THE HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL APPEAL No.1595 of 2010

JUDGMENT:

The appellant-complainant by name N.S.Viplava Kumar seeks to assail the judgment of acquittal dated 31.05.2010 passed by the learned XVI Additional Judge-cum-XX Additional Chief Metropolitan Magistrate, Hyderabad, in a private complaint case C.C.No.299 of 2008 filed by said complainant against the accused K.Prakash Goud, for an offence under Section 138 of the Negotiable Instruments Act (for brevity 'the Act').

2. The brief facts of the case are that on 05.08.2004 the accused borrowed an amount of Rs.4,70,000/- from the complainant and executed two promissory notes viz., promissory note (Ex.P.9) on 05.08.2004 for Rs.2,70,000/- and another promissory note(Ex.P.10) on 05.09.2004 for Rs.2,00,000/- and on demands the accused issued two cheques, one for Rs.2,00,000/- on 04.02.2005 (Ex.P.1) bearing No.386916 and the other bearing No.386917 for Rs.2,70,000/- on 07.02.2005(Ex.P.2) for discharge of loan and when the complainant presented the two cheques for collection, the same were dishonoured for 'funds insufficient' covered by Ex.P.3-memo of return for dishonor dated 05.02.2007 and Ex.P.4 dated 09.02.2005 respectively. Then the complainant issued Ex.P.5-legal notice dated 01.03.2005 and postal receipt for registered post dated 01.03.2005(Ex.P.6), Ex.P.7 is certificate of posting, and the legal notice is served on the accused on 03.03.2005 covered by Ex.P.8-postal acknowledgment card and though the accused issued reply (Ex.D.1) dated 03.04.2005 for Ex.P.5 legal notice issued by the complainant, failed to repay the amount and from non-payment within 15 days after service of notice under Section 138(b) of the Act from the accrual of cause of action, within one month under Section 142(b) of the Act, the complainant filed a complaint against the accused. The accused 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 Cr.P.C.”) when questioned on substance of accusation under Section 251 of Cr.P.C., he pleaded not guilty.

3. On behalf of the complainant during the course of trial, he was examined as PW1 and got examined P.W.2 and got marked Exs.P.1 to P.10 supra and on behalf of the defence, the accused examined himself as D.W.1, and got marked Exs.D.1 office copy of reply dated 03.04.2005, Ex.D.2 registered post receipt, dated 03.04.2005, Ex.D.3 certificate of posting receipt, Ex.D.4 returned unserved postal cover, Ex.D.5 certified copy of the complaint in C.C.No.1492 of 2005, Ex.6 certified copy of complaint in C.C.No.1493 of 2005, Ex.D.7 certified copy of complaint in C.C.No.1494 of 2005 and Ex.D.8 certified copy of complaint in C.C.No.1495 of 2005.

4. After closure of evidence, the accused was examined under Section 313 of the Cr.P.C. who denied the incriminating material put to him and stated no defence.

5. Appreciating the evidence, both oral and documentary, the Court below ultimately held that the complainant could not prove guilt of the accused for the offence under Section 138 of the N.I.Act and thereby not found guilty.

6. It is attacking the said findings, the present appeal is filed with the contentions in the grounds that the acquittal judgment of trial Court is contrary to law, that the trial Court failed to see that the accused having admitted liability and having failed to prove his case of repayment of amount is liable to be punished for an offence punishable under Section 138 of the N.I.Act, that the trial Court failed to note that while upholding that the cheques were issued in discharge of legal liability and acquitting the accused by dismissing the complaint for an offence punishable under

Section 138 of the N.I.Act, that the trial Court has to see that the Exs. D.5 to D.8 complaints are no way connected with Exs.P.1 and P.2 transactions, therefore the accused is liable to be punished, thereby sought for setting aside the acquittal judgment and allow the appeal finding the accused guilty. Learned counsel for the appellant reiterated the same during the course of hearing.

7. The learned counsel appearing for the 1st respondent-accused, on the other hand, submits that for this Court while sitting in appeal there is nothing to interfere with the judgment of the trial Court, hence to dismiss.

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

9. Now the points that arise for consideration are:

(1). Whether the accused did not issue the cheques 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, if so with what observations?

(2). To what result?

Point No.1:

10-(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.

10-(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].

10-(C). To fulfill the objective, the Legislature while amending the Act has made the following procedure:

In the opening words of the Section 138 it is stated: "Where any **cheque drawn by a person** on an account maintained by him with a banker for payment of any amount of money to another person from out of that account **for the discharge,** in whole or in part, **of any debt or other liability,** is **returned by the bank unpaid**,---------, such person **shall be deemed to have committed an offence** and shall, **without prejudice to any other provision of this Act (See Sec.143)**, be punished ----.

Provided, nothing contained in this section shall apply unless,-(a), (b); and (c) Explanation---(supra)."

"(i) Under Section 138 a deeming offence is created **by fiction of law**.

(ii) An **explanation** is provided **to Section 138** to define the words **"debt or other liability" to mean a legally enforceable debt or other liability."**

(iii) In Section 139, a presumption is ingrained that the **holder of the cheque received** it in discharge of debt or other liability.

(iv) Disallowing a defence in Section 140 that drawer has no reason to believe that cheque would be dishonoured.

(v) As per Section 146(new section) the production of **the Bank's slip or Memo with official mark** denoting that the cheque has been dishonoured **is prima facie evidence** for the Court to presume the fact of dishonour of such cheque unless such fact is disproved by the accused.

10-(D). Further the provision for issuing notice within thirty days under section 138 after dishonour is to afford an opportunity to the Drawer of the cheque to rectify his mistakes or negligence or in action and to pay the amount within fifteen days of receipt of notice, failing which the drawer is liable for prosecution and penal consequences.

10-(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>

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

10-(G). In the words-where **any** cheque, the word any suggests that for whatever reason **if a cheque is drawn** on an account maintained by him with a Banker in favour of another person **for the discharge of any debt or other liability**, the **liability cannot be avoided in the event of the cheque stands returned by the Banker unpaid.**

11-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".

11-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].

11-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.

11-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 i n **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.

12. 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:

12-A. The accused did not dispute his signatures on Ex.P.1 and P.2 cheques and the same were issued in favour of the complainant routed from his account but for saying those were given for commission purpose in connection with the complainant through one Ajay Srivasthav, to arrange the Congress Party ticket to contest from Musseerabad Constituency by payment of 19.00 lakhs to Ajay Srivasthav. The accused also did not dispute the Ex.P.9 and Ex.P.10 promissory notes issued in favour of the complainant with his signature and with signature of his son standing as security for the same but for saying the said printed promissory note signed by him and his son were also given to the complainant in that connection. From this, the accused admitted about the routing of the cheque from his account issued by him in favour of the complainant but for saying not received the consideration referred in the said cheques and those were given in blank not duly filled and not for any legally enforceable debt or any other liability. Thereby the burden is on the accused having admitted about the cheques issued voluntarily from his account by him in favour of the complainant to say those were not issued for any legally enforceable debt or other liability from the presumption is in favour of the complainant and against the accused under the reverse onus clause as per the Section 118 and 139 of the N.I.Act as laid down in Rangappa (supra). No doubt, it is also the defence of accused that the cheques were not given duly filled but in blank (by the accused to the complainant) though duly signed and routed from his account. For that also, it is for him to rebut the presumptions. Ex.P.1 cheque bearing No.386916, dated 04.02.2005 for 2.00 lakhs and Ex.P.2 cheque 386917, dated 07.02.2005 for Rs.70,000/- and in total for Rs.2,70,000/-. These two were even account payee cheques and the pen used for writing the name of the payee and for signing by the drawer appears one and the same though may not be for mentioning the amounts in 'words' and 'figures'. The case of the complainant was the amount covered by the two cheques were borrowed in connection with the marriage of the daughter of the complainant in the relevant period covered by the Ex.P.9 dated 05.08.2004 and P.10 dated 05.09.2004 promissory notes, it is not only the accused that signed but also his son Yogish goud in the printed promissory note as security(guarantor) to repay if the borrower/accused failed to pay as per the printed contents. There are two witnesses to the two pronotes by name A.Sajiva Narayana 2) G.Venkateshwarlu. Ex.P.1 cheque was dated 04.02.2005 for Rs.2,00,000/- and Ex.P.10 pronote was also for Rs.2,00,000/- dated 05.09.2004 whereas, the Ex.P.2 cheque was dated 07.02.2005 for Rs.2,70,000/- and Ex.P.9 promissory note relates to it for that was dated 05.08.2004. As per the Exs. P.3 and P.4 the cheques when presented returned dishonoured on 09.02.2005 and Ex.P.5 legal notice dated 01.03.2005 within one month from the date of receipt of intimation of dishonour issued by the complainant to the accused and admittedly accused received the statutory notice which he acknowledged under Ex.P.8 (P.6 and P.7 are postal receipt and under certificate of posting). Ex.D.1 is the office copy of the reply dated 03.04.2005, whereas, the Ex.P.8 acknowledgment of service of notice was of 03.04.2005 as per the postal round seal. Ex.P.7 certificate of posting shows dated 28.02.2005 was with postal round seal dated 01.03.2005. Coming to Ex.P.5 statutory legal notice contents, it refers that the accused obtained handloan of Rs.4,70,000/- in the month of October, 2004 to meet the engagement and marriage expenses of his daughter from the complainant having agreed to repay with interest at 24% p.a. and within three months and issued post-dated cheques Exs.P.1 and P.2 respectively towards security for the said loan amount in favour of the complainant and even after the lapse of three months he failed to repay the handloan with interest for which the accused advised to complainant to present the above cheques for clearance and on his assurance when presented the cheques, the same returned dishonoured respectively on 05.02.2005, 09.02.2005 and even informed orally but there was no response thereby called upon to repay within 15 days from the date of receipt of the notice, else to take legal recourse. Ex.D.1 reply issued by the accused, dated 03.04.2005 for the Ex.P.5 notice admittedly received, so that the accused did not borrow any hand loan much less Rs.4,70,000/- in October,2004 to meet engagement and marriage expenses of his daughter and complainant has no wherewithal to give said loan and he suppressed truth taking advantage of blank cheques given by the accused for some other purpose, for the complainant is known to the accused through a common friend and the complainant took advantage of the interest of the accused to contest assembly elections, assured him saying he got political influence in New Delhi and can manage to get Congress Party ticket to the accused and in that connection the accused paid Rs.19,00,000/- in the year 2004 to one Ajay Srivastsav at the instance of the complainant and the accused was deceived and he has taken action against Ajay Srivatsav which is pending and the complainant again assured that he would try to get money from Ajay Srivatsav and in that connection demanded Rs.2,00,000/- as commission for which when the accused pleaded inability as without realization to pay, the complainant insisted to give two blank and undated cheques as security and also taken signatures of accused on some printed blank papers and believing the complainant, accused gave the above cheques with his signatures and even the complainant assured to return the same if he is unable to recover the money from Ajay Srivatsav within 4 months having failed to recover the money from Ajay Srivatsav and even the accused demanded for return of the cheques and signed blank papers, the complainant was postponing and while the accused was contemplating to take legal recourse, the complainant clandestinely presented the cheques and accused is not fallen due any money to the complainant. The further version is with fabricated contents issued the notice to harass the accused with the dubious methods to damage the reputation of the accused in the locality even there is no amount due to him and he did not give the subject matter cheques and other blank signed papers to discharge the said amount and there is no legally enforceable debt and the question of dishonour of said cheques does not arise and without fulfilling the purpose for which the cheques were given by the accused got the cheques presented dishonoured without even notice to the accused and thus the accused committed no offence, hence, to return the subject matter of cheques and also the blank signed papers, else to take legal recourse.

12-B. Importantly, in the reply notice what all stated is complainant stated that he got influence with the Congress Party people at New Delhi to secure the Congress party ticket to the accused and in that connection the accused paid Rs.19,00,000/- in various dates to Ajay Srivatsav, in the year 2004 at the instance of the complainant. It is further version that for Ajay Srivatsav failed to pay the amounts, the accused has taken legal recourse against the Ajay Srivatsav which is pending and the complainant with a promise to recover the amount from Ajay Srivatsav subject to payment of commission to him of Rs.2,00,000/- and when the accused stated he has no money to pay before the realization of the said amount, the complainant obtained two blank signed cheques as security and also blank signed papers and misused the same even for nothing due and even nothing caused recovery from Ajay Srivatsav. No doubt, in the Ex.P.5 statutory notice which is only mean under Section 138(b) and (c) of the N.I.Act of intimation of cheques presented returned dishonoured with a demand to pay and for non payment within 15 days of service of notice to maintain complaint for the offence under Section 138 of the N.I.Act from accrual of cause of action and no any mention of details. However, if there were pronotes executed by the accused earlier to the said cheques, the same could have been found place generally in the Ex.P.5 statutory notice. However, it is mentioned that the amounts borrowed was by hand loans of Rs.4,70,000/- in October, 2004 for which two cheques issued one for Rs.2,00,000/- on 04.02.2005 and the other for Rs.2,70,000/- on 07.02.2005. In this background, one important thing to be kept in mind is in the Ex.D.1 reply notice cause simply stated that besides blank cheques there were other blank signed papers obtained by the complainant from the accused in demanding to return the same also and he did not even whisper what made son of the accused to sign in the printed pronote meant for the column of guarantor as security. The accused is not even denying either from the cross-examination of the complainant as P.W.1 or from his evidence as D.W.1 the signature of him on the pronotes Exs.P.9 and P.10 and also of his son as guarantor for security at the printed colomn of said pronote on the same leaf. The case of the complainant in the Ex.P.5 legal notice is the amount of Rs.4,70,000/- borrowed by the accused from the complainant for the purpose of engagement and marriage expenses of daughter of the accused and the said borrowal was in October, 2004. If that first version is correct, the Ex.P.9 promissory note for Rs.2,70,000/- was dated 05.08.2004 and Ex.P.10 pronote for Rs.2,00,000/- was dated 05.09.2004 are not in October,2004. It is not the case of the complainant from Ex.P.5 notice that the borrowals were in August and September. It is important to note that having not mentioned or whispered, the pronotes Exs.P.9 and P.10 in Ex.P.5 notice but for mentioning the borrowal by handloan of

Rs.4,50,000/- was in October, 2004, had really the Exs.P.9 and P.10 promissory notes were remaining blank, the complainant could conveniently put the dates on the promissory notes of October,2004 and not of August and September,2004 by taking advantage of it. The signature of the guarantor with ball pen used that is son of the accused in the two pronotes are correlating the dates put on the top of the pronote, so also the writings. In this background, if we read from Exs.P.9 and P.10, it is clear that the pronotes were not given in blank but duly executed as appearing and thus the complainant or inadvertently even mentioned the Exs.P.9 and P.10 pronotes dates and stated of October, 2004 borrowal in giving Ex.P.5 statutory notice for dishonour of Exs.P.1 and P.2 cheques mentioning the cheques were issued on 04.02.2005 and 07.02.2005 that itself will not belie the case of complainant. One thing here to be kept in mind is that, if really the accused issued two cheques in blank as referred in his Ex.D.1 reply notice, not even stating when he issued, but for saying in the year 2004, in connection with the promise to recover the amount due from Ajay Srivatsav to accused, the complainant obtained blank cheques. When such is the case, if truth has propounded in Ex.D.1, it is unknown what made the accused without even asking the bank to stop payment by addressing a letter as to in what circumstances the Exs.P.1 and P.2 cheques were issued if in blank by the accused to complainant for so called terms when not fulfilled no right to present for encashment for no consideration and as to why the accused kept quiet till Exs.D.1 notice dated 03.04.2005 for such long period including after receiving of Ex.P.5 legal notice dated 01.03.2005 and on 03.03.2005 as per the Ex.P.8 acknowledgment in taken one month time to reply and even not chosen to issue immediate notice, if not earlier to Ex.P.5 dated 01.03.2005, at least if the same received under Ex.P.8 on 03.03.2005 within no lapse of time; instead of waiting for one month to give Ex.D.1 reply. Therefrom, there a lot of cloud in the defence of accused. It indicates both parties approached the Court without clean hands to some extent. However, as per the law, particularly of the Rangappa(supra) once the cheques were admittedly routed from the account of the accused admittedly issued by him in favour of the complainant, for his version that those were the blank cheques issued by the accused to the complainant in October, 2004 for no date or month otherwise even mentioned in Ex.D.1, there is a presumption under Section 118 and 139 of the N.I.Act all the cheques issued were for legally enforceable debt or other liability and for the amount mentioned therein and the name as to payee admittedly to whom it were issued and on the respective dates of the cheques. When such is the case, as held in Narayan Menan(supra) reported in Krishna Janardhan Bhat(supra) that is explained in Rangappa(supra) while holding the finding of the Krishna Janardhan Bhat(supra) though correct, the observation thereunder of no presumption under Section 139 of the N.I.Act of the debt or other liability is legally enforceable to that extent is not correct, the burden is on the accused under reverse onus clause from the presumptions available in favour of the complainant and against the accused. Needless to say in discharge of the presumptions, the accused need not prove the entire case of the complainant untrue but for to establish his version by preponderance of probabilities and for that he did not even come to witness box when the material on record from the case of the complainant with reference to documents and cross-examination of the complainant and his witnesses could show by preponderance of probabilities to the defence version. Here in this regard to appreciate from the evidence on record further, there is nothing from the accused that he has no marriageable aged daughter by the relevant period in the year 2004 and his daughter's marriage was not performed in or around the August, 2000 to October 2004 followed from engagement to the marriage. The accused did not explain as to what made his son to sign pronote as guarantor and not even as co-executant on the printed pronotes Exs.P.9

and P.10 which no way refer the purpose even. Importantly, among Exs.D.1 to D.8 placed reliance by the accused, Exs.D.5 to D.8 are the cheque bounce cases against the Ajay Srivatsav maintained by the accused herein as complainant in C.C.Nos.1492 to 1495 and the other documents among Exs.D.1 to D.4 are the Ex.D.1 reply with postal receipt and certificate of posting and returned unclaimed cover. It is in this context necessary to mention that in none of Exs.D.5 to D.8, there is any little whisper for the complainant herein pleaded any role in any of the transactions between the accused herein as complainant against Ajay Srivatsav as accused for those 5 cheque bounce cases. The averments of the said private complaint maintained by the accused herein against Ajay Srivatsav particularly at paras 3 and 4 speak that the said Ajay Srivatsav as accused duped that complainant who is the accused herein with a promise that he got contacts to get Congress party ticket for Musheerabad Assembly constituency and received in all Rs.19,00,000/- in March, 2004 on various dates and having realized that he was cheated, the accused herein lodged a complaint against him and said Ajay Srivatsav compromised with him having agreed to pay a sum of Rs.17 lakhs and in terms of the said compromise, he issued 4 post-dated cheques for the said 17 lakhs, one for Rs.4,00,000/- dated 15.10.2004, second one for Rs.4,00,000/- dated 15.10.2004, third one for Rs.5,00,000/- dated 10.09.2004 and fourth one for Rs.4,00,000/- dated 25.09.2004 and the like. Thus, from the very documents covered by Exs.D.5 to D.8 placed reliance by the accused is defence version as if the complainant herein compromised to recover the amount due from Ajay Srivatsav and obtained the Exs.P1 and P.2 cheques on 05.08.2004 and 05.09.2004 in blank and failed to cause recover the amounts and failed to return the cheques and misused as had it been, there could be a little whisper about any little role of the complainant herein in his alleged introducing to the accused Ajay Srivatsav for borrowing with the huge amount, Ajay

Srivatsav for arranging party and for his failure to pay in obtaining the blank cheques for commission to recover. However, there could be no meaning in giving two cheques in blank, if at all for commission subject to recovery, that too, the commission is only for Rs.2,00,000/- to recover Rs.19,00,000/- out of it, that also belies the defence of the accused and his version in Ex.D.1 is proved untrue from his documents Exs.D.5 to D.9 particularly contents of paras 3 and 4. In this background, it is difficult to say from the above material that the accused could discharge his burden under the reverse onus clause, even by preponderance of probabilities to rebut the presumptions available in favour of the complainant for recovery of the means covered by the two cheques for the offence under Section 138 of the N.I.Act as per the Section 118 and 139 of the N.I.act as laid down in Rangappa(supra). Now from this, coming to further evidence in the cross-examination of P.W.1 and from the evidence of accused as D.W.1 how far any burden that could be discharged by the accused concerned, P.W.1 stated in his cross-examination by the accused that he was not doing any money lending business, but for doing seasonal commission business including in fishing and real estate for the last 20 years with no accounts and not income tax assessee and has no bank account but for the account with ICICI bank and he did not withdraw any amount of Rs.4,70,000/- from the said bank, for the lending to accused and he knows the accused as political leader though know present acquaintance and it is the accused that requested him to arrange loan of Rs.4,70,000/- to meet the expenses for his daughter's engagement and marriage for need of money thereby he borrowed same amounts from others arranged the same to the accused. No doubt, it is elicited that these facts not mentioned in Ex.P.5 statutory notice. The complainant need not mention the Ex.A.5 statutory notice all these facts much less in anticipation of future cross-examination by the accused as it is the accused that to elicit the facts the witness can depose. He denied the suggestion that he has no capacity to lend such amount much less even by borrowing any of the amount out of it to say lent. he deposed that the said Rs.4,70,000/- paid by him in cash Rs.1000/-, 500/-, and 100/- denominations that is Rs.2,70,000/- initially and again Rs.2,00,000/-in total Rs.4,70,000/- which is within one week after the accused approached the complainant to arrange the amount, he deposed that one Sanjeeva Narayana who is a friend of accused and son of accused by name G. Yogesh goud and G.Venkateshwarlu (attestors and guarantor of the pronotes) were present when he paid the amounts to the accused. These facts also the complainant need not state either in the notice or in the complaint or in the chief-examination in anticipation of the cross-examination for the suggestion non-mention of the same. He deposed that he does not know who scribed the Exs.P.9 and P.10 promissory notes. However, the Sanjeeva Narayana brought the filled promotes. He deposed that on the respective dates of Exs.P.9 and P.10 promissory notes, he paid said amounts and it is on the morning when paid the amounts evening the said pronotes sent by the accused and his son through Sanjeeva Narayana and in his presence the attestors signed on the pronotes and of whom Sanjeeva Narayana also friend of accused and he can examine Venkateshwarlu regarding the same. He deposed that he does not remember the dates of the said lending of Rs.2,70,000/- for his daughter's engagement and again Rs.2,00,000/- before his daughter's marriage and he cause issued Ex.P.5 legal notice. He deposed that in his sworn statement for taking private complaint case cognizance, he mentioned about Exs.P.9 and P.10 pronotes though as can be seen from Ex.P.5 legal notice those were not referred. He denied the suggestion of the accused did not receive the Ex.P.5 legal notice. In fact, the Ex.D.1 reply notice of accused when itself mentions as reply to Ex.P.5 notice, the said suggestion of accused is baseless. The P.W.1 deposed that he does not know Ajay Srivatsav and denied suggestion of said Ajay Srivatsav, New Delhi, is very close to Congress Party High Command and complainant took the accused to him to pay Rs.17,00,000/- to secure the Congress Party ticket in February, 2004 and they both meet Ajay Srivatsav. He deposed that in February, 2004 he went along with the accused to New Delhi and stayed in the hotel Megana palace of old Rajendra Nagar. In fact, even at request of the accused, the complainant accompanied him to go to Delhi and stayed in the hotel that no way enhance defence of the accused, much less to say the complainant got any acquaintance with the Ajay Srivatsav much less in cause paying Rs.19,00,000/- as per the Ex.D.1 version if not Rs.17,00,000/- as per the P.W.1's cross-examination suggestion by the accused. He deposed that after dishonor of the Exs.P.1 and P.2 cheques, he met the accused though the same not mentioned in Ex.P.5 and denied the suggestion, for recovering amount from Ajay Srivatsav as commission as he obtained blank cheque and misused so also the blank promissory notes and even the accused never borrowed Rs.2,70,000/- and Rs.2,00,000/- in saying as if borrowed and claiming as if due or the cases filed are false by taking advantage of the blank signed documents. From this, there is nothing to say the defence version of the accused proved by any preponderance of probabilities to rebut the burden of accused under reverse onus clauses against the presumptions available to the complainant. P.W.2 is the Manager of the bank to speak on the cheques presented dishonoured for 'insufficient funds' there is no cross-examination of him in this regard.

Coming to the evidence of accused, there is nothing more from the chief-examination than what is covered supra. Coming to his cross-examination, he deposed that he knows reading and writing Telugu and putting signature in English having studied 10th class, is in active politics with Congress Party for the last 40 years and his family is doing excise business of liquor and toddy and till the same is banned and the complainant is known to him for the last 8 years being the residents of same locality and he did not file any proof to show that he applied for Congress Party ticket to contest and he was not given any B-form or list from AICC President or its office from New Delhi that he is a fit candidate for Congress Party and there is no document to show in this regard even and he does not know candidature and designation of Ajay Srivatsav but for complainant taken to him and he does not know even the address of said Ajay Srivatsav for he paid 19 lakhs to him in March, 2004 and he does not remember the date but it is in the first week he paid in two installments within two or three days saying he paid first installment at Delhi and come back to Hyderabad and went by flight and paid the 2nd installment at Delhi so he cannot say the denominations and details of the said amounts of installments due to long lapse of time that the transaction took place at A.P.Bhavan in the presence of the complainant herein and he did not show any of the amounts in his income tax returns being assesses paying tax and in the Exs. D.5 to 8 by the complainant cases filed by him against Ajay Srivatsav, he did not make any mention of he paid 19 lakhs to him at the instance of the complainant herein. He denied the suggestion that he mentioned wrong address of the learned counsel of the complainant not to serve the Ex.D.1 reply intentionally. He has admitted that Yogish Goud is his son and denied the suggestion of his son stood as guarantor and signed Exs.P.9 and P.10 pronotes in the presence of Narayana, the 2nd witness of the pronote who is a friend of him. He deposed that he knows Sanjeeva Narayana though he cannot say his full address, he denied the suggestion of borrowing amount of Rs.4,70,000/- in total under Exs.P.9 and P.10 pronotes and issued Exs.P.1 and P.2 cheques in discharge of the liability and deposing falsehood to evade payment to the complainant and set up false evidence complainant. He denied the suggestion that the amount borrowed by him was to his daughter’s engagement and marriage expenses etc, and even then he is deposing falsehood. Thus, from this evidence on record, the complainant is not a stranger to the A.1 being same locality resident known to him for the past 8 years and the accused could not rebut the presumption available against to him under reverse onus clause including from any discrepancy in mentioning of the borrowals under hand loans in October,2004 instead saying in August and September,2004 respectively under Exs.P.9 and P.10 promissory notes that itself is not a ground to belie the case of the complainant that too, when the accused admitted his signature on the pronote and also the cheque routed from his account but for saying blank cheques obtained and his defence version of the blank cheques and blank promissory notes obtained for commission purpose of Rs.2,00,000/- to recover the amount of Rs.19,00,000/- due by Ajay Srivatsav to him is improbable to believe and no way substantiated and the Exs. D.5 to D.8 complainant cases filed against the Ajay Srivatsav by him nowhere even whisper a little in this regard to belie that version. The trial Court without adverting all these detailed aspects, went wrong with peripheral approach and thus the accused is liable for conviction. It is also to say in this context that the cheques issued duly signed by the accused for not shown as the security in support of the alleged defence version, from the presumption of legally enforceable debt or other liability duly issued for the amount therein on the respective dates could not rebut even otherwise, apart from presumptions under Section 139 and 118 of the N.I.Act supra, the inchoate instrument under Section 20 of the N.I.Act that is equally applicable to the cheques which need not be stamped even is an authorization to fill that also makes him liable. Accordingly, Point No.1 is answered.

13.In the result, the Criminal Appeal is allowed by setting aside the acquittal judgment of the trial Court in C.C.No.299 of 2008, dated 31.05.2010 impugned herein. The accused is found guilty for the offence under Section 138 of the N.I.Act.

14.For appearance and hearing on sentence of the accused, post on

30.10.2015.

Dr. B. SIVA SANKARA RAO, J

Date: 23-01-2015

Vvr

<u>30.01.2015</u>

15. Accused present and heard the accused. Following the expression of the Apex Court in ***SOMNATH SARKA Vs. UTPAL BASU MALLICK***[11] that the Act not contemplated grant of compensation but envisages imposition of fine not exceeding twice the amount of dishonoured cheque and out of said fine amount, the complainant be compensated under Section 357 Cr.P.C and that *'unlike for other forms of crime, the punishment here (insofar as the complainant is concerned) is not a means of seeking retribution, but is more a means to ensure payment of money. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery. As against the accused who is willing to under go a jail term, there is little available as remedy for the holder of the cheque."*

16. Having regard to the above and from the submission by the appellant/ complainant of the endeavour is to recover the amount of compensation from out of fine or otherwise, rather than sentencing the accused to jail, the accused is sentenced to undergo Simple Imprisonment till rising of the day and to pay a fine of Rs.5,00,000/- of which Rs.30,000/- shall go to the Government and the balance amount of Rs.4,70,000/- which the complainant is entitled towards compensation and the accused is directed to pay or deposit the same within eight weeks from the date of receipt of copy of this Judgment, failing which, the learned Magistrate is directed to recover the fine amount under Section 431 read

with Section 421 Cr.P.C by issuing warrant levying the fine with default sentence of three months Simple imprisonment as per Sections 65 to 68 read with Section 53 (6) IPC.

Dr.B.SIVA SANKARA RAO, J

Dt. 30.01.2015
B/o
Vvr/knl

---

[1] AIR 2003 SC 2035
[2] (2006)3 SCC 30
[3] (2009) 2 SCC 513
[4] AIR 2010 SC 1898
[5] AIR 2008 SC 1325
[6] AIR 2001 SC 3897
[7] AIR 1999 SC 1008
[8] AIR 2002 SC 182
[9] AIR 2008 SC 2898
[10] 1971 (1) An.W.R. 65
[11] 2014 (1) ALT Crl.1 145