

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

SATISH
RAMCHANDRA
SANGAR

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CRIMINAL APPEAL NO. 840 OF 2010
WITH
CRIMINAL APPEAL NO. 842 OF 2010
WITH
CRIMINAL APPEAL NO. 843 OF 2010
WITH
CRIMINAL APPEAL NO. 844 OF 2010
WITH
CRIMINAL APPEAL NO. 845 OF 2010

Kores (India) Ltd.

a Public Limited Company registered
under the Companies Act, 1956 having
its registered office at Kores House,
Post Box No.6558, Off. Dr. E. Moses Road,
Worli, Mumbai – 400 018 and Corporate
Office at 1st Pokhran Road, Thane (W),
400 606.

...Appellant

Versus

1. **Ashish Kumar Ahooja,**
Proprietor of M/s. Ambitious Marketing,
A-452, Shastri Nagar, New Delhi -
110 532.

2. **State of Maharashtra**

...Respondents

ALONG WITH
CRIMINAL APPEAL NO. 841 OF 2010

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2. **State of Maharashtra**

...Respondents

Mr. Darshit Jain i/b. Mr. Mohankumar K. a/w Mr.Gireesh U.G.Menon:-	Advocates for Appellant.
Ms.Shagufa Patel a/w Ms.Padma Chinta i/b. Mr.Harshad Bhadbhade:-	Advocates for Respondent No.1.
Mr.S.R.Agarkar:-	APP for Respondent No.2 – State.

CORAM : S. M. MODAK, J.

RESERVED ON : 5th JANUARY 2024

PRONOUNCED ON : 10th MAY 2024

JUDGMENT :-

1. On the basis of promises, reciprocal promises / obligations, business transactions are entered. One of the party promises to do some act and believing on it, other party promises to do another act. On the

basis of such set of promises, legal obligations are created. Sometime, such transactions take place in between the two parties, whereas, in some transactions, there are three parties. Sometime, the promises are interconnected amongst all these three parties. That is to say, fulfillment of promises depends upon fulfillment by other parties. If, one of them, fails to fulfill his promises, it affects fulfillment of the promises by other two parties. In some cases, one of the parties is a formal party, that is to say, though his presence is important, but fulfillment of the promises in between other two parties does not depend upon the fulfillment of the promise by the First-Party. In the Appeals before this Court, similar issue has cropped up.

Parties in this litigation

2. There are three parties involved. They are :-
 - (a) **Hewlett Packard** (H.P. Company) Manufacturing Printers and Computer Peripheral Items.
 - (b) **Kores (India) Ltd., Distributors** who distribute/ sell those products to retailers/Sub distributors. (Complainant/Appellant).
 - (c) **M/s.Ambitious Marketing Retailer** whose proprietor is Abhishek Ahuja. (sub distributor/Accused/Respondent).

3. There were two ‘*Memorandum of Understandings*’ (“hereinafter, “*MoU*”) executed in between these parties and referred by them. They are:-

- (a) MoU dated 1st May 2001 between **H.P.** and **Ambitious Marketing** (Accused)
And
- (b) MoU between **H.P.** and **Kores (India) Ltd.**

Amongst these MoUs, the MoU between **H.P.** and **Ambitious** is produced during evidence (Exhibit-31). Whereas, MoU between **H.P. and Kores (India)**, referred by the witnesses of Kores, was not produced on the ground of confidentiality/non relevancy. But, from the MoU available and the averments in the complaint and line of cross-examination, we may find the nature of relationship between the parties.

Nature of relationship

- (a) **Kores (India) Ltd.**, used to act as a whole-seller/distributor for H.P. Products and used to supply them to the sub distributors.
- (b) Sub distributor including **Ambitious** used to promote, sell and support the products of HP’s. Ambitious was to do the business within the specified area.
- (c) **Ambitious** was supposed to submit periodical reports to

H.P.

- (d) **Ambitious** was to sell H.P. Products from authorized whole-seller of H.P., only.
- (e) **H.P.**, has agreed to pay maximum sum of Rs.16,000/- (Rupees Sixteen Thousand Only) per month for expenses involved in sale promotion.
- (f) **Kores (India) Ltd.**, used to deliver goods as per order by preparing usual documents including delivery challans.
- (g) **Ambitious** used to make payment through cheques.

This was the practice prevailing amongst the parties.

Liability and issuance of cheques

4. In pursuance to this practice, Kores sold and delivered products to Ambitious. Ambitious owes an amount to the Kores (India) Ltd. towards the payment of the value of the goods. Ambitious issued in all 16 (Sixteen) cheques in favour of Kores (India) Ltd. They are for different amounts and for different dates. They were deposited by Kores in their Central Bank of India and in turn, they were presented before drawee Bank: Oriental Bank of Commerce in which Ambitious was having Bank Account. All were dishonoured for the reason *“payment stopped by the drawer”*.

Issuance of statutory notice

5. Consequently, there were 2 notices dated 27th January 2004 and 30th January 2004 issued to Ambitious. They were issued to 3 (Three) persons. They are as follows:-

- (a) Ashish Kumar Ahuja:- Proprietor.
- (b) P.P.Ahuja:- Marketing Manager
- And
- (c) Sunil Ahuja:- General Manager.

They were replied by addressee No.1 – Ashish K. Ahuja being a proprietor of M/s.Ambitious vide notice-reply dated 15th February, 2004.

Pre-notice correspondence

6. Prior to this statutory notice, there were two correspondence made on behalf of Ambitious Marketing. They are as follows:-

- (a) **Letter dated 1st August, 2003** – sent by Ashish Ahuja to the Complainant Kores (India) Ltd., asking them '*not to deposit the cheque till he will inform*' and **letter of same date** issued to "*Oriental Bank of Commerce to stop the payment of the cheques*"
- And
- (b) **Letter dated 22nd September, 2003** by Ashish Ahuja to Kores (India) Ltd., informing '*to start fresh chapter and*

assurance was given to clear pending payments at the earliest’.

Filing of complaints

7. When 6 (Six) complaints were filed by Kores (India) Ltd., for an offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter “NI Act”) before the Court of JMFC – Thane, the Complainant made several submissions thereby pointing out contrary stands taken by Ambitious. That is to say, writing a plain letter on one occasion and on subsequent occasion, raising certain grievances which are not raised on earlier occasion. As the payment has not come forward for all 16 (Sixteen) cheques, Kores (India) Ltd., filed 6 (Six) separate cases before the trial Magistrate. Their details are as follows :-

<u>Sr.No.</u>	<u>Case Number</u>	<u>Appeal Number</u>
1.	Summary Criminal Case No.804 of 2004	Criminal Appeal No.840 of 2010
2.	Summary Criminal Case No.805 of 2004	Criminal Appeal No.842 of 2010
3.	Summary Criminal Case No.806 of 2004	Criminal Appeal No.844 of 2010
4.	Summary Criminal Case No.807 of 2004	Criminal Appeal No.845 of 2010
5.	Summary Criminal Case No.808 of 2004	Criminal Appeal No.841 of 2010
6.	Summary Criminal Case No.809 of 2004	Criminal Appeal No.843 of 2010

Whereas, the details of cheques involved in every Complaint are as follows :-

<u>Sr.No.</u>	<u>Complaint Number</u>	<u>Cheque Number</u>	<u>Amount</u>
1.	Summary Criminal Case No.804 of 2004	180560 180557 180561	Rs.2,61,600/- Rs.3,28,100/- Rs.1,68,790/-
2.	Summary Criminal Case No.805 of 2004	615359	Rs.7,11,225/-
3.	Summary Criminal Case No.806 of 2004	180563 180566 180558	Rs.1,30,800/- Rs.2,13,900/- Rs.4,05,575/-
4.	Summary Criminal Case No.807 of 2004	180556 180553 180559	Rs.2,05,500/- Rs.2,43,360/- Rs.3,74,220/-
5.	Summary Criminal Case No.808 of 2004	180564 180565 180557	Rs.1,28,550/- Rs.2,89,250/- Rs.2,49,800/-
6.	Summary Criminal Case No.809 of 2004	180568 180569 180570	Rs.2,80,050/- Rs.68,500/- Rs.4,31,050/-

Whereas, the details of purchase order, invoice cum delivery challan and cheque number are as follows :-

<u>Purchase Order</u>	<u>Invoice cum delivery challan</u>	<u>Cheque Number</u>
(i)14/06/2003	(i)14/06/2003:Rs.3,28,100/-	180560
(ii)14/06/2003	(ii)14/06/2003:Rs.2,61,600/-	180557
(iii)16/06/2003	(iii)16/06/2003:Rs.1,68,790/-	180561

(i)04/07/2003 (ii)02/07/2003	(i)Undated Invoice:Rs.2,57,150/- (ii) 04/07/2003:Rs.3,46,100/- (iii) 04/07/2003:Rs.36,930/- (iv) 07/07/2003:Rs.1,33,100/- (v) 30/07/2003:Rs.28,770/- (vi) 16/07/2003:Rs.10,380/- (vii) 15/07/2003:Rs.54,500/- (viii) 11/07/2003:Rs.2,74,120/- (ix) 10/07/2003:Rs.1,54,500/- (x) 09/07/2003Rs.54,500/- (xi) 09/07/2003:Rs.4,83,740/- (xii) 07/07/2003:Rs.1,33,100/- (xiii) 04/07/2003:Rs.3,46,100/- (xiv) 04/07/2003:Rs.36,930/- (xv) 02/07/2003: Rs.2,57,150/- (xvi) 27/06/2003:Rs.4,31,050/- (xvii) 23/06/2003:Rs.2,80,050/- (xviii)23/06/2003:Rs.2,49,800/- (xix) 23/06/2003:Rs.68,500/- (xx) 19/06/2003: Rs.2,89,250/- (xxi) 18/06/2003: Rs.1,28,550/- (xxii)18/06/2003: Rs.4,05,575/- (xxiii)17/06/2003:Rs.2,13,900/- (xxiv)16/06/2003:Rs.1,30,800/- (xxv)16/06/2003:Rs.1,68,790/- (xxvi)14/06/2003:Rs.2,61,600/-	615359
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	(xxvii)14/06/2003:Rs.3,28,100/- (xxviii)12/06/2003:Rs.3,74,220/ (xxix)07/06/2003:Rs.2,43,360/- (xxx)05/06/2003:Rs.2,05,500/-	
(i)26/06/2003	(i) 23/06/2003:Rs.2,80,050/-	180568 180569 180570
(i)17/06/2003	(i) 17/06/2003:Rs.2,13,900/- (ii) 18/06/2003:Rs.4,05,575/-	180563 180566 180558
Nil	(i) 12/06/2003	180556 180553 180559
Nil	(i) 18/06/2003	180564 180565 180567

The details of memo and demand notice are as follows :-

<u>Details of Memo</u>	<u>Demand Notice</u>
Oriental Bank of Commerce dated 09/01/2004 : “Payment stopped by drawer”	27/01/2004
Oriental Bank of Commerce dated 09/01/2004 : “Payment stopped by drawer”	27/01/2004
Three memos of Oriental Bank of Commerce dated 09/01/2004 : “Payment stopped by drawer”	27/01/2004

Three memos of Oriental Bank of Commerce dated 09/01/2004 : “Payment stopped by drawer”	27/01/2004
Three memos of Oriental Bank of Commerce dated 09/01/2004 : “Payment stopped by drawer”	27/01/2004
Three memos of Oriental Bank of Commerce dated 09/01/2004 : “Payment stopped by drawer”	30/01/2004

8. Before the trial Court, both the parties have adduced oral and documentary evidence. There was common evidence recorded.

Evidence before the trial Court

9. The evidence on behalf of Kores (India) Ltd., consists of following:-

- (a) Complainant–**Witness No.1–Rakesh Garg**–Commercial Manager and Authorized Representative of Kores.
- (b) The evidence of **PW No.2 – Sanjay Santosh Mehrotra** – Regional Manager for Kores (India) Ltd.

The documents referred are as follows :-

- (i) Copies of cheques,
- (ii) Copies of invoices and purchase orders,
- (iii) Copies of cheque return memos,
- (iv) Copies of notices,
- (v) Copies of acknowledgments of notices and copy of reply.

10. Whereas, Accused – **Ashish Kumar Ahuja** gave evidence and he

relied upon the following documents :-

- (a) Stop payment letter to Kores (India) Ltd., dated 1st August 2003.
- (b) Stop payment instruction to Bank dated 1st August 2003.
- (c) Letter dated 22nd September, 2003 to Kores (India) Ltd.
And
- (d) Copy of notice reply dated 23rd February 2004
- (e) Copy of MoU.

Defence of Accused

11. **The Accused raised various defences which are as follows :-**

- (a) He was owing an amount from H.P. That is why, the amount of cheques is disputed.
- (b) Denying delivery of the goods.
- (c) Conduct of Kores (India) Ltd., in not producing the MoU in between them and H.P. (If could have been produced, it could have thrown light on their relationship with H.P.).
- (d) Filing of prosecution was unjustified as stop payment letter was already given.

12. Trial Court acquitted Ambitious as per judgment dated 28th February 2006. **Though judgments are different, but the reasoning is more or less the same.** These Appeals are filed by Kores. I have

heard learned Advocate Shri.Darshit Jain for the Appellant and learned Advocate Shri.Harshad Bhadbhade for Respondent No.1 at great length on various dates. **Even, I gave time to parties to avail of the possibility of settlement. However, for some reason or other, parties could not move in that direction.** Trial Court emphasized on various lacunae in the evidence adduced on behalf of Complainant.

Findings by the trial Court

13. The trial Court concluded “*presumption under Section 139 of NI Act was rebutted by the Accused*”. It resulted into acquittal of the Accused in all 6 (Six) Complaints. The findings of trial Court can be summarized as follows:-

- (a) **Not producing MoU** in between Kores and H.P., and adverse inference was drawn that it was unfavourable to the Complainant. (Para No.10).
- (b) **PW No.1 and PW No.2 are giving different versions about this MoU.** According to PW No.1, this MoU is not relevant, whereas, PW No.2 considers it as confidential. (Para No.10).
- (c) **PW No.1 gave different versions** about signing the cheques by Accused. In chief-examination, he says cheques are signed in his presence, whereas, in cross-examination, he says it is not. (Para No.11).

- (d) **Admission by PW No.1** about not working as Commercial Manager in the month of July-2003 and he never used to visit the parties to collect the payments. Further admission about collection of cheques by Delhi Office and not by Thane Office. (Para No.11).
- (e) **Demand notice was issued to 3 (Three) persons** whereas, **Complaint was filed against Ashish Kumar Ahuja.** PW No.1 could not explain this situation. (Para No.12).
- (f) There is **interpolation of date** in the invoice at Exhibit-20. PW No.1 took time in answering the question and demeanor was recorded. (Para No.13).
- (g) **PW No.1 could not give the name of retailer** to whom, Kores have supplied the goods. (Para No.14).
- (h) **Evidence of PW No.1 and PW No.2 are contradictory.** According to PW No.1, there were 15 (Fifteen) consignments and total due amount was Rs.37,79,045/- and cheques were issued immediately on delivery of cheques (Para No.15). **This is as per the PW No.1.**
- (i) **Whereas, as per PW No.2,** cheques were presented for encashment after expiry of 30 (Thirty) days. (Para No.16). As per Mr.Jain, fact of issuance is different from fact of deposit of cheques and the trial Court has misunderstood it.
- (j) **The name of PW No.2 was not cited in the list of witnesses.** He was examined after completion of evidence of PW No.1. (Para No.17). Signing of cheques in his

presence is version of PW No.2 but it is contradictory to evidence of PW No.1.

- (k) **PW No.2 answered number of points** which were left **incomplete by PW No.1.**
- (l) During examination in chief, he produced all copies of invoices and delivery challans. **This attempt is to cover up the case through PW No.2.** (Para No.17).
- (m) **Both the witnesses are silent about ownership of materials supplied by Kores.** Their evidence does not give clear picture about arrangement made by H.P. and Kores (India) Ltd., and Ambitious Marketing. The Complainant is not ready to produce list of RSR.
- (n) **Deliberate attempt on the part of the Complainant in not producing the agreement** between Kores and H.P. Whereas, agreement produced by the Accused (Exhibit-31) gives clear picture about relationship in between H.P. and Ambitious.
- (o) **The discrepancies, contradictions in the evidence of two witnesses cannot be termed as difference in observation or memory.** Whereas, PW No.1 made false statement about signing of cheques in his presence. (Para No.19).
- (p) The evidence of PW No.2 pertains to the discrepancies or contradictions surfaced during the evidence of PW No.1, **it can be considered as substantial improvement in the entire evidence of Complainant.** (Para No.20).

Conclusions drawn are as follows

- (a) Both the witnesses are giving different versions about issuance of cheque and writing the cheques.
- (b) Agreement between Kores and H.P., was withheld. Both the witnesses are giving different versions
- (c) Agreement in between H.P. and Ambitious was not provided for inspection by the Complainant. (Para No.21).
- (d) There was a dispute between H.P on one hand and the Ambitious/accused on other hand and it was pending before High Court of Delhi. As such the Kores (India) could not prove existence of debt/liability and the accused has rebutted the presumption.

My opinion on these findings is :--

- a. Trial Court lost sight of the fact that roles/participation of two witnesses for the complainant is different. As such variances are bound to occur.
- b. Trial Court had fallen in to the trap laid by the accused. In fact, the MoU between H.P. and Kores has no connection with the dispute between Kores and Ambitious.
- c. The dispute raised by the accused in fact is with H.P. and it has nothing to do with dispute with Ambitious. The claims raised by Ambitious were in fact raised for avoiding the payment to Kores.
- d. There were sufficient documents in the form bills and

challans which shows delivery of goods to Ambitious.

I will give reasons hereafter for arriving at above findings.

Findings about evidence of Accused

14. The Accused is not having direct connection with Kores but he used to place orders with H.P., and materials are supplied by Complainant. The original MoU with H.P. was produced. The arrangement continued till May-2003. According to the trial Court, this is the same document for which both the witnesses of the Complainant have given different version (Paragraph No.22). **As per Mr. Jain, this finding is incorrect.** (In fact, according to him, the trial Court is confused about this argument).

15. There was some dispute about commission over the sales in between H.P. and Ambitious and case was pending in Delhi High Court. The MoU (Exhibit-31) gives clear picture about mechanism between H.P., and Ambitious. On its perusal, the trial Court opined, original agreement existed in between H.P., and Ambitious and not between Complainant, H.P., and Ambitious. (As per Mr.Jain, it is nobody's case that there was tripartite agreement).

16. Page No.4 of the agreement says about the mechanism about

claim process in between H.P., and Ambitious. The trial Court opined Kores was acting as whole-seller. The trial Court opined, there was no tripartite agreement but it was only agreement between H.P. and Ambitious (Para No.26).

Findings on rebuttal of presumption

17. Trial Court opined “*Accused has rebutted the presumption under Sections 118 and under Sections 138 and 139 of the NI Act*”. The burden can be discharged by preponderance of probabilities. The presumption can be drawn under Section 114(g) of the Evidence Act if the parties withhold any document. The version of PW No.1 and PW No.2 about agreement between H.P. and Kores is conflicting. Whereas, subsequently the Accused produced document between H.P. and Ambitious. **(Para No.29).**

18. The Complainant has to prove execution of negotiable instrument beyond reasonable doubt. Whereas, Accused has to adduce evidence to create a doubt about execution of cheque. The evidence of Complainant creates doubt about execution of disputed cheque. Whereas, rebuttal evidence proves non existence of contract in between the Complainant and the Accused. **(Para No.34).**

19. **The trial Court commented** on letter dated 22nd September, 2003 sent by Accused to Complainant at Exhibit-34. It talks about start of a new chapter. However, **the trial Court opined** business was not restarted for want of consent from H.P. (Para No.35). There was no reply from the Complainant to the said offer. Cheques were in blank condition. (Para No.36).

These are the reasoning given by the trial Court.

Scope of enquiry in an Appeal against acquittal

20. It is true that there is a presumption of innocence in criminal trial. It is also true that this presumption of innocence is reinforced when trial results into acquittal. It is also true that Appellate Court should be slow in interfering the judgment of acquittal. The Appellate Court is not justified in reversing the judgment of acquittal just because a view different from the view expressed by the trial Court is permissible. Whereas, Mr.Bhadbhade relied upon the observations in case of *Central Bureau of Investigation v/s. Shyam Bihari and Others*¹. In this case, a special leave to prefer an Appeal sought by the State Government was refused by the High Court. The Hon'ble Supreme

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Court refused to interfere in the said judgment. Merely because contrary view is permissible, is no ground to interfere in the judgment of acquittal. (Para No.27). **But, it is also true that an enquiry in an offence for the offence punishable under Section 138 of NI Act cannot be equated with the trial of an offence under other laws.**

21. Normally, in an offence under other laws, entire burden is on prosecution and there is no role for the Accused except to pin point out lacunae and to create doubt in the prosecution evidence. **Whereas, an enquiry under 138 of NI Act is different due to following aspects:-**

- (a) When foundational facts are proved, **presumption** comes to the help of Complainant under Sections 118 and 139 of NI Act.
- (b) Unless and until **Accused rebuts that presumption**, initial presumption continues till conclusion of the enquiry and it may results into a decision against the Accused.
- (c) So, **pendulum of proving a fact** moves from the Complainant to Accused, from Accused to Complainant and again to Accused depending on facts and circumstances throughout completion of an enquiry.

22. So, when the Appellate Court is dealing with an Appeal against the judgment of acquittal involving an offence under Section 138 of NI Act, **the principle of “*slow interference*” does not apply with full**

force. The provision for rebuttal of presumption is provided in Section 139 of NI Act. It is a settled law that there can be rebuttal by adducing evidence by the Accused or it can be by putting his theory to the Complainant by way of cross-examination. **In this case, the Accused himself has entered into the witness-box.**

23. In view of the above reiteration of the principles of law, this Court is required to decide this Appeal by considering the following aspects:-

Points for Adjudication

- (a) Whether the documents are sufficient to hold that **goods are delivered by the Complainant** to the Accused and there **is liability created** in favour of the Complainant by the Accused ?
- (b) Whether the **contention of the Complainant is right** relating to **different roles** played by **PW No.1** and **PW No.2** in entering business dealings with Ambitious or whether the differences in their evidence is sufficient enough to dislodge the claim of the Complainant ?
- (c) What is the evidentiary value of evidence of PW No.1 individually and that of PW No.2 individually.
- (d) Whether the MoU in between H.P. and Kores (India) Ltd., **is relevant** for **deciding the dispute** raised by Ambitious Marketing ?

- (e) Whether the **trial Court committed a wrong** in deciding **that issue against the Complainant** ?
- (f) Whether the Complainant **has proved foundational facts** for drawing of presumption under Section 139 of NI Act on the basis of available documents ?
- (g) Whether the Accused **has taken different stands** in defending himself in various correspondence which are brought on record and it has got effect in **damaging his plea** as to rebuttal of presumption ?
- (h) Whether the **trial Court has committed a wrong** in concluding that the **Accused has rebutted the presumption** under Section 139 of NI Act ?
- (i) Whether it can be said that cheques are issued not towards discharge of liability but by way of security ?

Variance in between evidence of P.W.1 and P.W.2

24. Trial Court at various places in the impugned judgment has emphasized on this variance i.e. to say “*facts deposed by P.W.2 does not find place in the evidence of P.W.1*”. Even the trial Court observed P.W.2 was examined in order to fill up the lacuna in the case put up through P.W.1. According to Mr. Bhadbhade those findings are correct and if the evidence of both these witnesses are perused, we can very well say that what is there in the evidence of P.W.2 is not deposed by

P.W.1. According to him, if both witnesses are working in Kores Company, they are supposed to depose the facts in tandem.

25. Whereas, according to Mr. Jain, it cannot be considered as inconsistency. In fact, both these witnesses are the employees of Kores India and they are working in different offices and in different cities. Their job is different and their responsibilities are different. According to him, in fact P.W.1 works in Bombay office and he is looking after accounts. Whereas, P.W.2 works at Delhi office and he has represented the Company in dealing with Ambitious. As such he knows each and every fact. In fact few of the correspondence made by the Ambitious are also addressed to P.W.2 and the said fact itself proves involvement of P.W.2.

26. If we read the tenor of their evidence, we may find that P.W.1 has deposed on the basis of documents and he is not having personal dealings with Ambitious. On the other hand, P.W.2 – Sanjay is having personal knowledge about the transaction with Ambitious. If we read the evidence of P.W.2 – Sanjay, we may find he is aware of the transaction in following way:-

Evidence of PW 2

- a. He knows the accused. He knows practice of issuing

the bills and practice of issuing of cheques against those bills.

- b. The company has transacted with Ambitious to the tune of Rs.44 Lakhs and in turn 16 cheques were issued.
- c. There is interaction in between this witness and accused about honoring of the cheques. Even cheques were issued and signed by the accused in his presence.
- d. On this aspect, P.W.1 during the chief-examination had given a different answer. He says cheques were signed in his presence (however, during the cross-examination, he has deposed that in fact they were not signed in his presence).
- e. Even this witness – P.W.2 identifies the signature of the accused. There is assurance from the accused that the cheques will be honoured within 30 days.
- f. On the request of the accused cheques were not presented within that time but were presented in January 2004.
- g. Witness is aware about reason for dishonour of cheque being “stop payment”. Witness was aware one of the cheque was issued against balance payment whereas other cheques were issued against invoices. (para 1)
- h. As invoices were issued from Delhi office and prepared by store in-charge Mr. N.K. Sharma, P.W.2 has identified them. Witness was aware about the

manner of issuing the invoices. When one copy is given to the accused and he has given acknowledgment it is by way of acceptance of the goods.

- i. He is **aware about issuance of two legal** notices dated 27th January 2004 and 30th January 2004. He is also aware about giving reply by the accused through his counsel.

27. He was cross-examined on certain aspects. He had given following answers:-

- (i) He is aware about **appointment of Ambitious as supplier by HP** and HP has given to them a list of registered suppliers (RSR).
- (ii) According to him, **agreement in between Kores & HP is confidential and as such not having any concern to the transaction** between Kores and Ambitious.
- (iii) **He knows difference between confidential and non-confidential.**
- (iv) Statutory notices are given by Company Secretary on the instructions of the management of the Company.
- (v) He is aware that notices are given to **three persons** :-
 - (a) **Ashish Kumar Ahooja** is the proprietor.
 - (b) Whereas, **P.P. Ahooja** has signed the documents relating to stop payment instructions.

- (c) He knows earlier **Sunil Ahooja** was taking active part in the business. Whereas the complaint is filed only against accused Ashish Kumar Ahooja being proprietor of Ambitious. It is decided by the management not to involve the father of Ashish Kumar. It was the oral decision.
- (vi) He was aware about part-payment made by the accused about goods supplied as per invoices and cheques were issued towards remaining payment of the invoices and even earlier cheques were taken back.

28. On this background, it will be material to see what P.W.1 Rakesh has deposed. The facts are as follows:-

Evidence of P.W.1

- (a) He has reiterated the **averments in the complaint** and **board resolution** authorising him to represent the company. In paragraph 4, he has given the **details about 15 consignments** worth Rs.37,79,400/- and delivery of goods in perfect condition and issuance of 15 cheques by the accused.
- (b) The cheques covered in every complaint are different. **He knows the reason for dishonour** is stop payment instructions. Through him the **relevant invoices, cheques and memos were exhibited**.
- (c) In paragraph 6, he has deposed about sending of a notice from corporate service division situated at Thane. He was aware about **sending of a notice through R.P.A.D. and**

U.P.C. U.P.C. notice was served however packet of R.P.A.D. notice was returned back “unclaimed”.

- (d) As the notices were issued from corporate service division office at Thane, Complaints were filed before Thane Court. During the cross-examination, he had given the following answers:-

- i. He works as Commercial Manager at Bombay office predominantly he looks after accounts and debtors and creditors of the Company.
- ii. There was a written agreement executed in between Kores and HP in the year 1998. However, he was not present.
- iii. He tried to give explanation for not producing copy of that agreement as it was not important (this is one of the aspect wherein trial Court found his evidence and that of P.W.2 being inconsistent).
- iv. He does not look after supply but goods were supplied by Delhi office to Ambitious.
- v. Their officer Sanjay Malhotra – P.W.2 has received the order from Ambitious (P.W.2 has also deposed on that aspect. Trial Court has not considered this factor as corroborating evidence of these two witnesses).
- vi. The attention of this witness was drawn towards some interpolation in the date on invoice dated 16th June 2003 at Exhibit-27.

vii. About signing this document though initially the witness kept mum later on says that it was initialed by our go-down people. (Trial Court has laid emphasis on this conduct).

29. This witness has admitted about absence of knowledge regarding supply to accused as he is working at Bombay office (witness could have also said that he is aware of the transaction, however, he has not done that because he has specifically stated that he was looking after the accounts department). Can this answer be considered to the detriment to this witness? The witness is working as Commercial Manager since August 2003. In July 2003, he was not Commercial Manager. In the month of July, cheques were issued. Being Commercial Manager, it is his duty to collect the payment and not his duty to supply goods. In fact, he had given this answer truly. Answers given by him about issuance of notices, dispatch and receipt of notice in fact pertains to his portfolio. The facts deposed by him in respect of the transactions earlier to dishonour of cheques/ issuance of cheque why cannot be considered as the facts stated on the basis of the documents?

30. Trial Court has overlooked the fact that Company runs

through the natural persons and when complainant Company is having offices at Bombay and at Delhi also Company has deputed several persons at these two places. There is distribution of work as Commercial Manager and Regional Manager. These are the practices and customs followed when business is run on the large scale and through company. On this background, if you say that a person working at one place is not aware about the transactions that are carried out at other place, can you say that it is inconsistency or variance?

About collection of cheques

31. He has also clarified goods are supplied by Delhi office and employees working there used to collect the payments and in this case cheques are collected by Delhi officials only. When he had given this candid answer and when P.W.2 has deposed on that line, can you say that it is inconsistent. If PW1 could have stated that the Bombay office has in fact collected the cheques then it can be said to be inconsistent and untruthful. Whereas subsequently P.W.2 deposed that cheques are collected not by Bombay office but by Delhi office.

About signing of cheques

32. It is admitted by him during cross that **cheques are not signed in**

the presence of P.W.1. It is true that this answer is in contrast to the facts stated by him during the chief examination (cheques are signed in his presence). In fact, this witness could have stated untrue facts with confidence that cheques are signed in his presence but he has not done it. The trial Court has considered these two answers as inconsistency in the stand taken by P.W.1. It is true also but evidence is not simply chief-examination or simply cross-examination. It consists of both and after considering the facts stated in both of them, the Court has to draw an inference and give findings about those facts. If both are considered together only inference which can be drawn is cheques were not signed in his presence. If this answer is coupled with the facts stated by him about collection of cheques by Delhi office, the evidence of P.W.1 can be said to be truthful.

33. If he could have reiterated in cross-examination that cheques were signed in his presence, then it could have doubted his veracity. However, trial Court has taken hyper-technical approach and trial Court has forgotten the difference in between the inquiry of offence under Section 138 of N.I. Act and trial of offence under Penal Code.

About notices

34. He has also clarified about issuance of notice by him on the

instructions of the management. He has also clarified why complaint was filed only against one person whereas notices were issued to three persons. In fact, P.W.2 has also reiterated same fact. **While appreciating evidence of P.W.1 on one hand and P.W.2 on the other hand**, trial Court has considered **only the areas of inconsistency** but **not considered areas of consistency**.

35. He admits about receiving letter from accused Ashish not to present cheque for encashment. He also admits that inspite of those instructions he deposited the cheques for encashment. He did not make inquiry about sufficiency of funds (however, the burden is on accused to show that in fact, there is sufficient balance in his account. He has not laid any evidence on this aspect). When the witness was asked about the name of the retailer, he has kept mum.

Conclusion

36. While reiterating the answers given by both these witnesses, I have already narrated their nature of job, their nature of portfolio and their place of work. Admittedly, **P.W.2** was looking after supply of goods in Delhi office whereas **P.W.1** from Bombay office is looking after the accounts. It seems that P.W.1 comes into picture only after issuance of cheque. He is more conversant with issuance of notice,

posting of notice and its service. Whereas, P.W.2 seems to be more conversant with the transaction that took place till the time Ambitious issued the cheques.

37. There is one more instance which suggests that Ambitious was aware about involvement of P.W.2. In the letter dated 1st August 2003 addressed by Ambitious through Aashish Kumar, attention of P.W.2 was also brought. It pertains to non-deposit of cheque.

38. When we consider the evidence of both these witnesses together, we find that approach of the trial Court is hyper-technical. Trial Court has lost site of the fact that Kores India works from different places. When both these witnesses have deposed their different roles, it is but natural that they are going to depose different facts. In fact, it cannot be considered as inconsistency. In fact, it can be said that they have deposed about the facts which have taken place in ordinary course of business. I disagree with the findings given by the trial Court.

Non-production of MoU

39. In the evidence there is a reference of two MoUs/Agreements. It is as follows:-

- (a) Written agreement in between H.P & Kores executed in the year 1998.

- (b) MOU in between H.P. & Ambitious (It continued till May 2003). It was executed on 1st May 2001 Exh.31 (In SCC No.806/2004 Appeal No.844/2010/page 59).

Admittedly MOU in between H.P. & Kores is not tendered in evidence. P.W.1 & P.W.2 were put questions during cross-examination. Both admitted about its non-production. But they gave different answers. Trial Court had put emphasis on inconsistency in the explanations given by them.

40. It will be material to see what answers were given by both these witnesses during cross-examination.

Answers given by P.W.1

- a. The agreement was not executed in his presence.
- b. When asked, why this agreement is not produced, he answered "As it is not important, so I did not produce".

Answers given by P.W.2

He gave the answer "*The agreement between our company & HP Company has no concern with the transaction in question entered into with accused. It is confidential document which was entered with them and HP*".

41. P.W.1 said "*the agreement is not important*". Whereas, P.W.2

partly said “It has no concern with the transaction in question”.
Whether these answers are inconsistent? They gave the same answer but in different words. P.W.2 added one explanation as “It is confidential”.

Observations of Trial Court

42. Trial Court observed:-

“It must be taken into consideration the authorised representative of the same company are giving two different versions for the importance of the same document. One witness is saying that said agreement not important, hence, it is not necessary to produce it. At the same time the another witness for the same company replying in the different way that the said document is a confidential one and could not be produced. Resultantly, the only inference can be drawn from the contradictory evidence of these two witnesses with respect to the said document that the complainant i.e. Kores India Ltd. is attempting to withhold said agreement executed between Kores India Ltd. and H.P. Ltd. so it may give adverse inference which would be unfavorably to the complainant if it is produced in the Court”. (page 123 of Appeal No.840 of 2010)

43. Trial Court further observed:-

“The prosecution is attempting to withhold the

document i.e. an agreement executed between the complainant and H.P. Ltd. and giving different contention for the same which are completely contested nature. As P.W.1 is saying that this document is not important, hence, it was not produced. At the same time P.W.2 is saying that said agreement was a confidential and important in nature. Hence, it was not produced in the Court". (page 135 – 136) of same appeal.

Accused version

44. Whereas Ashish proprietor of Ambitious laid emphasis on their MoU with H.P. & he produced it in his evidence. (SCC/806/2004 Exh.31). His contention is :-

- a. After discontinuation of the business with HP, he claimed the dues. But HP has not responded.
- b. Dispute is pending before Delhi High Court.
- c. Even Kores has not responded and hence, he gave instructions to Kores & also to bank not to deposit/honor the cheques.

45. Before appreciating the submissions advanced by both the learned Advocates on this issue, it will be relevant to understand nature of business relationship amongst three parties. It can be inferred from averment pre-complaint correspondence and from depositions and

documents. It can be summarized as follows:-

Nature of business dealings

- (i) HP is a manufacturer whereas Kores (India) Pvt. Ltd. is a whole-seller appointed by HP.
- (ii) Accused is appointed by HP as supplier/dealer.
- (iii) HP has given a list of supplier to Kores (**RSR** list). Kores is entitled to supply goods to persons outside list.
- (iv) Whereas Ashish accused has described his relationship as a sub-distributor of HP.
- (v) He used to place orders to HP & Kores (India) used to supply goods to accused.

46. The pre-complaint correspondence between Kores and Ambitious/accused reveals following facts:-

- (a) Kores was requested by Ambitious not to present cheques until next information letter dated 1st August 2003 (Exh.33). (Appellant's contention – Letter does not mention the reason why cheques should not be presented. The grievances raised later-on are afterthought).
- (b) Stop payment instructions given by Ambitious to their banker O.B.C. dated 1st August 2003 (payment to be deferred till issues are resolved – there is reference of 3 parties. One is Kores India Ltd. and two others – not clear about their connection).
- (c) Ambitious has expressed gratitude towards Kores *vide*

letter dated 22nd September 2003. He has expressed desire to restart the business and accused to clear pending payments (Exh.34).

- (d) Vide letter dated 20th October 2003 Ambitious through the Advocates sent to HP raised grievance about policies of HP being contrary to Section 23 of Indian Contract Act, unilateral execution of MoU, non-inclusion of commission or incentive clause, insistence on issuing blank cheques. Damages of Rs. 2,04,32,945/- is claimed and H.P. was instructed not to deposit cheques (Exh.32 844/2010).
- (e) Statutory notice dated 27th January 2004 and 30th January 2004 demanding payment of 15 cheques amounting to Rs.37,79,045/-.
- (f) Notice reply dated **15th February 2004** (page 31) raising following issues:-
 - (i) Blank cheques were given at the time of delivery. It is as per the policy of H.P.
 - (ii) Grievance was raised about exploitative conduct of H.P.
 - (iii) Kores India and two others are only creatures of HP to cover up illegal business strategy.
 - (iv) Ambitious has stopped the business with HP since August 2003.
 - (v) That is why payment of cheque was stopped.

47. The following facts emerges after reading the MoU dated 1st

May 2001 in between HP and Ambitious :-

- (a) MoU is restricted to promotion, sales and support of HP products.
- (b) It will be valid for 6 months from May 2001 – October 2001.
- (c) It talks about appointment of minimum staff by sub-distributor.
- (d) RSR has to cover only the area assigned to him.
- (e) To provide periodical information to HP about the sales.
- (f) RSR has to purchase products from HP authorised whole-seller.
- (g) HP shall reimburse Rs.16,000/- p.m. to RSR for the expenses incurred in the program. He will lose the amount if he will not send periodical reports.
- (h) There was an arbitration clause in case of dispute.

Nature of dispute with HP

48. In his evidence, Ashish proprietor of Ambitious raised following dispute:-

- (a) No direct financial relationship with Kores (India).
- (b) Kores India has only supplied the goods.
- (c) dispute with HP about payment of commission is pending. It is pending with Delhi High Court.
- (d) there is no legal liability with Kores for supply of goods.

It will be relevant to consider the findings of the trial Court in respect of nature of business relationship and nature of dispute.

Findings of trial Court

49. The trial Court has referred about these 2 MoUs/Agreement at various places in the impugned judgment. But it seems that the trial Court is confused about “parties to this agreement and nature of business relationship in between 3 of them”. It is a matter of record that MoU in between HP & Kores is not produced. What is produced is MoU in between HP and Ambitious (Exh.31). There are only 2 executants HP & Ambitious. Even accused Ashish is not saying that Kores has signed the MoU **still the trial Court observed:-**

“In the present case also the accused being the competent witness adduced the rebuttal evidence and explained the facts and circumstances about existence of triparty Agreement between the H.P. Ltd., Kores India Ltd. and Ambitious Marketing and the present complainant Kores India Ltd. was acting as a distributor for supplying cheque between the H.P. Ltd. and Ambitious Marketing when any ownership and authority over the material supplied by HP Ltd.” (page 143 – last para of Appeal 840/2010.)

50. None of the party has put up a case of tripartite agreement. It is

not clear on the basis of which materials, this inference was drawn by the trial Court? **There is one more reason to infer about misunderstanding in the mind of learned trial Court Judge.** Trial Court framed a question:-

“Whether documents and rebuttal evidence of accused is sufficient enough to show that there was an agreement between H.P. Ltd. and accused and not a triparty agreement between H.P. Ltd., accused and complainant” (pg. 139).

51. The trial Court has framed the question properly. But it is wrong to refer about tripartite agreement. While answering this point trial Court concluded in para No.26 as under:-

“Even though all these receipts produced by the accused himself are also providing only conclusion that it is the contract between H.P. Ltd. & Ambitious Marketing (page 141).

52. Trial Court has taken recourse to the provisions of Section 114(g) of the Indian Evidence Act (Para 29). Furthermore, when PW1 & 2 have given inconsistent answers, trial Court has drawn an inference that the MoU will be unfavourable to the Complainant (Para 10).

I have already observed there is no inconsistency in

between evidence of PW1 and PW2 on the point of “*reason for not producing MoU in between HP & Kores*”. Now, it needs to be seen “*whether its non-production weakens the case of complainant*”?

53. Both the sides are having rival claims. According to complainant the said MoU is not connected to present dispute and as such not relevant. According to Mr. Jain, this MoU pertains to relationship in between HP & Kores. According to him, even though it is true that all the three parties deal in the business of selling HP products, still these MoUs are different and they are not correlated to each other. Whereas, learned Advocate Shri.Bhadbhade submitted there is interconnection in between their business and promises, counter promises and their fulfillment and breaches, if any are depending upon each other.

54. For deciding this controversy, I have read the provisions of Section 114 and illustration (g) also. Illustration (g) says :-

- (i) evidence which could be produced
- (ii) and is not produced
- (iii) if produced
- (iv) be unfavourable to the person who withholds it.

55. There is no dispute about existence of MoU in between HP &

Kores. There is no dispute that it is not produced. Dispute is about “necessity of production”. For that purpose, wordings of Section 114 are relevant. The principle is laid down and illustrations are for understanding the principle. They are not exhaustive. **It cannot be said that “court may presume facts only when contingencies described in illustrations exist”.** So, party can request the Court to presume about certain facts only when conditions laid down in Section 114 are fulfilled. If viewed from this angle, it can be said that the trial Court was wrong in taking recourse to illustration (g). Trial Court has not given any findings that conditions of Section 114 are fulfilled. Section 114 mentions:-

- (a) Court may
- (b) presume
- (c) existence of fact
- (d) likely to have happened.

For drawing presumption, Court has to consider:-

- (a) common course of natural events.
- (b) human conduct
- (c) public and **private business**

AND

their relation to the facts of particular case.

56. Here there are private business relationship in between:-

- (a) HP & Kores
- (b) HP & Ambitious
- (c) Kores & Ambitious.

57. What is the issue involved “whether there is legally enforceable debt/liability in between Kores & Ambitious. The grievance raised by Ambitious is :-

- (a) There is a dispute in between Ambitious & HP (the arrangement is unilateral in connection with commission paid to distributors).
- (b) That is why Ambitious does not owe an amount to HP.

58. Now there is no dispute in between HP & Kores. Letter at Exh.32 dated 20th October 2003 sent by Ambitious to HP echoed grievances made against HP. This letter does not say any dispute in between Ambitious & Kores. Damages to the tune of Rs.2,04,32,945/- is claimed from HP. There is also a grievance about insisting a blank cheque.

59. It has come in the evidence of accused Ashish that dispute is pending with the High Court of Delhi. Though Kores was made party to that proceedings, subsequently they were dropped for reason best known to them. (During arguments, it is submitted by Mr.Bhadbhade

that dispute is settled). Even I have directed the parties to address the Court on that aspect.

60. Now before the trial Court and this Court, Ambitious have not produced any documents to show exact nature of dispute between them, nature of reliefs sought and exact settlement arrived at subsequently. This Court feels “merely raising a claim that there is dispute in between them and HP is not enough”. Accused ought to have filed documents so show nature of their dispute and to show how it has a bearing on their dispute with Kores.

61. Ambitious was not a party to MoU in between HP & Kores. The Court is not aware why separate MoUs are prepared. It may be a part of practices/ customs followed in the business of selling Computer related products. So long as the Ambitious does not claim that said MoU contains a clause throwing some light on relationship in between distributor Kores & sub-distributor/Ambitious the accused is not going to be benefited. Though all are involved in same business, still their financial dealings are separate. So it can safely said that MoU in between HP & Kores has nothing to do with dispute in between Kores & Ambitious. Trial Court was wrong in observing an adverse inference against Kores for not producing MoU.

Evidence on the point of sale/delivery by Kores to Accused

62. Trial Court disbelieved this evidence and one of the reason is inconsistency in between testimony of PW1 and PW2. To prove delivery/ supply of goods, Kores relied upon the oral testimony and documentary evidence in the form of bills and challans. In all there are 6 complaints and now there are 6 Appeals. The details of bills/ invoices, cheques issued accordingly and the complaints filed is already given in the chart. In nutshell the case is :-

- (a) on delivery of goods, accused used to issue post dated cheques.
- (b) PW2 has clarified who issued the invoices. They are by Shri N.K. Sharma stores in charge. He has signed. The invoices are 26. They were marked as Exhibit 22 in SCC 805 of 2004.
- (c) The invoices also bears that signatures of representative of the accused.
- (d) PW1 is cross-examined Accused in respect of invoice dated 16th June 2003 (Exh.27). He admits that date is interpolated.
- (e) PW1 does not look after supply. But it is looked after by Delhi's office.
- (f) Sanjay Malhotra (PW2) has received the orders.

- (g) Invoices are signed by godown keeper.
- (h) Mr. Jain invited my attention to copies of invoices and delivery challans (together by way of separate compilation for convenience purpose).
- (i) It is true that they are invoices/orders signed for Ambitious and corresponding delivery challans. Both are signed for and on behalf of Ambitious.
- (j) Mr. Jain invited my attention to the invoice having date 14th June 2003 filed in SCC No.804 of 2003. Accused has pointed out interpolation in that date and trial Court uphold it.
- (k) when I have seen the date what is interpolation, only first date is earlier mentioned and there is overwriting and earlier digit from the figure is changed to 14. Trial Court accepted it interpolation.
- (l) It is not interpolation. But it is overwriting. At the same time there is stamp of Ambitious Marketing and signature. Date written is 14th June 2003. So where is the question of interpolation.
- (m) Such mistakes do occur while putting dates. Trial Court approach is unacceptable.
- (n) The evidence cannot be appreciated so strictly. There is difference between inquiry u/s. 138 of NI Act (which is quasi-criminal in nature) and ordinary criminal trial. Even in ordinary criminal trial it cannot be recognised. Whether it is an alteration in cheque details or amount

mentioned in figures. It is negligible. It ought to have been overlooked. The approach of trial Court is fault finding approach.

63. Trial Court has overlooked the fact that Ashish has deposed that Kores used to deliver the goods to Ambitious. The delivery challans were sent when goods were delivered. It is signed by representatives of accused (whoever is available). Though he has deposed that he used to place order on HP, there are orders tendered in evidence by PW2. But authenticity is not disputed by accused. He nowhere deposed those orders do not bear signature of his representatives. Trial Court has overlooked this documentary evidence. Even both the witnesses were not put suggestions that goods were not delivered.

64. Mr. Jain invited my attention to pre-complaint correspondence. I have already referred. The accused never complained that goods were not received. The dispute with HP is raised.

65. Trial Court approach is totally wrong. Ultimately what is appreciation of evidence? It is nothing but weighing the evidence, consider faults / lacunae in the evidence, to ascertain whether these lacunae goes to the root of the matter or whether it is minor/ superficial. Trial Court treated minor lacunae as major one and

discarded the evidence to non-suit the complainant. This cannot be considered as proper appreciation. This is nothing but an appreciation done so as to deny the relief to the complainant. That is why this Court has gone through the evidence minutely. It cannot be said that on this evidence, another view is possible. But the appreciation by the trial Court is an exercise undertaken by neglecting the practices followed in the business (about different roles by different witnesses), giving undue importance to non-production of MoU. I conclude that the complainant has proved they have sold goods of the value mentioned in the invoices and accused has purchased those goods. As such accused owes an amount of **Rs.44,90,270/-** (total of all challans) to the Kores India.

Issuance of cheques

66. Ambitious through proprietor Ashish Ahooja gave evidence. He has denied any financial relationship with Kores. He informed to Kores and Bank not to present the cheques for encashment. So about drawing of cheques and delivery of goods, he has not raised any dispute. The fact that he wrote letter to stop payment itself indicates cheques were issued. He has not raised dispute about non-receipt of goods. The

dispute which is raised is with HP and not with Kores. Ashish Ahooja disputed the liability for the reason of dispute with HP. I have already rejected that contention.

67. C.W.No.1 and C.W.No.2 both have deposed about delivery of cheques on delivery of consignment, those 16 cheques were issued. The observations of the trial Court about “*variance in between C.W. No.1 and C.W. No.2 on the aspect of signing*” was disagreed by me. But both the witnesses are at consensus about delivery of cheques on delivery of consignment and they are to be deposited within 30 days. During cross-examination, Ashish has said about placing orders with HP but he admits goods were delivered by Kores only.

68. According to Ashish all the cheques were blank but containing his signatures only. These cheques were collected by sales executive of HP. There is contrary version about collection of cheques by C.W.1 and C.W.2. Be that as it may, issuance of cheques by Ashish is not disputed.

About liability and rebuttal

69. According to Mr. Jain, the amount in cheque and amount in invoice/ delivery challan is same. The invoices bears the signature of representative of Ambitious. Trial Court opined that Ambitious has

rebutted the presumption u/s. 139 of Negotiable Instruments Act. **I am not in agreement with the observations of the trial Court** about variance in evidence and non-production of MoU in between HP and Kores. According to Mr. Bhadbhade, if the drawer issues blank cheque and if payee will fill those details, it amounts to material alterations and it is not negotiable instrument. To buttress this submission, he relied upon observations in case of *Pinak Bharat and Company, Mumbai v/s. Anil Ramrao Naik and another*². Mr. Jain disputed this contention and according to him, the facts are different. Mr. Bhadbhade submitted that the cheques were issued towards security and not towards discharge of liability.

70. **I agree with the submission of Mr. Jain.** The facts of *Pinak's* case are different. There was dispute in between the parties to the cheque about liability. Whereas in the case before us, there is dispute in between Ambitious and HP. The dispute raised by Ambitious is about financial issues in between them. **If Kores have delivered goods to Ambitious, they are eligible for payment of amount.** The MoU in between Ambitious and HP does not say anything about payment of goods received. This payment is independent. The amount mentioned

2 (2022) SCC OnLine Bom.6707

in 16 cheques is nothing but the amount mentioned in the invoices/ challans. Kores is having every right to fill those details in cheques and make them complete. The observations in *Pinak* is not applicable. Mr. Jain relied upon the observations in case of *Payal Malhotra v/s. Sulekh Chand*³ (the observations in Para Nos.6, 11 and 12).

71. Mr. Jain relied upon the observations in case of *Hiten P. Dalal v/s. Bratindranath Banerjee*⁴ However, the Supreme Court has discussed about sufficiency of evidence for rebuttal of presumption. It is not sufficient when the drawer has offered some explanation. If drawer adduces evidence to prove that holder of the cheque has not received the cheque for discharge of liability the presumption is said to be rebutted. In other words, issuance of cheque has to be preceded by passing of some consideration. In this case, goods are sold to Ambitious and they owe an amount to Kores. Cheques are issued towards discharge of that liability. It cannot be said that cheques were issued as a security. Already goods were delivered, so, the liability in between Ambitious and Kores is created. If introductory facts are proved, presumption has to be drawn. It has happened in this case. The issue of raising a presumption when blank cheques are given was answered by

3 2023 SCC OnLine Del 7597

4 (2001) 6 Supreme Court Cases 16

the Supreme Court in case of *Kalamani Tex and Another v/s. P. Balasubramanian*⁵. It was held permissible. Whereas, in case of *Bir Singh v/s. Mukesh Kumar*⁶ the object for inserting Section 138 in the statute book was reiterated. It is for infusing credibility to negotiable instruments and to have deterrent effect on the breach of issuing cheques callously.

72. I do not think that excuse given for disputing the liability arising out of cheques is acceptable. No doubt, the dispute was pending with Delhi High Court and Mr. Bhadbhade has produced copy of minutes of the meeting dated 18th July 2009 before the sole arbitrator. Certain terms agreed in between Ambitious and HP about payment were recorded. Kores was not a party to that settlement. This event is subsequent to the judgment of acquittal passed by the trial Court. That document is insufficient to suggest about any effect on the dispute in between Kores and Ambitious. Neither before the trial Court nor before the Appellate Court Ambitious has filed any documents showing nature of exact dispute. So the Court cannot accept the said contention in order to exonerate Ambitious from the liability arising out of the provisions of NI Act. **I hold that cheques are issued towards**

5 (2021) 5 Supreme Court Cases 283

6 (2019) 4 Supreme Court Cases 197

discharge of debt or liability and Ambitious has failed to rebut the presumption.

Dishonour of cheques and issuance of notice

73. It is a matter of record that all the cheques were dishonoured for the reason '*payment stopped by the drawer*'. It is not in dispute because Ambitious themselves have written a letter to Kores. For the reason stated above, Ambitious was not justified in issuing stop payment letter. Furthermore, no evidence was adduced to show there was sufficient balance in the Bank account of Ambitious. You cannot expect the witnesses for the complainant to know about the balance in the account of Ambitious. In fact, apart from taking plea of dispute about liability, Ambitious ought to have given an evidence about balance in the account. He has not done it. So the reason for dishonour falls within the purview of Section 138 of NI Act.

Issuance of notice

74. There are two notices dated 27th January 2004 and 30th January 2004. Reply is also given. So receipt of a notice is not in dispute. There is no dispute that complaints were filed beyond the period of limitation. This part of NI Act is also fulfilled.

Defect in recording 313 statement

75. According Mr.Bhadbhade trial Court has put omnibus questions. He invited my attention to the said statement. According to him, there is no reference about what C.W.1 and what C.W.2 has said. It has got prejudice. He relied upon the observation in case of following judgments:-

- (i) ***Maheshwar Tigga v/s. State of Jharkhand⁷***
- (ii) ***Khushvinder Singh v/s. State of Punjab⁸***

Mr.Jain relied upon following judgments:-

- (i) ***State of Punjab v/s. Swaran Singh⁹***
- (ii) ***Nar Singh v/s. State of Haryana¹⁰***

76. I have perused the statement of Ashish Kumar Ahuja recorded under Section 313 of the Code. In all, 9 questions were framed. It is true that there is a reference of witness No.1 and witness No.2 in question No.1. All other questions were put without referring the name of the witness. **There is a definite purpose for recording the statement under Section 313 of the Code. It consists of two parts. They are as follows:-**

7 (2020) 10 Supreme Court Cases 108
 8 2013 SCC OnLine P&H 2023
 9 (2005) 6 Supreme Court Cases 101
 10 (2015) 1 Supreme Court Cases 496

- (a) Court can put question to the Accused at any stage of the proceeding and there is no need to intimate him about putting of this question. (Section 313(1)(a) of the Code).
- (b) Once the witnesses for the Complainant are over, it is mandatory for the Court to put questions to the Accused on the basis of facts deposed by the witnesses and what has come in evidence. (Section 313(1)(b) of the Code).

There is a purpose behind putting such questions. It affords an opportunity to the Accused to explain the circumstances against him. There is a constitutional protection under Article 20 to an Accused. He cannot be compelled to give evidence against himself. By inserting the provision under Section 313 of the Code, the legislatures have balanced the rights of the Accused and also of the Prosecution because principles of natural justice requires the concerned persons must be heard. However, the right under Section 313 to the Accused is only for explaining the circumstances. The provisions of Sub-sections 2, 3 and 4 are also relevant. They are safeguards to the Accused. They are as follows:-

- (a) An oath should not be administered to the Accused. [Section 313(2)].
- (b) Accused cannot be prosecuted for refusing to answer questions or by giving false answers. [Section 313(2)].

(c) Answers given by the Accused may be taken into consideration in the enquiry or trial wherein he is prosecuted.

77. The provisions of Section 313(2) and (3) are nothing but an extension of the constitutional protection and the provisions of Section 313(4) of the Code are nothing but the extension of the principle laid down in the Evidence Act about “*entire burden on the Prosecution*”.

78. On the basis of answers given by the Accused, the Complainant is not relieved from the responsibility to prove the offence. The Court may consider the answers or may not consider it prior to arriving at a guilt of the Accused. There is one more factual aspect. Apart from answering the questions in 313, the Accused himself has also given evidence on oath. This is what is provided in Section 315 of the Code. This can be only on his request. These factual backgrounds need to be considered.

79. In case of ***Maheshwar Tigga*** (supra), the Hon’ble Supreme Court has considered what will be the effect of not putting a particular circumstance to the Accused in 313 statement. In that case, questions put to the Accused were put in an extremely casual and perfunctory nature. The question consisting of composite facts were put. (Para

No.7). The provision is incorporated for ensuring fair trial and it should not be done in a slipshod manner. This was one of the factors for setting aside the conviction. Whereas, in case of ***Khushvinder Singh*** (supra), issue of not putting the material to the Accused in 313 was considered. (Para No.17).

80. There cannot be any dispute about this proposition of law. Whereas, according to Mr.Jain, it is not necessary that questions should be framed in such a manner that there should be a reference of each and every witness examined by the Complainant. Even if summary of facts deposed by both the witnesses is put to the Accused, it is a sufficient compliance. According to him, that is the affair in between the Court and the Accused. A particular Judge may put questions in a particular manner whereas, another Judge may put questions in different manner.

81. According to me, if such an issue is raised before the Appellate Court, it needs to be seen whether circumstances are put to the Accused or not. He invited my attention to the question No.1 wherein there is a reference of both the witnesses. The Accused replied:-

“he has heard their evidence and understood the same”.

82. It is true that the role of both the witnesses are different. The CW No.1 is related to maintaining the accounts, issuance of notice, deposit of cheques and reasons for dishonour and filing of complaint, whereas, CW No.2 is concerned with interaction with the Accused, placing of orders, delivery, receipt of cheques. With this view in mind, I have minutely perused all the questions. **The gist of these questions is as follows:-**

- (a) About nature of business by the Accused was asked in question No.2.
- (b) About issuance of 15 post dated cheques for total sum of Rs.37,79,045/- (Rupees Thirty Seven Lakh Seventy Nine Thousand Forty Five Only) was asked in question No.3. There are 6 complaints. The details of the bills, amount and cheque number is also asked in that question (In fact, for 15 cheques, one notice is there and for 16th cheque, different notice is there. In fact, in 5 complaints there are 3 cheques involved in every complaint and in 1 complaint, 1 cheque is there and total of 16 cheques comes to R.44,99,270/-).
- (c) The question was asked about reason for dishonour being '*stopped payment*' and the relevant memos in the same question.
- (d) Issuance of demand notice by the corporate division – Thane and failure to make payment was asked in question

No.4.

- (e) It was asked in question No.5 that the cheques are issued for the respective invoice bill for materials supplied to him.

83. It is no doubt true that there is no reference of CW No.1 and 2 and what are the roles played by them. But, particulars of material evidence is certainly put to the Accused.

84. Question is, merely because there is no reference of CW Nos.1 and 2 in those questions, does it mean to say that any prejudice is caused to the Accused? It is important to note that even the Accused has given evidence on oath. That was his choice. However, it implies the fact that the Accused was fully aware about the case he has to meet and the case which he has to put up before the Court.

85. I agree that the trial Court ought to have made some reference of the Complainant Nos.1 and 2. However, the trial Court adopted an approach of putting summary of facts deposed by the two witnesses. After all, it is a summary trial. The issue of prejudice also needs to be considered on the background of giving of evidence on oath by the Accused. This fact rules out the grievance of prejudice taken by the Accused. I reject that contention.

Conclusion

86. For the above discussion, I come to the conclusion that the view of the trial Court is hyper technical view. The trial Court has overlooked the basic facts about the roles played by CW No.1 and CW No.2. The trial Court scrutinized their evidence by presuming that they are the witness to prove a particular fact only but in fact, they are the witness in respect of the facts forming transaction right from placing of the orders till filing of complaint. The trial Court overlooked the fact that the Complainant is not a natural person but an artificial entity working through natural persons and that too, in the office situated at different places. The trial Court decided the complaint as if the trial of bodily offences is being conducted.

87. The complaint under Section 138 of NI Act is based on the documents and proved by giving oral evidence. On some occasion, these complaints involve business transactions. It involves the correspondence in between the parties made in usual course. Such correspondence throws light on the intention of the parties. The trial Court overlooked the difference in relationship in between the H.P., and Kores, Kores and Ambitious and Ambitious and H.P., and Ambitious.

88. No doubt, Kores on behalf of H.P., was selling the products to the Sub-distributors. It is true that the MoU in between H.P., and Kores was not produced. There must be some financial terms. However, I have already observed the relationship in between Kores and Ambitious, stand on different footing. It is purely sale and purchase of products. Ambitious was getting some incentives from H.P. Ambitious was not satisfied. Their MoU nowhere contains a clause about who should pay for the products purchased by the Ambitious. This MoU is restricted only to incentives by way of sale promotion and it has nothing to do with basic transaction of sale and purchase of products. This defence was taken by the Ambitious just to avoid a lawful payment to Kores. I have given this finding on the basis of available documents and on the basis of documents not produced by the Ambitious including the Court litigation.

89. The cheques are the cheques within the purview of *instruments*. The instructions given for not depositing these cheques by Ambitious could not be substantiated by bonafide dispute with Kores. In fact, it was a dispute with the H.P. Coupled with this fact, no evidence was adduced to prove the sufficiency of amount in the account by Ambitious. The Kores have complied with the provisions of Section

138 of the NI Act relating to issuance of notice in time, receipt of notice and filing of complaint in time. Hence, I conclude that the judgment of acquittal needs to be reversed. I conclude that the Accused has committed offence punishable under Section 138 of the NI Act.

90. After pronouncing this judgment, I have heard both the learned Advocates on the point of sentence.

91. Learned Advocate for the Appellant submitted that let there be both the sentence. Whereas, learned Advocate for the Respondent prayed for leniency. It is true that there can be sentence for two years or fine which may extend to twice the amount of cheque or both. I am not inclined to award the sentence of imprisonment. Instead of that, there can be fine being the double amount of the cheques. In view of that following order is passed:-

ORDER

- (i) The Appeals are allowed.
- (ii) The order of conviction and sentence passed by the Court of JMFC – Thane in (a) Summary Criminal Case No.804 of 2004 (b) Summary Criminal Case No.805 of 2004 (c) Summary Criminal Case No.806 of 2004 (d) Summary Criminal Case No.807 of 2004 (e) Summary Criminal Case No. 808 of 2004 and (f) Summary Criminal Case No.809 of 2004 dated 28th February 2006 are set aside.

- (iii) The Respondent - Ashish Kumar Ahooja is convicted in all these cases for the offence punishable under Section 138 of the NI Act. The sentence will be as follows:-

<u>Details of Case No.</u>	<u>Amount of cheques</u>	<u>Fine amount@double</u>
S.C.C.No.804/2004	Rs.7,58,490.00/-	Rs.15,16,980/-
S.C.C.No.805/2004	Rs.7,11,225.25/-	Rs.14,22,450.50/-
S.C.C.No.806/2004	Rs.7,50,275.00/-	Rs.15,00,550/-
S.C.C.No.807/2004	Rs.8,23,080.00/-	Rs.16,46,160/-
S.C.C.No.808/2004	Rs.6,67,660.00/-	Rs.13,35,200/-
S.C.C.No.809/2004	Rs.7,79,600.00/-	Rs.15,59,200/-

- (iv) In case of failure to pay above said amounts, the Respondent - Ashish Kumar Ahooja is sentenced to simple imprisonment for two (2) months in every case. Let the Respondent to pay all these amounts within a period of eight (8) weeks before the trial Magistrate.
- (v) Once all these amounts are paid, it be paid to the Complainant by way of compensation.

92. Learned Advocate for the Respondent prayed for staying the order. Already the period of eight (8) weeks is granted, so in the mean time, the Respondent is at liberty to take appropriate steps. Hence, no question of stay.

[S. M. MODAK, J.]