

IN THE HIGH COURT OF JUDICATURE AT MADRAS
CORAM:

Reserved on	22.03.2017
Judgment Pronounced on	19.04.2017

THE HONOURABLE MR.JUSTICE M.VENUGOPAL
Crl.A.No.190 of 2016

K.Arun Kumar

..Appellant / Complainant

Vs.

R.Moorthy

..Respondent / Accused

Prayer: Criminal Appeal filed under Section 378 of Cr.P.C., to set aside the Order passed by the Learned Judicial Magistrate, Fast Track Court at Magisterial Level, Attur in S.T.C.No.34 of 2013 dated 28.01.2016 and to allow the above Criminal Appeal.

For Appellant : Mr.R.Nalliyappan

For Respondent : Mr.S.Subbiah

J U D G M E N T

The Appellant / Complainant has filed the present Criminal Appeal before this Court, being dis-satisfied with the 'Order / Judgment of Acquittal' dated 28.01.2016 in S.T.C.No.34 of 2013 passed by the Learned Judicial Magistrate, (Fast Track Court - at Magisterial Level), Athur.

2. Earlier, the trial Court while passing the impugned 'Judgment of Acquittal' in S.T.C.No.34 of 2013 dated 28.01.2016 on an appreciation of entire oral and documentary evidence available on record came to a resultant conclusion that there were no possibilities for the Respondent / Accused (Respondent) to have handed over the case cheque towards a 'Legally Recoverable Debt' and further the presumption under Section 139 of the Negotiable Instruments Act was repelled and proved on behalf of the Accused (the Respondent) and finally found that the offence against the Respondent / Accused was not proved beyond reasonable doubt and finally acquitted him under Section 255(1) of Cr.P.C.,

3. Assailing the correctness and the legal validity of the Impugned 'Judgment of Acquittal' dated 28.01.2016 in S.T.C.No.34 of 2013 passed by the trial Court, the Appellant / Complainant has filed the instant Criminal Appeal before this Court by taking a plea that the trial Court should have

appreciated that the Respondent / Accused borrowed a sum of Rs.2,00,000/- from the Appellant / Complainant, for his urgent family expenses and to discharge the said amount, he issued a post dated cheque dated 11.02.2013 on the same day.

4. It is represented on behalf of the Appellant / Complainant that when the Ex.P.1, Cheque dated 11.02.2013 was presented for collection, the same got returned, as such, the Appellant / Complainant had issued a Ex.P.6, Lawyer's Notice dated 16.04.2013 to the Respondent demanding the cheque amount. However, the Respondent / Accused had refused to claim the Ex.P.6 Lawyer's Notice, but these important aspects were not appreciated by the trial Court in a proper perspective.

5. The Learned Counsel for the Appellant urges before this Court that the Respondent / Accused had not denied the execution of Ex.P.1, Cheque dated 11.02.2013 and therefore, the 'Onus' is on the Respondent / Accused to establish that the Ex.P.1- Cheque was not a 'Legally Enforceable One'

6. The Learned Counsel for the Appellant proceeds to project an argument that the Respondent / Accused had taken a plea before the trial Court that he had not issued the cheque in question to the Appellant, but it was given to one Boopathy, which is not sustainable in the eye of Law.

7. The Learned Counsel for the Appellant submits that the trial Court had committed an error in acquitting the Respondent / Accused on the ground that the Appellant / Complaint had not mentioned the subject matter of cheque loan amount in his Income Tax Returns and therefore the Judgment of the trial Court is to be set aside by this Court to avoid 'Miscarriage of Justice.'

8. Lastly, it is the submission on behalf of the Appellant / Complainant that the trial Court should not have acquitted the Respondent / Accused based on discrepancies on the Complainant's side evidence.

9. The Learned Counsel for the Appellant cites the decision reported in 2015(3) MWN (Cr.) DCC 25 (Mad.) (Ravishankar V. Sasi Kanth and Another at Special Pages 28 and 29 wherein at Paragraph No.9, it is interalia observed as follows:-

".... It is true that under Section 138 of the Negotiable Instruments Act, for the purpose of drawing a presumption as contemplated under Section 118 read with Section 138 of the said Act, the burden lies on the Complainant to prove the guilt of the Accused. In the present case, to substantiate the Complaint, as mentioned above, the Complainant has produced Ledger

Book, which has entries relating to the transaction. The Accused also did not dispute the signature in the Cheque by sending a reply to the Statutory Notice sent by the Complainant. In such circumstances, it has to be held that the Complainant has discharged their initial burden and it is the Accused, who did not disprove the Complaint given by the Complainant."

10. Conversely, it is the submission of the Learned Counsel for the Respondent / Accused that there were no independent witnesses at the time of making alleged payment and in the present case there was no voucher and pronote and that apart, the Appellant / Complainant must establish 'Passing of Consideration'.

11. The Learned Counsel for the Respondent submits that the Respondent / Accused was only a turmeric broker and as per Section 269-SS of the Income Tax Act, 1961 for an amount of Rs.20,000/- and above or even any advance taken by way of any loan, then, the same was to be effected only by means an Account Payee Cheque and in the present case, there is an infraction of the ingredient of Section 269-SS of the Income Tax Act, 1961.

12. The Learned Counsel for the Respondent brings it to the notice of this Court that when the cheque amount according to the Appellant / Complainant was purported to be Rs.2,00,000/-, then the trial Court in its Judgment at Paragraph No.12(a) of Judgment had observed that there were more possibilities for the two persons who had acquainted themselves as friends for the past seven years and in the absence of any document for Rs.2,00,000/-, for their house, there were possibilities to take others.

13. The Learned Counsel for the Respondent contends that the trial Court at Paragraph No.12(e) of its Judgment had opined that the Appellant / Complainant had not made any endeavour to establish that Sekar was well acquainted person for him and for his relative.

14. The Learned Counsel for the Respondent submits that the trial Court had observed at Paragraph No.12(h) of its Judgment that just because the loan amount was not mentioned in the Income Tax Account, for that reason alone, it could not be construed that there was no loan and in fact the Judgment of the Delhi High Court was not considered in favour of the Complainant.

15. The Learned Counsel for the Respondent brings it to the notice of this Court that for Ex.D.2 - Notice issued by Boopathy s/o Sundaram, in the Reply Notice, Ex.D.3 issued by the Appellant / Complainant it was mentioned that a problem arose

between Bhoopathy Son of Sundaram and one Bhoopathy @ Periyannan and in Salem District from Karuppur Post, Vellalapatti one Periyathambi and Thambi Annan brought persons and they took the cheques and in the said cheques, the cheques given to Boopathy @ Periyannan were also included. Moreover, the trial Court opined that that there was no possibility for the Appellant / Complainant to obtain the cheque case from Periyannan (a) Bhoopathy and to institute the present case.

16. The Learned Counsel for the Respondent / Accused submits that 'Standard of Proof' required on the side of Prosecution and 'Burden of Proof' on the side of the Respondent / Accused under the Negotiable Instruments Act, 1881 is a different one.

17. The Learned Counsel for the Respondent / Accused submits that the Respondent / Accused had acted only as a 'Turmeric Broker' between the Appellant / Complainant and the Intending Purchasers and in fact there was no financial commitment made by the Respondent / Accused in regard to the amount payable by the Intending Purchasers / Purchaser to the Seller and the Intending Purchaser / Purchasers were introduced directly and in short, the liability of the Respondent / Accused seizes when the purchaser and seller directly get themselves involved in regard to the purchase of turmeric.

18. The Learned Counsel for the Respondent / Accused submits that the Respondent had not received any amount from the Appellant / Complainant in respect of the case cheque transaction and in fact, before the trial Court, the Respondent / Accused got himself examined as D.W.1 and further that he repudiated the stand of the Appellant/ Complainant.

19. The Learned Counsel for the Respondent / Accused in support of the proposition that 'Existence of Legally Recoverable Debt' is not a matter of presumption under Section 139 of Negotiable Instruments Act, relies on the decision of Hon'ble Supreme Court reported in (2008) 4 SCC at Page 54 (Kirishna Janardhan Bhat V. Dattatraya G.Hegde) wherein it is observed that Section 139 of Negotiable Instruments Act, 1881 merely raises a presumption in favour of Holder of Cheque that the said cheque was issued for discharge of any debt or other liability.

20. Further, it is held that the 'Existence of Legally Recoverable Debt' is not a matter of presumption under Section 139 of Negotiable Instruments Act. Also, he cites the decision of Hon'ble Supreme Court reported in (2014) 2 SC at Page 236 (John K.Abraham V. Simon C.Abraham and Another) wherein it is held that in order to draw presumption under Section 118 read with Section 139 of Negotiable Instruments Act, the burden lies

on the complainant to show (i) that he had requisite funds for advancing sum of rupees. (ii) that the issuance of cheque by accused in support of repayment of money advanced was through (iii) that the accused was bound to make payment as agreed in favour of the complainant.

21. The Learned Counsel for the Respondent / Accused seeks in aid of the decision of the Hon'ble Supreme Court reported in (2015) 1 SCC at Page 99 (K.Subramani V. K.Damodara Naidu) at Special Page 102 wherein at Paragraph No.9 it is held as under:

"9. In the present case the complainant and the accused were working as Lecturers in a Government college at the relevant time and the alleged loan of Rs.14 lakhs is claimed to have been paid by cash and it is disputed. Both of them were governed by the Government Servants' Conduct Rules which prescribes the mode of lending and borrowing. There is nothing on record to show that the prescribed mode was followed. The source claimed by the complainant is savings from his salary and an amount of Rs.5 lakhs derived by him from sale of site No.45 belonging to him. Neither in the complaint nor in the chief-examination of the complainant, there is any averment with regard to the sale price of site No.45. The concerned sale deed was also not produced. Though the complainant was an income-tax assessee he had admitted in his evidence that he had not shown the sale of site No.45 in his income-tax return. On the contrary the complainant has admitted in his evidence that in the year 1997 he had obtained a loan of Rs.1,49,205/- from L.I.C. It is pertinent to note that the alleged loan of Rs.14 lakhs is claimed to have been disbursed in the year 1997 to the accused. Further the complainant did not produce bank statement to substantiate his claim. The trial court took into account the testimony of the wife of the complainant in another criminal case arising under Section of the N.I. Act in which she has stated that the present appellant/accused had not taken any loan from her husband. On a consideration of entire oral and documentary evidence the trial court came to the conclusion that the complainant had no source of income to lend a sum of Rs.14 lakhs to the accused and he failed to prove that there is legally recoverable debt payable by the accused to him.

22. The Learned Counsel for the Respondent / Accused draws the attention of this Court to the decision of the Hon'ble Supreme Court between John K. John V. Tom Varghese and Another reported in 2007 (12) SCALE 333 at Special Page 334 wherein it is observed as under:

"A. Presumption raised in terms of Section 139 of the Act is rebuttable. If, upon analysis of the evidence brought on records 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 of India."

23. The Learned Counsel for the Respondent refers to the decision of Hon'ble Supreme Court reported in 2007(12) Scale 96 (K.Prakashan V. P.K.Surendran) at Special Page 100 wherein Paragraph Nos. 12 and 13 it is observed as under:-

"12. The Act raises two presumptions; firstly, in regard to the passing of consideration as contained in Section 118 (a) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature referred to in Section 139 discharged in whole or in part any debt or other liability. Presumptions both under Sections 118 (a) and 139 are rebuttable in nature. Having regard to the definition of terms proved and disproved as contained in Section 3 of the Evidence Act as also the nature of the said burden upon the prosecution vis-à-vis an accused it is not necessary that the accused must step into the witness box to discharge the burden of proof in terms of the aforementioned provision.

13. It is furthermore not in doubt or dispute that whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability."

Further, the Learned Counsel for the Respondent / Accused relies on the aforesaid decision at Spl.pages 102 and 103 wherein at Paragraph Nos.18,19 and 20 it is observed as under:

18. Ms. Srivastava has relied upon a decision of this Court in Goaplast (P) Ltd. v. Chico Ursula DSouza and Another [(2003) 3 SCC 232] wherein this Court opined:

"6...The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by

countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. This was the view taken by this Court in *Modi Cements Ltd. v. Kuchil Kumar Nandi*, 2. On same facts is the decision of this Court in *Ashok Yeshwant Badave v. Surendra Madhavrao Nighojakar*. The decision in *Modi* case overruled an earlier decision of this Court in *Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd.* which had taken a contrary view. We are in respectful agreement with the view taken in *Modi* case. The said view is in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138 of the Act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date".

19. No exception to the aforementioned legal principle can be taken. What, however, did not fall for consideration in the aforementioned case was as to how the said burden can be discharged.

20. It is now trite that if two views are possible, the appellant court shall not reverse a judgment of acquittal only because another view is possible to be taken. The appellate courts jurisdiction to interfere is limited. [See *M.S. Narayana Menon (supra)* and *Mahadeo Laxman Sarane & Anr. v. State of Maharashtra*, 2007 (7) SCALE 137] The High Court furthermore has not met the reasons of the learned Trial Judge. It proceeded on the premise that the appellant had not been able to discharge his burden of proof in terms of Section 139 of the Act without posing unto itself a

further question as to how the said burden of proof can be discharged. It furthermore did not take into consideration the legal principle that the standard of proof upon a prosecution and upon an accused is different."

24. For the purpose of appreciating the factual matrix of the case, at this stage, this Court makes a pertinent reference to the evidences of P.W.1 to 3 and D.W.1.

25. It is the evidence of P.W.1 (Appellant / Complainant) that because of his acquaintance with the Respondent / Accused, the Respondent / Accused on 01.02.2013 for his family urgent needs, demanded a sum of Rs.2,00,000/- from him and that he assured to repay the said sum within a 10 days and on that date, he issued a cheque bearing no.316550 dated 11.02.2013 drawn on State Bank of India, Athur Branch and further that he informed him to deposit the said cheque during the 2nd week of February.

26. P.W.1 proceeds to state in his 'Proof Affidavit' that on 12.02.2013, he deposited cheque in his Athur Axis Bank Account, but the said cheque got returned on 13.02.2013 stating that there was no 'Sufficient Funds' in the Respondent / Accused's Account. Moreover, when he informed the Respondent / Accused about the return of the cheque, the Respondent / Accused had informed him to deposit the said cheque during the 2nd half of April Month and accordingly he deposited the cheque in his account on 15.04.2013 at Pallavan Grama Bank at Manivilundan Colony Branch but on the next day, on 16.04.2013, the said cheque got returned stating that there was 'No Sufficient Funds' and this was informed to him by the Bank.

27. The stand of the Appellant / Complainant in his complaint in S.T.C No.34 of 2013 on the file of trial Court is that he issued Ex.P.6 - Lawyer's notice dated 26.04.2013 to the Respondent / Accused in respect of a sum of Rs.2,00,000/- which is due to him, but, the Respondent / Accused had not received Ex.P.6- Notice and the same got returned as per Ex.P.7 dated 04.05.2013. Therefore, the Appellant / Complainant was constrained to file a complaint before the trial Court which was taken on file in S.T.C. No.34 of 2013 in respect of an offence under Section 138 of Negotiable Instruments Act, 1881 committed by the Respondent / Accused.

28. P.W.1 (in his cross examination) had deposed that for the past seven years himself and the Respondent are friends but he does not know the name of the Respondent / Accused's wife, he does not know the child's name and further he does not know how the many children the Respondent / Accused has. Moreover, it is the evidence of P.W.1 that he is ready to produce the Income Tax Account for the period from 01.04.2013 to 31.03.2014 and that since he had advanced a sum of Rs.2,00,000/- to the Respondent /

Accused as hand loan, he had not shown the same in his Income Tax account.

29. Continuing further, P.W.1 in his evidence had stated that it was correct to state that as per Law, if a loan over and above Rs.20,000/- was given, then, the same should be given in the form of Cheque or Demand Draft.

30. P.W.1 (in his cross examination) had stated that Boopathy is not doing any business with him and that he knows the said Boopathy and it is correct to state that the said Boopathy in Athur circle purchased Turmeric from the Agriculturists and sold to R.S. Traders at Rasipuram and to an another suggestion, he had deposed that some times the said Boopathy would have sold turmeric to 'R.S.Traders'.

31. P.W.1 in his evidence (cross examination) had deposed that it was correct to state that from the certain agriculturists money was not received and that it was not correct to state that along with agriculturists as against the Respondent / Accused and R.S. Traders Owner, a complaint was lodged before the Superintendent of Police for the non-receipt of money. Further, it is the evidence of P.W.1 that he had not visited the Pelukurichi Police Station where a complaint was lodged and the same was enquired into in regard to the receipt of family card from the Respondent / Accused's house where his wife was threatened.

32. P.W.1 adds in his evidence that he does not know at one stage, R.S. Traders Branch Owner had absconded without paying the amount. Further, he does not know that since the aforesaid owners of R.S.Traders had absconded, Boopathy and other agriculturists joined together and made the Respondent / Accused to surrender and obtained seven cheques in the name of Boopathy and one blank cheque. Moreover he had stated in his evidence that he does not know that out of the said eight cheques, the four cheques in the name of Boopathy was utilised by employing the name of one Boopathy son of Sundaram of Kalakurichi at Salem and the cheque cases notice was sent. Besides this, it is the evidence of P.W.1 that it is not correct to state that he had utilised one blank cheque of the Respondent / Accused which was received from Boopathy and a false case was filed against the Respondent / Accused in regard to the non existence of a debt.

33. P.W.2 (from Pallavan Gramma Bank) in his evidence had deposed that he was serving in the said Bank, Manivilundan Branch for the past 1 ½ years and he had produced the Statement of Accounts of the Appellant / Complainant for the period from December 2012 to April 2013, namely Ex.P.8 and the said cheque belongs to the Athur State Bank of India Branch and the said cheque was sent for collection to Karur by their bank.

34. It is the evidence of P.W.3 that he knows well the Appellant / Complainant and the Respondent / Accused and that he is doing the avocation of Agriculture and that the Appellant / Complainant is known to him as his relative, that the turmeric grown in his land was purchased by the Respondent / Accused and Boopathy and they had not paid the money and cheated him and only in this regard he knows the Respondent / Accused for the past four years.

35. The evidence of P.W.3 is that he gave a complaint at the Thalaivasal Police Station since he had not received the turmeric amount and that he was informed that an enquiry would be conducted and the outcome of the same would be intimated and that Boopathy had absconded himself and after two or three years later, again the said Boopathy came back and he informed that he would settle the money and he went to Metalla and at Metalla, along with the Respondent / Accused, Police and other persons were there and he was directed to meet Pelukurichi Inspector and when they went there, the police informed him that no trouble would be given to the Respondent / Accused and he would pay the money.

36. P.W.3 had stated in his evidence that the Respondent / Accused and Boopathy had agreed to give the money in ten days and to that effect gave it in writing but again they had not paid the money and he along with Murugan, Siruvachur Palani and Muttal Ayyasamy and others went to the Police Station and the 6th Signature found in Ex.D4 belongs to him and in the said document at Sl.No.10 persons mentioned as Arunkumar is not the Appellant and that no one by Arun kumar came to the police station and that Arun Kumar is carrying agriculture and he is one of the partners in the Tahore Matric School.

37. P.W.3 in his cross examination had deposed that it was not correct to state that he, Arunkumar and others went to the police station and in the police station in Ex.D.4, Arunkumar had signed and since Arunkumar presently his relative, he is deposing falsely.

38. Further, P.W.3 in his (Re-examination) had stated that himself, the Respondent / Accused and the Appellant / Complainant belong to same community and the Respondent / Accused (along with Boopathy, Kalaiselvan and Selvi) is to pay to him a sum of Rs.4,00,000/- and further Boopathy, Kalaiselvan and Selvi have to pay him a sum of Rs.4,00,000/- and approximately a sum of Rs.1,00,000/- each, Rs.2,00,000/- each and Rs.3,00,000/- each was to be paid to the persons, who accompanied him.

39. D.W.1 (the Respondent / Accused) in his evidence had

stated that he does not know the Appellant / Complainant and that he has no transaction with the Appellant. One Boopathy S/o Ramasamy Gounder @ Periyannan in the Athur circle used to procure turmeric from the agriculturists and send them to him and for commission he used to sell the said turmeric to one Kalaichelvan, Selvi of Rasipuram of R.S.Traders and under this circumstance, in regard to the payment of turmeric money, there had occasioned a delay and suddenly Kalaichelvan and Selvi had absconded and after their absconding, later, 40 agriculturists and Boopathy came to him and created trouble with him stating that he was responsible for money and they created problem by threatening him with an utterance that 'If he does not pay the money he and his family would not be allowed to remain calmly' and for the said money they demanded cheque from him and took eight cheques in his name pertaining to the Athur, State Bank and in the said cheques in the name of Boopathy, four cheques for Rs.4,00,000/- each and three cheques for Rs.5,00,000/- were taken from him after filling up the date.

40. Further, it is the evidence of D.W.1 that in the ration card, the name of Boopathy was mentioned as Periyannan and therefore, without writing their name, one cheque was given after filling up the sum of Rs.2,00,000/- which was received by him and that again trouble was given to him and therefore, he issued a Ex.D.1 - Lawyer's Notice to Boopathy by engaging the Lawyer from Namakkal and three months later in the name of Boopathy S/o Sundaram, Kallankurichi of Salem, four cheques were presented in the Bank and a Lawyer notice Ex.D.2 was given to him and he issued Ex.D.3 reply notice explaining the true facts and in respect of the said cheque, no further proceedings were taken by them and under this circumstance, by utilising an another cheque which was given to Boopathy, in the name of the Appellant / Complainant a false case was filed against him and after six months, thereafter, Boopathy and the Appellant / Complainant brought 40 agriculturists created a problem with his wife at his house and that nearby persons phoned up to Oilpathy Police, who came over there and all of them were sent to Pelukurichi Inspector, who called him and the said Boopathy and after making an enquiry with Kalaichelvan and Selvi, obtained a undertaking in writing that within 20 days money was to be paid to the agriculturists and the Inspector obtained in writing from the agriculturists that they should not go to the house of the Respondent / Accused and create problem further and in the said written document, name of the Appellant / Complainant figures as No.10 and the copy of the said document was given to both sides by the Inspector and Ex.D-4 was the said document and he gave a police complaint for snatching ration card from his wife for which FIR was filed against Boopathy and his uncle and 40 agriculturists and Ex.D.5 was the said copy of FIR and later when he went in search of Selvi and Kalaichelvan and after finding them made a demand for payment of money for which

cheques were given for Rs.33 Lakhs and out of the said cheques when one cheque was presented in the Bank, it got returned owing to 'Insufficient Fund'.

41. D.W.1 had also deposed in his evidence that in the meanwhile, against himself, agriculturists, Boopathy, Kalichelvan, Selvi and Rathinam, a case was registered at Namakkal, DSP's Office and he was kept in judicial custody for 22 days and he had given the cheques bearing Nos.316542 to 316550 and in the interregnum, one cheque became useless and therefore he retained the same since a false case was filed against him, he has to be acquitted.

42. D.W.1 (in his cross examination) had stated that his father died in January 2013 and further that it was correct to state that he had finance problem and his father also had expired. Further, it is the evidence that it was correct to state that he could not do turmeric business hereafter and that he gave a complaint before the Office of the Superintendent of Police for the return of cheque issued by R.S. Traders and later since complaint was lodged against him, he was put into jail and hence he had not proceeded further with the complaint.

43. D.W.1 had also stated in his evidence that in the case cheque signature found belongs to him and he had written the sum of Rs.2,00,000/- in numerical and that he had not written the name and the words of Rs.2,00,000/-.

44. Apart from the above, it is the evidence of D.W.1 that in Ex.D.4 - Statement, 10 agriculturists had joined and gave the same in writing but it was correct to state that there were totally seven signatures in the said document and further it was correct to say that 10 agriculturists, who were mentioned in the said document had not signed.

45. D.W.1 had also added in his evidence that after his father's death because of the nuisance of agriculturists who became intensified he had remained elusive and that the same could not be stated as absconding and went to the job by not remaining in his house, he went to Rigvandi shop.

46. In the present case, Ex.P.1 - Cheque dated 11.02.2013 drawn in favour of the Appellant / Complainant refers to a sum of Rs.2,00,000/- . In Ex.P.1 - Cheque, the signature of the Respondent / Accused is seen. Obviously, the Ex.P.2, Cheque Return Advice addressed to the Appellant / Complainant dated 13.02.2013 refers to the fact of Return of Ex.P.1- Cheque owing to 'Funds Insufficient' . Ex.P.4 was the Return Memo dated 15.04.2013 of the Pallavan Grama Bank. Ex.P.5 was the Return Memo dated 16.04.2013 of Pallavan Grama Bank. Ex.P.6 - Appellant/ Complainant's Lawyer's Notice dated 26.04.2013

whereby and where under the Respondent / Accused was called upon to pay a sum of Rs.2,00,000/- in respect of the returned Cheque dated 11.02.2013 within 15 days from the date of receipt of notice. Ex.P.7 was the Returned Cover, which was not claimed by the Respondent / Accused inspite of the fact that intimation was given to him. Ex.P.8 is the Statement of Account of Pallavan Grama Bank, Manivilundun Colony Branch.

47. It transpires that the Respondent / Accused through his Advocate had issued Ex.D.1 Register Notice dated 07.02.2013 addressed to Periannan @ Boopathy, wherein it was mentioned that the Respondent/ Accused does not know the persons from whom the materials were procured and further he had asked him to state whether the materials were procured on loan. Apart from that in Ex.D.1 - the said Periyannan @ Boopathy was asked with a question whether in reality, he had remitted the money to the persons from whom he had purchased materials etc.,

48. A cursory perusal of Ex.D.1 - Notice dated 07.02.2013 unerringly points out that the Respondent / Accused from the year 2012 August had sold the turmeric bags procured by Periannan @ Boopathy and in fact till 19.12.2012 the Respondent / Accused on the request of Periyannan had rendered assistance to him and for the materials till date supplied the amounts due to be paid was paid by the Respondent through cash and cheque.

49. As seen from the contents of Ex.D.2 - Reply Lawyer's Notice dated 04.05.2013 addressed to the Respondent / Accused it is quite evident that an averment was made that the Respondent / Accused had business transaction with Boopathy and towards discharge of the amounts due for the supply of turmeric in bulk quantity, the Respondent / Accused had issued four cheques to and in favour of S.Boopathy viz.,

(i) Cheque No.316545 dated 05.03.2013 for Rs.4,00,000/- (Rupees Four Lakhs only)

(ii) Cheque No.316546 dated 11.03.2013 for Rs.4,00,000/- (Rupees Four Lakhs only)

(iii) Cheque No.316543 dated 22.02.2013 for Rs.4,00,000/- (Rupees Four Lakhs only)

(iv) Cheque No.316544 dated 27.02.2013 for Rs.4,00,000/- (Rupees Four Lakhs only)

drawn in Respondent / Accused's Bank Account at State Bank of India, Attur Branch. Further, in Ex.D.2-Notice, it was mentioned that the said Boopathy had presented the Cheques bearing nos.316545 and 316546 for collection in his Bank account at State Bank of India, SriRangapalayam Branch on 15.04.2013. However, the cheques were returned by the Respondent / Accused Banker's on 19.04.2013 with an endorsement stating that 'Funds

Insufficient'

50. In Ex.D.3 - Reply Lawyer's Notice dated 23.05.2013 issued on behalf of the Respondent / Accused addressed to the Appellant / Complainant's Lawyer, it is among other things mentioned that afore stated Boopathy had not paid the money to the sellers of turmeric and there arose a problem between the sellers and Boopathy in this regard and further that Periyathambi of Vellalapatti, Karuppur Post, Vellalar District and Thambiannan came with men and from the said Boopathy, they took the cash amounts and the cheques with the aid of men. In the said cheques taken from the said Boopathy, the cheque issued by the Respondent / Accused to and in favour of Periyannan @ Boopathy would also include and the cheques given by the Respondent / Accused to and in favour of Periyannan @ Boopathy wrongly used by the said Boopathy and that the action was taken in this regard.

51. In this regard, this Court relevantly points out that in Ex.D.4, Xerox Copy of the undertaking letter dated 26.11.2013 marked before the trial Court, it is stated that one year ago, Moorthy of Karkoodalpatti, Rajapalayam and Boopathy of Manivilundan Colony had received a turmeric belonging to them valid about Rs.32,00,000/- and till date, the amount was not paid and as a result of which, they gave a complaint and aforesaid two persons were called and enquired into and that the two were warned and that before 10.12.2013, the persons mentioned in the margin to whom the money was to be paid, should be paid a sum of Rs.32,00,000/- and the aforesaid two persons had agreed to pay the money before the aforesaid date and they gave the same in writing and furthermore, in future they were warned that they should not go to the house of Moorthy and Boopathy and should not make a payment of money or to indulge in verbal quarrel and they had agreed to abide by the contents of the writing in Ex.P.4 and the Respondent / Accused and Boopathy had signed. Further, the name of the person, who wrote Ex.D.4 was mentioned.

52. A glance of Ex.D.5, F.I.R. (Xerox copy) indicates that the complainant is the Respondent / Accused. As a matter of fact, the suspected accused are (i) Boopathy s/o Ramasamy, Athur (ii) Ramasamy of Athur and others. In reality, the contents of Ex.D.5, F.I.R. (Xerox copy) points out that R.Boopathy Son of Ramasamy, Manivilundan Colony, Athur Taluk, Salem District purchased turmeric and gave it to the Respondent and the Respondent sold the turmeric and the said money was given to Kalaichelvan, Chennai and Selvi of Thirupathur by him and the said Boopathy initially Kalaichelvi gave the money to the agriculturists and subsequently had not paid the money to the some agriculturists and when he met the said Kalaichelvan and Selvi in-person, on numerous occasions they informed that they

would pay the money, but vexatiously delayed the matter. Further, in Ex.D.5, it was stated that under the aforesaid circumstance, on 20.11.2013 at 12.00 noon Boopathy and his uncle Palaniappan of Mazhkalli post residing Attayam patti junction road brought some agriculturists and their relatives and they beat the Respondent and they scolded him in indecent words by saying that he alone should pay the money and if he does not pay the money, they threatened that they would finish him and his family etc., Moreover, it was mentioned that Boopathy and the persons who accompanied Boopathy snatched the ration card from his wife, who was returning from ration shop and regarding this incident, the Pelukurichi Police Inspector had warned Boopathy and others and accompanying agriculturists etc.,

53. It is to be pointed out that from Ex.D.5, it is clear that the Respondent / Accused (as Complainant) had prayed for securing his ration card and based on the Respondent / Accused's complaint, the Oilpatty Police had registered a case in P.S.Crime No.445 of 2013 under Sections 294(b), 323, 506(i) of IPC.

54. Dealing with the aspect of Exs.D4 and D.5 (Xerox Copies), this Court significantly points out that Ex.D4 undertaking letter dated 20.01.2013 signed by one A.Palanisamy and others was marked before the trial Court. In fact Ex.D.4 is only a xerox copy of undertaking given before the Pelunkurichi Police Inspector. The original of Ex.D.4 was not marked before the trial Court in S.T.C.No.34 of 2013 on the file of the trial Court. Likewise, the original of Ex.D.5 (FIR) was not marked.

55. In this connection, this Court significantly points out that Section 62 of the Indian Evidence Act deals with 'Primary Evidence'. The primary documentary evidence of a transaction evidenced by writing is the document itself which must be produced in original to prove the contents of the same as a best evidence if it exists and the same is available / obtainable. Undoubtedly, the Secondary Evidence is impermissible until the non-production of primary evidence is satisfactorily established, as per decision of the Hon'ble Supreme Court in Tukaram V. Dighole V. Manik Rao Shivaji Kokate reported in AIR 2010 SC 965.

56. The secondary evidence in respect of a document is to be permitted to be adduced only when the original is prove to have existed but was lost or misplaced as per decision in Bank of Borada, Bombay V. Shre Moti Industries, Bombay AIR 2008 Bom 201 (204).

57. It is to be noted that a xerox copy in the absence of original should not be allowed to be marked as per decision of Hon'ble Supreme Court Ram Suresh Singh V. Prabhat Singh reported

in AIR 2009 SC Page 2805.

58. The secondary evidence is to be let in before the concerned Judge / Court for recording the evidence. It is the primordial duty of the Judge recording evidence, who should decide, whether or not to admit a secondary evidence in accordance in Law. The xerox copy of a document can be admitted in a case if the original was established to have been lost or not immediately available, for given reasons. A photostat copy of the document should be admitted in evidence after examining the original record, as genuineness of the document was a fundamental question as per decision Government of Andhra Pradesh and others V. Karri Chinna Venkata Reddy and Others reported in AIR 1994 SC Page 591.

59. In short, a secondary evidence cannot be made admissible mechanically or either as a matter of course or routine, sufficient cause for non production of original document is to be ascribed. It is true that ordinarily if a litigant to an action does not object to a document being taken on record and the same is marked as an Exhibit he is estopped and precluded from questioning the admissibility thereof at a subsequent stage to. It is trite that a document which is otherwise inadmissible cannot be taken as evidence, only because no objection to the admissibility was taken thereon as per decision of the Hon'ble Supreme Court in Malay Kumar Ganguly V. Dr.Sukumar Mukherjee reported in (2009) 9 SCC Page 221(250).

60. At this juncture, this Court points out that in the Judgment of the trial Court in S.T.C.No.34 of 2013 no where it was stated as to why a xerox copy, viz., Ex.D.4 and Ex.D.5, were marked, in the absence of its originals. Also it is not known whether the original of Ex.D.4 and Ex.D.5 were either lost or destroyed. Moreover, no endeavour was made before the trial Court to call for the originals of Ex.D4 and Ex.D5 from the concerned police officer / police station.

61. In terms of Section 65 (a) of the Indian Evidence Act, 1872, a secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it.

62. It is an obligatory duty of a Court of Law to decide the question of admissibility of a document in secondary evidence before making an endorsement thereon. A secondary evidence of

the contents of the document cannot be admitted without non production of original first being accounted for in such a manner as to bring it within one or the other of the cases specified under Section 65 of the Indian Evidence Act, 1872. That apart, unless a secondary evidence is authenticated by a foundational evidence, the purported copy or xerox copy is in fact a true copy of the originals, the xerox copies Ex.D4 and Ex.D5 are quite inadmissible, in Law, in the considered opinion of this Court.

63. In so far as the statutory requirement of Section 269SS of the Income Tax Act, 1961 to the effect that 'Any advance taken by way of any loan, of more than Rs.20,000/- was to be effected by means of 'Account Payee Cheques only', at this stage, this Court worth recalls and recollects the Krishna P.Morajkar V.Joe Ferrao reported in (2013) 5 AIR Bombay R 294 at Paragraph 18 wherein it is observed as under:-

"18. The learned counsel for the respondent submitted that the observations of the Supreme Court in Para 14 of the judgment in Rangappa (supra) show that the Supreme Court had not in any cast any doubt on the correctness of the decision in Krishna Janardhan Bhat (supra), as it was based on specific facts and circumstances therein. Therefore, he submitted that observations in Krishna Janardhan Bhat (supra) about non-compliance of provisions of Section 269SS and the implications of Section 271 D of the Income Tax Act would still stand as good law. The learned counsel for the appellant submitted that even these observations would stand impliedly overruled. He pointed out that what was held in Krishna Janardhan Bhat (supra) was that advance taken by way of loan of more than Rs.20,000/- was only to be made by way of an account payee cheque. He submitted that in Rangappa (supra) the Supreme Court was specifically considering the case of an advance of Rs.45,000/- made in cash and yet the Supreme Court had upheld the conviction recorded. Thus even those observations based on the provisions of Section 269SS and 271 D of the Income tax Act made in Krishna Janardhan Bhat (supra) would stand impliedly overruled. I am entirely in agreement with the learned counsel for the appellant because the Supreme court in Rangappa (supra). The Supreme court had obviously noted the observations in Para 26 in Krishna Janardhan Bhat (supra) that advance of more than Rs.20,000/- was to be made only by way of an account payee cheque, and yet the Supreme Court accepted case of a complainant who claimed to have made an advance of Rs.45,000/- in cash and proceeded to uphold the conviction, even though the case rested on the fact that cash advance of a sum more than Rs.20,000/- was made. Thus, on this

aspect also Krishna Janardhan Bhat (supra) stood impliedly overruled by Rangapaa (supra), and the judgment is to be held rendered on the facts of that case, not laying down any law. Therefore, judgments which follow Krishna Janardhan Bhat (supra) can be safely ignored."

Also, in the aforesaid Judgment at Paragraph No.23 it is observed as under:-

23. In Sanjay Mishra (supra) the Court had also noted in para 14 the observations of the Supreme Court in Dalmia Cement (Bharat) Ltd., v. Galaxy Traders & Agencies Ltd., reported at (2001) 6 SCC 463 and ultimately, refused leave for filing an appeal against acquittal, possibly principally on account of the following facts noted by the Court in Paras 6,7 and 8 of the judgment.

" 6. I have given careful consideration to the submissions. I have perused a copy of the complaint and notes of evidence. In the cross-examination, the applicant has categorically stated thus:-

"... The entire amount was given in cash. The entire amount was my cash amount. The cash amount was kept at my Chembur's residence. At that time, it was unaccounted. I had not disclosed this amount to the Income tax after giving the loan till date. There was no agreement for interest on the amount given.."
" (Emphasis added)

The complaint was filed in the year 2005. The evidence of the applicant was recorded on 28th February 2006. The applicant admitted that the amount allegedly paid by him to the 1st respondent by way of loan was a cash amount kept at his residence and at that time it was an unaccounted amount. He categorically admitted that till date (i.e, till 28th February 2006) he has not disclosed the amount to the Income tax. According to the case of the complainant, he had advanced loan on 14th September 2004 which was repayable within 90 days. Thus on the 14th September unaccounted amount which was kept at the residence of the applicant. Moreover, till February 2006, when the evidence was recorded, the said amount was not disclosed in the Income Tax Returns of the applicant. Thus it continued to be an unaccounted amount.

7. It is true that merely because amount advanced is not shown in Income Tax Return, in every case, one cannot jump to the conclusion that the presumption under section 139 of the said Act stands rebutted. There may be cases where a small amount less than a sum of Rs.20,000/- is advanced in cash by way of loan which

may be repayable within few days or within few months. A complainant may not show the said amount in the Income Tax Return as it is repayable within few days or few months in the same financial year. In such a case the failure to show the amount in the Income Tax Return may not by itself amount to rebuttal of presumption under section 139 of the said Act. If in a given case the amount advanced by the complainant to the accused is a large amount and is not repayable within few months, the failure to disclose the amount in Income-Tax return or Books of Accounts of the complainant may be sufficient to rebut the presumption under Section 139 of the said Act."

64. From the ratio of the aforesaid decision one can deduce that a violation of any relevant provisions of the Income Tax Act concerns only the defaulter and the revenue. In brief, the infraction of the provisions of the Income Tax Act, would not in any manner accrue benefits to a certain / particular borrower, in the considered opinion of this Court. As such, the contra view taken by the trial Court in the Impugned Judgment in S.T.C.No.34 of 2013 dated 28.01.2016 is clearly incorrect in the eye of Law, in the considered opinion of this Court.

65. It is to be borne in mind that the purpose of bringing Section 138 of the Negotiable Instruments Act appears to inculcate faith in the efficacy of banking operations and credibility in transacting business of Negotiable Instruments. A dishonour of cheque can be termed as a regulatory offence, created to serve the public interest in ensuring the reliability of an instrument. Section 138 of Negotiable Instruments Act incorporates a strict liability insofar as the cheque is concerned. An Offending act under Section 138 of the Negotiable Instruments Act constitutes only a civil liability and in fact the said offence is created by a legal fiction in the statute. To put it precisely, the offence under Section 138 of Negotiable Instruments Act is a civil liability transformed into a criminal liability under restricted conditions by way of amendments to the Act, which is brought into force only in the year 1989.

66. It is to be remembered that Section 138 of Negotiable Instruments Act is a penal provision and to attract Section 138 of N.I.Act, the dishonoured cheque should have been issued in discharge or wholly or in part of any debt or other liability of Drawer to Payee.

67. It cannot be gainsaid that the presumption arises in favour of the holder of the cheque that it is for the discharge of any debt or other liability, as per Section 139 of Negotiable Instruments Act. Further, the same is subject to rebuttal proof. The standard of proof for repudiating the presumption is not the same as is for proof of a criminal charge. For proving

a criminal charge, strict proof applies. However, for a rebuttal presumption arising in favour of prosecution (in respect of offence under Section 138 of Negotiable Instruments Act) the 'Principle of Probabilities' applies, in the considered opinion of this Court.

68. A Court of Law is to initially begin with a statutory presumption until the contrary is established that the cheque was issued or drawn for consideration. The holder of the Negotiable Instrument is a 'Holder in Due Course' etc., under Negotiable Instruments Act and that the 'Holder of a cheque' had received the amount mentioned therein towards a discharge of whole or part of any debt or liability, as per decision Kiran Yugalkishore Bhattad V. Sushila Ramacharan Kattamwar reported in 2010 CRI LJ page 2705 (Bom.)

69. It cannot be forgotten that the presumption under Section 139 of the Negotiable Instruments Act extends only to the issuing of cheque towards discharge of 'Legally Enforceable Debt' or 'Liability' and it has to be raised only after the complainant establishes that such debt or liability in fact existed as on the date of the cheque in question and that the cheque was given to him by an accused. Added further, where a cheque was in possession of a complainant, the presumption under Section 139 of the Negotiable Instruments Act could be drawn that the complainant had discharged his initial burden as regards the Enforceable Debt. However, the onus to establish that the cheque was not issued against the Legally Enforceable Debt was on the accused. Moreover, every debt or liability upon which a cheque was issued was not enforceable, as per decision J. Daniel V. State of Kerala reported in 2006 Banking Cases at Page 273 (Ker.)

70. In Law, the Presumption of Fact can be rebutted by an Accused by offering a reasonable and plausible explanation and in fact it must be established that the said explanation is a true one because of the reason that the Presumption of Law cannot be discharged by offering a extension alone. The presumption is not in itself evidence, but only makes a prima facie case for a litigant whose benefit it exists. In as much as the phrase employed in Section 139 of the Negotiable Instruments Act mentions 'Shall Presume' the 'Onus of Proof' is on an accused to prove that the cheque in question was not issued in discharge of a Legally Enforceable Debt or Liability.

71. If a complainant's side evidence is not enough and it shakes the credibility of the case of complainant, then that itself will be just enough to rebut the available presumption, as opined by this Court. It is true that it is not the burden on the complainant in every case to plead, prove and establish that the original consideration to discharge the liability in

which the cheque was issued. Undoubtedly, the complainant is aided by a presumption under Section 139 of Negotiable Instruments Act. However, to rebut the presumption, an accused can rely not only in defence evidence adduced by him but he can rely upon broad improbabilities in prosecution case, the improbabilities of the prosecution witnesses evidence, the acceptance of suggestions made to the prosecution witnesses during cross examination is also a defence evidence, if any. In short, all circumstances mentioned under Section 105 of the Indian Evidence Act, 1872 can be utilised by the Respondent / Accused to discharge the burden under Section 139 of the Negotiable Instruments Act. A presumption under Section 139 of Negotiable Instruments Act would arise only where due execution of the cheque was established. The presumption covered under Section 138 of Negotiable Instruments Act can be projected only where the execution of the instrument is either proved or admitted. However, such presumptions are rebuttable and it would survive if only the contrary is not established by the accused that the cheque was not issued for consideration or for discharge of any debt or liability.

72. Ordinarily once a cheque is found with signature of an accused, it is to be presumed that the cheque was issued towards 'Legally Enforceable Liability'. However, a reasonable opportunity must be given to the Accused to rebut it. The Respondent / Accused cannot succeed to buttress the case of the prosecution by raising baseless contention. Just because the complainant had not filed a copy of the Income Tax Return, it cannot be concluded that the complainant had no financial ability to advance the loan in question. An accused can prove the non-existence for consideration by raising a probable defence, if an accused is proved to have discharged the initial burden on showing that the existence of consideration are doubtful or improbable one or the same was illegal one then, the burden would shift on the complainant who will be obliged to establish it, as a matter of fact and upon his failure to prove would dis-entitle him to secure the relief on the basis of a Negotiable Instrument.

73. It is to be mentioned that Section 139 of Negotiable Instruments Act has to be read along with Section 138 and a conjoint reading of both would point out that presumption would arise only in respect of the 'said amount' as per decision Suman Sethi V. Ajay Churiwal reported in 2002 CRL L.J. Page 1391.

74. A sheer proof of consideration is not enough to succeed in a prosecution under the Negotiable Instruments Act. The consideration must be of a specific nature and that is the reason why the presumption under Section 139 of Negotiable Instrument is enacted and in a prosecution under Section

Negotiable Instruments Act, the advantage of that presumption can be taken by all 'Holders in due course' (including the payee) as per decision Gopinathan (P.N.) V. Sivadasan Kunju reported in 2007 CrI.L.J page 2776 (Ker.)

75. It is to be relevantly pointed out that prosecution for dishonour of cheque is not warranted when a cheque sum is not an 'Enforceable Legal Liability'.

76. On a careful consideration of respective contentions, this Court taking note of the facts and circumstances of the present case and also bearing in mind the probable defences raised on behalf of the Respondent / Accused comes to consequent conclusion that the Respondent / Accused had brought material(s) on record consistent with his innocence which appears to be reasonably true and apart from that, the Respondent / Accused had raised a tangible defence relating to the non-existence of consideration for the Ex.P.1-Cheque, therefore, this Court holds that the Appellant / Complainant had failed to establish his case against the Respondent / Accused and viewed in that perspective, the 'Judgment of Acquittal' passed by the trial Court in S.T.C.No.34 of 2013 is free from any material irregularities or patent illegalities in the eye of Law. Resultantly, the Criminal Appeal fails.

In fine, the Criminal Appeal is dismissed.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

ssd

To

1. Learned Judicial Magistrate,
Fast Track Court at Magisterial Level,
Attur
2. The Public Prosecutor, High Court,
Madras
3. The Section Officer, Record Section,
High Court, Madras

CrI.A.No.190 of 2016

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