

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

Present:

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

*Dated, Bhubaneswar the 20<sup>th</sup> Aug. '14.*

**Crl. Appeal No. 11 of 2014.**

[Arising out of the judgment and order of conviction and sentence dated 25.01.2014 passed by Miss A. Pradhan, learned J.M.F.C., Bhubaneswar in I.C.C. Case No. 809 of 2011 (T.R. No.920 of 2012)]

1. Das Construction, Office at :- C-15, Forest Park, P.S. - Capital-1, Bhubaneswar, Dist. - Khurda.
2. Mr. Ayub Khan, aged about 52 years, S. Late Rafi Khan, Managing Partner, Das Construction, Office at :- C-15, Forest Park, P.S. - Capital-1, Bhubaneswar, Dist. - Khurda.

At present : HIG-114, Housing Board Colony, Dharma Vihar, P.O./P.S. - Khandagiri, Bhubaneswar-30, Dist. - Khurda.

... **Appellants.**

(Accused persons in the Court below)

***-V e r s u s-***

Sri Sibanarayan Barik, aged about 63 years, S/o. Late Chintamani Barik, At - Bauligarh, P.O. - Arachat, Via / P.S. - Banarpal, Dist. - Angul, A/P. - Qrs. No.11, Type-1, CPWD, CRPF Campus, BBSR-11, Dist. - Khurda.

... **Respondent.**

(Complainant in the Court below)

**Counsel :**

For Appellants -- Md. A. Alam & Associates.  
For Respondent -- Shri P.K. Mishra & Associates.

Date of argument : 06.08.2014.

Date of judgment : 20.08.2014.

**J U D G M E N T**

This appeal has been directed against the judgment and order of conviction and sentence dated 25.01.2014 passed by Miss A. Pradhan, learned J.M.F.C., Bhubaneswar in I.C.C. Case No. 809 of 2011, convicting appellant No.2 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 sixteen months and to pay compensation of Rs.12,00,000/- (Rupees Twelve Lakhs) to the respondent, and in the event of his failure to pay such compensation, to undergo Simple Imprisonment for a further period of four months.

**FACTS :**

2. The factual matrix leading to the case of the respondent (complainant in the Court below) is that he is a retired barber of CRPF. Appellant No.1 (accused No.1 in the Court below) is a juristic body running its business and

appellant No.2 (accused No.2 in the Court below) is its Managing Partner. The business of the appellants is to develop plots and construct building over plots of intending customers. The respondent purchased a plot bearing revenue plot No.1349 in mouza Bhubaneswar Sahar, Unit-38 (Pandra) from one Purnananda Pati and others under Registered Sale Deed through latter's Attorney Holder Konark Hovel (P) Ltd., Bhubaneswar, District - Khurda. Thereafter, he mutated his name and, consequently, Record of Right has been corrected in his favour. Appellant No.2 being a visitor to Konark Hovel (P) Ltd. requested the respondent to give contract to their Company for construction of house over the said plot. As the respondent suffered financial loss, he finally intended to sell the aforesaid plot to which appellant No.2 expressed his desire to purchase the same. So, consequent upon their agreement, full and final consideration for sale of such plot was fixed at Rs. 7,50,000/-. As per their discussion, appellant No.2 issued five numbers of post-dated cheques bearing No.889204 dated 12.10.2010, No.889205 dated 27.10.2010, No.889206 dated 10.11.2010, No.889207 dated 25.11.2010 and No.889208 dated 10.12.2010, each amounting to Rs.1,50,000/-, drawn on Andhra Bank, Baramunda Branch, Bhubaneswar in favour of the respondent. Necessary agreement was executed between

them on 06.10.2010 with condition that the respondent executed the General Power of Attorney in favour of appellant No.2 by receiving all the aforesaid amount in shape of post-dated cheques. It is alleged, inter alia, that on 11.10.2010, appellant No.2 asked the respondent not to present the said cheques on 12.10.2010, as he could not manage the amount, and requested to present the cheque No.889204 dated 12.10.2010, along with other cheques. On 09.11.2010, appellant No.2 requested the respondent not to present the other three cheques, as he could not arrange the amount and, finally, as per request of appellant No.2, the respondent presented cheque No.889204 dated 12.10.2010 on 12.01.2011; but the same was bounced with endorsement "funds insufficient". Subsequently, all the cheques were presented; but the Banker of appellant No.2 returned the said unpaid cheques with endorsement "funds insufficient". So, on 17.02.2011, the respondent issued a notice under section 138(b) of the Act calling upon the appellants to pay the unpaid amount of cheques within fifteen days from the date of receipt of such notice to discharge their legally enforceable liability. After service of notice, the appellants sent a reply on 03.03.2011 through their advocate denying the liability. Further, the respondent came to know that the plot in

question has been sold by appellant No.2 to outsider by fraudulent means. Since there was cause of action to file complaint, the same was filed under section 138 of the Act before the learned S.D.J.M., Bhubaneswar. Hence the case of the respondent.

3. The plea of the appellants is that there was an agreement for sale of the plot in question of the respondent consequent upon which appellant No.2 issued post-dated cheques; but due to wrong title, he asked the respondent to return the said cheques. Not only this, but also it is the case of the appellants that appellant No.2 has also paid Rs.50,000/- in shape of cash to the respondent and got the money receipt. Further plea of the appellants is that they have not incurred any legal liability or debt for which the cheques were issued and, accordingly, they are not liable under section 138 of the Act.

4. The learned J.M.F.C., Bhubaneswar, after examining two witnesses from the side of the respondent, going through the documents filed by him and also considering the evidence of one witness, who is none other than appellant No.2, adduced from the side of the appellants, recorded the order of conviction by awarding the sentence, as aforesaid.

**CONTENTIONS :**

5. Learned counsel appearing for the appellants submitted that the order of the learned trial Court is erroneous being not in accordance with law. He submitted that the learned trial Court has erred in both facts and law by not appreciating the documents and the evidence on record. It was further submitted by him that the learned trial Court has also erred in law by not understanding real intention of legislation under section 138 of the Act. The learned Court below has failed to appreciate the facts of the case by giving much emphasis on General Power of Attorney, which is not a registered one. Learned counsel also submitted that the learned Court below ought to have held that there is no legal liability or debt proved by the respondent to attract the provisions under section 138 of the Act, as no such legal liability or debt did exist on the date of issuance of the alleged cheques. He further submitted that the learned trial Court has miserably failed to appreciate the judgments of the Hon'ble Apex Court and our own Hon'ble High Court for which the impugned judgment and order is illegal, erroneous and bad in law. In support of his submission, learned counsel for the appellants placed reliance on the decision reported in **2014 (II) OLR (SC) - 99 (M/s. Indus Airways Pvt. Ltd. & Ors. Vs. M/s. Magnum Aviation Pvt. Ltd. & Anr.)**, where it has been held

that dishonour of post-dated cheques does not amount to an offence under section 138 of the Act. Thus, he prayed to set aside the order of conviction and sentence.

6. Learned counsel appearing for the respondent, on the other hand, submitted that in view of the agreement and candid admission about issuance of cheques by appellant No.2, the offence under section 138 of the Act has been clearly proved. He further submitted that since appellant No.2 issued the cheques in question to discharge their liability, later on requested to submit the same on a later date and the cheques were dishonoured with endorsement "funds insufficient", the appellants are squarely liable under section 138 of the Act. He further submitted that if the appellants had no legally enforceable liability on the date of drawal of cheques, how could appellant No.2 execute the Sale Deed on 23.10.2010 in favour of Smt. Purnima Devi in respect of the same plot and, subsequently, he sold the same to his wife ? According to him, the appellants had got legally enforceable liability or debt on the date of drawal of the cheques and the cheques have been dishonoured with endorsement "funds insufficient". So, he supported the judgment and order passed by the learned trial Court. He distinguished the decision filed by learned counsel for the appellants, stating that the present facts and

circumstances are not covered by such decision. On the contrary, he cited decision of the Hon'ble Apex Court in the case of *Ashok Yeshwant Badeve Vs. Surendra Madhavrao Nighojakar and another* (AIR 2001 SC 1315), wherein Their Lordships have been pleased to accept the post-dated cheque within the meaning of section 139 of the Act on the date on which it has been written. Relying upon the above decision, he submitted that this case is squarely covered by the said decision. Finally, he submitted to dismiss the appeal and confirm the order of conviction and sentence passed by the learned Court below.

**DISCUSSION :**

7. In the above context, it is to be seen as to whether the ingredients of section 138 of the Act have been proved against the appellants. Section 138 of the Act prescribes :

**“138. Dishonour of cheque for insufficiency, etc., of funds in the account** - 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 that bank, such person shall be deemed to have

committed an offence and shall, without prejudice to any other provision 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;

Provided that nothing contained in this section shall apply unless –

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(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 thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of 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.

*Explanation.* – For the purpose of this section, “debt or other liability” means a legally enforceable debt or other liability”.

8. It is apposite to refer to the decision in the case of ***M/s. Indus Airways Pvt. Ltd. & Ors. Vs. M/s. Magnum Aviation Pvt. Ltd. & Anr.*** (supra), wherein Their Lordships of the Hon’ble Apex Court have been pleased to observe at para - 13 that :

“The explanation appended to Section 138 explains the meaning of the expression ‘debt or other liability’ for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats

dishonoured cheque as an offence if the cheque has been issued in discharge of any debt or other liability. The expression leaves no manner of doubt that to attract an offence under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of existing or past adjudicated liability is *sine qua non* for bringing an offence under Section 138. 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, in our considered view, the cheque cannot be held to have been drawn for an existing debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability”.

With due respect to the said decision, I find that under section 138 of the Act, criminal liability has to be made out and, for such criminal liability, there should be subsistence of legally enforceable debt or other liability on the date of drawal of the cheques. On the other hand, drawal of the cheques in discharge of existing or past adjudicated liability is *sine qua non* for bringing an offence under section 138 of the Act. It is further revealed from the aforesaid decision that any cheque issued as an advance payment for purchase of goods cannot be held to have been drawn for an existing debt or liability. So, the initial onus that there exists debt or other liability, as required under section 138 of the Act, has to be

satisfied.

9. Section 139 of the Act states in the following manner :

**“139. Presumption in favour of holder.** – It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in section 138, for the discharge, in whole or in part, of any debt or other liability”.

10. 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 and 34 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".

With due respect to the above decision, I find that presumption arises about liability covered under the cheques; but such liability is rebuttable by showing that there existed no enforceable debt or liability. So, the onus lies on the appellants to prove that there was no legally enforceable debt or liability on the date when cheques were issued.

11. Since the onus of the appellants can be discharged by the principles of preponderance of probabilities, either they can adduce evidence or they can prove innocence by cross-examining the witnesses examined from the side of the

respondent. Appellant No.2 has examined himself as D.W.1. It is revealed from his evidence that he issued five numbers of cheques for purchase of land from the respondent. He has also stated that since the land in question was found to be a disputed one due to non-availability of road, he did not purchase the same on behalf of their Company. According to him, in spite of request, the respondent did not return the cheques. He has been cross-examined at length. He proved the certified copy of General Power of Attorney vide Ext.19 executed by the respondent in his favour, by virtue of which he is empowered to sell the land of the respondent. On going through Ext.19, it appears that irrevocable General Power of Attorney dated 06.10.2010 has been executed by the respondent in favour of appellant No.2. It appears from the said document that the respondent has allowed to sell, mortgage and to take all steps in respect of the land in question on his behalf as Power of Attorney Holder. Again, he has admitted in his cross-examination that basing on such document, he has sold the land to one Purnima Devi on 23.10.2010 vide Ext.20. Thereafter, he cancelled the Sale Deed vide Ext.21 and again sold the said land to his wife on payment of consideration vide Ext.22. So, the evidence of D.W.1 coupled with the documents show that five numbers of cheques were issued to the

respondent for purchase of land from him and by virtue of Power of Attorney Holder, D.W.1 has conducted such sale of the land. Not only this, but also from cross-examination of P.W.1, who is the respondent himself, it is revealed that on 06.10.2010, there was an agreement vide Ext.1, which has been reduced into writing in the office of the appellants. On going through the said document, it appears that this agreement is only declaration by both parties that the post-dated cheques, as stated above, have been issued by appellant No.2 to the respondent in pursuance of the execution of General Power of Attorney. Further, he has stated that he has not executed any Registered Sale Deed on 06.10.2010 in favour of the appellants relating to the land and property in lieu of the cheques in dispute vide Exts.2 to 6 received by him. He has also admitted that he has not executed any Registered Sale Deed in favour of the appellants till date. From the above evidence of D.W.1 and cross-examination by the appellants to P.W.1, it is found that before sale of the land in question by the respondent to the appellants, post-dated cheques were issued by appellant No.2 to the respondent. Till date also, the respondent has not executed Registered Sale Deed in favour of the appellants. Of course, execution of General Power of Attorney for sale of the land can be taken as a document

empowering appellant No.2 to sell the land in question. But, that sale took place by appellant No.2 in favour of Purnima Devi on 23.10.2010 vide Ext.20, as available from the evidence. At any rate, the land in question of the respondent was never sold on 06.10.2010, although post-dated cheques were given by appellant No.2 to the respondent. So, the post-dated cheques are given as an advance consideration for sale of the land in question by the respondent to the appellants or empowering to sell the same subsequently by appellant No.2 or cancellation of the same. Thus, the post-dated cheques cannot be considered to the effect that the cheques have been issued for an existing debt or liability. On the whole, it is found that on 06.10.2010, there was no legally enforceable debt or liability subsisting on the date of drawal of cheques. In other words, drawal of post-dated cheques in discharge of existing or past adjudicated liability being *sine qua non* for bringing an offence under section 138 of the Act has not been proved in this case. So, the presumption has been successfully rebutted by the appellants to prove that there was no legally enforceable debt or liability on the post-dated cheques issued by appellant No.2 to the respondent. On the other hand, the first ingredient of section 138 of the Act has not been proved. The learned trial Court has lost sight of delving into this

aspect for which its finding about the liability under section 138 of the Act against the appellants is not sustainable in law.

12. No doubt, the cheques have been proved being admitted by the appellants and the same have also been dishonoured being funds insufficient, as revealed from the evidence of P.W.1. The respondent has also proved that in spite of his request, payment could not be made. But, rest of the ingredients even if proved, they cannot warrant liability of the appellants when the main ingredient as to legally enforceable debt or liability has remained far from proof in this case.

13. Learned counsel appearing for the respondent submitted that the decision in the case of ***Ashok Yeshwant Badeve*** Vs. ***Surendra Madhavrao Nighojakar and another*** (supra) may be taken into consideration to rope in the liability of the appellants. On going through the said decision, I find that Their Lordships have discussed about the meaning of cheque and post-dated cheque and further held that for prosecuting an offence under section 138 of the Act, it is inevitable that the cheque is presented to the Banker within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. In the facts and circumstances, when legally enforceable liability or

debt has not been proved, the decision on which learned counsel for the respondents has relied does not apply to the facts and circumstances of the present case. It may so happen that civil liability may be considered against the appellants under other provisions of law, but criminal liability under section 138 of the Act has not been proved against them.

14. In view of the above analysis, the finding of the learned trial Court that the appellants are liable under section 138 of the Act is bad in law and cannot be maintained. In such premises, the appellants cannot be held guilty under section 138 of the Act. Hence ordered:

### **O R D E R**

The appeal is allowed on contest. The judgment and order of conviction and sentence dated 25.01.2014 passed by the learned J.M.F.C., Bhubaneswar in I.C.C. Case No. 809 of 2011 (T.R. No.920 of 2012) is hereby set aside. Appellant No.2 be discharged from bail-bond.

**Sessions Judge, Khurda  
at Bhubaneswar.**

20.08.2014.

Dictated, corrected by me and pronounced in the open Court this day the 20<sup>th</sup> August, 2014.

**Sessions Judge, Khurda**

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**at Bhubaneswar.**

20.08.2014.