

**IN THE HIGH COURT AT CALCUTTA  
CRIMINAL APPELLATE JURISDICTION  
APPELLATE SIDE**

**Present:**

**The Hon'ble Justice Ananya Bandyopadhyay**

**C.R.A. 88 of 2009**

**Tapan Chatterjee @ Tapan Kumar Chatterjee  
-Vs-  
The State of West Bengal & Anr.**

For the Appellant : Mr. Biswajit Manna

For the Respondent Nos.2, 3 and 4 : Mr. Sandip Chakraborty

Heard on : 10.10.2023, 08.02.2024, 08.04.2024,  
07.08.2024

Judgment on : 02.09.2025

**Ananya Bandyopadhyay, J.:-**

1. The present appeal calls into question the judgment and order dated 27<sup>th</sup> November, 2008 passed by the Learned Chief Judicial Magistrate, Howrah in Complaint Case No. 668C of 2004, whereunder the accused/opposite parties have been acquitted of the offences under Section 138 and 141 of the Negotiable Instruments Act. The appellant contends that the acquittal is founded upon misappropriation of evidence disregard to statutory presumptions and reliance upon conjectural defence unsupported by any credible material.

2. The narrative of the complaint and the sworn testimony of the appellant disclosed the appellant to have retired from service after discharging a long tenure in the State Bank of India. On receiving his retiral benefits, he extended financial assistance to the opposite parties, who were partners of a business firm with whom the appellant shared a cordial relation. An agreement dated 27<sup>th</sup> July, 2003 was executed whereby the appellant advanced Rs. 5,00,000/- to the said partners to enable them to meet their immediate working capital and sustain their enterprise. The disbursement was undertaken through five (05) cheques each being reflected with clarity in the records as follows:

| <u>Cheque Nos.</u> | <u>Date</u> | <u>Drawn On</u>                         | <u>Amount</u> |
|--------------------|-------------|-----------------------------------------|---------------|
| 590205             | 28.08.2003  | State Bank of India<br>Kadamtala Branch | Rs.1,50,000/- |
| 590206             | 29.09.2003  | State Bank of India<br>Kadamtala Branch | Rs.75,000/-   |
| 590207             | 30.10.2003  | State Bank of India<br>Kadamtala Branch | Rs.75,000/-   |
| 590208             | 29.12.2003  | State Bank of India<br>Kadamtala Branch | Rs.1,00,000/- |
| <u>Cheque Nos.</u> | <u>Date</u> | <u>Drawn On</u>                         | <u>Amount</u> |
| 590209             | 02.02.2004  | State Bank of India<br>Kadamtala Branch | Rs.1,00,000/- |

3. The appellant further averred, beyond the principal loan under the written agreement, an additional personal loan of Rs. 50,000/- was advanced by him to the opposite parties through cheque no. 590291. Out of the cheques issued under the arrangement only cheque no. 590205 amounting to Rs. 1,50,000/- was honoured. The remaining cheques did not meet with success. In particular cheques bearing nos. 590208 and 590209 when deposited for encashment on 3<sup>rd</sup> June, 2004 at the State Bank of India, Kadamtal Branch, were returned and paid on 7<sup>th</sup> June, 2004 with the endorsement "Exceeds Arrangement".
4. Following such dishonour, the appellant personally sought clarification from the opposite parties. He claimed of assurances been extended that the entire sum would be cleared in cash on or before 14<sup>th</sup> April, 2004. No such payment, however, ensued. Consequently, the appellant, through Learned Counsel issued a statutory demand notice dated 22<sup>nd</sup> June, 2004 calling upon the opposite parties to remit Rs. 2,00,000/- representing the dishonour instruments. The notice was neither replied to nor complied with.
5. The complaint was then instituted upon examination of the appellant under Section 200 of the Criminal Procedure Code and upon perusal of the supporting documents, the Learned Magistrate took cognizance and summons the accuseds. They appeared, secured bail and entered a plea of non-guilty. During the interregnum of the proceedings one of the accused Kashinath Pollea expired and the case abated against him.
6. During trial, the appellant appeared as PW-1 and affirmed his version. He produced the agreement, the cheques in-question, the bank slip evincing

dishonour and the statutory notice. His evidence sought to establish that the loans remain wholly unpaid except for the sum covered by cheque no. 590205. In defence, the accused persons asserted that the liability stood extinguished. They contended that a sum of Rs. 1,50,000/- had been repaid in cash to the appellant and the dishonoured cheques were not issued in discharge of any subsisting debt. The plea rested entirely on oral assertion. No receipt, acknowledgement, correspondence, banking traits evidencing the alleged repayment was furnished, nor did the accused persons attempt to demonstrate the cheques to have been issued for purposes other than acknowledged financial arrangement. There was not any explanation as to why no reply was furnished to the statutory demand notice which was ordinarily accepted if liability were truly non-existent.

7. Notwithstanding these deficiencies, the Learned Magistrate accepted the defence version and held that the presumption under Section 139 of the Negotiable Instruments Act stood rebutted. The accused was accorded benefit of doubt and acquitted. The appellant assailed the judgment on several grounds. It was urged that the Learned Magistrate failed to consider the legal mandate that once issuance of cheque was admitted, the presumption of legally enforceable debt arose and the burden shifted to the accused to rebut such presumption by cogent and reliable defence. The appellant contended the accused persons neither produced any acceptable material nor adduced any credible testimony to discharge such burden. The Learned Magistrate misapplied the extraneous considerations including aspects drawn from another case being Complaint Case No. 668C of 2004

which had no bearing on the present matter. The appellant asserted such reference reflected non-application of mind and detracted from proper evaluation of record.

8. Learned Advocate for the appellant further submitted as follows:-

- i. The appellant, after retirement from SBI, received a sum Rs.5,00,000/- as retrial benefit. The said amount was of provided as loan to the respondent nos. 2 to 4 for their working capital as they were in urgent requirement. The appellant paid the total amount of Rs.5,00,000/- in parts on different occasions. In response to such financial help, the accused respondents executed an agreement for refund of the said loan. The said Agreement was executed on 27.07.2003.

Initially the accused/respondents issued a blank cheque being no. 574225 to induce the appellant to pay the aforesaid sum of money but the said cheque was never used. However, at the time of execution of the Agreement for repayment the accused/respondents issued 5 cheques being nos. 590205 for Rs.1,50,000/-, Cheque No.590206 for Rs.75,000/-, Cheque No.590207 for Rs.75,000/-, Cheque No.590208 for Rs.1,00,000/- & Cheque No.590209 for Rs.1,00,000/-. The appellant further provided loan to the accused/respondents to the tune of Rs.50,000/- for which another postdated cheque bearing 590291 for Rs.50,000/- was issued by the accused/respondents.

There was no dispute relating to the cheque bearing no. 590205 amounting to Rs.1,50,000/-.

ii. CRA No.88 of 2009 related to -

- a) Cheque No.590206 for Rs.75,000/-
- b) Cheque No.590207 for Rs.75,000/-
- c) Cheque No.590591 for Rs.50,000/-

Cheque No.290206 dated 29.09.2003, Cheque No.590291 dated 29.09.2003 and Cheque No.590207 dated 30.10.2003 were deposited by the appellant on 25.03.2004 and 12.04.2004. All the three cheques were returned by the bank with the remarks "Funds Insufficient".

Thereafter the appellant was informed by the accused/respondents, who informed they would pay the entire amount by cash within 14.4.2004, but no payment was made as per assurance.

Demand Notice was issued on 17.4.2004, demanding payment as required under the Negotiable Instruments Act. In response to the demand notice, a letter was sent by the Learned Lawyer of the accused/respondents.

iii. CRA No. 89 of 2009 related to

- a) Cheque Nos. 290208 for Rs.1,00, 000/- and
- b) Cheque No. 290209 for Rs.1,00,000/-

Cheque No.590208 dated 29.12.2003 and Cheque No.590209 dated 02.02.2004 were deposited by the appellant on 3.6.2004 and both the cheques were returned by the banker with the remarks "Exceeds Arrangement".

Since no payments were made by the accused/respondents, even after demand notice proceedings were initiated under Section 138 of the Negotiable Instruments Act.

- iv. Examination u/s 313 Cr.P.C.:- Accused Respondents Shyamal Polley and Tapan Polley admitted that they issued the cheques. They also did not dispute the agreement. They stated they would give defence deposition however the only defence they took was "*The plaintiff sent me a notice. I have given reply to that notice*".
- v. Learned Magistrate acquitted the accused/respondents relying upon the letter sent in reply to the demand notice of the appellant wherefrom the Learned Magistrate came to a conclusion that the accused/respondents paid Rs.3,22,000/- to the appellant without examining any witness or any documentary proof to that effect.
- vi. Reply to demand Notice Exhibit 'A' exhibited on behalf of accused:-
  - a) Cheque no.590205 amounting to Rs.1,50,000/- was honoured. (It was admitted by the appellant also)

- b) Accused persons alleged the complainant on 16.08.2003 requested them to pay Rs.1,50,000/- as he was in urgent need. On 19.08.2003, the accused persons paid Rs.1,50,000/- in cash to the appellant.

No document or witness regarding payment of Rs.1,50,000/- in cash was adduced by the accused persons. Not even the daily income expense book of the factory was produced.

- c) Accused persons further claimed that Rs.22,000/- was paid to the appellant through cheque.

Cheque number, date of issuance and the date of clearing of cheque was not mentioned. Bank statement regarding payment of Rs.22,000/- to appellant was not produced in court.

- d) No liability of accused persons for Cheque No.590291 amounting to Rs.50,000/- as the same was not a part of the agreement. Counter claim by accused, the said cheque was issued for purchasing old furniture and two-wheeler of the appellant but after receiving the cheque the appellant did not provide the same to the accused.

No witness or document produced to support such claim nor any case initiated for return of the amount or the furniture and two-wheeler.

The cheque was not a part of the agreement but was issued for repayment of subsequent loan of Rs.50,000/-.

In order to make counter claim, the accused had to rebut his burden of liability for issuance of cheque, which they failed.

- vii. The Learned Magistrate considering Exhibit 'A' as sacrosanct came to the conclusion that the liability of the accused was Rs.5,00,000/- and Rs.3,22,000/-(1,50,000 +1,50,000+22,000) already paid as such the liability of the appellant could be only Rs.1,78,000/- which the accused wanted to pay to the appellant but was refused by appellant.
- viii. In the instant case, the order of acquittal required to be set aside by this Hon'ble Court for the following reasons:-
  - a) Total loan provided to the accused/respondents: Rs.5,00,000/- + Rs.50,000/- Rs.5,50,000/-.
  - b) Cheque No.590205 amounting to Rs.1,50,000/- was honoured. However, the other cheques total amounting to Rs.4,00,000/- were dishonoured.
  - c) Execution of Agreement for repayment of loan and issuance of cheques admitted by the accused/respondents.
  - d) Cheques were dishonoured due to insufficient funds.
  - e) Accused/respondents admitted during their examination under Section 313 Cr.P.C. that they issued the cheques.
  - f) Demand notice was issued within the stipulated time period admitted by the accused respondents.

g) No payments were made by the accused/respondents even after receiving the demand notice.

h) The Learned Magistrate erred in considering Exhibit 'A' as gospel truth without evidence in support of such claim.

9. The Learned Advocate representing the respondent nos. 2, 3 and 4 submitted that the Learned Trial Court, after considering the evidence and materials on record, had rightly acquitted the accused persons and the present appeal should be dismissed.

10. A circumspection of evidence of the prosecution witnesses revealed as follows:-

- i. PW-1 stated he had his own flat previously at Anandam Housing Society, Canal Side Road, Ichapur, Howrah. One D.K. Chakarborty introduced all the 3 accuseds with him in the matter of Bank Loan. During that time, he took voluntary retirement from S.B.I., as Chief Manager Marketing. They had visiting timing to each of their house, thereby developing family relation.

The accused persons had the business of manufacture of Sluice Valves in name of M/s Parbati Iron Foundry. He helped the accused persons to obtain Bank Loan. Due to dearth of working capital, the accused persons took loan for many occasions. They also made some payments also and there was an account to that effect.

Accused persons at that time issued a cheque for Rs.31,000/-. Regarding rest of the amount there was one agreement and they gave

5 postdated cheques, (Rs.1,50,000/-, Rs.75,000/- , Rs.75,000/- and two cheques of Rs.1,00,000/- each). That was the said agreement signed by him and marked as Exbt.-1. In connection with that case he filed 3 cheques, Rs.75,000/- dated 09.09.2003, Rs.75,000/- dated 30.10.03 & Rs.50,000/- dated 29.09.03 all drawn on S.B.I. in his favour issued by the accused persons on behalf of Parboti Iron Foundry and marked as Exbts.-2, 2(a), 2(b). There was no mention of cheque (Exbt.-2(b)) in the agreement. After above agreement the said cheque was issued to him.

All the three cheques were deposited with S.B.I., Kadamtala for encashment on two separate dates. But those were dishonored due to insufficiency of funds. There were the returned deposit slips dated 25.03.04 and marked as Exbts.3 & 3(a). Another returned deposit slip dated 12.04.04 was marked as Exbt.-3(b). There were the three return memos (Exbt.-4, 4(a) and 4(b)). Subsequently, he approached the accused and demanded the money, when the accused assured within 14.04.2003 they would pay the entire amount, however they did not pay the amount.

Subsequent thereto, lawyer's notice dated 17.04.04 was sent to the accused under registered post with A/D. He himself typed the same. There were the 4 postal receipt and marked as Exbt.-6, 6(a), 6(b) and 6(c). Those were the 4 A/D cards and marked as Exbt.-7, 7(a), 7(b) & 7(c).

In spite of notice the accused did not repay the amount. Accused replied on receiving the notice. The reply letter dated 27.04.04 received by him was marked as Exbt.-8. All statement of Exbt.-8 were not correct.

- ii. PW-1 in his cross-examination stated during the month of August/September, 2001 first transaction was made in between him and the accused.
- iii. Further cross-examination of PW-1 was resumed and he stated on 27.07.03 there was an agreement in between himself and the accused persons wherein a sum of Rs.5,00,000/- was decided to be outstanding in his favour and at that time five cheques were issued by the accused persons in his favour. There was another case being no.957/04 which was pending before 6<sup>th</sup> J.M., Howrah in respect to two cheques relating to the present agreement. The present case concerned only three cheques of which two cheques related to the present agreement. Another cheque for Rs.50,000/- did not relate to that agreement and the subsequent one.
- iv. Further cross-examination of PW-1 was resumed on 07.01.06 and he stated that the basis of his claim was an agreement between the parties held on 27.07.03 for Rs.5,00,000/-. On the basis of said agreement accused issued cheque for repayment of loan amount out of which one cheque amounting of Rs.1,50,000/- being cheque no.590205 dated 29.08.03 was encashed. His Learned Lawyer issued a letter to the accused company on 17.04.04 intimating return of a

cheque of Rs.1,50,000/- due to payment made in the due time. However he meant to send the cheque to the bank through the accused person by way of attaching pay in slip signed by him together with the cheque. He gave instruction to his Learned Lawyer to write a letter. He did not send any Learned Lawyer's letter to the accused. When the wrong in earlier lawyer's letter was detected stating the rectification of earlier letter, Lawyer for the accused, namely Tarashankar Panchal wrote him a letter stating a fact that the accused has paid Rs.22,000/- to him. After returning the cheque from the bank, he demanded the payment of cheque amount orally to the accused person after two days of such return. He had gone through the partnership deed of the accused firm. He did not know the portfolio of the accused persons in the said firm. Accordingly, he did not specify such portfolio in his petition. After making such oral demand, he sent a written demand notice through lawyer again to the accused person.

- v. PW-1 in his further cross-examination on 18.02.2006 stated in 668C/2004 he filed a lawyer's letter issued by Advocate-Tarashankar Pachal addressed to his lawyer Arindam Mukherjee. Said Advocate's letter was issued on behalf of Kashinath Polley and others. The said letter was sent shown to the witness. The document was admitted into evidence for the accused as Exbt. 'A'. Document filed by the prosecution was admitted into evidence for defence. On the date of agreement, 5 cheques were issued. PW-1 had mentioned the

particulars of those cheques in his petition. The petition in Case No. 668C/2004 was marked as Exbt. 'B' for the accused. At that time his lawyer was Arindam Mukherjee. The lawyer's letter addressed to M/s. Parbati Iron Foundry dated 17.04.2004 wherein he had mentioned the particulars of those 5 cheques (Exbt.5 was shown to the witness). He did not mention any other cheques in his Advocate's letter being Ext.5 save and except those 5 cheques issued on the date of agreement. The copy of letter issued by Tarashankar Pachal dated 27.4.2004 addressed to his lawyer Arindam Mukherjee. The copy of the letter was admitted into evidence for accused as Exbt. 'A'. He had also mentioned the particulars of 5 cheques issued at the time of agreement in his petition in Complaint Case No.957C/04. The petition in 957C/04 was marked as Exbt. 'B' as a whole. He had filed the copy of letter issued by his lawyer Arindam Mukherjee dated 22.06.2004 in Complaint Case No. 957C/04 also. The copy of said lawyer's letter Exbt.5 was identified. The copy of the lawyer's letter was marked as Exbt.'C'. (Document filed by the complaint was issued by the accused).

11. The agreement for repayment of loan is replicated as follow:-

**"AGREEMENT FOR REPAYMENT OF LOAN"**

*THIS AGREEMENT is made on this 27<sup>th</sup> day of July 2003 between Sarvashri Kashinath Polley, Shyamal Polley (alias Haradhan Polley) and Tapan Polley (alias Pradip Polley), being the Partners of the Firm PARBOTI IRON FOUNDRY (Factory : 32, Laxminarayan Chakraborty*

*Lane ; Office : 12, Narasingha Dutta Road, Kadamtala, Howrah-711101) hereinafter referred to as the FIRST PARTY*

*AND*

*Shri Tapan Kumar Chatterjee, son of Late Tarapada Chatterjee, residing at "ANANDAM", Drainage Canal Road (Radha Gobinda Road) Ichapur Canalside, Howrah-711104, hereinafter referred to as the SECOND PARTY,*

*WHEREAS, this AGREEMENT pertains to the repayment of the loan amount of Rs.5 lacs by the FIRST PARTY to the SECOND PARTY within the time frame as set out in the paragraphs hereinbelow:-*

*NOW THIS AGREEMENT HEREBY PROVIDES :-*

- (1) The First Party had taken a total amount of Rs.5 lacs (Rupees five lacs only) from the Second Party as loan to meet their working capital requirement for carrying on their business smoothly.*
- (2) Now by way of an assurance to repay the loan amount, the instant agreement is being executed whereby and whereunder, the First Party undertakes to repay the loan amount by 5 (five post-dated cheques, duly executed of their Cash Credit Account No.01650061047 maintained with State Bank of India; Kadamtala Branch, Howrah and handed over to the second party. The loan will be repaid in the mode and manner hereinafter provided, but not later than 5<sup>th</sup> February 2004.*

*Instalment*

*Payment Schedule – Particulars of*

*Post-dated cheques by which repayment  
is / will be made*

*1<sup>st</sup>*

*Cheque No.590205 dated 28/08/2003  
for Rs.1,50,000/-*

*2<sup>nd</sup>*

*Cheque No.590206 dated  
29/09/2003  
for Rs.75,000/-*

*3<sup>rd</sup>*

*Cheque No.590207 30/10/2003*

*for Rs.75,000/-*

*4<sup>th</sup>*

*Cheque No.590208 dated 29/12/2003  
for Rs.1,00,000/-*

*5<sup>th</sup>*

*Cheque No.590209 dated 02.02.2004  
for Rs.1,00,000/-*

*3. Should the First Party commit default in the payment of any single instalment, i.e. any of the above cheques is dishonoured by the Bank within the time as stipulated hereinabove, in that event, the Second Party shall be entitled forthwith to recover the loan amount with costs and incidental charges. The Second Party also reserves his right to proceed against the First Party legally, if so advised.*

*4. The First Party shall remain strictly bound by the terms and conditions of this Agreement as indicated hereinabove in the foregoing paragraphs 1 to 3.*

*.....”*

12. In **Mainuddin Abdul Sattar Shaikh Vs. Vijay D. Salvi**<sup>1</sup>, the Hon’ble Supreme Court held as follows:-

*“... 9. From a bare reading of Section 138 of the NI Act, the following essentials have to be met for attracting a liability under the section. The first and foremost being that the person who is to be made liable should be the drawer of the cheque and should have drawn the cheque 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 discharge in whole or part, of any debt or other liability. We see that from the bare text of the section it has been stated clearly that the person, who draws a cheque on an account maintained by him, for paying the payee, alone attracts liability.”*

13. In **Alka Khandu Avhad Vs. Amar Syamprasad Mishra and Anr.**<sup>2</sup>, the Hon’ble Supreme Court held as follows:-

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<sup>1</sup> (2015) 9 SCC 622

“... **9.** On a fair reading of Section 138 of the NI Act, before a person can be prosecuted, the following conditions are required to be satisfied:

9.1. That the cheque is drawn by a person and on an account maintained by him with a banker.

9.2. For the 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.

9.3. The said cheque 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.

**10.** Therefore, a person who is the signatory to the cheque and the cheque is drawn by that person on an account maintained by him and the cheque has been issued for the discharge, in whole or in part, of any debt or other liability and the said cheque has been returned by the bank unpaid, such person can be said to have committed an offence. Section 138 of the NI Act does not speak about the joint liability. Even in case of a joint liability, in case of individual persons, a person other than a person who has drawn the cheque on an account maintained by him, cannot be prosecuted for the offence under Section 138 of the NI Act. A person might have been jointly liable to pay the debt, but if such a person who might have been liable to pay the debt jointly, cannot be prosecuted unless the bank account is jointly maintained and that he was a signatory to the cheque.”

14. In ***Dashrathbhai Trikambhai Patel vs. Hitesh Mahendrabhai Patel and Anr.***<sup>3</sup>, the Hon’ble Supreme Court held as follows:-

“... **11.** Section 138 of the Act provides that a drawer of a cheque is deemed to have committed the offence if the following ingredients are fulfilled:

(i) A cheque drawn for the payment of any amount of money to another person;

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<sup>2</sup> (2021) 4 SCC 675

<sup>3</sup> (2023) 1 SCC 578

- (ii) *The cheque is drawn for the discharge of the “whole or part” of any debt or other liability. “Debt or other liability” means legally enforceable debt or other liability; and*
- (iii) *The cheque is returned by the bank unpaid because of insufficient funds. However, unless the stipulations in the proviso are fulfilled the offence is not deemed to be committed. The conditions in the proviso are as follows:*
  - (i) *The cheque must be presented in the bank within six months from the date on which it was drawn or within the period of its validity;*
  - (ii) *The holder of the cheque must make 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 from the receipt of the notice from the bank that the cheque was returned dishonoured; and*
  - (iii) *The holder of the cheque fails to make the payment of the “said amount of money” within fifteen days from the receipt of the notice.*

**12.** *The primary contention of the first respondent is that the offence under Section 138 was not committed since the amount that was payable to the appellant, as on the date the cheque was presented for encashment, was less than the amount that was represented in the cheque. The question before this Court is whether Section 138 of the Act would still be attracted when the drawer of the cheque makes a part-payment towards the debt or liability after the cheque is drawn but before the cheque is encashed, for the dishonour of the cheque which represents the full sum.*

**13.** *It must be noted that when a part-payment is made after the issuance of a post-dated cheque, the legally enforceable debt at the time of encashment is less than the sum represented in the cheque. A part-payment or a full payment may have been made between the date when the debt has accrued to the date when the cheque is sought to be encashed. Thus, it is crucial that we refer to the law laid down by this Court on the issuance of post-dated cheques and cheques issued for the purpose of security.*

**14.** *In Indus Airways (P) Ltd. v. Magnum Aviation (P) Ltd. [Indus Airways (P) Ltd. v. Magnum Aviation (P) Ltd., (2014) 12 SCC 539 : (2014) 5 SCC (Civ) 138 : (2014) 6 SCC (Cri) 845] , the issue before a two-Judge Bench of this Court was whether dishonour of post-dated cheques which were issued by the*

*purchasers towards “advance payment” would be covered by Section 138 of the Act if the purchase order was cancelled subsequently. It was held that Section 138 would only be applicable where there is a legally enforceable debt subsisting on the date when the cheque is drawn. In Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Ltd. [Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Ltd., (2016) 10 SCC 458 : (2017) 1 SCC (Civ) 126 : (2017) 1 SCC (Cri) 149] , the respondent advanced a loan for setting up a power project and post-dated cheques were given for security. The cheques were dishonoured and a complaint was instituted under Section 138. Distinguishing Indus Airways [Indus Airways (P) Ltd. v. Magnum Aviation (P) Ltd., (2014) 12 SCC 539 : (2014) 5 SCC (Civ) 138 : (2014) 6 SCC (Cri) 845] , it was held that the test for the application of Section 138 is whether there was a legally enforceable debt on the date mentioned in the cheque. It was held that if the answer is in the affirmative, then the provisions of Section 138 would be attracted.*

...

**16.** *Based on the above analysis of precedent, the following principles emerge:*

*16.1. Where the borrower agrees to repay the loan within a specified timeline and issues a cheque for security but defaults in repaying the loan within the timeline, the cheque matures for presentation. When the cheque is sought to be encashed by the debtor and is dishonoured, Section 138 of the Act will be attracted.*

*16.2. However, the cardinal rule when a cheque is issued for security is that between the date on which the cheque is drawn to the date on which the cheque matures, the loan could be repaid through any other mode. It is only where the loan is not repaid through any other mode within the due date that the cheque would mature for presentation.*

*16.3. If the loan has been discharged before the due date or if there is an “altered situation”, then the cheque shall not be presented for encashment.*

...

**20.** *The judgments of this Court on post-dated cheques when read with the purpose of Section 138 indicate that an offence under the provision arises if*

*the cheque represents a legally enforceable debt on the date of maturity. The offence under Section 138 is tipped by the dishonour of the cheque when it is sought to be encashed. Though a post-dated cheque might be drawn to represent a legally enforceable debt at the time of its drawing, for the offence to be attracted, the cheque must represent a legally enforceable debt at the time of encashment. If there has been a material change in the circumstance such that the sum in the cheque does not represent a legally enforceable debt at the time of maturity or encashment, then the offence under Section 138 is not made out.*

...

**26.** *Section 138 of the Act stipulates that if the cheque is returned unpaid by the bank for the lack of funds, then the drawee shall be deemed to have committed an offence under Section 138 of the Act. However, the offence under Section 138 of the Act is attracted only when the conditions in the provisos have been fulfilled. Proviso (b) to Section 138 states that a notice demanding the payment of the “said amount of money” shall be made by the drawee of the cheque.*

...

**29.** *Section 138 creates a deeming offence. The provisos prescribe stipulations to safeguard the drawer of the cheque by providing them the opportunity of responding to the notice and an opportunity to repay the cheque amount. The conditions stipulated in the provisos need to be fulfilled in addition to the ingredients in the main provision of Section 138. It has already been concluded above that the offence under Section 138 arises only when a cheque that represents a part or whole of the legally enforceable debt at the time of encashment is returned by the bank unpaid. Since the cheque did not represent the legally enforceable debt at the time of encashment, the offence under Section 138 is not made out.*

...

**30.** *The appellant contends that the purpose of Section 138 of the Act would be defeated if the dishonour of the cheque issued for security is not included*

*within the purview of Section 138 where the payment of a part of the cheque amount is made. It was contended that it would lead to a possibility where the drawer of the cheque could evade prosecution under Section 138 by paying a small amount of the debt while defaulting on the remaining payment. Section 56 stipulates that if there is an endorsement on a negotiable instrument that a part of the sum mentioned in the cheque has been paid, then the instrument may be negotiated for the balance. Section 56 reads as follows:*

*“56. Indorsement for part of sum due.—No writing on a negotiable instrument is valid for the purpose of negotiation if such writing purports to transfer only a part of the amount appearing to be due on the instrument; but where such amount has been partly paid, a note to that effect may be indorsed on the instrument, which may then be negotiated for the balance.”*

**32.** *A Division Bench of the Kerala High Court has held in Joseph Sartho v. G Gopinathan [Joseph Sartho v. G. Gopinathan, 2008 SCC OnLine Ker 254 : (2008) 3 KLJ 784] that since the representation in the cheque was for a sum higher than the amount that was due on the date that it was presented for encashment, the drawer of the cheque cannot be convicted for the offence under Section 138 of the Act. The High Court of Delhi addressed the same issue in Alliance Infrastructure Project (P) Ltd. v. Vinay Mittal [Alliance Infrastructure Project (P) Ltd. v. Vinay Mittal, 2010 SCC OnLine Del 182 : ILR (2010) 3 Del 459] . The High Court observed that when part-payment is made after the cheque is drawn, the payee has the option of either taking a new cheque for the reduced amount or by making an endorsement on the cheque acknowledging that a part-payment was made according to the provisions of Section 56 of the Act. It was also held that the notice of demand which requires the drawer of the cheque to make payment of the whole amount represented in the cheque despite receiving part repayment against the sum, before the issue of notice, cannot be valid under Section 138(b) of the Act. A similar view was taken by the High Court of Gujarat in Shree*

*Corpn. v. Anilbhai Puranbhai Bansal [Shree Corpn. v. Anilbhai Puranbhai Bansal, (2018) 2 GLH 105]* .

**33.** *Under Section 56 read with Section 15 of the Act, an endorsement may be made by recording the part-payment of the debt in the cheque or in a note appended to the cheque. When such an endorsement is made, the instrument could still be used to negotiate the balance amount. If the endorsed cheque when presented for encashment of the balance amount is dishonoured, then the drawee can take recourse to the provisions of Section 138. Thus, when a part-payment of the debt is made after the cheque was drawn but before the cheque is encashed, such payment must be endorsed on the cheque under Section 56 of the Act. The cheque cannot be presented for encashment without recording the part-payment. If the unendorsed cheque is dishonoured on presentation, the offence under Section 138 would not be attracted since the cheque does not represent a legally enforceable debt at the time of encashment.*

**34.** *In view of the discussion above, we summarise our findings below:*

*34.1. For the commission of an offence under Section 138, the cheque that is dishonoured must represent a legally enforceable debt on the date of maturity or presentation.*

*34.2. If the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encashed upon maturity, then the legally enforceable debt on the date of maturity would not be the sum represented on the cheque.*

*34.3. When a part or whole of the sum represented on the cheque is paid by the drawer of the cheque, it must be endorsed on the cheque as prescribed in Section 56 of the Act. The cheque endorsed with the payment made may be used to negotiate the balance, if any. If the cheque that is endorsed is dishonoured when it is sought to be encashed upon maturity, then the offence under Section 138 will stand attracted.*

*34.4. The first respondent has made part-payments after the debt was incurred and before the cheque was encashed upon maturity. The sum of rupees twenty lakhs represented on the cheque was not the “legally enforceable debt” on the date of maturity. Thus, the first respondent cannot be deemed to have committed an offence under Section 138 of the Act when the cheque was dishonoured for insufficient funds.*

*34.5. The notice demanding the payment of the “said amount of money” has been interpreted by judgments of this Court to mean the cheque amount. The conditions stipulated in the provisos to Section 138 need to be fulfilled in addition to the ingredients in the substantive part of Section 138. Since in this case, the first respondent has not committed an offence under Section 138, the validity of the form of the notice need not be decided.”*

15. Indisputably, the opposite party no.2 obtained a loan amount of Rs.5 lakhs as per the agreement dated 27.07.2003 as stated above. The entire sum of Rs.5 lakhs was to be re-paid through the cheques as elicited above. The appellant accepted to have received Rs.1,50,000/- as part payment of Rs.5 lakhs taken as a loan, through cheque no.590205 dated 28.08.2003. The appellant’s claim of an erroneous fact stated in the Advocate’s letter was not rectified through a subsequent communication, raised for the first time in the complaint as aforesaid.
16. The amount of Rs.1,50,000/- to have been paid in cash was subsequently denied by the appellant along with a further payment of Rs.22,000/- The moot question to be resolved in the perspective of the instant case is whether part payment on the part of the opposite party no.2 against the total loan amount of Rs.5 lakhs, will in totality, entail the legally enforceable debt to the extent of Rs.5 lakhs on the date of issuance of notice under Section 138

of the Negotiable Instruments Act indicating the cheque number being 590205 dated 28.08.2003 which has been admittedly disbursed in favour of the appellant prior to the notice under Section 138 of the Negotiable Instruments Act been issued.

17. The entire gamut of evidence and the materials on record signify a dispute between the parties with regard to admission and denial of cash payment of Rs.1,50,000/- and a further amount of Rs.22,000/- which has been negated by the appellant to have received and asserted by the opposite party no.2 to have paid. Notwithstanding the aforesaid disputation between the parties on the authenticity and veracity on their individual statement without corroborative evidence to have been adduced by either of the parties the cheque amount of Rs.1,50,000/- against cheque no.590205 dated 28.08.2003, could not be denied by the appellant nor could be disproved through bank account details.

18. In view of the aforesaid decisions of the Hon'ble Supreme Court as cited above since a part payment with regard to the loan amount had been satisfied, the notice to have been issued under Section 138 of the Negotiable Instruments Act against the cheques cumulatively to the extent of Rs.5 lakhs cannot be sustained. The reasoning of the Learned Trial Court, accordingly, is not interfered with.

19. The appellant could have alternatively availed of efficacious remedy at the appropriate forum to secure the disputed payment of balance amount of Rs.3,50,000/- which neither the opposite party could prove to have paid

apart from mere verbal assertion devoid of documentary evidence nor accepted by the appellant to have received from the same.

20. Under the facts and circumstances, the instant criminal appeal being CRA 88 of 2009 is dismissed.

21. There is no order as to costs.

22. The Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

23. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

**(Ananya Bandyopadhyay, J.)**