Dashrathbhai Trikambhai Patel vs Hitesh Mahendrabhai Patel on 11 October, 2022

Author: D.Y. Chandrachud

Bench: Hima Kohli, Dhananjaya Y Chandrachud

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No. 1497 of 2022

Dashrathbhai Trikambhai Patel …Appella

Vs.

Hitesh Mahendrabhai Patel & Anr. …Respond

JUDGMENT

Dr Dhananjaya Y Chandrachud, J

1. This appeal arises from a judgment dated 12 January 2022 of the High Court of Gujarat. The High Court dismissed an appeal against the judgment of the Additional Chief Judicial Magistrate dated 30 August 2016 by which the first respondent was acquitted of the offence under Section 138 of the Negotiable Instruments Act 18811. At the core, the issue is whether the offence under Section 138 of the Act would deem to be committed if the cheque that is dishonoured does not represent the enforceable debt at the time of encashment. 1 The Act The Facts

2. On 10 April 2014, the appellant issued a statutory notice under Section 138 of the Act to the first respondent-accused. It was alleged that the first respondent borrowed a sum of rupees twenty lakhs from the appellant on 16 January 2012 and to discharge the liability, issued a cheque dated 17 March 2014 bearing cheque No. 877828 for the said sum. It was further alleged that the cheque when presented on 2 April 2014 was dishonoured due to insufficient funds. The appellant issued the notice calling the first respondent to pay the legally enforceable debt of Rs. 20,00,000:

> “Therefore, my client hereby calls upon you to make payment of Rs. 20,00,000/-

> towards the legally enforceable debt due and payable by you within a period of 15 days from the date of receipt of this particular notice, […]"

3. On 25 April 2014, the first respondent addressed a response to the statutory notice where he alleged the following:

> (i) The first respondent and the appellant are related to each other. The appellant's son married the first respondent's sister;
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> (ii) The appellant lent the first respondent a loan of rupees forty lakhs. There was an oral agreement between the parties that the first respondent would pay rupees one lakh every three months by cheque and rupees eighty thousand in cash to the appellant. Two cheques were given to the appellant for security. It was agreed that the appellant would return both the cheques when the sum lent was paid in full;
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> (iii) The appellant's son-initiated divorce proceedings against the respondent's sister. However, the dowry that was given at the time of marriage is still in the possession of the appellant; and
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> (iv) The cheques that were issued for security have been misused by the appellant.

4. On 12 May 2014, the appellant filed a criminal complaint against the first respondent for the offence under Section 138 of the Act. On 19 May 2014, the first respondent issued another reply to the legal notice. By the said reply, the earlier reply to the legal notice was sought to be amended by replacing the acknowledgment of having received a loan of rupees forty lakhs to rupees twenty lakhs.

5. By a judgment dated 30 August 2016, the Trial Court acquitted the first respondent of the offence under Section 138 on the ground that the first respondent paid the appellant a sum of rupees 4,09,3015 between 8 April 2012 and 30 December 2013 partly discharging his liability in respect of the debt of rupees twenty lakhs. The split up of the payments is set out below:

Date	Amount
18.04.2012	Rs. 49,315/-
05.10.2012	Rs. 1,20,000/-
15.01.2013	Rs. 60,000/-
10.07.2013	Rs. 1,20,000/-
30.12.2013	Rs. 60,000/-
Total	Rs. 4,09,315/-

The Trial Court observed that the appellant has failed to prove that he was owed a legally enforceable debt of rupees twenty lakhs:

> "Therefore, the plaintiff's complaint proved that the accused has paid Rs, 4,09,315 out of the amount due as per fact. So that on the day the plaintiff deposited in the bank to recover a legal amount of Rs, 20,00,000/- The court believes that the prosecution has failed to prove that fact."

6. The appellant filed an appeal against the judgment of the Trial Court before the High Court of Gujarat. On 10 October 2019, the first respondent moved an application before the High Court of Gujarat seeking to place on record the amended reply dated 19 May 2014. By an order dated 11 October 2018, the High Court allowed the application for placing the additional evidence on record. The High Court by its judgment dated 12 January 2022 dismissed the appeal, thereby upholding the judgment of the Trial Court acquitting the first respondent. The High Court affirmed the finding of fact by the Trial Court that a part of the debt owed by the first respondent to the appellant was discharged and thus the notice of demand issued under Section 138 of the Act is not valid. In the course of the analysis, the following findings were entered:

> (i) The appellant has in the course of his cross-examination accepted that the first respondent had deposited rupees 4,09,315 in his account;
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> (ii) There is a statutory presumption that the sum drawn in the cheque is a debt or liability that is owed by the drawer of the cheque to the drawee. The part
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> -payment made by the first respondent ought to have been reflected in the statutory notice issued by the appellant. The sum in the cheque is higher than the amount that was due to the appellant. Thus, the statutory notice issued under Section 138 is not valid. It is an omnibus notice since it did not recognise the part-payment that was made; and
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> (iii) The cheque was a security for the money lent by the appellant. The undated cheque was presented to the bank without recognising the part-

payment that was already made.

The Submissions

7. Mr Mehmood Umar Faruqui, counsel appearing on behalf of the appellant submitted that:

> (i) There is nothing on record to show that the payment of rupees 4,09,315 was made towards the discharge of the debt of rupees twenty lakhs;

(ii) The payment of rupees 4,09,315 was before the issuance of the cheque; and

(iii) The first respondent did not make any payment of the sum that was due since the statutory notice that was served upon him on 15 April 2014.

8. Mr Nakul Dewan, senior counsel appearing on behalf of the first respondent submitted that:

(i) The term 'debt or other liability' used in Section 138 of the Act has been defined in the Explanation clause to mean a 'legally enforceable debt or other liability'. Thus, the demand made in the statutory notice must be for a sum that is legally enforceable;

(ii) If the debtor has paid a part of the debt, a statutory notice seeking the payment of the entire sum in the cheque without any endorsement under Section 56 of the part-payment made would not be legally sustainable; and

(iii) Since the first respondent has paid off a part of the debt, the appellant cannot initiate action if the cheque which represented the principal amount without deducting or endorsing a part payment has been dishonoured.

The Analysis

9. The rival submissions fall for our consideration. Section 138 of the Act reads as follows:

"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 for 8 [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 of other liability" means a legally enforceable debt or other liability.

(emphasis supplied)

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

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

(ii) The cheque is drawn for the discharge of the 'whole or part' of any debt or other liability. 'Debt or other liability' means legally enforceable debt or other liability; and

(iii) The cheque is returned by the bank unpaid because of insufficient funds.

However, unless the stipulations in the proviso are fulfilled the offence is not deemed to be committed. The conditions in the proviso are as follows:

(i) The cheque must be presented in the bank within six months from the date on which it was drawn or within the period of its validity;

(ii) The holder of the cheque must make a demand for the payment of the 'said amount of money' by giving a notice in writing to the drawer of the cheque within thirty days from the receipt of the notice from the bank that the cheque was returned dishonoured; and

(iii) The holder of the cheque fails to make the payment of the 'said amount of money' within fifteen days from the receipt of the notice.

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

12. It must be noted that when a part-payment is made after the issuance of a post-dated cheque, the legally enforceable debt at the time of encashment is less than the sum represented in the cheque. A part-payment or a full payment may have been made between the date when the debt has accrued to the date when the cheque is sought to be encashed. Thus, it is crucial that we refer to the law laid

down by this Court on the issuance of post-dated cheques and cheques issued for the purpose of security. In Indus Airways Private Limited v. Magnum Aviation Private Limited2, the issue before a two-Judge Bench of this Court was whether dishonour of post-dated cheques which were issued by the purchasers towards 'advance payment' would be covered by Section 138 of the Act if the purchase order was cancelled subsequently. It was held that Section 138 would only be applicable where there is a legally enforceable debt subsisting on the date when the cheque is drawn. In Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Limited3, the respondent advanced a loan for setting up a power project and post-dated cheques were given for security. The 2 (2014) 12 SCC 539 3 (2016) 10 SCC 458 cheques were dishonoured and a complaint was instituted under Section 138. Distinguishing Indus Airways (supra), it was held that the test for the application of Section 138 is whether there was a legally enforceable debt on the date mentioned in the cheque. It was held that if the answer is in the affirmative, then the provisions of Section 138 would be attracted. In Sripati Singh v. State of Jharkand4, this Court observed that if a cheque is issued as security and if the debt is not repaid in any other form before the due date or if there is no understanding or agreement between the parties to defer the repayment, the cheque would mature for presentation:

> "17. A cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. 'Security' in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. It is given, deposited or pledged to make certain the fulfilment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified timeframe and issues a cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment of amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same. On such presentation, if the same is dishonoured, the consequences contemplated under Section 138 and the other provisions of N.I. Act would flow.
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> 18. When a cheque is issued and is treated as 'security' towards repayment of an amount with a time period being stipulated for repayment, all that it ensures is that such cheque which is issued as 'security' cannot be presented prior to the loan or the instalment maturing for repayment towards which such cheque is issued as security. Further, the borrower would have the option of repaying the loan amount or such financial liability in any other form and in that manner if the amount of loan due and payable has been discharged

4 2021 SCC OnLine SC 1002 within the agreed period, the cheque issued as security cannot thereafter be presented. Therefore, the prior discharge of the loan or there being an altered situation due to which there would be understanding between the parties is a sine qua non to not present the cheque which was issued as security. These are only the defences that would be available to the drawer of the cheque in a proceedings initiated under Section 138 of the N.I. Act. Therefore, there

cannot be a hard and fast rule that a cheque which is issued as security can never be presented by the drawee of the cheque. If such is the understanding a cheque would also be reduced to an 'on demand promissory note' and in all circumstances, it would only be a civil litigation to recover the amount, which is not the intention of the statute. When a cheque is issued even though as 'security' the consequence flowing therefrom is also known to the drawer of the cheque and in the circumstance stated above if the cheque is presented and dishonoured, the holder of the cheque/drawee would have the option of initiating the civil proceedings for recovery or the criminal proceedings for punishment in the fact situation, but in any event, it is not for the drawer of the cheque to dictate terms with regard to the nature of litigation." (emphasis supplied) Based on the above analysis of precedent, the following principles emerge:

> (i) Where the borrower agrees to repay the loan within a specified timeline and issues a cheque for security but defaults in repaying the loan within the timeline, the cheque matures for presentation. When the cheque is sought to be encashed by the debtor and is dishonoured, Section 138 of the Act will be attracted;
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> (ii) However, the cardinal rule when a cheque is issued for security is that between the date on which the cheque is drawn to the date on which the cheque matures, the loan could be repaid through any other mode. It is only where the loan is not repaid through any other mode within the due date that the cheque would mature for presentation; and
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> (iii) If the loan has been discharged before the due date or if there is an 'altered situation', then the cheque shall not be presented for encashment.

13. In Sunil Todi v. State of Gujarat5, a two judge Bench of this Court expounded the meaning of the phrase 'debt or other liability'. It was observed that the phrase takes within its meaning a 'sum of money promised to be paid on a future day by reason of a present obligation'. The court observed that a post-dated cheque issued after the debt was incurred would be covered within the meaning of 'debt'. The court held that Section 138 would also include cases where the debt is incurred after the cheque is drawn but before it is presented for encashment. In this context, it was observed:

> "26. The object of the NI Act is to enhance the acceptability of cheques and inculcate faith in the efficiency of negotiable instruments for transaction of business. The purpose of the provision would become otiose if the provision is interpreted to exclude cases where debt is incurred after the drawing of the cheque but before its encashment. In Indus Airways, advance payments were made but since the purchase agreement was cancelled, there was no occasion of incurring any debt. The true purpose of Section 138 would not be fulfilled, if 'debt or other liability' is interpreted to include only a debt that exists as on the date of drawing of the cheque. Moreover, Parliament has used the expression 'debt or other liability'. The expression "or other liability' must have a meaning of its own, the legislature having used two distinct phrases. The expression 'or other liability' has a content which is broader than 'a debt' and cannot be equated with the latter. In the present case, the cheque was

> issued in close proximity with the commencement of power supply. The issuance of the cheque in the context of a commercial transaction must be understood in the context of the business dealings. The issuance of the cheque was followed close on its heels by the supply of power. To hold that the cheque was not issued in the context of a liability which was being assumed by the company to pay for the 5 Criminal Appeal No. 1446 of 2021 dues towards power supplied would be to produce an outcome at odds with the business dealings. If the company were to fail to provide a satisfactory LC and yet consume power, the cheques were capable of being presented for the purpose of meeting the outstanding dues."

14. The judgments from Indus Airways (supra) to Sunil Todi (supra) indicate that much of the analysis on whether post-dated cheques issued as security would fall within the purview of Section 138 of the Act hinges on the relevance of time. In Indus Airways (supra), this Court held that for the commission of the offence under Section 138, there must have been a debt on the date of issuance of the cheque. However, later judgments adopt a more nuanced position while discussing the validity of proceedings under Section 138 on the dishonour of post-dated cheques. This Court since Sampelly Satyanarayana Rao (supra) has consistently held that there must be a legally enforceable debt on the date mentioned in the cheque, which is the date of maturity.

15. This Court in NEPC Micon Ltd. v. Magna Leasing Ltd.6 held that the Courts must interpret Section 138 with reference to the legislative intent to supress the mischief and advance the remedy. The objective of the Act in general and Section 138 specifically is to enhance the acceptability of cheques and to inculcate faith in the efficacy of negotiable instruments for the transaction of business.7 Section 138 criminalises the dishonour of cheques. This is in addition to the civil remedy that is available. Through the criminalisation of the dishonour of cheques, the legislature intended to prevent dishonesty on the part of the drawer of a negotiable instrument.8 The interpretation of Section 138 must not permit dishonesty of the 6 AIR 1995 SC 1952 7 Sunil Sodhi v. State of Gujarat, Criminal Appeal No. 1446 of 2021 8 M/s Electronics Trade and Technology Development Corporation Ltd., 1996(3) Crimes 82 (SC) drawee of the cheque as well. A cheque is issued as security to provide the drawee of the cheque with a leverage of using the cheque in case the drawer fails to pay the debt in the future. Therefore, cheques are issued and received as security with the contemplation that a part or the full sum that is addressed in the cheque may be paid before the cheque is encashed.

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

17. The appellant contended that the cheque was issued by the first respondent on 17 March 2014. However, the payment of rupees 4,09,3015 received from the first respondent was between 8 April 2012 and 30 December 2013. It was contended that since the payments were made before the issuance of cheque, it cannot be considered as part-payment for the discharge of liability.

18. The appellant in his cross- examination conducted on 17 March 2016 has categorically mentioned that he did not take any receipt on lending rupees twenty lakhs to the first respondent. The appellant stated that a 'cheque against the cheque' was given. The relevant portion of the cross-examination is extracted below:

> "[...] I have paid the Income Tax Return for the accounting year 2012-13. It is true that I have shown the transaction of Rupees Twenty Lakhs in the said return. I am ready to present the Income Tax Return for the Accounting Year of Rupees Twenty Lakhs to the Accused; I have not acknowledged the receipt. It is true that I have given the cheque against the said cheque and not taken the receipt." (emphasis supplied)

19. In the testimony recorded under Section 145 of the Act, the appellant stated that he lent the first respondent a sum of rupees twenty lakhs on 16 January 2012 and that the respondent gave a cheque of rupees twenty lakhs stating that it may be deposited on the date specified in it:

> "The plaintiff and the Defendant of this case being a Vevai and has a house- like relationship, he has given the amount to the plaintiff as per his requirement on dtd. 16/01/2012 and for the payment of the amount paid by the Plaintiff to the in this case, his bank State Bank of India, AUDa Garden, Prahladnagar Branch, Ahmedabad Cheque Number: 8877828 of Rs. 20,00,000/- (Rupees Twenty Lakhs Only) and stated that the above cheque was deposited by the plaintiff on the date specified in it giving the plaintiff the firm confidence and assurance that the plaintiff would definitely get the amount due from us." (emphasis supplied) Further, in the cross-examination, the appellant stated that the amount that was paid by the first respondent was not paid as a reward or gift:
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> "I cannot say whether the accused has also paid me this amount in the count of Rupees Twenty Lakhs. The accused did not even give me that amount as a reward/gift."

20. It was the contention of the first respondent that the cheque was not dated. On the other hand, it was the contention of the appellant that the cheque was dated 17 March 2014. The Courts below did not record a finding on whether the cheque was un-dated or was dated 17 March 2014. However, it was conclusively held that the cheque was issued by the first respondent for security on the date when the loan was borrowed. It was also categorically recorded by the Courts below that a sum of rupees 4,09,315 that was paid by the first respondent was paid to partly fulfil the debt of rupees twenty lakhs. The appellant in his cross-examination has stated that a 'cheque against a cheque' was given when he loaned the sum of rupees twenty lakhs. Thus, it can be concluded that the cheque was given as a security to discharge the loan, either undated or dated as 17 March 2014. Merely because

the sum of rupees 4,09,315 was paid between 8 April 2012 and 30 December 2013, which was after 17 March 2014, it cannot be concluded that the sum was not paid in discharge of the loan of rupees twenty lakh. The sum of rupees 4,09,315 was paid after the loan was lent to the first respondent. The appellant in his cross- examination has not denied the receipt of the payments. He has also stated it was not received as a 'gift or reward'. In view of the above discussion, at the time of the encashment of the cheque, the first respondent did not owe a sum of rupees twenty lakhs as represented in the cheque at the time of encashment of the cheque that was issued for security.

21. The High Court while dismissing the appeal against acquittal held that the notice issued by the appellant is an omnibus notice since it does not represent a legally enforceable debt. Relying on the judgment of this Court in Rahul Builders v. Arihant Fertilizers & Chemicals9, it was held that the legal notice was not issued in accordance with proviso (b) to Section 138 since it did not represent the 'correct amount'. The appellant has contended that the requirement under Section 138 is to send a notice demanding the 'cheque amount'. It was contended that the offence under Section 138 was made out since the appellant in the statutory notice demanded the payment of rupees twenty lakhs which was the 'cheque amount'.

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

23. This Court has interpreted the phrase 'the said amount of money' as it finds place in proviso (b) to Section 138. In Suman Sethi v. Ajay K Churiwal10, the appellant issued a cheque for rupees twenty lakhs in favour of the first respondent. The cheque was dishonoured. A demand notice for an amount higher than the cheque amount was issued. A two-Judge Bench of this Court held that the demand has to be made for the 'said amount', which is the cheque amount. It was also observed that the question of whether the notice demanding an amount higher than the cheque amount is valid would depend on the language of the notice:

> "8. It is a well-settled principle of law that the notice has to be read as a whole. In the notice, demand has to be made for the "said amount" i.e. the cheque amount. If no such demand is made the notice no doubt would fall short of its legal requirement. Where in addition to the "said amount" there is also a claim by way of interest, cost etc. whether 9 (2008) 2 SCC 321 10 (2000) 2 SCC 38 the notice is bad would depend on the language of the notice. If in a notice while giving the break-up of the claim the cheque amount, interest, damages etc. are separately specified, other such claims for interest, cost etc. would be superfluous and these additional claims would be severable and will not invalidate the notice. If, however, in the notice an omnibus demand is made without specifying what was due under the dishonoured cheque, the notice might well fail to meet the legal requirement and may be regarded as bad."

24. In KR Indira v. G. Adinarayana11, it was held that the notice did not demand the payment of the cheque amount but the loan amount. It was observed that for the purposes of proviso (b), the amount covered in the dishonoured cheque must be demanded. In Rahul Builders (supra), the drawee demanded the payment of rupees 8,72,409 which was higher than the sum of rupees 1,00,000 represented in the cheque. It was reiterated that the phrase 'payment of the said amount' in proviso (b) would mean the cheque amount. Since the demand in the notice was not severable as the cheque amount could not be severed from the demand for the additional amount, it was held that it was an omnibus notice. Justice SB Sinha writing for a two-Judge Bench of this Court observed:

> "10. [...] One of the conditions was service of a notice making demand of the payment of the amount of cheque as is evident from the use of the phraseology "payment of the said amount of money". [...] It is one thing to say that the demand may not only represent the unpaid amount under cheque but also other incidental expenses like costs and interests, but the same would not mean that the notice would be vague and capable of two interpretations. An omnibus notice without specifying as to what was the amount due under the dishonoured cheque would not subserve the requirement of law. Respondent 1 was not called upon to pay the amount which was payable under the cheque issued by it. The amount which it was called upon to pay was the outstanding amounts of bills i.e. Rs 8,72,409. The noticee was to respond to the said demand. Pursuant thereto, it was to offer the entire sum of Rs 11 (2003) 8 SCC 300 8,72,409. No demand was made upon it to pay the said sum of Rs 1,00,000 which was tendered to the complainant by cheque dated 30-4-2000. What was, therefore, demanded was the entire sum and not a part of it."

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

26. The appellant contends that the purpose of Section 138 of the Act would be defeated if the dishonour of the cheque issued for security is not included within the purview of Section 138 where the payment of a part of the cheque amount is made. It was contended that it would lead to a possibility where the drawer of the cheque could evade prosecution under Section 138 by paying a small amount of the debt while defaulting on the remaining payment. Section 56 stipulates that if there is an endorsement on a negotiable instrument that a part of the sum mentioned in the cheque has been paid, then the instrument may be negotiated for the balance. Section 56 reads as follows:

> "56. Indorsement for part of sum due.- No writing on a negotiable instrument is valid for the purpose of negotiation if such writing purports to transfer only a part of the

> amount appearing to be due on the instrument; but where such amount has been partly paid a note to that effect may be indorsed on the instrument, which may then be negotiated for the balance."

27. Section 15 defines the phrase 'indorsement' as follows:

> "15. Indorsement.- When a maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same, and is called the "indorse"."

28. A Division Bench of the Kerala High Court has held in Joseph Sartho v. Gopinathan12 that since the representation in the cheque was for a sum higher than the amount that was due on the date that it was presented for encashment, the drawer of the cheque cannot be convicted for the offence under Section 138 of the Act. The High Court of Delhi addressed the same issue in Alliance Infrastructure Project Ltd. v. Vinay Mittal13. The High Court observed that when part payment is made after the cheque is drawn, the payee has the option of either taking a new cheque for the reduced amount or by making an endorsement on the cheque acknowledging that a part payment was made according to the provisions of Section 56 of the Act. It was also held that the notice of demand which requires the drawer of the cheque to make payment of the whole amount represented in the cheque despite receiving part repayment against the sum, before the issue of notice, cannot be valid under Section 138(b) of the Act. A similar view was taken by the High Court of Gujarat in Shree Corporation v. Anilbhai Puranbhai Bansal14.

29. Under Section 56 read with Section 15 of the Act, an endorsement may be made by recording the part-payment of the debt in the cheque or in a note 12 (2008) 3 KLJ 784 13 ILR (2010) III Delhi 459 14 [2018 (2) GLH 105] appended to the cheque. When such an endorsement is made, the instrument could still be used to negotiate the balance amount. If the endorsed cheque when presented for encashment of the balance amount is dishonoured, then the drawee can take recourse to the provisions of Section 138. Thus, when a part- payment of the debt is made after the cheque was drawn but before the cheque is encashed, such payment must be endorsed on the cheque under Section 56 of the Act. The cheque cannot be presented for encashment without recording the part payment. If the unendorsed cheque is dishonoured on presentation, the offence under Section 138 would not be attracted since the cheque does not represent a legally enforceable debt at the time of encashment.

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

> (i) For the commission of an offence under Section 138, the cheque that is dishonoured must represent a legally enforceable debt on the date of maturity or presentation;

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

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

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

(v) The notice demanding the payment of the 'said amount of money' has been interpreted by judgments of this Court to mean the cheque amount.

The conditions stipulated in the provisos to Section 138 need to be fulfilled in addition to the ingredients in the substantive part of Section

138. Since in this case, the first respondent has not committed an offence under Section 138, the validity of the form of the notice need not be decided.

31. For the reasons indicated above, the appeal against the judgment of the High Court of Gujarat dated 12 January 2022 is dismissed.

32. Pending application(s), if any, stand disposed of.

…. . . …. . . . . …. . . . . …. … … … … … . …. . . . . J. [Dr Dhananjaya Y Chandrachud]
…….J. [Hima Kohli] New Delhi;

October 11, 2022