IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No.661 of 2023

Nalini Kanta Nayak …. **Petitioner**
Mr. Tanmaya Kumar Mohanty, Advocate

-Versus-

Prasanna Kumar …. **Opposite Party**
Mr. Amit Prasad Bose, Advocate

CORAM:
JUSTICE R.K. PATTANAIK
DATE OF HEARING: 09.12.2025
DATE OF JUDGMENT:23.03.2026

1. Instant revision filed under Section 401 read with Section 397 Cr.P.C. is at the behest of the petitioner assailing the impugned judgment dated 2nd May, 2022 as at Annexure-2 passed in connection 1CC Case No.1190 of 2015 (T.R. No.137 of 2019) confirmed in Criminal Appeal No.19 of 2022 by judgment dated 4th November, 2023 i.e. Annexure-2 passed by the learned 3rd Additional Sessions Judge, Bhubaneswar for having convicted him for an offence punishable under Section 138 of the NI Act followed by a sentence and to pay compensation of Rs.30 lac in terms of Section 357(3) Cr.P.C. with a default sentence on the grounds inter alia that the order of conviction cannot be sustained in law and hence, liable to be interfered with and set aside in the interest of justice.

2. The opposite party filed the complaint in 1CC Case No.1190 of 2015 alleging therein that the petitioner though a power of attorney holder managed to sell away his property and in that connection, when it was protested, as such authorization was only to look after the property and not for any other purposes and for having received the consideration money of Rs.40 lac issued a cheque of Rs.20 lac dated 24th February, 2015, it could not be encashed and returned back dishonoured with an intimation and endorsement that the account has insufficient fund received on 3rd March, 2015 and thereafter, despite notice to the latter to pay back the cheque amount within fifteen days, the same was not responded.

3. A copy of the complaint is at Annexure-1. On the basis of such complaint, the opposite party alleged that the petitioner should be criminally prosecuted for dishonour of cheque in failing to discharge the liability arising out of the alleged transaction. Considering the evidence received only from the side of the opposite party, the learned J.M.F.C., Bhubaneswar reached at a conclusion that the case under Section 138 of the NI Act is established and sentenced the petitioner thereunder and also directed him to pay compensation. The petitioner being aggrieved of filed the appeal before the learned court below, but was dismissed vide Annexure-2 confirming the order of conviction and sentence awarded against him. Such confirmation of conviction order is presently under challenge by the petitioner on the premise that there has been no any debt or liability for him to discharge and that apart, a civil suit is pending before the court of learned Civil Judge (Senior Division), Bhubaneswar in respect of the property involved, wherein, the opposite party is seeking a declaration to the effect that the Power of Attorney dated 17th January, 2014 to create a 3rd party interest without passing any consideration to be bad in law and to grant permanent injunction against the petitioner and purchaser, namely, defendant No.2 and their agents from interfering in its peaceful possession over the same with such other reliefs sought for and in that view of the matter, any such conviction and sentence under Section 138 of the NI Act could not have been directed by the learned courts below, hence, the same is liable to be quashed.

4. Heard Mr. Mohanty, learned counsel for the petitioner and Mr. Bose, learned counsel for the opposite party.

5. Perused the LCR.

6. According to Mr. Mohanty, learned counsel for the petitioner, the order of conviction and sentence is not legally tenable in absence of any liability from being discharged with and that apart, the alleged cheque was issued for the purpose of security but it was misutilized by the opposite party. It is also submitted that the opposite party having instituted the suit in C.S. No.2239 of 2015 pending disposal in the court of leaned Civil Judge (Senior Division), Bhubaneswar, wherein, there is a status quo order in IA No.281 of 2015, the petitioner is unable to get back the money from the buyer further to hand it over to the opposite party and in that connection, the cheque in question was issued as a security and the same stood dishonoured and under such circumstances, the impugned order of conviction and sentence vide Annexure-1 cannot be justified so also the decision of the learned court below in appeal at Annexure-2.

7. On the contrary, Mr. Bose, learned counsel for the opposite party would submit that the learned courts below did not commit any error or illegality in reaching at a conclusion that the petitioner is guilty of dishonour of cheque drawn and issued by him to the opposite party and upon its presentation before the Bank failed to be enchased for an amount of Rs.20 lac which is a part of consideration money said to have been received from the buyer, namely, Debasmita Mishra. The further submission is that for the alleged default and when there was a liability to discharge and in that connection, the alleged cheque was issued by the petitioner, in absence of any rebuttal evidence, the learned courts below left with no option but to hold that he has committed an offence punishable under Section 138 of the NI Act.

8. In reply to the above, Mr. Mohanty, learned counsel for the petitioner would submit that the opposite party executed a General Power of Attorney dated 17th January, 2014 in respect of the plot in favour of the petitioner, for which, the latter handed over a security cheque for an amount of Rs.20 lac and assured to pay the consideration amount after selling of the same and thereafter, as against the transaction, the civil suit was filed challenging the Power of Attorney executed and in such view of the matter, no case under Section 138 of the NI Act is made out but the learned courts below reached at a conclusion to the contrary.

9. A copy of the plaint in C.S. No.2239 of 2015 is in the LCR and it reveals that the opposite party has instituted it against the petitioner and buyer with a declaratory relief sought for therein with injunction and as earlier stated, it is in respect of the Power of Attorney executed on 17th January, 2014 to be declared as bad in law against creation of a 3rd party interest without passing of consideration directly to him.

10. As far as issuance of cheque and receipt of the same by the opposite party, it is not denied by the petitioner, however, the claim is that the same was handed over as a security. The opposite party proved the presentation of cheque in the Bank with a deposit slip as Ext.4 and intimation regarding its dishonour with a return memo i.e. Ext.5. The original cheque has been marked as Ext.3 from the side of the opposite party. The signature of the petitioner on the alleged cheque has been marked as Ext-3/1. The issuance of the cheque or for that matter, signature of the petitioner thereon has not been disputed. The Power of Attorney executed in favour as the petitioner was proved as Ext.2. The sale deed in question in favour of buyer is marked as Ext.1. The claim of the opposite party is that the Power of Attorney was managed by the petitioner, who was authorized only to look after the property without any such rights for its disposal, hence, the suit. The opposite party has filed the suit challenging the General Power of Attorney and for a declaration that the same is not valid without passing of consideration money in his favour. The fact of execution of sale deed is not in denial. As earlier stated, that the drawal of the cheque by the petitioner has not been disputed either. The only ground is that the cheque dated 24th February, 2015 was drawn and issued to the opposite party as a security. But, the record reveals that such a plea was never advanced from the side of the petitioner even in response to the pleader notice i.e. Ext.6 said to have been duly received by him proved vide Exts.6, 7 and 8. No any evidence was adduced from the petitioner with such a plea that the cheque i.e. Ext.3 had not been received in discharge of any liability but was merely a security deposit and therefore, the cheque having been issued and not honoured by the Bank for insufficient found, any such notice thereafter without a response received from the drawer, according to the Court, a presumption would arise to the effect that an offence under Section 138 of the NI Act has been committed. In fact, a reverse presumption is to apply for the drawer of the cheque to prove and establish that there was no any lawful debt or liability to discharge with and in that connection, the cheque in question had been issued. In absence of any evidence from the side of the petitioner and when the opposite party and two other witnesses withstood cross-examination, it has to be concluded that a case under Section 138 of the NI Act is made out. When issuance of cheque has been admitted by the petitioner but claimed to be for a different purpose and not towards discharge of any liability and its dishonour is corroborated by Ext.5 and non-payment of the amount despite a pleader notice as per Ext.6, the Court is left with no other choice except to confirm view expressed by the learned courts below.

11. The contention of Mr. Mohanty, learned counsel for the petitioner is that the fate of the criminal action is to depend on the result in the suit and the learned court below under the circumstances leading to the execution of the sale deed which was within the knowledge of the opposite party though denied to have executed the Power of Attorney on the terms agreed upon, the order of conviction for the offence under Section 138 of the NI Act and sentence, as has been directed, is to prejudice him and hence, it has to be interfered with. The further contention is that the order of conviction is likely to influence the findings of the civil court and therefore, it ought to have been taken judicial notice of at least by the learned court below. Mr. Bose, learned counsel for the opposite party, on the other hand, submits that a criminal action shall lie irrespective of the pendency of the suit between the parties involving the buyer with any such relief sought for therein. According to the Court, a case under Section 138 of the NI Act for the dishonour of cheque either as a part of consideration money or speculatively an amount received by the power of attorney holder can be entertained, even if, a civil suit is pending between the parties which has a bearing vis-à-vis validity of the sale.

12. A criminal action is an independent remedy and can be pursued simultaneously even during and in continuation of a civil litigation between the parties as both serve distinct purpose. When a cheque is issued in connection with a transaction which is an outcome of a dispute between the real owner and the power attorney holder and it has been in respect of a liability for the latter having received part or full of the consideration money, a presumption of existence of debt would arise in view of Sections 118 and 139 of the NI Act and that it was issued for a legally enforceable liability and in that case, the burden shifts on the drawer to rebut such presumption. The sale deed is not void ab initio. The challenge at the instance of the opposite party is to the Power of Attorney executed by him in favour of the petitioner, who allegedly without any such authorization said to have disposed of the property to a 3rd party. So, to say, the sale deed is a voidable one at the instance of the opposite party and hence, to be declared as void. In such view of the matter, if the sale is merely voidable, the purchaser or for that matter, the power of attorney holder having received a part of the consideration money as an existing liability to pay back the cheque amount and when it is dishonoured, a cause of action would certainly arise for a criminal prosecution under Section 138 of the NI Act.

13. If ultimately the sale deed in question is found to be invalid, the underline debt may cease to exist and in such a situation, it could lead to acquittal of the drawer of the cheque for any such offence under Section 138 of the NI Act. While a case under Section 138 of the NI Act can proceed pending disposal of the suit but if the civil court decides that the sale is void with a decree therein holding that the petitioner had limited rights in dealing with the property, it would automatically lead to closure of the criminal action. The above aspect of the matter cannot be entirely brushed aside as has been rightly flagged and highlighted upon by Mr. Mohanty, learned counsel for the petitioner.

14. At the same time, when according to the opposite party, an amount of Rs.40 lac was received by the petitioner but in return, the alleged cheque was issued and the same could not be honoured by the Bank for insufficiency of fund and since, the plea of the petitioner regarding the cheque that it was issued as a security was not proved by any evidence, the inevitable conclusion would be that for the debt, it was drawn by him, he being the power of attorney holder. Under the above circumstances, it has to be held by the Court that the petitioner in consequence of a liability to discharge and having issued the alleged cheque was under obligation to pay back the amount to the opposite party and having failed so, he is liable under Section 138 of the NI Act.

15. But, according to the Court, it is indeed a genuine concern on the part of the petitioner, who is up against an order of conviction when the fate of the sale deed is dependent on the result of the suit challenging the legality of the Power of Attorney executed in his favour by the opposite party. It may be said that a criminal action on the anvil of a civil suit pending between the parties affecting the validity of a sale would involve complex considerations. It is not that a court is to decline any such action under Section 138 of the NI Act solely for the reason that such a suit is pending disposal. However, the concern is that in the event, the suit is decreed in favour of the opposite party, the sale deed would become invalid or unworkable and in such a situation, the opposite party cannot have any demand against the petitioner on the basis of the alleged cheque. In that case, the buyer may demand the money back either from the opposite party or petitioner being the power of attorney holder and allegedly for having received the consideration money either in part or full. If the suit is dismissed, it would result in validation of the sale executed in respect of the property and in such eventuality, the petitioner shall have to be held having the liability to honour the cheque having received the consideration money from the buyer. If the suit is decreed and the sale becomes invalid, it would result in an irreversible consequence since the petitioner has already been found guilty under Section 138 of the NI Act. Though, the Court is of the view that the criminal prosecution is valid on the basis of the complaint filed and for the petitioner having miserably failed to establish the plea that the alleged cheque was issued towards security but at the same time, the conclusion is that the order of conviction and sentence if not modified would have an adverse consequence of irreversible nature and could further lead to legal complications.

16. In the peculiar facts and circumstances of the case discussed hereinabove, the Court is of the view that the order of conviction under Section 138 of the NI Act is to be upheld however with modification as to the sentence and compensation awarded against the petitioner. It would be just and proper, if the petitioner is awarded fine of Rs.20,000/- and direction for him to pay a compensation of Rs.22 lac in terms of Section 357(3) Cr.P.C. with a default sentence against the cheque amount of Rs.20 lac to be kept in a fixed deposit in the name of Registrar, Civil Courts, Bhubaneswar with any Nationalized Bank renewable from time to time payable to the opposite party subject to outcome in the suit.

17. Hence, it is ordered.

18. In the result, the revision stands disposed of. As a necessary corollary, the order of conviction in 1CC Case No.1190 of 2015 (T.R. No.137 of 2019) confirmed in Criminal Appeal No.19 of 2022 vide Annexure-2 by the learned 3rd Additional Sessions Judge, Bhubaneswar is hereby modified to the extent as aforesaid directing the petitioner to pay a fine of Rs.20,000/- and compensation of Rs.22 lac, with a default sentence of three months SI, to be deposited in terms of the order of the learned J.M.F.C., Bhubaneswar and if not deposited within a period of next three months, it shall be realized according to law. It is further directed that the release of the compensation deposited before the court below, in terms of the direction as above, shall be subject to the result in C.S. No.2239 of 2015.

(R.K. Pattanaik)
Judge

Tuddu