IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 12TH DAY OF NOVEMBER 2015/21ST KARTHIKA, 1937

CRL.A.No. 920 of 2003 ( )

AGAINST THE ORDER IN Crl.MC 2983/2003 of HIGH COURT OF KERALA DATED 10-04-2003

AGAINST THE JUDGMENT IN CC 61/2001 of JUDICIAL FIRST CLASS MAGISTRATE IV (MOBILE),THIRUVANANTHAPURAM. DATED 04.02.2003

APPELLANT(S):
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* ULTRA TECH CEMENT LIMITED HAVING ITS
REGISTERED OFFICE AT 'B' WING, AHURA CENTRE
2ND FLOOR, MAHAKALI CAVES ROAD, ANDHERI (E)
MUMBAI - 400 093 AND HAVING ITS REGIONAL OFFICE
AT 39/4013, OFFICE-A, 8TH FLOOR,
K.G.OXFORD BUSINESS CENTRE, SREEKANDATH ROAD,
RAVIPURAM, ERNAKULAM, KOCHI-682 016

[THE NAME OF THE APPELLANT IS SUBSTITUED AS PER ORDER DATED 14.03.2012 IN CRL.M.A.NO.2140/2012]

BY ADV.SMT.SUMATHY DANDAPANI (SR.)

RESPONDENT(S):
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1. MR.M.JESUDAS
PROPRIETOR, M/S.TECHNOWOODS, PLOT NO.21
MANVILA DEVELOPMENT PLOTS, THIRUVANANTHAPURAM.

2. STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

R,R1 BY ADV. SRI.K.JAGADEESH
R,R1 BY ADV. SRI.P.B.SAHASRANAMAN
R,R1 BY ADV. SRI.T.S.HARIKUMAR
R,R BY ADV. PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

CRL.A.No. 920 of 2003 ( )

APPENDIX

PETITIONER'S ANNEXURES:

ANNEXURE A: COPY OF JUDGMENT DATED 22.04.2004 IN COMPANY PETITION NO.120 OF 2004 CONNECTED WITH COMPANY APPLICATION NO.540 OF 2003 OF HTE HIGH COURT OF JUDICATURE AT BOMBAY

ANNEXURE B: COPY OF JUDGMENT DATED 22.04.2004 IN COMPANY PETITION NO.121 OF 2004 CONNECTED WITH COMPANY APPLICATION NO.566 OF 2003 OF HTE HIGH COURT OF JUDICATURE AT BOMBAY

ANNEXURE C: COPY OF FRSH CERTIFICATE OF INCORPORATION CONSEQUENT ON CHANGE OF NAME NO.11-128420 DATED 14.10.2004 ISSUED BY V.A.VIJAYAN MENON, REGISTRAR OF COMPANIES, MAHARASHTRA, MUMBAI

RESPONDENTS' ANNEXURES: N I L

//TRUE COPY//

P.A. TO JUDGE

JV

K. RAMAKRISHNAN, J.

Crl. Appeal No.920 of 2003

Dated this the 12th day of November, 2015

JUDGMENT

Complainant in CC No. 61/2001 on the file of the Judicial First Class Magistrate Court -IV (Mobile), Thiruvananthapuram is the appellant herein. The case was taken on file on the basis of a private complaint filed by the complainant through its authorised agent against the accused under Section 138 of the Negotiable Instruments Act, herein after referred to as 'the Act'.

2. The case of the complainant in the complaint was that complainant is a company registered under the Indian Companies Act having its registered office at Bombay with branch at Cochin and resident office at Thiruvananthapuram. The complainant authorised its accounts officer S.Swaminathan Nair by a power of attorney to prosecute the case. The accused was appointed as complainant's authorised Stockist for the sale of cement since 20.06.1998. He placed orders for supply of cement as per the agreement with the complainant and the cement was being regularly supplied to him. As per the

statement of accounts as on 30.06.2000, there was an amount of Rs.4,68,945.64 was due and the statement of accounts was issued to the accused and he had accepted the same and issued Ext.P2 cheque No.010911 dated 31.07.2000 drawn on State Bank of Travancore, Engineering College Branch, Thiruvananthapuram for an amount of Rs.4,68,966/- in settlement of the amount due from him to the complainant. The cheque when presented was dishonoured for the reason 'exceeds arrangement' as per Ext.P4 dishonour memo and this was intimated to the complainant by their banker by Ext.P5 intimation letter. The complainant issued Ext.P6 notice vide Ext.P7 postal receipt and the same was received by the accused evidenced by Ext.P8 postal acknowledgement. The accused had not paid the amount but he sent a reply with false allegations. So he had committed the offence punishable under Section 138 of the Act, hence the complaint.

3. When the accused appeared before the court below, the particulars of offence were read over and explained to him and he pleaded not guilty. In order to prove the case of the complainant, the power of attorney holder of the complainant was examined as PW-1 and Exts.P1 to P10 were marked on their

side. After closure of the complainant's evidence, the accused was questioned under Section 313 of the Criminal Procedure Code and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that he was appointed as Stockist of the complainant company and at that time, an amount of Rs.50,000/- was deposited as primary security deposit and as collateral security, 10 blank signed cheques were obtained from him. Whenever supply is made, they used to fill up the cheque by entering the amount, name of the payee and the date and present and encash the same. He stopped the business on 31.03.1999 and thereafter, there was some settlement of account by which an amount of Rs.2,50,649/- was found to be due out of which Rs.50,000/- lying with them as security deposit has to be deducted and there was only a balance amount of Rs.2,00,649/-. He had not gone to the office of the complainant at Thiruvananthapuram and issued any cheque on 11.07.2000 as claimed. So much amount was not really due, he had sent proper reply to the notice issued. The blank signed cheques given as security at the time of entering the transaction was misused and the present complaint was filed. In order to prove his case, the accused himself was examined as DW-1 and Exts.D1 to D9 were marked on his side. After considering the evidence on record, the court below found that the complainant failed to prove their case that the cheque was issued in discharge of the amount due and there was dispute regarding the amount and there is no possibility for the accused issuing the cheque as claimed and under such circumstances, the offence under Section 138 is not attracted and acquitted the accused under Section 255 (1) of the Code of Criminal Procedure. Aggrieved by the same, the present appeal has been preferred by the appellant complainant before the court below along with Leave Petition as Crl.L.P.No.2983/2003 and leave was granted and the appeal was admitted to file.

4. Heard the learned counsel for the appellant and the learned counsel for the respondents.

5. The counsel for the appellant submitted that there is no dispute regarding the correctness of Ext.P3 accounts statement and no evidence adduced on the side of the accused to prove the settlement of account as claimed by him. Further, PW-1 had categorically stated that the accounts were settled and after settlement of account, Ext.P2 cheque was issued. The

court below had drawn some assumptions and presumptions and came to the conclusion that there was no possibility of accused issuing the cheque as claimed by the complainant which is not correct and not supported by any evidence. Further if the court finds the evidence adduced is not sufficient, he prays for an opportunity to examine the person having knowledge about the transaction and for that purpose he prays for a remand.

6. On the other hand, the counsel for the first respondent submitted that the evidence of PW-1 is not sufficient to prove the transaction as he had no direct knowledge about the transaction. He is only an accounts officer came from Bombay and he is only giving evidence on the basis of documents. Further, PW-1 had given evidence that there were other persons who were dealing with the company with whom he had settled the accounts and the amount was arrived at. He had taken the specific stand regarding correctness of amount claimed by issuing Exts.D1 to D3 letters earlier and thereafter when a notice was issued, he sent Ext.D4 reply to which they sent Ext.D5 reply. There also, the dispute regarding the accounts was mentioned. There is no evidence to show that Ext.P3 was delivered to the accused and he had acknowledged the same. Further, there was

difference in the ink in writting Ext.P2 cheque. So under the circumstances, court below was perfectly justified in acquitting the accused and the finding does not call for any interference.

7. Heard the learned Public Prosecutor also.

8. It is an admitted fact that the complainant is a company having different business activities including manufacturing and sale of cement as well. It is also an admitted fact that the accused was appointed as their dealer in Kerala in the year 1998 and he was taking delivery of cement. It is also in a way admitted that the agreement ended on 31.03.1999 and according to the complainant, there was settlement of accounts on the basis of Ext.P3 and on that basis an amount of Rs.4,68,965.64 was found to be due to the company from the accused and the accused came to their office at Thiruvananthapuram and issued Ext.P2 cheque for an amount of Rs.4,68,966/- in final settlement of that account and the cheque was dated 31.07.2000. But according to the accused, there was no such settlement and he had not issued Ext.P2 cheque and in fact, no such amount was due and in fact the authorised officers of the company came and discussed with him and found that an amount of Rs.250649/- alone was due and deducting the amount

of Rs.50,000/- given as security, only an amount of Rs.2,00,649/- was due. In order to prove the case of the complainant, the power of attorney holder of the complainant was examined as PW-1. A reading of the evidence of PW-1 will go to show that he is only an accounts officer of the company at Bombay and he had no direct knowledge about the dealings of the complainant company with the accused and he had only knowledge about the transactions through the documents maintained in the office. He had also stated that the cheque was not issued in his presence also. But according to the accused, his case was that at the time when the agreement was entered into, apart from obtaining a cash security of Rs.50,000/-, ten blank signed cheques were given and the practice was that, whenever supply is made, the cheques will be filled up and encashed. But this practice was denied by PW-1. He had produced Ext.D1 to D3 letters to show that even prior to the presentation of the cheque, he was disputing the liability. He had sent Ext.D4 reply notice to the notice sent by the complainant when the cheque was dishonoured also. He had demanded the cheque leaves with numbers 0010909, 0010912, 0010913 which were said to be with the complainant. EXt.D6 and D7 are the cheque books. But those cheque books cannot be accepted as evidence as it is only self creating document by the accused. Exts.D9 and D10 were produced to prove that the cheques which were given prior to after the date of Ext.P2 were encashed long prior to 31.07.2000. The amount mentioned in Exts.D2 and D3 were not accounted by the complainant company. There is no evidence on the side of the accused also to prove that there was a settlement of account as claimed by him through the representative of the complainant company and the accounts were settled for the amount mentioned by him in Ext.D5 reply notice. So under the circumstances, it cannot be said that accused also succeeded in establishing his case that amount mentioned in the cheque is not really due. But at the same time, the weakness of the case of the accused cannot be taken as ground for proving the case of the complainant. In this case since PW-1 has no direct knowledge about the transaction and as rightly pointed out by the counsel for the appellant, an opportunity has to be given to the complainant to prove their case by examining a proper person who is having direct knowledge about the transaction and settlement of accounts as claimed by them and issuance of the cheque by the accused the cheque in discharge of the liability fixed on the basis of settlement. Only that person can explain the manner in which the cheque was brought and delivered by the accused and able to explain the discrepancy noted by the court below in Ext.P2 cheque as well.

9. So under the circumstances, this Court feels that an opportunity has to be given to the complainant to prove their case by examining a person having direct knowledge about the transaction especially when there is dispute regarding the settlement of account raised by both parties and that can be settled only by adducing proper evidence, for which purpose, the order of acquittal passed by the court below has to be set aside and the matter has to be remitted to the court below for fresh disposal.

In the result, the appeal is allowed and the order of acquittal passed by the court below is set aside and the matter is remitted to the court below for fresh disposal in accordance with law. Court below is directed to take the complaint on file and give an opportunity to the complainant to adduce further evidence to prove the settlement of accounts and issuance of cheque by the accused and opportunity be given to the accused also to rebut the evidence adduced by the complainant and thereafter dispose of the case afresh in accordance with law. Parties are directed to appear before the court below on 21.12.2015. Considering the fact that case is of the year 2001, court below is directed to expedite disposal of the case as expeditiously as possible, at any rate, within three months from the date on which the case is posted for appearance of the parties as directed by this Court or on receipt of the copy of this judgment, whichever is later.

Office is directed to communicate this judgment to the court below immediately and also sent back the records to the court below at the earliest so as to reach that court before the date mentioned by this Court for the appearance of the parties.

SD/-
K. RAMAKRISHNAN,
JUDGE

JV