(2014) 09 AP CK 0008

Andhra Pradesh High Court

Case No: Criminal Appeal No. 821 of 2007

B. Raghunandan Reddy — APPELLANT

Vs

V. Rajashekar Reddy — RESPONDENT

Date of Decision: Sept. 1, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 207, 251, 29, 313, 357
- Evidence Act, 1872 - Section 145, 4, 73
- Negotiable Instruments Act, 1881 (NI) - Section 118, 138, 138, 138, 139
- Penal Code, 1860 (IPC) - Section 53(6), 65, 68

Citation: (2015) 1 ALD(Cri) 861 : (2015) 2 ALT(Cri) 150

Hon'ble Judges: B. Siva Sankara Rao, J

Bench: Single Bench

Advocate: A. Sudershan Reddy, Advocate for the Appellant

Judgement

B. Siva Sankara Rao, J.

The appellant-complainant seeks to assail the judgment of acquittal dated 29.03.2007 passed by the learned Judicial Magistrate of First Class, Wanaparthy, in the private complaint case C.C. No. 112 of 2004 filed by said complainant against the accused V. Rajasekhar Reddy (1st respondent herein), for an offence under Sections 138 and 142 of the Negotiable Instruments Act (for brevity ''the Act'').

2. The facts before the trial Court are that on 29.09.2002 the accused approached the complainant at his residence and borrowed an amount of Rs. 18,000/- and also executed Ex. P. 1 promissory note in favour of the complainant but failed to repay the same, then on demands made by the complainant, the accused issued Ex. P. 2 cheque bearing No. 236510 for Rs. 18,000/- on 29.10.2002, that on 21.04.2003, when the complainant presented for collection the same was returned dishonoured on the reason of ''insufficiency of the funds'' covered by Exs. P. 3 and P. 4 cheque return memos, dated 29.10.2002 and 25.04.2003 and the same is intimated to the accused

through Ex. P. 5 legal notice, dated 05.05.2003 covered by Ex. P. 6 receipt, by the complainant evidenced by Ex. P. 7 certificate of posting but the same was returned with an endorsement that the addressee was refused to take the notice, that the accused neither paid nor replied for legal notice which made the complainant to file the private complaint case.

3. The accused appeared before the Court pursuant to the summons and after supply of case copies under Section 207 of the Code of Criminal Procedure, when questioned on substance of accusation under Section 251 of the Code of Criminal Procedure (for brevity, "The Cr.P.C.") he pleaded not guilty.

4. On behalf of the complainant during the course of trial besides himself as P.W. 1 cause examined P.W. 2 G. Buchaiah and P.W. 3 Deshabandu and got marked Exs. P. 1 to P. 9, Viz., Exs. P. 1 to P. 7 mentioned supra, Ex. P. 8 medical certificate and Ex. P. 9 is returned postal cover and on defence side the accused examined himself as D.W. 1 and cause examined D.Ws. 2 and 3 and got marked Exs. D. 1 to D. 5 viz; receipt, scanning receipt, statement, user call details and certificate issued by Insurance company.

5. After closure of evidence of the complainant, the accused was examined under Section 313 of the Cr.P.C. who denied the incriminating material put to him. No more oral or documentary evidence adduced by accused.

6. Appreciating the evidence, both oral and documentary, the Court below ultimately held that the complainant could not prove guilt of the accused for the offence under Section 138 of the N.I. Act and thereby not found guilty and acquitted the accused with findings that as per the defence of accused, he did not issue Ex. P2 cheque to the complainant but for one Mallikarjuna Enterprises on 28.09.2002 by mentioning the date 29.10.2002 having purchased motor pipes worth of Rs. 48,000/- and he paid Rs. 30,000/- in cash and issued cheque for Rs. 18,000/- in the presence of D.W. 2 Sai Reddy, and later gave motor to said Mallikarjun for repairs as there is warrantee for one year and D.W. 2 Sai Reddy who deposed that he accompanied the accused to Mallikarjuna enterprises and on 28.09.2002, the accused has settled the account with Mallikarjun and the accused is liable to pay Rs. 48,000/- then the accused has paid Rs. 30,000/- in cash and issued cheque for Rs. 18,000/- and D.W. 3 was examined by the accused by issuing summons through Court and according to him, he is doing business under the name and style of Mallikarjuna Engineering company and the accused used to purchase motors and pipelines and he does not know whether accused paid Rs. 30,000/- and issued cheque for Rs. 18,000/- in the presence of D.W. 2 Sai Reddy on 28.09.2002 or not and there are presumptions under the N.I. Act for the signature on the pronote and cheque admitted by accused as issued. However, it is for the complainant to establish the passing of consideration under the cheque in dispute for no presumption available and for saying by P.W. 1 of accused borrowed amount and executed pronote in the presence of one Ramakrishna who was not examined in the present case but in the

civil suit O.S. No. 153 of 2005 for recovery of the amount examined as P.W. 2 for the said amount of Rs. 18,000/-. In the civil suit, the complainant also examined as P.W. 1 and deposed different versions saying the amount lent of Rs. 18,000/- was handloan not covered by any document but for cheque issued after one month and at other breath as if after two days of borrowal executed pronote and later issued the cheque for the same and in saying pronote scribed by one Ramakrishna gowd who was examined in the suit as P.W. 2 in proof of the pronote debt and his scribing at request of complainant and also attested as one of the witnesses and the defendant-accused went to the house of the complainant and borrowed the amount and executed document in his presence but he cannot say whether defendant attested in English or Telugu from lapse of time and even he deposed as if he scribed the contents in English, but it was in Telugu from a perusal of Ex. A. 1 pronote and he did not speak anything about receipt of consideration that creates doubt on credibility of evidence of P.W. 2 from all and that falsifies the contention of the complainant and probablises the defence supra including from Ex. D. 1 receipt from settlement of account between the accused and Mallikarjuna Enterprises of D.W. 2 Sai Reddy and the endorsement in this regard of the cheque issued to Mallikarjun from the promise to replace the motor on or before 29.10.2002 though said Mallikarjun as D.W. 3 examined on cause summons denied of purchase of motor by the accused-D.W. 1 on credit, as Ex. D. 1 receipt clearly shows said purchase and issued a cheque for Rs. 18,000/- to Mallikarjun after payment of Rs. 30,000/- as noted on its reverse that supported by the D.W. 2 in saying said Mallikarjun chosen to depose falsehood by his denial included of any phone calls having admitted about the purchase of motor by accused and its repairs which probablises the accused purchased motor from Mallikarjun and in that connection issued cheque that was missed in acquitting the accused.

7. It is said finding of the trail Magistrate now impugned in the appeal with the contentions in the grounds of appeal that the trial Court''s acquittal judgment is contrary to law and facts, that the trial Court did not properly appreciate the evidence on record, in ignorance of the admission by the accused of issuing dishonoured cheque and therefrom should have convicted the accused and went wrong in going into a civil matter with no evidence in that regard even and for the so called issue of cheque to Mallikarjun for alleged balance due for motor purchase is disproved from the evidence of Mallikarjun-D.W. 3 that too, Mallikarjun specifically denied his signature on record on reverse side of Ex. D. 1 which falsified the alleged issuing of cheque for so called motor purchase balance by accused to Mallikarjun strengthening the complainant''s case. Hence, to set aside acquittal judgment and allow the appeal by finding the accused guilty and to convict. The learned counsel for the appellant reiterated the same during the course of arguments.

8. The accused having been served failed to attend thereby taken as heard to decide on merits relying upon the proposition of law under Section 386 of Cr.P.C. three judge Bench expression of the Apex Court in Beni Singh vs. State of Utter Pradesh

1996 SC 3429.

9. Perused the material on record. The parties are hereinafter referred to as they are arrayed in trial Court for the sake of convenience.

10. Now the points that arise for consideration are:

(1). Whether the accused did not issue the cheque in favour of the complainant for discharge of legally enforceable debt to make liable for the offence under Section 138 of the NI Act and if so, the trial courts acquittal judgment is unsustainable?

(2). To what result?

Point No. 1:

11-(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.

11-(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 tatter''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 - Goaplast Pvt. Ltd. Vs. Shri Chico Ursula D''Souza and Another, .

11-(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.

11-(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.

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

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

11-(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.

12-A. The Apex Court in Narayan Menon v. State of Kerala (2006) 3 SCC 30 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".

12-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 Vs. Sharma Carpets, .

12-C. Further, as per the expression of the Apex Court in Rangappa Vs. Sri Mohan, referring to Goa Plast''s case (supra), Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, 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 Vs. Bratindranath Banerjee, 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 and Drum Manufacturing Company Vs. Amin Chand Payrelal, 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 Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, 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 Kasiviswesara Rao Vs. Thadikonda Ramulu Firm and Others, 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.

12-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 1971 (1) An.W.R. 65 that having received and acknowledged statutory legal notice after dishonour of cheque, non-giving of reply to said legal notice, improbablises defence version, as any prudent person under said circumstances should have, but for no defence to reply.

13. 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:

Coming to the facts in addition to what is discussed supra including the finding of the trial Court on the scope of the appeal, it is not in dispute of the signature of the accused on the Ex. P. 1 pronote as well as Ex. P. 2 cheque. It is from the account of the accused the Ex. P. 2 cheque was issued on the date 29.10.2002. The accused himself admits in his chief examination that the cheque was issued by putting date as 29.10.2002 and amount of Rs. 18,000/-. No doubt, the accused deposed that he purchased motor from . Mallikarjun-D.W. 3 on 28.04.2002 and issued the cheque to said Mallikarjun on 28.09.2002, by mentioning date of the cheque 29.10.2002. It is important to note that, if at all, really he mentioned date and amount with account number, is it believable that he did not mention name of the payee if at all issued to said Mallikarjuna by purchase of motor from Mallikarjun enterprises for the alleged balance due of Rs. 18,000/-. Is it believable of he did not mention only the payees name while filling the other contents if they issued for so saying said Mallikarjuna

enterprises of D.W. 3. In fact, the accused did not whisper how the Ex. P. 1 pronote came into existence, if at all that version is true and not executed in favour of the complainant. Admittedly, the signature on the pronote also belongs to him and the pronote was dated 29.10.2002. Whereas, the version of him of purchased of motor on credit and subsequent part payment and giving of post dated cheque on 29.10.2002 was on 28.09.2002 and not even 29.09.2002 and not even his case of he issued pronote also empty without filing the contents. Once the signature is admitted on the pronote, leave about presumptions for pronote under Section 118 of the N.I. Act. Even coming to the cheque, it is also a negotiable instrument. His very say supra speaks by mentioning the date, amount and account number and duly signed from his account, he issued the cheque to so called Mallikarjun for amount due. It is in fact within the meaning of Section 20 of the N.I. Act as a inchoate instrument from the said say with authorisation to fill the name of the payee and for said amount due as a legally enforceable debt. Leave it apart, after presentation of Ex. P. 2 cheque through Ex. P. 3 memo., on 29.10.2002 that is the date it appears on the cheque and again in April, 2003 covered by Ex. P. 4 of the cheque within its validity period and the dishonour was for insufficiency of funds, the complainant issued Ex. P. 5 legal notice dated 05.05.2003 which is within 30 days as per the Section 138 proviso-B with effect from the amended Act 55/2002 dated 26.02.2003 covered by Ex. P. 6 registered postal receipt to the address of accused i.e. Rajasekhar Reddy of Kalwarala village so also by certificate of posting under Ex. P. 7 with said address within Pangal mandal and Ex. P. 9 registered cover is returned with endorsement that the addressee refused to receive the notice, hence returned to sender. It is not even the case of the accused that the address is wrong or the said postal endorsement is wrong much less by cause examining the postman if at all as to what made him so to endorse unless he really refused from the presumption of due service. It was also held by this court way back in Chapala Hanumaiah (supra) 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. It is also important to note that it is the accused that cause summoned through the Court on his side is so called Mallikarjun of Mallikarjuna enterprises from whom he alleged to purchase the motor on payment of some cash and for remaining balance issued the Ex. P. 2 cheque and placing reliance on Ex. D. 1 receipt for the motor purchased on 28.04.2002. The receipt no way speaks on credit receipt. It speaks for Rs. 23,300/- and coming to the endorsement therein on its reverse side as if made by the said Mallikarjun in referring, received from the accused under the said bill, dated 28.04.2002 amount with interest at Rs. 48,000/- on 28.09.2002 i.e. Rs. 30,000/- and balance of Rs. 18,000/- by post-dated cheque No. 236510 dated 29.10.2002 in the presence of D.W. 2 Saireddy and promise to replace motor and pipes on or before 29.10.2002. It is specifically denied by the said Mallikarjun on said endorsement writing or signature that of him. Even then the accused did not choose to send the

said receipt to expert. In fact, the Court also got the power to compare but generally will not take up the ordeal Expert to bound to on factual matrix within its power under Section 73 of Indian Evidence Act of scribing of the signature disputed by D.W. 3 as that is the core of the defence of the accused which he could not prove as required them by preponderance of probabilities in the said evidence despite D.W. 3 denied the same, comparison of said signature with the signature on the deposition of D.W. 3 Mllikarjun clearly shows it is not the signature of Mllikarjun has shown lot of differences even to a naked eye between the two signatures that is one on reverse side of Ex. P. 1 and the two signatures in the deposition of D.W. 3 at pages 1 and 2 to say that it is not the D.W. 3 who deposed before the Court and signed deposition that signed on the reverse side of Ex. D. 1 that so called endorsement itself with no little correlation from the tenor of writing the strokes, originality, pen lift and pen halt and also length of signatures in the original and in the natural pattern and the signature is artificially created on the reverse side of Ex. D. 1 that was missed attention of the trial Court. From this also, it clearly proves by using so called D.W. 2 Saireddy the accused cause manipulated same writing on the reverse side of Ex. D. 1 taking advantage of earlier he purchased a motor in April, 2002 from Mallikarjun. If the evidence of D.W. 3 represents in this context with that of D.Ws. 1 and 2 including the cross-examination of P.W. 1 by the accused-D.W. 1 with reference to the Ex. P. 1 pronote and the Ex. P. 2 cheque contents, it belies the defence version as false and to strengthen the case of the complainant instead of appreciating in the right perspective, the trial Court went to the extent of discussing the so called evidence of the scribe of the Ex. P. 1 pronote in the civil suit examined as P.W. 2 by name B. Raghunandan Reddy though that deposition is not before this Court in the criminal case much less exhibited or confronted even to P.W. 1 by accused under Section 145 of the Indian Evidence Act, leave about cause summoning the said Raghunandan Reddy if at all to make use of the deposition and without that material forms part of the record, trial Court has no right to discuss evidence not borne by record by introducing into it thereby it is nothing but ill-appreciation of the evidence outside the record by bringing into the record to the surprise of the parties that is uncalled for within the parameters of law, that too, by surprise. It is also, in this context, importantly to discuss that on perusal of Ex. P. 2 cheque clearly shows admittedly signed with amount and date by the accused by mentioning account particulars and the writing of the payee with the same pen at a time from a close scribing and that also belies the version of the accused of he issued the cheque by keeping blank only the name of the payee and it is the said Mallikarjuna-D.W. 3 to whom he issued cause misused in the name of the complainant even the credit purchase of the motor and pipes transaction later settled as per endorsements on reverse of Ex. D. 1 of dated 28.09.2002 allegedly saying for replacement of the motor and pipes thereunder by 29.10.2002. It is unknown why he issued a postdate cheque on 28.09.2002 for the alleged credit purchase, dated 28.04.2002 and there is nothing more to say for the bill as per the Ex. D. 1 Rs. 23,300/-, how he paid the balance other than this Rs. 18,000/- by cheque

and for saying paid by cash on 28.09.2002 of Rs. 13,000/- is not even correlating for no need to pay any of Rs. 30,000/- cash and Rs. 18,000/- by cheque when the bill covered by Ex. D. 1 is only for Rs. 23,300/- that was not even explained by the accused. Apart from it if at all even taken for argument sake, the alleged Ex. D. 1 transaction and without even due for argument sake, truth of the contents of Ex. D. 1 on its reverse side, why the accused kept quiet even after 29.10.2002 pursuant to the said content, if the motor and pipes were not replaced and cheque is retained without even giving any notice either to replace or to return the cheque apart from it, he did not issue any notice to the bank to stop payment to probablise his version. Having admittedly issued cheque even what he says in the name of D.W. 3-Mallikarjuna not corroborated with what is discussed supra to establish as a false defence that probablises the complainant''s case in addition to what has discussed supra of the cheque writing clearly speaks of same pen by one time with mention of the name of the payee of the complainant and it is for the Ex. P. 1 pronote debt due, Ex. P. 2 cheque subsequently was issued. It is the clear case of the complainant that Rs. 18,000/- was the handloan and executed pronote and for the payment the cheque issued as a letter there was no improbability in the cheque much less in worth inconsistency of aggrieved nature to belie the complainant''s case or to enhance the above defence which is per se untrue. No doubt the Ex. D. 1 is not one receipt but two more receipts and all are dated 28.04.2002 and the other two receipts are even worth of Rs. 2,640/- and Rs. 836/-, not even tallying to the amount covered by so called endorsement on reverse side of the first receipt Ex. D. 1 discussed above. Ex. D. 3 is the account of the accused which is shown filed from 01.01.2002 to 19.07.2005, the transaction first started is on 08.09.2002 and there is no any cash withdrawal much less Rs. 30,000/- on 28.09.2002 but for based on self-cheque of Rs. 11,000/- withdrawn on 27.09.2002 that is not even correlating to alleged Rs. 30,000/- payment in cash on 28.09.2002. P.W. 1 even regarding his means deposed of doing poultry business of own and accused is friend of him as deposed in his chief examination for his lending though he was not doing any money lending business otherwise but for the poultry business for the past seven days with accounts though not an income tax assessee of the poultry business income but for having licence to the business and earning nearly Rs. 4,000/- per month therefrom and he was unmarried as on date and himself and his brother are having independent earnings in their family and he got bank account for past 5 to 6 years and he was utilising his business income. It is also brought in the cross-examination of P.W. 1 by accused that on 29.09.2002 the accused came to the house of the complainant along with Ramakrishna (scribe of the pronote) at about 8.00 A.M. and asked for Rs. 18,000/- and accused borrowed the amount at his house though he cannot say the said date of borrowal depends on that the pronote Ex. P. 1 was executed and scribed by Ramakrishna and signed by the accused, that again says the accused also scribed the contents. He denied the suggestion even the facts brought on record in the cross-examination of P.W. 1 by accused from the inconsistency and suggestion of accused did not borrow Rs. 18,000/- from the

complainant and even pronote much less agreed to repay within one month not executed the pronote. It is further brought in the cross-examination that after his demands to the accused to repay the said amounts, dates which he could not say, it is for that the accused issued the cheque at the house of the complainant which was in the morning hours between 9.00 to 10.00 A.M. or so and 5 months later he presented the cheque and denied the suggestion that earlier the cheque was not with him and thereby he could not present. He deposed that as the accused requested him to present after some time, he presented cheque for encashment about 5 months'' after issuance of the cheque. That also strengthens, from said cross-examination of P.W. 1, the case of the complainant. In the further cross-examination brought on record of P.W. 1 he knows Mallikarjun-D.W. 3 for the past 10 years and he denied the suggestion of accused issued Ex. P. 1 to Mallikarjun and he and Mallikarjun colluded and cause filed a false complaint. He deposed that handwriting in the Ex. P. 2 was different and he informed the accused about dishonouring of the cheque through his friend on 23.04.2003. It is not even his suggestion of the handwriting what is difference if at all it is only the name of the complainant from saying issued the cheque to Mallikarjun and the same was misused as discussed supra. A perusal of the cheque no way shows any difference in handwriting but for at a time with same pen suffice to say from said evidence including from denial of suggestion put to him by accused of accused did not issue Ex. P. 2 cheque in favour of complainant, and not liable to pay the amount there is no even any suggestion there at least after recalling of P.W. 1 of cheque issued to Mallikarjun and Mallikarjun and complainant colluded in cause filing by filling the name. It is in this context and coming to the evidence of the accused-D.W. 1, it is his version as if he does not know the complainant and only saw him for the first time before the Court. In fact as discussed supra, P.W. 1 deposed in chief also in the cross-examination by the accused of accused is friend of the complainant and out of that acquaintance, he lent the amount of Rs. 18,000/- and there is no such suggestion of unknown or stranger but for introduced in the chief examination first line for the first time. So also the version of accused given Ex. P. 2 cheque with his signature and by filling amount column of Mallikarjuna enterprises of Warangal in connection with the purchase of motor on 28.04.2002 and the cheque given on 28.09.2002 by mentioning the date 29.10.2002 and paid Rs. 30,000/- through one Sai Reddy (D.W. 2) and issued the cheque for balance. In this regard, it is in detail discussed regarding Ex. D. 1 and endorsements and its genuineness supra. Further, this version introduced only for the first time in D.W. 1''s evidence in chief and that probablises if not even such suggestion to D.W. I in cross-examination including by recall of not even that of the version and might not be created so called endorsement on reverse side and the first receipt Ex. D. 1 but for later he was cross-examined by complainant in saying the accused is known to the complainant and he issued the cheque on 29.10.2002 and there is no cash with Mallikarjun Enterprises to complainant and the accused did not give the Ex. P. 2 cheque to the said Mallikarjuna enterprises but for to the complainant and the so called

endorsements on reverse side of Ex. D. 1 is created story by the accused in collusion with the D.W. 2 by forging signature of said Mallikarjun.

14. Having regard to the above and from the presumptions available under Section 118 of N.I. Act, and also 139 of the N.I. Act and from the burden is on the accused under the reverse onus clause to rebut the same and from the defence set out by the accused which after that as a false version as detailed supra from time to time right from cross-examination by P.W. 1 to the correction of the endorsement on reverse of Ex. D. 1 and introducing the version in the evidence of D.W. 1 and putting it through D.W. 3 Mllikarjun by cause summoning and thereby suffice to say the accused could not rebut the said presumptions, hence proved that the accused issued a cheque in favour of the complainant in the impugned order and the trial Court acquittal is unsustainable and the accused is liable to be convicted under Section 138 of N.I. Act.

Point No. 2:

15. In the result, the Criminal Appeal is, therefore, allowed and the order of acquittal recorded by the Court below in C.C. No. 112 of 2004 is hereby set aside and the 1st respondent-accused is found guilty of the offence under Section 138 of the N.I. Act and is convicted accordingly.

16. For hearing of the accused on the quantum of sentence posted to 01.09.2014.

Date: 26.08.2014

Vvr

Dt. 01.09.2014

17. Even posted the matter from 26.08.2014 by reversing the acquittal judgment of the trial court finding the accused guilty allowing the appeal to this day for hearing of the accused on sentence, the accused did not appear and thus taken that he has no say. As per Ex. P. 2 - cheque amount is for Rs. 18,000/- dated 28.10.2002 and the case was subsequent to the amendment to the N.I. Act, introducing Section 143 with effect from 06.02.2003 which mandates the trial in summary procedure and convert if necessary and summons procedure and that was not questioned as irregular much less any prejudice caused thereby and this provision speaks on conviction, for sentence of imprisonment not exceeding one year and an amount of fine exceeding Rs. 5,000/- (without any limit with non-obstante clause irrespective of the provisions of Cr.P.C.) and the bar under Section 29 of Cr.P.C. of outer limit of fine of 10,000/- (amended and substituted for Rs. 5,000/- by the Cr.P.C. amendment Act of 2006) as was earlier, after this provision Section 143 introduced thereby of no application. It was also held by the Apex Court in Somnath Sarkar Vs. Utpal Basu Mallick and Another, that the Act not contemplated grant of compensation but envisages imposition of fine not exceeding twice the amount of dishonoured cheque and out of the said fine amount, the complainant be compensated under Section 357 Cr.P.C.

and that ''unlike for other forms of crime, the punishment here (in so far as the complainant is concerned) is not a means of seeking retribution, but is more a means to ensure payment of money. The complainants interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque''.

18. Having regard to the above and from the submission by the appellant/complainant of the endeavor 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. 25,000/- (Rupees twenty five thousand only) and out of which the complainant is entitled to an amount of Rs. 23,000/- (Rupees twenty three thousand only) as compensation (for the cheque is of Rs. 18,000/-) amount and remaining compensation of Rs. 2,000/- (Rupees two thousand only) shall deposit to the State. Registry is hereby directed to communicate this order to the learned Magistrate to secure the presence of accused on 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) of I.P.C.