HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL APPEAL Nos.548, 549 and 550 of 2009

COMMON JUDGMENT:

These three criminal appeals are filed against the separate acquittal judgments dated 30.12.2008 in C.C. Nos.908, 906 and 907 of 2004 on the file of X Additional Chief Metropolitan Magistrate, Secunderabad based on dishonour of the three respective Ex.P-1 cheques issued by the accused-respondent to the appeals, when presented by the complainant-appellant for encashment through bank, the same were returned dishonoured with respective bank memos Ex.P-2 and the statutory notice covered by Ex.P-3, dated 02.07.2004 with registered post receipt Ex.P-4 returned unclaimed and Ex.P-5 is the returned cover and Ex.P-6 is the acknowledgement of dues respectively in all cases and on such cause of action, the complainant filed the three private complaint cases.

2. The cases were taken cognizance after recording sworn statement or affidavit of the complainant and after summons, the accused appeared and when supplied copies under Section 207 Cr.P.C and questioned under Section 251 Cr.P.C, the accused denied commission of offence in all respective cases and the trial taken up therefrom.

3. During the course of trial in proof of the respective three cases the complainant as P.W-1 deposed with reference to Exs.P-1 to P-6 referred supra. In the cross-examination, Exs.D-1 to D-4 marked viz., statement of account in five pages (one sheet, and another half sheet) receipts passed by complainant, dated 20.09.2003 and 14.07.2001 for Rs.7,00,000/- and Rs.15,00,000/- received from Chaitanya Homes, through P.Ramachandra Raju (Accused) towards final settlement of the sale agreement

cancellation for 3000 Sq. yards in S.No.1 Kazaguda, cheque book of IDBI bank and used cheque particulars. After closure of said evidence of complaint under Section 313 Cr.P.C, the accused was examined by bringing to his notice, the incriminating material available and after recording his answers to the same from no other evidence adduced by accused, evidence was closed. It is the standard defence of the accused in the cross-examination of P.W-1 and in his answers to Section 313 Cr.P.C examination apart from other contentions that, as security the complainant used to take undated signed cheques and used to return such undated signed cheques after making payments to him of the excess amount, which he used to invest, that in said process, the complainant collected some cheques and after settling the account i.e., after his receiving the invested excess amount, the remaining three cheques lying with him misused, which is the subject matter of these respective three cases.

4. The trial Court mainly based on the core issue regarding the debt availed by the accused that it is not specifically stated as to how much of amount the accused borrowed as hand loan and on what date such borrowal was made both in statutory notice as well as in the Complaint and failed to establish about the borrowals which the accused said to have been made from the complainant, held the complainant could not succeed in bringing home guilt of the accused in all the three cases. Therefrom, impugning the same, these three appeals filed and came for common hearing and disposal.

5. It is the contention of learned counsel for the appellant in all three appeals that, the Court below failed to keep in mind the true facts that the accused being a relative and a business partner, a close acquaintance and having a relatively a long association in business would not interact to execute such documents that would

take place between them, that the Court below proceed to misinterpret the vital document Ex.D-4 which contains the signature of the accused, who would not put signature on such a paper without any purpose, that the Court below has erroneously come to a conclusion that the cheques were not issued for any legally enforceable debt, that the Court below failed to read the evidence of P.W-1 as a whole also from entire corss-examination done by the counsel, which would establish that there have been business transactions between the parties and as such monies out of close acquaintance were lent time to time without noting the dates and for which accounts were not maintained and later worked out in manuscript Ex.D-4 on 08.02.2003 and initials put by the accused, that the Court below ought to have held that the accused should have stepped into witness box to speak for what purpose he issued the impugned cheques and should have given opportunity and scope to the counsel for complianant for cross-examining him to establish that the cheques were issued towards payment of the legally enforceable debt, that the Court below has committed serious error in holding that the accused without stepping into the witness box for making reliance on certain answers which was elicited during the cross-examination of the complainant was successful in discharging the burden of him and rebutted the presumption of Section 139 of N.I.Act, that the Court below has mis-appreciated the evidence as well as the legal position under law, that the Court below proceeded to make hyper-technical comments by comparison between the notice Ex.P-3 and the complaint copy, that the Court below wrongly came to a conclusion that the signatures of the accused do not tally with the signature under Ex.P-3, that the Court below went to the extreme extent of being unjustly analytical that Ex.D-4 does not speak of the liability of accused to the complainant, that the Court below has misread from the answers given in the cross-examination

in respect of dates to say the same falsify the receiving of two cheques dated 09.05.2004 and 19.05.2004, apart from other merits in proof of legally enforceable debt due respectively to find the accused-respondent guilty and hence to allow the appeals.

6. Whereas it is the contention of counsel for the accused respondent in all the three appeals that, the trial Court having came to the right conclusion regarding discharge of burden when it is not proved about the existence of any legally enforceable debt against the accused and when it is proved by way of preponderance of probabilities about the complainant using or misusing the impugned cheques given to him by the accused for a different purpose then the purpose mentioned in the complaint, in such a case it cannot be said the accused committed any offence under Section 138 of N.I.Act and thereby sought for dismissal of the appeals. It is also the contention from the counsel for accused that there is a suppression of the factum of part payments made by the accused that were even received by the complainant not disclosed in the complaint and that there is nothing to interfere with the acquittal judgment of the trial Court respectively in all the three cases from presumption of innocence of accused strengthened thereby and hence to dismiss the appeals.

7. Perused the material record. The parties are being referred to as they were arrayed in the trial Court for the sake of convenience as complainant and accused in common disposal of the three appeals outcome of common oral evidence and common documents.

8. Now, the common points that arise for consideration are:

i) Whether the accused did not fell due, the respective amounts covered by Ex.P1 cheques and not issued the same for anything due and if issued having been routed from his accounts could rebut the presumptions and not for legally enforceable debts and only as a security and unenforceable and if not the trial Court's acquittal judgments are unsustainable and requires interference by this Court

while sitting in appeals for common disposal against the double presumption and with what observations and conclusions?

ii) To what result?

POINT No.1:

9-(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.

9-(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].

9-(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.

9-(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.

9-(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.

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

9-(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.**

10-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".

10-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].

10-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.

10-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 **Chapala Hanumaiah Vs Kavuri Venkateshwarlu**[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.

11) No doubt the counsel for the accused drawn attention of the Court, portion of observations in para No.14 of ***Rangappa*** supra in saying the initial presumption favours the complainant mandated by Section 139 of the Act that indeed include existence of a legally enforceable debt or liability and the burden is on the accused under reverse onus clause in furtherance of the legislative objective of improving the credibility of the Negotiable instruments as a device to

prevent undue delay in the course of litigation of a civil wrong whose impact is usually confined to the private parties involved in criminal transactions, and it is for the accused to rebut the presumption and no doubt the standard of proof is by preponderance of probabilities. If he is able to raise a probable defence which creates doubts the about existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by 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 or her own. The contention of accused there from is that, the complainant's contention in the appeal of adverse inference to be drawn against the accused for not coming to the witness box is untenable and accused could rebut the presumptions available if any, for arguments sake, by placed reliance upon Exs.D-1 to D-4 and from the answers given by the complainant in the course of his cross-examination by accused. Two more decisions placed reliance by the counsel for the accused are ***John K.Abraham V. Simon C. Abraham***[11] holding when complainant failed to produce relevant documents in support of his alleged source for advancing money to accused and as to when and where the transaction took place for which the cheque in question was issued and there are contradictory statements as to who wrote the cheque, the serious lacunae in the complainant's evidence requires acquittal as done by the trial Court and the High Court held not justified in reversing the judgment. In fact, in that expression at para No.10 it was observed that, the complainant not only not aware of the debt and when said substantial amount of Rs.1,50,000/- advanced to accused, as to who filled the cheque, when exactly the alleged transaction taken place for which the cheque was issued by accused, P.W-1 also admitted that the cheque was issued in the hand writing of the accused and again at another breathe with

different stand as to not in the hand writing of the accused and again as written by him and by further saying only the amount in words were written by him. It is to say this expression in ***John K.Abraham*** supra besides not referred three Judge bench expression of ***Rangappa*** supra scanning the law, no way taken a different approach, but for mainly pointing out the factual matrix referred above; (ii) the other judgment of a two Judge Bench in ***M/s.Indus Airways Private Limited V. M/s.Magnum Aviation Private Limited*** (Crl.A.No.830 of 2014, dated 07.04.2014); wherein answering the point raised to the limited extent as to post dated cheque issued by accused as an advance payment in respect of purchase orders could be considered in discharge of a legally enforceable debt or other liability to constitute for its dishonor an offence, observed at para No.13 referring to Section 138 of the Act that to attract the offence, there should be legally enforceable debt or other liability subsisting as on the date of drawal of the cheque. Whereas, the cheque issued as an advance payment only for the purchase order and the purchase order not carried to its legitimate conclusion the cause of cancellation or otherwise and the material when not supplied, the cheque cannot be held to have been drawn for existing debt or liability to enforce. In that case also what the principal laid down was even for purchase orders placed a cheque can be issued for the value of the order before supply and if the stock was supplied pursuant to which the cheque can be enforced. Whereas, if stock not supplied for whatever the reason purchase order cancelled, for no consideration to the cheque issued, that cannot be enforced.

12) From the above propositions of law, coming to the factual matrix, save those facts referred supra, even at the cost of repetition of the material facts to the extent necessary, Ex.P-1 cheque bearing No.843345 in C.C. No.906 of 2004 (Crl.A.No.549 of 2009) was

Rs.1,85,000/-, dated 01.06.2004, in C.C. No.908 of 2004 (Crl.A.No.548 of 2009) Ex.P-1 cheque bearing No.843334 was for Rs.2,50,000/- and in C.C. No.907 of 2004 (Crl.A.No.550 of 2009) Ex.P-1 cheque bearing No.843335 dated 09.05.2004 was also for Rs.2,50,000/-. Undisputedly these cheques were from the account of the accused maintained with cheque book facility with IDBI Limited, Basheerbagh, Hyderabad and Ex.D-4 the used leaves cheque book of the accused with IDBI Bank referred shows the cheque bearing No.843345 was issued for Rs.1,85,000/- in favour of N.Ch.Subbaraju, the complainant, further mentions the date as 24.07.2002 in disputing Ex.P-1 cheque in C.C. No.906 of 2004 supra was not issued and the date it bears on 01.06.2004 and in saying it was issued for security. Similarly the cheque bearing No.843334 was issued for Rs.2,50,000/- in saying from Ex.D-4 as issued on 14.04.2001 and not issued on the date it bears as Ex.P-1 in C.C. No.908 of 2004 on 19.05.2004 and also in saying issued for security purposes. So also for the cheque bearing No.843335 of Rs.2,50,000/- issued as if on 14.04.2001 itself for security purpose and not issued as Ex.P-1 in C.C. No.907 of 2004 on 09.05.2004. The answers given by the accused in his Section 313 Cr.P.C examination particularly for question No.5 in all the three cases was that the accused did not borrow any amount from Subbaraju, but for they were partners in business and on 14.04.2001 for security purpose, complainant obtained two cheques from him for each Rs.2,50,000/- and again on 27.04.2001 one more cheque for Rs.1,85,000/- and it was not for any borrowal of the amounts in the year 2004, that in relation to the three cheques the complainant has paid the amounts. However, he did not return the cheques back to him (accused). It is important to say that the answers given by accused in Section 313 Cr.P.C examination are also relevant as part of the defence of the accused as part of appreciation of evidence as per the settled law.

Thus, categorical answers in all the three cases from the accused disclose that the three cheques issued by him with his signatures that routed from his account covered by Ex.P-4 in his saying as shown in Ex.D-6 of the year 2001 April, same day for two cheques for each Rs.2,50,000/- and again of the year 2002 April for another cheque for Rs.1,85,000/-. It is necessary for the accused to say if at all for security given what made to issue two cheques on same day as security with equal amounts instead of giving one cheque that too admittedly saying he filled the amount but for saying not filled the name of payee or date. It is important to note further in this regard the scope of Section 20 of the Act. Section 20 reads as follows:

> **"20. Inchoate stamped instruments:-**
> Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in [India], and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as then case may be, upon it a negotiable instrument, instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount, provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder."

13) As per the said wording, the Negotiable Instrument signed and delivered by one person to another on a paper stamped in accordance with law in force in India either wholly blank or having written therein incomplete, he thereby gives prima facie authority to the holder thereof to make or complete upon it a negotiable instrument for any amount specified therein and not exceeding the amount covered by the stamp and the person so signing shall be liable. No doubt cheque is defined in Section 6 of the Act as a Bill of

Exchange payable on demand drawn on a specified banker. Negotiable Instrument is defined in Section 13 of the Act to mean a promissory note, bill of exchange or a cheque payable either to order or to bearer. The Negotiable Instrument Act originally came into force in the year 1881 by Act 26 of 1881. Section 20 of the Act referred supra amended only in the words, the States as India in the year 1951 and not at all in other respects. Whereas, Section 13 of the Act was amended by the amended Act, 1919, whereunder cheque is included as Negotiable Instrument. As such, irrespective of Section 20 of the Act speaks regarding stamp when cheque no way required as per the laws of the land on stamp paper; once the cheque is a negotiable instrument from combined reading of Section 6 and 13 with Section 20 of the Act, an inchoate instrument like a cheque even given incompletely by filling only the amount without even filling the name of payee or the date, it is an authorization to fill. Even it is to say for arguments sake, said contention of accused is true and proved so of the cheques were issued having admittedly routed from his account duly signed by filling the amounts, even not filled the date or name of payee, it is an authorization to fill for all practical purposes. It is to say in addition to the presumptions in favour of the payee and the cheque is for consideration, date, time of acceptance, time of transfer, order of endorsement, stamp and that holder is a holder in due course. The application of presumption under Section 118 of the Act to cheques is well laid down in the several expressions referred supra and in particular by the Three Judge Bench expression in ***Rangappa*** supra. Even taken the contention of the learned counsel for the accused from ***M/s.Indus Airways Pvt. Ltd*** supra expression, there was nothing holding a post dated cheque is unenforceable, but for if the cheque issued for no existing or subsisting debt as a post dated one, to come into force from the date it mentioned as a Negotiable Instrument and cheque for counting

validity, it is only for the supply of stock to meet future liability for no existing debt or liability for stock being supplied in future, for no consideration to enforce the cheque. That principal herein has no application, as it is not the case of the accused that the three cheques in question were issued for meeting any future transaction of liability to arise in future to the date of issue and the cheque and the liability not arisen for the other side obligation not fulfilled to enforce to invoke that principle. It is his defence of the cheque was issued only for a security purpose. Admittedly he mentioned the amounts in all the three cheques with his own hand writing. Then, as per the law referred supra, the presumptions under Section 118 of the Act and Section 139 of the Act are applicable for the three cheques in question equally to say the application of Section 20 of the Act as an authorisation to fill name of payee and date if not filled for not a material alteration even if it is being filled by the payee subsequently, that too it is the specific case of the accused in that cross-examination of P.W-1 as well as by placed reliance upon Ex.P-4 self written contents of the counter foils of the cheque book as security and also from his answers to question No.5 of Section 313 Cr.P.C examination as security. It is for him under the reverse onus clause as laid down in ***Rangappa*** supra as for what security that cheque was given respectively. It is not even the case of the accused that all the three cheques in question issued to some other person and there was a collusion between some other person and complainant herein in make use or misusing. Admittedly the three cheques were issued in favour of the complainant by mentioning the amounts. For saying it was in April, 2001 and April 2002 respectively issued the cheques no way contain those dates. It is for the accused to say the admittedly issued cheques to the complainant for his saying without mentioning date and without mentioning payee name were as security. From this back ground,

coming to Ex.P-6, the name of the accused undisputedly P.Rama Chandra Raju. Ex.P-6 contains noting of old amount Rs.4,55,000/- cash of January Rs.9,100/-, cash on 08.02.2003 Rs.1,70,900/- and cheque of even date Rs.50,000/- total Rs.6,85,000/-. As per P.W-1-complainant, the accused signed Ex.P-6. Ex.P-3 is the statutory notice for Ex.P-1 cheque dishonoured by Ex.P-2 memo, the notice was addressed to P.Rama Chandra Raju, cause issued by complainant saying the accused approached the complainant for hand loans for business purpose and the complainant being a businessman and dealing in real estate and in a position to help given to the accused the hand loans which the accused promised to return at the earliest and after repeated demands for the non-payment, the accused issued the respective cheques of the respective dates for its discharge in part respectively and the same when presented return dishonoured for insufficiency of funds which is an offence under Section 138 of the Act, hence to pay within 15 days respective cheque amounts with interest, else to take legal recourse. The address is P.Rama Chandra Raju, D.No.7-1-2, H., Shanthi Bagh, Begumpet, Hyderabad. In all the three complaint cases, the same house number and address given as per the perusal of the lower Court record. It is to the same address the summons were sent and the accused appeared. Ex.P-5 registered postal return cover contains the self-same address, also the postal endorsement as not claimed, the postal receipts show it was registered on 09.07.2004. The not claimed endorsements respectively the last one was dated 13.07.2004 in C.C. No.908 of 2004. Same is also the position in other two cases to avoid repetition. The unclaimed returned notice endorsement gives presumption of due service under Section 27 of the General Clauses Act and Section 114 of the Indian Evidence Act as per the settled law and the accused cannot contend non-service of the statutory notice

for not even paid after service of summons in the complaint case from date of service within 15 days. The law is fairly settled in this regard by the three Judge bench expression of C.C.ALAVI HAJI Vs. PALAPETTY MUHAMMED-(Appeal(crl.) No.767 of 2007).

14) Coming to complaint contents, for statutory notice contents referred supra, no doubt either in the complaint or in the statutory notice any specific date of specific amount of borrowal mentioned including the particulars of Ex.P-6 acknowledgement of the debt due by accused to complainant not signing for the respective amounts of Rs.6,85,000/- due and giving of the amounts including by cash or by cheque or details of old balance due. In the sworn statement of the complaint for taking cognizance of the invoice also, said particulars of borrowal of what date, what amount including the particulars of Ex.P-6 not there. So, also in his chief examination affidavit as P.W-1, but for to say in the chief examination of the complainant it detailed that the financial assistance to the accused was from time to time out of his sound financial resources and with long acquaintance and from request of accused, more so from the year 2002. The cross-examination of P.W-1 by accused, it is elicited that complainant is an agriculturist of Hyderabad, where he is residing for more than 35 years to his deposition dated 04.08.2006, being resident of Mahindra Hills, Secunderabad and also that he was doing business along with accused in partnership under the name and style Midhuna Enterprises since 1999 and the other partner was D.S.Chowdary besides complainant and the accused which is a real estate business at Nanakramguda and Jeedimetla, for which he is managing partner and denied the suggestion of complainant was looking after the entire business of Midhuna Enterprises and it is deposed by him that it is accused that was looking after. P.W-1, complainant deposed that in the year 1999 there was an agreement for land in S.No.109 of

Jeedimetla and that was later registered in the firm name and again saying the sale deed was not registered by vendor who cheated the firm in sale of the inam land for which there was an application filed before the District Collector and suit. Importantly accused did not dispute the said business and acquaintance between the complainant and accused and owning of agricultural lands by complainant and also doing business by complainant and also permanent resident of Hyderabad, for more than 35 years at Mahindra Hills, Secunderabad, but for saying for the business, complainant was Managing partner as per accused, whereas, the complainant says accused was Managing. It is admitted by P.W-1 in the further cross-examination that he is looking after the accounts aspect of the Midhuna Enterprises. It is categorically brought in the cross-examination of P.W-1 by accused that accused has taken various amounts from complainant for his business purpose and by the year 2002, he fell due Rs.4,55,000/- and thereafter taken cash of Rs.9,100/-, Rs.1,70,900/- by cheque Rs.50,000/-. He deposed that he cannot say the date or month or in which year accused obtained the said amounts for Rs.4,55,000/- fallen due and the said amounts particulars elicited in the cross-examination supra not stated in the complaint, but from the year 2002 said amounts were advanced. It is brought in the further cross-examination that complainant obtained receipts from accused for the amounts of hand loans given and in Ex.P-6 written by him, date not mentioned, with regard to Rs.4,55,000/- shown due and the Rs.50,000/- by cheque issued was drawn on State Bank of India, Market Street, Secunderabad from his account though he does not remember the cash payment of Rs.1,70,900/-. He deposed that other than Ex.P-6 receipt, he did not file any other receipts and no pronote taken from the accused, when amounts were lent. He denied the suggestion of no cheque for Rs.50,000/- given to accused as referred in Ex.P-6. He deposed that

there are no account books maintained by him with regard to the amounts lent to accused. Further, it is from agricultural income. It is suggested that accused is a distant relative to the complainant. He denied the suggestion of Ex.P-6 is the fabricated document after filing of the case. It is not suggested that the signature is a forged one.

15) It is the submission by the learned counsel for the accused that once it is suggested as fabricated, it includes even the signature for not admitted. He deposed with reference to the documents confronted to him of the erstwhile partnership business with his hand writing and with reference to the share given to the accused and the account is given to the accused at his request. It is in relation to Ex.D-1, he further deposed that in the year, 1999 to purchase 3,000 square yards of land from Chaitanya Homes for Rs.44,00,000/- an agreement was entered and all the three partners paid Rs.5,00,000/- each and subsequently the agreement was cancelled and the sale transaction was arranged through accused as vendor is his friend and he deposed that as per the receipt Ex.D-2 dated 20.09.2003 Rs.7,00,000/- received towards final settlement by cancellation of the sale transaction with Chaitanya Homes, through accused besides earlier amount of Rs.15.00 lakhs, Ex.D-4, dated 14.07.2001. He deposed that the amount he received is as managing partner of Midhuna Enterprises and it is all the three partners shared the amounts received viz., Rs.5,00,000/- each of said amount. However, the later amount was received by him as per the Panchayat settlement for the amount due to him in the partnership business. He denied the suggestion that in the final settlement of the amounts due to complainant by accused arrived a sum of Rs.7,00,000/- and whatever amount due to the complainant paid by the accused accordingly. He also denied the suggestion that he

contributed towards share of accused in the partnership some of the amounts and representing that also Rs.7,00,000/- received is for final settlement. After said cross-examination dated 01.09.2006, in the further cross-examination dated 29.09.2006, P.W-1 deposed that in favour of the firm Midhuna Enterprises, there was another agreement of sale for Ac.1-26 guntas of S.No.108, Jeedimetla in the year 2001 for Rs.38.00 lakhs and paid Rs.9.00 lakhs advance to Ram Murthy, Thaya Murthy and Srinivasa Rao vendors. The vendors were not paid total amount and to proceed against the vendors, the other two partners are not cooperating him including the accused and he is not aware whether said vendors returned back the advance through D.D and the same was refused by complainant and denied the suggestion that even the other partners willing to take back the advance refund amounts from said vendors, complainant is not cooperating. He deposed that cheque bearing Nos.843334 and 84335 respectively for Rs.2,50,000/- issued on 14.04.2001 and he is not aware the cheque No.843345 for Rs.1,85,000/- and on what date issued from Ex.B-4 cheque book. He deposed that he does not know dates of the three cheques shown to him from the said cheque book Ex.B-4. He denied the suggestion that another cheque bearing No.843336 for Rs.2,00,000/- also given by accused to the complainant and the same was returned back. He also denied the suggestion that these three cheques were issued by accused un-dated in April, 2001 to the complainant for security deposit. He deposed that for the amounts due under the three cheques covered by the three cases, he demanded the accused by approached personally for repayment though he cannot say dates of said demands for repayment. He deposed that on 08.02.2003 he and accused arrived a settlement as per which the said Rs.6,85,000/- found due by accused to him (as shown in Ex.P-6) and denied the suggestion that accused has not taken any loan and the alleged settlement does not arise and not true

and thereby that was not mentioned either in the legal notice or in the complaint. He deposed that the two cheques each Rs.2,50,000/- issued by accused on same day on 19.05.2004 and the other for Rs.1,85,000/- on 01.06.2004 and one of the cheques was mentioned dated 09.05.2004 and the other dated 19.05.2004. He deposed that the accused requested the complainant while issuing the cheques that he would pay back and take back the cheques and there from he did not present the cheques earlier. He denied the suggestion that the complainant deposited the cheques for each Rs.2,50,000/- on 14.04.2001 and the other for Rs.1,85,000/- on 27.04.2002 without putting any date on the cheques or the cheques issued by the accused were undated and the same misused by complainant. He deposed that in the complaint, it is mentioned that hand loans given to accused by complainant in the year 2002-03 though said fact not mentioned in the legal notice. He denied the suggestion of he managed the post man not to serve the notice and there is no existing liability or debt and the complaint is not maintainable or the cheques issued were for security. This is what all the cross-examination of P.W-1 by accused in setting up his defence of the cheque issued as security and even from Exs.D-1 to D-3, nothing probablise the defence of accused muchless supports to say from any of which as to the cheques issued by the accused to the complainant were towards security and nothing to belie even Ex.P-6. Even coming to Ex.P-3 legal notice, it is not even his suggestion at the cost of repetition that the address is not correct. The accused at the cost of repetition, having admitted the three cheques issued for the respective amounts; if at all the same is for the security even from his claim of alleged Ex.B-4 counterfoil of cheque book mentioning; there is no meaning for two cheques of Rs.2,50,000/- each issued with side by side numbers on same day of 14.04.2001. It is for the accused to say atleast with a clear cut suggestion as to

what made him to issue the two cheques on same date and with side by side numbers as a security. There is nothing including from any of the suggestions given to P.W-1 in the lengthy cross-examination running in more than 4 sittings. Even it is his suggestion that there is another cheque for Rs.2,00,000/- of self-same date with contention of cheque No.843336 and for the first time in the 4th sitting of cross-examination suggested as if later that cheque was returned and not the remaining. If so, what made him to keep quite if at all nothing due, without asking for return of the so called other cheques given as security. It is not even his case that he ever issued any notice to the bank to stop payment by mentioning the cheques given as security and nothing is due to honour. It is not even his case that the third cheque of Rs.1,85,000/- also issued on the same date. If so what made him to give another cheque also security. From his own showing with reference to Ex.B-4, the third cheque is with his own hand writing mentioned above of Rs.1,85,000/- with his signature from his account even in his claiming of the Ex.B-4 was issued on 27.04.2002. Even for that, when nothing due and earlier three cheques already issued two for each Rs.2,50,000/- and one for Rs.2,00,000/- on self-same day 14.04.2001, what made him again to issue another cheque for Rs.1,85,000/- as a security about an year latter in the end of April, 2002. It shows the Ex.P-1 cheques of the three cases issued by the accused in favour of the complainant are for the amounts due respectively as of the respective dates being inchoate instruments authorizing to fill the payee and the amount and nothing as security for nothing shown as to what security and what made to give three cheques at a date as per Ex.B-4 to give as security and again one year later for different amount to give as security and the other version of Rs.2,00,000/- cheque the amount paid or adjusted and cheque returned, if so what made him not to ask for return of the two cheques atleast to issue notice if not returned

when asked and again for alleged one year later giving another cheque and even later not to ask for return. Non giving of reply and managing to return the registered notice even sent undisputedly to the correct address, for nothing to show of the complainant managed to cause return, for nothing even to show to rebut the presumption of due service are also the circumstances coupled with the above facts to say accused could not establish even a little, to rebut the presumptions under the reverse onus clause for burden lies on him to discharge even by preponderance of probabilities. The trial Court did not properly appreciate all these facts.

16) The proposition placed reliance in ***John K.Abraham*** supra at the cost of repetition has no application to the present facts as, here the accused admittedly issued the cheques from his account with his signature and also for the respective amounts with his writing in claiming name of payee and date of issue kept blank that too admittedly issued in favour of the complainant, if not, for respective amounts due, if not on respective dates and in favour of the complainant for amounts due, what made him to issue as a security and in what transactions, in what connection and with what proof, for nothing even from his suggestive case in the cross-examination of P.W-1 with reference to Exs.P-1 to P-4 as discussed supra. Further, in this background, it is important to mention few more facts from the material on record that, the accused asked by filing an application in all the three cases respectively in the year 2007 to send the so called signature of him in Ex.P-6 receipt or acknowledgement to expert in disputing the same is not that of him. It is important to note that, he did not even ask to send the signatures or writings in the Ex.P-1 cheques to expert muchless to say the contemporary relevancy of the other writings as to name of payee and date on the three Ex.P-1 cheques respectively. It is not because he is unmindful or unconscious, but for reasons better

known. No doubt, these applications were opposed by complainant saying that, accused did not dispute his signature on Ex.P-6 by any specific question but for saying Ex.P-6 is fabricated and accused cannot take advantage of and inconsistent defence without specific denial and thereby once admitted it cannot be sent to expert. However, the Court passed orders to send the same and even the same was allowed, it was not fructified for no contemporary relevancy of other signatures of accused that could be produced. It is not because of the fault of the complainant, but even order passed by the trial Court, it is at the instance of the accused for non production of contemporary relevancy signatures. Leave it apart, that no way enhances the case of the complainant muchless the defence of accused, there is another application filed by complainant that accused is having account in IDBI Basheerbagh and a direction may be send to the Bank to submit the specimen signatures of the accused submitted to the bank to be sent or forwarded to the hand writing expert with contemporary relevancy of the year 2003 and thereby to direct the bank manager to send the specimen signatures of the accused obtained by the bank in the year 2003 to compare. If at all for the accused to obtain, it was not a different task. Thus, even from the above and even for arguments sake that also no way belies the defence of accused muchless contra enhances the strength to the case of the complainant and even ignoring that Ex.P-6 for arguments sake, when the accused himself admits including in the P.W-1 cross-examination and in his answers to question No.5 of Section 313 Cr.P.C examination of the cheques issued by him in the year, 2001 and complainant specifically says those were issued in the year 2004 and when complainant asked the Court to call for these specimen signatures of the accused of the year 2003 and 2004 of contemporary relevancy that submitted to the IDBI bank in maintaining the account with cheque book facility to compare, it

clearly shows other mode by the complainant even to substantiate that the signatures on the cheques Ex.P-1 for not as shown in Ex.B-4 given of the year 2001 or 2002 but of 2003-2004.

17) It is also important to note that, even there is evidence of complainant P.W-1 proved of the fact in dispute as to the Ex.P-1 three cheques, admittedly routed from the account of the accused issued in favour of the complainant, for the respective amounts, even in his saying without mentioning payee name and debt as if for security, unable to suggest even in what context and for what security and what made to issue three cheques on same day in 2001 April and again another cheque for different amount an year later with reference to Ex.B-4 and even complainant positively says the Ex.P-1 cheques of were respectively issued in May and June, 2004 and even effort made by complainant to call for the specimen signatures of the accused with bank in the year 2004 to compare the contemporary relevancy to substantiate his evidence further when it proves all the cheques issued only in 2004 and not 2001/2002, there is no oath against oath, muchless any material even by preponderance of probability to rebut the presumptions under the reverse onus clause, for burden on the accused to discharge apart from not even to dispute or rebut the said evidence of complainant to support the suggestive case of accused, which even not probabilising to believe as if given for security for no basis to issue three cheques on same day from his version if at all for security that too two cheques for some amount and one cheque for different amount and again allegedly for security and without even asking for return and without even notice, suffice to say as per the principle of law laid down in the expressions in particular of ***Rangappa*** supra that complainant could establish his case and the accused could not rebut the presumptions under reverse onus clause and trial Court

without adverting to it, even accused admittedly issued the cheques for his saying either as security or of the year 2001-02, no material placed not even to chosen to come to witness box and no specific suggestion even could be given and no positive case could set up as to for what purpose of security to give as discussed supra, the trial Court totally went wrong in giving importance to the minor discrepancies in the factual matrix without proper appreciation of all the material facts with reference to the law. Thus, the trial Court's acquittal judgment is liable to be set aside and the accused is found guilty in all the three cases.

18) In the result, the all the three Criminal Appeals are, therefore, allowed by setting aside the judgments dated 30.12.2008 in C.C. Nos.908, 906 and 907 of 2004 on the file of X Additional Chief Metropolitan Magistrate, Secunderabad and the accused found guilty for the offence punishable under Section 138 of the N.I.Act.

19) Post on 06.02.2015 for appearance of accused and hearing on sentence.

Dr. B. SIVA SANKARA RAO, J

Date:30-01-2015
Ksh

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06.02.2015 :

The accused is present. Heard. It is stated by the complainant as well as the accused that the accused paid the entire amount due under the three disputed cheques and they are going to compound the offence. Hence, instead of imposing sentence a lenient view may be taken by permitting for compounding.

As parties want to compound, the conviction judgment of this Court since coming in the way, this Court feels it to sub-serve the ends of justice to exercise the inherent power under Section 482 Cr.P.C. to set aside the finding of guilt of the accused by common

judgment dated 30.01.2015 and permitted for compounding. As the matter is practically settled between the parties, imposing of 10% above towards penalty is not always mandatory as per the subsequent expression of the Apex Court referring to the earlier expression in **Damodar S. Prabhu v Sayed Babalal**[12], **in Madhya Pradesh State Legal Services Authority v Prateek Jain**[13] that though it is the ordinary scale of penalty to be imposed for compounding the offence for special circumstances it can be reduced and thus by taking into consideration of the factual matrix and that an amount of Rs.34,250/- since paid to the Chief Justice Relief Fund, the same is recorded and the matter is compounded under Section 147 of the N.I.Act. Accused is acquitted. Bail bonds are cancelled.

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Dr. JUSTICE B. SIVA SANKARA RAO

Dt.06.02.2015.
PNV

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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] (2014)2 SCC 236
[12] (2010) 5 SCC 663
[13] (2014) 10 SCC 693