M/S Laxmi Dyechem vs State Of Gujarat & Ors on 27 November, 2012

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Bench: T.S. Thakur, Gyan Sudha Misra

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 1870-1909 OF 2012
(Arising out S.L.P. (Crl.) Nos. 1740-1779 of 2011)

M/s Laxmi Dyechem …Appellant
Versus
State of Gujarat & Ors. …Respondents

With

CRIMINAL APPEAL NOS. 1910-1949 OF 2012
(Arising out S.L.P. (Crl.) Nos.1780-1819 of 2011)

J U D G M E N T

T.S. THAKUR, J.

1. Leave granted.

2. These appeals are directed against orders dated 19th April, 2010 and 27th August, 2010 passed by the High Court of Gujarat at Ahmedabad whereby the High Court has quashed 40 different complaints under Section 138 of the Negotiable Instruments Act, 1881 filed by the appellant against

the respondents. Relying upon the decision of this Court in Vinod Tanna & Anr. v. Zaher Siddiqui & Ors. (2002) 7 SCC 541, the High Court has taken the view that dishonour of a cheque on the ground that the signatures of the drawer of the cheque do not match the specimen signatures available with the bank, would not attract the penal provisions of Section 138 of the Negotiable Instruments Act. According to the High Court, the provisions of Section 138 are attracted only in cases where a cheque is dishonoured either because the amount of money standing to the credit to the account maintained by the drawer is insufficient to pay the cheque amount or the cheque amount exceeds the amount arranged to be paid from account maintained by the drawer by an agreement made with the bank. Dishonour of a cheque on the ground that the signatures of the drawer do not match the specimen signatures available with the bank does not, according to the High Court, fall in either of these two contingencies, thereby rendering the prosecution of the respondents legally impermissible. Before we advert to the merits of the contentions urged at the Bar by the learned counsels for the parties, we may briefly set out the factual backdrop in which the controversy arises.

3. The appellant is a proprietorship firm engaged in the sale of chemicals. It has over the past few years supplied Naphthalene Chemicals to the respondent-company against various invoices and bills issued in that regard. The appellant's case is that a running account was opened in the books of account of the appellant in the name of the respondent-company in which the value of the goods supplied was debited from time to time as per the standard accounting practice. A sum of Rs.4,91,91,035/- (Rupees Four Crore Ninety One Lac Ninety One Thousand Thirty Five only) was according to the appellant outstanding against the respondent-company in the former's books of accounts towards the supplies made to the latter. The appellant's further case is that the respondent-company issued under the signatures of its authorised signatories several post dated cheques towards the payment of the amount aforementioned. Several of these cheques (one hundred and seventeen to be precise) when presented were dishonoured by the bank on which the same were drawn, on the ground that the drawers' signatures were incomplete or that no image was found or that the signatures did not match. The appellant informed the respondents about the dishonour in terms of a statutory notice sent under Section 138 and called upon them to pay the amount covered by the cheques. It is common ground that the amount covered by the cheques was not paid by the respondents although according to the respondents the company had by a letter dated 30.12.2008, informed the appellant about the change of the mandate and requested the appellant to return the cheques in exchange of fresh cheques. It is also not in dispute that fresh cheques signed by the authorised signatories, according to the new mandate to the Bank, were never issued to the appellant ostensibly because the offer to issue such cheques was subject to settlement of accounts, which had according to the respondent been bungled by the outgoing authorised signatories. The long and short of the matter is that the cheques remained unpaid despite notice served upon the respondents that culminated in the filing of forty different complaints against the respondents under Section 138 of the Negotiable Instruments Act before the learned trial court who took cognizance of the offence and directed issue of summons to the respondents for their appearance. It was at this stage that Special Criminal Applications No.2118 to 2143 of 2009 were filed by Shri Mustafa Surka accused No.5 who happened to be one of the signatories to the cheques in question. The principal contention urged before the High Court in support of the prayer for quashing of the proceedings against the signatory to the cheques was that the dishonour of cheques on account of the signatures 'not being complete' or 'no image found' was not a dishonour that could

constitute an offence under Section 138 of the Negotiable Instrument Act.

4. By a common order dated 19th April, 2010, the High Court allowed the said petitions, relying upon the decision of this Court in Vinod Tanna's case (supra) and a decision delivered by a Single Judge Bench of the High Court of Judicature at Bombay in Criminal Application No.4434 of 2009 and connected matters. The Court observed:

> "In the instant case, there is no dispute about the endorsement that "drawers signature differs from the specimen supplied" and/or "no image found-signature" and/or "incomplete signature/illegible" and for return/dishonour of cheque on the above endorsement will not attract ingredients of Section 138 of the Act and insufficient fund as a ground for dishonouring cheque cannot be extended so as to cover the endorsement "signature differed from the specimen supplied" or likewise. If the cheque is returned/bounced/dishonoured on the endorsement of "drawers signature differs from the specimen supplied" and/or "no image found-signature" and/or "incomplete signature / illegible", the complaint filed under Section 138 of the Act is not maintainable. Hence, a case is made out to exercise powers under Section 482 of the Code of Criminal Procedure, 1973 in favour of the petitioner".

5. Special Criminal Applications No.896 to 935 of 2010 were then filed by the remaining accused persons challenging the proceedings initiated against them in the complaints filed by the petitioner on the very same ground as was taken by Mustafa Surka. Reliance was placed by the petitioners in the said petitions also upon the decision of this Court in Vinod Tanna's case (supra) and the decision of the Single Judge Bench of High Court of Bombay in Mustafa Surka v. M/s. Jay Ambe Enterprise & Anr. [2010 (1) Bombay Cases Reporter (Crl.) 758]. The High Court has, on the analogy of its order dated 19th April, 2010 passed in the earlier batch of cases which order is the subject matter of SLP Nos.1780-1819 of 2011, quashed the proceedings and the complaints even qua the remaining accused persons, respondents herein. The present appeals, as noticed above, assail the correctness of both the orders passed by the High Court in the two batch of cases referred to above.

6. Chapter XVII comprising Sections 138 to 142 of the Negotiable Instruments Act was introduced in the statute by Act 66 of 1988. The object underlying the provision contained in the said Chapter was aimed at inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business and day to day transactions by making dishonour of such instruments an offence. A negotiable instrument whether the same is in the form of a promissory note or a cheque is by its very nature a solemn document that carries with it not only a representation to the holder in due course of any such instrument but also a promise that the same shall be honoured for payment. To that end Section 139 of the Act raises a statutory presumption that the cheque is issued in discharge of a lawfully recoverable debt or other liability. This presumption is no doubt rebuttable at trial but there is no gainsaying that the same favours the complainant and shifts the burden to the drawer of the instrument (in case the same is dishonoured) to prove that the instrument was without any lawful consideration. It is also noteworthy that Section 138 while making dishonour of a cheque an offence punishable with imprisonment and fine also provides for safeguards to protect drawers of such instruments where dishonour may take place for reasons other than those arising

out of dishonest intentions. It envisages service of a notice upon the drawer of the instrument calling upon him to make the payment covered by the cheque and permits prosecution only after the expiry of the statutory period and upon failure of the drawer to make the payment within the said period.

7. The question that falls for our determination is whether dishonour of a cheque would constitute an offence only in one of the two contingencies envisaged under Section 138 of the Act, which to the extent the same is relevant for our purposes reads as under :

> "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 provision of this Act, be punished with imprisonment of a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both."

8. From the above, it is manifest that a dishonour would constitute an offence only if the cheque is retuned by the bank 'unpaid' either because the amount of money standing to the credit of the drawer's account is insufficient to honour the cheque or that the amount exceeds the amount arranged to be paid from that account by an agreement with that bank. The High Court was of the view and so was the submission made on behalf of the respondent before us that the dishonour would constitute an offence only in the two contingencies referred to in Section 138 and none else. The contention was that Section 138 being a penal provision has to be construed strictly. When so construed, the dishonour must necessarily be for one of the two reasons stipulated under Section 138 & none else. The argument no doubt sounds attractive on the first blush but does not survive closer scrutiny. At any rate, there is nothing new or ingenious about the submission, for the same has been noticed in several cases and repelled in numerous decisions delivered by this Court over the past more than a decade. We need not burden this judgment by referring to all those pronouncements. Reference to only some of the said decisions should, in our opinion, suffice.

9. In NEPC Micon Ltd. v. Magma Leasing Ltd. (1999) 4 SCC 253, the cheques issued by the appellant-company in discharge of its liability were retuned by the company with the comments 'account closed'. The question was whether a dishonour on that ground for that reason was culpable under Section 138 of the Negotiable Instruments Act. The contention of the company that issued the cheque was that Section 138 being a penal provision ought to be strictly construed and when so interpreted, dishonour of a cheque on ground that the account was closed was not punishable as the same did not fall in any of the two contingencies referred to in Section 138. This Court noticed the prevalent cleavage in the judicial opinion, expressed by different High Courts in the country and rejected the contention that Section 138 must be interpreted strictly or in disregard of the object sought to be achieved by the statute. Relying upon the decision of this Court in Kanwar Singh v.

Delhi Administration (AIR 1965 SC 871), and Swantraj v. State of Maharashtra (1975) 3 SCC 322 this Court held that a narrow interpretation of Section 138 as suggested by the drawer of the cheque would defeat the legislative intent underlying the provision. Relying upon the decision in State of Tamil Nadu v. M.K. Kandaswami (1975) 4 SCC 745, this Court declared that while interpreting a penal provision which is also remedial in nature a construction that would defeat its purpose or have the effect of obliterating it from the statute book should be eschewed and that if more than one constructions are possible the Court ought to choose a construction that would preserve the workability and efficacy of the statute rather than an interpretation that would render the law otiose or sterile. The Court relied upon the much quoted passage from the Seaford Court Estates Ltd. v. Asher (1949 2 All E.R. 155) wherein Lord Denning, L.J. observed:

> "The English language is not an instrument of mathematical precision. Our literature would be much poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. ... A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do so as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

10. Relying upon a three-Judge Bench decision of this Court in Modi Cements Ltd. v. Kuchil Kumar Nandi (1998) 3 SCC 249, this Court held that the expression "the amount of money ..... is insufficient to honour the cheque" is a genus of which the expression 'account being closed' is a specie.

11. In Modi Cements Ltd. (supra) a similar question had arisen for the consideration of this Court. The question was whether dishonour of a cheque on the ground that the drawer had stopped payment was a dishonour punishable under Section 138 of the Act. Relying upon two earlier decisions of this Court in Electronics Trade & Technology Development Corporation Ltd. v. Indian Technologists and Engineers (Electronics) (P) Ltd. (1996) 2 SCC 739 and K.K Sidharthan v. T.P. Praveena Chandran (1996) 6 SCC 369, it was contended by the drawer of the cheque that if the payment was stopped by the drawer, the dishonour of the cheque could not constitute an offence under Section 138 of the Act. That contention was specifically rejected by this Court. Not only that, the decision in Electronics Trade & Technology

Development Corporation Ltd. (supra) to the extent the same held that dishonour of the cheque by the bank after the drawer had issued a notice to the holder not to present the same would not constitute an offence, was overruled. This Court observed:

"18. The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of Sections 138 and 139 of the Act. If we are to accept this proposition it will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Further the following observations in para 6 in Electronics Trade & Technology Development Corpn. Ltd. "Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induce the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly" (emphasis supplied) in our opinion, do not also lay down the law correctly.

20. On a careful reading of Section 138 of the Act, we are unable to subscribe to the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honour the cheque issues the same and, therefore, this amounts to an offence under Section 138 of the Act. For the reasons stated hereinabove, we are unable to share the views expressed by this Court in the above two cases and we respectfully differ with the same regarding interpretation of Section 138 of the Act to the limited extent as indicated above."

12. We may also at this stage refer to the decisions of this Court in M.M.T.C. Ltd. and Anr. v. Medchl Chemicals and Pharma (P) Ltd. and Anr.

(2002) 1 SCC 234, where too this Court considering an analogous question held that even in cases where the dishonour was on account of "stop payment" instructions of the drawer, a presumption regarding the cheque being for consideration would arise under Section 139 of the Act. The Court observed:

"19. Just such a contention has been negatived by this Court in the case of Modi Cements Ltd. v. Kuchil Kumar Nandi. It has been held that even though the cheque is dishonoured by reason of "stop-payment" instruction an offence under Section 138 could still be made out. It is held that the presumption under Section 139 is attracted in such a case also. The authority shows that even when the cheque is dishonoured by reason of stop-payment instructions by virtue of Section 139 the court has to presume that the cheque was received by the holder for the discharge, in whole or in part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus

show that the "stop-

payment" instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there were sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop-payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused. Thus a court cannot quash a complaint on this ground."

13. To the same effect is the decision of this Court in Goaplast (P) Ltd. v. Chico Ursula D'souza and Anr. (2003) 3 SCC 232, where this Court held that 'stop payment instructions' and consequent dishonour of the cheque of a post-dated cheque attracts provision of Section 138. This Court observed :

> "Chapter XVII containing Sections 138 to 142 was introduced in the Act by Act 66 of 1988 with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. The said provisions were intended to discourage people from not honouring their commitments by way of payment through cheques. The court should lean in favour of an interpretation which serves the object of the statute. A post-dated cheque will lose its credibility and acceptability if its payment can be stopped routinely. The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of a post-dated cheque.
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> In view of Section 139, it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong." (emphasis supplied)

14. A three-Judge Bench of this Court in Rangappa v. Sri Mohan (2010) 11 SCC 441 has approved the above decision and held that failure of the drawer of the cheque to put up a probable defence for rebutting the presumption that arises under Section 139 would justify conviction even when the appellant drawer may have alleged that the cheque in question had been lost and was being misused by the complainant.

15. The above line of decisions leaves no room for holding that the two contingencies envisaged under Section 138 of the Act must be interpreted strictly or literally. We find ourselves in respectful agreement with the decision in NEPC Micon Ltd. (supra) that the expression "amount of money ..... is insufficient" appearing in Section 138 of the Act is a genus and dishonour for reasons such "as account closed", "payment stopped", "referred to the drawer" are only species of that genus. Just as dishonour of a cheque on the ground that the account has been closed is a dishonour falling in the first contingency referred to in Section 138, so also dishonour on the ground that the "signatures do not match" or that the "image is not found", which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonour within the meaning of Section 138 of the Act. This Court has in the decisions referred to above taken note of situations and contingencies arising out of deliberate acts of omission or commission on the part of the drawers of the cheques which would inevitably result in the dishonour of the cheque issued by them. For instance this Court has held that if after issue of the cheque the drawer closes the account it must be presumed that the amount in the account was nil hence insufficient to meet the demand of the cheque. A similar result can be brought about by the drawer changing his specimen signature given to the bank or in the case of a company by the company changing the mandate of those authorised to sign the cheques on its behalf. Such changes or alteration in the mandate may be dishonest or fraudulent and that would inevitably result in dishonour of all cheques signed by the previously authorised signatories. There is in our view no qualitative difference between a situation where the dishonour takes place on account of the substitution by a new set of authorised signatories resulting in the dishonour of the cheques already issued and another situation in which the drawer of the cheque changes his own signatures or closes the account or issues instructions to the bank not to make the payment. So long as the change is brought about with a view to preventing the cheque being honoured the dishonour would become an offence under Section 138 subject to other conditions prescribed being satisfied. There may indeed be situations where a mismatch between the signatories on the cheque drawn by the drawer and the specimen available with the bank may result in dishonour of the cheque even when the drawer never intended to invite such a dishonour. We are also conscious of the fact that an authorised signatory may in the ordinary course of business be replaced by a new signatory ending the earlier mandate to the bank. Dishonour on account of such changes that may occur in the course of ordinary business of a company, partnership or an individual may not constitute an offence by itself because such a dishonour in order to qualify for prosecution under Section 138 shall have to be preceded by a statutory notice where the drawer is called upon and has the opportunity to arrange the payment of the amount covered by the cheque. It is only when the drawer despite receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount that the dishonour would be considered a dishonour constituting an offence, hence punishable. Even in such cases, the question whether or not there was a lawfully recoverable debt or liability for discharge whereof the cheque was issued would be a matter that the trial Court will examine having regard to the evidence adduced before it and keeping in view the statutory presumption that unless rebutted the cheque is presumed to have been issued for a valid consideration.

16. In the case at hand, the High Court relied upon a decision of this Court in Vinod Tanna's case (supra) in support of its view. We have carefully gone through the said decision which relies upon

the decision of this Court in Electronics Trade & Technology Development Corporation Ltd. (supra). The view expressed by this Court in Electronics Trade & Technology Development Corporation Ltd. (supra) that a dishonour of the cheque by the drawer after issue of a notice to the holder asking him not to present a cheque would not attract Section 138 has been specifically overruled in Modi Cements Ltd. case (supra). The net effect is that dishonour on the ground that the payment has been stopped, regardless whether such stoppage is with or without notice to the drawer, and regardless whether the stoppage of payment is on the ground that the amount lying in the account was not sufficient to meet the requirement of the cheque, would attract the provisions of Section 138.

17. It was contended by learned counsel for the respondent that the respondent-company had offered to issue new cheques to the appellant upon settlement of the accounts and that a substantial payment has been made towards the outstanding amount. We do not think that such an offer would render illegal a prosecution that is otherwise lawful. The offer made by the respondent-company was in any case conditional and subject to the settlement of accounts. So also whether the cheques were issued fraudulently by the authorised signatory for amounts in excess of what was actually payable to the appellant is a matter for examination at the trial. That the cheques were issued under the signature of the persons who were authorised to do so on behalf of the respondent-company being admitted would give rise to a presumption that they were meant to discharge a lawful debt or liability. Allegations of fraud and the like are matters that cannot be investigated by a Court under Section 482 Cr.P.C. and shall have to be left to be determined at the trial after the evidence is adduced by the parties.

18. On behalf of the signatories of the cheques dishonoured it was argued that the dishonour had taken place after they had resigned from their positions and that the failure of the company to honour the commitment implicit in the cheques cannot be construed an act of dishonesty on the part of the signatories of the cheques. We do not think so. Just because the authorised signatories of the cheques have taken a different line of defence than the one taken by by the company does not in our view justify quashing of the proceedings against them. The decisions of this Court in National Small Industries Corporation Limited v. Harmeet Singh Paintal and Anr. (2010) 3 SCC 330 and S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & Anr. (2005) 8 SCC 89 render the authorised signatory liable to be prosecuted along with the company. In the National Small Industries Corporation Limited's case (supra) this Court observed:

> "19. xxxx
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> (c) The answer to Question (c) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

19. In the result, we allow these appeals, set aside the judgment and orders passed by the High Court and dismiss the special criminal applications filed by the respondents. The trial Court shall now proceed with the trial of the complaints filed by the appellants expeditiously. We make it clear that nothing said in this judgment shall be taken as an expression of any final opinion on the merits of the case which the trial Court shall be free to examine on its own. No costs.

.....J. (T.S. THAKUR) .....J. (GYAN SUDHA MISRA) New Delhi November 27, 2012 Reportable IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION CRIMINAL APPEAL NOS. 1870-1909 OF 2012 (Arising out of S.L.P. (Crl.) No.1740-1779/2001) M/S. LAXMI DYECHEM .. Appellant Versus STATE OF GUJARAT & ORS. .. Respondents WITH CRL.APPEAL NOS. 1910-1949 of 2012 (Arising out of SLP (Crl.) Nos.1780-1819/11 J U D G E M E N T GYAN SUDHA MISRA, J.

1. I endorse and substantially agree with the views expressed in the judgment and order of learned Brother Justice Thakur. However, I propose to highlight a specific aspect relating to dishonour of cheques which constitute an offence under Section 138 as introduced by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 by adding that in so far as the category of 'stop payment of cheques' is concerned as to whether they constitute an offence within the meaning of Section 138 of the 'NI Act', due to the return of a cheque by the bank to the drawee/holder of the cheque on the ground of 'stop payment' although has been held to constitute an offence within the meaning of Sections 118 and 138 of the NI Act, and the same is now no longer res integra, the said presumption is a 'rebuttable presumption' under Section 139 of the NI Act itself since the accused issuing the cheque is at liberty to prove to the contrary. This is already reflected under Section 139 of the NI Act when it lays down as follows:-

> "139. Presumption in favour of holder.-- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability."

2. We have to bear in mind that the Legislature while incorporating the provisions of Chapter XVII, Sections 138 to 142 inserted in the NI Act (Amendment Act 1988) intends to punish only those who know fully well that they have no amount in the bank and yet issue a cheque in discharge of debt or liability already borrowed/incurred -which amounts to cheating, and not to punish those who refused to discharge the debt for bona fide and sustainable reason. It is in this context that this Hon'ble Court in the matter of M.M.T.C. Ltd. And Anr vs. Medchl Chemical and Pharma (P) Ltd. And Anr.[1] was pleased to hold that cheque dishonour on account of drawer's stop payment instruction constitutes an offence under Section 138 of the NI Act but it is subject to the rebuttable presumption under Section 139 of the NI Act as the same can be rebutted by the drawer even at the first instance. It was held therein that in order to escape liability under Section 139, the accused has to show that dishonour was not due to insufficiency of funds but there was valid cause, including absence of any debt or liability for the stop payment instruction to the bank. The specific observations of the Court in this regard may be quoted for ready reference which are as follows:

> "The authority shows that even when the cheque is dishonoured by reason of stop-payment instructions by virtue of Section 139 the court has to presume that the cheque was received by the holder for the discharge, in whole or in part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus show that the "stop-payment" instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there were sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop-payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused. Thus a court cannot quash a complaint on this ground." Therefore, complaint filed in such a case although might not be quashed at the threshold before trial, heavy onus lies on the court issuing summons in such cases as the trial is summary in nature.
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> 3. In the matter of Goaplast (P) Ltd. vs. Chico Ursula D'Souza And Anr.[2] also this Court had held that ordinarily the stop payment instruction is issued to the bank by the account holder when there is no sufficient amount in the account. But, it was also observed therein that the reasons for stopping the payment can be manifold which cannot be overlooked. Hence, in view of Section 139, it has to be presumed that a cheque is issued in discharge of any debt or other liability. But the presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption.

However, this presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. Therefore, in order to hold that the stop payment instruction to the bank would not constitute an offence, it is essential that there must have been sufficient funds in the accounts in the first place on the date of signing of the cheque, the date of presentation of the cheque, the date on which stop payment instructions were issued to the bank. Hence, in Goaplast matter (supra), when the magistrate had disallowed the application in a case of 'stop payment' to the bank without hearing the matter merely on the ground that there was no dispute about the dishonour of the cheque issued by the accused, since the signature was admitted and therefore held that no purpose would be served in examining the bank manager since the dishonour was not in issue, this Court held that examination of the bank manager would have enabled the Court to know on what date stop payment order was sent by the drawer to the bank clearly leading to the obvious inference that stop payment although by itself would be an offence, the same is subject to rebuttal provided there was sufficient funds in the account of the drawer of the cheque.

4. Further, a three judge Bench of this Court in the matter of Rangappa vs. Sri Mohan [3] held that Section 139 is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the

Act specifies the strong criminal remedy in relation to the dishonour of the cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. The Court however, further observed that it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose money is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant accused cannot be expected to discharge an unduly high standard of proof". The Court further observed that it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is all preponderance of probabilities.

5. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. If however, the accused/drawer of a cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant.

6. It is no doubt true that the dishonour of cheques in order to qualify for prosecution under Section 138 of the NI Act precedes a statutory notice where the drawer is called upon by allowing him to avail the opportunity to arrange the payment of the amount covered by the cheque and it is only when the drawer despite the receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount, that the said default would be considered a dishonour constituting an offence, hence punishable. But even in such cases, the question whether or not there was lawfully recoverable debt or liability for discharge whereof the cheque was issued, would be a matter that the trial court will have to examine having regard to the evidence adduced before it keeping in view the statutory presumption that unless rebutted, the cheque is presumed to have been issued for a valid consideration. In view of this the responsibility of the trial judge while issuing summons to conduct the trial in matters where there has been instruction to stop payment despite sufficiency of funds and whether the same would be a sufficient ground to proceed in the matter, would be extremely heavy.

7. As already noted, the Legislature intends to punish only those who are well aware that they have no amount in the bank and yet issue a cheque in discharge of debt or liability which amounts to cheating and not to punish those who bona fide issues the cheque and in return gets cheated giving rise to disputes emerging from breach of agreement and hence contractual violation. To illustrate this, there may be a situation where the cheque is issued in favour of a supplier who delivers the goods which is found defective by the consignee before the cheque is encashed or a post-dated cheque towards full and final payment to a builder after which the apartment owner might notice breach of agreement for several reasons. It is not uncommon that in that event the payment might be stopped bona fide by the drawer of the cheque which becomes the contentious issue relating to breach of contract and hence the question whether that would constitute an offence under the NI

Act. There may be yet another example where a cheque is issued in favour of a hospital which undertakes to treat the patient by operating the patient or any other method of treatment and the doctor fails to turn up and operate and in the process the patient expires even before the treatment is administered. Thereafter, if the payment is stopped by the drawer of the cheque, the obvious question would arise as to whether that would amount to an offence under Section 138 of the NI Act by stopping the payment ignoring Section 139 which makes it mandatory by incorporating that the offence under Section 138 of the NI Act is rebuttable. Similarly, there may be innumerable situations where the drawer of the cheque for bonafide reasons might issue instruction of 'stop payment' to the bank in spite of sufficiency of funds in his account.

8. What is wished to be emphasized is that matters arising out of 'stop payment' instruction to the bank although would constitute an offence under Section 138 of the NI Act since this is no longer res- integra, the same is an offence subject to the provision of Section 139 of the Act and hence, where the accused fails to discharge his burden of rebuttal by proving that the cheque could be held to be a cheque only for discharge of a lawful debt, the offence would be made out. Therefore, the cases arising out of stop payment situation where the drawer of cheques has sufficient funds in his account and yet stops payment for bona fide reasons, the same cannot be put on par with other variety of cases where the cheque has bounced on account of insufficiency of funds or where it exceeds the amount arranged to be paid from that account, since Section 138 cannot be applied in isolation ignoring Section 139 which envisages a right of rebuttal before an offence could be made out under Section 138 of the Act as the Legislature already incorporates the expression "unless the contrary is proved" which means that the presumption of law shall stand and unless it is rebutted or disproved, the holder of a cheque shall be presumed to have received the cheque of the nature referred to in Section 138 of the NI Act, for the discharge of a debt or other liability. Hence, unless the contrary is proved, the presumption shall be made that the holder of a negotiable instrument is holder in due course.

9. Thus although a petition under Section 482 of the Cr.P.C. may not be entertained by the High Court for quashing such proceedings, yet the judicious use of discretion by the trial judge whether to proceed in the matter or not would be enormous in view of Section 139 of the NI Act and if the drawer of the cheque discharges the burden even at the stage of enquiry that he had bona fide reasons to stop the payment and not make the said payment even within the statutory time of 15 days provided under the NI Act, the trial court might be justified in refusing to issue summons to the drawer of the cheque by holding that ingredients to constitute offence under Section 138 of the NI Act is missing where the account holder has sufficient funds to discharge the debt. Thus the category of 'stop payment cheques' would be a category which is subject to rebuttal and hence would be an offence only if the drawer of the cheque fails to discharge the burden of rebuttal.

10. Thus, dishonour of cheques simpliciter for the reasons stated in Section 138 of the NI Act although is sufficient for commission of offence since the presumption of law on this point is no longer res integra, the category of 'stop payment' instruction to the bank where the account holder has sufficient funds in his account to discharge the debt for which the cheque was issued, the said category of cases would be subject to rebuttal as this question being rebuttable, the accused can show that the stop payment instructions were not issued because of insufficiency or paucity of

funds, but stop payment instruction had been issued to the bank for other valid causes including the reason that there was no existing debt or liability in view of bonafide dispute between the drawer and drawee of the cheque. If that be so, then offence under Section 138 although would be made out, the same will attract Section 139 leaving the burden of proof of rebuttal by the drawer of the cheque. Thus, in cases arising out of 'stop payment' situation, Sections 138 and 139 will have to be given a harmonious construction as in that event Section 139 would be rendered nugatory.

11. The instant matter however do not relate to a case of 'stop payment' instruction to the bank as the cheque in question had been returned due to mismatching of the signatures but more than that the petitioner having neither raised nor proved to the contrary as envisaged under Section 139 of the NI Act that the cheques were not for the discharge of a lawful debt nor making the payment within fifteen days of the notice assigning any reason as to why the cheques had at all been issued if the amount had not been settled, obviously the plea of rebuttal envisaged under Section 139 does not come to his rescue so as to hold that the same would fall within the realm of rebuttable presumption envisaged under Section 139 of the Act. I, therefore, concur with the judgment and order of learned Brother Justice Thakur subject to my views on the dishonour of cheques arising out of cases of 'stop payment' instruction to the bank in spite of sufficiency of funds on account of bonafide dispute between the drawer and drawee of the cheque. This is in view of the legal position that presumption in favour of the holder of a cheque under Section 139 of the NI Act has been held by the NI Act as also by this Court to be a rebuttable presumption to be discharged by the accused/drawee of the cheque which may be discharged even at the threshold where the magistrate examines a case at the stage of taking cognizance as to whether a prima facie case has been made out or not against the drawer of the cheque.

.....J (Gyan Sudha Misra) New Delhi;

November 27, 2012

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[1] (2002) 1 SCC 234
[2] (2003) 3 SCC 232 = (2004) Crl.L.J. 664
[3] (2010) 11 SCC 441