

# In 1. M/S. Hanbal Mini Hydro Power vs In : Mysore Merchantile Company on 12 February, 2021

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Crl.A.1477 & 1585/2018

IN THE COURT OF THE LXIII ADDL.CITY CIVIL &  
SESSIONS JUDGE (CCH-64) AT BENGALURU.

Dated this Friday the 12th day of February 2021

P R E S E N T :- Sri B.VENKATESHA B.Sc., LL.B.,  
LXIII ADDL.CITY CIVIL & SESSIONS JUDGE,  
BENGALURU CITY.

Crl.A.No's.1477 & 1585/2018

Appellants in  
Crl.A.1477/18 : 1. M/s. Hanbal Mini Hydro Power  
Pvt. Ltd., Having its office at  
No.35, 36, Ganesh Nilaya,  
Kalappa Block, Basavanagudi,  
Bengaluru. Represented by  
its Managing Director,  
Sri. Ramachandra Madanapura  
Chennegowda.

2. Sri. Ramachandra Madanapura  
Channegowda,  
Managing Director,  
M/s. Hanbal Mini Hydro Power  
Pvt. Ltd., R/at No.215,  
Balaji Road, 2nd Block,  
Thyagarajanagar,  
Bengaluru - 560 028.

(By Sri Viswanath R Hegde,  
Adv.,)

Appellant in  
Crl.A.1585/18 : Sri. Mohan Kumar Parthasarathy,  
Kadmbi,  
S/o Sri. K.R. Parthasarathi,  
Aged about 73 years, Director,  
M/s. Hanbal Mini Hydro Power  
Private Limited, R/at No.48,  
1st Floor, 27th Cross, 7th 'B' Main,

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Crl.A.1477 & 1585/2018

Jayanagar 4th Block,  
Bengaluru - 560 011.

(By Sri. S. Narasimha, Adv.,)

V/s

Respondent in : Mysore Merchantile Company  
Crl.No.1477/18 Limited, Registered Office at  
No.201 and 202, 2nd Floor,  
Shresta Bhoomi, No.87,  
K.R.Road, Basavanagudi,  
Bangalore - 560 004.  
Rep. By its Managing Director,  
Sri. H.Srinivasa Shetty,  
Aged about 56 years,  
R/at No.571/31, 21st Main,  
4th 'T' Block, Jayanagar,  
Bangalore - 11.

(By Sri. H. Mujtaba, Adv.,)

Respondents in : 1. Mysore Merchantile Company  
Crl.No.1585/18 Limited, Registered Office at  
No.201 and 202, 2nd Floor,  
Shresta Bhoomi, No.87,  
K.R.Road, Basavanagudi,  
Bangalore - 560 004.  
Rep. By its Managing Director,  
Sri. H.Srinivasa Shetty,  
Aged about 56 years,  
R/at No.571/31, 21st Main,  
4th 'T' Block, Jayanagar,  
Bangalore - 11.

(By Sri. H. Mujtaba, Adv.,)

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Crl.A.1477 & 1585/2018

2. M/s. Hanbal Mini Hydro Power  
Pvt. Ltd., Having its office at  
No.35, 36, Ganesh Nilaya,  
Kalappa Block, Basavanagudi,  
Bengaluru.  
Represented by  
its Managing Director,  
Sri. Ramachandra Madanpura  
Chennegowda.

3. Sri. Ramachandra Madanapura  
Channegowda,  
Managing Director,  
M/s. Hanbal Mini Hydro Power  
Pvt. Ltd., R/at No.215,  
Balaji Road, 2nd Block,  
Thyagarajanagar,

Bengaluru - 28.

(By Sri Viswanath R Hegde,  
Adv.,)

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#### JUDGMENT

The appellants have filed these appeals U/Sec.374(3) of Cr.P.C., challenging the judgment and sentence order that passed in C.C.No.35691/2010 dated 02.07.2010 on the file of Court of XXXIII A.C.M.M., (SCCH-5), Bangalore. Appellants of Crl.A.No.1477/2018 are accused No.1 and 2. Appellant of Crl.A.No.1585/2018 is accused No.3 Respondent of Crl.A.No.1477/2018 and respondent Crl.A.1477 & 1585/2018 No.1 of Crl.A.No.1585/2018 is the complainant. Respondents No.2 and 3 of Crl.A.No.1585/2018 are accused No.1 and 2 (appellants of Crl.A.No.1477/2018). Therefore, for the sake of convenience, the parties to this appeal are herein afterwards referred with their ranks before the trial Court.

2. The record reveals that the complainant Company has filed a complaint U/Sec.200 of Cr.P.C against the A-1 to 3 for trial of the offense punishable U/Sec.138 of the N.I. Act alleging that the it is a company registered under the provisions of the Indian Companies Act incorporated in the year 2000 having its registered office in Bangalore. It was established to carry out the business of importing and exporting of all kinds of commodities including liquid edible oils, agricultural products, packed food items, soft drinks, tinned foods etc., to manufacture and deal in all kinds of eatables, to carry on the business of production, generation distribution, sales, development and maintenance of renewable energy and renewable energy products etc., Accused No.1 is also a Company incorporated under the provisions of Companies Act. A-2 is the Managing Director and that A-3 is its Director. A-2 and A-3 are in charge and they are responsible to the A-1 company for the conduct of its business. Therefore A-2 and 3 are jointly and severally responsible for the day to day Crl.A.1477 & 1585/2018 activities of A-1 Company. During the course of its business, the complainant Company has invited tenders from the prospective bidders through NCB route to execute the civil work for Yetthinahole Mini Hydro project in various survey numbers of different villages of Sakaleshpura Taluk as per tender document dated 24.09.2008. The accused No.1 Company has submitted its tender on 15.10.2008 bid for execution of civil works as specified in the tender document for Rs.5,66,86,624.00 along with other contractors. After scrutinizing and evaluating all the bids, the complainant company has accepted the bid of the A-1 Company for Rs.5,75,00,000/- for executing the entire civil work as per the specifications contained in the tender document with other ancillary work. The letter of acceptance was issued by the complainant to the A-1 company and called upon the A-1 to furnish performance security for Rs.28,75,000/- as per para 32.1 of the tender document. But, the accused No.1 has not furnished performance guarantee for the said sum of Rs.28,75,000/-. But, A-1 has requested the complainant to accept a cheque bearing No.674273 dated 19.10.2008 for Rs.28,75,000/- as performance guarantee. The A-1 has promised that it would arrange for performance guarantee and would take back the said cheque from the complainant. But, the A-1 has not furnished bank guarantee for Rs.28,75,000/- in favour of the complainant.

Crl.A.1477 & 1585/2018 It is further pleaded that pending execution of the agreement, notice to proceed with the work was issued to the A-1 Company and that the complainant has paid a sum of Rs.28,75,000/- to A-1 being 5% of the total amount of agreed contract towards mobilization advance by way of cheque bearing No.903205 dated 20.10.2008 drawn on Canara Bank, Prime corporate Branch, Bangalore. The said cheque was encashed by the A-1 company. On 01.12.2008 an agreement was executed in between the complainant and A-1 company for execution of the entire civil work as per terms of tender document. The time was the essence of the said contract and the accused was required to complete the entire work and hand over possession of the site to the complainant on or before 31.03.2009. Even after expiry of 6 months from 20.10.2008 the date of issuance of the said cheque, the A-1 company did not furnish bank guarantee as promised and again requested the complainant to accept the cheque bearing No.674273 dated 19.10.2008. A-1 has replaced the said cheque by No.117586 dated 23.06.2009 for Rs.28,75,000/- drawn on Corporation Bank, Sakaleshpura Branch, Sakalespura. The said cheque has been signed by A-2 as M.D of A-1. It is further pleaded that the A-1 company has failed to execute the work as per the specification contained in the said tender document within the term agreed by both the parties in the tender documents and the agreement. As a Crl.A.1477 & 1585/2018 matter of fact, the accused has executed only 9.81% of the total work. The accused has committed breach of terms and condition contained in the tender document and the agreement. As and when the A-1 raised the running account bill during the period of execution of the work, the complainant has been paying the amount to A-1 promptly without any delay. The deductions made in the previous bill being recovery of mobilization advance has been reversed by A-1 in the final bill and that complainant's engineer has accepted the bill while certifying. Therefore, the A-1 to 3 are liable to pay the entire amount of Rs.28,75,000/- to the complainant that paid to them on 20.10.2008 towards mobilization advance. Therefore, the complainant company has presented the cheque bearing No.117586 dated 23.05.2009 issued for Rs.28,75,000/- on 24.06.2009 for collection before its banker Canara Bank, M.G.Road Branch, Bangalore. But, the said cheque returned unpaid to the complainant on 03.07.2009 due to "funds insufficient/exceeds arrangement". The complainant company has intimated to A-1 to 3 about dishonour of the said cheque and requested them for payment of amount of Rs.28,75,000/-. The complainant company also has issued a legal notice on 08.07.2009 to A-1 to A-3 with a request for payment of Rs.28,75,000/- covered under the said cheque within 15 days from the date of receipt of said notice. The legal notice issued to A-1 Crl.A.1477 & 1585/2018 is received by A-2 and that the legal notice issued to A-2 and A-3 returned with a postal cover not claimed and left respectively. In spite of service of the said notice, A-1 to A- 3 failed to repay the said amount within 15 days. But, they sent a untenable common reply notice on 21.07.2009. Therefore, it was alleged that the A-1 to 3 are committed the offence punishable under Sec.138 of the N.I.Act. Hence, the complaint.

3. The trial Court has registered the said complaint as a criminal case and has issued summons to the A-1 to 3 for their appearance before the trial Court to face trial of the offence alleged. In pursuance of service of summons, the A- 2 to 3 have put their appearance before the trial Court. A-2 and A-3 are enlarged on bail. Their plea was recorded. They pleaded not guilty and claims trial of the said case. Therefore, the complainant examined Sri.H.Srinivas Shetty, it's M.D as PW.1 and got marked 16 documents as Ex's.P.1 to P.16. At the time of recording statement under Sec.313 of Cr.P.C, the A-2 and 3 are denied the incriminating evidence that appeared against them in the evidence placed before the Court. A-2 and A-3 are examined as DW's.1 and 2 and got exhibited 14

documents as Ex's.D.1 to D.14.

4. After appreciation of the complaint, evidence of PW- 1, DW's.1 & 2 contents of Ex's.P-1 to P-16 and Ex's.D.1 to D.14 as well as the arguments advanced by both sides, the trial Court has concluded that the A-1 to A-3 are guilty of the CrI.A.1477 & 1585/2018 offense punishable U/Sec.138 of the N.I.Act and has convicted them and has imposed a fine of Rs.50,000/-, in default of payment of fine, A-2 and A-3 shall under go S.I. for a period of 6 months. The Trial Court has also directed the A-1 to A-3 to pay a compensation of Rs.28,75,000/- to the complainant.

5. Being aggrieved by the said judgment and sentence order, the accused No.1 and 2 of CrI.A.1477/2018 have preferred appeal contending that the impugned judgment passed by the learned Magistrate is perverse, prejudiced, illegal and contrary to the facts of the case, materials on record and law. The learned Magistrate has erred in not noticing that the cheque in question was admittedly issued by the accused No.1 as a security for the due performance of the contract and not for presenting the same for encashment. The learned Magistrate has failed to appreciate that out of the cheque amount, a sum of Rs.7,00,000/- has already been deducted by the complainant. The learned Magistrate has failed to notice that the complainant was not entitled for the benefit of statutory presumption under Sec.139 of the N.I.Act and that presumption under Sec.139 of the N.I.Act cannot be substantive evidence and that it is only an enabling provision. The same is available only after the complainant proves that there exists debt or liability and that accused is required to discharge. The learned Magistrate has failed in CrI.A.1477 & 1585/2018 holding that the accused have failed to discharge the burden and disprove the presumption under Sec.139 of the N.I.Act.

6. Being aggrieved by the said judgment and sentence order, the A-3 has preferred the appeal in CrI.A.1585/2018 contending that impugned order is illegal, perverse, capricious and that it was passed without appreciating the facts and circumstances of the case which resulted in miscarriage of justice. The impugned order is passed without affording reasonable opportunity to the A-3. A-3 is not at all concerned to the transactions between the complainant & A-1 & 2. Just because he was nominal director of the A-1 Company, the trial court has convicted him. On perusal of the documents produced by the respondents, it is evident that nowhere in the alleged agreement of contract entered into between the respondents herein, his signature is not found in the alleged agreement of contract. Submission of the tender for the project is admittedly signed by the A-2 being the Managing Director of A-1 Company. The A-2 has issued the alleged cheque for sum of Rs.28,75,000/-. This appellant is not aware of any of the proceedings between the complainant, A-1 & 2. The trial court has not at all considered the said fact. The A-3 was not replied the alleged notice. Each and every documents like tender papers, agreements, issuance of cheques and all other papers have been admittedly CrI.A.1477 & 1585/2018 signed by A-2 on behalf of A-1 Company. The trial court has come to a wrong conclusion in convicting the A-3 who is not at all concerned in the episode. A-3 never received any notice. From 24th August 2005 to 1st October 2007, he was residing in Kulu of Himachal Pradesh and question of he receiving the amount from the complainant does not arise at all. In the Arbitration case filed by the Complainant and A-1 & 2 in A.S.No.83/2011, the A-3 is not a party and that it was admitted that A-3 is no way concerned to the project. A-3 is aged about 73 years and is suffering from various age old ailment and that he is not in a position to move

about. He was captain in Indian Army and is an Ex-service man and has deep roots in the society. The trial court without looking to the documentary evidence has come to a wrong conclusion in convicting him.

7. Among other grounds the appellants of both the appeals have sought to set-aside the impugned judgment and sentence order of the trial Court that passed against them in C.C.No.35691/2010. They have sought for their acquittal of the offence punishable U/Sec.138 of the N.I.Act.

8. After service of notice of these appeal, the complainant has put its appearance through its counsel. Trial Court record has been secured. Heard the arguments of learned counsels appeared for both sides. The learned counsel for A-1 to A-3 have submitted their separate notes of arguments. Advocate for A-1 and A-2 has filed copy of Crl.A.1477 & 1585/2018 order passed in A.S.11/2012 of CCH-11. The learned counsel appeared for the complainant also has filed his notes of arguments. In the written arguments also A-1 to A-3 and complainant have reiterated their contentions once again as averred in memorandum of appeals and complaint respectively. The learned advocate for A-1 and A-2 has relied case laws reported in 2018(4) KCCR 3464, 2016(1) KCCR 116, ILR 2006 KAR 3571, ILR 2006 SC 3366 and 2013(3) SCC 86. the learned counsel appeared for A-3 has relied case laws reported in LAWS (KAR) 2006(6) 96, LAWSK (DLH) 2007 (11) 36, LAWS (DLH) 2008 (9) 4 and LAWS(DLH)

144. he also has relied judgment rendered in Crl.A.No.1610/2001 D.D. 26.07.2006 and Crl.Pet.No.4104/2009 D.D.21.06.2013 of Hon'ble High Court of Karnataka. He also relied judgment rendered in Crl.A.1842/2008 and SLP(CRI)No.6031/2015 and 2010(11) SCC 441 in support of his arguments. The learned advocate for the complainant has relied several case laws as mentioned in his notes of arguments in support of his arguments.

9. Perused the complaint, impugned judgment and sentence order, evidence of PW.1, DW's.1 & 2, contents of Ex's.P.1 to P.16 and Ex's.D.1 to D.14 as well as the averments made in the memorandum of appeal. Perused the facts and circumstances of this case, aforesaid case laws and facts and circumstances of the case laws.

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10. The points that arise for consideration are as under:

1. Whether the A-1 and A-2 proves that trial court has erred in evaluating the evidence placed before it against them as per law with reference to the facts of this case?
2. Whether the A-3 proves that trial court has erred in evaluating the evidence placed before it against him as per law with reference to the facts of this case?
3. Whether the erred in passing the impugned judgment against A-1 to A-3 and that it warrants interference by this Court?

#### 4. What Order?

11. My findings on the above points are as under:

Point No.1 :- As in the Negative, Point No.2 :- As in the Affirmative, Point No.3 :- As partly in the Affirmative, Point No.4 :- As per the final order for the following:

#### REASONS

12. Points No.1 to 3 : These points are interlinked with each other. Therefore, these points are taken up together for joint consideration to avoid repetition of facts. After appreciation of the evidence & facts, the Trial Court in it's judgment at para 14 has opined that the accused have failed to rebut the presumption as per section 139 of N.I.Act by adducing cogent and corroborative evidence. Therefore the Trial Court has opined that the accused are found guilty CrI.A.1477 & 1585/2018 of the offence U/Sec.138 of N.I.Act. The learned counsel for the A-1 to 3 have argued that the reasons given by the Trial Court are not proper reasons with reference to the evidence and facts of this case. Before going to discuss these points it is necessary to sum up sections 118,138,139 and 141 of NI Act.

Sec.118 of the N.I.Act provides that, Until the contrary is proved, the following presumption shall be made (a) of consideration- that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration,

(b) as to the date- that every negotiable instrument bearing a date was made or drawn on such date,

(c) as to time of acceptance- that every bill of exchange was accepted within a reasonable time after its date and before its maturity

(d) as time of transfer-that every transfer of a negotiable instrument was made before its maturity

(e) as to order of endorsements- that the endorsements appearing upon negotiable instrument were made in the order in which they appear thereon

(f) as to stamps- that a lost promissory note,bill of exchange or cheque was duly stamped CrI.A.1477 & 1585/2018

(g) that holder is a holder in due course- that the holder of a negotiable instrument is a holder in due course.

Provided that, where the instrument has been contained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration,the burden of proving that the holder is a holder in due course lies upon him.

Sec.138 of the N.I. Act provides that "Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years or with fine which may extend to twice the amount of the cheque or with both."

proviso (a) the cheque has been presented to the bank within the period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier  
proviso (b) the payee or the holder in due course of the cheque, as the case may be makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque (within 30 days) of the receipt of information by him from the bank regarding the return of the cheque as unpaid and proviso (c) the drawer of the such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Sec.139 of the N.I.Act provides that, it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in under section 138 for the discharge, in whole or in part, of any debt or other liability.

Sec.141 of the N.I.Act provides that,

1) If the person committing an offence under section 138 is a Company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

PROVIDED that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

PROVIDED FURTHER that where a person is nominated as a Director of a Company by virtue of his holding any office or employment in the Central Government or State  
Crl.A.1477 & 1585/2018 Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

2) Notwithstanding anything contained in sub-section (1), where any offence under this Act, has been committed by a Company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such



director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation : For the purpose of this section

a) "company" means any body corporate and includes a firm or other association of individuals ; and

b) "director" in relating to a firm, means a partner in the firm.

13. In the oral evidence placed before the Court, the PW-1 has deposed his side of evidence by way of reiterating almost all the facts as averred in the complaint once again. In the evidence of the DW's 1 & 2, they deposed their evidence in accordance with the facts as pleaded in their memorandum of appeals. Case of A-1 & 2 is that the said cheque was issued towards security purpose only and that therefore it will not attracts the offence as alleged. A-3 has contended that he never participated in the alleged transaction. A-2 only is liable for the alleged transaction. Therefore, A-to 3 are has contended that their conviction is illegal. In view of the said rival contention, contents of Crl.A.1477 & 1585/2018 documents as well as evidence of PW.1 and DW.1 is scrutinized to verify whether the Trial Court has committed error in appreciating the evidence placed before it.

14. Ex.P.1 Extract of resolution passed by the Board of Directors of complainant company discloses that the complainant company has authorized the PW-1 to file complaint and depose evidence for complainant company. Ex.P.2 Letter of acceptance dated 20.10.2008 discloses that the complainant company has accepted the bid of A-1 company for Rs 575 lakhs and requested the A-1 company to furnish security performance for an amount equivalent to Rs 28.75 lakhs within 21 days from the date of receipt of letter, failing which action as stated in para 32.3 of ITB will be taken. Ex.P.3 office copy of the notice to proceed with the work dated 20.10.2008 discloses that the complainant company has intimated the A-1 company stating that A-1 company shall be proceed with the execution of work in accordance with the contractor documents pending formal agreement. In the said document, the complainant has enclosed cheque drawn on Canara Bank, Prime Corporate bewaring No.903205 of even dated towards mobilization amount at the rate of 5% of Rs.575 lakhs. Ex.P.4 notarized copy of agreement dated 01.12.2008 discloses that an agreement was executed in between the complainant and A-1 company in connection with carrying out civil work of Yetthinahole project amounting to Rs.575 lakhs. Contents of Crl.A.1477 & 1585/2018 Ex's.P.1 to P.4 documents are not disputed by both the parties to these appeals. Ex.P.5 cheque dated 23.05.2009 bewaring No.117486 of Corporation Bank, Sakaleshpura Branch, discloses that the A-1 Company has issued the said cheque to the complainant for Rs.28,75,000/- drawn in favour of the complainant Company. The signature marked as Ex.P.1(a) is the signature of A-2. It is not in dispute that A-2 is Managing Director and A-3 is Director of A-1 Company. Issuance of Ex.P.5 cheque in favour of the complainant is not disputed by A-1 and A-2. A-3 has contended that he is not aware about issuance of Ex.P.5 cheque to the complainant. A-1 and A-2 have contended that Ex.P.5 cheque has been issued to the complainant towards security of the agreement marked at Ex.P.4. Therefore they have contended that Ex.P.5 is not issued for discharge of legally enforceable debt, offence under Sec.138 of N.I.Act is not committed by them. In view of admission of issuance of cheque marked at Ex.P.5 in

favour of the complainant, the trial Court has rightly raised the initial presumption that the said cheque was issued towards discharge of legally enforceable debt. It is for the A-1 to A-3 to rebut the said presumption by placing a probable evidence. Ex.P.6 debit advise of Canara bank discloses that the Canara Bank, Bangalore, has returned the said cheque to the complainant Company unpaid as "Insufficient funds/Exceeds Arrangements". Ex.P.7 cheque return memo CrI.A.1477 & 1585/2018 issued by Corporation bank dated 29.06.2009 discloses that the Corporation bank, Sakaleshpura Branch, has returned the Ex.P.5 cheque as unpaid to the Canara Bank, Bangalore, due to "Insufficient Funds/Exceeds arrangements". So, it is clear that, the complainant has presented the said cheque for collection within 6 months from 23.05.2009. Ex.P.8 copy of the legal notice dated 08.07.2009 discloses that within 30 days from 29.06.2009, the complainant got issued the legal notice to the A-1 to A-3 by stating about dishonour of the said cheque due to "Funds Insufficient/Exceeds Arrangements" and has requested them to make payment of the amount covered under the said cheque within 15 days from the date of receipt of the said notice. Ex's.P.9 three postal receipts dated 08.07.2009 discloses that the legal notice marked at Ex.P.8 has been sent to A-1 to A-3 through registered post to their address as mentioned in the complaint. Ex.P.10 disclose that the said legal notice also has been sent to A-1 to A-3 through certificate of posting on 08.07.2009. Ex.P.11 postal acknowledgment discloses that the legal notice marked as Ex.P.8 issued to A-1 has been served to A-1. Ex's.P.12 and P.13 returned unserved RPAD covers discloses that legal notice sent to A-2 and A-3 returned back as A-2 and A-3 have not claimed the said postal covers though intimation delivered. Ex's.P.14 and P.15 originals of Ex.P.8 legal notice that sent through RPAD to A-2 and A-3 in Ex.P.12 and P.13 R.PAD CrI.A.1477 & 1585/2018 cover. Ex.P.16 reply notice dated 21.07.2009 discloses that A-1 to A-3 have replied on 21.07.2009 to the legal notice marked at Ex.P.8 by denying the contents as averred in the Ex.P.8 legal notice. In the said legal notice they have contended that Ex.P.5 cheque was not issued for discharge of legally enforceable debt and that it was issued for security purpose only. It was also stated that Rs.7,00,000/- was deducted by the complainant. It is clear that the notice issued to A-1 to A-3 has been duly served on them. Therefore contention of A-3 that legal notice is not served to him cannot be accepted. This complaint was presented on 17.08.2009 i.e., within 30 days after lapse of 15 days from 21.07.2009. So, it is clear that the Trial Court has not committed any error before registering the said complaint as criminal case against the accused. It is clear that the complainant company has complied the proviso of Sec.(a) to (c) of Sec.138 of N.I.Act. Therefore, as per case law laid in 2014(5) SCC 590, Indian Bank /Vs/ Union of India technically the commission of the offence stands completed, and it is for the A-1 to A-3 to show that no offence could have been committed by them for specific reasons and defenses.

15. Ex.D.1 tender documents for civil works of Yethinahole MHS discloses that it has been issued by the complainant inviting bids for Yethinahole project. Ex.D.2 CrI.A.1477 & 1585/2018 copy of letter dated 20.10.2008 discloses that A-1 company has wrote letter to the complainant company stating that it has submitting cheque bearing 674273 dated 19.10.2008 for Rs.28,75,000/- towards performance security and has requested the complainant to release first installment of mobilization advance for commencement of the work immediately. Ex.D.3 copy of Minutes of the meeting of Complainant company discloses that Dr.Janakairam will be the authorized person for co-ordinating with CEPI regarding clarification and any technical problem and Mr.Sathya Narayana, project engineer regarding feed back of site and communicated to CEPI. Ex.D.4 copy letter dated

17.01.2009 of A-1 company discloses that it has wrote letter to complainant company with proposed construction program. Ex.D.5 copy of Minutes of the meeting of complainant Company, A-1 Company and Engineers about execution of the work. Ex.D.6 copy of the letter dated 29.05.2009 discloses that complainant company has wrote letter to A-2 stating that the contract dated 01.12.2008 is expired and requested to stop work from 31.12.2009 and hand over the site to Mr.Shantharam Shetty, the site Engineer of complainant. It also disclose that the complainant company no desire or intention to extend or renew the contract of it has found too many violation of the contract or it has not satisfied about work performance of the company. Ex.D.7 order sheet in A.S.No.83/2011 discloses that the A-1 Crl.A.1477 & 1585/2018 company has instituted arbitration suit against complainant to set-aside the impugned award dated 05.9.2011 passed by R-2, the sole arbitrator. Ex.D.8 first running account bill dated Nil discloses that the amount of Rs.23,97,057.00 is liable to be paid to the A-1. The said bill disclose that an amount of Rs.1,43,125.00 has been deducted towards mobilization advance of 5%. Ex.D.9 2 nd running account bill dated Nil discloses that the amount of Rs.19,75,210.00 is liable to be paid to the A-1. The said bill disclose that an amount of Rs.2,07,500.00 has been deducted towards mobilization advance of 5%. Ex.D.10, 3 rd running account bill dated Nil discloses that the amount of Rs.38,32,400.00 is liable to be paid to the A-1. Ex.D.11, 4 th running account bill dated Nil discloses that the amount of Rs.31,01,899.00 is liable to be paid to the A-1. Ex.D.12 letter issued by A-1 to A-3 i.e., Capt.K.P.Mohan Kumar, HOD Penstock, ADHPL print dated 04.10.2007 discloses that relationship charges of A-3 has been revised with effect from 01.10.2007. Ex.D.13 certificate issued by District Magistrate, Kullu dated 16.05.2007 discloses that A-3, his wife and daughter have stayed at Kullu from 01.10.2005. Ex.D.14 rental agreement dated 28.04.2010 discloses that A-3 has obtained the said rent agreement on 28.04.2010 by Sri.T.V.Himanth Raj of J.P.Nagar, Bangalore for having taken the residential house at Banashankari 2nd Stage on monthly rent of Rs.20,000/-. Ex's.D.8 and D.9 bills disclose that Rs.3,50,625.00 has been Crl.A.1477 & 1585/2018 proposed to deduct towards amount paid towards mobilization advance. The judgment and decree passed in A.S.811/2012 dated 06.10.2020 on the file of CCH-11 is not instituted in respect of the dispute arise under Ex.D.1 contract. Therefore contents of the said judgment is not applicable to the facts of this case.

16. From the evidence placed before the Court, it is clear that A-2 is Managing Director and that A-3 is Director of A-1 Company. PW.1 is the Managing Director of Complainant Company. It is also clear that the DW.1 has admitted that the complainant company has paid Rs.28,75,000/- to the A-1 Company towards mobilization advance. It is clear that the A-1 Company has to furnish performance security to the complainant company towards receipt of Rs.28,75,000/- from the complainant company. DW.1 has admitted that Ex.P.5 cheque was issued to the complainant company instead of furnishing performance security. The evidence of DW.1 that recorded during the course of his cross examination is clear that the A-1 company has not completed the tender work as per terms and conditions noted in the tender document marked at Ex.D.1 document. Therefore, DW.1 has submitted that the complainant company has terminated the Ex.D.1 contract. DW.1 has not produced any evidence to show that running bills marked at Ex's.D.8 to D.11 have been honored and Crl.A.1477 & 1585/2018 that amount of Rs.3,50,625.00 has been deducted towards mobilization advance. In fact, the said bills are not been signed by the complainant. The certificate in the bottom of the said bill has not been signed by the complainant. Therefore no grounds to accept that the A-1 company has paid Rs.7,00,000/- to the complainant towards mobilization advance. No work has

been completed by the A-1 company as admitted by DW.1. A-1 has not contended before the Court that the complainant company is still liable to pay money to it towards the said contract. Therefore, A-1 has a liability to return Rs.28,75,000/- to the complainant company. The said cheque was issued towards performance security of Rs.28,75,000/- to the complainant company as the A-1 company has to pay back Rs.28,75,000/- the mobilization advance to the complainant. It is a liability of the A-1 company to pay it to complainant. Hence it is a legally recoverable amount from the A-1 company. Therefore in view of non-payment of the said cheque amount after service of demand notice, it is clear that the A-1 company has committed the offence that punishable under Sec.138 of N.I.Act. Admittedly, A-3 has not signed on the cheque or on Ex.D.1 contract. No evidence placed by the complainant company to show that A-3 was also personally involved in the said transaction. No evidence also placed to show that the said contract was executed with the consent of A-3. No evidence placed before the Crl.A.1477 & 1585/2018 court that A-1 and A-2 have committed the offence punishable under Sec.138 of N.I.Act within the knowledge of A-3. Therefore as provided under proviso clause of Sec.141(1) of N.I.Act, A-3 is not liable to be punished for the offence punishable under Sec.138 of the N.I.Act. Admittedly, A-2 is the M.D of A-1 Company and responsible to the A-1 company for the conduct of its business. Therefore, A-1 and A-2 are only liable to be punished. Therefore, I am of the opinion that appeal filed by the A-1 and A-2 in Crl.No.1477/2018 is devoid of merits and that therefore it is liable to be dismissed. As stated supra, A-3 has not committed the offence punishable under Sec.138 of the N.I.Act. Therefore, the trial court has committed error in convicting A-3. Therefore appeal filed by A-3 in Crl.A.No.1585/2018 is succeeds and that therefore the impugned judgment and sentence order that passed against A-3 is liable to be set-aside. Therefore grounds made out to interfere with the impugned judgment and sentence order to the extent as stated supra. Therefore, I answer the aforesaid points No.1 as in the Negative, Point No.2 as in the Affirmative and Point No.3 as partly in the Affirmative.

17. Point No.4: In view of the above discussion and the findings on points No.1 to 3, I proceed to pass the following:

Crl.A.1477 & 1585/2018 ORDER Appeal filed by the A-1 and A-2 Crl.A.1477/2018 under 374(3) of Cr.P.C is hereby dismissed.

The judgment and order of conviction passed against the A-1 & 2 in C.C.No.35691/2010 dated 02.07.2010 on the file of Court of XXXIII A.C.M.M., (SCCH-5), Bangalore. is hereby confirmed.

Appeal filed by the A-3 in Crl.A.1585/2018 under 374(3) of Cr.P.C is hereby allowed.

The judgment and order of conviction passed against the A-3 in C.C.No.35691/2010 dated 02.07.2010 on the file of Court of XXXIII A.C.M.M., (SCCH-5), Bangalore. is hereby set-aside.

A-3 is hereby acquitted of the offence punishable under Sec.138 of the N.I.Act. His bail as well as surety bond stands cancelled. He shall be set at liberty forthwith if he is not required in any other case/s.

Send back trial Court record with copy of this Judgment.

Crl.A.1477 & 1585/2018

Keep original of this judgment in  
Crl.A.No.1477/2018 and its copy in  
Crl.A.No.1585/2018.

(Typed by the Stenographer on my dictation, the transcript revised and then pronounced by me in open court on this Friday the 12th day of February 2021).

(B.VENKATESHA) LXIII ADDL.CITY CIVIL & SESSIONS JUDGE, (CCH-64), BENGALURU CITY.

Crl.A.1477 & 1585/2018 12.02.2020 Applt. By : S.N. Case called in the Open Court. Applt R-1 By : M.R.P. pre/abs. Resp pre/abs. Counsel for applt R-2, 3 : Smt.Shobha abs/pre. Counsel for resp abs/pre. For Judgment.

Judgment is pronounced in the Open Court, (vide separate judgment kept in file).

Appeal filed by the A-1 and A-2 Crl.A.1477/2018 under 374(3) of Cr.P.C is hereby dismissed.

The judgment and order of conviction passed against the A-1 & 2 in C.C.No.35691/2010 dated 02.07.2010 on the file of Court of XXXIII A.C.M.M., (SCCH-5), Bangalore. is hereby confirmed.

Appeal filed by the A-3 in Crl.A.1585/2018 under 374(3) of Cr.P.C is hereby allowed.

The judgment and order of conviction passed against the A-3 in C.C.No.35691/2010 dated 02.07.2010 on the file of Court of XXXIII A.C.M.M., (SCCH-5), Bangalore. is hereby set-aside.

A-3 is hereby acquitted of the offence punishable under Sec.138 of the N.I.Act.

His bail as well as surety bond stands cancelled. He shall be set at liberty forthwith if he is not required in any other case/s.

Send back trial Court record with copy 30 Crl.A.1477 & 1585/2018 of this Judgment.

Keep original of this judgment in  
Crl.A.No.1477/2018 and its copy in  
Crl.A.No.1585/2018.

LXIII A.C.C.& S.J.,  
Bangalore.