Janardhan. V vs Smt.Uma Abhilash Iyer on 1 October, 2015

IN THE COURT OF THE LXVIII ADDITIONAL CITY CIVIL
AND SESSIONS JUDGE, BENGALURU CITY (CCH-69)

Dated this the 1st day of October 2015

:PRESENT:
Sri.Shivaji Anant Nalawade, B.Com., LL.B.(Spl)
LXVIII Addl. City Civil and Sessions Judge,
Bengaluru City.

CRIMINAL APPEAL Nos.359/2014 AND 687/2014

APPELLANT/ACCUSED IN CRL.APL.359/2014: Janardhan. V
S/o Venkatesh,
Residing at No.10,
Govindashettypalya,
Electronic City Post,
Bengaluru - 560 100.

(By Sri.Mohan S Reddy,
Advocate)

- Versus -

RESPONDENT/ COMPLAINANT IN CRL.APL.359/2014: Smt.Uma Abhilash Iyer
D/o Late.N.S.Anantha Iyer,
Residing at No.A-101,
Purva Heights, Bilekahalli,
Bannerghatta Road,
Bengaluru - 560 076.

(By Sri.K.N.M, Advocate)

AND

APPELLANT/ COMPLAINANT IN CRL.APL.687/2014: Smt.Uma Abhilash Iyer
D/o Late.N.S.Anantha Iyer,
Residing at No.A-101,
Purva Heights, Bilekahalli,
Bannerghatta Road,
Bengaluru - 560 076.
(By Sri.Narahari.G, Advocate)

- Versus -

RESPONDENT/ACCUSED IN CRL.APL.687/2014: Janardhan. V
S/o Venkatesh,
Residing at No.10,
Govindashettypalya,

Electronic City Post,
Bengaluru - 560 100

(By Sri.S.R., Advocate)

COMMON JUDGMENT

Crl.Apl.No.359/2014 is preferred by the appellant/accused under Sec.374(3) of Cr.P.C. challenging the judgment and sentence passed by the XXII Addl.Chief Metropolitan Magistrate Court, Bengaluru in C.C. 12697/2009 dated 12-03-2014 wherein he has been convicted for the offence punishable under Sec.138 of Negotiable Instruments Act and sentenced to pay fine of Rs.15,05,000/- and in default of payment of fine shall undergo simple imprisonment for 6 months.

2. Crl.Apl.No.687/2014 is preferred by the appellant/complainant under Sec.372 of Cr.P.C. against the sentence passed by the XXII Addl.Chief Metropolitan Magistrate Court, Bengaluru in C.C.12697/2009 dated 12-

03-2014 for modifying the sentence to pay the fine to the extent of double the cheque amount.

3. The above appeals arise out of the judgment passed in C.C.12697/2009 dated 12-03-2014, so they are clubbed and disposed off by this common judgment.

4. The appellant in Crl.Apl.359/2014 is the accused and respondent in the said appeal is the complainant. Appellant in Crl.Apl.687/2014 is the complainant and

respondent in the said appeal is the accused before the trial court. For the sake of convenience, rank of parties is referred to as stood before the court below.

5. The brief facts leading for disposal of these appeals are as follows:

It is the case of the complainant that accused being the vendor of immovable property bearing Site No.134, New Katha No.2/1, Old Katha No.14/4, situated at Doddanagamangala village, Begur Hobli, Bengaluru South Taluk, measuring East-West 44 feet and North South 90', 09' feet in all measuring total extent of 3,993 sq.ft. She and accused have entered into an Agreement of Sale in respect of the above said immovable

property for total sale consideration of Rs.40,00,000/-. On 07-01-2008 she has paid Rs.10,00,000/- and for that accused has given acknowledgement. In view of the said transactions she has paid Rs.5,00,000/-on 14-02-2008, for which the accused has given acknowledgement. On 16-06-2008 she has given Rs.5,00,000/- to the accused and for that accused has given acknowledgement. She has given total part sale consideration of Rs.20,00,000/- to the accused and remaining Rs.20,00,000/- sale consideration has to be given at the time of executing the registered Sale Deed. It is the case of complainant that, the said property was in the revenue and gramatana site and there was ban for registration of the said sites, so the transaction was not

complete. It is the case of complainant that the accused has issued legal notice to her on 08-06-2008 and after the receipt of the said legal notice she has answered suitably through her counsel on 14-06-2008. Thereafter, she and accused came to a mutual understanding and accused has agreed to return the part sale consideration of Rs.15,00,000/- received from her and for the same accused has issued cheque in her favour for Rs.15,00,000/- dated 10-02-2009 drawn on Indian

Bank, Electronic City Branch, Bengaluru bearing Cheque No.651176. She has presented the said cheque from her banker Canara Bank, BTM Branch, Bengaluru, within limitation and the same returned dishonour for 'insufficient of funds'. She has intimated the said fact to the accused, accused requested her to present the said cheque for realization after 15-03-2009, again she has presented the said cheque for realization through her banker Canara Bank, J.P.Nagar Branch, Bengaluru and the same was returned dishonour for 'insufficient funds' in the accounts of the accused on 21-03-2009. Thereafter, she has issued legal notice to the accused on 24-03-2009 and called upon him to pay the cheque amount within 15 days from the receipt of the notice. The said notice was duly served on the accused, accused has not paid the cheque amount thereafter she has lodged a private complaint before the court within limitation

and thereby accused has committed the offence under Sec.138 of Negotiable Instruments Act.

6. After complainant has lodged the complaint before the trial court, it has taken cognizance of the offence and kept the case for recording sworn statement of the complainant

and registered the case in C.C.12697/2009 for the offence under Sec.138 of Negotiable Instruments Act. The trial court issued summons to the accused, accused appeared before the trial court on receipt of the summons and trial court has enlarged him on bail. Thereafter, the trial court has framed accusation under Sec.251 Cr.P.C. for the offence punishable under Sec.138 of Negotiable Instruments Act and read over the same to accused. Accused pleaded not guilty and claimed to be tried and thereafter case is posted for complainant's evidence.

7. The complainant in order to prove the guilt of the accused got examined herself as PW.1 and got marked 12 documents as Ex.P1 to 12 and closed her side. Thereafter, accused is examined under Sec.313 Cr.P.C. to enable him to explain incriminating circumstances appearing against him in the complainant evidence. Accused denied the statement in toto and further stated that he is having defence evidence. Accused examined himself as DW.1 and accused has produced 4 documents on his behalf and got them marked as Ex.D1 to 4 and closed his side. Thereafter trial court heard

the arguments advanced by the learned counsel for the

complainant counsel for the accused has not advanced arguments. Hence trial court has taken that accused has no arguments and passed the judgment and convicted the accused for the offence under Sec.138 of Negotiable Instruments Act and sentenced to pay fine of Rs.15,05,000/- in default to undergo Simple Imprisonment for 6 months.

8. Accused being aggrieved by the judgment and order passed by the trial court in C.C.12697/2009 dated 12-03-2014 came in appeal on the following among other grounds;

The trial court has failed to consider the fact that the cheque in question is not issued towards legally enforceable debt. The trial court has erred in appreciating the oral and documentary evidence lead by the parties and arrived at a wrong conclusion that Ex.P1-cheque is issued for legally recoverable debt. The trial court has erred in not appreciating the evidence on record that the cancellation of sale agreement was forcibly entered by the complainant at the instance of her Henchmen. The trial court has not considered the fact that the accused is the Power of Attorney Holder of one Usha Devi who has suffered Paralysis stroke and she has

executed power of attorney in his favour only to execute the Sale Deed and collect the sale consideration on her behalf and he is not liable in any way for the dues. The trial court has committed error in pronouncing the judgment when NBW was pending against the accused which is not permissible as per Sec.356(6) of Cr.P.C. The trial court has not appreciated the evidence lead by accused and documents produced by the accused and arrived at a wrong conclusion. The judgement and order passed by the trial court is highly illegal, unjust and arbitrary. The trial court has committed a grave error which results in failure of justice. On these grounds and among others the appellant/accused prayed for allowing the appeal by setting aside the judgment and sentence passed by the trial court and prayed for acquitting the accused.

9.The appellant/complainant in Crl.Apl.687/2014 aggrieved by the sentence of awarding only fine of Rs.15,05,000/-, came in appeal on the following among other grounds;

The trial court has committed grave error in awarding and imposing inadequate compensation/sentence. The trial court failed to take note that the cheque in question is dated 12-02-2009 for Rs.15,00,000/- and more than 5 years lapsed

by the time trial court passed the order under appeal (i.e., 07-03-2014) and inspite of this gap, not a single paisa more is awarded as compensation to the complainant on the principal cheque amount of Rs.15,00,000/-. The transanction being

commercial transaction between the parties, the trial court ought to have awarded the compensation amount by calculating the interest minimum at 18% p.a. on Rs.15,00,000/- besides awarding the damages. So, the trial court has committed grave injustice in passing the inadequate sentence. The trial court has failed to keep in mind the legislative intention and object in introducing Sec.138 of Negotiable Instruments Act. The quantum of sentence passed by the trial court is inadequate and liable to be modified. On these grounds and among others the appellant prayed for modifying the sentence and prayed for awarding the fine to the tune of double the cheque amount.

10. These appeals are presented before the Hon'ble Prl. City Civil and Sessions Judge, Bengaluru and they are registered as Crl.Apl.359/2014 and Crl.Apl.687/2014 and made over to this court for disposal according to law. After the receipt of the records this court has issued notice to the

respondent in both the appeals. The respondent in both the appeals appeared through their counsel. Thereafter the LCR's were secured and they are before the court.

11. Heard the arguments advanced by the learned counsel for the appellant and respondent in length.

12. The points that arise for my determination in Crl.Apl.359/2014 are as under:

1. Whether the trial court has committed any error in appreciating the oral and documentary evidence placed before it?

2. Whether the trial court has committed any error in arriving at a conclusion that Ex.P1-cheque is issued for legally enforceable debt and accused has committed the offence punishable under Sec.138 of Negotiable Instruments Act?

3. Whether the interference is necessary in the impugned judgment and sentence under appeal from this court?

4. What order?

13. The points that arise for my determination in Crl.Apl.687/2014 are as under:

1. Whether the appeal preferred by the complainant/appellant for modification of sentence is maintainable?
2. What Order?

14. After hearing the arguments and perusal of the oral and documentary evidence, my findings to the above points are as follows:

Findings in Crl.Apl.359/2014:

Point No.1 to 3 : In the NEGATIVE;

Point No.4 : As per final order;

Findings in Crl.Apl.687/2014:

Point No.1 : In the NEGATIVE;

Point No.2 : As per final order;

for the following;

REASONS

15. POINTS No.1 to 3 in Crl.Apl.359/2014: The

above points are inter-connected, hence they are taken up for discussion together in order to avoid repetition.

16. In the present case accused has not disputed that the property bearing No.134, New Katha No.2/1, Old Katha No.14/4 situated at Doddanagamangala village, Begur Hobli, Bengaluru South Taluk coming under the jurisdiction of Konnnappana Agrahara Village Panchayath measuring East-West 44 feet and North-South 90', 09' feet totally measuring 3,993 sq.ft belongs to one Usha Devi, he as power of attorney

of Usha Devi agreed to sell the said property to the complainant for Rs.40,00,000/-. Further accused has not disputed that he has received Rs.20,00,000/- as part of sale consideration. It is the case of complainant that as there is a bar for registration of revenue and gramatana sites, the sale transaction between him and the accused was not enforced and as per the mutual understanding between him and the accused, accused has agreed to repay the part sale consideration received from him and cancellation of sale agreement was executed and accused as per the said cancellation of Sale Agreement Deed has issued Ex.P1-cheque and he presented the same for encashment, the same was dishonoured. Thereafte,r he has issued legal notice to the accused and called upon him to repay the cheque amount, accused has received the said Notice and not paid the amount

thereafter he has lodged a private complaint before the court within limitation and thereby accused has committed the offence under Sec.138 of Negotiable Instruments Act.

17. It is the case of accused that he has not executed any cancellation of sale agreement on behalf of one Usha Devi. The said cancellation of sale agreement is obtained by

the complainant forcibly through her Henchmen. Further it is the case of accused that the transaction took-place between the complainant and one Usha Devi and he has only received the sale consideration amount on behalf of Usha Devi, so he is not liable to repay the said amount to the complainant. He has not voluntarily given the Ex.P1-cheque and the same is obtained by using force. In the presnt case, accused has not disputed that Ex.P1-cheque is from the cheque leaves issued to his account. Further has also not disputed the presentation of the cheque for encashment and dishonour of the same.

18. Complainant in order to prove her case examined herself as PW.1 and PW.1 has reiterated the averments of the complaint in her examination-in-chief. PW.1 has clearly stated that the accused, as power of attorney of one Usha Devi agreed to sell the property mentioned in the complaint for Rs.40,00,000/- to her and accused has received Rs.20,00,000/- and thereafter as the property intended to be purchased was coming under the revenue and gramatana

sites and as there was bar for registration, the Agreement of Sale was cancelled and accused agreed to repay the earnest money and accused for the repayment of the earnest money has issued Ex.P1-cheque and she presented the same for encashment through her banker and the same was dishonoured for insufficient funds. Thereafter she has issued legal notice to the accused and intimated him regarding dishonour of the cheque and called upon him to repay the cheque amount. Accused in spite of receipt of the notice has not paid the cheque amount thereafter she has lodged a private complaint before the court within limitation and thereby accused has committed the offence under Sec.138 of Negotiable Instruments Act. The counsel for the accused cross-examined PW.1 in length and nothing has been made out in the cross-examination of PW.1 so as to disbelieve her evidence.

19. Complainant in support of her case has produced original cheque issued by the accused to her which is at Ex.P1. In the present case accused has been examined himself as DW.1 and DW.1 in his cross-examination admitted as under;

"¤¦-1 ZÉPï £À£Àß SÁvÉUÉ ¸ÉÃjzÀ ZÉPÁÌVzÉ ªÀÄvÀÄÛ CzÀgÀ ªÉÄÃ°gÀÄªÀ ¸À» £À£ÀßzÁVzÉ JAzÀgÉ ¸Àj.

¸ÀzÀj ZÉPÀÌ£ÀÄß £Á£ÉÃ ¦ügÁåzÀÄzÁgÀjUÉ PÉÆnÖzÉÝÃ£É JAzÀgÉ ¸Àj."

20. The above admission of DW.1 itself clear that accused has admitted that Ex.P1-cheque is out of the cheque leaves issued to him to his account and Ex.P1-cheque belongs to him. Further the accused has clearly admitted that he has given Ex.P1-cheque to the complainant. Further accused in his cross-examination admitted as under;

"£Á£ÀÄ ¦ügÁåzÀÄzÁgÀjUÉ PÉÆnÖgÀÄªÀ ZÉPÀÄÌ F ¥ÀæPÀgÀtzÀ°ègÀÄªÀ ¤¦-1 zÁR¯ÉAiÀiÁVzÉ. «ªÁ¢vÀ ZÉPÀÌ£ÀÄß ¦ügÁåzÀÄzÁgÀgÀÄ £ÀUÀ¢ÃPÀgÀtPÁÌV ºÁdgÀÄ ªÀiÁrzÁUÀ insufficient funds JA§ »A§gÀºÀzÉÆA¢UÉ ¸ÀzÀj ZÉPÀÄÌ CªÀiÁ£ÀÅ DVzÉ JAzÀgÉ £À£ÀUÉ UÉÆwÛ®è."

Further DW.1 in his cross-examination admitted that;

"«ªÁ¢vÀ ZÉPÀÌ£ÀÄß ¦ügÁåzÀÄzÁgÀgÀÄ £ÀUÀ¢ÃPÀgÀtPÁÌV ºÁdgÀÄ ªÀiÁrzÀ ¢£ÀzÀAzÀÄ £À£Àß ¨ÁåAPï SÁvÉAiÀÄ°è ¸ÁPÀµÀÄÖ ºÀt EgÀ°®è JAzÀgÉ ¸Àj."

21. From the above admission of DW.1, it is clear that the accused has admitted that when the cheque was presented for encashment, there was no balance in his account to honour the said cheque. Accused has not

disputed that Ex.P1-cheque was dishonoured for insufficient funds. The complainant has produced Memo issued by Indian Bank dated 21-03-2009 and the same clearly goes to show that Ex.P1-cheque was presented for encashment and the same was dishonoured for insufficient funds. Complainant has produced another endorsement issued by

the Bank which is at Ex.P3. Complainant has produced the legal Notice issued by him to the accused which is at Ex.P4 and Ex.P4 discloses that the complainant has issued Notice as per Ex.P4 to the accused within limitation and intimated the accused regarding dishonour of the cheque and called upon him to repay the cheque amount. Complainant has produced the Postal Receipt, UCP Certificate, the office copy of letter given by her to the Post Office for non-receipt of acknowledgement and endorsement given by the Postal authorities and they are at Ex.P6 to 8. Ex.P6 to 8 clearly goes to show that the complainant has presented Ex.P1-cheque for encashment within limitation and the same came to be dishonoured for insufficient funds in the accounts of accused thereafter complainant has issued legal notice to the accused within limitation, notice was served, the accused has not

repaid the amount thereafter complainant has lodged a private complaint before the court within limitation.

22. Complainant has produced the Sale Agreement executed between him and one Uma Devi represented by the accused dated 07-01-2008 which is at Ex.P10. Accused has also not disputed Ex.P10. Accused has not disputed that Rs.20 lakhs earnest money is received by him on behalf of Uma Devi from the complainant. Complainant has produced the Bank statement which is at Ex.P12 and Ex.P12 discloses that at the time when the cheque was presented for

encashment, the balance was not sufficient to honour the said cheque.

23. The accused in order to prove his defence, examined himself as DW.1. DW.1 in his evidence stated that he know the complainant, he know one Umadevi. Umadevi has sustained Paralysis stroke and she intended to sell one of the sites belongs to her, so she has executed Power of Attorney for selling the said site in his favour. Further DW.1 has stated that Umadevi told him to execute the Agreement of sale in favour of complainant in respect of her site and he on the basis of the Power of Attorney executed by Umadevi has

executed the Agreement of Sale in favour of complainant on behalf of Umadevi. Further DW.1 has stated that at the time of executing the agreement, the complainant has paid Rs.10 laksh to him and he has given the said Rs.10 lakhs to Umadevi. On 14-02-2008 complainant has given Rs.5 lakhs in respect of the balance consideration and he has given the said amount to Umadevi. On 16-06-2008 complainant has given Rs.5 lakhs to him in respect of balance consideration and he has given the said amount to Umadevi. Further DW.1 has stated that for dishonour of Ex.P1-cheque, complainant has issued Notice to him and he has given reply to the same. Further this witness has stated that, for executing cancellation agreement complainant has brought the stamp

papers and at the time of executing the cancellation sale deed he has given Rs.20 lakhs to the complainant. Further DW.1 has stated that one Mico Manju @ Payasa came to him along with other 10 persons and taken him to Lakkasandra to the house of one Corporator. The Mico Manju and the other persons assaulted him and taken him forcibly to the house of the Corporator. He has repaid the earnest money to the complainant and even them complainant has not returned

the cheque to him. He was not due anything to the complainant. He is not liable for the complainant in any way. The counsel for the complainant cross-examined this witness and in the cross-examination this witness has admitted that he has executed Agreement of Sale as per Ex.P10 to the complainant. Further this witness has admitted that for canceling Ex.P10-Agreement, cancellation deed has been executed. Further this witness has admitted that at the time of executing the cancellation agreement he has agreed to pay cash of Rs.1,50,000/- and one cheque for Rs.15 lakhs and another cheque for Rs.1,50,000/- to the complainant. Further this witness has admitted that, Ex.P1-cheque is the cheque issued by him at the time of cancellation of sale agreement. Further DW.1 has admitted that Ex.P1-cheque was dishonoured for insufficient funds in his accounts. Further in the present case, accused himself has produced cancellation of sale agreement and the same is marked at

Ex.D4. DW.1 in his evidence admitted that Ex.D4 bears his signature and the signature of the accused is marked at Ex.D4(a). In Ex.D4-Cancellation Agreement itself clearly recited that the Agreement as per Ex.D10 is cancelled and the

accused has agreed to pay Rs.18 lakhs to the complainant and accused paid Rs.1,50,000/- by cash and issued two cheques one cheque for Rs.1,50,000/- bearing No.651175 dated 20-11-2008 and another cheque for Rs.15,00,000/- bearing No.651177 dated 10-02-2009. The document-Ex.D4 produced by the accused himself clearly goes to show that the accused is the party to Ex.D4 and accused has put his signature on it as per Ex.D4(a) and accused has admitted the contents of Ex.D4(a). In Ex.D4(a) it is clearly stated that the accused has agreed to refund the earnest money taken from the complainant to the tune of Rs.18 lakhs and for that accused has issued Ex.P1-cheque. The accused in his evidence has stated that at the time of executing Ex.D4, he has returned the entire amount to the complainant and if really the accused has returned the amount to the complainant, accused ought not to have signed on Ex.D4-Cancellation of Sale Agreement. Ex.D4 document is produced by the accused himself and the said document falsifies the version of accused that at the time of executing Ex.D4, he has repaid the earnest money received to the complainant. On

the other hand, Ex.D4 which is the document produced by

the accused himself falsifies his case that he has repaid amount to the complainant. Ex.D4 clearly goes to show that for the amount received by the accused from the complainant, accused has issued Ex.P1-cheuqe. So, the contention of the accused that Ex.P1-cheque is obtained by the complainant forcibly is unacceptable one.

24. The counsel for the accused has contended that Ex.P1-cheque is not issued for legally enforceable debt, so Sec.138 of Negotiable Instruments Act will not attract. In the present case, accused himself has admitted that he has received the earnest money of Rs.20 lakhs from the complainant for sale of site as Power of Attorney Holder of one Umadevi. Further accused has admitted the Ex.D4-Cancellation Agreement. Accused has admitted that he has issued Ex.P1-cheque. Ex.D4 discloses that for repayment of the earnest money received from the complainant, accused has issued Ex.P1-cheque, so Ex.P1-cheque is issued by the accused for legally recoverable debt. So, the version of the accused that Ex.P1-cheque is not issued for legally recoverable debt is unacceptable one.

25. The counsel for the accused has relied upon citation reported in 2010 Crl.L.J. 1061 (Case: Venkatesh Bhat

. A Vs. Rohidas Shenoy, wherein the lordship of our own Hon'ble High Court have held as under;

> "(B) Negotiable Instruments Act (26 of 1881), S.138 - Dishonour of cheque - Acquittal of accused - Validity - Cheque was issued by accused to complainant under an agreement between them - If there was any violation of terms of agreement by accused, remedy open to complainant to take appropriate steps before Civil Court and not criminal Courts - Acquittal proper."

26. In the present case in hand, Ex.P1-cheque is given by the accused for repayment of earnest money received from the complainant as per Ex.P10-Agreemetn. So the facts and circumstances in the present case and that of the above referred citation are different. Hence, giving respect to the Lordships in the above cited ruling, I am of the opinion that the principles in the above referred ruling are not applicable to the present case in hand.

27. Further the counsel for the accused has relied upon the citation reported in AIR 2006 Supreme Court 3366 (Case: M.S.Narayana Menon @ Mani Vs. State of Kerala and

others) and also relied citation reported in AIR 2006 Supreme Court 1325 (Case: Krishna Janardhan Bhat Vs. Dattatreya G Hegde). In the present case in hand, the accused has failed to prove the defence put-forth by him. Accused himself has admitted regarding the issuance of Ex.P1-cheque and dishonour of the same. So, the in the present facts and

circumstances, the principles laid down in the above cited ruling are not applicable to the present case in hand.

28. The counsel for appellant in Crl.A.No.359/2014 has contended that the trial court has not conducted deinova trial. So, the procedure adopted by the trial court is incorrect. So it is necessary to set aside the judgment of the trial court and remand the matter for fresh trial. The counsel for the appellant in Crl.A.No.359/2014 has relied upon citation of our Hon'ble Apex Court rendered in Crl.A.No.2045/2008 (case: M/s. Kumar Exports Vs. M/s. Sharma Carpets) wherein the Lordships of Hon'ble Apex Court have held as under:

> " There is heavy pendency of cases filed U/s 138 of N.I. Act in almost all the courts over the country. The service of summons itself consumes lot of time and some times more than one year. After appearance, the evidence would commence. In the normal administrative procedure, the Magistrate get transferred from

> one place to other after three years and also some times pre-mature transfers would also takes place. It is always unlikely that the Magistrate has recorded evidence would render judgment in the case. In such given practical situation, the words "for any other reason'' should be given liberal interpretation and should include the circumstance of the possibility of trial not being conclude within six months and the desirability to follow the procedure of summons cases. Keeping in view the nature of long drawn contest and also the punishment of imprisonment prescribed being two years, it is, therefore, always desirable that the Magistrate should as far as possible and at the earliest, keeping in view the practical situations when the trial not likely to be concluded within six months should record

his opinion that the trial of a case by summary procedure is not desirable and that the case to be tried as a summons case, in which event the legal hurdle U/s 326 of Cr.P.C. can be overcome.

29. In the present case in hand, perusal of the order sheet of the trial court clearly reveals that on 27-12-2012 the trial court has passed order and the same reads as under:

"Note: A careful perusal of the entire material available on record makes it clear that the questions involved in this case require detailed evidence. Further, it appears to me that the nature of this case is such a sentence of imprisonment for a term exceeding one year, in the event of Conviction, may have to be passed. Hence, for the afore said two reasons, I am of the Opinion that it is correct to convert the procedure of this case from Summary trial into Warrant trial, accordingly it is converted."

30. From the above order of the trial court, it is clear that the trial court has converted summary trial into summons trial. So, the trial court has over come the legal hurdle U/s 326 Cr.P.C. So in view of the above cited judgment of Hon'ble Apex Court, the trial court has converted the summary case into summons case and the hurdle is U/s 326 Cr.P.C. is over come. So the contention of the counsel for the appellant in Crl.A.No.359/2014 that the trial court has not conducted deinova trial. So, it is necessary to set aside the judgment of the trial court and remand the matter is unacceptable one.

31. Further the counsel for the appellant in Crl.A.No.359/2014 has contended that the trial court has

posted the case for judgment on 12-03-2014 and on that day accused was absent no exemption was filed and in absence of the accused, the trial court has pronounced the judgment which is contrary to the provisions of section 353 of Cr.P.C. The provisions of section 353(6) Cr.P.C. reads as under:

> " (6)If the accused is not in custody, he shall be required by the Court to attend to hear the judgment pronounced, except where his personal attendance during the trial has been dispensed

> with and the sentence is one of fine only or he is acquitted.
>
> Provided that, where there are more accused than one, and one or more of them do not attend the Court on the date on which the judgment is to be pronounced, the presiding officer may, in order to avoid undue delay in the disposal of the case, pronounce the judgment notwithstanding their absence."

32. From the above provisions of section 353(6) Cr.P.C. it is clear that when only fine is imposed against the accused, in such case the judgment can be pronounced in absence of accused. In the present case, perusal of judgment of the trial court clearly goes to show that the accused has been convicted and sentence to pay a fine of Rs.15,00,5000/-. No fine is imposed. Imprisonment imposed only in default of payment of fine. So the contention of the counsel for the appellant in Crl.A.No.359/2014 that the judgment is pronounced in absence of accused which is contrary to the provisions of section 353(6) Cr.P.C.is unacceptable one.

33. In the present case the evidence of PW.1 and Ex.P.1 to Ex.P.12 documents, admissions of DW.1 and Ex.D.1 to

Ex.D.4 documents clearly proves beyond reasonable doubt that Ex.P.1 cheque is issued by the accused for legally recoverable debt and complainant has presented the same for

encashment within limitation, the cheque was dis-honoured for funds insufficient in the account of the accused. Thereafter, the complainant has lodged private complaint within limitation and thereby the accused has committed offence U/s 138 of N.I. Act. Perusal of judgment of the trial court clearly goes to show that the trial court had appreciated the oral and documentary evidence lead by both sides, trial court has not committed any illegality no interference is necessary to the judgment of the trial court under appeal. Hence, for the above reasons I answer above point No.1 to 3 in the Negative.

34. Point No.1 in Crl.A.No.687/2014: The respondent in Crl.A.No.687/2014 has contended that the appellant has preferred the appeal for modification of sentence passed by the trial court and the appeal is not maintainable before this court. The appellant has to prefer the appeal before the Hon'ble High Court of Karnataka. The counsel for the appellant in Crl.A.No.687/2014 has contended that in view of insertion of proviso to section 372 Cr.P.C. as per Act No.5 of 2009 which is came into force from 30-12-2009 " the victim shall have a right to prefer an appeal against any order passed

by the Court acquitting the accused or convicting for lesser offence or imposing inadequate compensation, as such appeal shall lie to the Court to which an appeal ordinary lies against the order of conviction of such Court". So this court is competent to entertain and decide the appeal preferred by the complainant for modifying the sentence is maintainable.

35. Counsel for the respondent in Crl.A.No.687/2014 has contended that the complainant under Section 138 of N.I. Act cannot be equated to the victim has stated in proviso to section 372 Cr.P.C. So the complainant U/s 138 of N.I. Act is not entitled to prefer an appeal before this court. The counsel for the respondent in Crl.A.No.687/2014 has relied upon the order passed by of our own Hon'ble High Court of Karnataka in Crl.Petition No.6072/2014 dated:24-02-2015 {case M/s. Hill Range Power Project Developers and others Vs. M/s. Acciona Wind Energy Private Ltd.,} wherein the short point for consideration before the Lordships of our own Hon'ble High Court is "Whether appeal can be maintained against the judgment of acquittal for offence punishable U/s 138 of N.I. Act, before the jurisdictional Sessions Court under proviso to

section 372 of Cr.P.C. and the Lordships have clearly held as under:

"In my considered opinion, a person under the

complaint U/s 138 of N.I. Act cannot be termed as 'Victim' defined U/s 2(wa) Cr.P.C. The proviso to Section 142 N.I. Act reads as under:

"142. Cognizance of offences- Notwithstanding anything contained in the Code of Criminal Procedure 1973 (2 of 1974)-

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque,

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the provision to section 138;

(Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period}.

36. Therefore, the word 'Complaint' under proviso to section 142 of N.I. Act and the 'victim' U/s 2(wa) of Cr.P.C. are not one and the same. In view of this, I am of the considered opinion that the appeal filed under proviso to section 372 Cr.P.C. is not maintainable. In the present case in hand also, the complainant has preferred the

Crl.A.No.687/2014 for inadequate compensation awarded as per the proviso to section 372 Cr.P.C. and in view of the principles laid down of our own Hon'ble High Court of Karnataka in the above cited order that appeal preferred by the complainant U/s 138 of N.I. Act for inadequate compensation is not maintainable before the Sessions Court. So the Crl.A.No.687/2014 preferred by the complainant is not

maintainable before this court. Hence, for the above discussion, I answer the above point No.1 in Crl.A.No.687/2014 in the NEGATIVE.

37. Point No.4 in Crl.A.No.359/2014 and Point No.2 in Crl.A.No.687/2014: In view of my findings on point No.1 to 3 in Crl.A.No.359/2014 and reasons stated therein and my findings on point No.1 in Crl.A.No.687/2014 and reasons stated therein, I proceed to pass the following:

ORDER

The Criminal Appeal No.359/2014 is dismissed with cost.

The Judgment of trial court under appeal in Criminal Appeal No.359/2014 is confirmed.

Send back the LCR's along with the copy judgment to the trial court.

31 Crl.Appeal.359/2014 C/w 687/2014 Crl.A.No.687/2014 preferred by the appellant/complainant is dismissed holding that the appeal is not maintainable before this court.

The appellant/complainant is at liberty to prefer appeal before the competent Court.

Keep the original of this judgment in Crl.Apl.359/2014 and copy of it in Crl.Apl.No. 687/2014.

(Dictated to the Judgment Writer, transcribed by her, corrected, signed and then pronounced by me in the open court on this the 1st day of October 2015).

(SHIVAJI ANANT NALAWADE) LXVIII Addl. City Civil and Sessions Judge, Bengaluru City.

32 Crl.Appeal.359/2014 C/w 687/2014 Judgment is ready and pronounced in the open court vide separate:

ORDER The Criminal Appeal No.359/2014 is dismissed with cost.

The Judgment of trial court under appeal in Criminal Appeal No.359/2014 is confirmed.

Send back the LCR's along with the copy of judgment to the trial court.

Crl.A.No.687/2014 preferred by the appellant/complainant is dismissed holding that the appeal is not maintainable before this court.

The appellant/complainant is at liberty to prefer appeal before the competent Court.

Keep the original of this judgment in Crl.Apl.359/2014 and copy of Crl.Apl.No. 687/2014.

LXVIII Addl. City Civil and Sessions Judge, Bengaluru City.