IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 2ND DAY OF DECEMBER 2015/11TH AGRAHAYANA, 1937

CRL.A.No. 1105 of 2003 ( )

AGAINST THE ORDER/JUDGMENT IN Crl.MC 2982/2003 of HIGH COURT OF KERALA DATED 10-04-2003
&
AGAINST THE JUDGMENT IN CC 472/2001 of JMFC-V, THIRUVANANTHAPURAM (SPL.COURT-MARKLIST CASES) DATED 14-02-2003

APPELLANT/COMPLAINANT:

LARSEN & TOUBRO LIMITED,
REGISTERED OFFICE AT L&T HOUSE, BALLARD ESTATE,
MUMBAI - 400 001,
BRANCH OFFICE AT RAVIPURAM JUNCTION,
M.G.ROAD, ERNAKULAM, KOCHIN-682 016,
REPRESENTED BY ITS EXECUTIVE,
CEMENT MARKETTING, MR.M.P.SURESH KUMAR,
(BY VIRTUE OF POWER OF ATTORNEY).

BY ADV. SRI.K.P.DANDAPANI

RESPONDENT(S)/ACCUSED:

1. MR.P.ANI, AGED 40 YEARS,
S/O. S.PURUSHOTHAMAN,
PROPRIETOR,
M/S.SANI TRADERS,
MANATHARA ROAD, KADAKKAL,
P.O. KOLLAM.

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

R1 BY ADVS. SRI.SASTHAMANGALAM S. AJITHKUMAR,
SRI.K.K.VIJAYAN
SRI.KRISHNADAS P. NAIR

R2 BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ss

K. RAMAKRISHNAN, J.

Crl. Appeal No.1105 of 2003

Dated this the 2nd day of December, 2015

JUDGMENT

Complainant in C.C.No.472/2001 on the file of the Judicial First Class Magistrate Court-V (Special Court for Mark list Cases), Thiruvananthapuram, is the appellant herein. The case was taken on file on the basis of a private complaint filed by the complainant through its power of attorney holder evidenced by Ext.P1 power of attorney, against the first respondent alleging offence under Section 138 of the Negotiable Instruments Act, (hereinafter called 'the Act').

2. The case of the complainant in the complaint was that, the complainant and the accused were having business transaction in respect of supply of cement as a dealer of the complainant company and as per the statement of accounts dated 31.05.2001, an amount of

₹18,25,391.61 was due and in discharge of that liability, he had issued Exts.P2 and P3 cheques for ₹8,75,392/- and ₹9,50,000/- respectively, both dated 27.06.2001, drawn on Federal Bank Ltd., Kadakkal Branch in favour of the complainant concern. The complainant presented the cheques for collection and the same were dishonored for the reasons 'payment stopped by the drawer', evidenced by Exts.P4 and P5 dishonour memos. The complainant issued Ext.P6 notice intimating dishonour and demanding payment vide Ext.P6 series postal receipts and the same were received by the accused and he did not send any reply and he had not paid the amount. 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 concern was examined as PW1 and Exts.P1 to P6 series were marked on their side. After closure of the complainant's evidence, the accused was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that, the amount covered by the cheques is not really due and in fact he had not issued any cheque as claimed. In fact at the time when he accepted the dealership, five blank signed cheques were obtained and misusing two of such cheques, the present complaint has been filed. In order to prove his case, the accused himself was examined as DW1 and Exts.D1 to D10 were marked on his side. After considering the evidence on record, court below found that the complainant failed to prove their case and no offence under Section 138 of the

Act is 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 in the lower court along with Leave Petition as Crl.L.P.No.2982/2003 and the application was allowed, leave granted and the appeal was admitted to file.

4. Heard Smt.Sumathi Dandapani, senior counsel appearing for the appellant and Sri.Sasthamangalam Ajith Kumar, counsel appearing for the first respondent and Sri.Jibu P.Thomas, Public Prosecutor appearing for the 2nd respondent.

5. Senior counsel appearing for the appellant submitted that, the court below failed to note the fact that no reply has been sent to the notice issued. The case of the complainant was that, after the settlement of accounts, for the amount due, the cheques were issued. Further in Ext.D8 stop memo produced by the accused himself, it will

be seen that, it was not a blank signed cheque as claimed by them, but it is a duly filled cheques. But his case was that, there was some mistake in the amount. So he wanted to stop the payment. So the court below was not justified in coming to the conclusion that blank signed cheques were misused and the accused had rebutted the presumption is unsustainable in law and the same is liable to be set aside and the accused is liable to be convicted for the offence alleged.

6. On the other hand, the counsel for the first respondent submitted that the evidence adduced on the side of the accused will go to show that there was no settlement occurred and the blank signed cheques given were misused as he was disputing their accounts from the beginning. So according to the learned counsel, the court below was perfectly justified in acquitting the accused and Ext.D8 was given by the accused only when he came to

know from the bank that the cheques were presented for collection. So there is no interference is called for.

7. It is an admitted fact that, the complainant is a company dealing with multi activities including manufacture and sale of cements and the first respondent was appointed as their dealer and he was getting supply of cement on the basis of the orders based by him on credit basis and according to him, he was paying the amount regularly.

8. The case of the complainant in the complaint was that, as on 31.05.2001, as per the accounts an amount of ₹18,25,392/- was due and in discharge of that liability, the accused had issued Exts.P2 and P3 cheques. The case of the accused was that, he had not issued such cheques and blank signed cheques given were misused and the present complaint was filed.

9. It is true that he himself was gone to the

witness box and produced Exts.D1 to D10 to prove his case. In Ext.D5 series, he was disputing the amounts, but all these statements and letters were issued prior to issuance of the cheques mentioned in the complaint. The case of the complainant was that, the accused came to the office of the complainant and the accounts were settled and after satisfaction of the account, he had issued these two cheques. This aspect was mentioned in Ext.P6 notice. Though the accused received the notice, he did not send any reply for the same. He had no reason when he was examined as DW1, as to why he had not send any reply to the notice as well. It was in away admitted by the counsel for the accused at the time of hearing that, Ext.D1 suit filed by him before the Sub Court, Thiruvananthapuram, was dismissed after the disposal of this case in the lower court for non-payment of court fee. So that will only go to show that he had filed the suit only to create evidence that there was some dispute regarding the amount payable. If really he had the intention to have the settlement of accounts, he would have proceeded with the case, which he had not done in this case. Further in Ext.D8 what is stated by him is as follows:

"Please stop payment of the cheques 'No.267485' for ₹9,50,000/- and the cheque 'No.267483' for ₹8,73,392/-, both dated 27.06.2001, for the reason 'stop payment' due to a mistake in the entering of figures in the cheque, that came to my attention after it has been presented". The letter given to the bank was dated 06.07.2001, whereas the cheques were issued on 27.06.2001. If really those two cheques were issued as blank signed cheques and it was manipulated by the complainant as claimed by him, then he would have stated that as a reason in Ext.D8 for issuing stop memo. But that was not the reason mentioned in Ext.D8, which will go to show that he had admitted the issuance of the cheques and it was not a blank signed cheque, but according to him he came to know about the mistake in the amount only when he came to know about presentation of the cheque in the bank. So that will go to show that the cheques were issued by him as settlement of amounts as claimed by the complainant and later when it was presented for collection, he was not able to raise the amount or to pay the amount, issued Ext.D8 stop payment memo to avoid his liability to pay the amount. Further the reason for stop payment was not intimated to the complainant by the accused as well. If really there was some dispute regarding the amount, he would have sent a notice to the complainant not to present the cheques till the account is settled. That was not done by him as well. So under the circumstances, the finding of the court below that the accused had rebutted the presumption is unsustainable in law and it cannot be said that court below had appreciated the evidence in the correct perspective before coming to such conclusion. If really the documents produced by the accused himself were verified and scrutinized properly, court below should not have come to such a conclusion for acquitting the accused for the offence alleged.

10. Once the evidence adduced on the side of the accused is not sufficient to rebut the presumption, then court has to fall back on the presumption under Section 139 of the Act and it has to be presumed that the cheques were issued by the accused in discharge of a legally enforcible debt and if the amount is not paid in spite of notice issued intimating the dishonour within 15 days on receipt of notice, then offence under Section 138 of the Act is complete and court below ought to have convicted the accused for the said offence. So the order of acquittal passed by the court below is unsustainable in law and the same is set aside and

the accused is found guilty for the offence under Section 138 of the Act and he is convicted there under.

11. As regards the sentence is concerned, the offence was committed prior to amendment of the Negotiable Instruments Act. At that time, court has only power to award sentence of ₹5,000/- alone as fine. But in **Suganthi v. Jagadeeshan [2002(1) KLT 581(SC)],** the Supreme Court has held that, though the court has no power to award fine, court can award the cheque amount as compensation with default sentence and providing minimum substantive sentence.

12. Further in **Damodar S. Prabhu v. Sayed Babalal H. [JT 2010 (4) (S.C.) 457] = 2010(5) SCC 663**, the Supreme Court has held that, the offence under Section 138 of the Act is basically of quasi civil nature and by virtue of introduction of the Section 138 of the Negotiable Instruments Act, it has been given the colour of criminal

offence. Further the scheme of the Act will go to show that the intention of the legislature is to make the drawer to pay the amount and not to send him to jail. So considering these aspects, this court feels that sentencing the accused to undergo imprisonment till rising of the court and also to pay the cheuqe amount of ₹18,35,392/- as compensation to the complainant, in default to undergo simple imprisonment for six months will be sufficient and that will meet the ends of justice.

So the accused is sentenced to undergo imprisonment till rising of the court and also to pay the cheque amount of ₹18,25,392/- as compensation to the complainant, in default to undergo simple imprisonment for six months under Section 357(3) of the Code of Criminal Procedure.

In the result, the appeal is allowed and the order of acquittal passed by the court below is set aside. The first respondent/ accused is found guilty for the offence under Section 138 of the Act and convicted him thereunder and sentenced him to undergo imprisonment till rising of the court and also to pay the cheque amount of ₹18,25,392/- as compensation to the complainant, in default to undergo simple imprisonment for six months under Section 357(3) of the Code of Criminal Procedure. Nine months time is granted to the first respondent to pay the amount. So the first respondent is granted time till 02.09.2016 to pay the amount, till then, the execution of sentence is directed to be kept in abeyance.

Office is directed to communicate this judgment to the court below at the earliest.

Sd/-
K. Ramakrishnan, Judge

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P.A. to Judge

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