

the appellant under s.138 in order to convict her under s.142 – Appellant sufficiently rebutted the initial presumption as regards the issuance of the cheque under ss. 138 and 139 – The preponderance of probabilities also fully supported the stand of the appellant – Judgment of the High Court in having interfered with the order of acquittal by the trial court without proper reasoning, thus, liable to be set aside.

The respondent filed a complaint against the appellant under Section 142 of the Negotiable Instruments Act, 1881 for offence punishable under Section 138 thereof. According to respondent, the appellant-accused had entrusted it with some construction work and had issued a post dated cheque for Rs.25 lakhs in his favour towards the outstanding amount due to him for the work done by him. It was claimed that when the cheque was presented by the respondent with his bankers, the same was dishonoured due to insufficiency of funds in the account of the appellant. It was further claimed that though the respondent intimated about the dishonour of the cheque by a lawyer’s notice served on the appellant, she came forward with a reply taking the stand that no amount was due and that the respondent stealthily removed two cheques from the custody of the appellant of which the present one was forged and presented for clearance.

The trial Court held that the appellant was able to rebut the presumption and that there was no circumstance warranting the execution of the cheque issued in favour of the respondent and so holding, found the appellant not guilty of the offence under Section 138 of the Act and acquitted her under Section 255(1) of CrPC. In appeal, the High Court while reversing the judgment of the trial Court found the appellant guilty of the offence and sentenced her to pay a fine of Rs.30 lakhs and in default to pay the fine amount directed her to

A undergo simple imprisonment for 1 ½ years. It was further directed that on realization of the fine amount, the same should be paid to the complainant-respondent under Section 357(1) CrPC.

B In the instant appeal, the appellant raised various contentions, viz. 1) that she had discharged her burden by rebutting the initial presumption contemplated under Section 118 read along with Section 139 of the Act and having regard to the overwhelming preponderance of probabilities existing in her favour, the trial Court rightly
 C concluded that she was entitled for acquittal; 2) that the overwhelming evidence available on record as considered by the trial Court, though referred to by the High Court in the impugned judgment was completely
 D omitted to be considered by it while reversing the order of acquittal of the trial Court and 3) that the specific expression “holder” and “holder in due course” having been used in Sections 8, 9, 138, 139 and 142 of the Act, the respondent cannot be said to have fulfilled the requirement of the said provisions in order to avail the
 E benefits under the provisions of the Act.

Allowing the appeal, the Court

F HELD: 1.1. While the trial Court made every effort to examine the claim of the respondent as regards the issuance of the cheque by the appellant in his favour and the stand of the appellant by referring to the respective documentary evidence as well as the version of P.W.1 before reaching the conclusion about the guilt of the appellant, the High Court completely failed to consider
 G and appreciate the documents marked on the side of the appellant. The High Court failed to discharge its onerous responsibility of considering the material evidence available on record brought to its notice and for the reasons best known, the High Court blatantly declined to
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examine those materials by simply stating that the same was not warranted. [Para 8] [538-C-E-H; 539-A-B] A

1.2. The impugned judgment discloses that the attention of the High Court was drawn to specific Exhibits relied upon by the appellant and referred to by the trial Judge to reach a conclusion about the guilt or otherwise of the appellant, however, after referring to those Exhibits, in the very next sentence the High Court proceeded to state that the appellant failed to produce any material which was in her possession to show that no amount was due from the appellant to the respondent. Such an approach of the High Court displayed the total perversity in its approach while reversing the order of the trial Judge. [Para 11] [543-D-F] B C

2. Elaborate consideration was made by the trial Court for acquitting the appellant. The conclusions of the trial Judge were drawn by adducing cogent and convincing reasoning and no fault is found in the said conclusions drawn by the trial Judge. Taking into account various reasons *inter alia* including a) that the final payment was to be settled only after completion of the work and that the respondent did not complete the work; b) that there was no evidence to conclude that any measurement of the work was done and the accounts were settled; c) that the fact that the cheque was not in the handwriting of the appellant strengthens the defence version that it was not executed in favour of the respondent; d) that there was no reliable documentary evidence adduced by the respondent to hold that a sum of Rs.25 lakhs was due to him warranting execution of the cheque and e) that there was no amount legally due to the respondent to hold that the cheque was as a matter of fact issued by the appellant in favour of the respondent in order to hold that he was a holder of the cheque, the trial Court ultimately concluded that no D E F G H

A offence was made out as against the appellant under Section 138 of the Act in order to convict her under Section 142 of the Act. In the circumstance, the principles set out in the decision in *M.S. Narayana Menon alias Mani* as regards the presumption to be drawn and the preponderance of probabilities to be inferred are fully satisfied. In the said case, it was 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 preponderance of probabilities.

B 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. Presumption drawn under a statute has only an evidentiary value. The judgment of the trial Court in having drawn the conclusions to the effect that the appellant sufficiently rebutted the initial presumption as regards the issuance of the cheque under Sections 138 and 139 of the Act, was perfectly justified. The preponderance of probabilities also fully support the stand of the appellant as held by the trial Judge. The judgment of the High Court in having interfered with the order of acquittal by the trial Judge without proper reasoning is, therefore, liable to be set aside. Consequently, the conviction and sentence imposed in the judgment impugned is also set aside. [Paras 9, 10, 12 and 13] [542-G-H; 543-A-B; 544-D-F]

M.S. Narayana Menon alias Mani v. State of Kerala and another (2006) 6 SCC 39 – held applicable.

Case Law Reference:

G (2006) 6 SCC 39 held applicable Para 6

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1594 of 2012.

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From the Judgment & Order dated 17.3.2010 of the High Court of Kerala at Ernakulam in CrI. A.No. 1707 of 2007. A

Basava Prabhu Patil, Romy Chacko, Varun Mudgal for the Appellant.

V. Giri, M.Sadique, Nishe Rajen Shonker for the Respondents. B

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. The appellant/accused is aggrieved by the judgment dated 17.03.2010 passed in Criminal Appeal No.1707/2007 of the High Court of Kerala at Ernakulam. The respondent herein preferred a complaint against the appellant under Section 142 of the Negotiable Instruments Act (hereinafter called 'the Act') for an offence punishable under Section 138 of the Act. According to the complainant, the appellant/accused entrusted the work of construction of an Old Age Home and a Chapel at Punnaveli, Pathanamthitta District based on an agreement between the appellant and the respondent. According to the respondent, the appellant issued a post dated cheque for Rs.25 lakhs in favour of the respondent towards the outstanding amount due to him for the work done by him. The cheque was dated 21.03.2005. It was claimed that when the cheque was presented by the respondent with his bankers, the same was dishonoured due to insufficiency of funds in the account of the appellant. It was further claimed that though the respondent intimated about the dishonour of the cheque by a lawyer's notice dated 30.03.2005 served on the appellant on 31.03.2005, she came forward with a reply taking the stand that no amount was due and that the respondent stealthily removed two cheques from the custody of the appellant of which the present one was forged and presented for clearance. Before the trial Court the appellant pleaded not guilty. On behalf of the respondent Exhibits P-1 to P-20 were marked and the respondent examined himself as P.W.1. On behalf of the C
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A appellant Exhibits D-1 to D-4 series were marked, in the course
of cross-examination of P.W.1. No oral evidence was adduced
on behalf of the appellant. When the incriminating
circumstances were put against the appellant under Section
313 of Cr.P.C. she denied the same and filed a written
B statement.

2. The trial Court on a detailed analysis of the evidence,
placed before it, ultimately held that the appellant was able to
rebut the presumption and that there was no circumstance
warranting the execution of Exhibit P-1 cheque in favour of the
C respondent. So holding, the trial Court found the appellant not
guilty of the offence under Section 138 of the Act and acquitted
her under Section 255(1) of Cr.P.C. Aggrieved by the acquittal
of the appellant, the respondent preferred an appeal before the
High Court of Kerala at Ernakulam wherein the impugned
D judgment came to be rendered.

3. The High Court while reversing the judgment of the trial
Court found the appellant guilty of the offence and sentenced
her to pay a fine of Rs.30 lakhs and in default to pay the fine
E amount directed her to undergo simple imprisonment for 1 ½
years. It was further directed that on realization of the fine
amount, the same should be paid to the complainant under
Section 357(1) of Cr.P.C. Appellant was also directed to
appear before the trial Court on 17.07.2010 to make the
F payment of the fine amount. It was further directed that in default
of appearance before the trial Court, the trial Court would be
free to proceed against the appellant for taking coercive steps
for executing the sentence.

4. At the time when special leave petition was moved,
G based on the undertaking of the appellant, she was directed
to deposit a sum of Rs.25 lakhs in the trial Court within two
weeks. Subject to the said condition notice was issued and
interim stay was also granted subject to fulfillment of the said
condition. Subsequently, it was reported on 10.11.2010 that the
H amount directed to be deposited was also deposited.

5. We have heard Mr. Basava Prabhu Patil, Senior Counsel for the appellant and Shri V. Giri, Senior Counsel for the respondent. We have also perused the material papers placed before us, the judgment of the trial Court as well as that of the High Court.

6. Mr. Basava Prabhu Patil, Senior Counsel for the appellant in his submissions primarily contended that the appellant discharged her burden by rebutting the initial presumption contemplated under Section 118 read along with Section 139 of the Act and that having regard to the overwhelming preponderance of probabilities existing in favour of the appellant, the trial Court rightly concluded that the appellant was entitled for the acquittal. The learned Senior Counsel further contended that the overwhelming evidence available on record which was considered by the trial Court, though was referred to by the High Court in the impugned judgment has been completely omitted to be considered while reversing the order of acquittal of the trial Court. The learned Senior Counsel, therefore, contended that the impugned judgment of the High Court was liable to be set aside. Apart from the above submission, the learned Senior Counsel by referring to Sections 8, 9, 138, 139 and 142 of the Act sought to raise a contention based on the specific expression "Holder" and "Holder in due course" used in those provisions to contend that the respondent cannot be said to have fulfilled the requirement of the said provisions in order to avail the benefits under the provisions of the Act. Learned Senior Counsel relied upon the decision of this Court, *M.S. Narayana Menon alias Mani Vs. State of Kerala and another* reported in (2006) 6 SCC 39, in support of his submissions.

7. As against the above submissions Mr. V. Giri, Learned Senior Counsel for the respondent contended that the appellant was prevaricating in her stand as regards the issuance of the cheque, namely, the one in her reply to the lawyer's notice and the other before the Court, in her written statement. The learned

A Senior Counsel by referring to Annexure R-3 and R-4 contended that the contents of the said documents proved appellant's liability to the respondent and that the appellant miserably failed to rebut the initial presumption relating to the issuance of the cheque in favour of the respondent. As regards
B the submission based on Sections 8, 9, 138, 139 and 142 of the Act, made by the learned counsel for the appellant it was contended that the said contention has been raised for the first time in this Court and that in any event the status of the respondent as payee/holder of the cheque was duly proved.

C 8. Having heard learned counsel for the respective parties and having bestowed our serious consideration to the contentions raised, at the very outset, we wish to state that while the trial Court made every effort to examine the claim of the respondent as regards the issuance of the cheque by the
D appellant in his favour and the stand of the appellant by referring to the respective documentary evidence as well as the version of P.W.1 before reaching the conclusion about the guilt of the appellant, we find that the High Court completely failed to consider and appreciate the documents marked on the side
E of the appellant. We find that though the High Court made a reference to those specific Exhibits, the attention to which was drawn by the learned counsel, namely, Exhibit D-3, Exhibits P-6 to P-8, Exhibits D-4(A) to D-4(F) series vouchers as well as Exhibit D-4(J) voucher unhesitatingly stated that he did not
F propose to enter into any finding on merit as the same was unwarranted in the case on hand considering the nature of allegations and claim contained in the case. It also went on to state that in spite of those materials, in its conclusion, the appellant failed to produce whatever records available in her
G possession to show that no amount was due from her to the respondent. When we made a comparative consideration of the analysis made by the trial Court while holding that no offence was made out as against the appellant, as against the above reasoning of the learned Judge, in the order impugned in this
H appeal, we are convinced that the High Court has failed to

discharge its onerous responsibility of considering the material evidence available on record which were brought to its notice and for the reasons best known, the High Court blatantly declined to examine those materials by simply stating that the same was not warranted. A

9. In order to appreciate the correctness of the impugned judgment of the High Court, as well as, that of the trial Court, it will be worthwhile to refer to certain conclusions drawn by the learned trial Judge by making specific reference to the various documentary evidence placed before it vis-à-vis the oral version of the complainant himself. The significant admission of the respondent as P.W.1 was noted by the trial Court as under: B C

- (a) The construction work entrusted with the respondent had to be completed for a total sum of Rs.78,70,678/- as stated in Exhibit D-3. D
- (b) Respondent admitted that he had not completed the work and that he would have got payment only after the measurement of the quantity of the work done. E
- (c) All the amounts received from the accused were noted in Exhibit P-9.
- (d) It was admitted that a sum of Rs.12,60,100/- mentioned in Exhibit D-4 series voucher was not noted in Exhibit P-9. F
- (e) The amount received by him from the accused for conducting earth work was also not included in Exhibit P-9. G
- (f) The respondent received various amounts by cheques and cash. He, however, denied the suggestion that the accused gave two cheques to one Joychen Manthurthy by way of security on 23.10.2001 while borrowing Rs.5 lakhs from the H

- A said person.
- (g) It was admitted by the respondent that flooring of the building was done by the appellant herself and the expenses were not included in the bill.
- B (h) The respondent admitted that he had received Rs.77,31,500/- as per Exhibit P-9 statement while the total amount of work as per Exhibit D-3 agreement was Rs.78,70,678/-.
- C (i) The respondent, however, denied the suggestion that excess payments were made by the appellant to him.
- (j) Respondent also admitted that he did not complete the work and the flooring was ultimately done by the appellant herself.
- D (k) It was not in dispute that the final payment was to be settled only after completion of the work and that the respondent did not complete the work.
- E (l) There was no evidence to conclude that any measurement of the work was done and the accounts were settled.
- (m) As regards the variation in the stand of the appellant, namely, the one in the reply notice and the other in the written statement the same did not materially affect the stand of the appellant in the light of the overwhelming evidence in support of her stand.
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- G (n) The fact that the cheque was not in the handwriting of the appellant strengthens the defence version that it was not executed in favour of the respondent.
- (o) There was no reliable documentary evidence adduced by the complainant to hold that a sum of Rs.25 lakhs was due to him warranting execution
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of Exhibit P-1 cheque.

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- (p) There was no amount legally due to the respondent to hold that Exhibit P-1 cheque was as a matter of fact issued by the appellant in favour of the respondent in order to hold that he was a holder of the cheque.

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10. It was based on the above reasoning, the trial Court ultimately concluded that no offence was made out as against the appellant under Section 138 of the Act in order to convict her under Section 142 of the Act. While such an elaborate consideration was made by the trial Court for acquitting the appellant, it will be appropriate to refer to the nature of consideration made by the High Court which has been stated in paragraph 13 of the impugned judgment, which is to the following effect:

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“13. Another point vehemently raised by the counsel for the respondent/accused is that no amount is due from the accused to the complainant so as to issue Ext.P1 cheque. In order to substantiate the above submission, the learned counsel has taken me through the documents namely, Ext.D3, Exts.P6 to P8 final bills and Ext.D4(A) to D4(F) series vouchers and also Ext.D4(J) voucher. Regarding this submission, I am not proposed to enter into any finding on merit as the same is unwarranted in the present case considering the nature of allegations and claim contained in this case. But from the materials and evidence on record, it is crystal clear that the accused miserably failed to produce whatever records which she was in possession to show that no amount is due from the accused to the complainant. On the other hand, the attempt was to interpret and explain the documents produced by the complainant. Admittedly, no payment was made to the complainant otherwise than through the vouchers and cheques. If that be so, by producing those documents, the defence plea can be established. But there was no

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A attempt in this regard. When the accused has admitted the
 transaction claimed by the complainant and the
 complainant has established his claim that there was
 outstanding amounts due from the accused to the
 complainant out of the contract work undertaken by him
 B under Ext.D3 agreement, it is for the accused to establish
 that no amount is due to the complainant by producing
 cogent and concrete evidence if they are sticking on their
 stand.

(underlining is ours)

C 11. We can understand if the High Court had considered
 those Exhibits, the attention of which was drawn to it and stated
 as to how it was not in a position to agree with the conclusions
 drawn by the learned trial Judge. The above statement
 D contained in paragraph 13 of the impugned judgment discloses
 that the attention of the High Court was drawn to the specific
 Exhibits which were relied upon by the appellant and referred
 to by the learned trial Judge to reach a conclusion about the
 guilt or otherwise of the appellant. After referring to those
 E Exhibits, unfortunately, we find that in the very next sentence the
 High Court proceeded to state that the appellant failed to
 produce any material which was in her possession to show that
 no amount was due from the appellant to the respondent. Such
 an approach of the High Court, in our considered opinion, has
 F displayed the total perversity in its approach while reversing the
 order of the trial Judge. Even, Mr. V. Giri, learned Senior
 Counsel for the respondent in spite of his best efforts was
 unable to convince us to support the above conclusion found
 in the judgment of the High Court.

G 12. That apart having considered the conclusions of the
 learned trial Judge, we find that those conclusions were drawn
 by adducing cogent and convincing reasoning and we do not
 find any fault in the said conclusions drawn by the learned trial
 Judge. In the circumstance, the principles set out in the decision
 H relied upon by the learned counsel for the appellant in *M.S.*

Narayana Menon alias Mani (supra) as regards the A
presumption to be drawn and the preponderance of
probabilities to be inferred, as set out in paragraphs 31 to 33,
are fully satisfied. Those principles, set out in paragraphs 31
to 33, can be usefully referred to which are as under:

“31. A Division Bench of this Court in *Bharat Barrel & B*
Drum Mfg. Co. v. Amin Chand Payrelal albeit in a civil
case laid down the law in the following terms: (SCC pp.
50-51, para 12)

“12. Upon consideration of various judgments as noted C
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 D
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 E
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 F
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 G
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 H

A 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.

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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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33. 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.”

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13. Applying the abovesaid principles to the case on hand, we find that the judgment of the trial Court in having drawn the conclusions to the effect that the appellant sufficiently rebutted the initial presumption as regards the issuance of the cheque under Sections 138 and 139 of the Act, was perfectly justified. We also find that the preponderance of probabilities also fully support the stand of the appellant as held by the learned trial Judge. The judgment of the High Court in having interfered with the order of acquittal by the learned trial Judge without proper reasoning is, therefore, liable to be set aside and is accordingly set aside. Consequently, the conviction and sentence imposed in the judgment impugned is also set aside.

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14. Having regard to our above conclusions, the amount deposited by the appellant with the trial Court in a sum of Rs.25 lakhs with accrued interest, if any, shall be refunded to her forthwith on production of a copy of this judgment. The appeal stands allowed with the above directions.

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B.B.B.

Appeal allowed.