Vijay vs Laxman & Anr on 7 February, 2013

Equivalent citations: AIRONLINE 2013 SC 483, AIRONLINE 2013 SC 423

Author: Gyan Sudha Misra

Bench: T.S. Thakur, Gyan Sudha Misra

Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 261 2013

(Arising out of SLP (Crl.) 6761/2010)

VIJAY ..Appellant

Versus

LAXMAN & ANR. ..Respondents

J U D G M E N T

GYAN SUDHA MISRA, J.

Leave granted.

2. This appeal by special leave which was heard at length at the admission stage itself is directed against the judgment and order dated 29.1.2010 passed by a learned single Judge of the High Court of Madhya Pradesh Bench at Indore, in Criminal Revision No. 926/2009, whereby the conviction and sentence of one year alongwith a fine of Rupees One Lakh and Twenty Thousand imposed on the appellant for commission of an offence under Section 138 of The Banking Public Financial Institutions and Negotiable Instruments (Amendment) Act, 1988 (For short the 'N.I. Act') has been set aside and the criminal revision was allowed. The complainant- appellant, therefore, has assailed the judgment and order of the High Court which reversed the concurrent findings of fact recorded by the trial court and set aside the order of conviction and sentence of the respondent.

3. In order to appreciate the merit of this appeal, the essential factual details as per the version of the complainant-appellant is that the respondent-accused (since acquitted) had borrowed a sum of Rs.1,15,000/- from the complainant-appellant for his personal requirement which was given to him as the relationship between the two was cordial. By way of repayment, the respondent issued a cheque dated 14.08.2007 bearing No.119682 amounting to Rs.1,15,000/- drawn on Vikramaditya Nagrik Sahkari Bank Ltd. Fazalapura, Ujjain in favour of the appellant. The complainant- appellant alleged that on 14.8.2007 when the cheque was presented to the bank for encashment the same was dishonoured by the bank on account of 'insufficient funds'. The complainant-appellant, therefore, issued a legal notice after a few days on 17.8.2007 to the accused-respondent which was not responded as the respondent neither replied to the notice nor paid the said amount.

4. It is an admitted fact that the respondent-accused is a villager who supplied milk at the dairy of the complainant's father in the morning and evening and his father made payment for the supply in the evening. Beyond this part, the case of the respondent-accused is that the complainant took security cheques from all the milk suppliers and used to pay the amount for one year in advance for which the milk had to be supplied. It is on this count that the respondent had issued the cheque in favour of the complainant which was merely by way of amount towards security which was meant to be encashed only if milk was not supplied. Explaining this part of the defence story, one of the witnesses for the defence Jeevan Guru deposed that when any person entered into contract to purchase milk from any person in the village, the dairy owner i.e. the complainant's side made payment of one year in advance and in return the milk supplier like the respondent issued cheques of the said amount by way of security. In view of this arrangement, the accused Laxman started supplying milk to the complainant's father. In course of settlement of accounts, when accused Laxman asked for return of his security cheque, since he had already supplied milk for that amount to the complainant's father Shyam Sunder, he was directed to take back the cheque later on. The accused insisted for return of the security cheque since the account had been settled but the cheque was not given back to the respondent as a result of which an altercation took place between the respondent/accused and the milk supplier due to which the accused lodged a report at the police station on 13.8.2007, since the complainant's father Shyam Sunder also assaulted the respondent-accused and abused him who had refused to return the cheque to the respondent-accused which had been issued by him only by way of security. As a counter blast, the complainant presented the cheque for encashment merely to settle scores with the Respondent/milk supplier.

5. The complaint-appellant, however, filed a complaint under Section 138 of the N.I. Act before the Judicial Magistrate 1st Class, Ujjain, who while conducting the summary trial prescribed under the Act considered the material evidence on record and held the Respondent guilty of offence under Section 138 of the N.I. Act and hence recorded an order of conviction of the respondent-accused due to which he was sentenced to undergo rigorous imprisonment for one year and a fine of Rs.1,20,000/- was also imposed. The respondent-accused feeling aggrieved of the order preferred an appeal before the IXth Additional Sessions Judge, Ujjain, M.P. who also was pleased to uphold the order of conviction and hence dismissed the appeal.

6. The respondent-accused, thereafter, filed a criminal revision in the High Court against the concurrent judgment and orders of the courts below but the High Court was pleased to set aside the judgment and orders of the courts below as it was held that the impugned order of conviction and sentence suffered from grave miscarriage of justice due to non- consideration of the defence evidence of rebuttal which demolished the complainant's case.

7. Assailing the judgment and order of reversal passed by the High Court in favour of the respondent-accused acquitting him of the offence under Section 138 of the Act, learned counsel appearing for the complainant-appellant submitted that the learned single Judge of the High Court ought not to have interfered with the concurrent findings of fact recorded by the courts below by setting aside the judgment and order recording conviction of the respondent and sentencing him as already indicated hereinbefore. The High Court had wrongly appreciated the material evidence on record and held that the respondent-accused appeared to be an illiterate person who can hardly sign and took notice of some dispute affecting the complainant's case since an incident had taken place on 13.8.2007, while the alleged cheque was presented on 14.8.2007 for encashment towards discharge of the loan of Rs.1,15,000/-. Learned counsel also assailed the finding of the High Court which recorded that the cheque was issued by way of security of some transaction of milk which took place between the respondent-accused and father of the complainant- appellant and thus dispelled the complainant-appellant's case.

8. Learned counsel representing the respondent-accused however refuted the complainant's version and submitted that the case lodged by the complainant-appellant against the respondent was clearly with an ulterior motive to harass the respondent keeping in view the grudge in mind by lodging a false case alleging that personal loan of Rs.1,15,000/- was granted to the respondent and the answering respondent had issued cheque towards the repayment of said loan which could not stand the test of scrutiny of the High Court as it noticed the weakness in the evidence led by the complainant.

9. Having heard the learned counsels for the contesting parties in the light of the evidence led by them, we find substance in the plea urged on behalf of the complainant-appellant to the extent that in spite of the admitted signature of the respondent-accused on the cheque, it was not available to the respondent-accused to deny the fact that he had not issued the cheque in favour of the complainant for once the signature on the cheque is admitted and the same had been returned on account of insufficient funds, the offence under Section 138 of the Act will clearly be held to have been made out and it was not open for the respondent- accused to urge that although the cheque had been dishonoured, no offence under the Act is made out. Reliance placed by learned counsel for the complainant-appellant on the authority of this Court in the matter of K.N. Beena vs. Muniyappan And Anr.[1] adds sufficient weight to the plea of the complainant-appellant that the burden of proving the consideration for dishonour of the cheque is not on the complainant-appellant, but the burden of proving that a cheque had not been issued for discharge of a lawful debt or a liability is on the accused and if he fails to discharge such burden, he is liable to be convicted for the offence under the Act. Thus, the contention of the counsel for the appellant that it is the respondent-accused (since acquitted) who should have discharged the burden that the cheque was given merely by way of security, lay upon the Respondent/ accused to establish that the cheque

was not meant to be encashed by the complainant since respondent had already supplied the milk towards the amount. But then the question remains whether the High Court was justified in holding that the respondent had succeeded in proving his case that the cheque was merely by way of security deposit which should not have been encashed in the facts and circumstances of the case since inaction to do so was bound to result into conviction and sentence of the Respondent/Accused.

10. It is undoubtedly true that when a cheque is issued by a person who has signed on the cheque and the complainant reasonably discharges the burden that the cheque had been issued towards a lawful payment, it is for the accused to discharge the burden under Section 118 and 139 of the N.I. Act that the cheque had not been issued towards discharge of a legal debt but was issued by way of security or any other reason on account of some business transaction or was obtained unlawfully. The purpose of the N.I. Act is clearly to provide a speedy remedy to curb and to keep check on the economic offence of duping or cheating a person to whom a cheque is issued towards discharge of a debt and if the complainant reasonably discharges the burden that the payment was towards a lawful debt, it is not open for the accused/signatory of the cheque to set up a defence that although the cheque had been signed by him, which had bounced, the same would not constitute an offence.

11. However, the Negotiable Instruments Act incorporates two presumptions in this regard: one containing in Section 118 of the Act and other in Section 139 thereof. Section 118 (a) reads as under:-

> "118. Presumption as to negotiable instruments.—Until the contrary is proved, the following presumptions shall be made—
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> 1. of consideration: that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;" Section 139 of the Act reads as under:-
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> "139. Presumption in favour of holder.-It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability."

12. While dealing with the aforesaid two presumptions, learned Judges of this Court in the matter of P. Venugopal vs. Madan P. Sarathi[2] had been pleased to hold that under Sections 139, 118 (a) and 138 of the N.I. Act existence of debt or other liabilities has to be proved in the first instance by the complainant but thereafter the burden of proving to the contrary shifts to the accused. Thus, the plea that the instrument/cheque had been obtained from its lawful owner or from any person in lawful custody thereof by means of an offence or fraud or had been obtained from the maker or acceptor thereof by means of an offence or fraud or for unlawful consideration, the burden of disproving that the holder is a holder in due course lies upon him. Hence, this Court observed therein, that indisputably, the initial burden was on the complainant but the presumption raised in favour of the holder of the cheque must be kept confined to the matters covered thereby. Thereafter, the presumption raised does not extend to the extent that the cheque was not issued for the discharge of any debt or liability which is not required to be proved by the complainant as this is

essentially a question of fact and it is the defence which has to prove that the cheque was not issued towards discharge of a lawful debt.

13. Applying the ratio of the aforesaid case as also the case of K.N. Beena vs. Muniyappan And Anr. (supra), when we examine the facts of this case, we have noticed that although the respondent might have failed to discharge the burden that the cheque which the respondent had issued was not signed by him, yet there appears to be a glaring loophole in the case of the complainant who failed to establish that the cheque in fact had been issued by the respondent towards repayment of personal loan since the complaint was lodged by the complainant without even specifying the date on which the loan was advanced nor the complaint indicates the date of its lodgement as the date column indicates 'nil' although as per the complainant's own story, the respondent had assured the complainant that he will return the money within two months for which he had issued a post- dated cheque No.119582 dated 14.8.2007 amounting to Rs.1,15,000/- drawn on Vikramaditya Nagrik Sahkari Bank Ltd., Ujjain. Further case of the complainant is that when the cheque was presented in the bank on 14.8.2007 for getting it deposited in his savings account No.1368 in Vikarmaditya Nagrik Sahkari Bank Ltd. Fazalpura, Ujjain, the said cheque was returned being dishonoured by the bank with a note 'insufficient amount' on 14.8.2007. In the first place, the respondent-accused is alleged to have issued a post-dated cheque dated 14.8.2007 but the complainant/appellant has conveniently omitted to mention the date on which the loan was advanced which is fatal to the complainant's case as from this vital omission it can reasonably be inferred that the cheque was issued on 14.8.2007 and was meant to be encashed at a later date within two months from the date of issuance which was 14.8.2007. But it is evident that the cheque was presented before the bank on the date of issuance itself which was 14.8.2007 and on the same date i.e. 14.8.2007, a written memo was received by the complainant indicating insufficient fund. In the first place if the cheque was towards repayment of the loan amount, the same was clearly meant to be encashed at a later date within two months or at least a little later than the date on which the cheque was issued: If the cheque was issued towards repayment of loan it is beyond comprehension as to why the cheque was presented by the complainant on the same date when it was issued and the complainant was also lodged without specifying on which date the amount of loan was advanced as also the date on which compliant was lodged as the date is conveniently missing. Under the background that just one day prior to 14.8.2007 i.e. 13.8.2007 an altercation had taken place between the respondent-accused and the complainant-dairy owner for which a case also had been lodged by the respondent-accused against the complainant's father/dairy owner, missing of the date on which loan was advanced and the date on which complaint was lodged, casts a serious doubt on the complainant's plea. It is, therefore, difficult to appreciate as to why the cheque which even as per the case of the complainant was towards repayment of loan which was meant to be encashed within two months, was deposited on the date of issuance itself. The complainant thus has miserably failed to prove his case that the cheque was issued towards discharge of a lawful debt and it was meant to be encashed on the same date when it was issued specially when the complainant has failed to disclose the date on which the alleged amount was advanced to the Respondent/Accused. There are thus glaring inconsistencies indicating gaping hole in the complainant's version that the cheque although had been issued, the same was also meant to be encashed instantly on the same date when it was issued.

14. Thus, we are of the view that although the cheque might have been duly obtained from its lawful owner i.e. the respondent-accused, it was used for unlawful reason as it appears to have been submitted for encashment on a date when it was not meant to be presented as in that event the respondent would have had no reason to ask for a loan from the complainant if he had the capacity to discharge the loan amount on the date when the cheque had been issued. In any event, it leaves the complainant's case in the realm of grave doubt on which the case of conviction and sentence cannot be sustained.

15. Thus, in the light of the evidence on record indicating grave weaknesses in the complainant's case, we are of the view that the High Court has rightly set aside the findings recorded by the Courts below and consequently set aside the conviction and sentence since there were glaring inconsistencies in the complainant's case giving rise to perverse findings resulting into unwarranted conviction and sentence of the respondent. In fact, the trial court as also the first appellate court of facts seems to have missed the important ingredients of Sections 118 (a) and 139 of the N.I. Act which made it incumbent on the courts below to examine the defence evidence of rebuttal as to whether the respondent/accused discharged his burden to disprove the complainant's case and recorded the finding only on the basis of the complainant's version. On scrutiny of the evidence which we did to avoid unwarranted conviction and miscarriage of justice, we have found that the High Court has rightly overruled the decision of the courts below which were under challenge as the trial court as also the 1st Appellate Court misdirected itself by ignoring the defence version which succeeded in dislodging the complainant's case on the strength of convincing evidence and thus discharged the burden envisaged under Sections 118 (a) and 139 of the N.I. Act which although speaks of presumption in favour of the holder of the cheque, it has included the provisos by incorporating the expressions "until the contrary is proved" and "unless the contrary is proved" which are the riders imposed by the Legislature under the aforesaid provisions of Sections 118 and 139 of the N.I. Act as the Legislature chooses to provide adequate safeguards in the Act to protect honest drawers from unnecessary harassment but this does not preclude the person against whom presumption is drawn from rebutting it and proving to the contrary.

16. Consequently, we uphold the judgment and order of acquittal of the respondent passed by the High Court and hence dismissed this appeal.

.....J. (T.S. Thakur) .....J. (Gyan Sudha Misra) New Delhi;

February 07, 2013

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 261 OF 2013
(Arising out of S.L.P. (Crl.) No.6761 of 2010)

Vijay …Appellant

Versus

Laxman and Anr. …Respondents

J U D G M E N T

T.S. Thakur, J.

1. I have had the advantage of going through the judgment and order proposed by my esteemed colleague Gyan Sudha Misra, J. I entirely agree with the conclusion drawn by Her Ladyship that the respondent has been rightly acquitted of the charge framed against him under Section 138 of the Negotiable Instruments Act, 1881 and that the present appeal ought to be dismissed. I, however, would like to add a few words of my own in support of that conclusion.

2. The factual matrix in which the complaint under Section 138 of the Negotiable Instruments Act was filed against the respondent has been set out in the order proposed by my esteemed sister Misra J. It is, therefore, unnecessary for me to state the facts over again. All that need be mentioned is that according to the complainant the accused had borrowed a sum of Rs.1,15,000/- from the former for repayment whereof the latter is said to have issued a cheque for an equal amount payable on the Vikramaditya Nagrik Sahkari Bank Ltd. Fazalapura, Ujjain. The cheque when presented to the bank was dishonoured for 'insufficient funds'. The accused having failed to make any payment despite statutory notice being served upon him was tried for the offence punishable under the provision mentioned above. Both the courts below found the accused guilty and sentenced him to undergo imprisonment for a period of one year besides payment of Rs.1,20,000/- towards fine.

3. The case set up by the accused in defence is that he is a Milk Vendor who supplied milk to the father of the complainant who runs a dairy farm. The accused claimed that according to the prevailing practice he received an advance towards the supply of milk for a period of one year and furnished security by way of a cheque for a sum of Rs.1,15,000/-. When the annual accounts between the accused-respondent and the dairy owner-father of the complainant was settled, the accused demanded the return of the cheque to him. The dairy owner, however, avoided return of cheque promising to do so some other day. Since the cheque was not returned to the accused despite demand even on a subsequent occasion, an altercation took place between the two leading to the registration of a first information report against the father of the complainant with the jurisdictional police. On the very following day after the said altercation, the cheque which the respondent was demanding back from the father of the complainant was presented for encashment to the bank by the complainant followed by a notice demanding payment of the amount and eventually a complaint under Section 138 against the accused. The case of the accused, thus, admitted the issue and handing over of the cheque in favour of the complainant but denied that the same was towards repayment of any loan. The High Court has rightly accepted the version given by the accused-respondent herein. We say so for reasons more than one. In the first place the story of the complainant that he advanced a loan to the respondent-accused is unsupported by any material leave alone any documentary evidence that any such loan transaction had ever taken place. So much

so, the complaint does not even indicate the date on which the loan was demanded and advanced. It is blissfully silent about these aspects thereby making the entire story suspect. We are not unmindful of the fact that there is a presumption that the issue of a cheque is for consideration. Sections 118 and 139 of the Negotiable Instruments Act make that abundantly clear. That presumption is, however, rebuttable in nature. What is most important is that the standard of proof required for rebutting any such presumption is not as high as that required of the prosecution. So long as the accused can make his version reasonably probable, the burden of rebutting the presumption would stand discharged. Whether or not it is so in a given case depends upon the facts and circumstances of that case. It is trite that the courts can take into consideration the circumstances appearing in the evidence to determine whether the presumption should be held to be sufficiently rebutted. The legal position regarding the standard of proof required for rebutting a presumption is fairly well settled by a long line of decisions of this Court.

4. In M.S. Narayana Menon v. State of Kerala (2006) 6 SCC 39, while dealing with that aspect in a case under Section 138 of the Negotiable Instruments Act, 1881, this Court held that the presumptions under Sections 118(a) and 139 of the Act are rebuttable and the standard of proof required for such rebuttal is preponderance of probabilities and not proof beyond reasonable doubt. The Court observed:

> "29. In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words "proved" and "disproved" have been defined in Section 3 of the Evidence Act (the interpretation clause)...
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> 30. Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist.

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.

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32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies.

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41...Therefore, the rebuttal does not have to be conculsively 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'." 5 The decision in M.S. Narayana Menon (supra) was relied upon in K. Prakashan v. P.K. Surenderan (2008) 1 SCC 258 where this Court reiterated the legal position as under:

> "13. The Act raises two presumptions; firstly, in regard to the passing of consideration as contained in Section 118 (a) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature referred to in Section 139 discharged in whole or in part any debt or other liability. Presumptions both under Sections 118 (a) and 139 are rebuttable in nature.
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> 14. It is furthermore not in doubt or dispute that whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability."

6. To the same effect is the decision of this Court in Krishna Janardhan Bhat v. Dattatraya G. Hegde (2008) 4 SCC 54 where this Court observed:

> "32... Standard of proof on the part of an accused and that of the prosecution a criminal case is different.
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> 34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is preponderance of probabilities.

xx xx xx xx 45... 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 Section139 should be delicately balanced."

7. Presumptions under Sections 118(a) and Section 139 were held to be rebuttable on a preponderance of probabilities in Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pyarelal (1999) 3 SCC 35 also where the Court observed:

> "11... Though the evidential burden is initially placed on the defendant by virtue of S.118 it can be rebutted by the defendant by showing a preponderance of probabilities that such consideration as stated in the pronote, or in the suit notice or in the plaint does not exist and once the presumption is so rebutted, the said presumption 'disappears'. For the purpose of rebutting the initial evidential burden, the defendant can rely on direct evidence or circumstantial evidence or on presumptions of law or fact. Once such convincing rebuttal evidence is adduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of

> probabilities, the evidential burden shifts back to the plaintiff who has also the legal burden."

8. In Hiten P. Dalal v. Bratindranath Banerjee (2001) 6 SCC 16 this Court compared evidentiary presumptions in favour of the prosecution with the presumption of innocence in the following terms:

> "22... Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.
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> 23. In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. ..."

9. Decisions in Mahtab Singh & Anr. v. State of Uttar Pradesh (2009) 13 SCC 670, Subramaniam v. State of Tamil Nadu (2009) 14 SCC 415 and Vishnu Dutt Sharma v. Daya Sapra (2009) 13 SCC 729, take the same line of reasoning.

10. Coming then to the present case, the absence of any details of the date on which the loan was advanced as also the absence of any documentary or other evidence to show that any such loan transaction had indeed taken place between the parties is a significant circumstance. So also the fact that the cheque was presented on the day following the altercation between the parties is a circumstance that cannot be brushed away. The version of the respondent that the cheque was not returned to him and the complainant presented the same to wreak vengeance against him is a circumstance that cannot be easily rejected. Super added to all this is the testimony of DW1, Jeevan Guru according to whom the accounts were settled between the father of the complainant and the accused in his presence and upon settlement the accused had demanded return of this cheque given in lieu of the advance. It was further stated by the witness that the complainant's father had avoided to return the cheque and promised to do so on some other day. There is no reason much less a cogent one suggested to us for rejecting the deposition of this witness who has testified that after the incident of altercation between the two parties the accused has been supplying milk to the witness as he is also in the same business. Non- examination of the father of the complainant who was said to be present outside the Court hall on the date the complainant's statement was recorded also assumes importance. It gives rise to an inference that the non- examination was a deliberate attempt of the prosecution to keep him away from the court for otherwise he would have to accept that the accused was actually supplying milk to him and that the accused was given the price of the milk in advance as per the trade practice in acknowledgement and by way of security for which amount the accused had issued a cheque in question.

11. In the totality of the above circumstances, the High Court was perfectly justified in its conclusion that the prosecution had failed to make out a case against the accused and in acquitting him of the charges. With these observations in elucidation of the conclusion drawn by my worthy colleague, I agree that the appeal fails and be dismissed.

.....J. (T.S. Thakur) New Delhi February 7, 2013

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[1] 2001 (7) Scale 331
[2] (2009) 1 SCC 492