

***HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO**
+ CRIMINAL APPEAL Nos.1686 and 1687 of 2009

% 30-01-2015

Crl.A.No.1686 of 2009

#Tamilnad Mercantile Bank Ltd

....Appellant

Vs.

\$ M/s.Subaiah Gas Agency and 2 others

.... Respondents

Crl.A.No.1687 of 2009

#Tamilnad Mercantile Bank Ltd

....Appellant

Vs.

\$ M/s.Subaiah Gas Agency and 2 others

.... Respondents

!Counsel for the Appellants : Sri Paturu Madhusudhan

Counsel for the Respondents 1 and 2: Sri C.Raghu

<Gist :

>Head Note:

? Cases referred:

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. (1997) 4 SCC 247
12. 2013(1) LAWS (SC) 17
13. AIR 1956 Mysore 62
14. 1972 CrI.J 1409
15. 2010 CrI.J 2687
16. 1980 Supp. SCC 92
17. (1977) 4 SCC 551
18. 1990 Supp. SCC 132
19. (2004)4 SCC 129
20. AIR 2013 SC 2248
21. AIR 1977 SC 2185=(1977) 4 SCC 137
22. 1980(1) SCC 43
23. 1983(1) SCC 1
24. AIR 1961 SC 218
25. AIR 1962 SC 527
26. **2006(3) SCC-245 at paras-30&31 page-260.**
27. 1976-1-SCR-803
28. **2003(8) SCC-648 at paras-27&28 page-664.**
29. AIR 2011 SC 1137
30. AIR 1966 Allahabad 84

31. ILR 5 Allahabad 163
32. AIR 1967 SC 1639
33. AIR 1958 SC 376
34. 2005 CrI.J-4209 (AP)
35. (2014)5 SCC 590
36. (2013)1 SCC 177
37. (2014)10 SCC 373
38. (2014 (1) ALT CrI.145

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL APPEAL Nos.1686 and 1687 of 2009

COMMON JUDGMENT :

Both the appeals are filed impugning the orders dated 29.07.2009 in Criminal Revision Petition Nos.90 and 91 of 2007 on the file of IV Additional District and Sessions Judge, Visakhapatnam.

2) The Appellant and Respondents 1 and 2 are hereinafter called as Complainant and accused for the sake of convenience.

3) The facts in brief are that the Complainant filed C.C. Nos. 41 and 42 of 2005 against the accused for the offence punishable under Section 138 of Negotiable Instruments Act (for short, 'the Act') on the file of II Additional Chief Metropolitan Magistrate, Visakhapatnam alleging that the accused availed secured loan and over draft facility from the Complainant, that after disbursement of the said loan on overdraft, the accused issued cheques to discharge the respective dues and the same were dishonoured endorsing 'funds insufficient' on 06.08.2004 and 31.08.2004 respectively, that after issuing the statutory notice respectively the Complainant presented two complaints against both the accused. The cases were taken on file against both the accused under Section 138 of the Act and the accused were examined under Section 251 Cr.P.C, for which they pleaded not guilty and claimed

for trial. After examination of the witness P.W-1 on behalf of the complainant and after perusal of the respective documents marked on behalf of the complainant, since no documents marked on behalf of the accused nor examined any witness on behalf of the accused, the learned II Additional Chief Metropolitan Magistrate, Visakhapatnam passed Judgments in both the cases on 18.09.2007 respectively holding that A-1 and A-2 found guilty for the offence under Section 138 of the Act and convicted them under Section 255(2) of Cr.P.C and sentenced them to undergo simple imprisonment for three months in both the cases respectively and also directed to pay compensation of Rs.10,000/- and Rs.5,000/- respectively to the complainant.

4) Aggrieved by the conviction and sentence the accused preferred criminal revision petitions before the learned II Additional Chief Metropolitan Magistrate at Visakhapatnam contending that the trial Court has not properly appreciated the evidence on record and failed to note complainant's failure to prove legally enforceable debt or liability and the complainant introduced the existence of promissory note and revival letter at the time of trial, that the learned Magistrate erred in holding inefficiency in drafting the complaint is not a ground to reject the case of the complainant. After hearing both sides and after perusal of the revision grounds with other material on record, the learned IV Additional District and Sessions Judge, Visakhapatnam allowed the two revisions by setting aside the conviction Judgments of the trial Court dated 18.09.2007 in C.C. Nos.41 and 42 of 2005.

5) Against the said two revision reversal judgments the complainant presented the appeals contending that the revision Court below failed to note that the accused having borrowed

secured over daft from the appellant bank by depositing title deeds of the house property and agreed to repay the loan amount with interest and executed necessary loan documents in favour of the complainant issued the cheques that were when presented dishonoured with a reason 'funds insufficient' for which the complainant issued legal notice, that the accused wantonly not claimed to receive the legal notice addressed to him which is evident from the postal returned cover with endorsement 'not claimed' which clearly establishes the fact of giving notice to the accused his failure to pay and ought to have confirmed the Judgment of the trial Court, that the revision Court below having noted the existence of legally enforceable debt especially when in the presence of promissory note and revival letters which are marked and the accused with an intention to discharge in part of the debt has issued the cheques, the complainant filed the pronote and revival letters and therefore the complainant has proved that there is a legally enforceable debt in existence and it is for the accused to rebut that the debt amount under pronote was discharged by filing either receipt or voucher but the accused utterly failed in producing any iota of evidence to show that he has discharged the debt, that the revision Court below failed to note that a mere non-mentioning of the execution of pronote and revival letter in the complaint or statutory notice cannot be a ground for acquitting the accused by reversing the conviction judgments, that the revision Court below failed to note that the admission of loan transaction by the accused and his failure to come to witness box to prove his contention of the cheque was not signed by him or he signed the blank cheque that the revision Court below should have seen the presumptions under Section 139 read with Section 118 of the Act goes to show that the holder or payee of cheque received

the cheque in discharge in whole or in part of legally enforceable debt or liability, that the revision Court below failed to note the cardinal principle of law that when once the complainant has proved that there is an existence of legally enforceable debt by filing Exs.P-1 to P-6, it is for the accused to rebut the same that he has not been discharged by accused to rebut and thereby sought to set aside the acquittal judgment and prayed to convict the accused by allowing the appeal. The learned counsel reiterated the same in the course of hearing.

6) Whereas it is the contention of the counsel for the accused that the revision Court's judgment is just having fresh in mind the facts by proper appreciation on fact and law, that apart from the appeals not maintainable and no grounds to invoke Section 482 Cr.P.C for this Court while sitting against the revisional Court's acquittal judgment on merits also there is nothing to interfere and thereby sought for dismissal of both the matters

7) Now the points that arise for consideration in the appeal are:

1. *Whether the two appeals against the lower revisional Court's acquittal and reversal judgments are not maintainable and this Court cannot sit otherwise against the impugned acquittal revision Judgments, under Section 482 Cr.P.C and otherwise on merits and with what observations and conclusions?*

2. *To what result?*

POINT No.1:

8-(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.

8-(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].

8-(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.

8-(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.

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

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

8-(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.**

9-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".

9-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].

9-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.

9-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 **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, improbabilises the defence version, as any prudent person under the said circumstances should have, but for no defence to reply.

10) Before going into the correctness of the impugned lower revisional Court's acquittal judgment by reversing the trial Court conviction judgments, coming to the main issue on maintainability of the two appeals on hand for common disposal and otherwise

power of the Court to take the proceeding under Section 482 Cr.P.C for appeal or revision not maintainable otherwise with no other specific provision concerned; as per the detailed order of this Court in CrI.A.No.1043 of 2005 referring to earlier two single Judge expression of this Court in the same line as to the complainant of a private complaint case of dishonor of cheque is within the meaning of victim under the amended Cr.P.C.

10-A) Section 2(w)(a) read with proviso to Section 372 Cr.P.C enables the victim to maintain an appeal against the acquittal judgment or on insufficiency of sentence of fine or imprisonment while convicting or on inadequacy of compensation. Undisputedly the Cr.P.C amended Act, 5 of 2009 came into force with effect from 31.12.2009. The trial Court's conviction judgments in these two cases (by the II Additional Chief Metropolitan Magistrate, Visakhapatnam) in C.C. No.41 and 42 of 2005 respectively were dated 18.09.2007 to say by then the above amended Cr.P.C not came into force but for the amended Cr.P.C by Act 25 of 2005 with effect from 23.06.2006 including by amending sub-section (1) of Section 378 Cr.P.C. It is to say (and for the reason) that, Section 378 Cr.P.C deals with right of appeal (in general) in case of acquittal, whereas proviso to Section 372 Cr.P.C specially deals with right of victim even in case of acquittal.

10-B) Among Chapter XXIX Cr.P.C dealing with appeals under Section 372 to 394 Cr.P.C, as per Section 372 Cr.P.C prior to the proviso inserted enabling the victim to prefer an appeal supra, it speaks no appeal shall lie from any judgment or even an order of a criminal Court except as provided for by this Code or by any other law for the time being in force. Thus, the statutory right

of appeal prior to the remedy provided by proviso to Section 372 Cr.P.C with effect from 31.12.2009, is to be governed by any of the specific provisions of the said chapter XXIX as on the date of filing the appeal. The trial Court's conviction Judgments are no doubt not on plea of guilty, but on contest; thereby Section 375 Cr.P.C. has no application, equally Section 373 Cr.P.C for not against any security proceedings.

10-C) Coming to Section 374 Cr.P.C particularly from sub-section (3), where the accused convicted on a trial held by Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of First Class or of Second Class or sentenced under Section 325 Cr.P.C or order or sentence passed under Section 360 Cr.P.C by any Magistrate, there is a statutory right of appeal to the Court of Session. However, it is subject to the limitation under Section 376 Cr.P.C, which says notwithstanding anything contained in Section 374 Cr.P.C supra, there shall be no appeal by a convicted person in petty cases of which, as per Section 376 Cr.P.C clause (b), where conviction and sentence passed by a Court of Session or a Metropolitan Magistrate, if for a term not exceeding three months imprisonment or fine not exceeding Rs.200/- or both. Here the learned II Additional Chief Metropolitan Magistrate, Visakhapatnam, conviction Judgments in C.C. No.41 and 42 of 2005 were with sentence of simple imprisonment for three months and compensation of Rs.5,000/- with default sentence of simple imprisonment for one month. Had the trial Court imposed above said Rs.5,000/- as fine, there could be an appeal remedy for the bar under Section 376 Cr.P.C has no application, but for with three months simple imprisonment and only compensation (without fine) with default sentence for compensation. It is there from and rightly

the convicted accused in both C.C. No.41 and 42 of 2005 maintained the two revisions (for no appeal remedy) in Crl.Revision Petition Nos.90 and 91 of 2007 respectively before the Court of Session.

10-D) In this regard, it is also relevant to refer chapter XXX Cr.P.C relating to reference or revision covered by Sections 395 to 405 Cr.P.C. Of which, as per Section 401(4) Cr.P.C, on the powers of the High Court in revision, where under this Code if appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed. As per Section 399(1) Cr.P.C in the case of any proceeding, the record of which has been called for, the Sessions Judge may exercise all or any of the powers under Section 401(1) Cr.P.C viz., the discretion to exercise the powers conferred on a Court of appeal by Section 386, 389, 390 and 391 or 307 Cr.P.C. Further, as per Section 399(2) Cr.P.C, the sub-section (2) to (5) of Section 401 also shall as far as may be apply before the Court of Session in deciding a revision. It is to say there from that, once there is a remedy of appeal even before Court of Session against the conviction judgment of Metropolitan Magistrate, appeal is a bar from combined reading of Section 399 and 401 Cr.P.C referred supra. From said reading of Section 376 Cr.P.C with Section 374 Cr.P.C (referred supra) it is only the revision was maintainable and maintained before the Court of Sessions.

10-E) When such is the case, now coming to the maintainability of appeal against said revision orders or even to take the same as revision (by exercising the inherent power under Section 482 Cr.PC) the revision against an order covered by revision of the lower Court is a bar by virtue of Section 397(3)

Cr.P.C and the law is also clarified by the Three Judge Bench expression of the Apex Court in ***Krishnan V. Krishnaveni***^[11].

11) Thus, once there is a bar for second revision, it is to consider if appeal won't lie, whether to decide as a proceeding under Section 482 Cr.P.C.

11-A) From this, now coming back to Chapter XXIX Cr.P.C, Section 378 Cr.P.C which is with six sub-sections, the scope of which including the amendment to sub-section (1) to (3) by amended Act 25 of 2005 were considered by the expression of the Apex Court in ***Subhash Chand V. State of A.P.***^[12]. However, though that expression was long subsequent to coming into force of Cr.P.C amended Act 5 of 2009 amending Section 372 Cr.P.C incorporating proviso providing right of appeal to victim by incorporating definition of victim by Section 2(w)(a); the scope of which was not at all fallen for consideration therein for not brought to the notice of the Apex Court as to the enlarged definition of the victim thereunder in saying the complainant-officer in a food adulteration case under the Food Adulteration Act, to have right of appeal against acquittal judgment was with leave of Court under Section 378(4) Cr.P.C.

11-B) In this background, coming to Section 378 Cr.P.C further:- sub-section (3) of Section 378 Cr.P.C amended by Cr.P.C amended Act 25 of 2005 speaks that no appeal lies to High Court under Section (1) or (2) of Section 378 except with leave of the High Court. Now, by virtue of Section 372 Cr.P.C amended proviso by Act 5 of 2009 with Section 2(w)(a) of Cr.P.C definition of victim, this part of Section 378(3) read with Section 378(1) and (2) has to be read with Section 378(1)(b). It speaks, save as

otherwise provided in sub-section (2) and subject to sub-section (3) and (5), the State Government may, in any case, direct the public prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than High Court not being an order of acquittal passed by Magistrate in respect of a cognizable and non-bailable offence under clause(a), or an order of acquittal passed by the Court of Session in revision. Thus, against an order of acquittal passed by the Court of Session in revision, an appeal can be presented to the High Court by the State Government through Public Prosecutor.

11-C) From, this coming to Section 378(4) Cr.P.C, if such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to High Court. A combined reading of Section 378(1)(b) with sub-section (4) supra, in use of the words in sub-section (4) "if such an order of acquittal is passed in any case instituted upon complaint- - - - with leave of High Court to present appeal." Thus, against an order of acquittal passed by revision Court also in a case outcome of private complaint case, an appeal lies to the High Court. In that way according to the contention of the learned counsel for the appellants in the two appeals, the appeals against the revision, acquittal orders of the Sessions Judge by setting aside the conviction judgments of the trial Court, are prone to appeal and the appeals are maintainable.

12. It is otherwise by virtue of Section 372 proviso by amended Act 5 of 2009 the wording as 'provided that the victim shall have a right to prefer an appeal against any order passed by

the Court acquitting the accused or convicting for lesser offence or imposing inadequate compensation and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court. Though it is the contention of the learned counsel for the appellants that these appeals otherwise maintainable by virtue of Section 372 Cr.P.C as per the amended proviso by Act 5 of 2009, no doubt said provision provides right of appeal from judgment or order of a criminal Court to a superior Court, where ordinarily appeals lies against it. It is for the reason the right of appeal provided to the victim (against acquittal or insufficiency of sentence of imprisonment or fine or compensation) is against any order passed by the lower Court. In this context, it is important to note that the Apex Court in the year 2004 **Sujith Kumar Rana** (supra) held by interpreting the word 'order of Criminal Court' that it is not confined to trial Court, but includes even an order of appellate or revisional Court.

12-A) If that is the law, definitely under proviso to Section 372 Cr.P.C even against the impugned revision orders of the Court of Session reversing the trial Magistrate Court's conviction judgments, the appeal lies. It is also important to note in this context that, the expressions of the several High Courts including of the Mysore in **Chairman Village Panchayat V. Thimmanasetty**^[13] by interpreting Section 417 old Cr.P.C equal to present Section 378 Cr.P.C and following the same, by Gujarath High Court in **Mohd.Miya Khalumiya V. Majeedkhan**^[14] and of the Karnataka High Court in **K.H.Ganesh Rao V. H.Gopal**^[15] referring to the wording of Section 378 Cr.P.C held that to file an appeal against the acquittal judgment, it need not be against the acquittal judgment of the trial Magistrate but even against the

reversal acquittal judgment of the Court of Session in sitting against conviction judgment of trial Magistrate, to entertain the second appeal by High Court including in private complaint case with leave under Section 378(4) Cr.P.C, same is also held by this Court including in the Criminal Revision Case Nos.1522 and 1523 of 2014, vide common order dated 26.08.2014 in ***S.Chandra Prabhavathi V. State of Telangana***.

12-B) Thus, from the combined reading of these provisions against the revision acquittal judgments in Crl.R.P. Nos.90 and 91 of 2007 passed by IV Additional District and Sessions Judge, Visakhapatnam dated 29.07.2009 reversing the conviction judgment of the trial II Additional Metropolitan Magistrate in C.C Nos.41 and 42 of 2005 dated 18.09.2007, the present appeals are maintainable.

12-C) Even otherwise for arguments sake, the appeals are not maintainable from contention of the accused as Respondent No.2 to the present appeals in saying there can be no appeal against the lower Court's revision order reversing the trial Court's conviction judgment in acquitting the accused; then this Court's inherent power to decide the case by invoking Section 482 Cr.P.C is there.

13) It is important to note in this context from the expression in ***Krishnan*** (supra) referring to Section 397 read with Sections 401 and 483 and also Section 482 Cr.P.C that; though a second revision before High Court against the revision orders of the Sessions Court impugning the order of any Magistrate, under Section 397(3) is a bar, the inherent power of the High Court is still available under Section 482 Cr.P.C to proceed with the matter in

accordance with the requirements of justice. It was observed that besides the *suomotu* power of the High Court under Section 401 Cr.P.C to convert the appeal as revision and vice-versa including by invoking Section 482 Cr.P.C or to sit against the impugned order in revision either under Section 483 Cr.P.C or even under Section 482 Cr.P.C. Where it is found that miscarriage of justice or abuse of process of the Court or required statutory procedure not been complied with or the order passed or sentence imposed requires correction, it is but the duty of the High Court to have it corrected by exercising the inherent powers.

13-A) It is therefore to meet the ends of justice or to prevent abuse of process or otherwise, where it is necessary the High Court is preserved with inherent power and would be justified so to exercise such inherent power in appropriate cases even filed as an appeal or a revision or the like and for that conclusion the apex Court referred the maxim of *ex debito justitiae* i.e., in accordance with the requirements of justice. Thus, from that principle, the prohibition under Section 397(3) on revision power given to High Court or otherwise for no appeal provision, such a bar have no application and no way coming in the way for the High Court to decide the lis by sitting against the order of the Sessions Judge. It was observed particularly at para No.9 of the judgment in **Krishnan** (supra) on the inherent power of the High Court under Section 482 Cr.P.C referring to the said maxim that this power is not conferred by the Code but inherent in the High Court that is preserved by the Code. It was also observed by referring to the four Judges bench expression in **V.C.Shukla V. State through C.B.I**^[16] that refers the three Judge Bench expression in

Madhulimaye v. State of Maharashtra^[17] that even the bar under Section 397(2) Cr.P.C to maintain a revision not coming in the way to decide the matter before the High Court under Section 482 Cr.P.C as nothing in the provisions of the Code shall be deemed to limit or affect the inherent powers of the High Court.

13-B) Thus, the power of revision to entertain by High Court, even taken away under any of the provisions of Cr.P.C that can be exercised under Section 482 Cr.P.C. The Apex Court also referred for that several expressions including **Rajan Kumar Machananda V. State of Karnataka**^[18] another expression of the Three Judge Bench holding the bar under Section 397 Cr.P.C is not coming in the way to the High Court to decide the matter under Section 482 Cr.P.C. Further, the Apex Court in the other expression in **State of West Bengal V. Sujith Kumar Rana**^[19] held that inherent power under Section 482 Cr.P.C can be exercised by the High Court in deciding the matter pending before it, even there is any bar to exercise of power under Cr.P.C or any other law, the High Court within its inherent power can exercise the jurisdiction in that matter before it under Section 482 Cr.P.C by sitting against the order impugned of any authority or Court to which it is superior.

13-C) Further more, in the later expression in **Mohit @ Sonu Vs. State of U.P.**^[20], the Apex Court referred the settled expression of **Madhu Limaye**(supra) besides the expression earlier to it in **Amarnath Vs. State of Haryana**^[21] saying the orders which are not purely interlocutory in nature and which could be corrected in exercise of revisional power, the High Court would refuse to exercise inherent power; but where if revision is not

maintainable, the High Court can exercise inherent powers; to exercise inherent power, the order clearly brings a situation of abuse of process of the Court or for securing ends of justice or interference is absolutely necessary. It also referred **Rajkumar Vs. State**^[22] in distinguishing the power of revision and inherent power of the High Court in holding that none of the Cr.P.C. provisions will affect the amplitude of the inherent power reserved in the High Court by Section 482 of Cr.P.C. but for inherent power should not invade the area set apart for specific power under a specific provision of the Code.

13-D) It also held referring to the **Municipal Corporation of Delhi Vs. Ramakishan Rahatagi**^[23] which relied upon **Madhu Limaye** (three judge Bench expression) supra, saying on the question whether, where a power is exercised under Section 397 Cr.P.C., the High Court could exercise those powers under Section 482 Cr.P.C.; that the matter is however no longer res-integra as the entire controversy has been set at rest by **Madhu Limaye**(supra)-where it was pointed out that Section 482 Cr.P.C. had a different parameter to exercise the inherent power to pass necessary orders and is a provision independent of Section 397 Cr.P.C. A plain reading of Section 482 Cr.P.C. follow that, nothing in the Code (*which include Section 397(2) Cr.P.C. also*), shall be deemed to limit or affect the inherent powers of the High Court but for to say the order brings about a situation which is an abuse of process of the Court or for the purpose of securing the ends of justice or interference by the High Court is absolutely necessary for exercise of the inherent power in such a situation. It is also observed that the High Court alone can pass such orders **ex debito justitiae**- to do real and substantial justice in the lis. It was

also observed referring to Section 151 C.P.C. and the earlier expressions of the Apex Court in **Padamsen Vs. State of Uttar Pradesh**^[24] & **Manoharlal Chopra Vs. Rai Bahadur**^[25] that it is well recognized that the High Court is vested with inherent power, however, said inherent power is not to be exercised contrary to any express provision that being the intention of legislature in enacting the civil & criminal procedure codes *vis-a-vis* the law laid down by the Apex Court.

13-E) It was also held by the Apex Court in **Popular Muthaiah Vs State rep. by Inspector of police**^[26] that the inherent power is not confined to procedural or adjectival law, but even extending to determine substantial rights of the parties and it can be exercised in respect of even incidental or supplemental power irrespective of nature of proceedings; as it acts *ex debito justitiae*-to mean to do real and substantial justice in the lis for which alone the power exists inherently. The Apex Court in **Popular Muthaiah**(supra) referred the earlier expressions in 1) **Nawabganj Sugar Mills Vs. Union of India**^[27] holding that, though there are limitations on the powers of the Court, it cannot abandon its inherent powers. **The inherent power has its roots in necessity and its breadth is coextensive with the necessity** and in 2) **South Eastern Coal Fields Ltd. Vs State of M.P.**^[28] holding that **act of court does not confine to act of primary court, but even appellate or revisional or other superior court, as it is an act of court as a whole.** In **Popular Muthaiah**(supra) it is also held referring to the scope of the Maxim *actus curiae neminem gravabit*-that this principle is not confined to erroneous act of court, but is applicable to all acts which the court would not have passed if correctly appraised

of the facts and the law.

13-F) It is also in this juncture to mention the expression of the Apex Court in **Rajendra Prasad Gupta Vs. Prakash Chandra Mishra**^[29] relying upon the Full Bench expression of Allahabad High Court in **Rajnarayana Saxena Vs. Bhimsen**^[30] which relied upon the earlier Full Bench expression of the Allahabad High Court in **Narsing Das Vs. Mangal Dubey**^[31] holding that the Courts have to act upon the positive principle that every procedure is permissible till it is shown to be prohibited and prohibition as a general principle cannot be presumed.

13-G) It is also as per the well laid down expression of the Apex Court five judge Bench way back in **Ratilal Bhanji Mithani Vs. Assistant Collector of Customs, Bombay**^[32] referring to the earlier three judge bench expression in **Talab Haji Hussain Vs. Madhukar Purshottam Mondkar**^[33] that the High Court is having the inherent power under Section 561-A(old) 482(new) Cr.P.C, where such an order is necessary to secure the end of justice or to prevent abuse of process of Court as this power is always preserved to the High Court under the Code. It was also observed that the inherent power of the High Court is not conferred by Cr.P.C. but for to say the power which inheres in the High Court no way limited or effected for its exercise by High Court by the provisions of Cr.P.C.

13-H) Thus, from the above settled propositions of law, even revision or appeal is a bar by virtue of any of the specific provisions of Cr.P.C the High Court's inherent power can be exercised in deciding the matter before it under Section 482 Cr.P.C within its scope; that is not a bar from what is discussed

supra from several and settled expressions of the Apex Court to decide the two appeals on merits by taking the same under Section 482 Cr.P.C for otherwise not maintainable under Section 378(4) Cr.P.C or proviso to Section 372 amended Cr.P.C.

14) The other contention of the learned counsel for the accused/2nd respondent to these two matters is that, the subject under Section 482 Cr.P.C not entrusted in allotment of work to this Court in distribution by the Honourable the Chief Justice. In fact, the two matters are filed and numbered as appeals and the criminal appeal matters under Section 138 of Negotiable Instruments Act are undisputedly entrusted to this bench. When such is the case, in the case covered by Section 138 of the Act in deciding the matters filed as appeals; from contention of appeal won't lie; when the inherent powers of this Court which inheres from the very constitution that are saved by the Cr.P.C to decide the lis, it no way requires further entrustment, muchless to say, this Court is powerless to invoke Section 482 Cr.P.C.

15) Thus, the inherent power of the Court which inheres in it, enables to decide the appeals otherwise under Section 482 Cr.P.C by sitting against the revision reversal and acquittal Judgments (orders), reversing the trial Court's conviction judgment against the two accused persons on the two private complaint cases maintained by the present appellant-complainant bank.

16) From the above, since the two matters can be decided by this Court under Section 482 Cr.P.C, if not as appeals under Section 372 Cr.P.C as answered supra; now coming to the legality and correctness of the impugned reversal revision orders of the

Court of Session by sitting against the cases covered under Section 138 of the Act from the scope of law under Section 138 of the Act discussed supra, coming to the further facts, save those that are referred in the earlier paras even at the cost of repetition, where required, Ex.P-1 is the respective cheques in the two cases that were routed from the account of the accused i.e., M/s.Subbaiah Gas Agency represented by Sri S.Prasada Rao proprietor concerned and said Prasada Rao again in his individual capacity though the proprietor and the proprietary concern are one and the same (vide ***Rohit Parushram V. Dhiraj Raval***^[34]) with no necessity again to array and the other accused no other than his wife by name S.Raja Sri, the said cheques returned dishonoured and statutory notices issued, but not paid. The defence of the accused before the trial Court was that admittedly the 1st accused Prasada Rao, the proprietor of the Gas Agency availed overdraft facility, however, contended that there is no proof filed and the pronote covered by Ex.P-6 and revival letters Exs.P-5 and P-7 to give life to the pronote debt of the over draft facility filed only during trial with no whisper in the Ex.P-3 statutory notice under Section 138(b) of the Act. In fact as per Section 138(b) and (c) of the Act, the statutory notice is mainly meant within one month after dishonor of the cheque and receiving of intimation of dishonor to intimate to the accused, said factum so as to enable the accused to pay the amount within 15 days of receipt of the notice and not otherwise. Thereby the intimation of dishonor of cheque and demand to pay is suffice for the statutory compliance to pay within 15 days of receipt of notice and the non-payment gives cause of action to accrue and exist for one month there from to file complaint case as also laid down by the Apex Court in

Indian Bank Association V. Union of India^[35]. Even the Three Judge Bench expression of the Apex Court in ***M.S.R.Leathers V. S.Pallaniappan***^[36] speaks that, for every dishonor and statutory notice intimating dishonor to pay, there is a cause of action accrual to avail and even after giving of notice a second presentation of the cheque and on dishonor again giving of fresh statutory notice commences fresh cause of action from subsequent presentation and serving or deemed serving of notice in case of failure to pay within 15 days there from and the only thing is the cheque must be within the validity period by the time of last dishonor. When such is the law, when the statutory notice is not contemplated to mention the cheque issued is for the pronote debt covered by revival but for the cheque with particulars of the cheque presented and return dishonoured and demand to pay. Thereby, the non mention cannot be considered as a major ground muchless to belie the case of the complainant bank against the accused. It is therefrom, the trial Court held that the inefficiency in drafting the notice or the complaint or the non-mention of the particulars of the pronote with revival for which the cheque issued by themselves not fatal. It is in fact not the case of the accused persons that the cheque was not routed from their account. They failed to explain how the cheque leaf from the account of the accused, but for issued by the accused to the complainant bank, came to the custody of the complainant bank as held by the Apex Court in ***Rangappa*** supra to draw inference against the accused therefrom also of cheque duly issued. P.W-1 Manager of the Complainant Bank deposed that the accused persons borrowed secured overdraft for Rs.2,00,000/- from complainant bank by depositing the title deeds of the house property of 3rd accused and

created equitable mortgage and agreed to repay the loan with interest that is covered by the pronote that was even revived latter to save limitation, failed to pay and for demands issued the respective Ex.P-1 cheques. In the cross-examination he deposed that, the complainant bank is in custody of the pronote as well as the revival letters executed by the accused for the borrowal and denied the suggestion of no pronote and revival letters executed by accused for the borrowal and denied the suggestion of the pronote and revival letters not signed by the accused. In fact, even ignoring the pronote and revival letters, it is not the denial of signature of accused on the cheque Ex.P-1. It is not even explained how, but for issued by accused for the amounts borrowed from the complainant bank, the cheque leaf of accused came to the custody of the complainant bank. There is no reply even to the statutory notice. It is as held in ***Rangappa*** supra the presumptions under Sections 118 and 138 of the Act of the cheque issued duly and for consideration and for the legally enforceable debt or other liability are lying in favour of the complainant, once routed from the account of the accused, said cheque and the burden is on the accused under reverse onus clause to rebut the same. Thus, even to say the cheque issued for any debt is not legally enforceable and barred by time, the burden is on the accused. There is nothing from cross-examination of P.W-1 by accused in this regard and none of the accused came to witness box even particularly A-2 representing A-1 entity in discharge of the burden even by preponderance of probabilities. The only thing the accused want to rely is at the time of availing the loan, there is a suggestion to P.W-1 by possibility of obtaining signatures. There from, there is no such admission by P.W-1 in his cross-examination, so to say apart from the settled law that the evidence

has to be read as a whole and not by pick and choose of a stray sentence to construe whether there is any admission of any fact or not. It is in fact brought in the cross-examination of P.W-1 that, he is deposing from records and not the manager at the time of sanction of the loan and execution of documents. When such is the case, how it can be said as if P.W-1 admitted or there is an inference from P.W-1's evidence to say as an admission of signatures on blank documents obtained or if those are misused. Even for that little contention taken, atleast for arguments sake, there also burden lies on the accused as to on what circumstances and why a blank cheque issued by them in favour of the complainant bank that too while admitting there was a borrowal and loan transaction. Suffice to say, the cheques were duly issued by accused and that was the conclusion the trial Court rightly arrived. In fact in sitting against the said conviction judgment of the trial Court by the learned Sessions Judge under Section 397 Cr.P.C, there is nothing to interfere. Here, the scope of revision is different from the scope of appeal. So far as the revision concerned, the revisional jurisdiction under Section 397(1) is to exercise in sitting against correctness, legality or propriety of any finding, sentence or order recorded or passed as to the regularity of the proceeding of the inferior Court by calling for records. There is nothing impropriety or illegality on the part of the trial Court in the conviction judgments muchless on the sentence, for the lower revisional Court by sitting in revision against it to reverse the conviction judgments and the sentence at the instance of the accused persons 1 and 2 that is propriety concern and the proprietor who are one and the same as referred supra. However, the revisional Court in reversing the conviction judgment and sentence observed in para No.6 that the main grievance of the

accused impugning the trial Court's conviction judgment is, there is ill appreciation of evidence despite burden on complainant to prove that there is legally enforceable debt or other liability. In fact as laid down by the Apex Court in **Rangappa** supra and as discussed supra, the presumption is in favour of the complainant and under reverse onus clause, it is the burden of the accused to rebut the presumption by showing how the debt or other liability is not legally enforceable as discussed supra. Nothing from the cross-examination of P.W-1 that could be elicited and no any document filed by the accused. Even from Exs.P-1 to P-7 exhibited on behalf of the complainant, there is nothing there from to the advantage of the accused and the accused even did not choose to give to witness box and there is no oath against oath, besides nothing to rebut the presumptions available in favour of the complainant strengthened from the oral and documentary evidence of complainant supra. The lower Revisional Court mainly there from and also in saying the non-mention of the pronote and revival letters Exs.P-6 and P-7 are fatal to the case of the complainant ignoring the factum of the cheque issued by the accused not in dispute routed from his account with his signature and it is even as per **Rangappa** supra burden on accused to show how the debt or other liability is not legally enforceable and what is the evidence favourable to the accused from the material on record even to say there is discharge of the burden lies on the accused. A-3 not signatory to the cheque nor concern with proprietary concern but for if at all stood as guarantor, the loan availed by her husband, A-2 whose proprietary concern is A-1; as laid down by the Apex Court in **Anil Gupta V. Star India Private Limited** ^[37], A-3 cannot be made liable but for A-2, the proprietor of the self-same proprietary concern for no two entities to give

separate finding against **Rohit Parsuram** (supra). Thus, A-2 is found guilty. Thus, the reversal and acquittal judgments of the lower revisional Court by sitting against the conviction judgments of the trial Court are unsustainable and outcome of ill appreciation of facts and law that resulted grave injustice to the complainant-bank and the same is prone to the jurisdiction of this Court by way of appeal under Section 378(4) read with Section 378(1)(b) and (3) and otherwise under Section 372 and its proviso read with Section 2(w)(a) and otherwise within inherent power of this Court saved by the Section 482 Cr.p.C, for this Court to set aside the said revision Court reversal judgments to secure ends of justice being necessary. Accordingly, point No.1 is answered.

18) In the result, the two appeals taken under Section 482 Cr.P.C from otherwise if not maintainable either under Section 378(4) or under Section 372 amended Cr.P.C and the lower revision Court's acquittal judgments are set aside by restoring the trial Court's conviction judgments; it is however by modifying the sentence of three months simple imprisonment with fine of Rs.5,000/- to sentence of imprisonment till raising of the day by giving set off of the period of imprisonment undergone, if any, for the said day under Section 428 Cr.P.C and by imposing fine of Rs.3,20,000/- of which Rs.3,00,000/- towards the cheques value viz., the Ex.P-1 cheque value of Rs.2,00,000/- in C.C. No.41 of 2005 (CrI.R.C. No.90 of 2007) and Ex.P-1 cheque value of Rs.1,00,000/- in C.C. No.420 of 2005 (CrI.R.C. No.91 of 2007) shall go as compensation to the complainant and the remaining Rs.20,000/- as fine (at Rs.10,000/- in each case) to the State by directing the accused Prasada Rao (Proprietor of Proprietary concern) to pay the said amount of fine within one month from today and also to undergo before the trial Court said substantial

sentence of imprisonment till raising of the day following the expression of the Apex Court in **SOMNATH SARKA VS. UTPAL BASU MALLICK**^[38] 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.’*

19) Failing which directing the trial Court to secure his presence, if not entitled to set off any period undergone to undergo in open Court, the sentence till raising of the day and also to levy the said fine amount under Section 421 read with 431 Cr.P.C and recover with default sentence of three months simple imprisonment and pay the compensation amount to the complainant and remit the balance towards fine amount to the State. It is needless to say if the accused already paid the fine amount imposed and not withdrawn from the reversal judgment of the lower revisional Court, the same can be given set off out of the fine amount goes to the State.

Dr. B. SIVA SANKARA RAO, J

Date: 30-01-2015

N.B: L.R copy to be marked
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- [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] (1997) 4 SCC 247
- [12] 2013(1) LAWS (SC) 17
- [13] AIR 1956 Mysore 62
- [14] 1972 CrI.J 1409
- [15] 2010 CrI.J 2687
- [16] 1980 Supp. SCC 92
- [17] (1977) 4 SCC 551
- [18] 1990 Supp. SCC 132
- [19] (2004)4 SCC 129
- [20] AIR 2013 SC 2248
- [21] AIR 1977 SC 2185=(1977) 4 SCC 137
- [22] 1980(1) SCC 43
- [23] 1983(1) SCC 1
- [24] AIR 1961 SC 218
- [25] AIR 1962 SC 527
- [26] **2006(3) SCC-245 at paras-30&31 page-260.**
- [27] 1976-1-SCR-803
- [28] **2003(8) SCC-648 at paras-27&28 page-664.**
- [29] AIR 2011 SC 1137
- [30] AIR 1966 Allahabad 84
- [31] ILR 5 Allahabad 163
- [32] AIR 1967 SC 1639
- [33] AIR 1958 SC 376
- [34] 2005 CrI.J-4209 (AP)
- [35] (2014)5 SCC 590
- [36] (2013)1 SCC 177

[\[37\]](#) (2014)10 SCC 373

[\[38\]](#) (2014 (1) ALT CrI.145