

**IN THE COURT OF THE SUB-DIVISIONAL JUDICIAL
MAGISTRATE,
BHUBANESWAR.**

PRESENT:

Sri D.R. Sahoo, L.L.M.

S.D.J.M, Bhubaneswar.

1CC Case No-3414/2009

Trial No 1721/2010

Mr. Gouranga Charana Biswal, S/o. Late Nalu Biswal,
Vill/Po- Sutan, P.S. Konark, Dist- Puri, At present- 37, Housing
Board Colony, Lewis Road, Bhubaneswar- 751002

..... **Complainant**

Versus

1. M/s. Mohanty Hotel and Resorts (P) Ltd. a Private Limited Company, registered under the Provisions of the Companies Act, 1956, having its registered office at 2271, Biswal Commercial Complex (2nd Floor), Cuttack Road, Bhubaneswar-751006 and represented through its Managing Director, the accused person, no. 2(two) as well as Director, the accused persons no.3(three) as named below .
2. Mrs. Jyostna Mohanty, W/o: Mr. Dharendra Mohanty, Managing Director, Mohanty Hotels and Resorts (P) Ltd. Regd. Office at 2271, Biswal Commercial Complex (2nd Floor), Cuttack Road, P.S. Laxmisagar, Bhubaneswar-751006, Dist- Khurda
3. Mr. Dharendra Mohanty, S/o. Late Chakradhar Mohanty, Director, Mohanty Hotel and Resorts (P) Ltd. Office at 2271, Biswal Commercial Complex(2nd Floor), Cuttack Road, Bhubaneswar, P.S. Laxmisagr, Dist- Khurda

...**Accused persons**

Offence under Section 138 of N.I. Act

Counsel for the Prosecution : Sri S.K Dash and Associates

Counsel for the defence : Sri R.C. Sarangi and Associates.

Date of argument: 26.02.2014

Date of Judgment: 01.03.2014

J U D G M E N T

The above named accused persons stand prosecuted for committing offence punishable U/s. 138 of NI Act.

2. The complaint's case in brief is that: -

The accused No. 1 is a private company and the accused No.2 and 3 are its Managing Director and Director respectively and with deceitful intention, the accused persons persuaded the complainant to execute and register the sale deed dtd. 3rd January, 2009 in favour of M/s. Mohanty Hotel Resorts Pvt. Ltd. upon receipt of four post dated cheques for a sum of Rs.45, 00000/- (Rupees forty five lakhs only). But the accused persons got it reflected in the deed that the property is to be sold for a total consideration of Rs. 30,87,690/- in order to get concession with regard to purchase of stamp papers and registration expenses and the aforesaid consideration money reflected in the sale deed is payable to the complainant by two post dtd. Cheques i.e. cheque No.438143 dtd. 12.01.2009 for Rs. 17, 85,000/- and cheque No. 438139 dtd. 05.02.2009 for Rs. 13, 2,690/- only drawn on SBI, Main Branch, Bhubaneswar. It is the further case of the complainant that the accused No.3 for and on behalf of M/s. Mohanty Hotel and Resorts Pvt. Ltd. disclosed about handing over of all four cheques covering the entire consideration amount of Rs. 45, 00000/- and further reaffirmed that the aforesaid registered sale deed shall be regarded as a valid only upon realization of the amount covered under those four cheques. The complainant in good faith due to extreme cordial relation and previous transactions with the accused persons accepted the said post dated cheques and

executed the sale deed. The complainant has further alleged that the accused persons were fully aware that the property in question was mortgaged and for that reason though the same would have been valued nearly one crore at the time of transaction persuaded and settled to purchase the same for an amount of Rs. 45,00000/-(Rupees forty five lakhs) only . After getting those chques, the complainant presented those cheques for collection of the amount through his banker i.e. Bank of Baroda, Samantarapur, Bhubaneswar . Cheque No.438142 on dtd. 07.01.2009 for Rs. 3, 50,000/-(Rupees three lakhs fifty thousand) only and cheque No. 438143 dtd. 12.01.2009 for Rs. 17, 85,000/- (Rupees seventeen lakhs eighty five thousand) only drawn on SBI, Main Branch, Bhubaneswar, were deposited on 04.07.2009 and on dtd. 08.07.2009 respectively. The complainant got the return memo/ intimation slip from his banker on 27.07.2009 and came to know that the accused persons have instructed their banker to stop payment . Other two cheques i.e. cheque No.438139 and 438140 dtd. 05.02.2009 for Rs. 13,2,690/-(Rupees thirteen lakhs two thousand six hundred ninety) only and Rs. 10,62,310/- (Rupees ten lakhs sixty two thousand three hundred ten) only respectively drawn on SBI, Main Branch, Bhubaneswar were presented on 01.08.2009 for collection of the amount through the banker of the complainant. Those cheques also returned back with intimation of the banker of the accused persons i.e. the State Bank of India, Main Branch, Bhubaneswar to the effect that they did not have sufficient fund in their account for honouring the cheques. Then by demand notice dtd. 23.08.2009, the complainant demanded the accused persons to pay the total amount of Rs. 45,00000/-(Rupees forty five lakhs) only covered under all those four cheques within a period of 15 days from the date of receipt of the notice but despite of the notice on dtd. 25.08.2009, the accused persons failed to repay the amount by giving an evasive reply through 'their Advocate for which the complainant has filed this case U/s. 138 of N.I Act against the accused persons. Hence this Judgment.

3. The plea of the accused persons is that they have issued signed but blank cheque to the complainant and that there is civil dispute upon the disputed land and that other persons are claiming the said land. In toto, the accused persons have taken the plea that the complainant has filed this false case against them.

4. The sole point for determination in this case is as follows:-

Whether the accused has issued the cheque to discharge his liability and did not pay the cheque amount even after receipt of the demand notice and thereby committed the offence punishable U/S 138 of NI Act?

5. In order to establish his case the complainant has examined himself as P.W. 1 and has exhibited twelve documents. Out of those twelve documents Ext.1 is the cheque bearing No. 438142 dtd. 07.01.2009 and Ext. 1/1 is the signature of the accused Jyostna Mohanty on it. Ext. 2 is the cheque return memo corresponding to Ext.1 dtd. 06.07.2009. Ext. 3 is the cheque bearing No.438143 dtd. 12.01.2009 and Ext-3/1 is the signature of the accused Jyostna Mohanty on it, Ext. 4 is the corresponding cheque return memo dtd. 09.07.2009 corresponding to Ext.3. Ext. 5 is the cheque bearing No438139 dtd. 05.02.2009 and Ext. 5/1 is the signature of accused Jyostna Mohanty on it, Ext.6 is the cheque return memo dtd. 03.08.2009 corresponding to Ext.5. Ext. 7 is the cheque bearing No.438140 dtd. 05.02.2009 and Ext. 7/1 is the signature of accused Jyostna Mohanty on it. Ext.8 is the cheque return memo dt. 03.08.2009 corresponding to Ext.7, Ext. 9 and Ext.9/1 are registered post receipt in support of the fact of issuance of the demand notice to the accused persons. Ext. 10 and Ext.10/1 are the postal A.D. corresponding to Ext. 9 and Ext.9/1. Ext. 11 is the demand notice issued by the advocate of the complainant to the accused persons and Ext. 12 is the certified copy of the registered sale deed bearing No. 71/09 dtd. 3.01.2009. On the other hand the accused persons have examined the accused Dhirendra Mohanty as D.W. 1, one Gyanaranjan Barik as D.W. 2 and one Joyti Ranjan Mohanty as D.W. 3. The accused persons have also examined the

accused Jyostna Mohanty as D.W. 4 and have exhibited the bank statement summary through D.W. 3 for account No. 30362213061 as Ext. A has been marked with objection. The accused persons have also exhibited the summons along with the copy of the plaint issued to the accused Dharendra Mohanty in C.S. No. 05/12, C.S. No.06/12 and C.S. No. 07/12 pending in the Court of Civil judge, Sr. Division, Bhubaneswar as Ext. D, Ext. B and Ext. C respectively.

6 Being aggrieved with the fact of dishonour of cheques given by the accused No. 2 Mrs. Jyostna Mohatny , the complainant has approached this Court by filing this complaint case U/s. 138 of N.I. Act. on the allegation of the deceitful; intention of the accused persons who persuaded him to execute and register the sale deed on 3rd January in favour of M/s. Mohanty Hotel and Resorts Pvt. Ltd. on receipt of four post dated cheques for a sum of Rs. 45,00000/- (Rupees forty five lakhs) only. It is the further allegation of the complainant that the accused persons got it reflected in the deed that it is to be sold for total consideration of Rs. 30,87,690/- (Rupees thirty lakhs eighty seven lakhs six hundred ninety) only in order to get concession with regard to purchase of stamp papers and registration expenses and the consideration money was reflected in the sale deed to be payable through cheque No. 438143 dtd. 12.01.2009 for Rs. 17, 85,000/- (Rupees seventeen lakh eighty five thousand) only and cheque No. 438139 dtd. 05.02.2009 of Rs. 13, 2,690/- (Thirteen lakhs two thousand six hundred ninety) only. In such circumstances when the complainant deposited the cheque for realization of the consideration money, the cheques were dishonoured and intimation was given to the complainant by the concerned bank that the accused persons have instructed through their banker to stop the payment for which the complainant has filed this case after serving notice to the accused persons and upon expiry of the statutory period when the accused persons did not respond.

7. Learned counsel for the accused persons vehemently argued before the Court that notice has not been properly served on accused

No. 1 as per the provision and only accused No.2 and Accused No. 3 have appeared and contested the case and since no notice has been served on the drawer of the cheques in the terms of the Section 138(b) , the prosecution must fail in absence of the primary requirement in that regard, by relying upon the **reported case i.e. A.P. constructions V. Nirmala Kumari, 2013 (2) DCR-705 of Hon'ble Madras High Court and another reported case of Hon'ble Madras High Court in the case of B. Raman and others V. Shasun Chemicals and drugs Ltd. Chennai 2007(1)DCR 717. Learned counsel for the accused persons also relied upon the reported case of Hon'ble Kerala High Court in the case of Mahes Kumar V. Taxi Drivers Co-operative Society Ltd., 2011(1) Civil Court Case 347 (Kerala)** and vehemently argued that where the complainant filed case against the President and Secretary as persons in-charge and responsible to the society and notice not issued to the society and only issued to the President and Secretary alone, then unless society who is the drawer of the cheque is held liable, President and Secretary of the Society cannot be convicted U/s. 138 of N.I. Act. Likewise, **Hon'ble Madras High Court while discussing the fact of non-joinder of party in 2013(2) DCR 705** have held that once notice was issued without intimation the name of firm and impleading the firm in complaint U/s. 138 of N.I. Act, complaint is not maintainable against the firm.

8. Having regard to the observation of **Hon'ble Kerala and Hon'ble Madras High Court** in the above noted reported cases, it may humbly be stated here that the facts and circumstances in the present case are completely different because in the present case, the company i.e. M/s. Mohanty Hotels and Resorts Pvt. Ltd. has been impleaded as one of the accused and notice has been issued in the name of M/s. Mohanty Hotels and Resorts Pvt. Ltd. which has been duly received by the Managing Director Mrs. Jyostna Mohanty who has been arrayed as accused No.2. This fact is clearly evident from the notice issued to all the accused persons separately i.e. .accused No.1, accused No. 2 and accused No.3. The reverse side of the summons clearly reveal that the accused No. 2

on the capacity of the Managing Director of the accused No.1 has received the summons and knowing the entire facts as has been alleged by the complainant both the accused No.2 and 3 have appeared before the Court and have contested and defended for all the accused persons. So, it cannot be stated here that the accused No.1 has remained undefended, rather to utter surprise of this Court during argument a person namely: Laxmi Narayn Sahoo being directed by M/s. Jyostna Mohanty appeared before the Court and prayed to contest the case on behalf of the accused No.1 which is nothing but one attempt to make confusion that the accused No. 1 has not appeared before the Court and has not being given a scope to be defended.

9. In this score the observation of Hon'ble Appex Court in the case of M/s. Bilakchand Gyanchand Co. V. A. Chinnaswami , AIR, 1999 Supreme Court 2182 is relevant where Hon'ble Appex Court have held that a complaint shall not be quashed on the ground that notice was not sent to the company itself and only sent to the Managing Director of the company who has signed the cheque. Reliance can also be placed on AIR 2001 Supreme Court 518 in the case of Rajneesh Aggarwal V. Amit J. Bhalla where Hon'ble Appex Court have held that the object of issuing notice indicating the factum of dishonour of the cheques is to give an opportunity to the drawer to make payment within fifteen days so that it will not be necessary with the payee to proceed against any criminal action even though the bank dishonor the cheques. In that case Hon'ble Appex Court while discussing the facts and circumstances have hold that one Amit J. Bhalla who had signed the cheques as Director of M/s. Bhalla Tectrana industries Ltd. was issued notice and it was incumbent upon Sri Bhalla to see that the payments are made within the stipulated period of fifteen days. It is not disputed that Sri Bhalla has signed his cheque nor is it disputed that Sri Bhalla was not the director of the company. So, Hon'ble Appex Court bearing this fact in mind hold that the object of issuance of such notice cannot be construed in narrow technical way without

examining the substance of the matter. In this regard reliance can also be placed upon the observation of Hon'ble Appex Court in the case of Aneeta Hada Vs. Godfather Travels and Tours Pvt. Ltd. AIR, 2012 SUPREME COURT 2795 where Hon'ble Appex Court have held that the legislature in its wisdom has used the word drawer in Sections 7 and 138 of the Act but not an account holder. A notice issued to the Managing Director of the company who has signed the cheques is liable for the offence and a signatory of a cheque is clearly responsible for the incriminating Act and, therefore, a complaint U/s. 138 of the Act against the director or authorized signatory of the cheque is maintainable.

10. Having regard to the observation of the Hon'ble Appex Court in **Aneeta Hada Vs. Godfather Travels and Tours Pvt. Ltd. (Supra)** it may humbly be stated here that the present accused persons have received the notice issued by the Court and have defended this case on their personal capacity as well as defended the company (Accused No.1) and it makes them vicariously liable of commission of offence on the part of the company. With regard to the observation of Hon'ble Appex Court in the above noted reported case, the argument advanced by the learned counsel for the accused persons is that unless and until the company (accused No.1) has been given a proper scope to be defended its Managing Director or Director cannot be punished as it is absolutely clear that when the company can be prosecuted then only the person mentioned in other category could be vicariously liable for offence subject to the averments in the petition and proof thereof. With regard to the contention raised by the learned counsel for the accused persons, it can be stated here that the facts and circumstances of the present case is very specific and proper notices have been issued to all the accused persons including the company (accused No.1) and getting notice the Managing Director i.e. accused No. 2 and its Director i.e. accused No. 3 who happens to be the husband of the accused No. 2 appeared before the Court on the capacity of the Managing Director and Director of the company (Accused No.1) and have contested the entire case till end. So,

the observation of the **Hon'ble Appex Court** in Aneeta Hada's case **that a notice issued to the Managing Director of company who has signed the cheque is liable for the offence and signatory of a cheque is clearly responsible for the incriminating act and complaint U/s. 138 of N.I. Act against the Director or authorized signatory of the cheque is maintainable** is more applicable to the facts and circumstances of the present case.

11. Learned counsel for the accused persons has further argued that in the sale deed it has been reflected that two post dated cheques have been issued but as it is apparent in the sale deed under Ext.12 , no post dated cheque but two cheques have been issued. So, the cheques must be drawn on 03.01.2009 but not subsequent occasion. Learned counsel for the accused persons relied on **2007 (2) DCR, 321 in the case of C.C ALAVI HAJI V. PALAPETTY MUHAMMED & ANOTHER** in which the **Hon'ble Appex Court** have held that **conditions are stipulated in the provision to Section 138 of the Act. Under Clause (b) of the proviso, the payee or the holder of the cheque in due course is required to give a written notice to the drawer of the cheque within a period of thrifty days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. Under Clause(c), the drawer is given fifteen days time from the date of receipt of the notice to make the payment and only if he fails to make the payment, a complaint may be filed against him. The object of the proviso is to avoid unnecessary hardship to an honest drawer. Therefore, the observance of stipulations in quoted Clause (b) and its aftermath in Clause (c) being a precondition for invoking Section 138 of the Act, giving a notice to the drawer before filing complaint U/s. 138 of N.I Act is mandatory requirement.** Learned counsel referring the observation of **Hon'ble Appex Court** in the above noted reported case further argued that Ext.2 and Ext.4 indicate that those have been given to the complainant on 06.07.2009 and 09.07.2009 respectively. So, the statutory notice was to be issued prior to 06.08.2009 and 09.08.2009

but the statutory has been issued on 23.08.2009. So learned counsel submitted that the complaint was not maintainable.

Learned counsel for the accused persons also relied upon the reported case of **2009 (3) Criminal Court cases 972 (SC) in the case of Ramarajsingh V .State of M.P & Another and** submitted that in order to bring application of Section 138 of N I Act, the complainant must show (i) that cheque was issued ; (2) The same was presented; (3) it was dishonoured on presentation; (4) A notice in terms of the provision was served on the person sought to be made liable; and (5) Despite service of notice, neither any payment was made nor other obligations, if any, were complied with within fifteen days from the date of receipt of the notice . In this juncture learned counsel also relied upon **AIR 2008 Supreme Court 690 in the case of State of Rajsthan V. Ganeshi Lal** and submitted that decision under Article 141 of the Constitution of India is precedent on its own fact and what is binding in a decision is the principle on which it is decided. Reliance on a decision without looking into factual background of case impermissible and that circumstantial flexibility, one additional or different fact may make a world of difference between the conclusions in two cases.

12. Learned counsel for the accused persons also relied upon the reported **case i.e. S.M.S. PHARAMACEUTICALS LTD. V. NEETA BHALLA AND ANOTHER(2005) 8 Supreme Court cases 89** and vehemently argued that when the allegation of dishonor of cheque has been made against the company , essential averments to be made in complaint filed in respect thereof is necessary to aver that at the time of the offence was committed the person accused was in-charge of and responsible for the conduct of business of the company and that without this averment being made in the complaint the requirements of Section 141 cannot be said to be satisfied.

Having regard to the observation of the **Hon'ble Appex Court in the case of State Rajasthan V.s. Ganesjhi Lal (supra),**

S.M.S. PHARAMACEUTICALS LTD. V. NEETA BHALLA AND ANOTHER (Supra) and Ramarajsingh V. State of M.P and Another (Supra) it may humbly be stated here that in the instant case, the complainant has specifically mentioned about the conduct and act played by the accused persons No.2 and 3 in the company who is accused No.1 while dealing with the complainant with regard to the disputed property mentioned in Ext.12. So, the complainant has discharged his burden with regard to the averment made in the complaint with reference to the conduct of the accused persons as has been held by **Hon'ble Appex Cout in the case of.M.S. PHARAMACEUTICALS LTD. V. NEETA BHALLA AND ANOTHER (Supra)** and that he has clearly alleged in his complaint petition as to how the Director is in charge and responsible for the conduct of the business of the company.

13. In such fact and circumstances, learned counsel for the accused persons argued about the conduct of the complainant and the credibility of his allegation made with reference to the content of the sale deed vide Ext.12 and the content of his complaint petition with regard to the legal liability upon the accused persons. Learned counsel for the accused persons vehemently argued that the complainant has approached the Court with moddy hands who in his evidence has admitted that the property in question mentioned in the sale deed vide Ext.12 had mortgaged prior to the execution of sale deed and that knowing such fact the complainant has further tried to sale the property in question to the accused persons in deceitful manner with ulterior motive and ill intention and after getting executed the sale deed in fraudulent manner he misutilised the cheques issued by the accused persons which the accused persons had given to the complainant for security purpose as they had previous transaction relating to other flats situated over the landed property of the complainant which is evident from the facts and circumstances of the case. In such score learned counsel for the accused persons relied upon the reported case of **Hon'ble Appex**

Court of India in the case of Rangappa V. Sri Mohan 2010(3) CRIMINAL COURT CASES 022(S.C.) and submitted that standard of proof for rebuttal of presumption under section 139 of N.I. Act is that of preponderance of probabilities and that if accused is able to raise probable defence which creates doubt about the existence of legal enforceable debt or liability, the prosecution can fail. The sum total of argument advanced by learned counsel for the accused persons seems to have been based on the legal liability on the accused persons for which they have issued the cheque and subsequently instructed their banker to stop payment and in such score learned counsel has raised one important aspect that there was no legal liability upon the accused persons for honouring the cheques as because there was no legal liability due upon them rather the liability seems to be illegal one as the complaint petition itself shows the fraudulent intention of the complainant and his deceitful activities to cause harassment to the accused persons . Learned counsel referred summons issued to the complainant in C.S No.6/12, C.S. No. 07/12 and C.S .No. 5/12 pending in the Court of the Civil Judge, Senior Division, Bhubaneswar along with the copies of the plaint vide Ext. B. Ext. C. and Ect. D respectively which goes to show that one Prema Lata Devi and one Mihir Kumar Sahu have filed these suits impleading the present complainant as one of the defendant in those suits relating to Khata No.3576, Plot No.2271(Part) under Mouza Laxmisagar, P.S. Laxmisagar, Bhubaneswar. Most importantly it is the argument of the learned counsel for the accused persons that the complainant in his cross-examination has admitted the fact of mortgage of the disputed property in question to other persons prior to the execution of such sale deed vide Ext.12. In such circumstances it is his submission that the intention of the complainant in execution of Ext. 12, which is a primary document to ascertain the legal liability of the accused persons, seems to be doubtful and when the accused persons have succeeded in raising a probable defence which creates doubt about existence of legal enforceable debt or liability,

then the standard of proof for rebuttal of presumption U/s. 139 of the Act is that of **preponderance of probability** as has been observed by **Hon;ble Appex Court in Rangappa Vs. Sri Mohan (Supra)** . Having regard to the contention of the learned counsel for the accused persons, it may humbly be stated here that the copies of plaint along with summons vide Ext. B. Ext. C. and Ext. D reveals that the institution of the suits is of the year 2012 whereas the issuance of the cheques and execution of sale deed was of the year 2009. So, at that point of time i.e. the execution of sale deed and issuance of cheques towards discharge of legal liability in the year 2009, these facts were completely foreign to the knowledge of the accused persons to raise such issue. In criminal jurisprudence, the intention of person plays a major role and the facts and circumstances clearly shows that the intention of the accused persons at the time of issuance of cheque and its dishonour was not in conformity with law.

However, learned counsel for the accused persons has raised another important aspect i.e. the validity of the sale deed and its legality, the subject matter of which shall not be dealt by this Court while dealing with U/s. 138 of N.I Act. Section 138 of the N.I Act clearly envisages that it shall be presumed unless the contrary is proved that the holder of a cheque received the cheque of the nature referred to Section 138 of the Act for the discharge, in whole or part or any debt for other liability. In this instant case the evidence shows that the accused persons have admitted to have issued chques being signed on it to the complainant and it is also admitted fact that cheques have been dishonoured. Learned counsel for the accused persons raised another important aspect i.e. dates mentioned in the cheque. Learned counsel submitted that Ext.12 was executed on 03.01.2009 where as the cheques bearing No.438143 vide Ext. 3 and cheque bearing No.438139 vide Ext.5 have been issued on dated 12.01.2009 and 05.02.2009 respectively which are subsequent to the date of execution of Ext.12. It is the argument of learned counsel for the accused persons that a prudent person will not execute the sale

deed until and unless he gets the consideration money and in this instant case to utter surprise how can the complainant executed the sale deed with respect to the disputed property in question to the accused persons without receiving the consideration money and at the same time the content of Ext. 12 reveals that he received only cheques towards the consideration money and it is the allegation of the complainant that those cheques were post dated cheques which is not believable. On verification of the sale deed vide Ext.12 it reveals that only the serial No. of two cheques has been mentioned in the sale deed but the date of the said cheques are not found place in it. It can be stated here that the ambit of the scope of Section 138 of the N.I. Act is very limited and specific for a criminal Court who is not supposed to proceed to decide the validity of sale deed or to declare the right title of a person for a particular plot of land. The related aspect which is to be dealt with by this Court is to see (1) Whether the cheque was issued, 2) whether the same was presented, 3) whether it was dishonoured on presentation, 4) whether a notice in terms of the provision, served on the person sought to be made liable, and 5) whether despite of service of notice, neither any payment was made nor other obligation were complied with within fifteen days from the date of receipt of the notice. If all the five aspects will be analyzed then the evidence on record and the facts and circumstances shows that all the conditions have been complied with by the complainant before presenting this case before the competent Court.

14. It is not out of place to mention here that this Court has not lost its sight as regard to the point of legal liability raised by the learned counsel for the accused persons with regard to his argument on the point of preponderance of probability which has been dealt with by the **Hon'ble Apex Court Rangappa V. Sri Mohan (Supra)**. In this regard it may humbly be stated here that the cheques vide Ext. 3 and Ext.5 bearing No. 438143 and 438139 have been issued by the accused persons being the Managing Director of the accused

company to the complainant which also find placed in Ext. 12. During examination U/s. 313 of the Cr.P.C. the accused persons have specifically admitted that the chques vide Ext. 3 and Ext.5 have been issued by them on proper signature on it. So, the argument advanced by the learned counsel with reference to Ext. B., Ext C and Ext. D which are subsequent to the event of execution of Ext. 12 does not hold good as it violates the basic aspect of the criminal jurisprudence with reference to Sec. 138 of the N.I Act. Learned counsel for the accused persons also raised another important aspect by vehemently arguing that mere production of cheque or marking the same as Ext. does not prove that the cheque is drawn by the accused. He also submitted that mere fact that cheque produced in Court came from possession of complainant alone is not sufficient to prove execution, even though it may be one of the circumstances. In this regard, learned counsel for the accused persons relied upon two important decisions of **Hon'ble Kerala High Court in the case of Santhi V. Mary Sherly, 2011(3) Criminal Court Cases 332(Kerala) and in the case of C. Santhi Vs. Mary Shrely 2012 (1) Civil Court Cases 419.** Learned counsel for the accused persons also relied upon the reported case of **Hon'ble Delhi High Court in BPDF Investments (PVT) Ltd. V. Maple Leaf Trading International (PVT.) Ltd. 2006 (5) CRJ 512** and vehemently submitted that if there is material alteration in the cheque it became void that if there is material alteration , there must be with consent of other party and that alteration amounts to material alteration in terms of Section 87 of the N.I Act.

Having regard to the observation of Hon'ble Kerala High Court and Hon'ble Delhi High Court in the above noted reported cases, it may humbly be stated here that the accused No. 2 and 3 during course of their examination U/s. 313 of the Cr.P.C. have specifically admitted the fact that they have issued the cheques being signed by them and such aspect is getting strengthened by Ext.12 which reveals that these cheques have been given to the

complainant towards payment of the consideration money. So having regard to the observation of **Hon'ble Apex Court in the case of State of Rajasthan V. Ganeshilal (supra)**, it can be stated here that the facts and circumstances of the present case certainly differs from the facts and circumstances described in **S.M.S. PHARAMACEUTICALS LTD. V. NEETA BHALLA AND ANOTHER (Supra)** , **C. Santhi Vs.Mary Shrely (Supra)**, **BPDL Investments (PVT) Ltd. Vs. Maple Leaf Trading International (PVT.) Ltd. (Supra)** .

15. Learned counsel for the accused persons has raised another important aspect as regard to the period of limitation of issuance of demand notice to the accused persons from the date of receipt of cheque return memo from the concerned bank vide Ext.4 and Vide Ext. 6 corresponding to cheques Vide Ext.3 and Vide Ext.5 respectively. Learned counsel referred Ext. 4 and Ext.6 and submitted that Ext. 4 has been issued by the concerned bank on dtd. 09.07.2009 and Ext. 6 has been issued by the concerned bank on dtd. 03.08.2009 and the demand notice vide Ext. 11 was issued to the accused persons on dtd. 23.08.09 which is not within the prescribed time as per the provision of Section 138 of N.I. Act. On the other hand, learned counsel for the complainant vehemently argued that the cheque return memo vide Ext. 4 and Ext.6 have been issued by the concerned bank on dtd. 09.07..2009 and on dtd. 03.08.2009 respectively but the complainant received the same on 27.07.2009 and came to know that both the accused persons have instructed their banker to stop the payment. The provision U/s. 138 is very clear that the payee or the holder on due course of the cheque 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 the information by him from the bank regarding the return of the cheque as unpaid. Ext. 4 and Ext. 6 reveals that the concerned bank issued those memos on dtd. 09.07.2009 and on dtd. 03.08.2009 respectively. On the other hand, learned counsel for the complainant submitted that

the complainant got the intimation slip/ cheque return memo on 27.07.09. It is obvious that a cheque return memo / intimation slip cannot reach the person concerned on the very day of issuance as it will take some time to reach the complainant from the bank, may it through post or through any other means. But it is the submission of the learned counsel for the accused persons that no such averment has been made in the complaint petition and in an evasive manner it has been mentioned in the evidence which has been filed before the Court in form of Affidavit filed by the complainant but not a single scarp of document has been field in support of such evidence. The provision is very clear that within thirty days of the receipt of the information if the drawer fails to make the payment then the payee or holder in due course of the cheque may make a demand for the payment of said amount of money by giving notice in writing to the drawer of the cheque within thirty days of the receipt of the information. Here as has been discussed above the complainant has mentioned the fact of receipt of the cheque return memo/ intimation slip on 27.07.2009 and that such fact has not been negated in any manner by the accused persons. Most importantly, it is to be mentioned here that a cheque return memo/ intimation slip may not reach to the person concerned on the same date of issuance by the bank. In such circumstances the argument advanced by learned counsel for the accused persons with regard to the maintainability of the complaint petition for issuance of demand notice after the statutory period does not supported by the facts as well as law.

16. In conclusion having regard to the observation of **Hon'ble Apex Court as well as Hon'ble High Courts** of different States of India which have been referred above, this court holds that the complainant has successfully established the requirement of Section 138 of N.I. Act as has been observed by the **Hon'ble Apex Court 'in the case of Ramraj Singh V. State of M.P. and another (Supra)** and accordingly it is hold that the complainant has proved its case against the accused persons beyond all reasonable doubt and

accordingly they are found guilty for committing offence U/s. 138 of N.I. Act and as such they are convicted there under:

Taking consideration of the facts and circumstances of this case, this Court does not feel it proper to extend any of the benevolent provision of the probation of offenders Act or the provision U/s. 360 of the Cr.P.C. The convict No.1 is a juristic persons and has been represented by convict No. 2 and 3. Hence the convicts no. 2 & 3 are sentenced to undergo simple imprisonment for a period of two years each having committed the offence U/s. 138 of the N.I Act. In addition to that both the convicts are directed to pay a compensation of Rs.50, 00000- (Rupees fifty lakhs) only to the complainant U/s. 357 (3) of the Cr.P.C. and in default to undergo simple imprisonment for a further period of four months.

S.D.J.M., Bhubaneswar.

Typed to my dictation, corrected by me and pronounced the judgment in the open Court today given under my hand and seal this the ^{1st} day of March, 2014.

S.D.J.M., Bhubaneswar.

List of witnesses examined on behalf of the prosecution:

P.W.1: Gouranga Chandra Biswal

List of witnesses examined on behalf of the defence:

D.W. 1: Dharendra Mohanty

D.W. 2: Gyanaranjn Barik.

D.W. 3: Joytiranjan Mohanty

D.W.4: Jyostna Mohanty

List of Exts. marked on behalf of the Complainant:

- Ex.:- 1: Cheque bearing No.438142 dtd. 07.01.09.
- Ext. – 1/1 Signature of Mrs. Jyostna Mohanty on Ext.1.
- Ext. – 2: The cheque return memo corresponding to Ext. 1.
- Ext.- 3: Cheque bearing No.438143 dtd. 12.01.2009.
- Ext.-3/1: Signature of the accused Jyostna Mohanty on it.
- Ext.-4: Cheque return memo dtd. 09.07.09 corresponding to Ext. 3.
- Ext-5: Cheque bearing No. 438139 dtd. 05.02.09
- Ext. 5/1. Signature of the accused Jyostna Mohanty on it.
- Ext.-6: Cheque return memo dtd. 03.08.2009 corresponding to Ext. 5
- Ext.- 7: Cheque bearing No. 438140 dtd. 05.02.09.
- Ext. 7/1. Signature of the accused. Jyostna Mohanty on it.
- Ext. 8: Cheque return memo dtd. 03.08.09 corresponding to Ext. 7.
- Ext. - 9: Registered post receipt in support of fact of issuance of demand notice to the accused persons.
- Ext. 9/1. Registered post receipt in support of fact of issuance of demand notice to the accused persons.
- Ext. 10. Postal A.D. corresponding to Ext. 9 and 9/1.
- Ext. 10/1: Postal A.D. corresponding to Ext. 9 and 9/1.
- Ext.11: Demand Notice.
- Ext. 12: Certified copy of the Registered sale deed bearing No. 71/09 dtd. 03.01.09.

List of Exts. marked on behalf of the Defence

- Ext.A : Statement summary of account No.30362213061.
- Ext.B: Summon and Copy of Plaint issued to accused Dharendra Mohanty in C.S.06/12 pending in the Court of C.J.(SD), BBSR.
- Ext.C: Summon and Copy of Plaint issued to accused Dharendra Mohanty in C.S.07/12 pending in the Court of C.J.(SD), BBSR.
- Ext. D: Summon and Copy of Plaint issued to accused Dharendra Mohanty in C.S.05/12 pending in the Court of C.J.(SD), BBSR

S.D.J.M., Bhubaneswar.