Received on	:-	19.04.2007.
Registered on	:-	17.01.2008.
Decided on	:-	17.06.2017.
Duration	:-	Y. : M. : D.
		09 : 05 : 00.

IN THE COURT OF THE METROPOLITAN MAGISTRATE,
06TH COURT, MAZGAON, MUMBAI.

(Judgment under section 355 of Cr.P.C.)

(PRESIDED OVER BY TEJWANT SINGH A. SANDHU)

Exh.68.

a)	The Serial number of the case	:-	**129/SS/2008.**
b)	The date of the commission of offence	:-	15.03.2007.
c)	The name of the complainant if any,	:-	**Mr. Hemal Ashok Ganatra,** Age : 31 Years Proprietor of M/s. National Kumkum Industries, **Office At** :- 35, Abhechand Gandhi Marg, (New Bardan Lane), Vadgadi, Mumbai-400 003.
d)	The name of the accused persons his parentage and residence	:-	**1. M/s. Gajanan India Chem Co.** **2. Mr. Amit Mittal.** **3. Mr. Narayan Mittal-** ***(Deleted being Dead as per order on application dated 06.09.2010.).*** **All Address At** :- 501, Bhoomi Gokul Off. A.K. Vaidya Marg, Goregaon (East), Mumbai- 400 063.
e)	The offence complained of or proved	:-	Under section 138 of the Negotiable Instruments Act, 1881.

f)	The plea of the accused and his examination if any	**:-**	Accused pleaded not guilty and claimed to be tried.
g)	Final order	**:-**	The accused are **acquitted** of the offence punishable under section 138 of the Negotiable Instruments Act.
h)	The date of such order	**:-**	**17.06.2017.**
i)	Appearance	**:-**	Adv. Bhatiya for the Complainant. Adv. Trivedi for the Accused.

JUDGMENT

(Delivered on 17.06.2017)

The points for my determination along with my findings thereon are as under :-

SR.NO.	**POINTS**	**FINDINGS**
1)	Whether the accused issued **7** cheques bearing **Nos.050640, 050641, 050642, 050643 and 042927** of Rs.10,000/- each and Cheques bearing Nos.**042917 and 42928** of Rs.25,000/- each, all dated 17.02.2007, in favour of the complainant in discharge of a legally enforceable liability?	**...No.**
2)	Does the complainant prove that, the accused dishonoured the said cheques in discharge of a legally enforceable liability?	**...No.**
3)	What order ?	**Accused are acquitted.**

REASONS

AS TO POINTS Nos.1 and 2 :-

2. To bring home the guilt of the accused, the complainant has examined Mr. Hemal Ganatra a Proprietor on his affidavit below

Exh.P.3. The complainant has also relied upon certain documents below **Exh.P.5** to **Exh.P.21**. In his cross-examination a document that is a copy of Plaint of Suit is called upon which is at **Article-A**. All said documents will be discussed at proper place.

3. The Court has recorded the statement at **Exh.67** of the accused under section 313 (1)(b) of Code of Criminal Procedure. It is his defence that, he has no concern with accused No.1 which was the Proprietorship concern of his father. It is a false complaint to harass him.

4. Heard the learned advocate Shri. Bhatiya for the complainant and Shri. Trivedi for the accused at length.

5. For the offence punishable under section 138 of Negotiable Instrument Act (In short N. I. Act), the first burden is upon the complainant to prove the fact that a cheque was drawn by the accused on an account maintained by him to the Banker for the payment of any amount of money to the complainant from out of that account for the discharge, in whole or part, of any debt or other liabilities and the same was returned by the Bank unpaid for the reason mentioned in the memo.

STATUS OF ACCUSED NOS.1 AND 2 AND LIABILITY OF ACCUSED NO.2 FOR ACCUSED NO.1 :-

6. It is case of the complainant that, accused No.1 is a unregistered partnership firm **and or** association of persons. Accused Nos.2 and 3 are Partners **or** Members of accused No.1. Both are responsible of controlling and conducting day to day business of accused No.1. They also carry on business in the name of M/s. Shree Ganesh Traders. They have approached through Broker Sandip Shah. As per their representation, he has supplied materials to them under various invoices and delivery orders. To discharge the said liability, the accused have issued 7 cheques. Said cheques were signed by accused No.3 **for and on** behalf of accused No.1. Said cheques were dishonoured for the reason 'Payment stopped by Drawer'.

7. During the course of proceedings accused No.3 has been deleted as per order on application dated 06.09.2010. Said application is in respect of filing of Death Certificate of accused No.3, it was filed by accused No.2. After taking say of complainant my learned Predecessor has passed on order on 09.11.2011 and held accused No.3 as expired and deleted his name from the complaint. After deletion of accused No.3, the complainant has filed an application at **Exh.48** to direct accused No.2 to represent accused No.1. Said application was decided on merits and was allowed. As per observation in Para-6 and 7 of the order, the opportunity to put the defence to accused No.2 was open.

8. Accordingly, accused No.2 put his defence that, accused No.1 is not the Partnership Firm or Association of person and he is not liable for the acts of accused No.1. It is his defence that, accused No.1 was the Proprietorship concern of which his father accused No.3 (deleted accused) was the Proprietor. Now, as per complaint accused No.1 was shown as unregistered Partnership Firm **and or** association of persons. But it has been admitted by complainant that, there is no such document to show that, accused No.1 is either Partnership Firm or Association of Persons.

9. The document at **Exh.P.5** was admitted to be the document of liability of accused No.2. But on perusal of the same, it appears to be account statement prepared by the complainant. On perusal of the same, none of the accused have signed it as received. None of the invoices in column No.3 of said statement were filed on record.

10. It is admitted that, in demand notice also accused No.2 was not shown as a Partner or a Member of Association of Persons of accused No.1. On the contrary, as called in cross-examination the complainant has filed a copy of plaint of Suit filed before Hon'ble Bombay High Court. On perusal of the same accused No.1 is shown as defendant No.1 while accused No.3 is shown as defendant No.2. In Para-1 of the plaint accused No.3 was shown as Sole Proprietor of accused No.1 which is shown as a Proprietorship concern. There is no reference in respect of accused No.2 of the present complaint in said Suit. It appears that, said suit was also filed on the basis of the disputed cheques on record. Hence, in said facts the complainant has failed to prove that, accused No.1 is either Partnership Firm or an Association of Persons. Even complainant has failed to prove that, accused No.2 is the Partner or Member of Association of Persons of accused No.1. On the contrary, his plaint proves that, accused No.1 is a Sole Proprietorship concern of which accused No.3 was the Sole Proprietor.

11. Further, the disputed cheques also shows that, they have been signed in the capacity of proprietor. As per complaint said sign is of accused No.3.

12. The learned advocate Shri. Bhatiya argued that, accused No.2 is the son of accused No.3 and is liable being the beneficiary of accused

No.3. It may be true but only to the extent of **civil proceedings**. No person could be held liable for the criminal proceedings as a beneficially of another. Hence, I held that, accused No.1 is a Sole Proprietorship concern of which accused No.3 was the Sole Proprietor. Accordingly, only accused No.3 was liable for the acts of accused No.1 for the purpose of the offence under section 138 of N.I.Act. Accused No.2 could not be held liable for the act of accused No.1.

VALIDITY OF THE DEMAND NOTICE :-

13. It has been submitted by the learned advocate Shri. Trivedi that, the demand notice **Exh.P.20** is invalid. He submits that, there is no demand of the amount of cheques. He submits that, it was not issued to accused No.3 who is the Sole Proprietor and Signatory of the cheques of accused No.1. On perusal of demand notice **Exh.P.20,** it appears that, it has been issued to accused No.2 only. There is no reference of accused No.1 or accused No.3 as a Proprietor, Partner or Association of Persons. Even there is no demand of dishonoured cheques amount. Hence, it is held to be invalid.

SERVICE OF NOTICE :-

14. It is has been submitted by learned advocate Shri. Trivedi submits that, the notice **Exh.P.20** was never served upon accused No.2. He invited my attention to the receipt of Vichare Currier at **Exh.P.21**. On perusal of the same, it appears to be issued to Shree Ganesh Traders. Said Shree Ganesh Traders is not the party to the present complaint. There is no reference of any of the accused on said receipt. There is no other evidence that, said notice was served on accused Nos.1 to 3. Hence, it is held that, the notice was not served upon any of the accused. Accordingly, I answer Point Nos.1 and 2 in the negative.

AS TO POINT NO.3 :-

15. In view of my negative finding to points Nos.1 and 2 as the complainant has not proved the legally recoverable debt from the accused, hence the accused is liable to be acquitted. Hence, in answer to point No.3, I pass the following order :-

ORDER

1) The accused are acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act vide Section 255 (1) of the Code of Criminal Procedure.

2) The bail bonds of the accused are canceled.

3) The accused to execute bail bonds with surety bond of Rs.15,000/- to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against this judgment vide Section 437(A) of the Code of Criminal Procedure. Said bail bonds shall be in force for Six months.

Sd/-
(Tejwant Singh A. Sandhu)
Metropolitan Magistrate,
Date :- 17.06.2017. 6th Court, Mazgaon at Sewree, Mumbai.

Judgment dictated on :- 17.06.2017.
Judgment transcribed on:- 17.06.2017.
Judgment signed on :- 17.06.2017.

Sd/-
(Tejwant Singh A. Sandhu)
Metropolitan Magistrate,
Date :- 17.06.2017. 6th Court, Mazgaon at Sewree, Mumbai.

SBA/-