Captain Sanjeev Agarwal vs Jupiter Aviation Services on 29 March, 2021

IN THE COURT OF LXIX ADDITIONAL CITY CIVIL
AND SESSIONS JUDGE (CCH 70)

Present: Sri. Gururaj Somakkalavar, M.A, LLB.,
LXIX Additional City Civil and
Sessions Judge, Bengaluru.

Dated this the 29 th day of March, 2021

Crl. Appeal No.1976/2018

Appellant : CAPTAIN SANJEEV AGARWAL
S/o Late Uma Kant Agarwal,
Aged about 52 years,
R/at Flat No.541, Jal Vayu Towers,
NGEF Layout, Bengaluru - 560 038.

[By Sri.Ravi Jagan., Advocate]

V/s

Respondent : JUPITER AVIATION SERVICES
PVT. LTD
A company incorporated under
the Companies Act 1956 having its
registered office at No.54,
Richmond Road,
Bengaluru - 560 025.
Rep by its Authorized Signatory
Mr.Julian D'souza.

(By Sri NGK, Advocate)

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: JU DG M E NT :

Appellant/accused has assailed the legality and correctness of his conviction to the offence punishable U/Sec.138 of N.I.Act and his sentence to pay fine amount of Rs.50,000/- and in default shall under go simple Crl.Apl No.1976/2018 imprisonment for 6 months.

Further it is made clear that the accused is to be paid an amount of Rs.25,00,000/- to the Complainant as compensation and in default shall under go simple imprisonment

for 3 months for the said offence through impugned judgment and order of sentence dated 22.09.2018 in C.C.No.26200/2012, on the file of XXXIII Additional Chief Metropolitan Magistrate and SCCH 5, Bengaluru City.

The parties are referred to their original ranks.

2. Essential material facts lead to this appeal succinctly is as follow:-

Respondent/complainant company, which will be herein after referred as 'complainant' launched criminal prosecution against accused for the offence punishable U/Sec.138 of N.I. Act through his private complaint maintained U/Sec.200 of Code of Criminal Procedure with support of allegation that Ex.P.6 cheque bearing No.497009, dated 01.10.2011 for Rs.25,00,000/- drawn at Syndicate Bank, Indiranagar Branch, Bengaluru which was returned dishonoured on the ground of 'Payment Stopped by Drawer` as per Ex.P.7 the Bank Endorsement. Accordingly the complainant got issued legal notice as per Ex.P8, calling upon the accused to pay the amount and despite of service of notice the accused failed to pay the cheque amount and thereby accused committed the alleged offence. The Trial Crl.Apl No.1976/2018 Court after taking cognizance on the complaint of complainant and examination of available materials, including complaint and sworn statement of complainant and other materials registered a case in C.C.No.26200/2012 against accused for the offence punishable U/Sec.138 of N.I.Act. Accused appeared before trial court through his counsel. He was supplied with copies of papers and its supporting materials. Substance of accusation was read over and explained to the accused. Accused pleaded not guilty and claimed to be tried. Complainant company to bring home above guilt of accused, examined its representative as PW.1 and got marked 10 documents exhibited as Ex.P.1 to P.10. Accused was examined U/Sec.313 of Code of Criminal Procedure. He denied all incriminating evidence appeared against him. Then accused examined himself as DW.1 on his behalf and marked 28 documents as Ex.D.1 to D.28. The trial court after hearing arguments of learned counsels and examination of available materials, found accused guilty for the above offence with aforementioned finding on the points addressed for decision making in the impugned judgment and believed the existence of above version of complainant through impugned judgment and accordingly sentenced accused in the above manner through impugned order of sentence.

3. Feeling aggrieved and dissatisfied with the above nature of verdict of court below, accused has preferred instant appeal. Accused in his appeal memo, while Crl.Apl No.1976/2018 reiterating above noted material events taken place prior to complaint and subsequent to complaint, it is specifically contended that, The Learned Magistrate failed to appreciate the content and import of the Sponsorship Agreement and thereby failed to see that the complainant was not entitled to Rs.25 lakhs and consequently the cheque in question could not have been used as issued in repayment of any legal liability. The Learned Magistrate could not have considered the dishonored cheque in isolation from the Letter of Appointment and Sponsorship Lettter, which indicate that the

Sponsorship Letter was a contract in terroum and the Rs.25 lakhs claimed by the complainant was in the nature of a penality and not a genuine pre estimate of actual damges and was therefore not recoverable, even on dishonour of the cheque.

4. The Learned Magistrate failed to appreciate the import of Ex.D18 which showed that TDS for 30.09.201 on 14.10.201 (Ex.D18) 7 days after the date of Ex.D14 indicating that the accused even as on 30.09.2011 was in service. The Learned Trial Judge therefore failed to appreciate that the accused having been in service till 30.09.2011 had completed 2 years of employment with the complainant and the complainant was not entitled to receive Rs.25 lakhs as per the Sponsorship Agreement. This grounds is made without prejudice to the stand that the Sponsorship Agreement was illegal, being a contract in terorum and the sum of Rs.25 lakhs was in nature of Crl.Apl No.1976/2018 penality which was not recoverable in law. The Learned Trial Judge failed to appreciate that in cross-examination PW.1 admits receipt of the letter dated 07.10.2011 being the letter of resignation with immediate effect but follow it up denying that the accused continued to be in service on that day. The appreciation of evidence on record by the Lerned Magistrate to say the least, is perverse. The Learned Magistrate without adveting to the relevant material on record and considering the detailed succinct written arguments filed on behalf of the accused proceeds to consider the question of stock payment and refers to a host of judgments which were totally irrelevant for the purpose of determination of the case.

5. The Learned Trial Judge after having noticed that on 01.10.2009 the complainant had taken 10 post dated cheques ought to have found that as on that day there was no subsisting liability and such cheques were taken only as security in the event of the accused leaving the employment before 2 years and the complainant left without a cheque within its validity period of six months. The Learned Trial Judge failed to appreciate that on the accused working till 30.09.2011, the complainant would no longer be liable to pay Rs.25 lakhs under Ex.P3 but only Rs.20 lakhs and that therefore the cheque presented by the complainant was not in payment of a legal liability.

6. The Learned Magistrate failed to make the distinction between a post dated cheque and a secuirty Crl.Apl No.1976/2018 cheque. In the case of a post dated cheque there is a subsisting liability on the date of issue of the cheque though payment by the cheque is deferred to a future date. In the case of a secuirty cheque there is no liability on the date of issue of the cheque but is taken to cover a liability which may arise at a future. The cheque in question was clearly a secuirty cheque. The finding of the Learned Magistrate that once the accused resigned the cheques no longer remained security cheque is a reasoning which has to be rejected as a cheque issue as a security cheque does not change colour with passage of time or events. The Learned Magistrate erred in holding that cheque were issued as guarantee and therefore not security cheques. The cheques were issued by for recovery of illegal panality pursuant to an unenforceable contract interrorum.

7. The Learned Magistrate failed to appreciate that once the acused had shwn that he worked till and inclusive of 30.09.2011, the presumption that he was liable to pay Rs.25 lakhs under the cheque in question was rebutted as evidenced by the Sponsorship Agreement Ex.P3. With these amongst other grounds the appellant prays to set aside the impugned judgment and acquite his as per law. The Appellant has produced the certified copy of the impugned judgment.

8. Heard the argument and perused the record and also the citations relied by the counsel for the appellant.

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9. In the light of challenge of impugned judgment by accused and above noted materials, following points fall for decision making of this court:-

1. Whether the complainant has proved that the accused has committed the offence punishable u/sec.138 of NI Act.?

2. Whether the impugned judgment and order of sentence passed by the learned Magistrate is proper and correct?

3. What order?

10. This court upon re-appreciation of available materials in the file with reference to prevailing law of land, give finding to the above points as follow:-

POINT NO.1 In negative
POINT NO.2 In negative
POINT NO.3 As per final order, on the following;

: R E A S ON S :

11. POINT NO.1 AND 2 : I have perused the

appeal memo, the private complaint, order sheet, impugned judgment and other materials available on record. The Respondent/complainant filed the private complaint against the accused. After considering the materials the learned Magistrate took cognizance and registered the case against the accused, the Accused appeared through his counsel and opposed the complaint. After full pledged trial the trial court convicted the accused in the above manner. Being aggrieved by the judgment of conviction the appellant has Crl.Apl No.1976/2018 filed this appeal.

12. On careful perusal of the impugned judgment, it depicts that the complainant has filed the complaint against the accused for the offence u/sec. 138 of NI Act. It is the case of the complainant that, the accused was employed by the complainant vide Employment Contract dated 01.10.2009 and the employment of the accused was subsequently confirmed vide Confirmation Letter dated 30.09.2010. The complainant and the accused entered into Sponsorship Agreement dated 01.10.2009 and as per the said Agreement the complainant had agreed to sponsor the accused for a pilot training course for the Challenger CL300 aircraft at the Bombardier Training Centre in the United States of America for a duration of one month. The complainant agreed to bear the expenses for the said pilot training course, amounting to Rs.25,00,000/- on the sole condition that the accused would serve in the complainant's employment for a minimum period of 5 years

commencing from 01.10.2009 as per Clause 6 of the Sponsorship Agreement. It had fulfilled its obligations under the Sponsorship Agreement without fail by providing for the requisite training. However, the accused tendered his resignation on 29.03.2011 before the completion of the prescribed time period of employment in the Sponsorship Agreement thereby defaulting on the agreement.

13. As per the Clause No.2 of the Sponsorship Agreement, the accused could pay the complainant a sum of Crl.Apl No.1976/2018 Rs.25,00,000/- in case he failed to serve the complainant for minimum of 2 years. The said period would be over on 30.09.2011. However, by virtue of resigning on 29.03.2011 the accused owned the complainant the bond value, amounting to Rs.25,000,000/- together with interest calculated on the same at the rate of 13% p.a from the date of such termination till the date on which it actually paid as per Clause 2 and 9 of the Sponsorship Agreement. Accordingly to the complainant, the accused issued a cheque bearing no. 497009 dated 01.10.2011 drawn on Syndicate Bank for a sum of Rs.25,00,000/-. The complainant present the said cheque for encashment through its banker, the same was dishonoured and returned with an endorsement stating "Payment Stopped by Drawer" vide Cheque return memo dated 13.10.2011. Consequently, the complainant issued a legal notice to the accused through its counsel on 20.10.2011 wherein the complainant called upon the accused to pay the amount of Rs.25,00,000/- within 15 days from the date of receipt of the notice as per the provisions U.sec 138 of NI Act. The legal notice was served on the accused on 24.10.2011. Thereafter the accused had issued a reply notice through his counsel on 05.11.2011 falsely claiming inter alia that he does not owe any debt towards the complainant. The accused failed to repay the cheque amount despite the expiry of the statutory period of 15 days since the receipt of the complainant's notice dated 20.10.2011. Hence the complainant constrained to file the complaint.

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14. To prove the case the complainant company examined its representative as PW.1 and marked Ex.P.1 to 10 and Subsequently statement of the accused u/sec. 313 of Cr.P.C. is recorded and the accused led evidence as DW.1 and marked Ex.D.1 to D.28.

15. Since the accused has challenged the conviction order of the trial court, the evidence is to be re appreciated in this appeal. The complainant has to discharge initial burden and prove the liability by the accused.

16. The counsel for the appellant addressed argument on behalf of the appellant. In the argument the counsel for the appellant narrated the case of the complainant and proceeding before trial court. The main argument of the appellant in support of the appeal is that, the trial court has not properly appreciated the evidence. The counsel for the appellant emphasized that the trial court has not appreciated the fact regarding date of resignation. It is argued that the accused remain in the employment of the complainant not only until end of 30.9.2011 but continued to remain in the employment of the complainant company till 7.10.2011 and finally he has submitted letter of resignation and seized employment. Hence he is not liable for any amount. It is also argued that the trial court should have inquired whether the accused was in employment for 2 years even according

to the complainant could over on Crl.Apl No.1976/2018 30.9.2011. It is also argued that the trial court has not appreciated that on 1.1.2009 the date of issuance of 10 post dated cheques of Rs. 25 lakhs , there was debt due from the accused. Hence the cheques could be treated as security cheques and the trial court would have given finding as to the quantum of debt. There is no ambiguity in the witness of the accused wherein he has rebutted that he has complied the terms of the sponsorship agreement and remained in employment and worked for complainant until 30.9.2011. It is also argued that the burden shifts on the complainant to prove beyond reasonable doubt that the accused was not his employee on 30.9.2011 and was due of Rs. 25 lakhs which the complainant has failed to prove the same. With these grounds the appellant prays to allow the appeal and set aside the impugned judgment and acquit him.

17. On the other hand the counsel for the respondent has justified the impugned judgment and order of conviction. It is also argued the respondent has honored its contractual obligation, there is a presuming infavor of the respondent u/sec. 139 of N Act, the effective date of resignation is 30.9.2011 and not 7.10.2011. It is further argued that as per Ex.P.3 clause No.4 the contract read with recital B andclause 1 of the Sponsorship Agreement make it abundantly evident that the respondent was only contractually obligated to provide a one time PIC simulator training to the accused at Bombardier facility in the USA. It is further argued that it is clear that the respondent has Crl.Apl No.1976/2018 honored the terms of the contract and the Sponsorship Agreement and the accused is wrong in stating that the respondent failed to perform its obligation under the Contract and the Sponsorship Agreement and hence is dis entitled from claiming the bond amount of Rs. 25 lakhs. It is further argued that the appellant has only advanced a two pronged defense that the respondent has breached its obligations under the Contract and the Sponsorship Agreement, and that the appellant resigned after 30.9.2011 and hence owes to the respondent only Rs. 20 Lakhs, but the appellant failed to provide cogent or conclusive evidence. It is further argued that the appellant has attempted to mislead the court. The appellant tendered his resignation on 29.3.2011 with effect from 1.4.2011 the resignation letter was accepted and acknowledged by the respondent on 29.3.2011. clause No. 9 of the Contract stipulates tha the notice period is 6 months from the date of resignation which could end on 30.9.2011. The appellant has himself admitted that the notice of resignation was acknowledged by the respondent on 29.3.2011, and that the respondent did not withdraw its acceptance of the notice of resignation during the notice period. It is also argued that the effective date of resignation of the appellant is 30.9.2011. It is also argued that the appellant has provided differing accounts on a crucial point of fact and hence his evidence is not reliable and sufficient to rebut the presumption u/sec. 139 of the Act. It is also argued that adverse inference may also be drawn against the appellant on the basis of the fact that Crl.Apl No.1976/2018 despite claiming tht monies were due and payable to him for services rendered to the respondent in Octobr 2011, the appellant took no steps to initiate proceedings for recovery of such monies. This proves that the appellant`s claim that he hwas emplyed with the respondent even in October 2011 is false and an afterthought to escape from liability. It is also argued that dishonor of cheque on grounds of the issuer of a cheque having issued a `stop payment` instructions constitutes an offence u/sec. 138 of the NI Act is an established point of law. Notably the appellant does not deny having instructed his banker to stop payment of the cheque. It is also argued that the trial court has passed the impugned judgment by properly appreciating evidence on record and the appellant has failed to rebut the presumption u/sec. 139 of the NI Act. There is no irregularity committed by the trial court. With

these grounds the respondent prays to dismiss th appeal and confirm the impugned judgment. In support of his argument the counsel for the respondent has relied upon following authorities;

1. Sampelly Stayanarayana Rao v Indian Renewable Energy Development Agency Ltd. In (2016) 10 SCC 458.

2. Suresh Chandra Goyal v. Amit Singhal in (2015) SCC Online Del 9459.

3. Rangappa v Sri Mohan in (2010) 11 SCC

4. Modi Cements Ltd v. Kuchil Kumar Nandi Crl.Apl No.1976/2018 in (1998) 3 SCC 249

5. Goaplast Pvt. Ltd. v. Chico Ursula D`Souza and Anothr in (2003) 3 SCC 232

18. To substantiate the fact the complainant produced Ex.P.1 the authorization letter, Ex.P.2 Employment Contract, Ex.P.3 copy of Sponsorship Agreement, Ex.P.4 the copy of confirmation letter, Ex.P.5 copy of Resignation Letter, Ex.P.6 i.e. impugned cheque, Ex.P.7 the Bank Endorsement, Ex.P.8 copy of legal notice, Ex.P.9 Acknowledgement and Ex.P.10 Reply Notice. Apart from production of documents by the complainant the complainant adduced oral evidence in pursuance of that, he examined himself as PW.1. He reiterated the complaint averments in his examination in chief. He is subjected to cross-examination by the counsel for the accused. During the cross-examination of PW. 1 it is tried to prove that the PW. 1 has no authority to adduce evidence. However same is denied by PW. 1. The suggestion is admitted by the PW. 1 that accused requires training to fly aircraft and on 1.10.2009 accused joined complainant company. During the cross-examination the counsel for the accused tried to elicit that the complainant company has not imparted proper training as per the terms of the Sponsorship Agreement. It is tried to elicit that the complainant company has not complied with the terms of Ex.P. 3 i.e. Sponsorship Agreement and by that the training is not completed. During cross-examination PW.1 deposed that accused Crl.Apl No.1976/2018 sought employment in the complainant company in the month of October 2009 and he was appointed as a pilot. It is denied by PW. 1 that the accused was a co pilot. He admits that the accused was a captain on the date of appointment . It is also admitted by PW. 1 that accused was trainee at Bombadia Training Center. It is deposed by PW. 1 that accused was sent to USA for training as a pilot in command (PIC). It is denied by PW. 1 as per the approval of DGCA marked as Ex.D. 1 approval is valid for 6 months from the date of issue of said approval at Ex.D.1. It is also denied by PW.1 apart from flight training PIC, training should be completed from the date of approval. It is also denied by PW. 1 that they do not have an examiner. It is deposed by PW. 1 that accused has issued 10 post dated cheques. It is suggested and same is admitted by PW. 1 that according to the terms of Sponsorship Agreement marked as Ex.P. 3, if the accused left the employment on or after 1.10.2011 he should pay Rs. 20 lakhs. Further it is admitted by the PW. 1 that accused gave notice on 29.3.2011 stating that he will resign 6 months from 1.4.2011. However PW. 1 denied that accused continued to be in service in between 29.3.2011 to 7.10.2011. He deposed that according to him accused has left the employment from September 2011. PW. 1 has specifically denied the suggestion that they did not impart PIC training to the accused and deliberately retain him as a copilot. Further it is also denied that they do not have instructor to impart training to the

accused.

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19. On appreciation of this evidence as stated above the counsel for the accused tried to elicit that there is a default on part of the complainant company. Hence the accused has no liability to pay any compensation of Rs. 25 lakhs. It is also tried to elicit that the accused has gave the notice of 6 months to resign from the employment.

20. Now the complainant company has put up case that accused as per the agreement at Ex.P. 3 is bound to serve the complainant company for five years and as per clause no. 2 of the Sponsorship Agreement accused is liable to pay compensation if he fails to serve the company for five years but the accused has resigned the company within the stipulated time. Hence he is liable to pay the compensation of Rs. 25 lakhs.

21. On appreciation of the documents as well as the evidence of PW. 1 it has to be observed that whether the complainant established that there exist a liability and accused to discharge the said liability has issued the impugned cheque which got dishonored. Now since there are so many facts were put before the court regarding the training, employment, resignation and further the accused also alleged that the complainant company has not complied with terms of Ex.P. 3 and has not imparted training in respect of PIC and as per the approval of DGCA the complainant company has to complete the training within 6 months. The complainant company has not completed the training to the accused and the complainant company has kept the accused as a copilot whereas the Crl.Apl No.1976/2018 training is in respect of pilot in command. There are many facts were put up before the court by both the sides. Since dispute is in respect of liability by the accused towards the complainant company and to discharge the same accused has issued the cheque and which has got dishonored and due to that the accused has committed offence u/sec. 138 of NI Act, same has to be appreciated.

22. To adjudicate the dispute as stated above the complainant has to establish the liability by the accused. Now whether the liability exists or not is to be looked into. There is a thin line in respect of existence of liability by the accused. As per the case of the complainant the accused has entered into an agreement with the complainant company for the training of PIC. Wherein he was sponsored to get the training in USA and the entire cost of the training will be borne by the complainant company. It is agreed that the accused has to come back to India and serve the complainant company for five years and Sponsorship Agreement entered as per Ex.P. 3. It is one of the clause in Ex.P.3 that if the accused fails to serve the complainant company for five years as agreed he is liable to pay the bond value which is mentioned at clause 2 of Ex.P. 3. It is the case of the complainant that since accused has resigned from the complainant company within stipulated time of 2 years, he is liable to pay compensation as agreed in Ex.P. 3. That, accused has to reimburse the cost of training to the complainant company if he fails to serve the company.

23. There is dispute in respect of resignation date Crl.Apl No.1976/2018 wherein the entire dispute arise. As per the complainant the first term at clause 2(a) of Ex.P. 3 the first two years are 1.10.2009

to 30.9.2011. The accused has resigned from the company on 29.3.2011. Hence it is within the two years hence the accused is liable to pay compensation of Rs. 25 lakhs, whereas accused put up version that he has given 6 months notice on 29.3.2011 and served for six months under the notice period and his resignation is effective from 7.10.2011. These being the two different versions, it is necessary to ascertain the point of liability when it accrues and whether the accused is liable to the complainant. To appreciate the said fact it is necessary to re-appreciate Ex.P.2 and 3 conjointly. Ex.P. 2 is the employment contract and Ex.P.3 is the Sponsorship Agreement. The liability borne out from the clauses of these two documents. For proper appreciation of the facts regarding liabilty it is necessary to extract the clauses or terms of the said 2 documents. The relevant clause in Ex.P. 2 is the clause No. 9 which is extracted as under;

Notice period and Termination; Following your Probationary Period, the company shall have the right to eliminate your employment, by providing you with three (3) month`s notice (the "Notice Period") in writing to that effect, or payment of salary in lieu thereof, without assigning any reason therefore and shall not be liable to make any further severance payment to you of any kind whatsoever. However if termination is due to company business strategic reasons, sponsorship agreement will become null & void. If you wish to terminate your employment, you will be required to provide six months notice (the "Notice Period") in writing to that effect, or payment of salary in lieu thereof.

Crl.Apl No.1976/2018 In Ex.P. 3 clause 2,3,6 and 9 are as follows;

2. The agreed bond value (Sponsorship Agreement) is for the following amount:-

(a) For first two years Rs. Twenty Five Lakhs (01 Oct 2009 -30 Sep. 2011)

(b) Subsequent three years Rs. Twenty Lakhs (01 Oct 2011-30 Sep. 2014)

3. To comply with the bond value the employee will submit post dated cheques (each cheques valid for six months) in the name of the company.

Therefore the employee will handover ten post dated cheques of Rs. 25 lakhs each along with acceptance of this employment agreement with the company. At the end of 24 months from the effective date, six post dated cheques for Rs. 20 lakhs will be handed over to the company by the employee and the previous set of post dated cheques for Rs. 25 Lakhs will be returned to the employee by the company.

The company agrees not to encash these cheques (bond value) unless the employee defaults on this sponsorship agreement.

6. In consideration of the Sponsorship, upon the completion of the Pilot Course, the Employee shall immediately return to India and serve in the employment of the company for a minimum period of five (5) years (the `Minimum Term`) which shall commence from the date of this agreement.

9. In the event that the Employee terminates his employment, for any reason during the Minimum Term, he shall pay liquidated damages amounting to the bond value, as agreed above, to the company, together with interest calculated on the same at the rate of 13% per annum, from the date of such termination till the date on which it is actually paid.

24. If the above said clauses at Ex.P.2 and 3 read conjointly the question of liability be decided. As per the clause No. 9 in Ex.P. 2 in the second part if the accused wish to terminate employment he is required to provide 6 Crl.Apl No.1976/2018 months notice i.e. notice period in writing to that effect and the effect of notice period commences, if the notice is delivered on the date of delivery if it is by hand and in case of post on the date of dispatch. As per Ex.P. 3 in clause No.2 there is specific mention regarding the bond value that for the first two years from 1.10.2009 to 30.9.2011 it is Rs. 25 lakhs and remaining 3 years from 1.10.2011 to 30.9.2014 it is Rs. 20 lakhs and in pursuance of the agreement the accused has handed over 10 post dated cheques and it is a term in clause No.3 that the company agrees not to encash the cheques unless the employee i.e. accused default on his Sponsorship Agreement.

25. The said clause No.2 and 3 also be read with clause No. 6 wherein it is agreed that after returning to India the accused has to serve the employment of the company for minimum period of 5 years and same shall commence from the date of Sponsorship Agreement. If he fails in that regard he shall liable to pay the liquidated damages amounting to the bond value as agreed in the clause No.3 of Ex.P.3 to the company together with interest calculated on the same at the rate of 13% p.a. The another important term is at clause no.9 which has very much relevancy to the present dispute. As per the clause no.9 in the event if the employee terminates his employment for any reason during minimum period i.e. 5 years he shall pay liquidated damages amounting to bond value as agreed in clause no. 3 of Ex.P.3 to the company together with interest at 13% p.a. from the date of termination till the date on Crl.Apl No.1976/2018 which it is actually paid.

26. After carefully scrutinizing these terms it is understandable that as bond valud as per Ex.P.3 is 25 lakhs for two years and 20 lakhs for remaining three years. As per the complaint since the accused left the employment within 2 years by resigning on 29.3.2011 as per his resignation letter at Ex.P. 5. Wherein the resignation come into effect from 1.4.2011 which is within 2 years. Hence he is liable for payment of bond value of Rs. 25 lakhs. As per the accused he has not resigned within 2 years and he has worked till 7.10.2011 after notice period of 6 months. Hence as per his reply notice Ex.P. 10 he is liable for 20 lakhs but not 25 lakhs. As the bond value for the remaining 3 years after completion of 2 years is for 20 lakhs. Now the dispute is in respect of completion of service for 2 years. If the accused terminates his employment within 2 years, he is liable for 25 lakhs, if he is not terminated the same and the employment is extended after 2 years he is liable only for 20 lakhs not 25 lakhs.

27. The very crucial fact to be observed here that whether the resignation tendered by the accused comes within the term of 2 years as per clause No.2 of Ex.P.3. As stated above if the accused defaulted in completion of 2 years as per Ex.P.3 he is liable to pay Rs. 25 lakhs to the complainant. The date of the resignation plays very crucial role in this case. As per the complainant the accused has tendered his resignation on 29.3.2011. Hence he has not Crl.Apl No.1976/2018 completed 2

years term as per clause No.2 of Ex.P.3. On the contrary accused puts up a defense that he has tendered resignation as well as notice period on 29.3.2011 and he has worked for 6 months and his resignation come into force or employment seizes on 7.10.2011 as per Ex.D.14. As per the accused he has complied with the clause No.9 of Ex.P.2 Notice period and termination. As per the clause he has given notice period of 6 months. Hence his employement does not come to end within 2 years. Hence he is not liable for any payment towards complainant.

28. Now it has to be appreciated the crucial point of tendering resignation and seizer of employment. As per clause 2 of Ex.P. 3 the last date of first term is 30.9.2011. As per Ex.P. 5 accused has tendered resignation on 29.3.2011, in which he has specifically stated that to accept his notice period and resignation from complainant company with effect from 1.4.2011. His notice period starts from 29.3.2011 for six months as per clause No.9 of Ex.P. 2 i.e. notice period and termination. Subsequently again on 7.10.2011 accused has addressed another letter to complainant captioned as resignation wherein he states that he has made his notice for resignation w.e.f 1.4.2011 and he has served the requisite notice period of 6 months from 1.4.2011 and he submits his resignation from complainant company with immediate effect on 7.10.2011 and seeks for release from all duties with immediate effect. The said Ex.D. 14 received by the complainant on 7.10.2011.

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29. It is very pertinent to note here that after tendering of notice period and resignation on 29.3.2011 by the accused to the complainant company , the complainant company has issued a letter on 12.10.2011 asper Ex.D. 2 . This Ex.D. 2 is very crucial and significant in the present case. As per the said Ex.D.2, the complainant company has explained to the accused that, he has tendered his resignation on 29.3.2011 with notice period of 6 months. Further it is stated in Ex.D. 2 that the accused has not completed minimum term of 5 years and as per clause No.9 of Sponsorship Agreement Rs. 25 lakhs is due to the complainant. In the last part of the letter it is mentioned which is extracted as under;

> "Please provide detailed update on the various activities carried by you during the course of your employment and the corresponding current status. On receipt of the detailed update your resignation shall be duly considered."

This part is very crucial as because, it decides the seizer of the employment of the accused in complainant company. The pertinent point to be observed here that, When an employee tenders his resignation to the employer, the employer has to accept the resignation and on acceptance of the said resignation, the employment seizes. The notice period is given for the termination of the employment. The employment seizes on the date of the acceptance of the said Crl.Apl No.1976/2018 resignation and the employment terminates. Here in this case the accused has tendered his resignation on 29.3.2011, mentioning both for acceptance of resignation and notice period. It is not in dispute that the accused has continued his employment till 7.10.2011. Here as stated above Ex.D. 2 plays a crucial role in the present case, as on observation of the said Ex.D. 2 a letter dated 12.10.2011 by the complainant company to the accused, the complainant company has not accepted the resignation of the accused. On the other hand it has stated that resignation shall be duly

considered , that means the complainant has not accepted the resignation of the accused even on the date of 12.10.2011 even after completion of 6 months period from the date of EX.P. 5 i.e. 29.3.2011. The complainant has not placed on record that on what date it has accepted the resignation of the accused and the employment seized and the accused is terminated from the employment. Absolutely there is no material on record to state on what date he has been terminated or the resignation is accepted.

30. On the other hand the accused has placed on record that, after his resignation on 29.3.2011, he has continued in the employment and he has been paid all the benefits and salaries. The accused has also placed records to show that, there is a letter correspondent between the complainant and the accused in respect of disbursement of benefits. These documents clearly shows that the accused has been continued in the employment after 29.3.2011. This fact stated above clearly establish that the accused Crl.Apl No.1976/2018 has entered into 3rd year of his term mentioned in clause No.2 of Ex.P. 3,

31. It is clear from Ex.P.3 that the moment there is a violation in terms of the Ex.P.3 Agreement wherein if the accused left the employment within 2 years , at that moment the liability come into existence. The liability coming into existence depends upon the contingencies of the act of the accused. The complainant has to establish that, due to the act of the accused to say termination of employment, the liability come into existence. But on appreciation of all the material on record it is very much clear that though the accused has tendered his resignation on 29.3.2011 but his employment is not seized on 29.3.2011. Even going by Ex.D2 which is not denied by the complainant company the employment is not seized on 12.10.2011 the employment of the accused has not been seized by accepting the resignation and there is a material on record to show that he has continued the employment.

22. At this juncture it is necessary to observe the evidence of PW. 1. During the cross-examination the PW. 1 admitted the suggestion that according to the terms of Sponsorship Agreement at Ex.P.3, if accused left the employment on or after 1.10.2011 he should pay Rs. 20 lakhs. Further he has admitted that accused gave notice on 29.3.2011 stating that he will resign 6 months from 1.4.2011. He further deposed that accused has left the employment from September, 2011. If the evidence of PW. 1 is appreciated it is clear that he has admitted that the accused continued in employment Crl.Apl No.1976/2018 after 29.3.2011. He has admitted that there is 6 months notice period has been given by the accused. From this it is very much clear that the employment of accused was not seized on 29.3.2011.

32. If the evidence of PW. 1 coupled with the documents at Ex.D. 2 and Ex.D. 14 if carefully observed the employment of the accused was not seized on 29.3.2011 as claimed by the complainant. Hence the first term at Ex.P. 3 clause No.2 is continued and the accused entered into 3 rd year i.e. second term of the Sponsorship Agreement as stated in clause No.2 of the Agreement. The accused replied to the legal notice of the complainant at Ex.P. 10 wherein he has admitted that as he has continued in the employment for 6 months he is not liable for Rs. 25 lakhs. However complainant is entitled for Rs. 20 lakhs.

33. Hence considering the entire facts and the documentary evidence coupled with the oral evidence it is very much clear that the accused has submitted his resignation and notice period from 29.3.2011. However the complainant has replied to the said letter as per Ex.D.2 on 12.10.2011 whereby it is stated that resignation will be duly considered. By this it is clear that the resignation of the accused was not accepted by the complainant company and accused continued in the employment even after 29.3.2011. However he has contended that his employment seizes from 7.10.2011 as per Ex.D. 14. So on appreciation of these facts the employment of the accused entered into third year. As per clause No.2 of Ex.P. 3 if the accused left Crl.Apl No.1976/2018 the job or employment within two years he is liable to pay Rs. 25 lakhs and for remaining 3 years he is liable for Rs. 20 lakhs as per the bond value in Ex.P. 3. Considering these aspects stated above the accused is liable for Rs. 20 lakhs and not Rs. 25 lakhs. Certainly as per clause No.3 of Ex.P.3 the complainant is entitled to present the 10 post dated cheques on default of terms of the Agreement. Here on appreciation of the facts the accused has not violated the first term at clause No.2 i.e. agreed bond value for first two years. However as per clause No.6 he has to serve the complainant company for minimum period of 5 years. He has violated clause No. 2 second part for remaining 3 years. Hence he is liable for Rs. 20 lakhs as per clause No.2 (d) of the Sponsorship Agreement.

34. It is pertinent to observe that the complainant has presented the impugned for Rs. 25 lakhs. Whereas the liability may be 20 lakhs. Hence considering the facts and circumstances as on the date of presentation of the cheque there is no liability of Rs. 25 lakhs by the accused. The complainant fails to establish the fact that as on the date of presentation of the cheque there exists liability of Rs. 25 lakhs towards the complainant by the accused which arose on violation of terms of the Agreement.

35. The accused has raised many contentions that the complainant company has not complied the terms of the Sponsorship Agreement and has not imparted proper training to the accused. However on appreciation of evidence of DW. 1 he has categorically admitted that at his Crl.Apl No.1976/2018 consent Ex.P. 3 was executed and he has signed the agreement understanding the terms of the agreement and he has specifically admitted that the liability of the accused was fixed under Ex.P. 3. He has been provided with training. He has further admitted that the complainant company sponsored him to undergo pilot training course. He has further admitted that as per Ex.P.3, he has to pay Rs. 25 lakhs as compensation to the complainant in case of failure on part of him to serve the complainant for a period of 2 years. It is further suggested to DW. 1 that as per Ex.P.3 he has to pay Rs. 20 lakhs to the complainant as compensation in case if he fails to serve the complainant for 5 years after completion of the course. He further admitted that he has tendered his resignation letter as per Ex.P. 5. However he has denied that under Ex.P. 5 his resignation was effective from 1.4.2011. He further deposed that his notice period commenced from 1.4.2011.

36. Though the accused has admitted the liability but the complainant has to establish that there exists liability on the date of presentation of the cheque and it is evident from the cross-examination of DW. 1 that complainant has suggested that the accused has to pay 20 lakhs if he fails to serve the complainant company for a period of 5 years. The complainant though try to elicit from the evidence of DW. 1 that accused has tendered his resignation on 29.3.2011, but accused deposed that the resignation was not effective from 1.4.2011. Though it is tried to elicit, but the fact which reveals

from the documentary evidence that, the Crl.Apl No.1976/2018 complainant has not accepted the resignation of the accused and it is clear that the accused has continued his employment evenafter 29.3.2011. So also he was continued even on the date of 12.10.2011wherein the resignation of the accused under Ex.D. 2 was under consideration by complainant company. Accused has admitted cheque belongs to his account and also admitted signatures on cheques of him. The cheques are given during execution of Ex.P.3, but mere admission of signature and cheque does not amounts to offence. It cannot be said that accused has committed offence u/sec. 138 of NI Act. The complainant has to prove the liability and to discharge same cheque issued and the cheque dishonored. But here as stated above complainant failed to prove the liability itself. Hence admission of cheque and signature will not help the complainant company.

37. Here it is necessary to appreciate the nature of defense and standard of proof by the accused. As per the settled position of law the prosecution in general and the complainant in the particular is required to prove his case beyond all reasonable doubts. The standard of proof to disprove the case of the complainant by the accused is not the same standard of proof as required to prove the case of the complainant. In other words the complainant is required to prove his case beyond all reasonable doubt and the accused is required to disprove the case of the complainant by setting up a probable defense to disbelieve the case of the complainant. In this regard this court wants to rely upon Crl.Apl No.1976/2018 the decision and the principle laid down by the Hon`ble Supreme Court in Kumar Exports vs. Sharma Carpets reported in ILR 2009 KAR 1633 wherein it is held that ;

Presumptions under Sections 118 and 139 - How to be rebutted - Standard of proof required for rebuttal - HELD , Rebuttal does not require proof beyond reasonable doubt - Something probable has to be brought on record - Burden of proof can be shifted back to the complainant by producing convincing circumstantial evidence - Therefore the said presumptions arising under Sections 118 and 139 case to operate - To rebut said presumptions accused can also rely upon presumptions under Evidence Act, 1872 Section 114 (common course of natural events, human conduct and public and private business) - Evidence Act, 1872 - Section 114 - Presumptions of fact under.

As per the observation of the Hon`ble Apex Court the complainant has to discharge the initial burden. After that the burden shifts on the accused. Once accused places the probable defense or explanation the burden again shifts back to the complainant to rebut the defense put up by the accused. Here in this case the accused has put up probable defense that he has tendered resignation and notice period on 29.3.2011 and he has continued to work after that. He has not violated the condition of first 2 years term. Hence Crl.Apl No.1976/2018 he is not liable for Rs. 25 lakhs to the complainant. On appreciation of the documents, it is clear that the accused has tendered resignation as well as notice period on 29.3.2011. But same was under consideration even on the date i.e. 12.10.2011 as per Ex.D. 2 and complainant has not accepted the resignation and his employment not seized. Here the accused has put up a probable defense. Now the burden shifts back on the complainant to prove that his employment of accused was seized by accepting the resignation as on 29.3.2011. But on appreciation of entire material on record the complainant has not placed any explanation that his resignation was accepted and the employment of the accused was seized as on 29.3.2011. Hence the accused is able to rebut the initial presumption raised in favor of the complainant and he has placed probable defense and explanation to rebut the case of the

complainant. Hence considering the facts and circumstances of the case the complainant fails to establish that there exists liability as on the date of the presentation of the cheque and the liability come into existence by the act of the accused and the cheque was issued for discharge of the said liability. However the cheques in question are the post dated cheques which are tobe presented on violation of terms of the agreement. Though it is contended that there is a violation of terms of the agreement,but the complainant completely fails to establish that there exists liability of 25 lakhs as on the date of presentation of cheque. Since there is no liability exists and the cheque in question was not Crl.Apl No.1976/2018 issued for discharge of liability. Hence the accused has not committed offence u/sec. 138 of N.I Act. The complainant fails to establish that accused has committed offence u/sec. 138 of N.I Act. Hence the point no.1 is answered in negative.

38. POINT NO.2; The trial court has completely relied upon the date of resignation as on 29.3.2011. but fails to appreciate that eventhough resignation was tendered on 29.3.2011 whether the complainant has accepted the said resignation and employment was seized. Though the trial court has relied upon the contentions of the complainant but failed to carefully observe the seizer of employment and come to wrong conclusion that since there is violation of terms of the agreement there exists liability and to discharge the said amount the cheques were issued as per the clause No.3 of Ex.P.3 and same got dishonored and the accused is liable for discharge of liability. Since the cheque got dishonored the accused has committed the offence punishable u/sec. 138 of NI Act. This conclusion of the trial court seems to be incorrect. The trial court ought to have appreciated the evidence in its totality not on the basis of part of evidence. The trial court erred in not appreciating the facts in its proper perspective. Hence the present appeal deserves to be allowed and the order of the trial court is to be set aside. Therefore, impugned judgment and order of sentence of trial court is not in accordance with law which called for interference of this court. Accordingly, this point No.2 is answered in the negative.

Crl.Apl No.1976/2018

39. POINT NO.3; In the light of my finding on point No.1 and 2 this court proceeds to pass the following;

O R DE R Appeal filed by the accused is hereby allowed.

Impugned judgment and order of sentence of trial court in CC No. 26200/2012 dated 22.9.2018 on the file of 33rd ACMM (SCCH 5) is hereby set aside.

The accused is acquitted for the offence punishable u/sec. 138 of N.I. Act.

Stay order if any stands vacated.

Send back TCR along with copy of this judgment to trial court to take further action in the matter.

(Dictated to the JW on computer, script thereof is corrected, signed and pronounced by me in open court on this the 29th day of March, 2021) (Gururaj Somakkalavar) LXIX Addl.C.C. & Sessions

Judge, Bengaluru.