

(2008) 11 KAR CK 0067

In the Karnataka High Court

Case No : Criminal R.P. No's. 658 and 660 of 2006

Sridhar Narayan Hegde

APPELLANT

Vs

The Karnataka Bank Ltd. and State of Karnataka

RESPONDENT

Date of Decision : 21-11-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 482
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2008) 11 KAR CK 0067

Hon'ble Judges : K.N. Keshavanarayana, J

Bench : Single Bench

Advocate : Vijay Kumar A. Patil, in Criminal RP No. 658 and Vijay Kumar A. Patil and S.S. Nagarale, in Criminal RP Nos. 659, 660 and 661/2006, for the Appellant; A.R. Desai, for the Respondent

Final Decision : Allowed

Judgement

K.N. Keshavanarayana, J.—In all these petitions filed u/s 397 r/w 482 Cr.P.C, the legality and correctness of the common judgment dated 14.2.2006 passed by the Presiding Officer, Fast Track Court-III and Additional Sessions Judge, Belgaum in Criminal Appeal Nos. 95, 96, 102 and 103 of 2005 dismissing those appeals filed by the petitioners herein and affirming the identical but separate judgment dated 1.6.2005 passed by the JMFC -IV Court Belgaum in CC Nos. 754/02, 755/02, 98/03 and 284/03 convicting the petitioners herein who were arrayed as accused, for the offences punishable u/s 138 of the N.I. Act (for short the "Act") and sentencing them to pay compensation to the common respondent - complainant and to pay fine, is questioned. As common questions of fact and law arises for consideration, these petitions were heard and are being disposed of by this common order.

2. The common petitioner in CrI.R.P. Nos. 659/06 and 661/06 viz., Saraswathi Narayan Hegde was arrayed as accused No. 1 in C.C. Nos. 284/2003 and 755/02, respectively. The common petitioner in CrI.R.P. Nos. 658/06 and 660 / 06 viz.,

Sridhar Narayan Hegde was arrayed as accused No. 1 in C.C. Nos. 98/03 and in C.C. No. 754/02 respectively. In c.c. No. 98/2003 one Aishwarya Services represented by its Proprietor Ramachandra Narayan Hegde and in C.C. No. 754/02, one Annapoorna Agencies represented by its Proprietor Manjunath Narayan Hegde had been arrayed as accused No. 2. In C.C. No. 755/02 Manjunath Narayan Hegde and in C.C. No. 284/2003 Annapoorna Agencies by its proprietor Manjunath Narayan Hegde had been arrayed as accused No. 2. The tabular details as to the corresponding criminal appeals and C.C. numbers with reference to the criminal revision petitions filed before this Court are as under:

Sl.	CrI.RP.	Criminal	Corresponding	Complainant	Accused
Cheques Nos.	Drawn on	No.	No.	Appeal No.	C.C. No.
Persons & amount					
1.	658/2006	96/2005	98/2003	The Karnataka A-1 - Sridhar No. 0801091 Canara District Bank Limited, Narayan Hegde Dt. 30.1.2002 Central co- Belgaum. A-2 Rs. 5,90,000/- operative Bank Ramachandra Ltd., Itagi Narayan Hegde	
2.	659/2006	103/2005	284/2003	The Karnataka A-1 Saraswathi No. 906363 Varada Bank Limited, Narayan Hegde Dt. 18.1.2002 Grameena Belgaum. A-2 Manjunath Rs. 4,80,000/- Bank, Narayan Hegde Siddapur Branch, U.K.	
3.	660/2006	95/2005	754/2002	The Karnataka A-1 - Sridhar No. 741377 Varada Bank Limited, Narayan Hegde Dt. 24.1.2002 Grameena Belgaum. A-2 - Rs. 3,74,000/- Bank, Ramachandra Siddapur Narayan Hegde Branch, U.K.	
4.	661/2006	102/2005	755/2002	The Karnataka A-1 Saraswathi No. 906361 Varada Bank Limited, Narayan Hegde Dt. 12.1.2002 Grameena Belgaum. A-2 Manjunath Rs. 5,00,000/- Bank, Narayan Hegde Siddapur Branch, U.K.	

3. Common complainant viz., Karnataka Bank Limited filed the above noted complaints against the respective accused persons u/s 200 of Cr.P.C. alleging offences punishable u/s 138 of the N.I. Act The common averments made in all the complaints are as under;

Accused No. 1 in each of these cases issued cheques in favour of accused No. 2 who in turn got those cheques discounted with the complainant Bank. Accordingly, the Bank after deducting the commission paid the balance amount covered under those cheques to accused 2 and thus the bank became holder in due course of these cheques. When the complainant Bank presented these cheques, they were returned unpaid with bankers endorsement "insufficient funds in the account of the drawer of the cheque" viz., accused No. 1. Subsequently, once again the cheques were represented for encashment But

even then all the cheques were dishonoured as there was no sufficient funds to honour the cheques in the accounts of accused No. 1. The fact of dishonour of the cheques were brought to the notice of accused No. 1 and 2 through legal notices and they were called upon to pay the amounts paid under the cheques. However, though notices were served on them, they failed to comply with the demands made therein within the statutory period. Therefore, the accused have committed the offence punishable u/s 138 of the Act.

4. The learned Magistrate before whom complaints were presented took cognizance of the offence alleged and after recording sworn statement of the authorized officer on behalf of the Bank, ordered issuance of summons to accused persons. Upon service of summons, the respective accused Nos. 1 and 2 appeared before the learned Magistrate. In all the cases, the respective accused No. 1 pleaded not guilty for the accusation made against them. However, accused No. 2 in all the cases sought for discharge inter alia contending that as he was not the drawer of the cheque, he cannot be prosecuted for the offences u/s 138 of the Act.

5. After hearing both sides, the learned Magistrate by orders dated 21.9.2004 ordered discharge of accused No. 2 in all the cases. Therefore, the proceedings in all these complaints were proceeded with only against accused No. 1. After the complainant led evidence in all the cases, the learned Magistrate examined the accused No. 1 u/s 313 Cr.P.C., wherein accused No. 1 denied all the incriminating circumstances appearing against him / her, in the evidence of the witness examined on behalf of the complainant. However, accused No. 1 did not choose to lead any defence evidence nor produced any documentary evidence.

6. After hearing both sides, the learned Magistrate, as noted earlier, by identical but separate judgments dated 1.6.2005 held that the complainant Bank is the holder in due course of the cheques in question for consideration and that the accused No. 1 has failed to rebut the statutory presumption u/s 139 of the Act to the effect that the cheques in question were not issued for due discharge of any debt or liability. In this view of the matter, the learned Magistrate held that the accused No. 1 in all the complaints (being the drawers of cheques) are guilty of offence punishable u/s 138 of the Act Accordingly, the learned Magistrate convicted accused No. 1 in all the complaints for the offence punishable u/s 138 of the Act and directed him/her to pay fine of Rs. 5,000/- in each case and in default, to undergo simple imprisonment for six months. Respective accused No. 1 in all the cases was directed to pay compensation of Rs. 10,00,000/- in C.C. No. 98/03; Rs. 6,00,000/- in C.C. No. 284/03; Rs. 8,00,000/- in CC. No. 755/2002 and Rs. 7,00,000/- in C.C. No. 754/2002 to the complainant Bank towards the cheque amounts and in default to pay the compensation amount, they were ordered to undergo simple imprisonment for a period of one year in each case.

7. Being aggrieved by the judgment of conviction and sentence passed by the learned Magistrate, the respective accused No. 1 filed appeals before the

Sessions Judge at Belgaum in Criminal Appeals as noted above. Those appeals were made over to the Presiding Officer, Fast Track Court-III, Belgaum who by the common judgment dated 14.2.2006 dismissed all the appeals and upheld the judgment of conviction and sentence ordered by the learned Magistrate. Being aggrieved by the judgment of the learned Sessions Judge dismissing the appeals, the respective accused No. 1 have filed these revision petitions as noted above.

8. Upon service of notice of these revision petitions, the complainant Bank has appeared through its learned Counsel.

9. I have heard the learned Counsel appearing for the revision petitioner/ accused-1 and the learned Counsel appearing for the complainant bank.

10. Sri. Santhosh. S. Nagarale, learned Counsel appearing for the accused / revision petitioner contended that both the courts below have failed to consider that a holder in due course of a negotiable instrument cannot maintain a complaint alleging offence u/s 138 of the Act against the drawer of the cheque since there is no legally enforceable debt between the parties and there is no privity of contract between them. In this regard, he also relied upon two decisions of Andhra Pradesh High Court in the case of Kalyani Refineries Ltd. and Another Vs. Banaras State Bank Ltd. and Another, and in the case of Shridi Sai Steel Balu Complex and Others Vs. State of A.P. and Another, He further contended that the courts below have utterly failed to see that the complainant has not proved existence of legally enforceable debt against the drawer of the cheque. He further contended that the presumption u/s 139 of Act is only to the extent that cheque is issued for discharge of debt or liability and this presumption does not extend as to the existence of legally enforceable debt or liability. Therefore, the complainant is under an obligation to prove existence of legally enforceable debt or liability as a matter of fact to the satisfaction of the Court and only if the complainant establishes the existence of legally enforceable debt or liability then the presumption u/s 139 of the Act to the effect that the cheque issued was to discharge legally enforceable debt could be drawn. To substantiate this contention he relied upon judgment of the Supreme Court in the case of Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, . He further contended that as complainant in these cases has not placed any evidence worthy of acceptance to prove the existence of legally enforceable debt or liability due by the accused No. 1 in favour of payee under the cheques, the courts below are not justified in drawing presumption u/s 139 of the Act and on that basis holding the accused guilty of the offence punishable u/s 138 of the Act He further contended that the courts below have reached an erroneous conclusion that the complainant Bank is holder in due course of the cheques in question. In this regard, according to the learned Counsel, the courts below have failed to notice that to become a holder in due course, the complainant - Bank was required to show that the Bank got into possession of the cheques from the payee by a valid endorsement and delivered by the payee to the Bank to claim the status of "holder in due course". He further contended that the facts and

circumstances of the case as brought out in the evidence clearly indicates that the complainant - Bank has not acted diligently before the purported discount of the cheques as no enquiry was shown to have been done by the Bank regarding title of the payee under the instruments and therefore the Bank was not a holder in due course as contemplated u/s 9 of the Act.

11. On the other hand, the learned Counsel for the complainant sought to support the reasoning of the courts below. He further contended that reading of Section 138 proviso (b) and Section 142(a) of the Act makes it clear that even a holder in due course of a negotiable instrument is entitled to maintain a complaint u/s 138 of the Act and therefore, the complaints filed by the complainant in the court below are maintainable. He further contended that admitted fact on record clearly establishes that the payee under the cheques got them discounted with the complainant Bank and the Bank after deducting the commission, paid balance amount covered under the cheques to the payees and the endorsement made by the Bank on the instrument to the effect "payees account credited" would clearly establish that the complainant Bank became possessor of the cheques for consideration and since at the time of possessing the cheques by paying consideration, there was no circumstances to believe that any defect existed in the title of the payee over the cheques in question, the complainant Bank became holder in due course in respect of these cheques as contemplated u/s 9 of the Act and therefore, the courts below by considering the entire materials on record have rightly reached the conclusion that the complainant Bank is the holder in due course of the cheques for consideration. He further contended that the complainant Bank made payment in accordance with apparent tenor of the instrument in good faith and without any kind of negligence and since there was no circumstances which would afford a reasonable ground for believing that the payees under these cheques were not entitled to receive payment of the amount mentioned therein, the payment by the complainant bank to the payee of the cheques in question was payment in due course as contemplated u/s 10 of the Act He further contended that though as held by the Apex Court in the case of Krishnajanardhan Bhat v. Dattatatreya G. Hegde referred to supra, the presumption u/s 139 of the Act do not extend as to the existence of the legally enforceable debt or liability, in the light of the presumption u/s 118(a) of the Act, the courts below have correctly drawn a rebuttable presumption against the accused that the cheques in question have been drawn by the drawers viz., accused in favour of the payees for consideration and since the complainant - Bank became the holder in due course by paying consideration to the payee under these cheques, the presumption u/s 118(a) of the Act would enure to the benefit of complainant - Bank, as such, the courts below have rightly held that the cheques in question have been issued for discharge of debt due, in view of presumption u/s 139 of the Act He further contended that the accused have not placed any evidence to rebut these statutory presumptions under Sections 118(a) and 139 of the Act and therefore, the decision of the Apex Court in the aforesaid case do not apply to the facts of

the case on hand. He further contended that the courts below having regard to the facts and circumstances, have concurrently held that the respective accused is guilty of offence u/s 138 of the Act since admittedly the cheques in question issued by the accused persons have been dishonoured when presented for encashment and in spite of issuance of statutory notices, the amounts covered under the cheques have not been paid to the Bank, therefore, there are no grounds to interfere with the concurrent judgments of the courts below. With these submissions, the learned Counsel sought for dismissal of petitions.

12. In the light of the rival contentions, following points arise for consideration:

(1) whether courts below were justified in holding that the complainant bank is holder in due course of the cheques in question?

(2) Whether the holder in due course of a cheque, can maintain a complaint for the offence punishable u/s 138 of the Act against the drawer of the cheque?

(3) Whether the courts below were justified in holding that the accused is guilty of the offence punishable u/s 138 of the Act?

13 Point No. 1:

There is no serious dispute that the cheques involved in all these cases bear signature of respective accused and that they were drawn in favour of persons, who had been originally arrayed as accused No. 2. It is the specific case of the complainant Bank that these cheques were discounted by the payees and after deducting the commission, the balance amount covered under cheques was paid to the payees. Under these circumstances, it is the contention of the complainant that it became the holder in due course of the cheques in question for consideration.

Section 8 of the Act defines the "Holder" as under:

The "holder" of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

Section 9 of the Act defines the "Holder in due course" and it reads as under:

"9. "Holder in due course" - "Holder in due course: means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if [payable to order], before the amount mentioned in it became payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

Section 10 of the Act defines "payment in due course" as under:

10. "Payment in due course" - "Payment in due course" means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not

afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

Thus from the definitions of the "holder", "holder in due course" and "payment in due course" in Sections 8, 9 and 10, as extracted above, any person to become a "holder in due course" of a negotiable instrument, the following requirements are to be satisfied:

- (i) he must be a holder for consideration;
- (ii) the instrument must have been transferred to him before it becomes overdue;
- (iii) he must be a transferee in good faith and he should not have any reason to believe that there was any defect in the title of the transferor.

The evidence placed on record in all these cases which is not seriously disputed by the accused persons, clearly establishes that the payee under these cheques issued by respective accused got the cheques discounted with the complainant bank and received consideration and delivered the cheques to the possession of the complainant. On the reverse side of these cheques, there is an endorsement to the effect that the payee's account is credited. This is another circumstance, which would establish the circumstance of complainant becoming the holder of the cheques in question for consideration. Therefore, the courts below were right in holding that the complainant became the possessor of the cheques in question for consideration.

14. Section 118(g) of the Act raises presumption that holder of the instrument is a holder in the due course. However as per proviso, where an instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of any offence or fraud or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him. In the present case, it is not the contention of the accused that the complainant bank obtained the custody of the cheques by means of any offence or fraud or for unlawful consideration. Therefore, as per the presumption u/s 118(g) of the Act, the complainant became holder in due course of the cheques in question. It is not the case of the accused that the cheques are not negotiable. Therefore, the complainant Bank was not prevented from purchasing the cheques for valuable consideration.

15. Now the next aspect require to be considered is whether the complainant has satisfactorily proved the third requirement namely that it was a transferee in good faith and it had no sufficient cause to believe that any defect existed in the title of the transferor over the cheques.

16. The Apex Court in the case of M/s. U. Ponnappa Moothan Sons, Palghat Vs. Catholic Syrian Bank Ltd. and others, had an occasion to consider as to what constituted " sufficient cause to believe that any defect existed in the title of payee over the instrument " found in Section 9 of the Act to call a person in

possession of negotiable instrument as holder in due course. After referring to decisions of various courts including English Courts and by referring to the passages from the Bashyam & Adiga on The Negotiable Instruments Act, 15th Edition and other authors, Their Lordships of the Apex Court in paras 13 and 17 have observed thus:

13. However, with regard to the legal importance of negligence in appreciating the principle of sufficient cause to believe" a passage from Chalmers" book The Law Relating to Negotiable Instruments in British India" 4th Edn. may usefully be noted:

All the circumstances of the transactions whereby the holder became possessed of the instrument have a bearing on the question whether he had "sufficient cause to believe" that any defect existed.

It is left to the Court to decide, in any case where the holder has been negligent in taking the instrument without close enquiry as to the title of his transferor, whether such negligence is so extraordinary as to lead to the presumption that the holder had cause to believe that such title was defective.

(Emphasis supplied)

This view is more sound and logical. The legal position as explained by Chitty may be noted in this context which reads as under:

While the doctrine of constructive notice does not apply in the law of negotiable instruments the holder is not entitled to disregard a "red flag" which has raised his suspicions.

We, therefore, modify the view taken by the Allahabad High Court in Durga Shah Mohan Lal Bankers Vs. Governor General in Council and Others, to the extent that though the failure to prove bona fide or absence of negligence would not negative the claim of the holder to be a holder in due course, yet in the circumstances of a given case, if there is patent gross negligence on his part which by itself indicates lack of due diligence, it can negative his claim, for he cannot negligently disregard a "red flag" which arouses suspicion regarding the title. In this view of the matter we hold that the decision in Raghavji's case 1906 (8) Bom LR 921 does not lay down correct law. We agree with the view taken by the Allahabad High Court with above modification.

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17. From the above discussion it emerges that the Indian definition imposes a more stringent condition on the holder in due course than the English definition and as the learned authors have noted the definition is based on Gill's case 1824 (107) ER 806. Under the Indian law, a holder, to be a holder in due course, must not only have acquired the bill, note or cheque for valid consideration but should have acquired the cheque without having sufficient cause to believe that any

defect existed in the title of the person from whom he derived his title. This condition requires that he should act in good faith and with reasonable caution. However, mere failure to prove bona fide or absence of negligence on his part would not negative his claim. But in a given case it is left to the Court to decide whether the negligence on the part of the holder is so gross and extraordinary as to presume that he had sufficient cause to believe that such title was defective. However, when the presumption in his favour as provided u/s 118(g) gets rebutted under the circumstances mentioned therein then the burden of proving that he is a "holder in due course" lies upon him. In a given case, the Court, while examining these requirements including valid consideration must also go into the question whether there was a contract express or implied for crediting the proceeds to the account of the bearer before receiving the same. The enquiry regarding the satisfaction of this requirement invariably depends upon the facts and circumstances in each case. The words "without having sufficient cause to believe" have to be understood in this background.

In *Bank of Maharashtra Vs. Automotive Engineering Co.*, , the Apex Court while considering the expression "in good faith and without negligence" occurring in Section 10 of the Act, has observed in para 11 that though no strait-jacket formula can be laid down to cover each case of negligence of a banker, the question of negligence requires to be decided in the facts and circumstances in each case.

17. As held by the Apex Court in Ponnappa's case referred to supra, when the presumption in favour of the holder of the Negotiable Instrument as provided u/s 118(g) of the Act gets rebutted under the circumstances mentioned therein, then the burden of proving that he is holder in due course lies upon him. The Apex Court has clearly held that the enquiry regarding satisfaction of this requirement depends upon the facts and circumstances of each case and the words "without having sufficient cause to believe" have to be understood in this background. No doubt, it is not the case of the drawers of the cheques that the complainant became the possessor of the cheques in question under the circumstances mentioned u/s 118(g) of the Act. Therefore, the presumption u/s 118(g) has not been rebutted.

18. Of course, as held by the Apex Court in Ponnappa's case though failure on the part of holder of an instrument to prove his bonafide or absence of negligence would not negative his claim as a holder in due course, yet in the circumstances of a given case, if there is patent gross negligence on his part which by itself indicates lack of due diligence, it can negative his claim for he cannot negligently disregard a "red flag" which arouses suspicion regarding the title. In the light of this, let me consider the facts and circumstances of this case to find out as to whether there is patent gross negligence on the part of the complainant indicating lack of due diligence which is sufficient to create suspicion regarding the title of transferors over the cheques.

19. The evidence on record indicates that the drawers of these cheques are close

relatives of payees. Two cheques were issued by mother in favour her son Manjunath Narayan Hegde, while the other two cheques were issued by one brother namely Sridhar Narayana Hegde, in favour of his another brother namely Ramachandra Narayana Hegde. They all belong to one family. The cheques in question were drawn for substantial amounts. It is not the say of either P.W.I or P.W.2 that before discounting the cheques, the payees were asked as to whether the cheques drawn for such substantial amounts were for discharge of any debt or liability due to them by the drawers or whether the cheques were issued as financial assistance to them by the drawers for their business. The very fact that the cheques are shown to have been issued by two members of a family in favour of remaining two members of same family for substantial amounts would be sufficient in normal circumstances to create suspicion in the mind of even an ordinary person much less an official of a scheduled Bank about the entitlement of payees to receive the amounts mentioned therein. In view of this, the Officer of the Bank before discounting the cheques, ought to have made minimum enquiry as to under what circumstances, the drawers have issued the cheques: As the cheques were purported to have been issued for considerable amount, the bank, before discounting them ought to have enquired with the banks on which the cheques are drawn to know as to whether, the cheques would be hounoured if sent for collection & whether there is sufficient fund in the accounts of the drawers. With the advancement in Technology, this kind of enquiry was not difficult Why in such a hurry substantial amount was paid to the payees by discounting the cheques even without making any enquiry about the credibility of the drawer and payee, is not explained by the complainant Bank. There is absolutely no evidence placed by the complainant bank to show that if acted in good faith. The Manager, who discounted the cheques is not examined to explain the steps he took before discounting the cheques. On the other hand, the evidence on record establishes that, the Bank initiated disciplinary action against the said Manager for causing loss to the Bank by his negligent act in discounting the cheques without proper enquiry, and he was found guilty and was demoted. This fact is more than sufficient to come to the conclusion that the complainant Bank has not acted in good faith, and there were several circumstances and reasons to raise suspicion as to whether the payees under the cheques were entitled to receive the money under the cheques. Therefore, there is no difficulty in holding that the Bank did not become the holder in due course of those cheques. The courts below have failed to consider the above aspects and have reached erroneous finding.

20. In the light of the above discussion, I hold that the courts below were not justified in holding that the complainant bank is holder in due course of the cheques in question. Hence, I answer point No. 1 in the negative.

21. Point No. 2:

Section 138 of the Act deals with dishonour of cheques for insufficiency of funds in the accounts. The main section deals with the offence upon dishonour of the

cheque. However, proviso to Section 138, lays down conditions under which dishonour of cheque would constitute an offence punishable u/s 138 of the Act. As per proviso (b) dishonour of the cheque do not become an offence unless the payee or holder in due course of the cheque as the case may be makes a demand for payment of said money by giving a notice in writing to the drawer of the cheque within a period of thirty days of the receipt of the information from the Bank regarding the dishonour of the cheque. Thus, Section 138 proviso (b) clearly provides for holder in due course of the cheque also making a demand by issuing a notice.

22. Section 142 of the Act deals with cognizance of the offences. As per Clause (a) of Section 142, notwithstanding anything contained in Cr.P.C, 1973 no Court shall take cognizance of the offence punishable u/s 138 except on a complaint made by the payee or, as the case may be, the holder in due course of the cheque. (emphasis supplied) Thus from the above, it is clear that even on a complaint filed by the holder in due course, the court can take cognizance of the offence punishable u/s 138 of the Act. Thus, reading of Sections 138(b) & 142(a) of the Act make it clear that a holder in due course is entitled to maintain a complaint for offence u/s 138 of the N.I. Act.

23. A single Judge of the Andhra Pradesh High Court in Kalyani Refineries Ltd. and Anr. v. Banaras State Bank Ltd. referred to supra, no doubt has held that mere fact that cheque drawn by a third party in favour of its clients are discounted by the bank, does not lead to any privity of contract between the drawer of the cheque and the bank and the concept of civil liability cannot be imported into the question of criminal liability. It has been further held that holder in due course cannot maintain a complaint for offence u/s 138 of the Act.

Another Single Judge of the Andhra Pradesh High Court in the case Shridi Sai Steel, Balu Complex and Ors. etc. v. State of A.P. and another referred to supra also has held that holder in due course of a cheque cannot maintain a complaint for the offence u/s 138 of Act. I am unable to concur with the views expressed in these two decisions as the learned Judges have not taken into consideration, the provisions of Section 138(b) and 142(a) of the Act which clearly indicates that holder in due course can maintain a complaint Therefore, I decline to place any reliance on the above two decisions. Having regard to the statutory provisions of Section 138 proviso (b) and 142(a) of the Act, I have no doubt in my mind that a holder in due course of a cheque can maintain a complaint for the offence punishable u/s 138 of the Act In view of the above, I answer point No. 2 in the affirmative.

24. Point No. 3:

As could be seen from the judgments of the courts below, both the courts after holding that the complainant became holder in due course and that the accused issued those cheques to the payees who in turn discounted the same with the bank for consideration, have drawn the presumption under Sections 118(a) and

139 of the Act to the effect that the cheques in question: have been issued for consideration and those cheques are issued for discharge of legally enforceable debt. The courts below have further held that since the accused have failed to rebut statutory presumption u/s 118(a) and 139 of the Act, by placing any positive evidence or by bringing out any circumstance on record, they are guilty of offence punishable u/s 138 of the Act. As noticed earlier, it is the contention of the learned Counsel for the accused that the courts below have erroneously drawn the presumption u/s 139 of the Act that the cheques in question have been issued for consideration though the said presumption does not extend as to the existence of legally enforceable debt or liability. In other words, it is his contention that before drawing presumption u/s 139 of the Act to the effect that the cheques in question have been issued for discharge of a debt or liability, it was incumbent on the part of the complainant to have proved the existence of legally enforceable debt or liability. It is also his contention that presumption u/s 118(a) of the Act has no application to the facts and circumstances of the case. The Apex Court in the case of *Krishnajanardhan Bhat v. Dattatreya G. Hegde* referred to *supra*, after considering the various decisions on the point, has observed thus in paragraphs 28 to 31 and 19 as under:

28. Indisputably, a mandatory presumption is required to be raised in terms of Section 118(a) and Section 139 of the Act. Section 13(1) of the Act defines "negotiable instrument" to mean "a promissory note, bill of exchange or cheque payable either to order or to bearer.

29. Section 138 of the Act has three ingredients, viz.:

- i) that there is legally enforceable debt;
- ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which pre-supposes a legally enforceable debt;
- iii) that the cheque so issued had been returned due to insufficiency of funds.

30. The proviso appended to the said section provides for compliance with legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption u/s 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

31. The Courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also xxx

(Underlined by me)

Thus from the observations extracted above, it is clear that presumption u/s 139 of the N.I Act is only to the extent that the cheque was drawn for discharge in

full or in part of any debt or other liability and the said presumption do not relate to the existence of legally enforceable debt or liability. Therefore, before drawing the presumption u/s 139 of the N.I. Act, it is the duty of the Court to see whether or not the complainant has discharged his initial burden as to existence of legally enforceable debt. Nodoubt as per Section 118(a) of the Act, there is a rebuttable presumption that every negotiable instrument was made or drawn for consideration and when such instrument is accepted, endorsed, negotiated or transferred was accepted, endorsed, negotiated or transferred for consideration,

25. In the aforesaid decision, the Apex Court also considered how an accused person could discharge the burden of proof placed upon him under a statute. In para 32, their lordships have observed thus:

An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different"

(underlining is by me)

Again in para 44 and 45, the Apex Court has observed thus:

xxxxx The courts must be on guard to see that merely on the application of presumption as contemplated u/s 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. It is for the aforementioned reasons that we have taken into consideration the decisions operating in the field where the difficulty of proving a negative has been emphasised. It is not suggested that a negative can never be proved but there are cases where such difficulties are faced by the accused e.g. honest and reasonable mistake of fact. In a recent article The presumption of Innocence and Reverse Burdens; a Balancing Duty published in Premachand S. Bansode and Another Vs. State of Maharashtra, it has been stated:

In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But courts will not allow these pragmatic considerations to override the legitimate rights of the defendant Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice-whether the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment.

45. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is

essential to the economic life of a developing country like India. This, however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely, presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should delicately be balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same.

(Underlined by me)

26. Keeping the above principles in mind let me consider whether in these cases, the courts below were justified in holding the accused guilty of the offence punishable u/s 138 of the Act

27. As noticed earlier, it is the specific case of the complainant that the accused as drawer of the cheques in question issued the cheques in favour of the persons who had been arrayed as accused-2 who in turn got the cheques discounted with the complainant Bank for consideration. Thus from the specific case of the complainant, it is clear that there was no privity of contract between the drawer of the cheques and the complainant bank. No doubt the moment the complainant Bank paid consideration to the payee of the cheques, the complainant Bank stepped into the shoes of the payee and that the presumptions available u/s 118(a) and 139 of the Act would come into play. However, as held by the Hon'ble Supreme Court, it is not necessary for accused in all such cases to enter the witness box to rebut the statutory presumptions and he may discharge the burden of rebutting such presumption on the basis of the materials brought on record. Therefore, in the light of the above, even if presumption u/s 118(a) and 139 of the Act is drawn against the accused person, what is required to be considered is as to whether the accused have been able to rebut this presumption either by positive evidence led by him or through the materials already brought on record. The perusal of the judgments of the two courts below indicates that the courts below have not made any endeavour to find out as to whether the accused has been able to rebut the presumption. The courts below have merely proceeded that the accused have not entered the witness box, therefore the statutory presumption has not been rebutted. This approach of the courts below, according to the above decision of the Apex Court, is perverse. The courts below ought to have considered the various circumstances to find out as to whether the statutory presumptions u/s 118(a) and 139 of the Act have been rebutted.

28. It may be noted that neither in the statutory notice issued prior to filing of complaint nor in the complaint filed by the bank, there is any averment made to the effect that accused issued cheques in favour of the payees towards discharge of any legally enforceable debt or liability due by the drawer to the payee. The only allegation made in these complaints are that on 18.1.2002, accused-2 being

the payee of the cheques came to the complainant bank and requested the bank to discount the cheque issued by accused in his favour and accordingly, the complainant bank discounted the said cheque and paid the amount to the payees under the cheque. Thus the complaints are silent as to whether the cheques in question were issued for consideration and towards discharge of such legally enforceable debt or liability. Thus, the existence of debt or liability due by the drawer of the cheque to the payee is not indicated in the complaint. Even the evidence of P.Ws. 1 and 2 examined on behalf of complainant bank also do not disclose as to whether the cheques in question were issued by the respective drawer to the respective payee for discharge of any debt or liability. According to evidence of P.W. 1, on the particular day, payees under the cheques came to the Bank and requested for discount of cheques issued by accused. It is not his say that payee disclosed that the drawers of cheques have issued them towards discharge of any debt or liability due and that the drawer owed amount to payees. The payee of the cheques who discounted the cheques with the complainant bank have not been examined to show that drawers of the cheques owed any money to them and that the cheques were issued for discharge of such debt As noticed, the specific case of the complainant is that cheques issued by the accused were discounted by the payee of the cheques. Discounting of a cheque by the bank is a normal business operation of the bank. Mere fact that the cheques drawn by a third party in favour of its clients are discounted by the banks, does not lead to any privity of contract between the drawer of the cheque or the bank to attract criminal liability. Therefore, the aspect of civil liability cannot be imported into the question of criminal liability as the criminal liability has to be covered from the specific statutory provisions in that behalf. Admittedly, the cheques in question were not drawn in favour of the bank. The existence of any legally enforceable debt or liability between the drawer or the payee of the cheque is not even remotely indicated. May be the complainant Bank can enforce its civil right against the drawer and the payee of the cheques in a civil court. It is in the evidence of P.W. 1 that the complainant bank has already instituted civil suits before the jurisdictional court for recovery of the amounts covered under these cheques. It is also in the evidence of P.W. 1 that the complainant Bank initiated disciplinary proceedings against its Manager who discounted these cheques and that the Manager was found guilty and has been demoted. From this, it is clear that there was patent gross negligence on the part of the Manager who discounted the cheques. While considering point No. I, I have already held that there was patent gross negligence on the part of the Officer of complainant Bank in paying the amount to the payees by discounting the cheques, as such, the complainant Bank cannot be considered as "holder in due course" of these cheques. Therefore, the complainant cannot maintain criminal action against the drawer of cheques, for offence u/s 138 of the Act. Therefore, having regard to the various facts and circumstances of this case, I am of the opinion that the courts below are not justified in holding that the accused are guilty of offence u/s 138 of the Act The statutory presumptions even if they are drawn against the accused, in the light of the various circumstances

indicated above, has stood rebutted. In the light of the discussion made above, I hold that the judgment of the courts below convicting the accused persons is perverse and contrary to the evidence on record. Therefore, it is liable to be set aside. Accordingly, I answer point No. 3. In view of the above discussion, revision petition deserves to be allowed.

29. Accordingly, the revision petitions are allowed. The judgment of conviction and sentence dated 1.6.2005 passed by the JMFC-IV Court Belgaum in CC Nos. 754/02, 755/02, 98/03 and 284/03 and the common judgment dated 14.2.2006 passed by the Presiding Officer, Fast Track Court-III and Additional Sessions Judge, Belgaum in Criminal Appeal Nos. 95, 96, 102 and 103 of 2005 affirming the judgments of the Trial Court are hereby set aside.

30. The accused are acquitted of the charge leveled against them. The bail and surety bonds of the accused are ordered to be discharged. The complaints filed by the complainant bank are dismissed.