IN THE COURT OF THE SESSIONS JUDGE, KHURDA AT BHUBANESWAR.

Present:

Dr. D.P. Choudhury,
Sessions Judge, Khurda
at Bhubaneswar.

Dated,Bhubaneswar the 04th Feb..'15.

Crl. Appeal No.59 of 2013.

[Arising out of the judgment and order of conviction and sentence dated 07.10.2013 passed by Miss A. Pradhan, learned J.M.F.C., Bhubaneswar in I.C.C. Case No.1020 of 2011 (T.R. No.605 of 2012)]

M/s. P.M. Enterprises, represented through its Managing Partner Parthasarathi Mohanty, aged about 54 years, S/o. Late Basant Mohanty, At - Plot No.54, Goutam Nagar, P.S. - Baragada, Bhubaneswar - 751 014.

... **Appellant.**

-V e r s u s-

M/s. Genjovials, 5-3/158, Zone-B, Mancheswar Industrial Estate, Bhubaneswar - 751 007, Represented through its M.D. Er. Saroj Kumar Tripathy, aged about 45 years, S/o. Subash Chandra Tripathy, R/o. B/106, Rupa-IV, Toshali Apartment, Satya Nagar, Bhubaneswar.

... **Respondent.**

Counsel :

For Appellant -- Shri R.K. Rout & Associates.
For Respondent -- Shri S. Das & Associates.

Date of arguments : 12.01.2015.
Date of judgment : 04.02.2015.

J U D G M E N T

In this appeal, the appellant has assailed the judgment and order of conviction and sentence dated 07.10.2013 passed by the learned J.M.F.C., Bhubaneswar in I.C.C. Case No.1020 of 2011, convicting him for offence punishable under section 138 of the Negotiable Instruments Act, 1881 (hereinafter called "the Act") and sentencing him to undergo Simple Imprisonment for a period of four months and to pay compensation of Rs.70,000/- (Rupees Seventy Thousand) to the respondent, and in the event of his failure to pay such compensation, to undergo Simple Imprisonment for a further period of one month. Appellant was the accused and respondent was the complainant before the trial Court.

2. The parties hereinafter have been referred to as they have been arrayed in the Court below for the sake of convenience and proper appreciation.

FACTS :

3. The factual matrix leading to the case of the complainant is that he is the manufacturer of different herbal products under the name and style of M/s. Genjovials, having his factory office-cum-godown at Mancheswar Industrial Estate, Bhubaneswar. The complainant and the accused entered into an agreement on 16.05.2010 and, as per the

agreement, the accused was to market the products of the complainant. As per the terms and conditions of the agreement, the accused was to make payment within sixty days from the date of receipt of goods in terms of the invoice for first six months and, thereafter, thirty days from the date of invoice. It is alleged, inter alia, that as per the agreement, the accused issued post-dated cheque No.320970 dated 30.11.2010 amounting to Rs.48, 115/- drawn on Bank of Rajasthan Ltd., Ashok Nagar, Bhubaneswar against invoice No.26 dated 03.09.2010 and the said cheque was issued in favour of the complainant. Accordingly, the complainant deposited the cheque in UCO Bank, Ashoka Market Branch, Bhubaneswar on 07.03.2011 for encashment; but on 08.03.2011, the complainant was intimated by his Banker that the cheque has been bounced as the concerned account was closed. It is further alleged by the complainant that the accused issued the said cheque knowing fully well that he had debt and liability to pay, but closed the account. Thereafter, the complainant issued pleader's notice to the accused asking for payment on 26.03.2011, which was received by the accused on 28.03.2011. When the said payment was not made, the complainant filed the complaint case in the Court.

4. The plea of the accused, as revealed from his

cross-examination made to the witness examined on behalf of the complainant and his statement recorded under section 313 of the Cr. P.C., is that the cheque was issued for security purpose but not against legal liability or debt, as no material was supplied against such cheque. It is the further plea of the accused that he has not received any notice from the complainant.

5. The complainant, in order to prove his case, examined the Managing Partner of the Company and also adduced documentary evidence. No evidence has been led by the accused. The learned trial Court after analysing the oral and documentary evidence, recorded the order of conviction by awarding the sentence, as aforesaid.

CONTENTIONS :

6. Learned counsel appearing for the appellant challenged the impugned order of conviction and sentence on the ground that the same is arbitrary, illegal and perverse apparent on the face of the record. He further submitted that the evidence of P.W.1 and the documents filed by the complainant have not been appreciated properly by the learned trial Court. According to him, the learned trial Court has erred in law by not accepting the cheque in question submitted by the accused towards security deposit and by observing that the

cheque under Ext.3 has been issued in discharge of his liability although there is no evidence adduced by the complainant to prove the legal liability or debt against the accused. Learned counsel for the appellant further submitted that the complainant has miserably failed to prove that he sold the medicines to the accused, who has acknowledged the same, and in order to discharge such liability, issued the cheque in question for which the learned trial Court is wrong and illegal by holding the accused guilty. The learned Court below has also erred in law by not finding fault with the case of the complainant when a crucial independent witness, who prepared Ext.2, the invoice, has not been examined by the complainant. It was further submitted by him that the learned trial Court has not framed any issue - whether the cheque was issued for discharging legal liability or debt, which is the main ingredient of section 138 of the Act, to find out the debt or legal liability incurred by the accused. The learned trial Court has also erred in law by not delving deep into the issue that no statutory notice was served on the accused. On the whole, he submitted that the learned trial Court has passed the order of conviction and sentence without application of judicial mind and without appreciating the evidence on record for which the impugned order of conviction and sentence being illegal and invalid

should be set aside.

7. On the other hand, learned counsel appearing for the respondent submitted that the accused admitted to have issued the cheque in question knowing fully well that he has closed the account in the concerned Bank and rightly the learned trial Court has found the accused guilty of the offence under section 138 of the Act. He further submitted that the cheque was issued against the invoice of medicines of the complainant marketed by the accused and the finding of the learned trial Court in this regard is well-founded and there is no wrong in the judgment of the learned Court below. While fully supporting the judgment of the learned trial Court, he submitted to dismiss the appeal.

DISCUSSION :

8. The main points for consideration in this case are :

i) Whether there is legal debt or liability incurred by the accused to issue the impugned cheque ?

ii) Whether the cheque was dishonoured and the accused failed to pay the amount therein ?

9. Their Lordships in ***K. Subramani*** Vs. ***K. Damodara Naidu*** reported in **(2015) 60 OCR (SC) - 24** have been pleased to observe as under :

"8. Three Judge Bench of this Court in the decision in Rangappa case (supra) laid down that the presumption mandated by Section 139 of the N.I. Act includes

a presumption that there exists a legally enforceable debt or liability and that is a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested....."

10. With due respect to the said decision, I find the presumption under section 139 of the Act is rebuttable at the instance of the accused. Now, the question arises as to how to rebut the presumption.

11. In the case of ***Krishna Janardhan Bhat*** Vs. ***Dattatraya G. Hegde*** **[(2008) 4 SCC 54]**, Their Lordships have been pleased to observe at paras 29-32, 34 and 35 that :

"29. Section 138 of the Act has three ingredients viz:

(i) that there is a legally enforceable debt;

(ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and

(iii) that the cheque so issued had been returned due to insufficiency of funds.

30. The proviso appended to the said section provides for compliance with legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

31. The courts below, as notice hereinbefore,

proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct.

32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of the accused and that of the prosecution in a criminal case is different.

... 34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of the accused is 'preponderance of probabilities'. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies.

35. A statutory presumption has an evidentiary value. The question as to whether the presumption whether stood rebutted or not, must, therefore, be determined keeping in view the other evidence on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration".

12. With due respect to the above decision, I find that presumption arises about liability covered under the cheque under section 139 of the Act, but such liability is rebuttable by

showing that there existed no enforceable debt or liability. So, the onus lies on the accused to prove that there was no legally enforceable debt or liability on the date when the cheque was issued. Since the onus of the accused can be discharged by the principles of preponderance of probabilities, either he can adduce evidence or he can prove his innocence by cross-examining the witness examined from the side of the complainant. Bearing in mind the above principles, let me find out whether the presumption has been rebutted by cross-examining the witnesses examined by the complainant and the documents filed by him.

13. In the case at hand, it is revealed from the evidence of P.W.1 that there was an agreement between their firm and the firm of the accused to have business as manufacturing company and marketing company respectively. He has proved the said agreement vide Ext.1, which shows that net rates of each item have to be discussed and finalized by both parties and invoices will be made accordingly. It is further revealed from cl.3 of the agreement that the MRP of each item shall be finalized mutually and local VAT on MRP will be borne by the marketing firm separately. The manufacturing firm will avail the stocks at the godown as per requirement. The said agreement further shows that as per the

requirement of the marketing firm in a lot not less than 1000 unit at a time against a written order accompanying with post dated cheque of a post period of sixty days initially for first six months and a period of thirty days subsequently. It is also evincible from the above agreement that there must be written order as per the requirement for goods and post-dated cheque against such order will be issued, but the rates will be finalised mutually and invoice will be issued accordingly. He has proved the retail invoice vide Ext.2 which shows that three medicines with good quantity have been requisitioned on 03.09.2010 for Rs.48,115/-. He has further proved the concerned cheque vide Ext.3 which shows that post-dated cheque has been issued by the accused on 30.11.2010 as per the statement of P.W.1. In cross-examination, it is revealed that as per the agreement, written order shall be placed for supply of materials; but he has not filed the written order in the Court so also the the rate chart, as everything is available in the invoice. It is true that Ext.2 shows the rate chart, but it is not found therefrom that such rate has been fixed being agreed upon between the parties. There is no written order filed. On the other hand, it is found from the statement of P.W.1 that the cheque in question is a post-dated one. There is nothing found from the statement of P.W.1 that any post-dated cheque was issued

against the goods supplied. Moreover, there is no statement of P.W.1 to show that the goods have been supplied against such Ext.3. On the whole, I find that the statement of P.W.1 does not disclose that on the date of issuance of cheque, goods have already been supplied or written order has already been issued so as to create legal liability or debt with the accused.

14. In this regard, I may rely upon a decision reported in **2014 (II) OLR (SC) - 99** (***M/s. Indus Airways Pvt. Ltd. & Ors***. Vs. ***M/s. Magnum Aviation Pvt. Ltd. & Anr.***) where Their Lordships have been pleased to observe at para-19 as under :

> ".....In what we have discussed above, if a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise and material or goods for which purchase order was placed is not supplied by the supplier, in our considered view, the cheque cannot be said to have been drawn for an existing debt or liability".

15. With due respect to the said decision, I find that in the instant case, since it has already been found in the above paragraphs that no purchase order was issued nor any goods were supplied, the post-dated cheque as advance payment cannot be said to have been drawn for an existing debt or liability. So, the accused has successfully rebutted the presumption that arises under section 139 of the Act that

there is legal liability or debt on the date of issue of the post-dated cheque vide Ext.3. The learned Magistrate has not gone through such principles of law applicable to the offence under section 138 of the Act, instead she has only taken into consideration the other ingredients of the provisions of law to find out whether the cheque has been issued and the same has been dishonoured. It is admitted by the accused that the cheque has been issued by him, but he has denied about receipt of any notice. In fact, the issuance of notice has been duly proved by P.W.1 vide Exts.6, 7 & 8. It is also proved by P.W.1 that such notice has been received by the person concerned in the affairs of the firm. So, the other ingredients of section 138 even if have been proved, but the main ingredient, as discussed above i.e. legal liability or debt, being not proved, the offence under section 138 of the Act fails. On the other hand, the accused has discharged his onus by rebutting the presumption that he is guilty of the offence punishable under section 138 of the Act. There is reason to disagree with the view taken by the learned trial Court on this aspect. When one of the main ingredients of section 138 of the Act remained far from proof, the conviction and sentence, as maintained by the learned trial Court by holding the accused guilty under section 138 of the Act, does never exist. As such, I am in complete

disagreement with the order of conviction and sentence passed by the learned trial Court as the same is illegal, bad in law and is liable to be set aside. Hence ordered :

O R D E R

The appeal is allowed on contest against the respondent and the judgment and order dated 07.10.2013 of conviction and sentence with order to pay compensation passed by the learned J.M.F.C., Bhubaneswar in I.C.C. Case No.1020 of 2011 is hereby set aside.

Sessions Judge, Khurda
at Bhubaneswar.
04.02.2015.

Dictated, corrected by me and pronounced in the open Court this day the 04th February, 2015.

Sessions Judge, Khurda
at Bhubaneswar.
04.02.2015.