particularly on Pages 2 to 4, it is brought on record that the complainant never defended the accused and accused is doing skin business and his relatives at Madras were dealing with skin business. PW1 denied the suggestion of he is doing business with his relative at Madras, despite practising advocate and used to invest money with the accused for exporting leather during 2003-05, and he obtained from accused as security the blank cheques and filled them and filed the case. As stated supra this version of the accused is silent in his reply. Further, in the further cross-examination of PW1 what was suggested is in December, 2004 or January, 2005, the complainant finalised the accounts with the accused relating to leather business and in that process, Rs.20,000/- fallen due by the accused to the complainant and to realise the amount, he obtained sale agreement from father of accused and by make believe, the accused of the cheques claimed as lost and not returned. In fact the sale agreement executed by father of accused is for the alleged Rs.20,000/- in relation to the alleged business transaction between the accused and complainant and prior to that any blank cheques were issued, he could have obtained atleast receipt of those were misplaced and atleast subsequently he could take any recourse by giving notice, rather keeping mum; which could not be the conduct of any prudent person. Apart from it, such an important fact if true, he could have mentioned in the reply notice and its non-mention also shows an introduced version and this aspect the lower appellate Court did not properly advert to. Thereby as held by the Apex Court in **RANGAPPA** (supra) from the cheques admittedly routed from the account of the accused with his signature and a perusal of the two cheques Exs.P1 and P2 no where show a different writing with a subsequent interpolation or a subsequent filling respectively and that also belies the said version of accused. Therefrom even the theory propounded by PW1 (complainant) for the first time in his cross examination, the so-called receipts said to have been issued by the accused were lost in a theft case and with no proof but for the feeble attempt to explain in the cross examination of the report given and the crime registered and date and crime number unable to say admittedly for that no any record even filed of any complaint given, the giving of cheques by the accused since established and from the presumption under Section 118 and 139 are in favour of the complainant and the complainant's evidence in this regard is that accused borrowed the amounts and issued the cheques and the theory of blank cheques issued as security could not be established by accused even by preponderance of probability to rebut the presumptions. Thus, suffice to say including from the so-called version of blank cheque theory is silent in his reply notice but for mere denial of cheques or passing of receipts or borrowal of amounts or anything true, it can be safely concluded that complaint could prove guilt of the accused for non-payment even after notice of dishonour of the cheques routed from his account with his signatures for nothing to believe theory of blank cheques given as security.

Thus by reversing the acquittal judgment of the lower appellate Court restoring the conviction judgment of the trial Court supported by reasonsas per the settled principles laid down by the Apex Court in **RANGAPPA** (supra).

Now coming to any interference with the sentence passed by the trial Court, 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, while restoring the trial Court's conviction judgment, however by modifying the sentence of one year Simple Imprisonment and Compensation of Rs.1,50,000/- with default sentence of 3 months Simple Imprisonment, the accused is sentenced to undergo Simple Imprisonment till rising of the day and to pay a fine of Rs.1,25,000/- and out of which an amount of Rs.1,15,000/- 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. 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 of Cr.P.C. by issuing warrant levying the fine, if the accused failed to pay within two months from. The accused is liable for default sentence of three months Simple Imprisonment for non-payment of the fine within the time stipulated as per Sections 65 to 68 read with 53(6) I.P.C.

Accordingly, the criminal appeal is allowed.

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

Dr. B. Siva Sankara Rao, J

23rd January, 2015

KSM