Supreme Court of India
M.S. Narayana Menon @ Mani vs State Of Kerala & Anr on 4 July, 2006
Author: S.B. Sinha
Bench: S.B. Sinha, P.P. Naolekar

CASE NO.:
Appeal (crl.) 1012 of 1999

PETITIONER:
M.S. Narayana Menon @ Mani

RESPONDENT:
State of Kerala & Anr.

DATE OF JUDGMENT: 04/07/2006

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:

J U D G M E N T S.B. SINHA, J :

The Second Respondent was a member of the Cochin Stock Exchange. The Appellant used to carry on transactions in shares through the Second Respondent in the said Stock Exchange. They have been on business terms for some time. A complaint petition was filed on 19.11.1992 by the Second Respondent herein against the Appellant purported to be for commission of an offence under Section 138 of the Negotiable Instruments Act (for short "the Act"), on the following allegations:

The Second Respondent had been carrying on business of stock and share brokers under the name and style of "Midhu and Midhun's Co.". It is a sole proprietory concern. The Appellant also used to do transactions in shares through him in his capacity as a share broker. It has not been disputed that the Appellant had closed the account and, thus, when the cheque in question being dated 31.7.1992 (Ex. P-1) drawn on Ernakulam Banerji Road branch of the Syndicate Bank, was presented for encashment by the complainant through his bankers, namely, the Cochin Stock Exchange Extension Counter of the Syndicate Bank, it was returned on 4.8.1982 with the remarks "account closed".

Allegedly, a sum of Rs. 3,00,033/- was, thus, owing and due to him from the Appellant in relation to the said transactions. The Appellant is said to have paid a sum of Rs. 5000/- in cash and issued another cheque being dated 17.8.1992 drawn on Ernakulam Broadway Branch of the Vijaya Bank for a sum of Rs. 2,95,033/-. The said cheque being Exhibit P-3 was presented for encashment on 18.8.1992 through the same bankers, but it was dishonoured on 19.8.1992 as the funds in the account of the Appellant were found to be insufficient.

A notice was issued by the complainant on 27.8.1992 informing the Appellant about the dishonour of the said cheque. He sent a reply to the said notice. The defence of the Appellant had been that the first cheque was a blank cheque given by him to Respondent No. 2 by way of security. The second cheque was issued in February, 1992 and the same had been given for the purpose of discounting.

The Respondent is said to have not issued any contract note pertaining to the transactions the Appellant had with him.

At the trial, Respondent No. 2 has examined five witnesses including himself. The Appellant examined three witnesses. Respondent No. 2, however, did not produce the original books of accounts in order to prove the transactions he had with the Appellant.

The prosecution of the Appellant was confined to the dishonour of the cheque dated 17.8.1992 only.

In the said proceedings, the Appellant herein raised a plea that the Respondent No. 2 was in dire financial assistance and a cheque for a sum of Rs. 2,95,033/- was given by way of loan so as to enable him to tide over his difficulties. He also adduced his evidence before the Trial Court. The Trial Court in its judgment dated 15.7.1994 opined that the Appellant herein had failed to discharge the onus placed on him in terms of Section 139 of the Act stating:

"To the evidence adduced in this case, I have to hold that the accused failed to rebut the presumptions available to Ext. p3 cheque. The case of P.W.1 that the cheque was issued by the accused on the date mentioned therein for discharging a liability due to him, is supported by Ext. D2 to D9. The case of the complainant that the accused paid Rs. 5,000/- and thereafter he issued Ext. P3 cheque, is only to be accepted under this circumstance. I find that the cheque was issued by the accused for discharging a liability legally due to the complainant, point answered accordingly."

A verdict of guilt against the Appellant under Section 138 of the Act on the basis of the said findings was recorded. He was sentenced to undergo rigorous imprisonment for one year.

On an appeal preferred thereagainst by the Appellant herein, the said judgment of conviction and sentence was, however, set aside. The appellate court analysed the evidences on records in great details and concluded that explanation offered by the Appellant was more probable.

The complainant, however, aggrieved by and dissatisfied therewith filed a criminal appeal before the High Court which has been allowed by reason of a judgment dated 24.5.1999 which is impugned herein.

Submission of Mr. L. Nageswara Rao, learned senior counsel appearing on behalf of the Appellant is that the Trial Court and the High Court misconstrued and misinterpreted Section 139 of the Act and furthermore failed to take into consideration the principle of law that once the accused discharges the initial burden placed on him, the burden of proof would revert back to the prosecution.

The High Court, according to the learned counsel, acted illegally and without jurisdiction in arriving at the finding that it was for the accused to prove his innocence by adducing positive evidence for rebutting the statutory presumption that he had not received the cheque of the nature referred to under Section 138 of the Act for the discharge, in whole or in part, of any debt or other liability.

Mr. E.M.S. Anam, learned counsel appearing on behalf of the Respondent, on the other hand, argued that statutory presumption raised to the effect that an accused in terms of Section 139 of the Act although is a rebuttable one, the question will have to be determined upon taking into consideration another presumption drawn in terms of Section 118(a) thereof.

According to the learned counsel, the Appellant did not dispute the statement of accounts in relation to certain transactions. He had also acknowledged his liability in relation to some of the transactions. In that view of the matter, it was urged, that the dispute being only in relation to the quantum of debt, the impugned judgment of the High Court must be sustained against the Appellant as he rebutted the presumption arising against him under Section 118(a) read with Section 139 of the Act.

Before adverting to the propositions of law adverted to by the learned counsel, we may notice certain broad facts.

Issuance of three cheques being Ex. P-1, 2 and 3 by the Appellant is not in dispute. One of the cheques being Exhibit P-1, according to the accused, however, was a blank one.

Cochin Stock Exchange has been constituted under the Securities Contracts (Regulation) Act, 1956. It is governed by the provisions of the Securities and Exchange Board of India Act, 1992 as also the Securities Contracts (Regulation) Rules, 1957 framed under the 1956 Act.

The transactions carried out by the brokers in the Cochin Stock Exchange are governed by the bye-laws framed by it as also the regulations made under the provisions of the aforementioned Act. Indisputably, dealings in the stock exchange are governed by the bye-laws made under the statute which were marked as Exhibit D-15 in terms whereof inter alia trading sessions, meaning thereby, meetings of the members of the Cochin Stock Exchange must be held on the floor of the Exchange itself; entry wherefor is restricted only to its members. All transactions by the investors and speculators must be made through the members of the Exchange. Whereas the Second Respondent was a member of the Stock Exchange, the Appellant was not. They belong to different districts in the State of Kerala. Indisputably, the Appellant had been taking the services of the Second Respondent for transacting his business of purchase and sale of shares.

All bargains on securities carried on for a period of 14 days is known as settlement. A statement of accounts is furnished by a broker to the investor in prescribed form being Form A together with a contract note. The contract note contains accounts of the securities purchased or sold, its quantity, rate as also the date of transaction. The same is issued so as to enable an investor to compare the entries in the contract note with those made in the statement of accounts enabling him to confirm or deny the particulars contained therein. The dispute between the parties appears to be covered by settlement Nos. 15 to 22 during the years 1991-92. The Second Respondent in his evidence admitted that Exhibits D-2 to D-9 corresponded to P-10 series which pertained to settlement Nos. 15/91 to 22/92 showing transactions entered into by and between him and the Appellant for a sum of Rs. 3,00,033/-.

According to the Appellant, Exhibits D-2 to D-9 did not reflect the correct accounts of the transactions and the entries made therein are false. His further plea was that the date of the cheque (being Exhibit P-3) was not in his own handwriting which had been issued to the complainant so as to enable him to facilitate the complainant to discount the same and overcome his economic exigencies.

The learned appellate court noticed that it had been accepted that if Exhibits D-2 to D-9 accounts corresponding to Exhibit P-10 series cannot be relied on as true and correct accounts incorporating the particulars of various transactions, the complainant's case will fall to the ground as the story of issuance of the cheque by the Appellant could not have been founded thereupon. As regards the contention of the Second Respondent that the Appellant was estopped and precluded from disputing the correctness of Exhibit P-10 series as he having accepted and acknowledged the correctness thereof, it was held:

" On a close scrutiny I am of the view that the said contention on behalf of PW1 cannot be accepted. In the case of the statement of accounts dated 24-1-1992, 7-2-1992 and 21-2-1992 in Ext. P10 series pertaining to the 20th, 21st and 22nd settlements (corresponding to Exts. D7 to D9) there is an endorsement on the reverse to the effect that those accounts were received and accepted by the accused. But, there is no such endorsement in the case of the statement of accounts dated 8-11- 1991, 22-11-1991, 6-12-1991, 20-12-1991 and 10- 1-1992 pertaining to the 15th, 16th, 17th, 18th and 19th settlements corresponding to Exts. D2 to D6. That apart, if Exts. D2 to D9 accounts corresponding to Ext. P10 series are true then all the transactions entered therein should find a place in Ext. D11 series of accounts maintained by the Cochin Stock Exchange. With regard to Ext. D11 series of accounts there is no quarrel that the same are the officially maintained accounts prepared after every settlement the transactions of which are fed in to the computer by means of memos of confirmation like Ext. D1 memo. A comparison of Ext. P10 series of accounts with Ext. D11 series of officially approved accounts will show that transactions worth Rs. 14,63,555/- entered in Ext. D10 series go unaccounted in Ext. D11 series. This is not a small figure to be lightly ignored. There is no dispute that the column pertaining to contract number in Ext. P10 series of accounts is left blank both in the case of purchases as well as sales of shares. The specific case of the accused is that PW1 was not giving him copies of the contract notes pertaining to the transactions by which he had purchased and sold shares on behalf of the accused. The above version of the accused is probabilised by the blank columns regarding the contract number in Ext. P10 series. If, as asserted by PW1 he had been promptly giving contract notes to the accused, then the relevant columns in Ext. P10 series for entering the contract note number would have been filled up. Moreover, except the bald statements of PW1 that he is having in his possession carbon copies of the contract notes issued to the accused, there has been absolutely no gesture on his part to produce them before court. Without comparing the statement of accounts with the relevant contract note it is impossible for the accused or any speculator for that matter, to either confirm or deny the entries in the statement of accounts "

Admission or acknowledgement of three out of eight statements of accounts by the Appellant, the learned appellate court opined, by itself would not be sufficient to invoke the principle of estoppel. The appellate court noticed that the parties came to know each other personally at the Cochin Stock

Exchange and till the fifteen settlements they did not meet. It was further found that before such acquaintance ripened into thick business relations some security from the Appellant was sought for by the Second Respondent by way of abundant caution wherefor only according to the Appellant a blank cheque was given. The court having regard to the facts and circumstances of this case, came to the conclusion that the said version of the Appellant is quite credible and probable. In doing so, the business practice that some security is always asked for in similar transaction was noticed.

The appellate court further held that the stand of the Appellant was corroborated by the Assistant Secretary of the Cochin Stock Exchange as he had categorically stated that the members could carry on business in transactions within the Exchange itself. It was noticed that the said witness categorically stated that all its members were required to maintain prescribed books of accounts for a period of five years but the Second Respondent herein clearly and in unequivocal terms admitted that he had not been maintaining the prescribed books of accounts including register of transactions, general ledger, clients' ledger, journals and documents register showing full particulars of shares and securities received and delivered. In the aforementioned situation, it was held that when Exhibit P-10 series of the statement of accounts which were not traceable to any statutory rules would not have any probative value particularly when D-11 series of statement of accounts officially maintained by the Cochin Stock Exchange contained vital omissions in regard to transactions to the tune of Rs. 14 lakhs. Furthermore, the books of accounts having not been kept in the ordinary course of business were not admissible in evidence and, thus, the genuineness thereof was open to question. The learned Judge further came to the conclusion that the Second Respondent had not been able to prove that the discrepancies could be explained away as has been sought to be done by the Second Respondent when there were some other transactions which did not pertain to the Cochin Stock Exchange particularly when the Appellant had denied or disputed the same categorically stating that apart from the transactions in the Cochin Stock Exchange, the Second Respondent had never been engaged by him for purchasing or selling shares from other Stock Exchanges. The court further noticed that even a suggestion had been put on behalf of the Second Respondent to the Appellant while he was being examined as DW-5 that it was because brokerage, value of application forms and other transactions outside the Cochin Stock Exchange which are not included in D-11 series, those settlements did not tally with Exhibit P-10 series. Significantly it was held:

" When PW1 himself does not have such a case either in his oral evidence or in the averments in his complaint, the explanation for the wide discrepancy between Ext. P10 series and Ext. D11 series could have been offered by the defence. The trial Magistrate could explain away the above discrepancy by observing that there are certain variations. In the first place it was not open to the defence to put forward such an explanation which the complainant himself does not have either in his written complaint or in his testimony. Secondly, the discrepancy in figures runs into more than 14 lakhs of rupees. DW4, the Executive Director of Cochin Stock Exchange has credibly deposed before Court that a member of one exchange cannot transact outside the floor of the exchange and if one enters into any such transaction which is called "kerb transaction", he has to report the same to the exchange of which he is a member. PW1 has no case that he has reported any of the kerb transactions entered into by him to the Cochin Stock Exchange. Ext. D11 series of statement of accounts maintained by the Cochin Stock Exchange does not contain any of those kerb transactions.

When PW1 was admittedly engaged by the accused for purchasing and selling shares from the Cochin Stock Exchange only, Ext. P10 series of accounts which include kerb transactions entered into by PW1 outside the floor of the Cochin Stock Exchange cannot be put against the accused to prove any liability. Even according to PW1 his commission (that is, brokerage) ranges only from 0.25% to 0.75%. The accused examined as DW5 has asserted that even if brokerage was included in Ext. D11 statement of accounts maintained by the Cochin Stock Exchange still the said accounts will not tally with Ext. P10 series of accounts. As for the value of application forms, the same comes to only 2 rupees and this cannot tilt the balance to the tune of 14 and odd lakhs of rupees "

The High Court on the contrary did not go into the said contentions at all. It proceeded on the basis that the scope and ambit of the evidence to be adduced in the mater of prosecution of an offence punishable under Section 138 of the Act should not go beyond the requirements of law and that correctness of the accounts maintained by the Second Respondent in terms of the provisions of the Act and Rules could not have been a ground to disbelieve his case. It was held:

" The contention of the 1st respondent is that all the transactions mentioned in Ext. P10 series are not found in Ext. D11 series maintained by the Cochin Stock Exchange in the name of the appellant as share broker. The appellant has explained this contention of the respondent stating that the transactions conducted by him outside the Stock Exchange will not be found in the accounts maintained by the Cochin Stock Exchange and therefore there is difference in Ext. P10 series and Ext. D11 series."

The High Court, in view of the findings of fact arrived at by the appellate court, in our opinion, committed a manifest error in reversing the said judgment. The Second Respondent evidently had not been able to explain the discrepancies in his books of accounts. If except putting a suggestion to the witness, the Second Respondent has not been able to bring on records any material to show that the parties had any transactions other than those which had been entered into through the Cochin Stock Exchange, the explanation of the accused could not have been thrown over board. The High Court has furthermore committed a manifest error of record in arriving at a finding that the Appellant himself or through his agent has acknowledged as correct the statements appearing in Exhibit P-10 series dated 16.12.1991, 20.12.1991, 28.12.1991, 10.1.1992, 24.1.1992, 7.2.1992 and 21.2.1992. Admittedly there had been no acknowledgement in respect of five statements of accounts being Exhibits D-2 to D-6.

In view of the said error of record, the findings of the High Court to the effect that the Appellant had not been able to substantiate his contention as regard the correctness of the accounts of Exhibit P-10 series must be rejected.

In view the aforementioned backdrop of events, the questions of law which had been raised before us will have to be considered. Before, we advert to the said questions, we may notice the provisions of Sections 118(a) and 139 of the Act which read as under:

"118. Presumptions as to negotiable instruments - Until the contrary is proved, the following presumptions shall be made:

(a) 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."

"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."

Presumptions both under Sections 118(a) and 139 of the Act are rebuttable in nature.

What would be the effect of the expressions 'May Presume', 'Shall Presume' and 'Conclusive Proof' has been considered by this Court in Union of India (UOI) v. Pramod Gupta (D) by L.Rs. and Ors., [(2005) 12 SCC 1] in the following terms:

" It is true that the legislature used two different phraseologies "shall be presumed" and "may be presumed" in Section 42 of the Punjab Land Revenue Act and furthermore although provided for the mode and manner of rebuttal of such presumption as regards the right to mines and minerals said to be vested in the Government vis- `-vis the absence thereof in relation to the lands presumed to be retained by the landowners but the same would not mean that the words "shall presume" would be conclusive. The meaning of the expressions "may presume" and "shall presume" have been explained in Section 4 of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus, the expression "shall presume" cannot be held to be synonymous with "conclusive proof" "

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) to mean: -

"Proved A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

Disproved A fact is said to be disproved when, after considering the matters before it the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist."

Applying the said definitions of 'proved' or 'disproved' to 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.

A Division Bench of this Court in Bharat Barrel & Drum Manufacturing Company v. Amin Chand Payrelal [(1999) 3 SCC 35] albeit in a civil case laid down the law in the following terms:

"Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non- existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt "

This Court, therefore, clearly opined that it is not necessary for the defendant to disprove the existence of consideration by way of direct evidence.

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

Presumption drawn under a statute has only an evidentiary value. Presumptions are raised in terms of the Evidence Act. Presumption drawn in respect of one fact may be an evidence even for the purpose of drawing presumption under another.

The Second Respondent herein was a member of a Stock Exchange. The transactions in relation to the Stock Exchange are regulated by the statutes and statutory rules. If in terms of the provisions of a statute, a member of a Stock Exchange is required to maintain books of accounts in a particular manner, he would be required to do so, as non-compliance of the mandatory provisions of the Rules may entail punishment. It is not in dispute that transactions comprising purchases and sales of shares by investors is a matter of confidence. Both parties would have to rely upon one another. For the said purpose, the courts of law may also take judicial notice of the practice prevailing in such business. The learned Appellate Judge rightly did so.

The definite case of the second Respondent was that the cheque dated 17.8.1992 was issued by the Appellant in discharge of his debt. The said liability by way of debt arose in terms of the transactions. For proving the said transactions, the Second Respondent filed books of accounts. The books of accounts maintained by the Second Respondent were found to be not reflecting the correct state of affairs. A discrepancy of more than Rs. 14,00,000/- was found.

It was for the Appellant only to discharge initial onus of proof. He was not necessarily required to disprove the prosecution case. Whether in the given facts and circumstances of a case, the initial burden has been discharged by an accused would be a question of fact. It was matter relating to appreciation of evidence. The High Court in its impugned judgment did not point out any error on the part of the appellate court in that behalf.

What would be the effect of a presumption and the nature thereof fell for consideration before a Full Bench of the Andhra Pradesh High Court in G. Vasu v. Syed Yaseen Sifuddin Quadri [AIR 1987 AP 139]. In an instructive judgment, Rao, J. (as His Lordship then was) speaking for the Full Bench noticed various provisions of the Evidence Act as also a large number of case laws and authorities in opining:

"From the aforesaid authorities, we hold that once the defendant adduces evidence to the satisfaction of the Court that on a preponderance of probabilities there is no consideration in the manner pleaded in the plaint or suit notice or the plaintiff's evidence, the burden shifts to the plaintiff and the presumption 'disappears' and does not haunt the defendant any longer."

It was further held:

"For the aforesaid reasons, we are of the view that where, in a suit on a promissory note, the case of the defendant as to the circumstances under which the promissory note was executed is not accepted, it is open to the defendant to prove that the case set up by the plaintiff on the basis of the recitals in the promissory note, or the case set up in suit notice or in the plaint is not true and rebut the presumption under S. 118 by showing a preponderance of probabilities in his favour and against the plaintiff. He need not lead evidence on all conceivable modes of consideration for establishing that the promissory note is not supported by any consideration whatsoever. The words 'until the contrary is proved' in S. 118 do not mean that the defendant must necessarily show that the document is not supported by any form of consideration but the defendant has the option to ask the Court to consider the non-existence of consideration so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that consideration did not exist. 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. Thereafter, the presumption under S. 118 does

not again come to the plaintiff's rescue. Once both parties have adduced evidence, the Court has to consider the same and the burden of proof loses all its importance."

If for the purpose of a civil litigation, the defendant may not adduce any evidence to discharge the initial burden placed on him, a 'fortiori' even an accused need not enter into the witness box and examine other witnesses in support of his defence. He, it will bear repetition to state, need not disprove the prosecution case in its entirety as has been held by the High Court.

A presumption is a legal or factual assumption drawn from the existence of certain facts.

In P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd edition, at page 3697, the term 'presumption' has been defined as under:

"A presumption is an inference as to the existence of a fact not actually known arising from its connection with another which is known.

A presumption is a conclusion drawn from the proof of facts or circumstances and stands as establishing facts until overcome by contrary proof.

A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged but of which there is no direct proof. It follows, therefore that a presumption of any fact is an inference of that fact from others that are known". (per ABBOTT, C.J., R. v. Burdett, 4 B. & Ald,

161) The word 'Presumption' inherently imports an act of reasoning a conclusion of the judgment; and it is applied to denote such facts or moral phenomena, as from experience we known to be invariably, or commonly, connected with some other related facts. (Wills on Circumstantial Evidence) A presumption is a probable inference which common sense draws from circumstances usually occurring in such cases. The slightest presumption is of the nature of probability, and there are almost infinite shades from slight probability to the highest moral certainty. A presumption, strictly speaking, results from a previously known and ascertained connection between the presumed fact and the fact from which the inference is made."

Having noticed the effect of presumption which was required to be raised in terms of Section 118(a) of the Act, we may also notice a decision of this Court in regard to 'presumption' under Section 139 thereof.

In Hiten P. Dalal v. Bratindranath Banerjee [(2001) 6 SCC 16], a 3- Judge Bench of this Court held that although by reason of Sections 138 and 139 of the Act, the presumption of law as distinguished from presumption of fact is drawn, the court has no other option but to draw the same in every case where the factual basis of raising the presumption is established. Pal, J. speaking for a 3-Judge Bench, however, opined:

" 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.

In other words, provided the facts required to form the basis of a presumption of law exist, 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. A fact is said to be proved when, "after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists". 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"."

The court, however, in the fact situation obtaining therein, was not required to go into the question as to whether an accused can discharge the onus placed on him even from the materials brought on records by the complainant himself. Evidently in law he is entitled to do so.

In Goaplast (P) Ltd. v. Chico Ursula D'Souza and Another [(2003) 3 SCC 232], upon which reliance was placed by the learned counsel, this Court held that the presumption arising under Section 139 of the Act can be rebutted by adducing evidence and the burden of proof is on the person who want to rebut the presumption. The question which arose for consideration therein was as to whether closure of accounts or stoppage of payment is sufficient defence to escape from the penal liability under Section 138 of the Act. The answer to the question was rendered in the negative. Such a question does not arise in the instant case.

In Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay [AIR 1961 SC 1316], Subba Rao, J., as the learned Chief Justice then was, held that while considering the question as to whether burden of proof in terms of Section 118 had been discharged or not, relevant evidence cannot be permitted to be withheld. If a relevant evidence is withheld, the court may draw a presumption to the effect that if the same was produced might have gone unfavourable to the plaintiff. Such a presumption was itself held to be sufficient to rebut the presumption arising under Section 118 of the Act stating:

" Briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact. We are not concerned here with irrebuttable presumptions of law."

Two adverse inferences in the instant case are liable to be drawn against the Second Respondent:

(i) He deliberately has not produced his books of accounts.

(ii) He had not been maintaining the statutory books of accounts and other registers in terms of the bye-laws of Cochin Stock Exchange.

Moreover, the onus on an accused is not as heavy as that of the prosecution. It may be compared with a defendant in a civil proceeding.

In Harbhajan Singh v. State of Punjab and another [AIR 1966 SC 97], this Court while considering the nature and scope of onus of proof which the accused was required to discharge in seeking the protection of exception 9 to Section 499 of the Indian Penal Code stated the law as under:

" In other words, the onus on an accused person may well be compared to the onus on a party in civil proceedings, and just as in civil proceedings the court trying an issue makes its decision by adopting the test of probabilities, so must a Criminal Court hold that the plea made by the accused is proved if a preponderance of probability is established by the evidence led by him..."

In V.D. Jhingan v. State of Uttar Pradesh, [AIR 1966 SC 1762], it was stated:

" It is well-established that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt "

[See also State of Maharashtra v. Wasudeo Ramchandra Kaidalwar, AIR 1981 SC 1186] In Kali Ram v. State of Himachal Pradesh [(1973) 2 SCC 808], Khanna, J., speaking for the 3-Judge Bench, held: " One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal."

In The State through the Delhi Administration v. Sanjay Gandhi [AIR 1978 SC 961], it was stated:

" Indeed, proof of facts by preponderance of probabilities as in a civil case is not foreign to criminal jurisprudence because, in cases where the statute raises a presumption of guilt as, for example, the Prevention of Corruption Act, the accused is entitled to rebut that presumption by proving his defence by a balance of probabilities. He does not have to establish his case beyond a reasonable doubt. The same standard of proof as in a civil case applies to proof of incidental issues involved in a

criminal trial like the cancellation of bail of an accused "

The evidences adduced by the parties before the trial court lead to one conclusion that the Appellant had been able to discharge his initial burden. The burden thereafter shifted to the Second Respondent to prove his case. He failed to do so.

The submission of the Second Respondent that the Appellant had not denied his entire responsibility and the dispute relating only to the quantum of debt cannot be accepted.

We in the facts and circumstances of this case need not go into the question as to whether even if the prosecution fails to prove that a large portion of the amount claimed to be a part of debt was not owing and due to the complainant by the accused and only because he has issued a cheque for a higher amount, he would be convicted if it is held that existence of debt in respect of large part of the said amount has not been proved. The Appellant clearly said that nothing is due and the cheque was issued by way of security. The said defence has been accepted as probable. If the defence is acceptable as probable the cheque therefor cannot be held to have been issued in discharge of the debt as, for example, if a cheque is issued for security or for any other purpose the same would not come within the purview of Section 138 of the Act.

We have gone through the oral evidences. The Second Respondent has even failed to prove that the Appellant had paid to him a sum of Rs. 5000/- by cash.

In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well-settled principles of law that where two views are possible, the appellate court should not interfere with the finding of acquittal recorded by the court below.

We, therefore, are of the opinion that the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed. The Appellant is on bail. He is discharged from the bail bonds. The Second Respondent shall pay and bear the costs of the Appellant. Counsels' fee assessed at Rs. 10,000/-.