BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On	:	20.12.2023
Pronounced On	:	19.03.2024

CORAM

THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

Crl.R.C(MD). No.824 of 2022

1. Concord Exports
   Proprietor: O.R.B. Vikraman
   D. No.3/301, Surveyor Colony,
   2nd Street, K. Puthur, Madurai.

2. O.R.B. Vikraman ... Petitioners/Appellants/Accused

Vs.

Balu Agencies
Represented by its Proprietor:
Chittibabu
Amanakunatham Village,
Aruppukottai Taluk,
Virudhunagar District. ... Respondent/Respondent/Complainant

PRAYER: Criminal Revision Petition has been filed under Section 397 r/w 401 of Cr.P.C., to call for records and set aside the order of dismissal of an appeal dated 20.07.2022 in C.A.No.22 of 2019 on the file of the Additional District & Sessions Judge, Virudhunagar in Virudhunagar District confirming the order of conviction dated 30.07.2019 in C.C.No.102 of 2014 passed by the Learned Judicial Magistrate, Aruppukottai for the offence punishable under Section 138 of NI Act and allow this Criminal Revision in Crl.R.C.(MD)No.824 of 2022.

For Petitioners : Mr.M.Michael Bharathi

For Respondent : Mr.K.Chella Pandian,
Senior Counsel
for Mr.M.Jothi Basu

ORDER

The petitioner filed this Criminal Revision Case challenging the conviction and sentence of two years rigorous imprisonment and direction to pay the cheque amount of Rs. 33,51,876/- to the respondent in C.C.No.102 of 2014 dated 30.07.2019, by the learned Judicial Magistrate Aruppukottai, which was confirmed by the learned Additional District and Sessions Judge, Virudhunagar, in C.A.No.22 of 2019, dated 20.07.2022.

2.1. The respondent/complainant procured agricultural products namely, food grains from various farmers and supplied the same to various companies in wholesale and retail on credit basis running a business in the name and style of 'Balu Agencies'. The revision petitioners also were one of the customers of the complainant for 6 years prior to 2013. The complainant had been supplying yellow maize to the revision petitioners on credit basis. The business terms between them were satisfactory and also they were the close business friends.

That being so, the petitioner purchased maize to the value of Rs.48 lakhs from the complainant and he failed to pay the part of the amount. Therefore, the complainant obtained loan from the Tamil Nadu Mercantile Bank and settled the amount to the individual farmers. Thereafter, the petitioners agreed to settle the amount to the Bank along with the interest. But, they did not make any payment. On demand made by the complainant, the petitioners are said to have given a cheque dated 02.12.2013 bearing No.857255 to the value of Rs.33,51,876/- drawn from Indian Overseas Bank. The said cheque was presented in the complainant's bank on 27.02.2014. The same was retuned with an endorsement that “there was no sufficient funds” in his account. Hence, the complainant issued a statutory notice on 22.03.2014.

2.2The petitioners received the said notice on 24.03.2014 and sent reply on 01.04.2014 with the material averments that since the complainant supplied the inferior quality of maize containing moisture, the same were returned from the foreign country. Thereby, they suffered huge loss. In result, the liability was fixed to the extent of Rs.13,51,876/-. For settling the same, 1 year time was fixed and also in the notice, they stated that the cheque and pro-note were issued as security at the time of entering into business terms with the complainant. The said fact was already intimated to the respondent during the course of police enquiry conducted on the basis of the police complaint made by the respondent to recover the alleged amount of Rs.33,51,876/- who filed Criminal Original Petition before this Court to register the case on the basis of the complaint. Therefore, the police officer conducted an enquiry and insisted to pay the amount. The petitioner issued legal notice denying the liability and questioning the jurisdiction of the police to enter into the commercial dispute. Finally, the complaint was closed as the dispute was civil in nature. He also issued notice during the police enquiry to the respondent stating that the petitioners handed over unfilled cheque and promissory note as a security and they took a stand that they had suffered huge loss, due to the supply of impure maize with moisture. Hence, there is no liability to make the payment of Rs.33,51,876/-. The complainant misused the cheque, which was issued very long back as security.

2.3. The complainant/respondent filed the complaint before the learned Judicial Magistrate, Arupukottai, under Section 138 Negotiable Instrument Act and the same was taken on file in C.C.No.102 of 2014 and summon was issued to the petitioners. After receipt of the summon, the petitioners appeared before the trial Court and pleaded not guilty.

2.4. The complainant to prove the case, examined P.W.1 and P.W.2 and marked Ex.P.1 to Ex.P.6 and the learned trial Judge examined the petitioners under 313 Cr.P.C., and the petitioners denied the same as false and filed the detailed written explanation under Section 313(5) of Cr.P.C., In 313(5) of Cr.P.C., they reiterated the stand taken in the reply notice and stated that the cheque was not issued to discharge legally enforceable debt. The same was furnished as security and they have no knowledge about the loan obtained by the defacto complainant from the Tamil Nadu Mercantile Bank on 24.01.2012 and 25.01.2015. He never undertook to discharge the said loan amount obtained by the defacto complainant with interest. The defacto complainant misused the old cheque by presenting the same before his bank for collection. He also marked Ex.D.1 to Ex.D.5 during the cross-examination of the witnesses.

2.5. The learned trial Judge after considering the above evidence of the complainant and documents, convicted the second petitioner under Section 138 Negotiable Instruments Act and sentenced him to undergo 2 years Rigorous Imprisonment and also directed to pay the cheque amount by passing the impugned judgement dated 30.07.2019 in C.C.No.102 of 2014. Aggrieved over the same, he filed the Crl.A.No.22 of 2019 on the file of Principal Session Court, Srivilliputhur. The same was confirmed by the impugned judgment dated 20.07.2022.

3. Challenging the same, the revision petitioners filed this revision on the grounds stated in the memorandum of grounds of Revision.

4.1. The learned counsel appearing for the petitioners submitted that both the Courts below failed to consider that the evidence on record clearly probabilises the defence of the petitioners that the cheque was issued as a security long back before the alleged date of issuance of cheque dated 02.12.2013 and the same was misused by the complainant. Even as per the pleading of the complainant, he supplied maize to the petitioners and the petitioners made part payment and refused to pay the balance amount. To settle the same, the petitioners are alleged to have given a cheque to the value of Rs. 33,51,876/-. To prove the supply of goods to the value of cheque amount, the defacto complainant did not adduce any evidence. Before invoking the presumption clause, foundational facts are to be established. Without proof of foundational facts, the presumption cannot operate. In this case, there is no liability on the alleged date of issuance of cheque for the said amount. No document was produced to prove the supply of the maize for the said amount covered under the cheque and part payment made towards the supply of the maize to the petitioners and the balance amount was agreed to be settled by the petitioners. Without proof of the same, the presumption clause was invoked by the both the Courts below. Hence, there is perversity in appreciation by the Courts below on facts and law. The learned trial Judge not even referred the defence document marked by the petitioners. In the judgment, it has not even been stated that the petitioners filed the defence document and there was no discussion at all. Hence, the trial Court judgment is not in consonance with the definition of judgment as defined under the Section 354 Cr.P.C.,

4.2. The learned counsel appearing for the petitioners further submitted that the learned Appellate Judge failed to properly appreciate the documents filed by the petitioners and the grounds raised by the petitioners. The learned Appellate Judge, without considering written statement filed under Section 313 of Cr.P.C., supported with the defence documents and the other circumstances emanated from the evidence of the complainant, erroneously confirmed the judgment of the learned trial Judge stating that the petitioners in his cross-examination admitted the fact that they are liable to pay the amount of

Rs.13,51,876/-. Both the Courts below failed to consider that the defacto complainant filled the cheque issued for the purpose of security with amount of Rs.33,51,876/-. Mere issuance of the cheque with the signature of the petitioner does not prove the liability on the revision petitioners.

4.3. The learned counsel for the petitioners further submitted that during the course of chief examination, the defacto complainant stated that the cheque was issued by the petitioners in Thoothukudi office. In cross examination, it was stated that he approached the defacto complainant in his Madurai office and gave the cheque. The said diametrically opposite versions would show that the cheque was not issued on 02.12.2013. The said aspect was not properly considered by both the Courts below. Both the Courts below have not properly considered the plea of the petitioner that the cheque was issued as a security and the same was misused by the defacto complainant. Both the Courts below have not properly considered the law on the subject i.e., both the Courts below have not properly considered the precedents on the subjects in proper manner.

4.4. The learned counsel for the petitioners further submitted that the learned trial Judge, has come up with a strange proposition that the accused did not examine himself and hence, adverse inference was taken against the petitioners. According to the learned trial Judge, the defence taken by the petitioners has to be established through the petitioners and the other witnesses. The said proposition is against the law laid down by the Hon'ble Supreme Court in number of judgments.

4.5 The learned counsel for the petitioners further submitted that the Appellate Judge also failed to consider the issue raised by the petitioners that the cheque was issued only as security on the basis of the defence document and the other documents. Both the Courts decided the case by taking adverse inference against the 2nd petitioner for the reasons that the 2nd petitioner has not examined himself as a witness to speak about the defence. The said approach of the both the Courts below is erroneous.

4.6. The learned counsel for the petitioners further submitted that the complainant has not stated in the complaint about the sequence of events that took place before the filing of the Calender Case i.e., the complainant's attempt to recover the amount through the police and the notice issued by the petitioners to the defacto complainant before the presentation of the cheque and after the presentation of the cheque in proper manner.

4.7. The learned counsel for the petitioners further submitted that both the Courts below failed to consider the important omission on the part of the defacto complainant in the police complaint about the issuance of cheque. The learned Appellate Judge without properly appreciating the entire evidence of P.W.1, stated that the petitioners admitted the liability to the tune of Rs.40,60,000/-. As per the finding of the learned trial Judge, the petitioners admitted the liability of Rs.80,60,000/- and he paid Rs.40,00,000/-. The balance amount to be paid is sum of Rs.40,60,000/-. The said approach of the learned Appellate Judge is perverse on the ground that the defacto complainant's case is not so i.e., the said approach is against the pleadings and evidence of the defacto complainant. The defacto complainant in his evidence and pleading stated that the liability is Rs.33,51,876/-. But, the learned Appellate Judge projected the case as Rs.40,00,000/-. Hence, the learned counsel seeks the indulgence of this Court to re-appreciate the evidence to test whether the findings of the Courts below suffer any perversity.

4.8. In sum and substance, the learned counsel for the petitioners further submitted that the issuance of cheque for the above amount of Rs.33,51,876/- is not established to discharge the liability of supply of maize to the value of Rs.33,51,876/- through the relevant record. In the said circumstances, his defence that the cheque was issued only as security is established in compliance with rule of the preponderance of probability. Hence, he seeks for setting aside the conviction and sentence passed against the petitioners by the Court below by allowing this petition and he relied the judgement of the Hon'ble Supreme Court.

5.1. The learned senior counsel appearing for the respondent submitted that the issuance of the cheque is admitted and the supply of maize also is admitted. The case of the revision petitioners that the cheque was issued for security purpose was not established. The defacto complainant clearly stated that the cheque was issued on 02.12.2013. Even though, the same was disputed, there is no contra evidence adduced and hence, the cheque was issued only to discharge the liability of the amount mentioned in the cheque.

5.2. The learned Senior counsel appearing for the respondent further submitted that the accused admitted the supply of maize to the value of

Rs.80,60,000/-. But, his case is that the same was inferior quality with moisture. Therefore, he suffered loss. Hence, liability is to be reduced to Rs.13,51,876/-. The same was arrived after the settlement between the complainant and the accused. To prove the same, he did not get into the witness box and deposed before the Court. Hence, both the Courts below correctly took the stand against the petitioners. Even though, the petitioners tried to establish through the cross-examination of the complainant and the other documents, there is no material to prove the case of the petitioners that the balance amount was only Rs.13,51,876/-. Hence, the concurrent findings of both the Courts below need not be interfered with.

5.3. The learned Senior counsel appearing for the respondent further submitted that even though the learned trial Judge failed to address the issuance of the cheque as a security on the basis of the defence document, the learned Appellate Judge appreciated the said documents and recorded the finding that the said document is not sufficient to accept the case of the petitioners that the liability is only Rs.13,51,876/-. In the said circumstances, non-mentioning of the cheque particulars in the police complaint is not fatal to the *defacto* complainant's case. More particularly, both the Courts below appreciated the entire evidence and gave categorical finding that the petitioner has not established his case that the cheque was issued prior to the date of 02.12.2013 and the defacto complainant misused the same.

5.4. The learned Senior counsel appearing for the respondent further submitted that as per the case of the *defacto* complainant, the arrived amount is Rs.33,541,876/- after the repayment made by the petitioner i.e., after the settlement. Hence, the petitioner has come forward with the false case that the arrived amount is Rs.13,51,876/-. Hence, the petitioner has not only come forward with a false plea but also distorted the fact before this Court.

5.5 The learned Senior counsel appearing for the respondent further submitted that the defacto complainant also produced the income tax returns to show the loss and also produced the document to show obtaining of loan. In the said circumstances, there is no reason to interfere with the order passed by both the Courts below.

5.6. The learned Senior counsel appearing for the respondent relied the following judgments:-

i) ***Tedhi Singh Vs, Narayan Dass Mahand*** reported in ***2022 (1) MWN (Cr.) (DCC) 139 (SC)***

ii) ***Sunil Todi and Others Vs, Sttate of Gujarat and Another*** reported in ***2021 (3) MWN (Cr.) DCC 167 (SC)***

iii) ***J.Devi Vs, S.Gandhi*** reported in ***2023 (2) MWN (Cr.) DCC 30 (Mad.)***

6. This Court considered the rival submission made by both the counsel and perused the records and also the precedents relied upon by them.

7. In this case, from the detailed submissions made by both the counsel, the following questions are framed for consideration:-

i) Whether the judgment of the learned trial Judge without considering the defence document is in accordance with Section 354 of Cr.P.C.?

ii) Whether the first appellate Court is correct in recording the finding that the petitioner was not able to prove that the cheque was issued only as a security?

8. Whether the judgment of the learned trial Judge without considering the defence document is in accordance with Section 354 of Cr.P.C.?

8.1.The defacto complainant deposed in chief examination that the petitioners had been purchasing the maize for more than a period of six years and he either paid the amount in instalments or by one settlement. Both are close business friends. He purchased maize in 2012 for the value of Rs.48,00,000/-and made part payment through the bank and he evaded to repay the amount and assured to pay the amount. Therefore, the defacto complainant borrowed money from bank and settled to the individual farmers. Thereafter, the defacto complainant demanded repayment and the petitioner agreed to pay the balance amount with bank interest. But the petitioners failed to repay the amount. Hence, he approached the petitioner in his office at Madurai on 02.12.2013 and he was said to have handed over the cheque bearing No.857255 of Indian Overseas Bank for the value of Rs.33,51,876/-. The same was dishonoured and complaint was filed.

8.2.The accused/petitioner came forward with the specific case that the defacto complainant supplied maize for the value of Rs.80,60,000/-. The said maize was exported to Vietnam and the same was returned due to the misbrand and low quality and therefore, he incurred loss of Rs.20,00,000/-. Therefore, a settlement was arrived between the revision petitioner and the defacto complainant and the defacto complainant agreed to receive a sum of Rs. 13,51,876/- within a period of one year. But the defacto complainant gave a police complaint on 28.01.2014 without mentioning the details of the cheque. The Police officer also called the petitioner for enquiry and the defacto complainant filed Crl.O.P.(MD).No.5412 of 2014 before this Court to register the case on the basis of his complaint. Pending the same, the petitioner/accused sent a legal notice to the defacto complainant on 21.02.2014 demonstrating the above facts and also admitted his liability to the extent of Rs.13,51,876/-. In the said notice also the petitioner clearly stated about the issuance of blank pro-note and the above said cheque for security and also agreed to receive back the blank pro-note and cheque upon making the payment of Rs.13,51,876/- and the contents of the notice is as follows:

> *Our clients also are given to understand that you are taking hasty steps to institute Criminal Proceedings against our clients by misusing the blank pro-note and blank cheque No.857255 drawn on Indian Overseas Bank, Tuticorin Branch given as security by out clients.*
>
> *Your acts are unwarranted, unjust and illegal.*

> *Our clients are ready to send a sum of Rs. 13,51,876/- to you as agreed by you for final settlement on your assurance to return back the blank pro-note and blank cheque No.857255 drawn on Indian Overseas Bank, Tuticorin Branch to out clients.*

8.3.Thereafter, the police officers closed the enquiry on the ground that the same was in civil nature and directed the parties to approach the Civil Court. On the basis of the same, this Court closed the Crl.O.P.(MD).No.4512 of 2014 with liberty to the defacto complainant to file the protest petition. Thereafter, the defacto complainant presented the cheque on 27.02.2014.

8.4.The petitioner marked the above said complaint, order in Crl.O.P.(MD).No.4512 of 2014, notice dated 21.02.2014 and acknowledgement as Ex.D1 to Ex.D5, during the cross examination of the defacto complainant and he also admitted the same. But, the learned trial Judge, in the impugned judgment in C.C.No.102 of 2014 dated 30.07.2019 stated "no defence documents marked". The learned trial Judge has not made any discussion about the defence document marked. The said approach of the learned trial Judge is not in accordance with Section 354 of Cr.P.C. Therefore, the learned counsel for the petitioner correctly relied the following portion of decision of the Hon'ble Supreme Court:

In *Mukhtiar Singh v. State of Punjab*, (1995) 1 SCC 760 at page 765

10. *...On the plainest requirement of justice and fair trial the least that was expected of the trial court was to notice, consider and discuss, howsoever briefly, the evidence of various witnesses as well as the arguments addressed at the bar. The trial court has not done so. The trial court apparently failed in the discharge of its essential duties. There is no mention in the judgment as to what various witnesses deposed at the trial, except for the evidence of the medical witness. The judgment does not disclose as to what was argued before it on behalf of the prosecution and the defence. The judgment is so infirm that we are unable to appreciate as to how the findings were arrived at. The judgment of the trial court is truly speaking not a judgment in the eyes of law. The trial court appears to have been blissfully ignorant of the requirements of Section 354(1)(b) CrPC. Since, the first appeal lay to this Court, the trial court should have reproduced and discussed at least the essential parts of the evidence of the witnesses besides recording the submissions made at the bar to enable the appellate court to know the basis on which the 'decision' is based. A 'decision' does not merely mean the 'conclusion' — it* *embraces within its fold the reasons which form the basis for arriving at the 'conclusions'. The judgment of the trial court contains only the 'conclusions' and nothing more. The judgment of the trial court cannot, therefore, be sustained.*

In Prem Kaur v. State of Punjab, (2013) 14 SCC 653 at page 660

***24.** Thus, in view of the above, the law can be laid down that the court must give reasons for reaching its conclusions. The courts below have dealt with the matter in a very summary fashion. The statements of reasons, for the conclusion reached by them, which could have been more enlightening, are missing. The judgments of the courts below do not comply with the requirement of the statutory provisions as laid down in CrPC. The view taken by the courts below is manifestly unreasonable and has resulted in miscarriage of justice. The courts ought not to have given the defective and cryptic judgment. In fact it is no judgment in the eye of the law. We are not in a position to judge the correctness, legality and propriety of the findings recorded by the courts below. The absence of sound reasons is not a mere irregularity, but a patent illegality.*

8.5.From the above reading of the principle laid down by the Hon'ble Supreme Court, this Court accepts the argument of the learned counsel for the petitioner that the judgment of the learned trial Judge in C.C.No.102 of 2014 dated 30.07.2019 is not in accordance with Section 354 of Cr.P.C. The judgment does not refer the defence document in the index portion of the defence exhibits and also the learned trial Judge has not at all considered the said defence documents. Therefore, the question is answered in favour of the petitioner/accused.

8.6.But, the learned appellate Judge, considered the said defence documents without remanding the matter as a final Court of fact in the interest of justice and also in accordance with the Sections 374 and 386 of Cr.P.C.

8.7.When the judgment of the trial court is not in accordance with law, the first appellant Court instead of remanding the matter to the trial Court, itself can decide the issues and the same has been fortified by the principle laid down by the Hon'ble Supreme Court in the case of ***Mohinder Singh v. State of Punjab***, **(1985) 1 SCC 342 : 1985 SCC (Cri) 87 at page 344** and has held as follows**:**

> ***3...****the High Court instead of analysing and appreciating evidence, remanded the case back to the Sessions Judge for writing a proper judgment. In the first place, assuming that the High Court was right in thinking that the judgment*

suffered from some infirmities and there were certain facts which were not taken into consideration they would not be grounds for remanding the case to the Sessions Court to write a proper judgment. The High Court itself was a final court of facts and it was its duty to satisfy itself regarding the correctness and acceptability of the evidence. Thus, it was entirely open to the High Court to reappraise the evidence once again to consider the facts which may have been overlooked by the Sessions Judge and it should have decided the appeal itself instead of remanding the case to the Sessions Court.

8.8. Therefore, the first appellate Court without remanding matter, considered the grounds raised by the petitioner and the defence documents and confirmed the judgment of the trial Court by disbelieving the case of the petitioner that the cheque was issued by him as a security put forth by him on the basis of the defence documents.

9. Whether the first appellate Court is correct in recording a finding that the petitioner was not able to prove that the cheque was issued only as a security?

9.1.The pleadings of the complainant is that the petitioner purchased maize from the complainant to the tune of Rs.48,00,000/- and he made certain payment through the bank. The remaining liability is Rs.33,51,876/-. To discharge the same, he approached the petitioner in his office at Madurai on 02.12.2013. He is said to have handed over the unfilled promissory note and the cheque in question for the value of the said amount. But in his evidence, he stated that the cheque was issued at Thoothukudi and also without filling the same. He did not know, who filled the cheque. Further, he also gave unfilled promissory note in his hand. To consider the defence of the petitioner, this Court appreciates the evidence of P.W.1.

9.2. From the testimony of P.W.1, it is clear that earlier the complainant made a police complaint before the District Crime Branch, Virudhunagar, and he has not stated about the issuance of cheque. Further, in the chief examination, he deposed that he has supplied maize to the value of Rs.48,00,000/-. But, in his cross examination, he made a contradictory statement that he supplied maize for an amount of Rs.80,60,000/- and the petitioner paid Rs.40,00,000/- only. The said contradiction coupled with failure to state the said transaction in the income tax return of the defacto complainant, the case of the petitioner that the cheque was given as security and the same was misused by the defacto complainant by filling the amount of Rs.33,51,876/- is probable one. The petitioner proved his case through the documents and the evidence of complainant and defence documents.

9.2.1. The Hon'ble Supreme Court in the following judgments clearly ruled that the defence of the accused may be proved either through the examination of the accused or through filing of defence document and through the cross-examination of the defacto complainant's side evidence and documents. It is not necessary that the accused should come as a witness to prove the case.

In ***Basalingappa v. Mudibasappa, (2019) 5 SCC 418 at page 432***

> ***25.3.****To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.*
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> ***25.4.*** *That it is not necessary for the accused to come to the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.*

25.5. It is not necessary for the accused to come in the witness box to support his defence.

9.2.2. *In* ***Kumar Exports v. Sharma Carpets, (2009) 2 SCC 513 at page 520***

20. *The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove* *the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.*

9.2.3. The Hon'ble Suprme Court in ***Rangappa v. Sri Mohan, (2011) 1 SCC (Cri) 184 at page 454***

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.*

9.3.Therefore, both the Courts below erroneously took an adverse inference against the petitioner on the ground that he has not appeared as a defence witness and deposed in support of his defence that it is a security cheque and failed to prove the case of security cheque and non-existence of the liability of the amount mentioned in the cheque ie., Rs.33,51,876/-.

9.4.Further, the petitioner specifically filed detailed explanation under Section 313 of Cr.P.C. The Hon'ble Supreme Court has held in the following cases the Court should have considered the explanation furnished by the accused during the course of the proceedings under Section 313 of Cr.P.C, and the non consideration is the ground for an acquittal.

In ***Reena Hazarika v. State of Assam*, (2019) 13 SCC 289 at page 295**

> ***19.*** *Section 313 CrPC cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2) CrPC. The importance of this right has been considered time and again by this Court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) CrPC the Court is duty-bound under Section 313(4) CrPC to consider the same. The mere use of the word "may" cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available, is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 CrPC, in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn*

duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 CrPC and to either accept or reject the same for reasons specified in writing.

20. *Unfortunately neither the trial court nor the High Court considered it necessary to take notice of, much less discuss or observe with regard to the aforesaid defence by the appellant under Section 313 CrPC to either accept or reject it. The defence taken cannot be said to be irrelevant, illogical or fanciful in the entirety of the facts and the nature of other evidence available as discussed hereinbefore. The complete non-consideration thereof has clearly caused prejudice to the appellant. Unlike the prosecution, the accused is not required to establish the defence beyond all reasonable doubt. The accused has only to raise doubts on a preponderance of probability as observed in HateSingh Bhagat Singh v. State of Madhya Bharat [Hate Singh Bhagat Singh v. State of Madhya Bharat, 1951 SCC 1060 : AIR 1953 SC 468 : 1953 Cri LJ 1933] observing as follows: (AIR p. 471, para 26)*

"26. We have examined the evidence at length in this case, not because it is our desire to depart from our usual practice of declining to re-assess the evidence in an appeal here, but because there has been in this case a departure from the rule that when an accused person puts forward a reasonable defence which is likely to be true…. then the

burden on the other side becomes all the heavier because a reasonable and probable story likely to be true when pitted against a weak and vacillating case is bound to raise reasonable doubts of which the accused must get the benefit. ...”

In Jai Prakash Tiwari v. State of M.P., reported in 2022 SCC OnLine SC 966

30. *Moreover, it is the solemn duty of the courts below to consider the defence of the accused. The same must be considered with caution and must be scrutinised by application of mind by the judge. The Court may accept or reject the same, however it cannot be done cursorily. The reasoning and the application of mind must be reflected in writing. However, from the observations extracted above, it is clear that the courts below have failed to undertake this solemn duty. Rather, the evidence of the accused has been dealt by the Court in a casual manner.*

9.5. In this case, the Court below has failed to consider the specific case of the petitioner furnished during the course of the 313 of Cr.P.C., proceedings. He specifically pleaded that the respondent used the cheque issued as a security and using the same filed this case. He also pleaded that the respondent supplied the inferior quality of the maize. To prove the same also he marked the documents Ex.D1 to Ex.D4 and also he relied the various circumstances of the evidence of the respondent. But both the Courts below have not considered the above in accordance with law. Hence, this Court applying the above principle laid down by the Hon'ble Supreme Court in ***Reena Hazarika v. State of Assam*****, (2019) 13 SCC 289 at page 295** and in ***Jai Prakash Tiwari v. State of M.P., reported in 2022 SCC OnLine SC 966*** acquit the petitioner.

10. The learned Senior counsel appearing on behalf of the defacto complainant placed heavy reliance on the judgment of the Hon'ble Supreme Court in the case of ***Sunil Todi and Others Vs. State of Gujarat and Another*** reported in ***2021 3 MLW Crl.167 SC.*** In the said judgment, the Hon'ble Supreme Court has held that the issuance of the cheque as a security to be decided on appreciation of the evidence during the course of trial and the same is not a ground to quash the proceedings. In this case, this Court upon considering the pleadings, evidence of the defacto complainant and documents filed on the side of the defacto complainant and the accused come to the conclusion that the cheque was issued as a security.

11. The issue before the Hon'ble Supreme Court in the said case is that whether the quashing of the proceedings can be entertained on accepting the plea

of the accused that the cheque was issued for security. The Hon'ble Supreme Court has held that the same has to be decided only after full-fledged trial upon appreciation of the evidence.

12. The issue of quashing of the case under Section 138 of the Negotiable Instruments Act, on the ground that the cheque was issued for security has been addressed by the Hon'ble Supreme Court in the following cases:

(i) ***Indus Airways (P) Ltd. v. Magnum Aviation (P) Ltd.***, reported in ***(2014) 12 SCC 539***

(ii)***Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Ltd.***, reported in ***(2016) 10 SCC 458***

(iii) ***Sripati Singh v. State of Jharkhand***, reported in ***2021 SCC OnLine SC 1002***

(iv) 2021 (3) MWN (Cr) DCC 167 (SC)

(v) ***Dashrathbhai Trikambhai Patel v. Hitesh Mahendrabhai Patel***, reported in ***(2023) 1 SCC 578***

13. In ***Dashrathbhai Trikambhai Patel v. Hitesh Mahendrabhai Patel***, reported in 2023 (1) SCC 578, the Hon'ble Supreme Court discussed all the above judgments and has held in Paragraph No.20 is as follows:

> ***20.****The judgments of this Court on post-dated cheques when read with the purpose of Section 138 indicate that an offence under the provision arises if the cheque represents a legally enforceable debt on the date of maturity. The offence under Section 138 is tipped by the dishonour of the cheque when it is sought to be encashed. Though a post-dated cheque might be drawn to represent a legally enforceable debt at the time of its drawing, for the offence to be attracted, the cheque must represent a legally enforceable debt at the time of encashment. If there has been a material change in the circumstance such that the sum in the cheque does not represent a legally enforceable debt at the time of maturity or encashment, then the offence under Section 138 is not made out.*

14. In this case, it is the specific pleading of the defacto complainant that he collected the maize from the individual farmers and supplied to the petitioner to the value of Rs.48,00,000/- and the petitioner paid part amount. But, he defaulted in making remaining amount of Rs.33,51,876/- and hence, the defacto

complainant borrowed the loan from the bank and repaid to the individual farmers and thereafter, the petitioner agreed to pay the said amount with interest and hence, he issued the cheque on 02.12.2013.

15. The defence of the petitioner is that the defacto complainant supplied the maize with the inferior quality and moisture. Therefore, the exported maize was returned and he suffered loss. Thereafter, the defacto complainant agreed to receive only a sum of Rs.13,51,876/-. The cheque and unfilled promissory note were issued at the time of entering the business transaction for security. The said cheque was misused by the petitioner to file this complaint. He properly made a reply to the notice sent by the defacto complainant. He also produced the defence documents. He also filed the written explanation under Section 313 of Cr.P.C.

16. The learned trial Judge committed error in stating that no defence documents were filed and there was no discussion on the defence documents. The learned appellate Judge, without making any discussion on the pleadings and evidence of the complainant made a discussion of the case of the defence and relied a portion of the defence and convicted the petitioner ie., the petitioner received the maize to the value of Rs.80,60,000/- from the defacto complainant

and he paid only a sum of Rs.40,00,000/- and remaining amount is Rs.40,60,000/-. The petitioner failed to prove the same. Absolutely there was no discussion, how the complainant arrived the amount of Rs.33,51,876/-. In the said circumstances, as already discussed and also from the pleadings of the complainant, there is a material change on the date of the alleged issuance of cheque regarding the liability. The same was clear from the notice issued without any clear-cut mention of liability on the part of the petitioner.

17. The learned appellate Judge has not considered the defence document in a proper manner. The specific case of the accused is that the liability is only to the extent of Rs.13,51,876/-. It is also the case of the defacto complainant in the notice, complaint and chief examination that the petitioner procured maize for the value of Rs.48,00,000/- and he made part payment and for remaining payment of Rs.33,51,876/- he issued the cheque in question, but, he completely failed to adduce any evidence in this regard.

18. But the learned appellate Judge, gave a finding in Paragraph No.16 that the petitioner has not established his case by examining himself ie., *In this Case, through suggestions made in the cross-examination of PW1, it is seen that*

the accused had admitted the total liability of Rs.80,60,000/- and it is admitted that out of above said sum, Rs.40,00,000/- was already paid by the accused. So, admittedly the accused has to pay a sum of Rs.40,60,000/- to the complainant. It is the defence that due to misbranded and low quality of the grains the accused incurred loss of Rs.20,00,000/- and the liability to pay the remaining amount is admitted by the accused. As already discussed the accused did not come to the witness box to prove that he incurred loss due to the low quality of the grains supplied by the complainant. Moreover, till date he has not repaid the admitted liability also. So, as per the above judgment, if the entire amount due is already paid, then only the cheque can be considered as security. If there is any existing liability, there is no rule that the cheque which is issued as security can never be presented by the drawee of the cheque. So, in this case, since there is existing legally enforceable liability, the complainant is entitled to present the cheque before the bank and the accused cannot be permitted to take a defence that it was given only as security.

19. The said discussion of the learned first appellant Judge is quite contrary to the case of the petitioner in the pleadings and evidence. The learned first appellant Judge either has to go by the evidence of the defacto complainant

or by the case of the defence. Upon appreciation of the defence document and 313 Cr.P.C., explanation and the above deposition of P.W.1 two probable views are available. According to the petitioner/accused, the remaining agreed amount is only Rs.13,51,876/-. According to the complainant, the remaining amount is Rs.33,51,876/-. In the said circumstances, it is relevant to rely on the following portion of the judgment of the Hon'ble Supreme Court in ***Indus Airways (P) Ltd. v. Magnum Aviation (P) Ltd.***, reported in ***(2014) 12 SCC 539 at page 545*** and benefit of doubt is given to the accused.

> ***9.****The Explanation appended to Section 138 explains the meaning of the expression "debt or other liability" for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The Explanation leaves no manner of doubt that to attract an offence under Section 138, there should be a legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of an existing or past adjudicated liability is sine qua non for bringing an offence under Section 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation*

or otherwise, and material or goods for which purchase order was placed is not supplied, in our considered view, the cheque cannot be held to have been drawn for an existing debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability.

***15.** The above reasoning of the Delhi High Court is clearly flawed inasmuch as it failed to keep in mind the fine distinction between civil liability and criminal liability under Section 138 of the NI Act. If at the time of entering into a contract, it is one of the conditions of the contract that the purchaser has to pay the amount in advance and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Section 138. For a criminal liability to be made out under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. We are unable to accept the view of the Delhi High Court that the issuance of cheque towards advance payment at the time of signing such contract has to be considered as subsisting liability and dishonour of such cheque amounts to an offence under Section 138 of the NI Act. The Delhi High Court has travelled beyond the scope of Section 138 of the NI Act by holding that the purpose of enacting Section 138 of the NI Act would stand defeated if* *after placing orders and giving advance payments, the instructions for stop payments are issued and orders are cancelled. In what we have discussed above, if a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise and material or goods for which purchase order was placed is not supplied by the supplier, in our considered view, the cheque cannot be said to have been drawn for an existing debt or liability.*

20. Adding further, the defacto complainant's specific stand is that the cheque was issued in Madurai, but in the course of cross examination it is stated at Thoothukudi. The said different stand in the examination also affect the trustworthiness of his testimony and connection on the basis of said inconsistent testimony could not be sustained as held by the Hon'ble Supreme Court in ***Suraj Mal v. State (Delhi Admn.)***, reported in ***(1979) 4 SCC 725 at page 726***

> ***2.*** *It is well-settled that where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witnesses.*

21.1. The learned counsel for the respondent relied the judgment of the Hon'ble Supreme Court in the case of ***State of Kerala vs. Puttumana Illath Jathavedan Namboodiri*** reported in ***1999 SCC (Crl) 275***

> ***5.*** *Having examined the impugned judgment of the High Court and bearing in mind the contentions raised by the learned counsel for the parties, we have no hesitation to come to the conclusion that in the case in hand, the High Court has exceeded its revisional jurisdiction. In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. On scrutinizing the impugned judgment of the High Court from the aforesaid standpoint,*

we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction in interfering with the conviction of the respondent by re-appreciating the oral evidence. The High Court also committed further error in not examining several items of evidence relied upon by the Additional Sessions Judge, while confirming the conviction of the respondent. In this view of the matter, the impugned judgment of the High Court is wholly un-sustainable in law and we, accordingly, set aside the same. The conviction and sentence of the respondent as passed by the Magistrate and affirmed by the Additional Sessions Judge in appeal is confirmed. This appeal is allowed. Bail bonds furnished stand cancelled. The respondent must surrender to serve the sentence.

21.2. The Hon'ble Supreme Court in Paragraph No.5, has stated that the Court has power to exercise the revisional jurisdiction in the case of the miscarriage of justice and when the finding of both the Courts are perverse. This Court already discussed the perversity in the above mentioned paragraphs and hence, in this case, to avoid the miscarriage of justice, this Court interferes in the finding of both the Courts below and set aside the conviction and sentence imposed under Section 138 of the Negotiable Instruments Act.

22. The petitioner admitted his liability of Rs.13,51,876/-. Both the petitioner and the defacto complainant pleaded that they are good friends in the business. Both have admitted that for the past 6 years they were in the business. Considering this extra ordinary situation, even though this Court is inclined to allow the revision by setting aside the conviction and sentence imposed on the petitioner, this Court is not inclined to place the defacto complainant in an uncomfortable position to recover the said admitted amount of Rs.13,51,876/-.

22.1.The Hon'ble Supreme Court before amendment to Section 143(1) ie., 06.02.2003 and after the amendment directed the Court to follow the compensatory and restitutive approach. Further, the Hon'ble Supreme Court has held in the following decision that the proceeding under Section 138 of the Negotiable Instruments Act is civil in nature in ***P. Mohanraj v. Shah Bros. Ispat (P) Ltd.***, reported in **(2021) 6 SCC 258 at page 323**

> ***(This is the clearest enunciation of a Section 138 proceeding being a "civil sheep" in a "criminal wolf's" clothing.)***
>
> *22.2.In [Kaushalya Devi Massand v. Roopkishore Khore, (2011) 4 SCC 593, Hon'ble Supreme Court Court succinctly stated : (SCC p. 595, para 11)*

“11.....An offence under Section 138 of the Negotiable Instruments Act, 1881, is almost in the nature of a civil wrong which has been given criminal overtones.”

22.3. In R. Vijayan v. Baby, (2012) 1 SCC 260 at page 267

18..... Direction to pay compensation by way of restitution in regard to the loss on account of dishonour of the cheque should be practical and realistic, which would mean not only the payment of the cheque amount but interest thereon at a reasonable rate.

In Meters & Instruments (P) Ltd. v. Kanchan Mehta [Meters & Instruments (P) Ltd. v. Kanchan Mehta, (2018) 1 SCC 560 : (2018) 1 SCC (Civ) 405 : (2018) 1 SCC (Cri) 477] , this Court noticed the object of Section 138 and the amendments made to Chapter XVII, and summarised the case law and held that :

67.... the gravamen of a proceeding under Section 138, though couched in language making the act complained of an offence, is really in order to get back through a summary proceeding, the amount contained in the dishonoured cheque together with interest and costs, expeditiously and cheaply. We have already seen how it is the victim alone who can file the complaint which ordinarily culminates in the payment of fine as compensation which may extend to twice the amount of *the cheque which would include the amount of the cheque and the interest and costs thereupon.*

By applying the above principles, to redress the grievance of the defacto complainant, this Court in the interest of justice and equity direct the petitioner to pay the admitted amount of Rs.13,51,876/- with the interest of 6% from the date of the Ex.R4 ie, 21.02.2014.

23. In view of the above discussion, this Court finds that the finding of both the Courts below suffer from inherent infirmities and improbabilities. Hence, this Court has to interfere with the concurrent finding. Accordingly, the Criminal Revision is allowed in the following terms:

(i)The judgment and conviction passed by the learned Additional District and Sessions Judge, Virudhunagar, in C.A.No.22 of 2019, dated 20.07.2022, confirming the judgment of the learned Judicial Magistrate, Aruppukottai in C.C.No.102 of 2014, dated 30.07.2019 is hereby set aside. Bail bond executed by the petitioner stands cancelled. The petitioner is set at liberty, unless his presence is required for any other case.

(ii)The petitioner is hereby directed to pay the amount of Rs.13,51,876/- with interest of 6% from the date of Ex.R4 ie.,12.02.2014, within a period of three months from the date of receipt of a copy of this order. Otherwise, the defacto complainant is at liberty to execute the same in the manner known to law.

19.03.2024

NCC : Yes/No
Index : Yes/No
Internet: Yes/No
dss/*sbn*

To

1. The Additional District & Sessions Judge,
   Virudhunagar, Virudhunagar District.

2. The Judicial Magistrate,
   Aruppukottai.

3. The Section Officer,
   Criminal Section(Records),
   Madurai Bench of Madras High Court,
   Madurai.

K.K.RAMAKRISHNAN, J.

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Pre-delivery Order made in

Crl.R.C(MD). No.824 of 2022

19.03.2024