THE HON'BLE SRI JUSTICE M.S.K.JAISWAL

CRIMINAL REVISION CASE Nos.1529, 1530. 1872, 1904, 1906 of 2007

COMMON ORDER:

In all these Criminal Revision Cases common facts and common question of law are involved and hence they are disposed of by this common order.

2. Crl.Rc.No.1529/2007 is filed by the *de facto* complainant/Company against the judgment in Crl.A.No.416/2006, dated 09.07.2007 on the file of the Special Judge for Economic Offences-cum-VIII Additional Metropolitan Sessions Judge, Hyderabad, by and under which, the conviction and sentence as imposed against A1, A2 & A5 was modified.

3. Crl.Rc.No.1530/2007 is filed by the *de facto* complainant/Company against the judgment in Crl.A.No.418/2006, dated 09.07.2007 on the file of the Special Judge for Economic Offences-cum-VIII Additional Metropolitan Sessions Judge, Hyderabad, by and under which, the conviction and sentence as imposed against A1, A2 & A5 was modified.

4. Crl.Rc.No.1872/2007 is filed by the petitioners/A1, A2 & A5 against the judgment in Crl.A.No.416/2006, dated 09.07.2007 on the file of the Special Judge for Economic Offences-cum-VIII Additional Metropolitan Sessions Judge, Hyderabad, by and under which, the conviction as imposed against A1, A2 & A5 was confirmed.

5. Crl.Rc.No.1904/2007 is filed by the petitioners/A1, A2 & A5 against the judgment in Crl.A.No.418/2006, dated 09.07.2007 on the file of the Special Judge for Economic Offences-cum-VIII Additional Metropolitan Sessions Judge, Hyderabad, by and under which, the conviction as imposed against A1, A2 & A5 was confirmed.

6. Crl.Rc.No.1906/2007 is filed by the petitioners/A1, A2 & A5 against the judgment in Crl.A.No.417/2006, dated 09.07.2007 on the file of the Special Judge for Economic Offences-cum-VIII Additional Metropolitan Sessions Judge, Hyderabad, by and under which, the conviction as imposed against A1, A2 & A5 was confirmed.

7. The case of the *de facto* complainant in brief is that the complainant i.e., M/s.Steel Authority of India Limited (SAIL) is a Government Company, having its registered office at New Delhi and A1 Company i.e. M/s.Shri Shakti LPG Limited, having its registered office at Hyderabad used to purchase LPG steel from the complainant. During that business transaction, A1 requested the complainant to provide unsecured interest free credit facility for 90 days, beyond which it agreed to pay interest @25% p.a. and promised to give post-dated cheques assuring that they would maintain sufficient funds in the accounts to honour the said cheques. The complainant permitted A1 to avail credit facility by taking delivery of the goods. As on 30.09.1999, A1 was due a sum of Rs.1,57,71,073 inclusive of interest. Towards part payment of the said debt, A1 issued the following cheques, which were signed by A2 and A3.

Sl.No.	Date	Cheque No.	AmountRs.
1.	24.05.1999	239442	11,25,000-00
2.	24.05.1999	239443	11,25,000-00
3.	26.04.1999	239495	22,50,000-00
4.	29.05.1999	239496	11,25,000-00
5.	03.06.1999	239498	11,25,000-00
6.	11.06.1999	233955	33,75,000-00
7.	15.06.1999	233956	33,75,000-00
8.	19.06.1999	233957	20,25,000-00

8. Under intimation, the complainant presented the afore mentioned cheques at State Bank of India, Commercial Branch, R.P.Road, Secunderabad for encashment on 01.10.1999, but they were all dishonoured with an endorsement "Payment stopped by the Drawer" and the said information received by the complainant on 04.10.1999. The complainant issued legal notice to the accused on 13.10.1999, but the accused failed to pay the cheque amounts within 15 days from the date of receipt of notice. Hence the complainant filed three separate complaints against the accused for dishonour of the above mentioned cheques.

9. The complainant filed CC.No.1370/1999 on the file of the XIV Additoinal Chief Metropolitan Magistrate, Hyderabad under Section 138 of the Negotiable Instruments Act against the accused for dishonour of two cheques viz., Cheque Nos.239442 and 239443, both dated 24.05.1999 for Rs.11,25,000/- and

Rs.11,25,000/- respectively.

10. The complainant filed CC.No.1371/1999 on the file of the XIV Additoinal Chief Metropolitan Magistrate, Hyderabad under Section 138 of the Negotiable Instruments Act against the accused for dishonour of three cheques viz., Cheque Nos.239495, 239496 and 239498, dated 26.05.1999, 29.05.1999 and 03.06.1999 for Rs.22,50,000/-, Rs.11,25,000/- and Rs.11,25,000/- respectively.

11. The complainant further filed CC.No.1372/1999 on the file of the XIV Additoinal Chief Metropolitan Magistrate, Hyderabad under Section 138 of the Negotiable Instruments Act against the accused for dishonour of three cheques viz., Cheque Nos.233955, 233956 and 233957, dated 11.06.1999, 15.06.1999 and 19.06.1999 for Rs.33,75,000/-, Rs.33,75,000/- and Rs.20,25,000/- respectively.

12. The trial Court after recording the sworn statement of the complainant had taken the said three cases on file for the offence under Section 138 of Negotiable Instruments Act against the accused. On appearance of the accused, they were examined under Sec.251 Cr.P.C, and the accused pleaded not guilty and claimed to be tried.

13. In all three calendar cases, to bring home the guilt of the accused, the complainant examined PW 1 and got marked Exs.P1 to P10 on its behalf. After closure of the evidence, the accused were examined under Section 313 Cr.P.C putting all incriminating material available against them, but the accused denied the material evidence. On behalf of accused, A5-Company Secretary was examined as DW 1 and Exs.D1 to D7 were marked.

14. On appreciation of oral and documentary evidence, in all three calendar cases, the trial Court found A3 & A4 not guilty for the offence under section 138 of Negotiable Instruments Act and acquitted A3 & A4. However, found A1, A2 & A5 guilty of the offence under section 138 of Negotiable Instruments Act and convicted them, sentenced A1 to pay a fine of Rs.5,000/-, and sentenced A2 & A5 to undergo rigorous imprisonment for six months and to pay fine of Rs.5,000/- each, in default to suffer simple imprisonment for 30 days each.

15. Challenging the conviction and sentence passed by the trial Court, A1, A2 & A5 filed Crl.A.Nos.416, 417 & 418 of 2006. The appellate court on re-appreciation of the evidence on record, confirmed the conviction recorded by the trial Court against A1,

A2 & A5 for the offence under section 138 of Negotiable Instruments Act, however, the sentence of imprisonment imposed against A2 & A5 was set aside, while maintaining the imposition of fine against A1, A2 & A5.

16. Aggrieved by the judgment confirming the conviction, A1, A2 & A5 filed Crl.RC.Nos.1872, 1904 and 1906 of 2007, and aggrieved by setting aside the sentence against A2 & A5, the complainant company filed Crl.RC.Nos. 1529 & 1530 of 2007.

17. Now the point that arises for consideration in all these revisions is whether the conviction and sentence imposed by the Courts below against A1, A2 & A5 is legal and sustainable or alternatively required any modification.

Point:

18. The contention of the learned counsel appearing for the revision petitioners/A1, A2 & A5 is that the cheques in question were not issued towards legally enforceable debt and they were issued towards security. The learned counsel submits that without proper appreciation of the evidence of DW 1, the Courts below erroneously convicted A1, A2 & A5, while acquitting A3 & A4.

19. On the other hand, the learned counsel appearing for the *de facto 0*complainant submits that the complainant has placed voluminous oral and documentary evidence on record, which clearly establishes that the accused issued the cheques in question towards legally enforceable debt, and both the Courts below have concurrently found A1, A2 & A5 guilty of the offences alleged, convicted and sentenced them. The learned counsel further submits that the appellate Court without giving any valid reasons, erroneously set aside the sentence of imprisonment imposed against A1, A2 & A5 by the trial court.

20. In view of the above, the admitted facts out weigh the contentious issue. Briefly stated the admitted facts are as under:

The complainant is a company in the production of steel. The accused is also a company in the business of LPG gas cylinders. The accused company used to purchase the steel from the complainant company for the purpose of gas cylinders. Transactions worth crores of rupees were taking place. On request of the accused company, the complainant company agreed to provide unsecured interest free credit facility for 90 days for the material purchased by the accused company. Beyond 90 days, the interest @25% p.a. will be charged. On the basis of the assurance of the accused company, the complainant used to supply steel on credit basis. The accused issued several post-dated cheques, which are by and large for a sum of Rs.11,25,000/- or in multiples thereof. As on 01.10.1999, according to the complainant, the accused was due an amount of Rs.1,57,71,073/- According to the accused, the amount fell due by that date is Rs.1,05,00,000/- It is also admitted fact that cheques in three set of cases are for a sum of Rs.1,57,71,000/-. It is also admitted fact that for the amounts covered by the cheques in these three criminal cases, the complainant also filed O.S.No.192/2002 on the file of the Chief Judge, City Civil Court, Hyderabad on 23.02.2002 for recovery of Rs.1,30,60,346/-

21. It is also admitted fact that the complainant also filed Company Petition No.62/2000 before this Court praying for winding up of the accused company. In the said company petition, the accused company admitted the liability to the extent of Rs.1.05 crores and disputed the rest. The Company Court, by order dated 14.03.2001, directed the accused company to pay the admitted amount of Rs.1.05 crores, which the accused company paid.

22. Issuance of cheques is not in dispute. The contentious aspect is whether those cheques are issued in discharge of existing liability or only by way of security for the supplies being made by the complainant company.

23. As many as 8 post-dated cheques, which were in the custody of the complainant company, were presented for encashment on 01.10.1999. In view of the instructions of the accused company, payment of those cheques was stopped. The cheques were returned on such instructions, but they were not dishonoured for want of sufficient funds.

24. If the drawer of the cheque instructs the Bank to stop payment of a particular cheque without there being any valid reasons or grounds, it also amounts to dishonour of cheque, but when the accused company can show that though they had sufficient balance in their account, but they have a *bona fide* dispute about the claim of the complainant company and therefore they instructed its Banker to stop payment, then the return of the cheques by the Banker do not attract punishment under Section 138 of the Negotiable Instruments Act.

25. As already stated, on behalf of the complainant, one T.K.Patnaik was examined as PW 1 and Exs.P1 to P9 were marked. On behalf of the accused company, A5

was examined as DW 1 and Exs.D1 to D7 were marked. Even when the accused was examined under Section 313 Cr.P.C., they have taken a specific defence that they have not given any cheques towards any liability and that they have given the cheques only towards security and that there is no liability to pay any amount to the complainant.

26. Both parties let in oral evidence through PW 1 and DW 1 to substantiate their respective claims. Para-3 of the Chief Affidavit of PW 1 reads as under:

> "I submit that in the usual course of the business the Accused No.1 requested the Complainant Company to provide unsecured Interest free credit facility for 90 days, beyond which interest at the rate of 25% per annum was charged. The Accused No.1 and 2 clearly and unequivocally promised the Complainant Company that they would pay the amount due for the purchase of goods. The Complainant Company basing upon the above promise permitted the Accused No.1 avail the credit facility and was thereby included to part with goods from time to time which was received by the accused under various invoices without demur. As on 30.09.1999 the accused No.1 was due and payable a sum of Rs.1,57,71,073/- (Rupees one crore fifty seven lakhs seventy one thousand and seventy three only) including the interest up to 30.09.1999."

27. In the cross examination, PW 1 admitted that the cheques under dispute are post-dated cheques at the time of issuance. He further stated that he do not remember whether no goods were supplied to the accused company on the date of issuance of the cheques by the complainant company and that all the invoices are subsequent to the issuance of the cheques. He further stated that he do not remember whether these cheques are received by the complainant towards security for future transactions. The specific admission made by PW 1 is that the amounts mentioned on the dishonoured cheques do not tally with the amounts of invoices. He also admits that in the company petition, the accused company paid Rs.1.05 crores. He also admits that for the same amounts, as are covered by the cheques in question, a civil suit was filed and the same was pending.

28. From perusal of the evidence of PW 1, it is difficult to conclude that satisfactory evidence is placed on record for concluding that the cheques in question were issued by the accused company in discharge of legally enforceable debt and it

appears that those cheques were issued by the accused company by way of security for the unsecured credit facility provided by the complainant company for the supply of steel.

29. On behalf of the accused, its Finance-cum-Company Secretary was examined as DW 1 and he deposed that at the time when the purchase orders were placed, they furnished some security by way of post-dated cheques to the complainant. He further deposed that after actual delivery of goods, the amount will be paid to the complainant and the Company will return the post-dated cheques and such an arrangement went on for some time. It is further in his evidence that at one point the volume of transaction is very huge and the dispute arose with regard to the rate of goods. The complainant agreed one rate, but demanded higher rate for the goods. He further deposed that when the accused company wanted to pay the actual amount due to the complainant company, the complainant did not accept and on the other hand, pressed into service the post-dated cheques which were given to them by way of security. He further deposed that the complainant company has deposited the cheques in spite of written and oral instructions not to do so. He further speaks about the company petition and their paying amount, which was not in dispute i.e. Rs.1.05 crores. It is further in his evidence that for the same amount covered by these cheques, a civil suit was filed by the complainant and Ex.D4 is the Xerox copy of the plaint in the said suit. Exs.D5 and D6 are two crucial correspondences in between the accused company and the complainant company, both dated 01.10.1999, and they shall be discussed hereinafter.

30. In addition to the oral evidence, reliance is placed by the complainant company on Ex.P2 letter addressed by the accused company to the complainant company along with the cheque. It is the contention of the accused that the complainant obtained several letters similar to Ex.P2 by keeping the cheque number, date and amount blank, and the accused company handed over such letters and gave different cheques. The cheque number, date and amounts are filled up by the complainant before the cheques were presented for encashment. Ex.P2 reads as under:

> "This is to bring to your notice that we intend to enjoy the facilities of unsecured credit in respect of supply of materials from your branch as per the policy of the Company.
>
> In this connection, we are submitting Cheque bearing No.239443, Dated

> 24/5/99 for Rs.11,25,000/- towards our liability for the price of the materials sold and delivered to us on credit basis as well as interest accrued thereon. We authorize you to present those cheques in the bank on due date.
>
> We assure and undertake that as and when such cheque(s) is/are presented to our Bank, the same will be honoured by them and we will keep sufficient amount in our account for payment of the cheque amount.
>
> We further agree and undertake that we shall not intimate our Banker to stop payment(s) of the cheque(s) delivered to you against our liability as aforesaid.
>
> We also undertake that we shall never issue any notice requesting you not to present the cheque(s) issued by us on the respective due date(s).
>
> We are aware that on the faith of this undertaking you have agreed to provide us unsecured credit and we submit that in the event of any default in honouring the cheque(s) you are at liberty to take action against us for the dishonour of the cheque(s) under the provisions of Section 138 of NI Act or any other Legal action for recovery of the cheque amount plus interest."

31. A perusal of the contents of Ex.P2 no doubt shows that the cheques in question were issued towards the liability for the price of the material sold and delivered on credit basis to the accused company. However, the fact that the material information is filled up with pen, viz., the cheque number, its date and amount shows that the contention of the accused that several such letters were obtained by the complainant company and were pressed into service for their purpose seems to be probable. If really Ex.P2 letter was handed over to the complainant company along with the cheque, they would not have given the letters by keeping blank material information viz., the cheque number, date and the amount. Rest of the contents were typewritten except for the three items. Except for Ex.P2, no clinching evidence is placed on record for holding that the cheques in question were issued for discharge of existing liability.

32. With regard to Ex.P.2, it is the crucial document of the complainant, by and under which, the accused company is said to have delivered the cheques for discharge of the existing liability. Another aspect that is glaring is that the said letter does not contain the date or any reference number which will usually be find on other correspondence. For instance, in Ex.D.5, which is the communication sent by

the accused company to the complainant on 01.10.1999, there is a reference bearing No.SSLPG/F&A/SAIL/99-2000 and date is mentioned. Such things are not found on Ex.P.2, which clearly show that several such letters by keeping the material information, blank cheques were obtained by the complainant company at the time of placing the indents for supply of the steel.

33. As already stated, the bone of contention between the complainant and the accused is as to whether the cheques in question were issued by way of security and never intended to be encashed or that they were issued towards discharge of the existing liability as on the date when the cheque is issued. After the cheque in question was presented on 01.10.1999 and was returned by the banker, the complainant company has issued the statutory notice on 13.10.1999. It is Ex.P.8. In the said notice, it was informed to the accused company that the accused has issued the cheque bearing No.239443, dated 24-05-1999 for Rs.11,25,000/- for the price of the goods, interest and other charges in respect of the materials delivered under delivery order No.98/556, dated 25.02.1999. Thereafter, the details of the invoice are extracted. It shows that as per the said invoice, the value of the material supplied was Rs.11,99,584/- and out of that, a sum of Rs.1,11,916/- was deducted. The net invoice value is shown as Rs.10,87,668/-. A sum of Rs.94,612/- is added towards interest up to 30.09.1999. The total is shown as Rs.11,82,280/-. If really, the cheque referred to above was issued in discharge of the debt with reference to the invoice number, referred to above, the amount would not have been Rs.11,25,000/-, but it should be Rs.11,82,280/-. It is evident that the cheque of Rs.11,25,000/- do not tally with any of the three figures viz., total cost of the material at Rs.11,99,584/- or after deduction Rs.10,87,668/-, nor does it tally with total amount due which is shown at Rs.11,82,280/- This clearly shows that the complainant company, at the time of placing the order and even before the goods are delivered, was following the practice of obtaining the post-dated cheques along with letter, such as Ex.P.2, by keeping the cheque number, date and amount blank.

34. In addition to the above, the accused company has produced certain documents in support of their contention that the cheques were not intended to be pressed into service for realizing the amounts due, but only by way of security for credit supplied.

35. As already stated, the 8 cheques that were covered by three criminal cases are all dated in between 24.05.1999 to 19.06.1999. The total of these 8 cheques comes to Rs.1,55,25,000/- All these 8 cheques were presented on 01.10.1999 and they

were returned with endorsements “payment stopped by the drawer”. There are three letters in between two dates i.e. dated 29.09.1999 and 01.10.1999. Ex.D5 is the letter addressed by the accused company (A5) and addressed to the complainant, which reads as under:

> “(Fax No.237937)
>
> Sub: Return of PDCs-advise for stop payment-dispute
>
> regarding quantum of dues.
>
> Please refer our fax dated 30th September’ 99 and 1st October’ 99 and also the personal discussions the undersigned had with you today regarding post dated cheques issued by us. Please recall that we have issued the post dated cheques against the tentative dues to be settled. Also recall that you have agreed to issue either credit notes or adjust the said amounts covered by the said post dated cheques in respect of allowing the rebate/discount on the rate actually charged by SAIL, when compared to the rate that is to be charged by SAIL to our group. But in spite of repeated requests no such steps are taken.
>
> Besides the above we have already made payment of Rs.77 lakhs by various pay orders in respect of the dues payable to you. Now we suspect some foul play going away from the commitment of rebate/discount in the rate. Hence we do not wish to pay the further amounts covered under the said post dated cheques unless you settle our account immediately and return the post dated cheques for which amounts were already paid by way of pay orders.
>
> We also bring to your notice that we shall not be held liable or responsible for any non-payment of the amounts under the said post dated cheques and the entire responsibility squarely rests on you to settle our account and return the post dated cheques for the amounts we paid. The moment the account is settled and after duly intimated to us in writing, we shall take steps to arrange funds to clear the balance amounts covered under the post dated cheques.
>
> Any deviation from the above, we will not be responsible.”

36. The above said letter was sent by Fax and its receipt is not disputed. What could be gathered from the said letter Ex.D5 is that there was serious dispute in between the accused and the complainant with regard to the amount due and it was also informed that the cheques, which were issued by way of security should be returned.

Accused company also informed the complainant company that they do not intend to pay amount covered by the cheques unless the commitment of rebate and discount in the rate is fulfilled. In spite of the above letter, calling upon the complainant not to present the 8 cheques pending settlement of account, the complainant deposited the said cheques on 01.10.1999, which, as already stated, were returned.

37. In reply to Ex.D5 letter, on the same day, i.e. on 01.10.1999 the complainant company issued a reply, which reads as under:

> "Kindly refer to your letter No.SSLPG/F&A/SAIL/99-2000, dated 01.10.1999 regarding return of PDCs.
>
> In this connection, we invite your kind attention to our letter of even No. dated 29.09.99 wherein we have intimated that in case payment of our outstanding amount is not received by 30th September'99, we would be depositing your PDCs with our bankers on 01.10.99.
>
> Accordingly, the following PDCs submitted by you have been sent to our bankers for realization of overdue outstanding:

Sl.Nl.	Cheque No. & Date	Amount(Rs.)
1)	233957 dt.19.06.99	20,25,000/-
2)	233956 dt. 15.06.99	33,75,000/-
3)	233955 dt.11.06.99	33,75,000/-
4)	239498 dt.03.06.99	11,25,000/-
5)	239496 dt.29.05.99	11,25,000/-
6)	239495 dt.26.05.99	22,50,000/-
7)	239443 dt.24.05.99	11,25,000/-
8)	239442 dt.24.05.99	11,25,000/-
	TOTAL	1,55,25,000/-

> Further, we are holding the following PDCs submitted by you at the time of issuance of Credit Sale Delivery Orders:

Sl.Nl.	Cheque No. & Date	Amount(Rs.)
1)	239440/15.05.99	22,50,000/-
2)	239441/20.05.99	11,25,000/-
3)	239048/15.04.99	10,70,000/-
4)	239047/15.04.99	10,70,000/-
5)	239479/05.04.99	1,10,000/-
6)	239480/12.04.99	1,65,000/-

7)	239481/15.04.99	1,01,226/-
	TOTAL	58,91,226/-

> We have, vide our letter dated 17.09.99, submitted our statement of account as on that date and requested you to send your statement of account for reconciliation. We would like to state that the above PDCs will be returned to you as soon as the reconciliation of accounts is completed.”

38. A perusal of Ex.D6 shows that the said 8 cheques, amounting to Rs.1,55,25,000/- were deposited in spite of the instructions from the accused company not to do so. In addition to 8 cheques already presented, the complainant company was in possession of another 7 post-dates cheques, totaling Rs.58,91,226/- In Ex.D6 letter, it is stated that those cheques are still in possession of the complainant company. The above letter clearly shows that the statement of account was sent to the complainant company on 17.09.1999 and the accused company was also called upon to send their statement of account for reconciliation. No such reconciliation took place in between 17.09.1999 and 01.10.1999, but the cheques were presented for encashment. The letter further places on record that the 7 post-dated cheques will be returned as soon as the reconciliation of account is completed.

39. A perusal of Exs.D5 and D6 clearly shows that even before the post-dated cheques were presented by the complainant company, there was correspondence disputing the claim of the complainant by the accused company. Therefore, the accused company requested the complainant not to deposit the cheques, but the complainant went ahead and deposited the said cheques for encashment and in view of the instructions of the accused company, the same were returned.

40. The fact that there was a *bona fide* dispute about the accounts in between the complainant and the accused as on 01.10.1999, that is the date on which the cheques were presented is evident from the orders of this Court in Company Petition No.62/2000, dated 14.03.2001, wherein this Court held as under:

> “According to the petitioner, an amount of Rs.1.79 lakhs is due from the respondent company to the petitioner towards the price of the material supplied by the petitioner to the respondent on the various points of places and interest on the delayed payments. The details of which may not be necessary to be given herein in view of the facts to be mentioned

later in this judgment. The fact that the respondent received some material from the petitioner is admitted. The respondents also admit the fact that a tune of Rs.105 lakhs the respondents are liable to pay to the petitioner. However, the respondents disputed the liability insofar as the balance amount of the claim of the petitioner is concerned. The dispute is on various counts like on the actual price of material supplied and also liability to pay interest etc.

In fact, when the matter is taken up for hearing, the learned counsel for the respondents offered that the respondents are willing to make the payment to the tune of Rs.105 lakhs which is the admitted liability, if some reasonable time is granted to the respondents. The learned counsel further submitted that the respondents are willing to hand over a cheque for an amount of Rs.20 lakhs, which could be encashed by the petitioner on or after 22nd March, 2001. With reference to the balance amount of Rs.85 lakhs, the learned counsel for the respondents submitted that the same would be paid within a period of 6 months if the Court so permits them. The learned counsel for the petitioner on the other hand submitted that with regard to the balance amount claimed by them, the right of the petitioner to recover the same in accordance with the procedure established by law may be preserved and subject to the said condition that the petitioner is willing to receive the payment of Rs.105 lakhs by the respondents. However, the learned counsel for the petitioner submitted that the period of six months time as requested by the respondents is too long.

In the circumstances, I am of the opinion that it is not strictly a case where the respondent company is not able to pay its debts, but there is a *bona fide* dispute about the actual amount of liability…."

41. The observations made by the learned Judge of this Court clearly shows that it is not a case where the accused company is not able to pay its debt, but there is a *bona fide* dispute about the actual amount of liability.

42. In view of the above observations, there is no doubt for holding that as on the date when the cheques were presented, it is not as though that there was no balance in the account of the accused company and that the cheques were dishonoured for want of sufficient funds. It is only because there was a *bona fide* dispute about the actual amount and in view of the instructions of the accused company, the cheques were returned unpaid.

43. The learned counsel appearing for the complainant relied upon a decision of the Delhi High Court in ***Credential Leasing & Credits Ltd. Vs. Shruti Investments***

and ors. wherein after referring to various authorities of the Supreme Court, the Delhi High Court in paras-27 and 28 of the judgment observed as under:

> “27. Thus, the "debt or other liability" has to be a legally enforceable debt or other liability. Neither the main provision of Section 138, nor the explanation suggest that the debt or other liability should be in existence on the date of issuance of the cheque, i.e. on the date of its delivery to the drawee or someone on his behalf or, on the date that the cheque bears. The only reference to time in the Section, is the point of time when the cheque is returned unpaid by the drawers bank.
>
> 28. In my view, therefore, the scope of Section 138 NI Act would cover cases where the ascertained and crystallised debt or other liability exists on the date that the cheque is presented, and not only to case where the debt or other liability exists on the date on which it was delivered to the seller as a post-dated cheque, or as a current cheque with credit period. The liability, though, should be in relation to the transaction in respect whereof the cheque is given, and cannot relate to some other independent liability. If, on the date that the cheque is presented, the ascertained and crystallised debt or other liability relatable to the dishonoured cheque exists, the dishonor of the cheque would invite action under Section 138 NI Act. There could be situations where, for example, an issue may be raised with regard to the quality, quantity, deficiency, specifications, etc. of the goods/services supplied, or accounting. It would have to be examined on a case to case basis, whether an ascertained or crystallised debt or other liability exists, which could be enforced by resort to Section 138 NI Act, or not.”

44. In ***M/s.Indus Airways Pvt.Ltd. v. M/s.Magnum Aviation Pvt.Ltd.*** the Hon’ble Supreme Court observed as under:

> "....the fine distinction between civil liability and criminal liability under Section 138 of the N.I. Act. If at the time of entering into a contract, it is one of the conditions of the contract that the purchaser has to pay the amount in advance and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Section 138. **For a criminal liability to be made out under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque."**

45. The learned counsel appearing for the accused company relied upon the following decisions:

In ***M.S.Narayana Menon alias Mani v. State of Kerala and Anr.*** The Hon’ble

Supreme Court held as under:

> "23. Admission or acknowledgement of three out of eight statements of accounts by the Appellant, the learned appellate court opined, by itself would not be sufficient to invoke the principle of estoppel. The appellate court noticed that the parties came to know each other personally at the Cochin Stock Exchange and till the fifteen settlements they did not meet. It was further found that before such acquaintance ripened into thick business relations some security from the Appellant was sought for by the Second Respondent by way of abundant caution where for only according to the Appellant a blank cheque was given. The court having regard to the facts and circumstances of this case, came to the conclusion that the said version of the Appellant is quite credible and probable. In doing so, the business practice that some security is always asked for in similar transaction was noticed."

46. In ***M/s.Adithya Alkalods Ltd. And others v. M/s.NCC Finance Ltd. And another*** this Court held as under:

> "3. There is no dispute that Ex. D-1 was issued by the complainant intimating the accused that a post dated cheque should be deposited as security for the bill discounting amount. Therefore, it is evident that this cheque was made use of by putting the date as 18-2-1997. This is not open to the complainant. The blank cheque issued worked out when the subsequent hire purchase agreement came into force, for enforcement of which the accused has issued 36 fresh cheques. If there are any defaults in pay-merit of instalments, certainly the complainant can make use of the cheques given subsequently under hire purchase agreement. The complainant cannot enter the date on the cheque given earlier and present the same and claim the amount. It is true that the accused did not reply to Ex. P-10 notice. But, that itself is not enough to hold that the case of the complainant is proved. The cheque utilised and now marked as Ex. P-8, has worked out and that cannot be made use of for enforcement of subsequent hire purchase agreement. Certainly, the case of the complainant is not based on sound principles. The conviction and the sentences are set-aside. The fine amount, if any, paid shall be returned to the accused."

47. In ***Laxminivas Agarwal v. Andhra Semi Conductors Pvt.Ltd.*** this Court observed as under:

> "……So it is clear that by the date on which the accused issued cheques Exs : P-1 to P-3 there was no existing liability or debt incurred/borrowed

by the accused from the complainant and that those cheques were issued as security for the future contingent liability that may be incurred for refund of the amount in the event of failure to supply the BEL components. So I find considerable force in the contention of the learned Counsel for the respondents-accused that those cheques were taken as additional security by the complainant. As seen from Ex: P 16 the complainant has taken not only the blank cheques, but also took pledge of the title deeds relating to 6 acres of land belonging to the accused. Therefore, I have no hesitation to hold that the three cheques were taken from the accused by the complainant on 17-9-1998 and 15-4-1999 as security for prompt supply of BEL components or for prompt repayment in the event of failure to supply the components. Thus, these two points are found in favour of the respondents accused."

48. While adjudicating the criminal liability, even though the authorities can be taken as factors to be kept in mind, basically what is required to be seen is as to whether the facts of the particular case in hand leads to a conclusion that the accused company has committed the offence so as to punish him thereof. The peculiar facts of the case in hand are to be kept in mind and it has to be examined on a case to case basis and determine as to whether unascertained and crystallized debt or other liability exists which could be enforced by following the provisions of Section 138 of the Negotiable Instruments Act.

49. The facts of the case in hand are peculiar. To recapitulate briefly it is not in dispute that there were transactions worth crores of rupees in between the complainant company and the accused company. The complainant company has provided credit facility to the accused company with a grace period of 90 days for payment and that was to be interest free. Only if the payment is not made within 90 days, the complainant was entitled to recover the amount by charging interest @25% p.a. For fulfilling the said obligation and commitment, the complainant obtained certain cheques form the accused company by way of security. The understanding was that if the payment is not made, after settlement of account, the cheques will be pressed into service. It is also on record that by 30.09.1999, according to the complainant, the amount due was in the range of Rs.1.55 crores. Even on that date, the accused company has disputed the amount and has stated that the complainant company has failed to give rebate and concession, which was offered. According to the accused company, the amount due by that date is only Rs.1.05 crores, but not Rs.1.57 crores.

50. Even before the cheques in question were deposited by the complainant company, the accused informed the complainant that unless the settlement of account is made, the cheques shall not presented and even if they are presented, they will not be honoured. In spite of that information, the complainant presented the cheques, which were returned not because there were no funds in the account, but they were returned as the accused instructed its banker to stop payment. The complainant company has resorted to three criminal proceedings for the self-same amount. While these three criminal cases were filed for dishonour of cheques under section 138 of Negotiable Instruments Act, the complainant company has also filed Company Petition No.62/2000 for the same amount. For the same amount, the complainant company has also filed O.S.No.192/2002 on the file of the Chief Judge, City Civil Court, Hyderabad and obtained decree. It is also on record that the Company Court has found that there was a *bona fide* dispute about the actual amount and that it is not a case whether the accused company is not able to pay its debts.

51. In that view of the matter, it cannot be said that the accused company is liable for the criminal consequences punishable under Section 138 of the Negotiable Instruments Act.

52. As stated above, the three criminal cases were originally filed against A1-company and 4 others. The learned trial Court has acquitted A3 and A4 and convicted the A1-Company and A2 & A5. In so far as the A1-Company, the trial Court imposed a fine of Rs.5,000/- and in so far as A2 & A5, the trial Court imposed sentence to undergo rigorous imprisonment for six months and to pay fine of Rs.5,000/- each.

53. Against the said judgment, the convicted accused preferred appeal. The learned appellate Court, taking into consideration that the admitted amounts have been paid and the complainant company has also filed a civil suit for realizing the amount, and also observing that since the amount has already been paid by A1-Company, again sentencing A2 and A5 to undergo imprisonment will amount to double jeopardy, set aside the sentence of imprisonment recorded by the trial Court against A2 & A5, but maintained the imposition of fine against A1, A2 & A5.

54. Having observed that again sentencing A2 & A5 to undergo imprisonment will amount to double jeopardy, maintaining the imposition of fine against A1-

Companay, A2 & A5 by the learned appellate Court, in my opinion, is not proper. Having observed so, the learned appellate Court ought to have allowed the appeals and acquitted the accused.

55. One more aspect which is noticed is that the learned appellate Judge in para 21 after referring to certain facts has concluded that the statutory notice as contemplated under Section 138(b)(c) of the N.I.Act was not issued and therefore the complaint in respect of Ex.P.5 cheque bearing No.239442 for Rs.11,25,000/- is liable to be dismissed, since there is non-compliance of the statutory requirement, as laid down in Section 138(b)(c) of the N.I.Act.

56. For the reasons stated above, I have no hesitation to hold that the accused are not liable to be convicted for the offence under section 138 of the Negotiable Instruments Act.

57. Accordingly, the Crl.R.C.Nos.1529/2007 & 1530/2007 filed by the *de facto* complainant are dismissed; and Crl.R.C.Nos.1872/2007, 1904/2007 & 1906/2007 filed by A1, A2 & A5 are allowed. A1, A2 & A5 stand acquitted of the charge leveled against them. The bail bonds executed by the A1, A2 & A5, if any, shall stand cancelled. The fine amount, if any, paid by A1, A2 & A5 shall be refunded.

Pending miscellaneous applications, if any, shall stand closed in consequence.

M.S.K.JAISWAL,J

Date:12.11.2015

Dsr