

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 05.01.2017

Pronounced on : 23.01.2017

Coram

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

Crl.A.No.13 of 2014

M/s.India Cements Investments
Services Limited,
No.38, Sterling Road, Chennai,
Represented by its Assistant General
Manager (Operations)
Mr.K.Sathyanarayanan ... Appellant/Respondent/Complainant

V.

T.P.Nallusamy ... Respondent/Appellant/Accused

Prayer: Appeal filed under Section 378 of the Criminal Procedure Code,
praying to set aside the order dated 08.11.2013 passed by the
Learned Additional District and Sessions Court Judge, Namakkal in
C.A.No.1/13 and to confirm the judgment made in STC.No.823/2010
dated 27.12.2012 on the file of the Learned Judicial Magistrate I,
Namakkal.

For Appellant : Mr.M.Aravind Subramaniam

For Respondent : Mr.D.Sivakumaran

JUDGMENT**Preamble:**

The Appellant/Respondent (Complainant) has filed the instant Criminal Appeal before this Court as against the Judgment dated 08.11.2013 in C.A.No.1 of 2013 passed by the Learned Additional District and Sessions Judge, Namakkal.

2.The Learned Additional District and Sessions Judge, Namakkal, while passing the impugned Judgment in C.A.No.1 of 2013, on 08.11.2013, at paragraph 11, had, among other things, observed to the effect that '... P.W.1 had deposed in his cross examination (before the trial Court) that he had not filed the Contract Note and that he does not know ordinarily when shares were purchased, the account details were to be submitted to the Company Law Board and further that, the Respondent/Accused is a client of the Appellant Company and it was correct to state that in three cheques, the Respondent/Accused signature was found in black ink'.

3.Further, the First Appellate Court had proceeded to observe in the Judgment that P.W.1 had stated that it was correct to state that in three cheques apart from the signature, the amount details mentioned in the cheques were different ones and in the cheque dated

17.01.2008, his company's name was written and in other two cheques, their company's seal was affixed and the said three cheques were given by the Respondent/Accused at the same time and on the same date, the three cheques were presented for collection by their company.

4. Besides the above, the First Appellate Court in its Judgment, at paragraph 11, had proceeded to observe that it was evident that the present case was filed by the Appellant/Complainant by using the blank signed Cheques - Ex.P5 to P7, after filling up the same (by the Accused). Apart from that, the First Appellate Court had stated in the Judgment that the HDFC Bank Manager was not examined to show that the Respondent/Accused had no sufficient money in his account on 23.01.2008 and also that, the Account List of the Respondent/Accused was not filed by the Appellant and also that since it was not mentioned whether Ex.P5 to P7 - Cheques were given to the Appellant/Company or the Cheque was given for the loan taken from the Appellant/Company and the reasons were not established through an oral and documentary evidence to show that the Respondent/Accused had issued three cheques and cheated the Appellant/Company, ultimately found the Respondent/Accused not guilty and

allowed the Appeal.

5. Earlier, the trial Court, in its Judgment in S.T.C.No.823 of 2010 dated 27.12.2012, had, *inter alia*, observed that for the 'Legally Enforceable Debt' as seen under Section 138 of the Negotiable Instruments Act, the Respondent/Accused had issued Ex.P5 to P7 - Cheques and when they were deposited in the bank account, the said cheques were dishonoured owing to insufficient funds and when a notice was issued at the proper time, the same was received by the Respondent/Accused and when the cheques amount was not paid, the case was proved on behalf of the Complainant as per Section 138 of the N.I. Act. There was no rebuttal evidence adduced on the side of the Respondent/Accused and finally, held that the Respondent/Accused was guilty under Section 138 of the Negotiable Instruments Act, since he had not paid the cheques amount in due time and for the said offence, a simple imprisonment one year was imposed on the Respondent/Accused and also directed the compensation amount of Rs.10,00,000/- to the Appellant to be paid by the Respondent/Accused under Section 357(3) Cr.P.C. Further, in default of payment of compensation amount, the Respondent/Accused was directed to undergo further three months simple imprisonment.

Appellant's Contentions:

6.Before this Court, the Appellant/Respondent/Complainant (as an aggrieved person), has focussed the present Criminal Appeal, taking a plea that the Cheques were issued pursuant to the Ex.P3 - Agreement, but this was not taken into account by the First Appellate Court in a proper and real perspective.

7.It is represented on behalf of the Appellant that the First Appellate Court had failed to note Ex.P4 - Statement of Account and in fact, the Statement of Account (Ex.P4) had duly reflected an outstanding sum of Rs.15,47,440.90/-.

8.The Learned Counsel for the Appellant projects an argument that for the outstanding sum of Rs.15,47,440.90 the Respondent/Accused had issued the cheques only for Rs.10,00,000/- (which is a part liability) and added further, the cheques do not represent the amount in entirety.

9.The Learned Counsel for the Appellant takes an emphatic plea that the trial Court had taken a wrong inference on seeing the seal of

the Appellant/Company in two cheques and in fact, the relevant cheques were produced by the Respondent/Accused to the Appellant/Company with a request to draw the company's name and against this request, the Appellant's/Company's seal was affixed. That apart, the very fact of handing over of these cheques in question to the Appellant/Company by the Respondent/Accused is a proof that the Respondent owes such amount to the Appellant.

10.The Learned Counsel for the Appellant proceeds to take a stand that the Respondent/Accused had failed to examine any witness in order to produce any document to rebut the presumption under Section 138 of the N.I. Act. But, this crucial aspect of the matter was not taken in account by the First Appellate Court in a proper manner.

11.The Learned Counsel for the Appellant brings it to the notice of this Court that the Respondent/Accused had entered into contract with full knowledge of its implications under the caption 'Futures and Options Contracts' in Derivatives (which is governed by rules and regulations of National Stock Exchange) and as such he cannot feign ignorance in this regard. Unfortunately, the First Appellate Court had failed to appreciate the same.

12.The Learned Counsel for the Appellant submits that the First Appellate Court had failed to note that the Reserve Bank of India Amendment Act, 2006 was passed to legitimise the 'Contracts in Derivatives' with retrospective effect with introduction of Chapter III-D. Section 45-U (a) of RBI Act, which defined 'Derivative'.

13.Advancing his arguments, the Learned Counsel for the Appellant contends that the Respondent/Accused had entered into an agreement with the Appellant/Company in the year 2006 and for more than two years was doing business and only in the year 2008, there arose a dispute when the Respondent/Accused started loosing money on shares and could not be able to make payments to the Appellant.

14.Expatiating his submission, the Learned Counsel for the Appellant takes a forceful stand that the Respondent/Accused had not examined any witness to adduce prima facie evidence to prove his defence and further he had not filed any document to exhibit that the amount reflected in Ex.P4 statement of accounts produced by the Appellant/Company was a false one.

15.The Learned Counsel for the Appellant submits that the Respondent/Accused had not replied to the legal notice issued by the Appellant/Company pursuant to the dishonour of cheques and also not gave any clarification either in respect of the cheques in question or in respect of the statement of account furnished.

16.The Learned Counsel for the Appellant strenuously submits that without analysing the evidence and documents, the Appellate Court had jumped to a resultant conclusion that the Respondent/Accused was not guilty of the offence under Section 138 of the Negotiable Instruments Act and acquitted him, which has resulted in serious miscarriage of Justice.

17.The Learned Counsel for the Appellant submits that the First Appellate Court had committed an error in observing that non filing of account details of transaction between the Appellant/Respondent before the Company Law Board is an illegal one. Furthermore, it is the stand of the Appellant that the First Appellate Court had incorrectly observed in its Judgment that there was no relationship between the Appellant and the Respondent when in fact the same was established

by evidence on record.

18.It is the contention of the Learned Counsel for the Appellant that the First Appellate Court had rendered a Judgment of Acquittal in the Criminal Appeal without analysing the documents and available evidence on record and also arrived at a conclusion based only on mere conjectures.

19.The Learned Counsel for the Appellant submits that the Appellant is engaged in providing numerous financial services viz., share trading and share brokering. Furthermore, the Appellant is registered with the National Stock Exchange.

20.It is represented on behalf of the Appellant that the Respondent/Accused, with a view to avail the services of the Appellant/Complainant, entered into a contract with the Appellant viz., member and constituent agreement on 18.12.2006, in and by which, the Respondent/Accused was made aware of the risks involved in the transactions.

21.The Learned Counsel for the Appellant brings it to the notice of this Court that the said agreement was exclusively dealing with

Derivatives Market of the National Stock Exchange and by means of the 'Risk Disclosure Document' it was categorically mentioned that the Respondent/Accused ought to keep the margin of sum available to cover the losses involved in the scheme of 'Trading'. That apart, it was also stated that if the prices of shares move against him, he may lose a part or whole margin of the principal invested during a short span of time.

22.The Learned Counsel for the Appellant contends that the Clauses 1.3.6, 1.3.8, 1.3.10 speak of the remedies available to the Respondent/Accused if there is any discrepancy in the statement of form. Indeed, the transaction between the Respondent/Accused and the Appellant do stand over a period of two years commencing from the year 2006 till the arising of dispute in the year 2008.

23.It is the clear cut stand of the Appellant that the Respondent/Accused was having a credit balance in the Accounts and in regard to the credit balance, he issued cheques, being the subject matter of the complaint. As a matter of fact, the cheques were issued for the purposes of maintaining the margin sum with the Appellant/Complainant. Apart from that, the Appellant comes out with a plea that

since the shares of the scrips which the Respondent/Accused purchased started falling, had resulted in the adjustment of the margin amount on the cheques given to the Respondent/Accused.

24.The Learned Counsel for the Appellant submits that the Respondent/Accused had issued cheques as margin money for the purchase of the shares under the future and option segment. In this connection, the Learned Counsel for the Appellant takes a stand that the Respondent/Accused had issued the cheques amounting to a sum of Rs.10,00,000/- to cover the margin amount and since the cheques were returned, the Appellant could not trade in the shares which were mentioned by the Respondent/Accused, perforcing the Appellant to issue Ex.P11 – Lawyer's Notice dated 20.02.2008 (which were duly acknowledged by the Respondent/Accused on 23.02.2008), and thereafter, he neither paid the money nor issued reply raising disputes on the cheques issued by him.

25.The Learned Counsel for the Appellant contends that there is no need to file a copy of the Agreement before the Company Law Board and in reality, in the cheques in question, there was no 'Material Alteration', inasmuch as the Appellant/Company seal was endorsed on

the cheques. Therefore, there was no 'Material Alteration' in the cheques as per Section 87 of the Negotiable Instruments Act, in regard to the sum written in the cheques either in words or in figures. Moreover, when both parties are not disputing the signatures in the cheques, the ingredients of Section 139 of the Negotiable Instruments Act will squarely apply to the terms of the contract.

26.The Learned Counsel for the Appellant/Company points out that as per Ex.P3 - Risk Disclosure Document, Clause 1.3.6, it is for the Respondent/Accused to make a demand for the Contract Note. Further, the Respondent/Accused is to contact the Investors Grievance Cell of the National Stock Exchange and besides that, there is a Legally Enforceable Debt for which the cheques were given and also that the Respondent/Accused had countersigned the cheques and therefore, there is no 'Material Alteration'.

27.The Learned Counsel for the Appellant takes a plea that the Respondent/Accused had failed to establish the allegations that the cheques issued were of a different colour through a handwriting expert, as per Section 45 of the Indian Evidence Act, 1872.

28.The Learned Counsel for the Appellant submits that when the transaction itself commenced from the year 2006, when no cheque could have been issued prior to the year 2006 and therefore, it is only legal and logical that the year of the cheque was changed from 2000 to 2008. Moreover, the fact that the year was changed from 2000 to 2008 does not affect the rights or liabilities of the parties.

29.The Learned Counsel for the Appellant/Complainant cites the following decisions:

(i)In the Judgment of the Hon'ble Supreme Court in ***Crl.A.No.867 of 2016 (arising out of S.L.P.(Crl.) No.5410 of 2014) between Sampelly Satyanarayana Rao V. Indian Renewable Energy Development Agency Limited*** at paragraph **16 to 20**, it is observed and held as follows:

"16.We are in respectful agreement with the above observations. In the present case, reference to the complaint (a copy of which is Annexures P-7) shows that as per the case of the complainant, the cheques which were subject matter of the said complaint were towards the partial repayment of the dues under the

loan agreement (para 5 of the complaint)

17. As is clear from the above observations of this Court, it is well settled that while dealing with a quashing petition, the Court has ordinarily to proceed on the basis of averments in the complaint. The defence of the accused cannot be considered at this stage. The court considering the prayer for quashing does not adjudicate upon a disputed question of fact.

18. In Rangappa Versus Sri Mohan 9 (2010) 11 SCC 441 , this Court held that once issuance of a cheque and signature thereon are admitted, presumption of a legally enforceable debt in favour of the holder of the cheque arises. It is for the accused to rebut the said presumption, though accused need not adduce his own evidence and can rely upon the material submitted by the complainant. However, mere statement of the accused may not be sufficient to rebut the said presumption. A post dated cheque is a well recognized mode of payment (Souza (2003) 3 SCC 232)

19. Thus, the question has to be

answered in favour of the respondent and against the appellant. Dishonour of Cheque in the present case being for discharge of existing liability is covered by Section 138 of the Act, as rightly held by the High Court.

20.Accordingly, we do not find any merit in this appeal and the same is dismissed. Since we have only gone into the question whether on admitted facts, case for quashing has not been made out, the appellant will be at liberty to contest the matter in trial court in accordance with law.”

(ii)In the decision ***S.Arumugham V. Srinivasan, 2016 (2) TLNJ 356 (Criminal)***, it is held that '***Complainant is to discharge the initial onus that cheque was given to him by the accused in discharge of 'Legally Enforceable Liability' and further he is to show that the cheque was issued in discharge of particular loan amount etc.'***

(iii)In the Judgment of this Court in ***Crl.A.No.92 of 2008 dated 23.02.2015 (between B.Uma Maheswari V. Petchiammal)*** at ***paragraph 18***, it is observed as follows:

"Considering the facts and circumstances of the case along with the above decisions, since the respondent / accused has not rebutted the presumption under Section 139 of the Act, the onus of proving that Ex.P.1 cheque has been issued for discharging subsisting liability is not shifted on the appellant. So the appellant / complainant has proved that Ex.P.1 cheque was issued by the respondent for discharging legally subsisting liability by invoking presumption under Sections 118 and 139 of the Act and even though the appellant had issued statutory notice to the respondent, the respondent has not repaid the amount. Hence, I am of the view, the appellant / complainant has proved that the respondent / accused is guilty for offence under Section 138 of Negotiable Instruments Act beyond reasonable doubt. Therefore, the judgment of the acquittal passed by the trial Court is perverse and it is liable to be set aside and it is hereby set aside."

(iv) In the decision ***M/s.Durairaj Mills Limited V.***

M/s.Siruvanee Clothing Company & others, 2013-2-L.W. (Crl.)

640 at special page 650, at paragraphs 39 to 41, it is observed as under:

"39.It is to be noted that an alteration of a Negotiable Instrument is material, if it might easily affect a person's substantial right whether such result really follows or not and even though the change is abandoned by the person in whose favour it was intended to operate. Moreover, an alteration made before a Bill is completely issued, eg. the alteration by the drawer of a purported place of drawing inserted by an acceptor, who has accepted a Bill before it being signed by the drawer is not 'Material Alteration'. A formal alteration, which is insignificant or superfluous would not affect the instrument in any manner in the considered opinion of this Court.

40.After all, a 'Material Alteration' is one which varies the rights and liabilities, or legal position of the parties ascertained by the deed in its original state or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision

which was originally unascertained and as such void, or may otherwise prejudice the party bound by the deed as originally expressed, as per the decision in AIR 1961 Madras 251 Rajagopala Iyer Vs. Arudai Velar.

41.If a party consenting to an alteration cannot at a later point of time turn around and say that the instrument suffers from material alteration. Any 'Material Alteration' of the negotiable instrument renders the same void against any one, who is a party thereto at the time of making alteration and does not consent thereto, unless, the alteration was made in order to carry out the common intention of original parties. It is to be borne in mind that the legally permissible completion of an inchoate instrument cannot be construed as 'Material Alteration' of a negotiable instrument, as per decision Hitenbhai Parekh, Proprietor Vs. State of Gujarat 2010 Cri L.J. NOC 455 (Gow.)"

(v)In the Judgment dated 06.04.2010 in Crl.A.(MD).No.196 of 2009 (between Spenser David V. Virjin Mary) at paragraphs

9 & 15, it is observed as follows:

"9.As argued by the learned counsel appearing for the complainant, the proviso to [Section 146](#) of the Negotiable Instruments Act reads as follows: "146.Bank's slip prima facie evidence to certain facts.- The Court shall, in respect of every proceeding under this chapter, on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved".

15.While referring the proviso to [Section 139](#), it is held that it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. While referring the decision in *M.M.T.C Ltd., v. Medchl Chemicals and Pharma (P) Ltd.*, (2002) 1 SCC 234 it is observed that "There is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting

liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial."

30.Appellant's Citations:

(i)In the decision ***R.Elango V. K.Dhanasekaran and others, (2008) 8 MLJ 299***, it is held as under:

"If a party to a suit seeks opinion of the handwriting expert, before commencement of trial, the same shall be accorded, Party can suggest his choice of expert. Expert opinion is of weak evidentiary value and can be considered along with other evidence. An expert never supplants the view of the Court. Original documents should not be sent out of the custody of the Court. Expert can be summoned to take photographs for comparison."

(ii)In the decision ***Rajshree Sugars & Chemicals Limited, Rep. By its Director and Chief Operating officer Mr.R. Varadaraj, Coimbatore V. Axis Bank Limited, formerly known UTI Bank Limited, rep. By its Assistant Vice President, Chennai and another, (2008) 8 MLJ 261 at special page 263***, it is

observed and held as under:

"I. In simple terms, derivatives are financial instruments whose values depend on the value of other underlying financial instruments. " A derivative is a financial instrument: (a) whose value changes in response to the change in a specified interest rate, security price, commodity price, foreign exchange rate, index of prices or rates, a credit rating or credit index, or similar variable, (b) that requires no initial net investment or little initial net investment relative to other types of contracts that have a similar response to changes in market conditions; & (c) that is settled at a future date."
Actually derivatives are assets who values are derived from values of underlying assets. These underlying assets can be commodities, metals, energy resources, and financial assets such as shares, bonds and foreign currencies."

II. "Definition of the word "debt" in Section 2(g) of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 includes any liability claimed as due from any person, by a Bank, during the course of any business activity

undertaken by the Bank. Therefore, if the claim of the Bank has arisen during the course of any business activity undertaken by the Bank, then the amount so claimed by the Bank would certainly come within the meaning of the word "debt" as defined in Section 2(g). Section 6(1) of the Banking Regulation Act, 1949, enables a Banking Company to engage in any one or more of the forms of business enumerated in clauses (a) to (o), in addition to the business of Banking. Sub-section (2) of Section 6 prohibits a Banking Company from engaging in any form of business other than those enumerated in sub-section (1). Therefore, if a transaction falls within any one of the forms of business covered by Section 6(1) of the Banking Regulation Act, 1949, it would certainly be a business activity undertaken by the Bank. Consequently, a claim that arises during the course of such a business activity undertaken by the bank, would come within the definition of the word "debt" in Section 2(g). Transaction in derivatives, fall within the category of "business activity undertaken by the Bank" as they are

covered by Section 6(1) of the Banking Regulation Act, 1949."

(iii) In the decision of the Hon'ble Supreme Court in ***Crl.A. No.1761 of 2008 dated 23.10.2008 (between S.L.Construction and another V. Alapati Srinivasa Rao and another) at paragraphs 18 & 19***, it is observed as follows:

"18.Indisputably, by reason of Section 138 of the Act a penal provision has been laid down that the issue of any cheque would commit an offence if the cheque when presented is dishonoured.

19.For the said purpose a legal fiction was created. The proviso appended to the said provision, however, restricts the application of the main provision by laying down the conditions which are required to be complied with before any order taking cognizance can be passed which are:(i)that the cheque must be presented within a period of six months from the date on which it is drawn; (ii)on the cheque being returned un-paid by the banker, a notice has to be issued within thirty days from the date of receipt of information by him from the bank regarding the cheque being unpaid; (iii) in the event, drawer of the cheque fails to

make payment of the said amount of money to be paid within 15 days from the receipt thereof, a complaint petition can be filed within the period prescribed in terms of Section 142 thereof."

(iv) in the decision ***Marothi Chits (P) Limited V. N.S.Ramakrishnan, (2006) 2 M.L.J. (Crl.) 705***, it is observed that ***'A cheque so issued at thte time of receiving the chit amount is not only for the purpose of security, but is also in discharge of a liability, if the successful bidder fails to pay the amount, the cheque can be used to collect the money from him, the liability that has arisen under chit transaction'.***

(v) In the ***Judgment of the Hon'ble Supreme Court in Crl.A.No.1968 of 1996 dated 20.11.2003 (between Goa Plast (P) Limited V. Chico Ursula D'Souza)***, it is observed as under:

"The object and the ingredients under the provisions, in particular, Sections 138 & 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In

our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the Bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious set back. The Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. 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.”

(vi) In the decision of the Hon'ble Supreme Court ***M/s.M.M.T.C. Ltd. and another V. M/s.Medchl Chemicals & Pharma (P) Ltd. and another, 2001 (4) CTC 749 at special page 754, at paragraphs 14 & 15,*** it is observed as follows:

"14. There is therefore no requirement that the Complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on basis of averments in the Petitions filed by them the High Court could not have concluded that there was no existing debt or liability.

15. Lastly it was submitted that a complaint under Section 138 could only be maintained if the cheque was dishonoured for reason of funds being insufficient to honour the cheque or if the amount of the cheque exceeds the amount in the account. It is submitted that as payment of the cheques had been stopped by the drawer one of the ingredients of Section 138 was not fulfilled and thus the complaints were not maintainable."

(vii) In the ***order dated 25.01.1999 in Crl.O.P.No.603 of 1999 (between M/s.Alsa Constructions and Housing Limited,***

Chennai and another V. M.Mal Reddy), it is held as follows:

"Sec.139 of the Negotiable Instruments Act would provide that it shall be presumed, unless the contrary is proved, that the complainant received the cheque from the accused for the discharge of the debt or liability. Therefore, the accused cannot escape by merely saying that the cheque was given only as a security and that on the date of issuance of the cheque, there was no existing liability, it is for the accused to rebut the presumption contained in Sec. 139 of the Act."

Respondent's Submissions:

31.In response, it is the submission of the Learned Counsel for the Respondent that Ex.P2 dated 18.12.2006 is the Client Enrolment Form wherein the name of the Respondent finds a place and Ex.P3 is the Risk Disclosure Document and that P.W.1 (serving as Executive (Operations) in Appellant/Company), in his cross examination, had admitted that the Contract Note purportedly given to the Respondent/ Accused was not produced into Court and in respect of purchase/sale of share, the same is supported by a Contract Note and in fact, P.W.1

had also agreed to a suggestion that in the year 2008 at the National Stock Exchange, there was big down fall in shares of all companies.

32.The Learned Counsel for the Respondent proceeds to take a stand that Ex.P4 – Account Papers (beginning from 01.01.2008 to 03.01.2008) would have a binding force only if the Respondent had counter signed in the said document and in Ex.P4 under the head 'Client's signature with date', the signature and date of the Respondent /Accused was not there and in the absence of signature of the Respondent/Accused, Ex.P4 could not be taken to be a proper document of confirmation relating to the statement of accounts.

33.The Learned Counsel for the Respondent contends that the Appellant/Complainant had not averred in the complaint that Rs.15,00,000/- is due from the Respondent, on the evidence of P.W.1 (in his proof affidavit) refers to a sum of Rs.15,47,440/- due to be paid by the Respondent/Accused. As such, it is represented on behalf of the Respondent that the Appellant/Complainant is improving his case in instalment.

34.The Learned Counsel for the Respondent brings it to the

notice of this Court that P.W.1 (in his sworn affidavit) at paragraph 4 had stated that the Respondent/Accused as part loan amount of Rs.10,00,000/- from and out of the outstanding amount had issued three cheques [in HDFC Bank Account Cheques, Namakkal Branch] viz., (i) Cheque bearing No.177366 dated 17.1.2008 for a sum of Rs.2,50,000/-; (ii) Cheque bearing No.177367 dated 18.1.2008 for a sum of Rs.2,50,000/-; (iii) Cheque bearing No.177368 dated 21.1.2008 for a sum of Rs.5,00,000/- and he informed to present the same cheques in the Bank and to collect the amount.

35.The Learned Counsel for the Respondent refers to the evidence of P.W.1 (in cross examination) that the three cheques were issued by the Respondent/Accused at the same time and further P.W.1 had deposed that under the three cheques, the signature of the Respondent/Accused was found in black ink. Apart from that, he had also admitted to a suggestion that under the three cheques except the signature, the details of the amount were differently mentioned.

Respondent's Case Laws:

36.The Learned Counsel for the Respondent cites the ***Judgment of this Court dated 11.11.2016 in Crl.A.No.630 of 2014***

(between N.Krishnagiri V. M/s.18 Steps Medias Private Limited, Rep. By its Managing Director Ravikumar, Coimbatore and others) reported in CDJ 2016 MHC 6310, wherein at paragraphs 25 to 27, it is observed as follows:

"25. The ingredients of [section 138](#) of the Act are (1) that there is a legally enforceable debt; (2) that the cheque was drawn from the account of bank for discharge in entirety or in part of any debt or other liability which presupposes a legally enforceable debt; and (3) that the cheque was issued and was returned because of 'insufficiency of funds'.

26. In this regard, this court pertinently points out that the presumption under [section 139](#) of the Act extends only to the issuance of cheque towards discharge of legally enforceable debt or liability and it has to be raised only after the Complainant proves that such debt or liability, in fact, exists as on the date of cheque in question and that the cheque was given to him by the Accused. By now, the law is well settled that the 'Burden of Proof' for rebutting presumption is not the same for proving of a criminal charge. For rebuttal of

presumption arising in favour of prosecution, the principle of 'preponderance of probability' clearly applies whereas to prove a 'Criminal Charge', a strict proof squarely applies.

In a criminal case, it is the duty of the prosecution/Complainant to establish its/his case against the particular Accused beyond the shadow of doubt. In the instant case, there was no evidence tendered by PW1(Appellant/Complainant) before the trial court as to the place where the sum of Rs.7,00,000/- was given by the Appellant to the Second Respondent/A2 and that when the complaint mentions that the Accused had given a cheque on 10.3.2012, PW1(in cross-examination) had clearly stated that he had received only the undated cheque which is clearly a favourable circumstance in favour of the Respondents/Accused and this aspect is certainly not helpful to the Appellant/Complainant, as opined by this court."

37.The Learned Counsel for the Respondent relies on the ***Judgment of this Court dated 08.10.2014 in Crl.A.Nos.483 &***

484 of 2008 between A.Thayalan V. S.S.Mani, (CDJ 2014 MHC

4369) wherein at paragraph 49, it is laid down as follows:

"49. In this connection, this Court pertinently points out that under Section 34 of the Indian Evidence Act, 1872 the entries in 'Books of Accounts' kept in the course of business are relevant and as such, they are admissible whenever they refer to a matter into which a Court of Law is to enquire. Further, such entries, though admissible, are not alone, sufficient to charge a person with liability unless corroborated by other evidence, as per decision Kandaswami V. Theagaraja, AIR 1968 Madras 203. That apart, this Court aptly points out the decision Experor V. Narbada Prasad, ILR (1929) 51 All 864 wherein it is held that 'Account books are admissible in evidence without any formal proof that they were regularly kept in the course of business.' Admittedly, the Appellant/Complainant had categorically stated, in his evidence, that he would show profits in construction materials in his Income Tax Return and that other accounts were not shown in the I.T. Return. As such, it can safely be concluded that the

Appellant/Complainant had not shown the purported huge loan amount of Rs.6,50,000/- in his I.T. Return. Also that, the Appellant/Complainant had not established to the subjective satisfaction of this Court that the cheques in question in two cases were given for 'Legally Enforceable Debt/Liability'.

38. In addition to the above, the Learned Counsel for the Respondent refers to the following Judgments:

(i) In the ***Judgment dated 14.11.2016 in Crl.A.No.509 of 2015 (CDJ 2016 MHC 6316) between M/s.Shree Sakthi Modern Rice & Oil Mill, Erode V. R.Kalaimani, wherein at paragraphs 32 & 33***, it is observed as follows:

"32. At this juncture, a mere running of the eye over the contents of Section 138 of the Negotiable Instruments Act unerringly points out that a mere execution of the cheque is not sufficient to constitute an offence punishable under the Act. Unless it is established that the Debt or other Liability in question is a Legally Enforceable one, in the considered opinion of this Court. In short, the explanation to Section 138 of the Act

clearly mentions that for the purpose of 'Debt' or 'Liability' means a 'Legally Enforceable Debt' or other 'Liability'. As a logical corollary, only a claim based on an Enforceable Debt or other Liability would constitute an offence under Section 138 of the Negotiable Instruments Act.

33.It cannot be gainsaid that as per Section 139 of the Negotiable Instruments Act, there is a presumption that the 'Holder of a Cheque' had received it for the 'Discharge of Debt or other Liability'. In reality, the existence of Debt is not the subject matter of presumption under Section 139 of the Negotiable Instruments Act. Any Debt would cover the liability of another individual also, in the considered opinion of this Court."

(ii) In the ***Judgment of the Hon'ble Supreme Court dated 06.07.2009 in Crl.A.No.786 of 2001 (between State of U.P. V. Nadnu Vishwakarma and others) reported in CDJ 2009 SC 1344, at paragraph 18***, it is observed as under:

"18.It is a settled principle of law that when on the basis of the evidence on record two views could be taken - one in

*favour of the accused and the other against the accused - the one favouring the accused should always be accepted. This Court in the case of **Chandrappa v. State of Karnataka**, (2007) 4 SCC 415, at page 432 observed as follows :*

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

*(2) **The Code** of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.*

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers

of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

(iii) In the decision of the Hon'ble Supreme Court **John K. John V. Tom Varghese and another, (2007) 12 Supreme Court Cases 714, at special page 717 at paragraph 11**, it is, among other things, observed as follows:

"11.. Presumption raised in terms of Section 139 of the Act is rebuttable. If, upon analysis of the evidence brought on record by the parties, in a fact situation obtaining in the instant case, a finding of fact has been arrived at by the High Court that the cheques had not been issued by the respondent in discharge of any debt, in our opinion, the view of the High Court cannot be said to be perverse warranting interference by us in exercise of our discretionary jurisdiction under Article 136 of the Constitution."

(iv) In the decision **M.S.Narayana Menon V. State of Kerala and another, (2006) 6 SCC 39, at special page 51, at paragraphs 32 to 36**, it is observed as follows:

"32.The standard of proof evidently is pre-ponderance of probabilities. Inference of pre-ponderance of probabilities can be drawn not only from

the materials on records but also by reference to the circumstances upon which he relies.

33.Presumption drawn under a statute has only an evidentiary value. Presumptions are raised in terms of the Evidence Act. Presumption drawn in respect of one fact may be an evidence even for the purpose of drawing presumption under another.

34.The Second Respondent herein was a member of a Stock Exchange. The transactions in relation to the Stock Exchange are regulated by the statutes and statutory rules. If in terms of the provisions of a statute, a member of a Stock Exchange is required to maintain books of accounts in a particular manner, he would be required to do so, as non-compliance of the mandatory provisions of the Rules may entail punishment. It is not in dispute that transactions comprising purchases and sales of shares by investors is a matter of confidence. Both parties would have to rely upon one another. For the said purpose, the courts of law may also take judicial notice of the practice prevailing in such business. The

learned Appellate Judge rightly did so.

35.The definite case of the second Respondent was that the cheque dated 17.8.1992 was issued by the Appellant in discharge of his debt. The said liability by way of debt arose in terms of the transactions. For proving the said transactions, the Second Respondent filed books of accounts. The books of accounts maintained by the Second Respondent were found to be not reflecting the correct state of affairs. A discrepancy of more than Rs. 14,00,000/- was found.

36.It was for the Appellant only to discharge initial onus of proof. He was not necessarily required to disprove the prosecution case. ..."

Also, in the aforesaid decision at pages 54, 55 & 56 at paragraphs 44, 48, 52 & 54, it is observed as under:

"44.In Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay [AIR 1961 SC 1316], Subba Rao, J., as the learned Chief Justice then was, held that while considering the question as to whether burden of proof in terms of Section 118 had been discharged or not,

*relevant evidence cannot be permitted to be withheld. If a relevant evidence is withheld, the court may draw a presumption to the effect that if the same was produced might have gone unfavourable to the plaintiff. Such a presumption was itself held to be sufficient to rebut the presumption arising under **Section 118** of the Act stating:*

"Briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact. We are not concerned here with irrebuttable presumptions of law."

48.*In **Kali Ram v. State of Himachal Pradesh** [(1973) 2 SCC 808], Khanna, J., speaking for the 3-Judge Bench, held: "One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence*

as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal."

52. The Appellant clearly said

that nothing is due and the cheque was issued by way of security. The said defence has been accepted as probable. If the defence is acceptable as probable the cheque therefor cannot be held to have been issued in discharge of the debt as, for example, if a cheque is issued for security or for any other purpose the same would not come within the purview of Section 138 of the Act.

54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well-settled principles of law that where two views are possible, the appellate court should not interfere with the finding of acquittal recorded by the court below.”

Discussions:

39. The plea of the Appellant/Complainant in his Complaint (before the trial Court) is that the Respondent/Accused had issued three cheques dated 17.01.2008, 18.01.2008 and 21.01.2008 drawn on HDFC Bank Ltd., PSK Towers, 127-C-3, Salem Road, Namakkal-

637 001 bearing Nos.177366, 177367 and 177368 for a sum of Rs.2,50,000/-, 2,50,000/- and 5,00,000/- (totally Rs.10,00,000/-) to the Complaint towards the payment of dues under the share trading transactions performed with it as of 17.01.2008 under the Respondent /Accused Account No.FN0021. Further, the cheques were presented for collection through the Appellant/Complainant's Bankers, HDFC Bank, PSL Tower, First Floor, 127, Salem Road, Namakkal – 637 001 and the cheques got returned on 23.01.2008 with the remarks 'Insufficient Funds'.

40.According to the Appellant, Ex.P11 – a Lawyer's Notice dated 20.02.2008 was addressed to the Respondent/Accused calling upon him to pay a sum of Rs.10,00,000/- towards the written cheques within 15 days and the same was received by the Respondent/Accused on 23.02.2008. That apart, 15 days time was elapsed on 09.03.2008. Since the Respondent/Accused had not made any payment, a complaint was filed before the trial Court against the Respondent/Accused in respect of an offence under Sections 138 to 142 of the Negotiable Instruments Act, 1881.

41.At this stage, this Court pertinently points out that the

prosecution under Section 138 of the Negotiable Instruments Act is attracted only when the cheque was issued in respect of current or past liabilities. In reality, a cheque issued in respect of uncertain future liabilities would not attract the ingredients of Section 138 of the Negotiable Instruments Act. There is no requirement on the part of the Respondent/Accused to adduce evidence in Law or to enter the witness box, if he can gainfully collect materials from the evidence of Complainant, of course in his favour.

42.It is to be remembered that a mere admission of signing a blank cheque would not amount to admission of due execution of cheque. By means of the Complainant's material admissions, contradictions, an Accused in a given case can probablise his defence. No wonder, it is for the Drawer to establish that a cheque was not drawn for consideration. Besides these, an existence of Legally Recoverable Debt is not a matter of presumption under Section 139 of the Negotiable Instruments Act. It merely raises a presumption in favour of a Holder of a Cheque that the same was issued for discharge of any debt or other liability.

43.It is to be borne in mind that the definition Section 2(ac) of

the Securities Contracts (Regulation) Act, 1956 speaks as under:

"(ac) "derivative" includes -

(A) a security derived from a debt instrument, share, loan whether secured or unsecured, risk instrument or contract for differences or any other form of security;

(B) a contract which derives its value from the prices, or index of prices, of underlying securities;]"

44. Furthermore, Section 18-A under the caption 'Contracts in Derivative' enjoins as under:

"18-A. Contracts in derivative.- Notwithstanding anything contained in any other law for the time being in force, contracts in derivative shall be legal and valid if such contracts are-

(a) traded on a recognised stock exchange;

(b) settled on the clearing house of the recognised stock exchange,

in accordance with the rules and bye-laws of such stock exchange.]"

45. That apart, Section 45-U(a) of the Reserve Bank of India Act,

1934, reads as follows:

"(a) "derivative" means an instrument, to be settled at a future date, whose value is derived from change in interest rate, foreign exchange rate, credit rating or credit index, price of securities (also called "underlying"), or a combination of more than one of them and includes interest rate swaps, forward rate agreements, foreign currency swaps, foreign currency-rupee swaps, foreign currency options, foreign currency-rupee options or such other instruments as may be specified by the Bank from time to time;"

46.It is to be pointed out that Contracts Note, Derivatives are legal and valid, if traded on a recognised Stock Exchange, as per Rules and Bye-laws. Even the circulars of the Central Board viz., Reserve Bank of India do permit transaction in derivatives and financial instruments for transferring or hedging risk and therefore are not void.

47.It is to be noted that a cheque must be issued either in respect of past or existing debt or other subsisting liability. A salient feature in respect of an offence under Section 138 of the Negotiable

Instruments Act is that the cheque in question was drawn for discharge for entirety or part of liability. If this aspect is not mentioned in the complaint, then, it is a fatal one.

48. In fact, as per definition Section 2(n) of the Criminal Procedure Code, the term 'offence' includes not only the doing of possible act, but by omitting to do something as well. Undoubtedly, the burden is on the Appellant/Complainant's side to prove that the cheque was signed by 'Drawee' in discharge of Legally Enforceable Debt. Also that, the 'cause of action' under the Negotiable Instruments Act, 1881 will arise not on mere presentation of a cheque nor just dishonour of cheque alone. The real cause of action is the non payment of sum cheque or non compliance of demand through notice by a 'Drawer' within the statutory period.

49. In the instant case, on the side of the Appellant, Contract Note [for the purchase/sale of share(s)] was not filed and marked as Exhibit. Furthermore, Ex.P4 – Clients Statement of Accounts under the head 'Clients Signature with date', the signature of the Respondent/Accused with date were left blank. Although on behalf of the Appellant/

Complaint, it is represented before this Court that Ex.P4 is the Original Copy of the Statement of the Accounts upto Settlement No.: 2008062 For Code : FN00021 in the name of the Respondent/Accused to confirm the said statement viz., Ex.P4, the signature with date of the Respondent/Accused were not obtained. In this connection, this Court aptly points out that the mere production of the extracts of the account books would not amount to a proof of those extracts and they are to be established by evidence as per decision ***Ishwar Dass Jain V. Sohan Lal, AIR 2000 SC 426.***

50.Indeed, the entries in Books of Accounts regularly kept in the course of Business, are relevant in all proceedings in a Court of Law but these entries are not by themselves sufficient to charge any person with liability, as per decision of the Hon'ble Supreme Court in ***State of A.P. V. Ganeswara Rao, AIR 1963 SC 1850.*** It is true that Section 34 of the Indian Evidence Act, 1872 does not speak of any particular form of corroborative evidence. In fact, Section 34 does not mean there ought to be an independent evidence to prove each and every transaction entered in a book of account. What is essential to be borne in mind in each case is whether besides the entries in a book of account, there is any evidence to prove that the transactions referred

to in those entries actually took place. Such a corroboration can be provided through the evidence of a person who wrote the books of account and in whose presence the transactions took place, as per decision ***Dwarka Doss V. Baboo Jankee Doss, (1855) 6 MIA 88, 98.***

51. Suffice it for this Court to make a pertinent mention that by mere proof of the entries in the account books regularly kept in the course of Business, one cannot obtain a Decree and he has to establish by some other independent evidence that it was a real and honest transaction as per decision ***Chandradhar Goswami V. Gauhati Bank Limited, AIR 1967 SC 1058.*** In Law, although account books by themselves are not sufficient to charge the Respondent/Defendant with liability to pay, he can be made liable if there is corroboration in support of the account books. Further, Section 34 of the Indian Evidence Act does not fetter in any way as to the nature of the material upon which a Court of Law may rely upon to support the statements in a 'Book of Accounts'. Such materials may be like Vouchers, Receipts or any other documentary evidence or of one's oral evidence.

52. Moreover, in the decision ***Mathilda V. Fritz Gaebelie, AIR 1926 Mad 955***, it is held that the law requires not only the proof of account books but also of each entry therein. It must be established that the account books produced from lawful/proper custody. The account books are to be kept in the ordinary course of Business. If a person possessing personal knowledge of the facts in regard to the entries in the 'Account Books' to the effect that they were maintained regularly in the course of Business, then, the person who wrote the entries may be examined. The law simpliciter requires that competent person has to speak about the entries should be examined as a witness to show that the transaction in question was a real and honest one.

53. It is to be pointed out that Section 4(2) Cr.P.C. enjoins that all offences under any other Law, other than I.P.C. shall also be enquired into or tried and otherwise dealt with the provisions of the Code, subject to any other enactment which contemplates a different mode of trial for such offence. Furthermore, the non-obstante clause in Section 142 of the Negotiable Instruments Act clearly spell out that the three matters mentioned in Section have an overriding effect on the ingredients of Criminal Procedure Code. Apart from that, in an exercise

of an Appellate Jurisdiction, the Court has power not only to correct an error in the Judgment under Appeal but to make such disposition of the case, of course according to equity, good conscience, fair play and Justice.

54.In the present case, although it is represented on behalf of the Appellant/Company that as per Clause 1.3.6 of the Risk Disclosure Document, it is for the Respondent/Accused to make a demand for the Contract Note, yet, this Court is of the considered opinion that if the Contract Note is exhibited, then, it will throw light in regard to the factual aspects of the subject matter in issue between the parties.

55.In so far as the Statement of Accounts is concerned, notwithstanding the fact that on the side of the Appellant, a plea is taken that Clause 1.3.10 of Risk Disclosure Document speaks of the signing of Statement of Accounts to the Respondent/Accused and not to the Company Law Board, this Court opines that since Ex.P4 - Statement of Accounts does not contain the signature of the Respondent/Accused with date original account book to support the entries found therein and ought to have been produced and filed

before the trial Court as an Exhibit. However, such a course was not resorted to and therefore, Ex.P4 does not carry any weight in Law.

56.A perusal of the Judgment of the First Appellate Court in C.A.No.1 of 2013 dated 08.11.2013 shows that the First Appellate Court had observed at paragraph 10 that in Ex.P7 - Cheque, it was written as '21.1.2000' and the last '0' was corrected as '8'. Further, in the three cheques given by the Respondent/Accused, it was not made mention of on what date they were presented for collection. Moreover, the First Appellate Court went on to add that to prove the written memos filed, the HDFC Bank Manager was not examined to show how much amount was available in Respondent/Accused Account. In this connection, though a stand is taken on behalf of the Appellant/Complainant that as per Section 146 of the Negotiable Instruments Act, the Manager of the Bank need not be examined to speak about the written of three cheques etc., this Court is of the considered opinion that the Appellant/Complainant ought to examine the concerned Bank Manager to substantiate his version of the case. In fact, the evidence of the Bank Manager in favour of the Appellant/Complainant will strengthen its case.

57. Suffice it for this Court to point out that when the Respondent /Accused has taken a plea that the three cheques in question were given for the purpose of security, then, as per Section 106 of the Indian Evidence Act, 1872 the facts which are within his knowledge are to be spoken to by him as a witness, so that he will be subjected to cross examination. Even though under Section 138 of the Negotiable Instruments Act, the burden is on the Complainant to prove his case against the Respondent/Accused beyond all reasonable doubt, yet, nothing prevented the Respondent/Accused to have entered into a witness box and spoken about the facts which are special within his knowledge. In this regard, considering the fact Section 138 of the Negotiable Instruments Act creates a vicarious liability the 'onus of proof' to some extent is on the Respondent/Accused. Section 106 of the Indian Evidence Act is an exception to the general rule relating to 'onus of proof' and the same applies only to such matters of defence which are supposed to be within the knowledge of the Respondent. In the instant case on hand, the Respondent/Accused had not gone into the witness box to speak about the facts which are within his knowledge.

58. At this stage, this Court significantly points out that an

Appellate Court is not there to fill up the loopholes or lacunae in the prosecution evidence. A miscarriage of Justice might have occurred where an Accused would have been acquitted. However, an Appellate Court can exercise its plenitude of his discretionary power to prevent an Accused to escape from the clutches of Law. Ultimately, the Deliverance of Substantial Cause of Justice is to be borne in mind by an Appellate Court.

59. In view of the aforesaid detailed discussions and also this Court, taking note of the entire attendant facts and circumstances of the case in an integral manner, is of the earnest view that based on the materials available on record, it is not possible for this Court to pronounce a Judgment and therefore, opines that 'Remand' of the matter is just, fair and necessary, otherwise there will be an aberration of Justice. Further, this Court opines that Contract Note is to be marked through the evidence of proper witness on behalf of the Appellant/Complainant in the main case. The original Account Books to prove the entries made therein ought to be produced in the present case on behalf of the Appellant to prove the transaction in question between the parties as, bona fide, real and honest one. Viewed in that perspective, this Court holds that Ex.P4 would not suffice and at the

risk of repetition, this Court opines that the said document does not carry weight in the absence of signature of the Respondent. The Bank Manager at HDFC is to be examined on behalf of the Appellant as a witness to speak about the written memos (pertaining to the written of three cheques) etc. Viewed in these perspectives, this Court, without delving deep into the matter and also not expressing any opinion on the merits of the matter, interferes with the Judgment of the First Appellate Court in C.A.No.1/2013 as well as the Judgment of the trial Court in S.T.C.No.823/2010 and set aside the same in furtherance of substantial cause of Justice. Consequently, the Criminal Appeal succeeds.

Disposition:

60.In the result, the Criminal Appeal is allowed. The Judgment of the First Appellate Court in C.A.No.1/2013 and the Judgment of the trial Court in S.T.C.No.823/2010 are set aside for the reasons assigned in this Appeal. The entire subject matter in issue is remanded back to the trial Court for fresh disposal in the manner known to Law and in accordance with Law. Liberty is granted to the respective parties to raise all factual and legal pleas as per Law. The trial Court is to provide adequate opportunities to the Appellant/Complainant to examine

further witnesses on its side and to file necessary documents. Further, the Respondent/Accused is to examine himself as a defence witness and to mark necessary documents so as to place the said materials before the trial Court for the purpose of an effective and efficacious adjudication and to prove his case and also examine additional witnesses, mark documents in the main case. It is made clear that the trial Court, in any event, shall dispose of the main case with a fair, free, unbiased, open mind and that too in a dispassionate manner (of course uninfluenced with any of the observations made by this Court in this Appeal), after providing enough opportunities to both parties by following the principles of Natural Justice, within a period of four months from the date of receipt of copy of this Judgment. Soon after disposal of the case in S.T.C.No.823/2010, the trial Court shall send a compliance report to this Court without fail.

23.01.2017

Index : Yes

Internet : Yes

Sgl

To

1.The Additional District and Sessions Judge,
Namakkal.

2.The Judicial Magistrate I, Namakkal.

3.The Registrar (Judicial)
High Court, Madras.

[For favour of Information and
necessary follow up action]

4.The Section Officer,
Records Section,
High Court, Madras.

M.VENUGOPAL,J.

sgl

JUDGMENT IN
Crl.A.No.13 of 2014

23.01.2017