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THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.3881 of 2023

(In the matter of an application under Section 482 of the Code of Criminal Procedure, 1973)

Smt. Anupama Biswal ……. Petitioner

-Versus-

State of Odisha & another ……. Opposite Parties

For the Petitioner : Mr. Dipti Ranjan Mohapatra, Advocate

For the Opp. Party No.1 : Mr. M.K. Mohanty
Additional Standing Counsel
(For the Opp. Party No.1)

For the Opp. Party No.2 : Mr. Lalit Sahu, Advocate

CORAM:

THE HONOURABLE SHRI JUSTICE SIBO SANKAR MISHRA

Date of Hearing: 16.01.2025 :: Date of Judgment: 04.03.2025

S.S. Mishra, J. The petitioner has invoked the inherent jurisdiction of this Court under Section 482 Cr.P.C. seeking quashing of the criminal complaint being ICC Case No.208 of 2021 initiated by the opposite party No.2 for

the alleged commission of the offence punishable under Section 138 of the N.I. Act.

2. The brief fact in the complaint is that the opposite party No.2, being the complainant has alleged that, on the basis of the assurance given by the son of the present petitioner to arrange admission of her son in a Government Medical College, she had given cash to the son of the petitioner. The son of the petitioner could not arrange the seat in the Government Medical College for the son of the complainant, as promised by him. The criminal case was initiated against the son of the petitioner for various offences, which is pending trial.

3. When the matter stood thus, the complainant demanded the money back from the son of the petitioner. To discharge the said liability, the petitioner issued two cheques from her account in favour of the complainant. On being presented the said cheques, the bankers of the petitioner dishonoured the cheque. The statutory demand notice was issued by the complainant to the petitioner. Since the demand notice was not responded, the complainant case being ICC Case No.208 of 2021 was

initiated. The petitioner is seeking quashing of the said criminal complaint case on various grounds.

4. Heard Mr. D.R. Mohapatra, learned counsel petitioner, Mr. M. K. Mohanty, learned Additional Standing Counsel for the opposite party No.1 (State) and Mr. Lalit Sahu, learned counsel for the opposite party No.2.

5. Mr. Mohapatra, learned counsel for the petitioner primarily focused on the ground that the cheque issued by his client is not against the legally recoverable debt. Therefore, the criminal complaint under Section 138 of the N.I. Act is not maintainable. He has relied upon the judgment of Hon'ble Madras High Court in ***N.V.P Pandian v. M.M. Roy,*** reported in ***AIR 1979 MAD 42.*** He has drawn the attention of this Court to Paragraphs 5 and 11 of the said judgement which reads as under:

> *"5. But, the question for consideration is whether the respondent would be entitled to maintain the action for the recovery of the plaint claim. It should be noted that the suit is based on the original loan and not merely on Ex. A-1, agreement. The specific case of the respondent is that in consideration of the promise made by the appellant to obtain a seat for her son in the Madras Medical College she paid Rs. 15,000/- to him. No doubt, she would say that she gave the money as loan to the appellant on the latter's assurance that he would obtain a seat for her son in the Madras Medical College. But, a reading of the entire*

paragraph 3 of the plaint would make it clear that it was because the appellant failed to get a seat for her son in the Madras Medical College that the respondent filed the suit for the refund of the sum of Rs. 15,000/-. A readding of Ex. A-6 notice dated 26th November 1972, sent by the respondent's counsel would make it clear that the amount was paid for the purpose of securing a seat in the Medical College and not as a loan as is now sought to be made out in the plaint. On the fact of it, it is clear that the agreement was against public policy. It is well known that selection to the Medical Colleges in the State is made on the basis of merit in accordance with the norms prescribed from time to time by the Government. The public has an interest to see that in the selection of candidates for a seat in the Medical College the fittest persons should be selected. The law will not uphold an agreement whereby a person has agreed to use his influence or position for the purpose of securing a title, contract or some other benefit from the Government. The public has a right to demand that the public officials shall not be induced merely by consideration of personal gain to act in a manner other than that which the public interest demands. Therefore, when the respondent borrowed Rs. 15,000 in consideration of the appellant agreeing to use his influence and secure for her son a seat in the Madras Medical College, it could only be by means other than straight forward.

11. Following these decisions, it has to be held that the instant case falls clearly under the maxim in pari delicto potior est conditio possidentis. The respondent must have known when she paid Rs. 15,000 that she was paying the money for an illegal object or an object opposed to public policy. She cannot in any way be considered to be less guilty party as none of the situations contemplated in Sitaram v. Radha Bai is present. I therefore, follow the decision in Kuju Collieries v. Tharkhand Mines and Ratanchand v. Askar and hold that the respondent is not entitled to a refund of the money from the appellant. The respondent herself could not get the relief she wanted without setting up and proving the illegal object for which she had paid the money. I therefore, set aside the judgment and decree of the trial court, dismiss the suit and allow the appeal with costs."

To support his case, learned counsel for the petitioner has further relied upon the judgment of Hon'ble High Court of Delhi in ***Virender Singh vs. Laxmi Narain and Ors***., reported in **MANU/DE/9709/2006.** Relevant part of paragraph 13 of the said judgement is reproduced hereunder:

> *13. "…… In the present case neither party is a victim of exploitation. Both had voluntarily and by their free will joined hands to flout the law. Therefore, in terms of the Supreme Court decisions in Sita Ram v. Radha Bai (supra) and Mohd. Salimuddin (supra) themselves, the parties being in pari delicto, the doctrine would apply and the sum of Rs.80,000/- could not be recovered in a court of law. Meaning thereby that there did not exist any legally enforceable debt or liability for the discharge of which it could be said that the cheque in question was issued. Consequently, Section 138 of the said Act would not be attracted. This legal position was not appreciated by the courts below and it is for this reason that they fell into error. That being the case, the conviction of the petitioner is set aside. It is, however, made clear by the learned Counsel for the petitioner that the sum of Rs.1 lac, which had been deposited pursuant to the orders by the court below, has already been withdrawn by the respondent No. 1 and that he would not be pressing for its return. The learned Counsel for the petitioner also submits that to maintain his bona fides, he would be paying a further sum of Rs.20,000/- within two months to the complainant/respondent No. 1. He submits that the said sum will be deposited in the trial court, which the complainant/respondent No. 1 may withdraw immediately thereafter.*

6. Relying upon the aforementioned judgments, Mr. Mohapatra, learned counsel for the petitioner primarily submitted that the cheque was issued to discharge the so-called liability of the son of the petitioner, who had

taken the cash from the complainant to arrange the seat in the Government Medical College, which apparently is an immoral conduct. Therefore, the debt so emanating from the aforementioned transaction is an immoral debt, which is not recoverable either in the common law or otherwise in accordance with law. Accordingly, the complaint under Section 138 of the N.I. Act is also not maintainable. In this regard, Mr. Mohapatra has drawn my attention to the Judgment of Karnataka High Court in the case of ***R. Parimala Bai Vs Bhaskar Narasimhaiah,*** reported in ***2018 SCC OnLine Kar 3989***. The relevant Paragraph 25 of the said judgement is reproduced for ready reference:

> *"25. It is seen that, there are absolutely no allegations whatsoever that the accused has taken this money as a loan or a debt or as a liability at any point of time. It is clear cut case of the complainant that, he has paid money for the purpose of securing job for his son, even without examining whether the accused has got any authority to provide job to his son or not and what is the procedure that is required to be followed by the HAL factory for the purpose of selecting any candidate for the purpose of providing any job. Therefore, without examining anything, the complainant himself has entered into a void contract with the accused and paid money as against the public policy for illegal purpose."*

He has further relied upon the judgement of Bombay High Court in the case of ***Nanda Vs Nandkishor,*** reported in ***2010 SCC OnLine***

Bom 54. The relevant Paragraph 3 of the said judgement is reproduced below:

> ***"3.*** *The accused did not dispute the fact that he had issued the cheque under his signature and had received notice (Exh. 22) from the complainant; but outrightly denied the complaint and any liability on the ground that the complainant was doing business of money lending without any requisite licence for money lending and that the complainant has failed to prove legally enforceable or recoverable debt or legal liability as against accused, in view of the provisions of the Bombay Money Lenders Act, 1946. The accused opposed the complaint stoutly on the ground that under section 139 of the N.I. Act, there cannot be presumption of pre-existing liability and complainant had failed to prove that the cheque was issued towards legally enforceable debt or liability."*

To substantiate his submission, learned counsel for the petitioner has further relied upon the judgment of Hon'ble Madras High Court in case of ***Jeyaramachandran Vs. Babu @ A.M.Iqbal*** (**Crl.A.Nos 534 & 535 of 2013**) which was disposed of on 20.03.2020. Paragraph 19 of the said judgement is reproduced here under:

> *"19. The doctrine or rule of in pari delicto is the embodiment of the principle that the Courts refuses to enforce the illegal agreement at the instance of the person who is a party to the illegality or fraud. As above pointed out, the three exceptional conditions to which the abovesaid maxim does not apply, not applying to the facts and circumstances of the present case, resultantly, as held by the Delhi High Court, in the abovesaid decision, considering the facts and circumstances of the present*

> *case, there did not exist any legally enforceable debt or liability for the discharge of which the cheques in question could be held to have been issued, in such view of the matter, Section 138 of the Negotiable Instruments Act would not be attracted and the abovesaid aspects of the matter having also been taken into consideration by the Appellate Court and inter alia rightly chosen to acquit the respondent of the offence put forth against him."*

7. To counter the submission of Mr. Mohapatra, learned counsel for the petitioner, Mr. Sahu, learned counsel for the opposite party No.2 has submitted that whether the dues are legally recoverable against which the cheque was issued or not, could only be ascertained by undertaking complete trial. The complaint has been pending since more than one year and much has taken place before the trial Court. Therefore, at this belated stage, no interference is called for.

8. As per the statutory mandate under Section 143(2) of the N.I. Act, the trial of the case under Section 138 of the N.I. Act should have been completed within six months. However, the petitioner, on some pretext or the other, is trying to prolong the trial of the case to defeat the cause of the opposite party No.2-complainant.

9. Mr. Sahu, learned counsel for the opposite party No.2 has also relied upon the judgment of Jammu & Kashmir High Court - Srinagar Bench in the case of ***Fayaz Ahamad Sheike & Another Vs Mushtaq Ahmad Khan & Another*****,** which was disposed of on 15.07.2022 in **CRM(M) No.280/2021 & CRM(M) No.281/2021** and contended that the complainant is well within her right to continue the prosecution for the alleged commission of the offence punishable under Section 138 of the N.I. Act as well as Section 420 of the IPC simultaneously against the petitioner accused. Paragraph 15 of the said judgment is reproduced below:

> *"15. From the aforesaid analysis of law on the subject, it is clear that offences under Section 138 of the NI Act and Section 420 of IPC are distinct from each other because ingredients of the two offences are different. While in a prosecution under Section 138 of NI Act, fraudulent or dishonest intention at the time of issuance of cheque need not be proved but in a prosecution under Section 420 of IPC, such intention is an important ingredient to be established. For proving offence under Section 138 of NI Act, it has to be established that the cheque has been P a g e | 13 issued by the accused to discharge a legally enforceable debt or liability and the same has been dishonoured for insufficiency of funds etc. and despite receipt of statutory notice of demand, the accused has failed to pay the amount of cheque within the stipulated time. It is only when accused fails to make the payment within the stipulated time upon receipt of notice of demand that the offence under Section 138 of NI Act is*

made out against an accused. In the case of prosecution for the charge under Section 420 of IPC, these ingredients need not be proved by the prosecution. However, it has to be proved by prosecution that at the very inception i.e. at the time of issuance of the cheque by the accused, he had a dishonest intention. Thus, offence under Section 420 of IPC is made out at the time of issuance of the cheque itself which is not the case with offence under Section 138 of NI Act. Therefore, the two offences are distinct from each other and the principle of double jeopardy or rule of estoppel does not come into play."

10. There is no quarrel on the point of law that both the prosecution under Section 420 of the IPC and the complaint under Section 138 of the N.I. Act can run simultaneously against the accused. Both the offences are independent offences.

11. Therefore, I am completely in agreement with the contention raised by Mr. Sahu, learned counsel for the opposite party No.2.

12. However, this Court is examining as to whether the complaint under Section 138 of the N.I. Act initiated by the opposite party No.2 is maintainable against the petitioner. Once the petitioner on the basis of the facts of the present case and the case cited at the Bar could establish that the debt against which the cheques were issued is not legally recoverable dues.

13. It would be apt to reproduce the provision of Section 138 of the N.I. Act.

> ***"138. Dishonour of cheque for insufficiency, etc., of funds in the account.—***
> *Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:*
> *Provided that nothing contained in this section shall apply unless—*
> *(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*
> *(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*
> *(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*
> *Explanation.—*
> *For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]"*

Reading of the provision indicates the basic ingredients to initiate the proceeding under Section 138 of the N.I. Act are as under:

> " *Ingredients of Section 138 of Negotiable Instruments Act:*
>
> *i.* *A person must have drawn a cheque to another person for payment of certain amount which is* ***legally recoverable****;*
>
> *ii.* *Cheque has been presented to bank within a period of 3 months from date it was drawn;*
>
> *iii.* *Cheque is returned by bank unpaid because of insufficient fund in the account;*
>
> *iv.* *Holder of cheque makes a demand for payment of the said amount of money by giving notice to drawer and within 30 days period it is unpaid and returned;*
>
> *V.* *Drawer fails to make payment to the payee."*

14. Relying upon the aforementioned judgments, this Court has obtained the view that the cheques issued by the petitioner in favour of the complainant is not legally enforceable debt being immoral debt. One of the ingredients to initiate a proceeding under Section 138 of the N.I. Act is essentially the cheques issued should be towards a debt or other liability, which is legally enforceable debt or the liability. On the basis of the undisputed facts germinating from the record, the petitioner could successfully establish that the cheques issued by her to the complainant is to clear the amount illegally accepted by his son for arranging a seat in the Medial College for the son of the complainant. The son of the

complainant has also participated in the illegal act. Therefore, the cheques issued by the petitioner to discharge the immoral debt created by her son is not enforceable under law.

15. The doctrine of *in pari delicto* is clearly applicable in the present case. The Court should refuse to enforce illegal debt. The complainant, being a party to the illegal transaction out of which the present dispute has arisen, cannot encash from her own guilt. He has been equal partners in the illegal conduct indulged by the son of the petitioner. Ambitious parents indulging in the illegal methods to secure admission of their wards to a good college at the cost of meritocracy and fairness in education, is indeed a crime. Such actions not only deprive deserving candidates of their rightful opportunities but also foster an environment of dishonesty and corruption, ultimately harming the future of education and society at large. Parents must evolve beyond a regressive mind-set that imposes career choices upon their children, driven by unfulfilled personal aspirations. While it is natural for parents to dream of a successful future for their children, such aspirations must be nurtured through ethical means rather than unlawful shortcuts. Parents must act as facilitators in

their child's educational and career journey—offering guidance and motivation while respecting their individuality. They should aid, but not dictate the decision-making process, support their child's choices, provide them with the freedom to explore their skills and encourage them to develop and achieve through merit and perseverance. Upholding these values will not only ensure fairness in education but also foster a generation that values integrity, hard work, and self-discovery. The indulgence of the parent-complainant, who serves in the police department, in such an act that contradicts the very ethos of society is highly condemnable. This not only raises questions about the complainant's own conduct but also necessitates a closer examination of the transaction in question.

16. Although it is well settled that once a cheque is admitted to have been signed and issued in favour of the holder, there is a statutory presumption operates to the effect that it is issued in discharge of a legally enforceable debt or liability. This presumption being a rebuttable one, the issuer of the cheque is able to discharge the burden that it was issued for some other purpose. Therefore, it is inevitable for the petitioner

to face the trial and rebut the presumption operating against her because it is admitted case on the part of the petitioner that she indeed has issued the cheques.

17. The Hon'ble Supreme Court in the case of ***Rathish Babu Unnikrishnan vs. The State (Govt. of NCT of Delhi) & Anr.***, ***vide Criminal Appeal Nos.694-695 of 2022 (Arising out of SLP (Crl.) Nos.5781-5782 of 2020)*** the Court held thus:

> *"17. The consequences of scuttling the criminal process at a pre-trial stage can be grave and irreparable. Quashing proceedings at preliminary stages will result in finality without the parties having had an opportunity to adduce evidence and the consequence then is that the proper forum i.e., the trial court is ousted from weighing the material evidence. If this is allowed, the accused may be given an un-merited advantage in the criminal process, also because of the legal presumption, when the cheque and signature are not disputed by the appellant, the balance of convenience at this stage is in favour of the complainant/prosecution, as the accused will have due opportunity to adduce defence evidence during the trial, to rebut the presumption.*
>
> *19. In our assessment, the impugned judgment is rendered by applying the correct legal principles and the High Court rightly declined relief to the accused, in the quashing proceeding. Having said this, to rebut the legal presumption against him, the appellant must also get a fair opportunity to adduce his evidence in an open trial by an impartial judge who can dispassionately weigh the material to reach the truth of the matter. At this point, one might benefit by recalling the words of Harry Brown, the American author and investment advisor who so aptly said- "A fair trial is one in which the rules of evidence are honored, the accused has competent counsel, and the judge enforce the proper court room procedure- a*

trial in which every assumption can be challenged" we expect no less and no more for the appellant."

18. It is again well settled principle of law that while exercising the inherent jurisdiction under Section 482 Cr. P.C., the High Court should not scuttle the trial in between, particularly when the presumption operates against the accused person. The accused is to undergo a full trial and discharge his burden to prove the case otherwise.

19. However, in the fact scenario of the present case, on the basis of the admitted facts, even if the petitioner is put to trial, in my considered view, the trial definitely would not result in securing conviction. Therefore, this case appears to be covered by the judgment of the Hon'ble Supreme Court in the case of ***Gian Singh v. State of Punjab and another,*** reported in ***2012 (10) SCC 303,*** it would apt to reproduce relevant part of the judgment: -

"61. The position that emerges from the above discussion can be summarised thus : the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. ***Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz. : (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court.*** *In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim*

have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. ***In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law*** *despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."*

20. The aforementioned principle has also been reiterated by the Hon'ble Supreme Court in many other judgments. Therefore, this Court is of the opinion that subjecting the petitioner to the rigors of the trial is

destined to be a futile exercise and will be the abuse of the process of the court because the cheques were admittedly issued by the present petitioner towards a debt created by her son by indulging in criminal act. The complainant herself is also a party to the immoral and illegal transaction made with the son of the petitioner. The principle of *Ex turpi causa non oritur actio*" applies to the fact of this case. No action arises from an immoral or illegal cause. Therefore, the court will not assist a party in recovering money if debt arises from illegal or immoral activity.

21. Therefore, the complainant being a party to the immoral transaction cannot derive the benefit of the same and prosecute the petitioner for the offence punishable under Section 138 of the N.I. Act. The view expressed by this Court is only regarding the prosecution initiated by the complainant under Section 138 of the N.I. Act and the same shall not be construed as if the expression of opinion regarding the other cases pending relating to the transaction between the son of the petitioner for which he is facing the trial or regarding any other offence made out against the petitioner.

22. Accordingly, the CRLMC is allowed. The proceeding in ICC Case No.208 of 2021 U/s.138 of the N.I. Act pending in the court of the learned S.D.J.M., Bhadrak stands quashed qua the petitioner. The Opposite Party No.2 is granted liberty to proceed against the petitioner in accordance with law, if any other offence is made out.

…….
(S.S. Mishra)
Judge

The High Court of Orissa, Cuttack
The 4th of March, 2025/ Subhasis Mohanty, Personal Assistant