THE HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL APPEAL No.1557 of 2007

JUDGMENT:

The appellant-complaint seeks to assail the order of acquittal dated 04.04.2007 passed by the learned Judicial Magistrate of the First Class, Pithapuram in the private complaint case C.C.56 of 2006 filed by said complainant under Section 138 of the Negotiable Instruments Act (for brevity 'the Act').

2) The grounds of appeal and the submission during hearing impugning said dismissal of complaint resulting acquittal of accused is that the trial Magistrate went wrong by ill-appreciation of the evidence in acquitting the accused instead of convicting by observations that the cheque dated 08.11.2005 in his bank for collection and same when sent to the account of the accused on 12.11.2005 it was returned dishonoured for insufficiency of funds and as if the said presentation with collecting bank is disentitlement, that the defence of the accused as if blank cheque given by her to Vishnu Priya Finance Company. By such a stray sentence to the complainant in cross-examination which he even denied could establish nothing muchless by her coming to witness box to probabilise the defence and thereby the trial Court's acquittal judgment holding accused not issued the cheque muchless for legally enforceable debt is unsustainable to set aside by allowing the appeal and convicting the accused.

3) The learned counsel appointed as legal aid counsel to defend the accused for the absence of accused despite of service of notice vehemently contended that the trial Court is right in its elaborate discussion on the factual matrix in coming to the conclusion of there is no proof of the cheque issued voluntarily to the complainant by accused muchless by borrowal of any amount and no scrap of paper filed other than the cheque for a stranger for so called lending that too for a

professional money lender and nothing shown at what rate of interest lent, what principle lent and trial Court thereby rightly observed that it is highly improbable of believing the said version without money lender lending without interest and sought for dismissal of the appeal for no legally enforceable debt muchless for anything due to say the cheque was issued to the complainant. It is also contended that the trial Court was also right in observing premature presentation of the cheque for collection as it is presented by complainant to their bank to send for collection on 08.11.2005 of the cheque bearing No.503890, dated 09.11.2005. Perused the material on record. The parties are being referred to as complainant and accused respectively for the sake of convenience.

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

1. *Whether there is no legally enforceable debt for which the cheque said to have been issued by the accused as per the complainant and if not the acquittal judgment of the trial Court is unsustainable and requires interference by this Court while sitting in appeal and with what observations and findings?*

2. *To what result?*

Point No.1:

5(A). Before advert to the merits of the matter, it is beneficial to quote; the provisions incorporated in Chapter XVII of the N.I. Act make a civil transaction to be an offence **by fiction of law and with certain (rebuttable) presumptions that shall be drawn**. Sections.138 to 142 are incorporated in the N.I.Act,1881 as Chapter XVII by the Banking Public Financial Institutions and Negotiable instruments Laws (Amendment) Act,1981 (66 of 1988) which came into force w.e.f.01-04-1989 and the N.I.Act was further amended by Act,2002 (55 of 2002) which came into force w.e.f.06-02-2003 incorporating new sections 143 to 147 in this Chapter XVII and further some of the existing provisions not only of the Chapter XVII but also of other Chapters amended to overcome the defects and drawbacks in dealing with the matters relating to dishonour of

cheques.

5(B). The object and intention of these penal provisions of the Chapter XVII (Sections 138 – 147), in particular, Sections 138 & 139 (besides civil remedy), are to prevent issuing of cheques in playful manner or with dishonest intention or with no mind to honour or without sufficient funds in the account maintained by the drawer in Bank and induce the Payee/Holder or Holder in due course to act upon it. The remedy available in a Civil Court is a long drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee. Since a cheque that is dishonoured may cause uncountable loss, injury or inconvenience to the Payee due to the latter's unexpected disappointment, these provisions incorporated are in order to provide a speedy remedy to avoid inconvenience and injury to the Payee and further to encourage the culture of use of cheques and enhancing credibility of the instruments as a trustworthy substitute for cash payment and to inculcate faith in the efficacy of Banking operations - GOA PLAST (PVT.) LTD. v. CHICO URSULA D'SOUZA[1].

5(C). To fulfill the objective, the Legislature while amending the Act has made the following procedure:

In the opening words of the Section 138 it is stated: "Where any **cheque drawn by a person** on an account maintained by him with a banker for payment of any amount of money to another person from out of that account **for the discharge,** in whole or in part, **of any debt or other liability,** is **returned by the bank unpaid**,---------, such person **shall be deemed to have committed an offence** and shall, **without prejudice to any other provision of this Act (See Sec.143)**, be punished ----. Provided, nothing contained in this section shall apply unless,-(a), (b); and (c) Explanation---(supra)."

"(i) Under Section 138 a deeming offence is created **by fiction of**

law.

(ii) An **explanation** is provided **to Section 138** to define the words **"debt or other liability" to mean a legally enforceable debt or other liability."**

(iii) In Section 139, a presumption is ingrained that the **holder of the cheque received** it in discharge of debt or other liability.

(iv) Disallowing a defence in Section 140 that drawer has no reason to believe that cheque would be dishonoured.

(v) As per Section 146(new section) the production of **the Bank's slip or Memo with official mark** denoting that the cheque has been dishonoured **is prima facie evidence** for the Court to presume the fact of dishonour of such cheque unless such fact is disproved by the accused.

5(D). Further the provision for issuing notice within thirty days under section 138 after dishonour is to afford an opportunity to the Drawer of the cheque to rectify his mistakes or negligence or in action and to pay the amount within fifteen days of receipt of notice, failing which the drawer is liable for prosecution and penal consequences.

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

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

5(G). In the words-where **any** cheque, the word any suggests that for whatever reason **if a cheque is drawn** on an account maintained by him with a Banker in favour of another person **for the discharge of any debt or other liability**, the **liability cannot be avoided in the event of the cheque stands returned by the Banker unpaid.**

6-A. The Apex Court in NARAYAN MENON v. STATE OF KERALA[2] held that once the complainant shown that the cheque was drawn by the accused on the account maintained by him with a banker for

payment of any amount in favour of the complainant from out of that account for its discharge and the same when presented returned by the Bank unpaid for insufficiency of funds or exceeds arrangement, such person shall be deemed to have been committed an offence under Section 138 of N.I. Act. What Section 139 of the Act speaks of the presumption against the accused to rebut is the holder of a cheque received the cheque of the nature referred in Section 138 of the Act for discharge of debt. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon. Accused need not enter into the witness box and examine other witnesses in support of his defence. Accused need not disprove the prosecution case in its entirety. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man".

6-B. The presumption that further applied among clauses (a) to (g) of Section 118 of N.I. Act also, like the presumption under Section 139 of the Act, as per Section 4 of the Evidence Act, is a rebuttable presumption for which the burden is on the accused, however, to rebut the presumption if a case is made out by accused either by pointing out from the case of the complainant including very documents and cross-examination or by examining any person and need not be always by coming to witness box vide decision in KUMAR EXPORTS PVT. LTD. V. SHARMA CARPETS[3].

6-C. Further, as per the expression of the Apex Court in RANGAPPA vs. MOHAN[4] (3-Judges Bench) paras-9 to 15 referring to Goa Plast's case (supra), KRISHNA JANARDHAN BHAT v.

DATTATRAYA G. HEGDE[5] by distinguishing at para-14 saying the observation in KRISHNA JANARDHAN BHAT (supra) of the presumption mandated by Section 139 does not indeed include the existence of a legally enforceable debt or liability is not correct, though in other respects correctness of the decision does not in any way cause doubted; by also referring to HITEN P. DALAL v. BRATINDRANATH BANERJEE[6] holding at paras-22 and 23 therein of the obligation on the part of the Court to raise the presumption under 138, 139 and 118 of the N.I. Act, in every case where the factual basis for raising the presumption has been established since introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused, as a presumption of law distinguished from a presumption of fact as part of rules of evidence and no way in conflict with presumption of innocence and the proof by prosecution against the accused beyond reasonable doubt, but for saying to rebut the accused can discharge the burden showing reasonable probability of non-existence of the presumption of fact and to that proposition, the earlier expression in BHARAT BARREL & DRUM MANUFACTURING COMPANY v. AMIN CHAND PYARELAL[7] para-12 showing the burden on the accused is to bring on record by preponderance of probability either direct evidence or by referring to circumstances upon which he relies, rather than bare denial of the passing of the consideration; apparently that does not appear to be of any defence, to get the benefit in discharge of the onus against, also held referring the M.M.T.C. LTD. AND ANOTHER v. MEDCHL CHEMICALS & PHARMA (P) LTD[8] that where the accused able to show justification of stop payment letter even from funds are there, but no existence of debt or liability at the time of presentation of cheque for encashment to say no offence under Section 138 of the N.I. Act made out in discharge of the burden. It was concluded referring to the above, including of MALLAVARAPU KASIVISWESWARA RAO v. THADIKONDA RAMULU

FIRM & ORS[9] paras-14 and 15 that the initial presumption lays in favour of the complainant and Section 139 is an example of a reverse onus clause, which has been included in furtherance of the legitimate objection of improving the credibility of the negotiable instruments. While Section 138 specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. Bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions and the test of proportionality should guide the construction and interpretation of reverse onus clause and the accused cannot be expected to discharge an unduly high standard or proof and in the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden to discharge by preponderance of probabilities by raising creation of doubt about the existence of a legally enforceable debt or liability to fail the prosecution and for that the accused can rely on the material submitted by the complainant also in order to raise such a defence and he may not need to adduce any evidence of his own.

6-D**.** It was also observed in para-15 that the accused appear to be aware of the fact that the cheque was with the complainant, further-more the very fact that the accused has failed to reply to the statutory notice under Section 138 of the Act leads to the inference that there was merit in the complainant's version. It was also held by this court way back[10] that having received and acknowledged the statutory legal notice after dishonour of cheque, non-giving of reply to said legal notice, improbablises the defence version, as any prudent person under the said circumstances should have, but for no defence to reply.

7-(A). From above legal position, coming to decide on the facts from oral, circumstantial and documentary evidence, how far it is proved

the case of the complainant and from drawing of presumptions and inferences if any, how far rebutted by accused concerned:

8) It is important to note that accused is working in Government Hospital, Kakinada as F.N.O. The complainant is a businessman of Pithapuram. The trial Court also observed that in between the residence of the accused of Nagulapalli is near Pithapuram. There from, there is no absurdity to find by trial Court of no acquaintance or strangers or no possibility of lending. Accused admitted the Ex.P-1 cheque bears her signature. Her defence is she borrowed amount from Viswa Priya Finance Company of Pithapuram and the complainant might have got the blank cheque given by her there to Viswa Priya Finance from them and misused for nothing borrowed from complainant. Even to probabilise said defence, there must be a basis for preponderance of probabilities as also observed by the trial Court though accused need not come to witness box. However, she could not file any scrap of paper about any borrowal of amount from Viswa Priya Finance, Pithapuram, muchless acquaintance between complainant and Viswa Priya Finance for securing the blank cheque of her given to Viswa Priya Finance from them. In the absence of which when the complainant came with a specific case of accused borrowed the amount for which the cheque was issued and he gave an expression as in the cross-examination that interest promissed to pay in two or three months and even it is not the case of accused that she liquidated the debt to the so called Viswa priya Finance and demanded for return of the cheque by giving of any notice or the like by referring to the cheque supra and there from she suspects said cheque in misuse by filing said notice or the like and it does not her version of anything still due to Viswa Priya Finance unliquidated. In absence of the same, a stray sentence of she borrowed amount from Viswa Priya Finance or she gave blank cheque to Viswa Priya Finance or the same might have been secured by complainant and might have misused in creating etc, cannot be given credence as also laid down in para 15 by the Apex Court in

Rangappa V. Mohan [11]***.*** Having regard to the above, for the cheque as proved from the evidence of complainant sole testimony unrebutted issued by accused for the amount borrowed for which he issued legal ntoice after dishonour of cheque when presented covered by Ex.P-4 memo by Ex.P-2 legal notice that was returned unclaimed by the accused as per Ex.P-3 returned registered post cover as intimated and unclaimed to say sufficient service vide decision ***B.Vinod Shivappa V. Nand Belliappa*** [12]. As accused could not rebut the evidence of P.W-1 was also the presumptions available to the accused under Section 139 read with 138, explanation and Section 118(a) and (b) of Negotiable Instruments Act under the reverse onus clause, it is sufficient to say the complainant could prove that the accused issued the cheque for the amount borrowed and due and failed to pay despite notice intimating dishonour thereby accused is liable and the trial Court went wrong in acquitting the accused. Accordingly point No.1 is answered.

POINT No.2:

9) In the result, the appeal is allowed and the trial Court's acquittal judgment is set aside and the accused is found guilty. As accused did not choose to appear, there is no need of postponing the matter for hearing of the accused. Since accused a lady and dishonour of the cheque and the trial of the case were after amendment by Act 55 of 2002 after Section 143 of the Negotiable Instruments Act came into force which mandates summary trial and nothing shown of the conducting of trial as summons case caused any prejudice to accused muchless to vitiate the proceedings but for from that provision there is no limit on the amount of fine that to be imposed from the non-obstanti clause of notwithstanding anything contained in Cr.P.C like in Section 29 Cr.P.C of the fine to be imposed of Rs.5,000/- amended by 2006 amendment of Rs.10,000/-.

10. Having regard to the above and from the submission by the

appellant/complainant of the endeavour is to recover the amount of compensation from out of fine or otherwise, rather than sentencing the accused to jail, the accused is sentenced to undergo Simple Imprisonment till rising of the day and to pay a fine of Rs.30,000/- the amount of the cheque which the complainant is entitled as compensation for the cheque amount. It is thereby directed the learned Magistrate to secure the presence of accused of warrant to undergo the sentence in that open Court and also to cause recover the fine amount under Section 431 read with Section 421 of Cr.P.C. by issuing warrant levying the fine with default sentence of three months Simple Imprisonment as per Sections 65 to 68 read with 53(6) I.P.C.

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Dr. JUSTICE B. SIVA SANKARA RAO

28th day of March, 2014
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[1] AIR 2003 SC 2035
[2] (2006)3 SCC 30
[3] (2009) 2 SCC 513
[4] AIR 2010 SC 1898
[5] AIR 2008 SC 1325
[6] AIR 2001 SC 3897
[7] AIR 1999 SC 1008
[8] AIR 2002 SC 182
[9] AIR 2008 SC 2898
[10] 1971 (1) An.W.R. 65
[11] AIR 2010 SC 1898
[12] (2006)6 SCC 456