

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.03.2018
Pronounced on : 28.12.2018

CORAM

THE HONOURABLE MR.JUSTICE R. SURESH KUMAR

Crl.A.No.367 of 2015

K.Muthusekar

... Appellant / Complainant

Vs

S.T.S.Jayakumar

... Respondent / Accused

Criminal Appeal filed under Section 378(4) of the Criminal Procedure Code, to set aside the order of acquittal passed by the learned I Additional District and Sessions Judge at Tirupur in C.A.No.7 of 2015, dated 27.03.2015.

For Appellant : Mr.S.Baskar
for M/s.Ram & Ram

For Respondent : Mr.I.Abrar Mohammed Abdullah

J U D G M E N T

This Criminal Appeal has been filed against the Judgment made by the I Additional District and Sessions Judge, Tirupur, dated 27.03.2015 made in Crl.A.No.7 of 2015, reversing the Judgment and conviction made by the Judicial Magistrate / Fast Track Court, Tirupur on 26.12.2014 made in S.T.C.No.109 of 2012.

2. The appellant herein is the complainant and the respondent herein is the accused before the trial Court and for the sake of convenience, they would be called herein as complainant and accused respectively.

3. The case of the complainant is that, the complainant knows the accused through a relative of the complainant and common friend of both one Natarajan 4 years prior to the transaction in question. As such, the accused, in order to invest some amount in a Spoken English Academy run by him in the name and style of JKR Spoken English, required money and therefore he along with Natarajan came and requested the

complainant a sum of Rs.10,00,000/- for such investment as loan.

4. Accordingly, the complainant had paid a sum of Rs.7 lakhs on 02.08.2010 at his home in the presence of the said Natarajan to the accused and for the said loan amount of Rs.7 lakhs, the accused agreed to pay the interest of 12% p.a. On the very same day, i.e., on 02.08.2010, the accused had executed a promissory note, Ex.P.1. On the same day, the said Natarajan also given loan of a sum of Rs.3 lakhs to the accused, for which he executed another pro-note.

5. Though such an amount of Rs.7 lakhs was paid by the complainant to the accused, for which he executed pro-note and he agreed to repay the same when demanded, the accused did not come forward to pay back the said amount of Rs.7 lakhs, when it was demanded. However at one point of time, i.e., on 06.05.2011, the accused issued a cheque in the name of or in favour of the complainant for a sum of Rs.7 lakhs drawn in Axis Bank, Tirupur Branch, dated 06.05.2011 with Cheque No.015026. On request of the accused, the complainant deposited the said cheque on 06.05.2011 itself at his Bank, however, the same was returned on 07.05.2011 for the reason "Funds Insufficient" in the account of the accused.

6. Thereafter the complainant sent a statutory notice under Section 138(b) of the Negotiable Instruments Act (For short NI Act) on 17.05.2011 and the said notice was sent to various addresses given by the accused. Out of the several copies of the notice sent to various addresses of the accused, the accused received it on 18.05.2011 at first address and he also received the notice at 2nd and 9th addresses on 20.05.2011. However, the notice sent to 3rd and 8th addresses of the accused had been returned on 18.05.2011.

7. On receipt of the notice from the complainant, the accused on 31.05.2011 sent a reply, where he has made a denial of receipt of the amount and also has given a different story. Since the accused did not come forward to pay back the money to the complainant, in spite of the receipt of notice under Section 138(b) of the NI Act and had given a reply with different story, it can be presumed that the accused had committed the offence punishable under Section 138 of the NI Act, accordingly the complainant filed a complaint under Section 138 of NI Act.

8. The said complaint was taken on file in S.T.C.No.109 of 2012 by the trial Court. Before the trial court, on behalf of the complainant, he himself was examined as P.W.1 and Exs.P.1 to P.24 were marked. On behalf of the accused, there was no witnesses examined, nor any documents were marked. The trial Court, after having completed the trial and after having

appreciated the evidence adduced before the trial Court and after having examined the same, has rendered the Judgment and conviction by its order, dated 26.12.2014, whereby it was found that the accused was guilty of the offence punishable under Section 138 of the Negotiable Instruments Act. Accordingly, the trial Court convicted him and sentenced him to undergo one year SI and imposed a fine of Rs.1000/- in default, one month SI was also awarded.

9. Aggrieved over the said Judgment and conviction made by the trial Court, the accused preferred appeal before the First Appellate Court, i.e., I Additional District and Sessions Judge, Tiruppur in C.A.No.7 of 2015. The First Appellate Court, having considered the Judgment of the trial court as well as the strength of evidence adduced by the parties before the trial Court, has come to the conclusion that the guilt of the accused under Section 138 of the NI Act had not been proved by the complainant and accordingly, the First Appellate Court reversed and set aside the Judgment and conviction made by the trial Court and set the accused at free by its Judgment, dated 27.03.2015. Aggrieved over the said order of acquittal made by the First Appellate Court, the complainant has preferred this Criminal Appeal.

10. I have heard Mr.S.Baskar, the learned counsel appearing for the complainant and Mr.I.Abrar Mohammed Abdullah, learned counsel appearing for the accused.

11. The learned counsel appearing for the complainant would make a submission that, the accused had not denied the execution of the cheque as well as the signature found in the cheque which is marked as Ex.P.2. The accused also did not deny the execution of the pro-note, which was marked as Ex.P.1. The cheque issued by the accused was presented before the complainant's Bank and it was returned for the reasons Insufficiency of Funds. Thereafter statutory notice under Section 138(b) of NI Act was issued, which was received by the accused and he had issued a reply notice on 31.05.2011, which was marked as Ex.P.23 and on the strength of these evidences, the complainant was able to prove before the trial Court that, the accused committed the offence punishable under Section 138 of NI Act, as the statutory presumption under Sections 118 and 139 of NI Act has been strongly created and made in favour of the complainant, which has not been rebutted acceptably by the accused and therefore, the trial Court has rightly convicted the accused.

12. The learned counsel appearing for the complainant would further submit that, even though a stand was taken by the accused in the reply notice, i.e., Ex.P.23, that the accused did not know the complainant till he received the statutory notice,

i.e., Ex.P.4, in the cross-examination of P.W.1, i.e., the complainant, there had been a suggestion from the side of the accused that, the accused had taken chit amount in his name, of course in favour of or for the benefit of the complainant and the said chit amount since had been not paid by the complainant, that had been adjusted by the chit company from the amount of the accused, as he had chit transaction with the said chit company and at that time, the accused had given cheques as security purposes, which had been misused by the complainant.

13. Pointing out these contradiction, the learned counsel appearing for the complainant would submit that, the self-contradiction made by the accused, as he had taken one stand in the reply notice and had taken another stand at the time of cross-examination of P.W.1, therefore he was not able to bring any acceptable rebuttal to the statutory presumption already established in favour of the complainant.

14. The learned counsel appearing for the complainant also pointed out that, in the reply notice, the accused had taken a stand that, he actually borrowed a sum of Rs.4,50,000/- only from Natarajan and in order to settle the same, he had given empty cheques and empty pro-notes, which were misused by the complainant in collusion with or in connivance of, the said Natarajan. Taking a complete U-turn, other story was tried to be projected by the accused at the time of cross-examination of P.W.1, stating that, there had been a chit transaction between the accused and the chit company, that too for the benefit of the complainant. These contradictions has completely shattered the case of the defence, i.e., the accused as he has never cared to give cogent evidence either by oral evidence or by documentary evidence to substantiate his contention, in order to give acceptable rebuttal to the statutory presumption created or made already in favour of the complainant under Sections 118 and 139 of the NI Act.

15. By stating all these reasons, the learned counsel appearing for the complainant would contend that, these aspects, though had been considered properly by the trial Court and rightly the trial Court had convicted the accused, the appellate court has gone into the aspect completely in deviation of these evidences and had taken a very strange view that, the complainant was not able to prove that, from which source he paid the money, i.e., Rs.7 lakhs to the accused and since the complainant was not able to prove the source of money as he did not file any Income-Tax Return before the trial Court to substantiate that he had enough means at that time to give loan to the accused for the said sum of Rs.7 lakhs, the case of the complainant had not been proved and therefore on that ground, the first appellate Court had come to a cryptic conclusion that,

the case of the complainant was not proved and therefore the conclusion arrived at by the trial Court was erroneous and accordingly, the first appellate court set aside the conviction and sentence and acquitted the accused, which is thoroughly erroneous.

16. Per contra, Mr.I.Abrar Mohammed Abdullah, the learned counsel appearing for the accused would submit that, the trial Court had not considered the important aspect of the source for the complainant to make the payment of Rs.7 lakhs by way of loan to the accused. He would submit that, since the complainant claimed that the said amount of Rs.7 lakhs was paid by way of cash and he deposed before the trial Court that, he mobilised the fund out of his own source, which includes the paper bag business he was undertaking, no such evidence had been filed before the trial Court to substantiate his contention that, he had enough means and source to mobilise the fund of Rs.7 lakhs and paid to the accused.

17. The learned counsel would further point out that, it is a settled legal proposition that, mere issuance of the cheque and the signature of the cheque admitted by the accused, it cannot be presumed that the cheque was issued only in order to repay the debt towards the complainant unless it is proved that such a debt as claimed by the complainant was a legally enforceable transaction.

18. Here in the case in hand, according to the learned counsel for the accused, absolutely the claim made by the complainant that he paid a sum of Rs.7 lakhs towards loan with 12% interest was not at all paid to him and in the absence of any acceptable evidence to substantiate such payment, it cannot be easily presumed that, such alleged loan paid by the complainant to the accused is a legally enforceable debt.

19. He would further submit that, if there is no satisfactory evidence before the Court to substantiate that the loan is a legally enforceable one, it cannot be presumed that the cheque in question was issued by the accused only to clear the said debt. Therefore, though these aspects were not properly considered by the trial Court, the first appellate court, having considered the evidence, as the case of the complainant was not supported by any document or oral evidence, in proper perspective, had come to a conclusion that, the complainant was not able to prove the debt, as if it is a legally enforceable one and for the said purpose the cheque in question was issued by the accused. Accordingly, the first appellate court rightly set aside the Judgment and conviction made by the trial Court and allowed the appeal by acquitting the accused.

20. I have considered the said submissions made by the learned respective counsel appearing for the parties, i.e., complainant as well as the accused respectively and have perused the materials placed before this Court.

21. On perusal of the evidences made available before this Court, certain admitted facts are to be noted. That the cheque in question, i.e., P.W.2, was the cheque of the accused and he did not deny the signature made in the Ex.P.2. Also the accused did not deny the execution of the pro-note, Ex.P.1. In this context, the definite case of the complainant before the trial Court was that, on 02.08.2010, a sum of Rs.7 lakhs by way of cash was paid to the accused by the complainant as a loan with 12% interest per annum. On the said date, i.e., on 02.08.2010, the pro-note, i.e., Ex.P.1 was executed by the accused. The further definite case of the complainant was that, on 06.05.2011, in order to repay the loan amount, for a sum of Rs.7 lakhs only towards principal, the cheque in question drawn at Axis Bank, Tirupur Branch, was issued by the accused. When the cheque was presented on 06.05.2011 itself, it was returned on the next day, i.e., on 07.05.2011. Thereafter, the legal notice was issued under Section 138(b) of the NI Act on 17.05.2011, which was received on 18.05.2011 and 20.05.2011 by the accused and in fact he had chosen to reply on 31.05.2011.

22. In this context, the reply notice given by the accused, i.e., Ex.P.3 is to be first evaluated, where, the definite stand taken by the accused is to be looked into.

23. In the said notice, the accused has taken the following stand :

"My client stated that he didn't borrow any amount from your client at any point of time and he doesn't know about your client before receiving your legal notice dated 17.05.2011, actually my client has borrowed a sum of Rs.4,50,000/- on 05.05.2010 at 2.5% per annum from P.Natarajan, Kangayam Road, Tirupur and the same day my client duly signed and gave up fill up two promissory notes and two cheques to P.Natarajan for the collateral purpose of the said loan amount. The cheque Numbers are 1.015026, 2.015027. My client has promised him that when he pays on 31st July 2011, my client will repay a sum of Rs.4,50,000 + 1,50,000 = 6,00,000. But now P.Natarajan has misused my client's cheques and documents through your client."

24. Though such a stand was taken that, the accused did not

even know the complainant before he received the notice, dated 17.05.2011 from the complainant (Ex.P.4), a completely opposite stand had been taken by the accused, which is reflected in the cross-examination of P.W.1, by way of suggestion made on behalf of the accused. The relevant portion of the cross-examination of P.W.1, who is none other than the complainant before whom the following suggestions had been made which was denied by the complainant :

"மார்க்கதாச்சி சிட்பண்ட்ஸ் நிறுவனத்தில் எனக்காக எதிரி சீட்டு போட்டு கொடுத்தார் என்றாலும், பூங்கொடி தேவி என்பவர் மூலமாகத்தான் எதிரியை எனக்கு தெரியும் என்றாலும் எதிரியை எனக்கு நேரடியாக தெரியாது என்றாலும் சரியல்ல. எடுத்த சீட்டினை நான் மேற்கொண்டு கட்டவில்லை என்றாலும் அதனால் சீட்டு முடிக்கப்பட்டது என்றாலும் ஏற்கனவே எதிரி சீட்டு நிறுவனத்தில் வரவு, செலவு, வைத்திருந்தார் என்றாலும், எதிரி பெயரில் தான் சீட்டு போடப்பட்டு இருந்தது என்றாலும் நான் கொடுக்க வேண்டிய எதிரி வரவு, செலவு, வைத்திருந்த பணத்தை நேர் செய்து கொண்டார்கள் என்றால் சரியல்ல சீட்டு முடிக்கப்பட்டதால் சீட்டு முடிக்கப்பட்டதற்காக கொடுக்கவேண்டிய தொகைக்காக எதிரி கொடுக்கவேண்டிய தொகைக்காக பாதுகாப்பிற்காக வெற்றுகாசோலை மற்றும் வெற்று பிராமிசரி நோட்டு ஆகியவற்றை பயன்படுத்தி இந்த வழக்கை தாக்கல் செய்துள்ளேன் என்றால் சரியல்ல. எதிரி எனக்கு ரூ.7,00,000 கடனாக கொடுக்க வேண்டியது இல்லை என்றாலும் சீட்டுத்தொகை தான் கொடுக்கவேண்டியுள்ளது என்றாலும், சீட்டு தொகை ரூ.5,00,000 மட்டும் என்றாலும் அதற்காக பாதுகாப்பிற்காக கொடுக்கப்பட்ட வெற்று காசோலை மற்றும் வெற்று பிராமிசரி நோட்டு ஆகியவற்றை நிரப்பி வழக்கை தாக்கல் செய்துள்ளேன் என்றால் சரியல்ல."

25. On behalf of the accused, neither any oral evidence nor any documentary evidence was marked before the trial Court.

26. If at all a stand has to be taken by the accused to project his defence theory in order to rebut the statutory presumption created in favour of the complainant by virtue of Sections 118 and 139 of NI Act, the accused could have examined himself and other supporting materials could have been placed before the trial Court.

27. Here in the case in hand, the first stand taken by the accused, as reflected in his reply notice was that, he did not know the complainant at all till he received Ex.P.4, notice, dated 17.05.2011 issued by the complainant. However by way of suggestion in the cross-examination of P.W.1 complainant, it is the case of the accused that, he had chit transaction at Markadharasi chit fund and in order to help the complainant, the accused had taken chit amount from Markadharasi chit fund for a sum of Rs.5 lakhs and for taking the said amount of Rs.5 lakhs

from Markadharasi chit fund to help the complainant, the accused claimed to have given two cheques which were misused by the complainant. It is to be noted here that, the accused had taken a definite stand that, he did not know the complainant at all till he received the notice, dated 17.05.2011. However it was suggested on his behalf while cross-examining the complainant, i.e., P.W.1, that the accused had taken chit amount for the complainant. If at all the case projected by way of suggestion made at the time of cross-examination of P.W.1 by the accused side, he could have very well tried to establish the said stand of the accused by examining himself and also could have produced the documents if any to establish that, he had taken chit amount from Markadharasi chit fund for a sum of Rs.5 lakhs for the complainant. No such attempt even had been taken by the accused and not even a piece of evidence had been produced before the trial Court by the accused to substantiate the said theory.

28. That apart, when the accused taken a stand that, he did not even know the complainant, then how the accused had taken Rs.5 lakhs chit amount from Markadharasi chit fund to the complainant and this aspect has not been explained or substantiated.

29. It is further to be noted that, in the reply notice, i.e., Ex.P.23, the accused had taken a definite stand as extracted herein above that, he had actually borrowed a sum of Rs.4,50,000/- on 05.05.2010 at 2.5% interest p.a., from P.Natarajan and on the same day, he had given duly signed two promissory notes and two cheques to the said Natarajan for collateral purpose. This stand of the accused has been completely shattered by the accused's own stand while the cross-examination of P.W.1, as the suggestion made on behalf of the accused side was that, the two cheques as well as the two promissory notes were given by the accused towards security for the chit amount of Rs.5 lakhs taken from Markadharasi chit fund for the purpose of paying the same to the complainant. It is absolutely an alien stand and is utter contra to the stand taken by the accused in the reply notice.

30. These factors, i.e., the contradiction has been properly appreciated by the learned trial Court Judge in his Judgment. The relevant portion of the said discussion and finding given by the trial Court is extracted hereunder :

"மேலும் எதிரி தரப்பில் புகார்தாரருக்கு அனுப்பப்பட்ட பதில் அறிவிப்பான ம.த.சா.ஆ.24வை பார்வையிடுகையில் அதில் புகார்தாரரை எதிரிக்கு தெரியாது என்றும், எதிரி 05.05.2010ல் திரு.பி.நடராஜன் என்பவரிடம் ரூ.4,50,000// கடன் பெற்றதாகவும், அதற்கு ஆதரவாக இரண்டு கடன் உறுதிச்சீட்டுகள், காசோலை எண்கள் 015026, 015027

ஆகியவற்றை நிரப்பாமல் கையெழுத்து மட்டும் செய்து பாதுகாப்பிற்காக அவரிடம் கொடுத்ததாகவும், மேற்படி காசோலைகளை புகார்தாரர் பிநடராஜன் என்பவருடன் சேர்ந்து மோசடியாக நிரப்பியுள்ளதாக குறிப்பிட்டுள்ளது தெரியவருகிறது. ஆனால் எதிரி தரப்பில் புகார்தாரரான ம.த.சா.1ஐ குறுக்கு விசாரணை செய்கையில். ரூமார்க்கதாச்சி சிட்பண்ட்ஸ் நிறுவனத்தில் எனக்காக எதிரி சீட்டு போட்டுக் கொடுத்தார் என்றாலும், பூங்கொடி, தேவி என்பவர் மூலமாகத் தான் எதிரியை எனக்கு தெரியும் என்றாலும் எதிரியை எனக்கு நேரடியாகத் தெரியாது என்றாலும் சரியல்ல. எடுத்த சீட்டினை நான் மேற்கொண்டு கட்டவில்லை என்றாலும் அதனால் சீட்டு முடிக்கப்பட்டது என்றால் ஏற்கனவே எதிரி சீட்டு நிறுவனத்தில் வரவு, செலவு, வைத்திருந்தார் என்றாலும், எதிரி பெயரில் தான் சீட்டு போடப்பட்டு இருந்தது என்றாலும், உங்களுக்கு கொடுக்க வேண்டிய தொகைக்காக எதிரி வரவு, செலவு, வைத்திருந்த பணத்தை நேர் செய்த கொண்டார்கள் என்றால் சரியல்ல. சீட்டு முடிக்கப்பட்டதால் சீட்டு முடிக்கப்பட்டதற்காக கொடுக்க வேண்டிய தொகைக்காக எதிரி கொடுக்க வேண்டிய தொகைக்காக பாதுகாப்பிற்காக வெற்று காசோலை மற்றும் வெற்று பிராமிசரி நோட்டு ஆகியவற்றைப் பயன்படுத்தி இந்த வழக்க தாக்கல் செய்துள்ளேன் என்றால் சரியல்ல. எதிரி எனக்கு ரூ.7,00,000// கடனாக கொடுக்க வேண்டியது அல்ல என்றாலும் சீட்டுத்தொகை தான் கொடுக்க வேண்டியுள்ளது என்றாலும் சீட்டுத்தொகை ரூ.5,00,000// மட்டும் என்றாலும் அதற்காக பாதுகாப்பிற்காக கொடுக்கப்பட்ட வெற்று காசோலை மற்றும் வெற்று பிராமிசரி நோட்டு ஆகியவற்றை நிரப்பி வழக்கை தாக்கல் செய்துள்ளேன் என்றால் சரியல்ல.ஓ என்று ம.த.சா.1 சாட்சியம் அளித்துள்ளது தெரியவருகிறது.

சிட்பண்ட்ஸ் நிறுவனத்தில் எனக்காக எதிரி சீட்டு போட்டு கொடுத்தார் என்றாலும், பூங்கொடி, தேவி என்பவர் மூலமாகத் தான் எதிரியை எனக்கு தெரியும் என்றாலும் எதிரியை எனக்கு நேரடியாகத் தெரியாது என்றாலும் சரியல்ல. எடுத்த சீட்டினை நான் மேற்கொண்டு கட்டவில்லை என்றாலும் அதனால் சீட்டு முடிக்கப்பட்டது என்றாலும் ஏற்கனவே எதிரி சீட்டு நிறுவனத்தில் வரவு, செலவு, வைத்திருந்தார் என்றாலும், எதிரி பெயரில் தான் சீட்டு போடப்பட்டு இருந்தது என்றாலும் நான் கொடுக்க வேண்டிய எதிரி வரவு, செலவு, வைத்திருந்த பணத்தை நேர் செய்து கொண்டார்கள் என்றால் சரியல்ல சீட்டு முடிக்கப்பட்டதால் சீட்டு முடிக்கப்பட்டதற்காக கொடுக்கவேண்டிய தொகைக்காக எதிரி கொடுக்கவேண்டிய தொகைக்காக பாதுகாப்பிற்காக வெற்று காசோலை மற்றும் வெற்று பிராமிசரி நோட்டு ஆகியவற்றைப் பயன்படுத்தி இந்த வழக்கை தாக்கல் செய்துள்ளேன் என்றால் சரியல்ல. எதிரி எனக்கு ரூ.7,00,000 கடனாக கொடுக்க வேண்டியது இல்லை என்றாலும் சீட்டுத்தொகை தான் கொடுக்கவேண்டியுள்ளது என்றாலும், சீட்டு தொகை ரூ.5,00,000 மட்டும் என்றாலும் அதற்காக பாதுகாப்பிற்காக கொடுக்கப்பட்ட வெற்று காசோலை மற்றும் வெற்று பிராமிசரி நோட்டு ஆகியவற்றை நிரப்பி வழக்கை தாக்கல் செய்துள்ளேன் என்றால் சரியல்ல.ஓ என்று ம.த.சா.1 சாட்சியம்

அளித்துள்ளது தெரியவருகிறது.

எதிரி தரப்பில் புகார்தாரருக்கு அனுப்பப்பட்ட பதில் அறிவிப்பில் புகார்தாரரை எதிரிக்கு தெரியாது என்றும், எதிரி 05.05.2010ல் திரு.பி.நடராஜன் என்பவரிடம் ரூ.4,50,000// கடன் பெற்றதாகவும், அதற்கு ஆதரவாக இரண்டு கடன் உறுதிச்சீட்டுகள், காசோலை எண்கள் .015026, 015027 ஆகியவற்றை நிரப்பாமல் கையெழுத்து மட்டும் செய்து பாதுகாப்பிற்காக அவரிடம் கொடுத்ததாகவும், மேற்படி காசோலைகளை புகார்தாரர் பி.நடராஜன் என்பவருடன் சேர்ந்து மோசடியாக நிரப்பியுள்ளதாகவும் குறிப்பிட்டுள்ள நிலையில்

புகார்தாரரை குறுக்கு விசாரணை செய்யும் போது எதிரி தரப்பில் மார்க்கதாச்சி சிட் பண்டஸ் நிறுவனத்தில் எதிரி புகார்தாரர் தவணை செலுத்தவில்லை என்றும் அதனால் எதிரியின் கணக்கிலிருந்து புகார்தாரர் செலுத்த வேண்டிய தொகையை மேற்படி நிதி நிறுவனத்தினர் நேர் செய்து கொண்டதாகவும், எதிரி கொடுக்க வேண்டிய தொகைக்காக பாதுகாப்பிற்காக வெற்று காசோலை மற்றும் கடன் உறுதிச்சீட்டு ஆகியவற்றை பயன்படுத்தி இந்த வழக்கை தாக்கல் செய்துள்ளதாக குறிப்பிட்டுள்ளதும் தெரியவருகிறது. ஆக எதிரி தரப்பில் வழக்கறிஞர் அறிவிப்பில் ஒரு நிலைப்பாடும், அதற்கு நேர் முரணாக ம.த.சா.ஐ குறுக்கு விசாரணை செய்யும் போது மற்றொரு நிலைப்பாடும் எடுக்கப்பட்டுள்ளது தெரியவருகிறது. மேலும் மேற்படி இரண்டு மாறுபட்ட, முரண்பாடான நிலைப்பாடுகளை நீரூபிக்கும் விதத்தில் எதிரி தரப்பில் எவ்வித சாட்சிகளோ, சான்றாவணங்களோ ஆஜர்படுத்தாமல் உள்ள நிலையில் எதிரி தரப்பில் நிலைப்பாட்டை இந்நீதிமன்றத்தில் நீரூபிக்க தவறிவிட்டதாக இந்நீதிமன்றம் கருதுகிறது/ "

31. Further, in so far as the source through which the complainant was able to pay or give a sum of Rs.7 lakhs towards loan to the accused is concerned, the evidence given by the complainant who was examined as P.W.1 is as follows :

"நான் எதிரிக்கு ரொக்க பணமாக கொடுத்ததாக கூறுவதை எதிரிலிருந்து எடுத்து கொடுத்தேன் என்றால் வங்கியிலிருந்தும் கொஞ்சம் பணமும் என் கைவசம் இருந்த பணமும் சேர்த்து எதிரிக்கு பணம் கொடுத்தேன். பின்ப, சாட்சி மீண்டும் தனது தாயார் வங்கியிலிருந்து எடுத்துக் கொடுத்ததாக கூறுகிறார். பாதி பணம் எடுத்துக் கொடுத்ததாக கூறினார் (தனது தாயார்) எவ்வளவு, தொகை வங்கியிலிருந்து எடுத்துக் கொடுக்கப்பட்டது என்றால் ரூ.5,00,000 வங்கியிலிருந்து எனது தாயாரின் வங்கியிலிருந்து எனது தாயாரின் வங்கிக் கணக்கிலிருந்து எடுத்துக் கொடுக்கப்பட்டது. எந்த தேதியில் வங்கியிலிருந்து பணம் எடுக்கப்பட்டது என்றால் எதிரிக்கு பணம் கொடுத்த ஒரு வாரத்தில் முன்பாக எடுக்கப்பட்டது. வங்கிக் கணக்கு பட்டியலை தாக்கல் செய்துள்ளேனா என்றால் தாக்கல் செய்யவில்லை தேவைப்பட்டால் தாக்கல் செய்கிறேன். எனது தாயார் என்ன செய்கிறார் என்றால் ஆசிரியராக இருந்து ஓய்வ, பெற்று விட்டார் எந்த தேதியில் ஓய்வ, பெற்றார் என்றால் எனக்கு ஞாபகம் இல்லை. "

32. Though at the time of examination of P.W.1, the bank account of the mother of the complainant was not produced, subsequently on re-opening on 09.09.2014, the said bank account (Pass book) of the mother of the complainant was marked as Ex.P.24. On perusal of Ex.P.24, it reveals that, a sum of Rs.5 lakhs was withdrawn from the account of the complainant's mother on 13.07.2000. In this context it is to be noted that, the case of the complainant was that, on 02.08.2010, he paid Rs.7,00,000/- to the accused and in order to substantiate this aspects, the P.W.1 complainant had deposed before the trial Court that, out of Rs.7 lakhs, Rs.5 lakhs amount, which was dropped from his mother's account and the remaining amount is the fund mobilised by the complainant from his personal source.

33. This aspect has been appreciated in proper perspective by the trial Court and the learned trial Court Judge has given the following findings in his Judgment :

"இவ்வழக்கில் புகார்தாரர் தரப்பில் எதிரி புகார்தாரரிடம் 02.08.2010 தேதியில் ரூ.7 லட்சம் கடன் பெற்றுக் கொண்டு ஒரு கடன் உறுதிச்சீட்டும் (ம.த.சா.ஆ.1) அந்த கடன் தொகை திருப்பி செலுத்துவதற்காக எதிரியில் 06.05.2011 தேதியில் வழக்கு காசோலையானது (ம.த.சா.ஆ.2) புகார்தாரருக்கு வழங்கப்பட்டதாக முன்வைக்கப்பட்ட சங்கதி புகார்தாரர் தரப்பில் நிரூபிக்கப்பட்டுள்ளதா என்பதை பரிசீலனை செய்கையில் புகார்தாரராக ம.த.சா.1 தனது குறுக்கு விசாரணையில் குநான் எதிரிக்கு ரொக்க பணமாக கொடுத்ததாக கூறுவதை எதிலிருந்து எடுத்துக் கொடுத்தேன் என்றால் வங்கியிலிருந்து கொஞ்சம் பணமும், என் கைவசம் இருந்த பணமும் சேர்த்து எதிரிக்கு பணம் கொடுத்தேன். சாட்சி மீண்டும் தாயார் வங்கியிலிருந்து பாதி பணம் எடுத்துக் கொடுத்ததாக கூறினார். எவ்வளவு, தொகை வங்கியிலிருந்து எடுத்துக் கொடுக்கப்பட்டது என்றால் ரூ.5,00,000// வங்கியிலிருந்து எனது தாயாரின் வங்கிக் கணக்கிலிருந்து எடுத்துக் கொடுக்கப்பட்டது.ஓ என்று சாட்சியம் அளித்துள்ளது தெரிய வருகிறது. இது குறித்து புகார்தாரர் தரப்பில் குறியீடு செய்யப்பட்டுள்ள ம.த.சா.ஆ.24ஆன புகார்தாரரின் தாயாரான திருமதி பிகந்தரி என்பவரது வங்கிக் கணக்கை பரிசீலனை செய்கையில் 13.07.2010 தேதியில் அவரது வங்கிக் கணக்கிலிருந்து காசோலை மூலமாக ரூ.5,00,000// தொகை எடுக்கப்பட்டுள்ளது தெரியவருகிறது. எனவே இதன் மூலம் புகார்தாரரின் கூற்றில் உண்மை இருப்பதாக இந்நீதிமன்றம் கருதுகிறது."

34. In spite of these evidences, which definitely created a statutory presumption under Sections 118 and 139 of the NI Act in favour of the complainant, whether such statutory presumption has been properly rebutted by the accused has to be looked into.

35. In this context, when we peruse the evidence, absolutely no evidence was adduced on the side of the accused either orally or document wise. The only evidence according to the accused side is that, suggestion made by the accused side on the P.W.1 in cross-examination as well as the stand taken by the accused in the Ex.P.23, reply notice. Apart from these two materials / stand, nothing was produced before the trial Court to project or substantiate the case of the accused side.

36. However the first appellate court has given the following findings in the Judgment impugned. The relevant portion of the findings is extracted hereunder for clarity as well as appreciation :

"இந்த வழக்கில் வாதி தனக்கு ரூ.7,00,000// கடன் கொடுக்கக்கூடிய அளவிற்கு வசதி உள்ளதா என்பதை மெய்ப்பிக்கவில்லை என்று எதிரி தரப்பில் எடுத்துரைக்கப்பட்டது. அதன் அடிப்படையில் பார்க்கும் போது வாதி தன் சாட்சியத்தின் குறுக்கு விசாரணையில் நான் எதிரிக்கு கடன் எந்த ரூபத்தில் கொடுத்தேன் என்றால் ரொக்கமாக கொடுத்தேன். நான் எதிரிக்கு கடன் கொடுத்ததாக சொல்லப்படும் தொகையினை கம்பெனி கணக்கு பட்டியலில் காண்பித்துள்ளேனா என்றால் இல்லை. எனது தனிப்பட்ட கணக்கில் பராமரித்து வருகிறேன். நான் தனிப்பட்ட முறையில் பராமரித்து வரும் கணக்கு பட்டியலை நீதிமன்றத்தில் தாக்கல் செய்துள்ளேனா என்றால் இல்லை... எதிரிக்கு ரொக்க பணமாக கொடுத்ததாக கூறுவதை எதிரிலிருந்து எடுத்து கொடுத்தேன் என்றால் வங்கியிலிருந்து கொஞ்சம் பணமும் என் கைவசம் இருந்த பணமும் சேர்த்து எதிரிக்கு பணம் கொடுத்ததாக கூறுகிறார்... எவ்வளவு, தொகை வங்கியிலிருந்து எடுத்துக் கொடுக்கப்பட்டது என்றால் ரூ.5,00,000// வங்கியிலிருந்து எனது தாயாரின் வங்கி கணக்கிலிருந்து எடுத்து கொடுக்கப்பட்டது. எந்த தேதியில் வங்கியிலிருந்து பணம் எடுக்கப்பட்டது என்றால் எதிரிக்கு பணம் கொடுத்த ஒரு வாரத்திற்கு முன்பாக எடுக்கப்பட்டது... எனது அறிவிப்பிலோ, புகாரிலோ எதிரியால் காசோலை எப்போது எங்கு வழங்கப்பட்டது என்ற விவரம் குறிப்பிடவில்லை என்றால் சரிதான். நோட்டீசிலோ புகாரிலோ சொல்லப்படும் தேதி என்னிடம் பணம் இருந்ததற்கான ஆதாரம் எதுவும் குறிப்பிடவில்லை என்றால் சரிதான்... வா.சா.ஆ.24 எனது தாயார் ஸ்டேட் பேங்க் வங்கி கணக்கு பத்தகம் ஆகும். எனது தாயாரின் பெயர் ஆ.சுந்திரி ஆகும். அவர் தான் எனது தாயர் என்பதை காட்டுவதற்கு நான் எழுத்துப்பூர்வமான ஆதாரம் தாக்கல் செய்துள்ளேனா என்றால் செய்யவில்லை என்று கூறியுள்ளார். அவரது சாட்சியத்தில் தனது தாயார் கணக்கிலிருந்து ரூ.5,00,000// எடுத்ததாக கூறி வா.சா.ஆ.24 தாக்கல் செய்யப்பட்டுள்ளது. ஆனால் மேற்படி கணக்கிற்குரிய நபர் இந்த வழக்கில் சாட்சியாக விசாரிக்கப்படவில்லை. மேற்படி தாயார் கணக்கிலிருந்து எடுக்கப்பட்டதாக சொல்லப்படும் ரூ.5,00,000// எதிரிக்கு கொடுப்பதற்காக தான் எடுக்கப்பட்டது என்பது குறித்தும்

எந்தவிதமான வாய்மொழி சாட்சியமும் முன்னிலைப் படுத்தப்படவில்லை. ரூ.7,00,000// வரை கடன் கொடுக்கும் தகுதி உள்ளது என்பதை மெய்ப்பிக்க எந்தவொரு ஆதாரமும் வாதி தரப்பில் தாக்கல் செய்யப்படவில்லை. வாதி வருமான வரியும் செலுத்தி வருவதில்லை என்று கூறியுள்ளார். வருமான வரி சட்டத்தில் ரூ.20,000//க்கு மேல் பட்டுவாடா செய்ய முடியாது. காசோலை மூலமாகவோ அல்லது கேட்பு, காசோலை மூலமாகவோ கொடுத்திருக்க வாய்ப்பு, உண்டு. ஆனால் அவ்வாறு கொடுக்காமல் ரொக்கமாக பணம் கொடுத்ததாக சொல்வது ஏற்றுக்கொள்ளத்தக்கதாக இல்லை. மேலும் காசோலை மூலமாக தாயார் கணக்கிலிருந்து எடுத்ததாக வாதி சொல்லியிருந்தும் கூட மேற்படி காசோலையையே நேரடியாக எதிரியிடம் கொடுத்து மெப்பித்திருக்க வாய்ப்பு, இருந்திருந்தும் அவ்வாறு மெய்ப்பிக்காமல் பணமாக கொடுத்ததாக சொல்வது ஏற்றுக்கொள்ளத்தக்கதாக இல்லை. மேலும் வா.சா.ஆ.24 வங்கி பாஸ் புத்தகத்தை பார்க்கும் போது 17.3.2010ம் தேதி ரூ.5,00,000// எடுக்கப்பட்டதாக கண்டுள்ளது. ஆனால் எதிரிக்கு பணம் கொடுத்ததாக சொல்லப்படும் 2.8.2010 ஆகும். மேலும் தன் தாயாரின் கணக்கிலிருந்து தான் ரூ.5,00,000// எடுத்து கொடுத்ததாக புகாரிலோ தன் தாயாரின் கணக்கிலிருந்து தான் ரூ.5,00,000// எடுத்து கொடுத்ததாக புகாரிலோ தன் முதல் விசாரணை பிரமாண வாக்குமூலத்திலோ அல்லது அறிவிப்பிலோ வாதி கூறவில்லை. எனவே வாதி சொல்வது போல வா.சா.ஆ.24 கணக்கிலிருந்து எடுக்கப்பட்ட பணம் தான் எதிரிக்கு கொடுக்கப்பட்டது என்பது குறித்து வாதியின் தாயாரை விசாரித்து மெய்ப்பித்திருக்க வாய்ப்பு, இருந்திருந்தும் அவ்வாறு மெய்ப்பிக்க தவறியுள்ளதால் வாதிக் கு மேற்படி தொகையைச் செலுத்தக்கூடிய அளவிற்கு பொருளாதார வசதி உள்ளது என்பது நிரூபிக்கப்படவில்லை. மேலும் ரூ.7,00,000// கடன் கொடுக்கும் ஒரு நபர் தனக்கு வருமான வரி கணக்கே இல்லை என்று கூறுவதிலிருந்து பார்க்கும் போது வாதி சொல்வது ஏற்றுக்கொள்ளத்தக்கதாக இல்லை. அட்டை பெட்டி தயாரிக்கும் தொழில் செய்து சம்பாதித்து வருவதாக சொல்லியிருக்கும் வாதி ரூ.7,00,000// வரை கடன் கொடுத்திருந்தும் அதை தன் கம்பெனி கணக்கில் காண்பிக்கவில்லை என்றும், தனியாக ஒரு கணக்கு பராமரித்து வருவதாகவும் வாதி கூறியுள்ளார். ஆனால் அவ்வாறு தனிப்பட்ட கணக்கு வாதி தரப்பில் முன்னிலைப்படுத்தப்படவில்லை. அவ்வாறு தனியாக பராமரித்து வரும் கணக்கை வாதி தாக்கல் செய்யவில்லை என்பதாலும், வருமான வரி கணக்கு செலுத்தி வருவதில்லை என்று கூறியுள்ள சூழ்நிலையிலும், தன் தாயார் கணக்கிலிருந்து பணம் எடுக்கப்பட்டதாக வாதி கூறியிருந்தும் தன் தாயார் வழக்கில் விசாரிக்கப்படாததாலும் வாதி கூறியுள்ளது போல வாதிக் கு ரூ.7,00,000// எதிரிக்க கடன் கொடுக்கக்கூடிய அளவிற்கு பொருளாதார வசதி மெய்ப்பிக்கப்படவில்லை என்பதும் வாதி சொல்வது போல புகாரில் சொல்லப்பட்டுள்ள கடன் சட்டப்படி நிலைநிறுத்தக்கூடிய கடன் அல்ல என்பதும் தெரிகிறது. எனவே வா.சா.ஆ.2 காசோலையில் உள்ள கையெழுத்து எதிரியினுடையது என்ற ஒரே காரணத்தால் மேற்படி காசோலையில் உள்ள அனைத்தும்

மெய்ப்பிக்கப்பட்டதாக தீர்மானிக்க முடியாது. ஏனெனில் சட்டப்படியான கடன் மெய்ப்பிக்கப்படவில்லை என்பதாலும், காசோலை முழுவதும் நிரப்பி எதிரியால் கொடுக்கப்படாத சூழ்நிலையிலும் முதல் நோக்கிலேயே வாதி தன் தரப்ப, வழக்கை மெய்ப்பிக்கவில்லை என்பது தெளிவாகிறது. முதல் நோக்கில் வாதி தரப்ப, வழக்கு மெய்ப்பிக்கப்படவில்லை என்பது வா.சா.1ஐ குறுக்கு விசாரணை செய்ததிலிருந்தே எதிரி மெய்ப்பித்துள்ளதால் எதிரி தன்னை இந்த வழக்கில் விசாரித்துக் கொள்ளாததால் வழக்கு எந்தவிதத்திலும் பாதிப்படையவில்லை என்றே தீர்மானிக்கப்படுகிறது."

37. The first appellate court has not looked into the Ex.P.1, Pro-note, Ex.P.2, Dishonoured cheque, Ex.P.23, Reply notice given by the accused and Ex.P.24, Bank passbook accounts, i.e., S/B Account of the mother of the complainant in proper perspective.

38. In fact the first appellate court in the above said findings has pointed out that, as per Ex.P.24, Rs.5 lakhs was withdrawn on 17.03.2010, however, the amount of Rs.7 lakhs claimed to have been given on 02.08.2010 and the complainant did not say either in the complaint or in his chief examination that Rs.5 lakhs out of Rs.7 lakhs paid to the accused was taken only from the mother's account, therefore in order to substantiate the same, the complainant ought to have examined his mother as one of the witness, in absence of the same, the case of the complainant cannot be accepted.

39. In this regard, this Court finds that, the factual matrix recorded by the learned first appellate Court about the dates itself is wrong, because, Ex.P.24 clearly demonstrates that on 13.07.2010, a sum of Rs.5 lakhs was withdrawn from the account of the mother of the complainant, whereas the learned first appellate Court Judge recorded it as if the said withdrawal was made on 17.03.2010. On the basis of the wrong recording of the date of withdrawal, the learned Judge has further given the findings that the loan was claimed to be given on 02.08.2010, whereas the amount was withdrawn on 17.03.2010, therefore it cannot be presumed that, the said amount withdrawn from the mother's account was given to the accused for the loan purpose and for the said purpose, the mother of the complainant ought to have been examined.

40. These reasoning given by the learned first appellate Court Judge is not only against facts as well as the evidence but also is completely in flaw.

41. The learned appellate Court Judge has given yet another finding that, in order to prove that one R.Sundari, whose bank statement was filed as Ex.P.24, was the mother of the

complainant, no document was filed. Therefore the learned first appellate Court even doubted the relationship of the complainant and her mother, which is very unfortunate, because, when we peruse the original, Ex.P.24, which is a Saving Bank Passbook of the complainant's mother, clearly given the address of the complainant, i.e., No.42, Nachipalayam post, Vijayapuram via, Tirupur - 641 606 and the photo of the complainant's mother also has been pasted in the Saving Banks Account book. It is also to be noted that, the mother of the complainant is a retired Teacher. Therefore there could have been a source for getting pension and infact there had been continuous transactions of credit and withdrawal available in the said account, where on the particular date, i.e., on 13.07.2010, a sum of Rs.5 lakhs had been withdrawn.

42. Out of the sum of Rs.7 lakhs loan amount, since there are evidences to establish that Rs.5 lakhs had been withdrawn just a week or two before the said payment of the loan and for the remaining amount since the complainant was running a business, certainly the complainant had established that, he got a source to mobilise the said fund of Rs.7 lakhs for giving the said loan to the accused.

43. Moreover, the first appellate court failed to appreciate the fact that, the accused has not taken a definite stand. In the reply notice he had taken a stand that, he did not know the complainant and also taken a stand that, he borrowed a sum of Rs.4,50,000/- from Natarajan and in order to repay the same by way of security, he had given two blank cheques and two blank promissory notes. Whereas the very same accused has, on his behalf, when P.W.1 was cross-examined, had taken a stand that, the accused had taken a chit for a sum of Rs.5 lakhs from Markadharasi chit fund only for the complainant. These contradictory stand taken by the accused clearly exposes the accused that, he did not have any valid defence or alternative theory in order to rebut the presumption established in favour of the complainant by virtue of Sections 118 and 139 of NI Act.

44. These aspects have not at all been considered by the first appellate court and in fact, the first appellate court has taken a completely tangent view and even to the extent of recording the factual matrix wrongly in his findings. Therefore the entire approach taken by the first appellate court, in the opinion of this Court, is completely flawed.

45. The legal position on the above discussed aspects have been well settled.

46. In Hiten P.Dalal v. Bratindranath Banerjee reported in (2001) 6 SCC 16, the Hon'ble Apex Court has decided that, the third presumption available to the Bank under Section 139 of the

NI Act gives a clear presumption to the Bank to come to a conclusion that, unless contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability, makes the effect that these presumption is to place the evidential burden on the appellant or proving that the cheque was not received by the Bank towards the discharge of any liability. In this context, the following findings of the Hon'ble Apex Court is extracted hereunder :

"21. The appellant's submission that the cheques were not drawn for the 'discharge in whole or in part of any debt or other liability' is answered by the third presumption available to the Bank under Section 139 of the Negotiable Instruments Act. This section provides that "it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability". The effect of these presumptions is to place the evidential burden on the appellant of proving that the cheque was not received by the Bank towards the discharge of any liability

22. Because both Sections 138 and 139 require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras vs. A. Vaidyanatha Iyer AIR 1958 SC 61, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused" (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the

accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary.

A fact is said to be proved when, "after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists". Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'."

47. The Hiten P.Dalal's case cited above has been followed by the Hon'ble Apex Court in the subsequent decision in K.N.Beena v. Muniyappan and anr., reported in (2001) 8 SCC 458, the following findings of the Apex Court can be usefully referred to herein :

"7. In our view the impugned Judgment cannot be sustained at all. The Judgment erroneously proceeds on the basis that the burden of proving consideration for a dishonoured cheque is on the complainant. It appear that the learned Judge had lost sight of Sections 118 and 139 of the Negotiable Instruments Act. Under Section 118, unless the contrary was proved, it is to be presumed that the Negotiable Instrument (including a cheque) had been made or drawn for consideration. Under Section 139 the Court has to presume, unless the contrary was proved, that the holder of the cheque received the cheque for discharge, in whole or in part, of a debt or liability. Thus in complainant's under Section 138, the Court has to presume that

the cheque had been issued for a debt or liability. This presumption is rebuttable. However the burden of proving that a cheque had not been issued for a debt or liability is on the accused. This Court in the case of Hiten P. Dalal v. Bratindranath Banerjee reported in MANU/SC/0359/2001 : 2001 Cri LJ 4647 has also taken an identical view.

8. In this case admittedly the 1st Respondent has led no evidence except some formal evidence. The High Court appears to have proceeded on the basis that the denials / averments in his reply dated 21st May, 1993 were sufficient to shift the burden of proof onto the Appellate complainant to prove that the cheque was issued for a debt or liability. This is an entirely erroneous approach. The 1st Respondent had to prove in the trial, by leading cogent evidence, that there was no debt or liability. The 1st Respondent not having led any evidence could not be said to have discharged the burden cast on him. The 1st Respondent not having discharged the burden of proving that the cheque was not issued for a debt or liability, the conviction as awarded by the Magistrate was correct. The High Court erroneously set aside that conviction."

48. In fact the learned counsel appearing for the accused has relied upon the Judgment of the Apex Court in (2003) 1 SCC 1 in the matter of C. Antony v. K.G. Raghavan Nair, where the learned counsel relied upon para no.6, which reads thus :

"6. This Court in a number of cases has held that though the appellate court has full power to review the evidence upon which the order of acquittal is founded, still while exercising such an appellate power in a case of acquittal, the appellate court, should not only consider every matter on record having a bearing on the question of fact and the reasons given by the courts below in support of its order of acquittal, it must express its reasons in the judgment which led it to hold that the acquittal is not justified. In those line of cases this Court has also held that the appellate court must also bear in mind the fact that the trial court had the benefit of seeing the witnesses in the

witness box and the presumption of innocence is not weakened by the order of acquittal, and in such cases if two reasonable conclusions can be reached on the basis of the evidence on record, the appellate court should not disturb the finding of the trial court [See Bhim Singh Rup Singh v. State of Maharashtra, (1974) 3 SCC 762 and Dharamdeo Singh v. State of Bihar, (1976) 1 SCC 610]"

49. The learned counsel also relied upon the Judgment of this Court made in P.Krishnasamy vs. Delta Knit Wearables, reported in 2011 (3) MWN (Cr.) (DCC) 1.

50. I have perused the two decisions referred by the accused side.

51. In C.Antony's case, it was the case where the trial Court held that, the prosecution case was not proved and therefore dismissed the complaint. However in appeal, the High Court on re-appreciation of the evidence, concluded that the appellant / accused was guilty and accordingly convicted him. Setting aside the said decision taken by the High Court, the Apex Court has held that, the appellate court should not only consider every matter on record having a bearing on the question of fact and the reasons given by the Courts below in support of its order of acquittal, it must express its reasons in the Judgment which led to hold that the acquittal is not justifiable.

52. Here in the case in hand, first of all, it is not the case of acquittal by the trial Court, it is a conviction. However the first appellate Court while reversing the said conviction has given its finding, which this Court finds that factually wrong. This Court also finds that, the first appellate Court has not at all considered the statutory presumption under Sections 118 and 139 of NI Act and no evidences absolutely whatsoever from the accused side to bring an acceptable rebuttal of such statutory presumption. Therefore the case cited by the accused side, i.e., C.Antony's case would not help the accused and in fact it strengthen the case of the complainant in the present case in hand.

53. Like that, in respect of P.Krishnasamy's case, the learned Judge had raised a doubt that, the cheque was issued in 1995 and was used in the year 2000. Therefore it created a doubt in the minds of the Court, as the delay in using the cheque was not at all explained by the complainant. Therefore the learned Judge came to a conclusion in that case, that there had been a failure of complainant to discharge its initial burden to prove existence of legally enforceable liability.

54. Here in the case in hand, on facts, with support of evidence, the complainant was able to establish the prima facie case that, statutory presumption that there had been a debt, which is legally enforceable, for which cheque in question was issued supported by pro-note executed by the accused.

55. In the absence of any denial of the signature of the accused both in the pro-note as well as in the cheque, i.e., Ex.P.1 and Ex.P.2, the execution of those Ex.P.1 and Ex.P.2 can be safely accepted in favour of the complainant. Therefore in this case the statutory presumption under Sections 118 and 139 very well had been created or established by the complainant, whereas the said presumption, even though a rebuttable presumption, has not been shattered by way of acceptable rebuttal on the side of the accused. In fact the accused has not brought any evidence either orally or by way of documents.

56. If at all the theory of the accused that, he had chit transaction with Markadharasi chit fund and for the said purpose, cheques were issued which were misused by the complainant is to be taken into account, the said theory, even though is completely contrary to the earlier stand taken by the accused in the reply notice, i.e., Ex.P.23, at least in order to establish or substantiate the said stand of the chit transaction as projected by the accused by way of suggestion made while cross-examining P.W.1, the accused could have examined himself and produced some documents to show prima facie, that he had chit transaction with Markadharasi chit fund. However no such attempt has even been taken by the accused side, which has clearly established that, the accused has got nothing to project as defence theory as he tried to project. However these aspects have not at all been taken into account by the first appellate Court.

57. About the statutory presumption under Section 139 of NI Act, the Hon'ble Apex Court in Rangappa v. Sri Mohan reported in (2010) 11 SCC 441 has given the following finding :

26. In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence

wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.

27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.

29. Coming back to the facts in the present case, we are in agreement with the High

Court's view that the accused did not raise a probable defence. As noted earlier, the defence of the loss of a blank cheque was taken up belatedly and the accused had mentioned a different date in the 'stop payment' instructions to his bank. Furthermore, the instructions to 'stop payment' had not even mentioned that the cheque had been lost. A perusal of the trial record also shows that the accused appeared to be aware of the fact that the cheque was with the complainant. Furthermore, the very fact that the accused had failed to reply to the statutory notice under Section 138 of the Act leads to the inference that there was merit in the complainant's version. Apart from not raising a probable defence, the appellant-accused was not able to contest the existence of a legally enforceable debt or liability.

58. In a similarly placed case under Section 138 of the NI Act, where, though the trial Court has convicted, the first appellate Court reversed the same, as against which, when appeal were preferred, this Court in Crl.A.No.481 of 2016 in V.P.Kumarasamy v. S.Ayyappan, by order, dated 08.02.2018, I have taken the following view :

"27. Here in the case in hand, the only evidence according to the accused, was that he had filed Insolvency Petition, where he shown the name of the son-in-law of the complainant as one of the creditors and showing various liabilities including the name of the son-in-law of the complainant, the cheques which have already been given to each of the creditors have been mentioned and Ex.P.1, the cheque in question had also been given to the son-in-law of the complainant, which has been misused by the complainant.

28. In this regard, though the first appellate Court has given much credence on the said statement based on the certified copy of the Insolvency Petition filed before the appellate Court, the said petition does not disclose anything in favour of the accused to support his case that Ex.P.1-cheque was also given to the son-in-law of the complainant. Moreover, it was the definite case of the accused before the trial Court that, there

was a chit transaction between the son-in-law and the accused and out of the said transaction, whatever money borrowed by the accused had already been settled. Once, the transaction between the son-in-law of the complainant and the accused since had been settled as admitted or averred by the accused, the question of showing the said Palanisamy i.e., the son-in-law of the complainant, once again in the Insolvency Petition, as one of the creditors, does not arise at all.

29. Moreover, on perusal of the said Insolvency Petition as has been shown above, it is disclosed that the very same cheque of ICICI Bank had been shown against not only Palanisamy, the son-in-law of the complainant, but also against one Muthukumar. Therefore, the accused was not definite in the specific case as he averred or deposed before the trial Court and hence, the averment or deposition on the part of the accused cannot be taken as an acceptable rebuttal and the statutory presumption is always in favour of the complainant. Therefore, this Court has no hesitation to come to the conclusion that the first Appellate Court has erroneously reversed the finding and Judgment given by the trial Court and accordingly, this Court is of the view that the Judgment impugned passed by the First Appellate Court is liable to be set aside and the Judgment and conviction of the trial Court is to be restored.

30. In the result, the Judgment of the First Appellate Court namely, the learned II Additional District and Sessions Judge, Erode, made in C.A.No.25 of 2014 dated 07.12.2015 is set aside and the Judgment and the conviction made by the learned District Munsif -cum- Judicial Magistrate, Kodumudi, Erode, in S.T.C.No.433 of 2009, is restored."

59. Applying the principle laid down in various Judgments, as cited above of the Hon'ble Apex Court as well as this Court, on facts, the complainant has established the case that, statutory presumption that, cheque in question has been executed by the accused and in support of which, he had also executed a pro-note, i.e., Ex.P.1 and there is no contra evidence to prove

the contrary stand brought in by the accused side, in order to shatter the statutory presumption created under Sections 118 and 139 of the NI Act. The appreciation of these aspects by the trial Court and the consequential conviction became inevitable and the same ought not to have been disturbed by the first appellate Court. However the first appellate court on complete erroneous assumption with wrong facts has come to a conclusion that the trial Court Judgment was wrong and accordingly set aside the same.

60. However on perusal of the evidences and also on consideration of the facts of the case, by applying the law settled in this regard by the Hon'ble Apex Court as well as this Court, in number of Judgments, as has been cited above, this Court is of the considered view that, the first appellate Court has erroneously decided the appeal under the impugned Judgment.

61. For all these reasons stated above and the discussion made herein above, this Court is inclined to set aside the Judgment of the first appellate Court by restoring the Judgment and conviction made by the trial Court.

62. In the result, the Judgment made in C.A.No.7 of 2015 by the I Additional District and Sessions Judge, Tirupur, dated 27.03.2015 is hereby set aside and the Judgment and conviction made by the Judicial Magistrate / Fast Track Court, Tirupur in S.T.C.No.109 of 2012, dated 26.12.2014 is hereby restored.

As a sequel, the trial Court is directed to execute the sentence awarded against the accused in Judgment, dated 26.12.2014 of the trial Court made in S.T.C.No.109 of 2012. Thus the appeal is allowed as indicated above.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

tsvn

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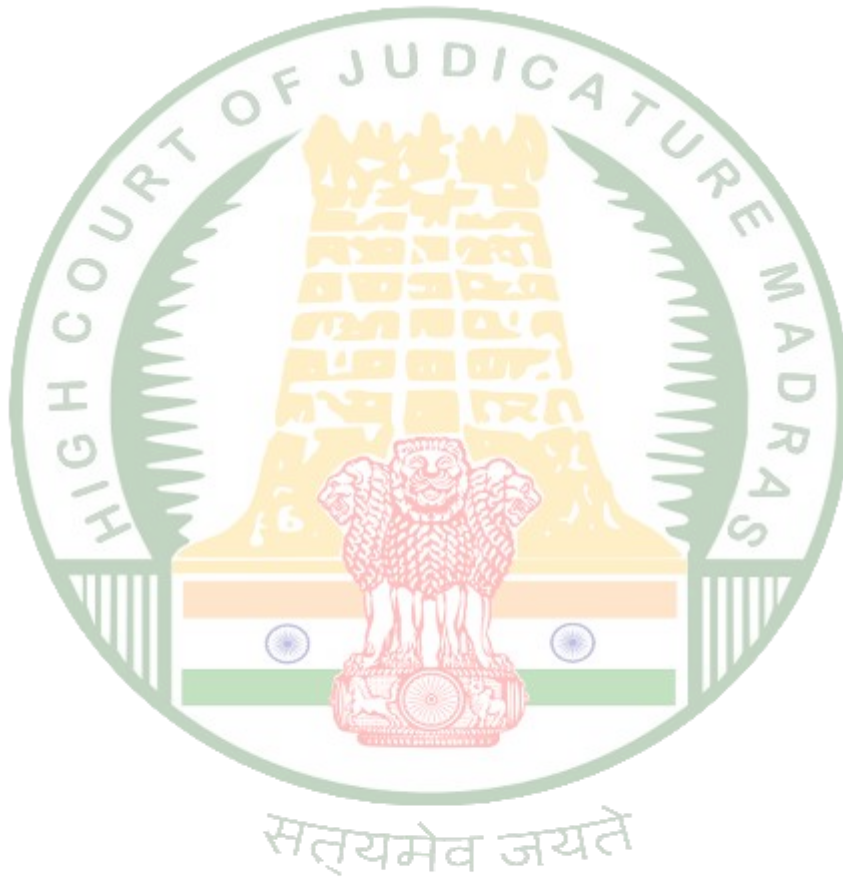
1. The I Additional District and Sessions Judge
Tirupur.
2. The Judicial Magistrate / Fast Track Court,
Tirupur.

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3. The Public Prosecutor
High Court of Madras, Chennai.

CrI.A.No.367 of 2015

SJ(CO)
GSP(23/01/2019)



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