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

Present:

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

Dated,Bhubaneswar the 04th Aug.'14.

Crl. Appeal No. 48 of 2012.

[Arising out of the judgment of conviction and sentence dated 11.06.2012 passed by Shri Janak Rout, learned J.M.F.C., Bhubaneswar in I.C.C. Case No. 3264 of 2008 (T.R. No.1429 of 2011)]

Lingaraj Mohanty, aged about 64 years, S/o. Late Gejendranath Mohanty, At/P.O. - Samantarapur, near Maa Bhuasuni U.P. School, P.S. - Lingaraj, Bhubaneswar, Dist. - Khurda.

... **Appellant.**

-V e r s u s-

Narendra Kumar Pradhan, aged about 62 years, S/o. Late Brajabandhu Pradhan, C/o. Bilash Routray, Kumbhar Sahi, Kapileswar, P.S. - Airfield, Bhubaneswar-2, Dist. - Khurda.

... **Respondent.**

Counsel :

For Appellant -- Shri C.R. Dash & Associates.

For Respondent -- Shri D.C. Mohanty & Associates.

Date of argument : 14.07.2014.
Date of judgment : 04.08.2014.

J U D G M E N T

This appeal has been directed against the order of conviction and sentence dated 11.06.2012 passed by the learned Judicial Magistrate, 1st Class, Bhubaneswar in I.C.C. Case No. 3264 of 2008 (T.R. No.1429 of 2011), convicting the appellant 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 one year and to pay compensation of Rs.3,00,000/- (Rupees Three 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.

2. The backdrop of the case of the respondent (complainant in the Court below) is that on 03.05.2008, the appellant (accused in the Court below) requested him to give a sum of Rs.2,00,000/- towards friendly loan for investing the same in his business. Considering the request of the appellant, the respondent paid him the said sum on 08.05.2008. The appellant promised to repay the same on or before 05.06.2008. For better security of the loan amount, the appellant also issued a cheque bearing No.157827 dated 08.05.2008 for Rs.2,00,000/- in favour of the respondent only drawn on UCO

Bank, Bhubaneswar. In connection with the above loan, he also executed an agreement with the respondent on the same day in presence of witnesses. The appellant failed to repay the loan amount within the stipulated period in spite of repeated requests made by the respondent. When the appellant avoided the repayment of the loan amount on different pretexts, the respondent deposited the cheque with his banker for encashment. But, on 25.06.2008, the respondent was intimated by his banker that the cheque, which he had presented, was dishonoured for the reason "Funds Insufficient" in the account of the appellant. Then, the respondent issued demand notice to the appellant in his correct home address on 03.07.2008. The appellant received the notice on 05.07.2008, but failed to refund the cheque amount within the specified period.. Consequently, the respondent filed the complaint against the appellant in the Court below, alleging that he is liable under section 138 of the Act.

3. The appellant squarely denied the charge against him and took the plea that he is innocent. The learned J.M.F.C., Bhubaneswar, after examining two witnesses from the side of the respondent and considering the documentary evidence with the plea of the appellant recorded under section 313 of the Cr. P.C. arrived at a conclusion that the cheque

was issued by the appellant to the respondent; it was dishonoured due to insufficiency of funds in the account of the appellant; within thirty days demand notice was issued and after receiving the said demand notice, the appellant did not repay the loan amount; and finally found the appellant guilty of the offence punishable under section 138 of the Act and convicted him thereunder. The learned Court below did not extend the benefit of the Probation of Offenders Act to the appellant and sentenced him, as aforesaid.

4. Learned counsel appearing for the appellant, challenging the findings arrived at by the learned trial Court, submitted that the impugned judgment and order of conviction and sentence is erroneous due to improper appreciation of evidence. The learned Court below has failed to appreciate the ingredients of section 138 of the Act inasmuch as the cheque in question was issued in favour of the respondent as a token of security and not for discharging any legal liability. But, the learned Court below has failed to appreciate the words “debt or other liability” occurring in section 138 of the Act because the debt or liability must be proved by the respondent through evidence and in the absence of the same, the learned Court below ought to have held that there is no legally enforceable debt or other liability to be discharged by the appellant.

Moreover, he submitted that the learned trial Court has not properly assessed the evidence inasmuch as the cross-examinations of the witnesses are left without consideration in the judgment while arriving at the conclusion. The learned Court below has also not considered the citations relied upon by learned counsel for the appellant and has whimsically passed the impugned judgment and order, which is bad in law and liable to be set aside. On the whole, he submitted to set aside the order of conviction and sentence passed by the learned J.M.F.C., Bhubaneswar against the appellant.

5. On the contrary, learned counsel appearing for the respondent submitted that there is no justifiable ground to set aside the order of conviction and sentence, which is based on proper appreciation of evidence, inasmuch as the respondent has successfully proved the guilt of the appellant warranting his conviction under section 138 of the Act.

6. The main point for consideration in this appeal is whether the ingredients of section 138 of the Act have been proved against the appellant. 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".

7. 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".

8. 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". (emphasis supplied).

With due respect to the above decision, I find that the existence of legally recoverable debt is not a matter of presumption under section 139 of the Act and it merely raises a presumption in favour of the holder of the cheque that the same has been issued for discharge of any debt or other liability. Moreover, the prosecution must prove the guilt of the accused beyond all reasonable doubt, whereas defence on the part of the accused is preponderance of probabilities and the same can be proved by the accused by adducing evidence or bringing materials through the evidence of prosecution witnesses. In the instant case, the appellant has not led any evidence, but the evidence has been led by the respondent.

9. So, let me find out the first ingredient of section 138 of the Act whether the friendly loan of Rs.2,00,000/- was

paid by the respondent to the appellant. In this regard, there is no finding of the learned trial Court; but the Appellate Court cannot lose sight of such factor when the evidence is already on record for appreciation. The respondent has examined two witnesses, including himself. He is P.W.1 and P.W.2 is an outside witness. No documentary evidence is filed to show that the loan amount of Rs.2,00,000/- was paid by the respondent to the appellant. Even if there is no documentary evidence, the oral evidence can be appreciated to prove the payment of loan amount of Rs.2,00,000/- to the appellant by the respondent. P.W.1 has filed his evidence in shape of affidavit with regard to examination-in-chief, besides being further examined in the Court. It is revealed from his evidence that on 08.05.2008, he paid Rs.2,00,000/- to the appellant, who promised to refund the same on or before 05.06.2008, and for better security of the loan amount, the appellant also issued a cheque bearing No.157827 dated 08.05.2008 for Rs.2,00,000/- in his favour only drawn on UCO Bank, Bhubaneswar. In his examination-in-chief, he has proved the agreement executed between him and the appellant vide Ext.6, signature of the appellant vide Ext.6/1 and his signature vide Ext.6/2. I went through the agreement, which is a typed one made on stamp papers worth Rs.10/-. But, the signatures of witnesses have not been

proved by the respondent, although the signatures of the appellant and the respondent have been proved by P.W.1 on the first page of Ext.6. Be that as it may, it is available on the first page of the agreement that 2nd party paid Rs.2,00,000/- only to 1st party on 08.05.2008 in presence of witnesses and 1st party, after receiving the same, signed the agreement. This endorsement does not disclose whether the money was paid by cash or in any other mode. Therefore, it is necessary to go through the cross-examination of the said witness. In cross-examination, P.W.1 has stated that as the appellant was investing in real estate business, he needed money from him and the appellant supplied requisite stamp papers for execution of the agreement between them. In para-16, he has stated that after preparing agreement paper, the appellant came to his house and there he (P.W.1) signed the same. So, the fact that the appellant signed the agreement before him after it is prepared is not established by P.W.1, except stating that Ext.6/1 is the signature of the appellant. Thus, the execution of the document by the appellant voluntarily is not established by the respondent by positive and creditworthy evidence. On going through the stamp papers, no signature of the appellant is found showing that it has been purchased by him, except the endorsement of the stamp vendor that it has been purchased in

the name of the appellant and he has stated that one Upendra Muduli and Baban Muduli were witnesses to the agreement. Out of the said witnesses, Baban Muduli has been examined, but he has not proved the signatures in the agreement. Since the agreement has not been proved in a proper way and it is denied by the appellant, the oral evidence of P.W.1 has to be assessed with the touch stone of appreciation of evidence. In para-10 of his cross-examination, he has stated that he has paid the amount to the appellant from his ready cash available with him and he has not received any receipt in respect of the payment made by him to the appellant. Further, in para-14, he has stated that he has never given any loan to anyone prior to this. Further, he has stated that he has collected money from his own source, from his house owner and from his brother and kept the same for the purpose of marriage of his daughter. Hence, the evidence of P.W.1 is not consistent and clear to show wherefrom he got the money - whether it is ready cash or whether he has collected from others, as stated in para-14 of his cross-examination. If he has not given any loan earlier, it is not very much easy to speak that he has acceded to the request of the appellant to pay such amount of Rs.2,00,000/-, which was kept for his daughter's marriage, without obtaining any receipt. He has never said that this agreement vide Ext.6

is a document of receipt of money by the appellant. In such circumstance, the evidence of P.W.1 is not clear, cogent, trustworthy and consistent to prove that he has paid friendly loan of Rs.2,00,000/- to the appellant. So, his evidence requires corroboration.

10. P.W.2 has stated that there was an agreement between the parties and he signed on it after it was read over and explained to him by the appellant and, in the month of May, 2008, Narendra Babu gave Rs.2,00,000/- to Lingaraj Babu in his presence. But, he has neither proved the signatures in the agreement nor proved the agreement. During cross-examination, he has stated that he has studied upto Class-V and he does not know why the respondent gave money to the appellant; but he has admitted that he is quite close to the respondent as he has good terms with him. When he does not know why the money was given and he has not stated whether it was by cash or in shape of any document, his evidence is not clear, cogent and trustworthy to prove the payment. Moreover, the mystery lies why he did not prove his signature in the agreement if he has signed the same at the time of payment of money or made in pursuance of such agreement. So, the evidence of P.W.2 is not clear, cogent and above reproach to show that he was present at the time of

execution of the agreement and signed thereon and in his presence the respondent paid Rs.2,00,000/- to the appellant. On the whole, his evidence does not lend corroboration to the evidence of P.W.1 to prove the execution of the agreement and payment of Rs.2,00,000/- by the respondent to the appellant as a friendly loan to invest in real estate business.

11. From the foregoing discussion, it is found that the initial onus of the respondent has not been established, whereas the appellant has discharged his onus through the evidence of witnesses examined from the side of the respondent read with the documents that he has not incurred debt or loan of Rs.2,00,000/- from the respondent. On the other hand, it is not proved that there was any debt or legal liability incurred by the appellant from the respondent. Thus, the first ingredient of section 138 of the Act is not proved in this case.

12. It is revealed from the evidence of P.W.1 that on 08.05.2008, the respondent gave a cheque bearing No.157827 drawn on UCO Bank, Bhubaneswar as security of the loan amount. When the loan amount was not paid back within 05.06.2008, he requested the appellant several times to refund the same and, finally, he used that cheque and, as per the advice of the appellant, he deposited the cheque with his banker for encashment. He has proved the cheque vide Ext.1

issued by the appellant and the cheque return memo issued by the Bank vide Ext.2 showing that funds is insufficient. There is no fruitful cross-examination to this witness in this regard; but the fact remains that this cheque was given as a security and he has never stated that the agreement vide Ext.6 was made with the purpose that if the loan amount is not paid, then this cheque can be utilised as a return of debt of the appellant. Although it is mentioned in the last page of Ext.6 that if the amount is not paid within the stipulated period, the 2nd party shall deposit the said cheque with his banker for collection of money and in case the cheque is dishonoured, the 2nd party shall be at liberty to approach the competent Court to entertain the case under section 138 of the Act. When the agreement is not proved by cogent and positive evidence to be a genuine document, as discussed earlier, and the evidence of P.W.1 is not forthcoming to show that the cheque was issued for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt, the presentation of the same by the respondent with the banker will not attract the liability of the appellant.

13. P.W.1 has, of course, proved the memo of the banker showing that the said cheque amount is not available in the account vide Ext.2, the notice sent by his advocate vide

Ext.3 and the postal receipt vide Ext.4. The confirmation letter of the postal office that demand notice was served on the appellant is marked as Ext.5. Those documents have been challenged by the appellant in his statement recorded under section 313 of the Cr. P.C., but the same will not improve the case of the respondent when the two main ingredients, as stated above, are not proved. On the whole, I find that the presumption under section 139 of the Act has been rebutted by the appellant by adducing evidence through cross-examination of P.Ws. On the other hand, I find that the ingredients of section 138 of the Act have not been proved to bring home the charge against the appellant. The learned trial Court has not properly appreciated the evidence on record to prove the ingredients of section 138 of the Act. For that, the findings of the learned Court below are not based on legal evidence and, as such, the conviction and sentence passed by it is not sustainable in law. Accordingly, the findings of the learned Court below holding the appellant guilty under section 138 of the Act and thereby recording conviction and sentence against him are liable to be set aside.

14. Resultantly, the appeal is allowed on contest and the order of conviction and sentence dated 11.06.2012 passed by the learned Judicial Magistrate, 1st Class, Bhubaneswar in

I.C.C. Case No. 3264 of 2008 (T.R. No.1429 of 2011) is hereby set aside.

Sessions Judge, Khurda
at Bhubaneswar.
04.08.2014.

Dictated, corrected by me and pronounced in the open Court this day the 04th August, 2014.

Sessions Judge, Khurda
at Bhubaneswar.
04.08.2014.