Sangeeta Batra vs M/S Vnd Foods & Ors. on 1 July, 2015

Author: Vipin Sanghi

Bench: Vipin Sanghi

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 27.05.2015

Judgment delivered on: 01.07.2015

+ Crl. A. No.679/2015

SANGEETA BATRA ..... Appellant.
Through: Mr. K. N. Popli & Mr. Mohit Popli, Advocates.

versus

M/S. VND FOODS & ORS. ..... Respondents
Through: Mr. Mr. Juggal Wadhwa, Mr. Rishabh Wadhwa and Mr. Parth Kaushik, Advocates for R-1 & 2.
Mr. Rajeev Kumar and Mr. Saurabh Kumar, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

JUDGMENT

VIPIN SANGHI, J.

1. The present appeal is directed against the common judgment dated 10.07.2014 passed by the learned Metropolitan Magistrate (NI Act)-041 Tis Hazari Courts, New Delhi in CC No. 76/10, whereby the complaint preferred by the appellant under Section 138 of the Negotiable Instruments Act (the NI Act), was rejected, and the respondents/accused were acquitted.

2. The case of the complainant/appellant is that the complainant, along with her four other sisters (who have also preferred identical complaints in respect of dishonoured cheques issued in their individual favour) are the owners of the premises - J-2/22, Rajouri Garden, New Delhi having 1/5th undivided share each. The aforesaid property is a freehold property consisting of basement, ground floor, first floor and second floor with roof rights. All the sisters/ complainants had appointed one Mr. Vipin Batra as their Attorney by way of a GPA dated 23.06.2008, and through him entered into five lease agreements on 18.07.2008-all marked as Ex.CW-1/DA, with the accused in respect of the

undivided share of each of the sisters in the aforesaid premises for a period of nine years, at a total monthly rent of Rs. 5,50,000/- (before TDS deduction). The share of rent of each sister was Rs. 1,10,000/-. The respondents leased the property for the purpose of running a Restaurant under the name & style of „Kabab Factory . The first three months, starting from the 1st July, 2008 to 30th September, 2008, was to be the rent free period for the purposes of carrying out the necessary works for the commencement of the restaurant business. The obligation for payment of the rent was to commence from 1st October, 2008 onwards. The period of nine years was divided, for the purposes of computation of monthly rent, into four slabs, as follows:

i) Monthly rent for the period 1st July, 2008 to 30th September, 2008 shall be Nil.

(This period of 3 months will be treated as free for fit out to commence the restaurant)

ii) Monthly rent for the period 1st October, 2008 to 30th June, 2011 shall be Rs.1,10,000/-

iii) Monthly rent for the period 1st July 2011 to 30th June, 2014 shall be Rs.1,26,500/-

iv) Monthly rent for the period 1st July 2014 to 30th June, 2017 shall be Rs.1,45,475/-

The tenancy, however, got terminated in January, 2010.

3. At the time of the execution of the lease agreement, security deposit of an amount equivalent to three months rent was made by the accused. In addition to that, the accused/ lessee also issued 12 post dated cheques qua each lease agreement to each complainant/ lessors as advance rent, totaling 60 cheques for the period of 01.10.2008 to 30.09.2009. The said cheques were handed over to each of the complainants at the time of execution of each of the lease agreements i.e. on 18.07.2008 in pursuance of Clause (4) of the lease agreements-which are all having identical terms and conditions. Clause 4 of each of the lease agreements, insofar as it is relevant reads: "the lessee has also submit 12 post dated cheques at the time of execution of this lease deed as advance for monthly rent...." Each of the cheques were drawn for the amount of Rs. 91,300/- (After TDS deduction on rent of Rs. 1,10,000/-). Of these 60 cheques, 47 got dishonoured upon presentation, leading to filing of 47 separate complaints qua each dishonoured cheque. The details of the complaint, wherefrom the present appeal arises, are as follows:

CC No.	Complainant	Cheque dated	Cheque No.
76/01	Sangeeta Batra	06.04.2009	017198

4. However, the restaurant never commenced business as the necessary permissions for the installation of the lift and other alterations were not procured within time, though the accused remained in occupation of the aforesaid property. Subsequently, the aforesaid property was booked and sealed by the MCD for unauthorized construction/ excess coverage in violation of bye-laws. On 13.04.2009, a portion of the basement and third floor were sealed, and the rest of the property was sealed on 12.09.2009.

5. The learned MM set out the fivefold defence of the accused as follows:

> i) Complaint being still born, having not been filed by competent attorney;
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> ii) Lease Agreement is as agreement void ab-initio, being an agreement forbidden by law/against public policy;
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> iii) Lease Agreement is a voidable contract, on account of misrepresentation/concealment of material information by the lessor;
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> iv) Lease Agreement having got frustrated; the accused/lessee is absolved from payment of rent;
>
> v) The final defence is that the cheques were issued not in discharge of a subsisting liability but as advance/security cheques.

6. He returned findings on the first three issues aforesaid in favour of the appellants/complainants. It was held that the complaint had been filed by the competent authority and that lease agreements were not void ab initio as they were not agreements forbidden by law or against public policy. It was also held that there was no misrepresentation or concealment of material information by the lessor. After holding that the lease agreement entered into were valid and were neither void nor voidable, the learned MM proceeded to consider whether the contract subsequently became void on account of sealing of the premises by the MCD.

7. In this context, the learned MM considered the issue whether the agreement got frustrated on account of sealing and inability of the respondent/accused/lessees to use the leased premises, thereby discharging the respondent/accused of their liability to pay rent. On this issue as well, the learned MM returned a finding in favour of the appellant/complainant holding that the doctrine of frustration would not absolve the parties from complying with the terms of the contract. The contract contained in the lease agreement could not be said to have been frustrated on account of supervening third party conduct, and that the parties were under an obligation to perform their part of the contract. Finally, the learned MM considered the issue whether the cheques in question had been issued, not in discharge of a subsisting liability, but as advance/security cheques.

8. On this aspect, the learned MM held that the rent becomes due or accrues on the utilization of the premises for the purpose for which it was taken. Since the premises was sealed, it could not be utilized by the respondent for the purpose of running a restaurant. The cheques in question were advance cheques and were issued prior to the crystallized liability having arisen. Reliance was placed on the judgment of the Supreme Court in M/s Indus Airways Pvt. Ltd. vs M/s Magnum Aviation Pvt. Ltd., IV (2014) SLT 321, and in particular on the following extract from the said judgment:

> "13. The explanation appended to Section 138 explains the meaning of the expression „debt or other liability for the purpose of Section 138. This expression means a

> legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The explanation leaves no manner of doubt that to attract an offence under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of existing or past adjudicated liability is sine qua non for bringing an offence under Section 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise, and material or goods for which purchase order was placed is not supplied, in our considered view, the cheque cannot be held to have been drawn for an existing debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability...".

9. The learned MM held that, since the cheques in question had been received by the complainants in advance at the time of execution of the lease deeds and the property could not be used for the intended purpose, the dishonour of the cheques in question would not entail an action under Section 138 of the NI Act.

10. Learned counsel for the appellant submits that the impugned judgment is misdirected in law and it is based on erroneous view of law. He submits that the impugned judgment has resulted in grave miscarriage of justice. While the learned MM has returned findings of fact in favour of the appellant/complainant on all the issues, only on account of the fact that the cheques in question had been issued in advance towards payment of rent and the liability for payment of rent arise month to month, the learned MM has concluded that the dishonour of the cheque in question could not be the basis of a complaint under Section 138 of the NI Act. For reaching this conclusion, the learned MM has placed reliance on the judgment of the Supreme Court in Indus Airways (supra). Learned counsel submits that this is on account of a superficial reading of the said judgment, and its misapplication to the facts of the present case.

11. Learned counsel submits that the learned MM has failed to appreciate that there was no question of suspending the obligation to make payment of rent on account of the sealing of the leased premises, as the respondents had the option to surrender the lease. So long as the lease was not surrendered, merely on account of the sealing of the leased premises, the obligation to pay rent did not get suspended or ceased. Whether, or not, the respondents were able to use the premises for the intended purpose, namely, to set up a restaurant, was not relevant or material. Learned counsel submits that when the premises was let out by the appellant along with the other four sisters, there was no notice by the Municipal Corporation pending.

12. Learned counsel submits that the building was booked vide letter dated 17.10.2008, whereas the premises had been leased to the respondent on 18.07.2008. Learned counsel submits that the building was not sealed for want of completion certificate and that the said sealing had taken place on account of unauthorized construction. It was booked on 17.10.2008 for excess coverage of basement, ground floor, first floor and additional second floor. It was again booked on 20.06.2009

for unauthorized construction of basement, ground floor, first floor, second floor and third floor. Learned counsel has referred to the testimony of DW-1, Sh. S.K. Gupta, A.E. (Building), SDMC, West Zone, New Delhi and in particular to his cross examination recorded on 20.02.2013 in this regard.

13. Learned counsel submits that under the terms of the lease agreement, the respondents/lessees were obliged to obtain all the requisite permission before undertaking any additions or alteration in the lease premises. In this regard, reference is made to the following clauses of the lease deeds dated 18.07.2008 which are identical and which were all marked as CW-1/DA:

> "f) The Lessee shall not make or permit to be made any structural addition on the roof except the lift room and a temporary shed for generator set approx. measuring 10ft. × 12ft. In case any liability like property tax, penalties, duties, fines etc is imposed by the Municipal Corporation of Delhi, Delhi Development Authority or any other concerned Department/ Authority on account of the Lessee s use of the roof, the Lessee shall be liable for the same.
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> g) Also it is expressly agreed that in case any proceedings are commenced or liability, if any sort arises on account of any breach of any statutory, mandatory or regulatory provisions, then the Lessee shall be wholly and solely responsible to defend the said proceedings and consequences thereof, whether civil or criminal shall be solely borne by the Lessee. The Lessee shall also indemnify and also keep indemnified the Lessor against any loss or damages that the Lessor suffers or that are undergone by the Lessor due to non-compliance of any statutory, regulatory or mandatory provisions or rules or regulations etc. x x x x x x x x x x
>
> i) The Lessee shall not make or permit to be made any structural addition or alteration in the Demised Premises except the addition and installation of lift in the front side of the building as shown bounded red in the site plan annexed as Annexure „B , installation of fire security system and exit gate on the back side of the building at his own costs and risks. The Lessee shall not remove the lift, fire security system and gate of back side at the time of handing over the vacant and peaceful possession of the Demises Premises. The Lessee shall not be entitled for any compensation for the same/ any other improvements at the time of vacation.
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> x x x x x x x x x x
> k) At the time of installation of lift, fire security system and
>
> other civil work and before commencing the restaurant business, the Lessee shall get the permission/ license, if necessary, from the concerned authority/ department at his own costs and that the Lessee shall get the same renewed from time to time."

14. Learned counsel submits that the respondent/accused undertook unauthorized construction of the third floor between the first booking-which took place on 17.10.2008, and the second booking-which took place on 20.06.2009, when the premises was already leased out to the

respondents. Learned counsel submits that DW-1 S.K.Gupta admitted that as per Master Plan 2021, the property in question, which is on Najafgarh Road is permitted for commercial use and can be used commercially for running a restaurant. He also admitted that the complainant had paid the conversion charges vide receipts dated 19.06.2008 and 30.06.2008.

15. Learned counsel submits that, in any event, the respondents by opting to hold on to the lease premises even after its sealing, and not surrendering the lease, incurred the liability to pay the rent.

16. On the other hand, learned counsel for the respondent submits that the appellant and the other co-owners were responsible for the sealing of the premises. In this regard, clause 7(b) of the lease deed Ex. CW-1/DA is referred to, which reads as follows:

> "b) The Lessor hereby warrants and represents that the Lessor being the owner of 1/5th undivided share of the said Demised Premises and being fully entitled to execute this Lease deed will hold the Lessee free and harmless of any demands, claims, actions or proceedings by any authorities, local body or interference from any other person with the Lessee s possession and enjoyment of the Demised Premises. The Lessor further assures that the Demised Premises is not subject matter of any pending litigation, acquisition proceedings, by reason whereof the Lessor is prohibited from leasing the same."

17. Learned counsel submits that sealing took place on account of unauthorized construction on all the floors including basement, ground and first floor as stated by DW-1. The booking first took place on 17.10.2008 for excess coverage at basement, ground, first floor and addition to second floor. It is submitted that on account of the said illegalities committed by the appellant and the other co-owners, the premises came to be sealed and the respondent could not put the premises to use and, therefore, there was no obligation to make payment of rent for the period that the premises remained sealed.

18. Learned counsel further submits the appellant and the other co-owners did not choose to terminate the lease after the premises was sealed and the cheques were being dishonoured. This shows that there was no breach of the terms and conditions on the part of the respondent.

19. Learned counsel for the respondent has sought to place reliance on the judgment of the Supreme Court in M.S. Narayana Menon @ Mavi Vs. State of Kerala & Another, (2006) 6 SCC 39.

20. Learned counsel for the respondent submits that in the suit filed by the appellant, and the other co-owners, the plaintiffs-including the appellant, had preferred CCP No.111/2012 in C.S. (OS) No.735/2010. The same was dismissed by this Court on 07.02.2014. Consequently, reliance is also placed on the judgment of the Supreme Court in K. Prakashan v. P.K. Surendran, (2008) 1 SCC 258 in support of the submission that where two views are possible, the appellate court shall not reverse a judgment of acquittal only because it prefers the other possible view. He submits that the appellate courts jurisdiction to interfere with a judgment of acquittal is limited. Reliance is placed on the judgment of the Supreme Court in Sanwat Singh & Ors. v. State of Rajasthan, AIR 1961 SC 715,

wherein the Supreme Court held that if the trial court has acquitted the accused, the appellate court shall not take a different view unless the finding is such that no reasonable person will come to that conclusion. The Supreme Court also referred to the decision of the Privy Council in Sheo Swarup v. King Emperor, LR 61 IA 398, wherein the Privy Council had observed:

> "... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses ...."

21. Mr. Wadhwa has also placed reliance on the judgment of this Court in Virender Singh v. Laxmi Narain & Anr., 135 (2006) DLT 273, wherein this Court invoked the maxim "Pari delicto portior est conditio possidentis", i.e. the Courts will refuse to enforce an illegal agreement at the instance of a person who himself is a party to the illegality or fraud. This submission is made in furtherance of the submission that the lease agreements were void and contrary to the law inasmuch, as, they had been entered into to perpetuate an illegality, i.e. of putting the premises in question to use contrary to the building bye-laws.

22. Reliance is also placed on the judgment in Shreyas Agro Services Pvt. Ltd. v. Chandrakumar S.B., 2006 Crl LJ 3140 - a Division Bench decision of the Karnataka High Court. The Karnataka High Court had taken a view in this case that the words "for discharge of any debt or other liability" in Section 138 of NI Act should be interpreted to mean current, existing or past ascertained liability, and that a cheque issued in respect of a future liability not in existence as on the date of cheque would not attract prosecution under Section 138 of the NI Act. Learned counsel also relies on Indus Airways (supra) for this proposition.

23. In his rejoinder, learned counsel for the appellant has referred to the reply dated 23.05.2009 (Ex.DW-2/C3) sent by the respondents to the appellants letter dated 05.05.2009. In this reply, the respondents, inter alia, stated that "We have all the intentions to clear the cheques, which have got dishonoured due to our tight financial position. You are duly apprised of this fact. You were also requested not to present the cheques".

24. Learned counsel for the appellant further submits that the respondents, in fact, made payment of rent for some period even after the first sealing of the premises in question on 13.04.2009. In this regard, reference is made to the cross examination of DW-2, Sh. Vinod Kumar undertaken on 15.03.2013, where he, inter alia, stated:

> "It is correct that three demand drafts dated 18.04.09 were delivered by us to the complainant. The same were given towards advance rent. The aforesaid three demand drafts were not in addition to 60 cheques earlier given towards the advance rent. The copy of the said drafts is Ex. DW-2/C-1 (one page). The said demand drafts

were towards rent. It is correct that the aforesaid demand drafts were delivered by us to the complainant after first sealing of the property i.e. 13.04.09. It is correct that five demand drafts were delivered by us to the complainant vide letter dated 27.03.09 vide Ex DW-2/C-2, wherein we called back our old cheques."

25. Since the respondents have urged that this Court should not interfere with the judgment of acquittal in the present appeal, I may refer to the judgment of the Supreme Court in Ghurey Lal v. State of U.P., (2008) 10 SCC 450. In this decision, the Supreme Court after considering several earlier decisions, laid down the guidelines to be followed by the High Courts and other appellate courts if the court is inclined to overrule or otherwise disturb the trail courts finding of acquittal. The relevant extract from this decision reads as follows:

"70. In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

i) The trial court's conclusion with regard to the facts is palpably wrong;

ii) The trial court's decision was based on an erroneous view of law;

iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

v) The trial court's judgment was manifestly unjust and unreasonable;

vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic expert, etc.

vii) This list is intended to be illustrative, not exhaustive."

Pertinently, in Ghurey Lal (supra), the Supreme Court considered the judgment of the Privy Council in Sheo Swarup (supra), relied upon in Sanwat Singh (supra). Thus, this Court would scrutinize the impugned judgment in the context of Ghurey Lal (supra).

26. Section 108 of the Transfer of Property Act deals with the aspect of rights and liabilities of lessor and lessee. The rights and liabilities of the lessee are enumerated from clause (d) onwards upto clause (q). Clause (e) of Section 108 reads:

> "(e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:
>
> Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision;"

(Emphasis supplied)

27. Thus, if the leased premises is rendered substantially and permanently unfit for the purpose for which it was let, the lessee has the option to avoid the lease. Unless the lessee so avoids the lease, he cannot avoid his obligation contained in clause (l) of Section 108, which states that "the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf;".

28. This position is rather well settled. As early as in 1973, this Court in Chamber of Colours and Chemicals Pvt. Ltd. v. Trilokchand Jain, 1973 (9) DLT 510 dealt with this issue. In this case, proceedings were initiated under the Delhi Rent Control Act, 1958, inter alia, on the ground of non payment of rent by the tenant. The Rent Controller passed an order under Section 15(1) of the said Act, directing deposit of arrears of rent and directing payment of interim rent from month to month. During pendency of the eviction proceedings, a part of the tenanted premises was destroyed by fire. The tenant did not deposit the interim rent fixed by the Controller. Consequently, the landlord moved an application under section 15(7) of the said Act praying that the defence of the tenant be struck out. The tenant/appellant then contended that the landlord was not entitled to claim rent as part of the premises had been destroyed by fire, and the landlord had refused-either to reconstruct the destroyed premises, or permit the appellant/tenant to do so. The application of the landlord under section 15(7) was rejected by the Rent Controller. However, in first appeal, the Rent Control Tribunal allowed the appeal of the respondent/landlord. Consequently, the tenant preferred a second appeal before the High Court.

29. This Court rejected the appellants/tenants submission that it had the right to suspend the payment of rent on the destruction of the premises and upon the refusal of the respondent/landlord to either reconstruct himself, or permit the tenant to do so. The discussion in the said decision reads as follows:

> "8. On the second point on merits, it is contended that it was the appellants' right to suspend payment of rent on the destruction of the premises and upon the refusal of the respondent either to reconstruct it himself or permit the appellants to do so. Let me first examine the position under the Transfer of Property Act. In the case of the

tenancy premises being wholly destroyed or rendered substantially and permanently unfit by fire etc. for the purposes for which it was let, the only right given to the lessee by section 108(e) of the Transfer of Property Act is to exercise the option of treating the lease to be void. In such a case the lessee cannot continue to hold on to the premises or say that the lease continues but he will not pay the rent. If the lessee does not exercise the option to treat the lease to be void, he will remain liable to pay the rent. (See Sidick Haji Hossin v. Bruel and Co., (1910) 8 IC 1049. In Gandavalla Munuswamy v. Marugn Muniramiah, AIR1965AP167 it was observed:-

"Under S.108(e), T.P. Act a lease is not automatically determined on the destruction by fire or irresistible force of a substantial portion of the property leased. It is a matter of option with the lessee to get rid of the lease or not. He could treat it as void if he so desired. But the law does not compel him to do so. This aspect of the matter makes it all the more necessary that an unambiguous declaration of the lessee's intention to treat the lease as void must be communicated to the Lesser. The Lesser would not otherwise be able to take appropriate steps on the footing that the lease has come to an end and he is Therefore at liberty to deal with the property as he chooses. What is even more important is that a mere declaration of intention to treat the lease as void is not sufficient. The lessee must also yield up possession of the property to the Lesser as required by the provisions of Section 108(q) of the Transfer of Property Act. He cannot continue in possession and yet declare that he has treated the lease as void. That would obviously be an inconsistent and impermissible position to adopt. So long as a lessee has not surrendered to his Lesser the possession which he obtained from the latter at the time of the lease. he cannot rid himself of his obligations under the lease. His holding to the possession into which he was inducted by his Lesser will estop him from disputing the right of his Lesser to evict him and to recover possession from him."

9. To the same effect are the cases reported in AIR1966All225 and in re- Alanduraippar s case, AIR1963Mad94 , There cannot be any unilateral suspension of rent. The tenant continues to be liable for the whole of the rent until he obtains an order from the Court or agreement from the landlord for reduction of the proportionate part of the rent. (See. Kishan Chand v. Rainesh Chander and others 1969 AIRCJ 839 a decision of Deshpande J. of this Court). Therefore, where an order for deposit of rent has been made under sub-section (1) of section 15 of the Act, the tenant cannot unilaterally suspend the payment or deposit of rent as ordered by the Controller and if he does so he undoubtedly commits a breach of the order of the Controller which will entitle the tenant to ask for an order under sub-section (7) of section 15 of the Act".

[emphasis supplied] From the above extract, it would be seen that the aforesaid legal position as existed for over a century.

30. The decision in the Chamber of Colours and Chemicals (supra) was followed by this Court again in Chander Mohan Jain & Ors. v. State Bank of Patiala & Anr., 58 (1995) DLT 799. This is a short order and the relevant extract from the same reads as follows:

> "(2) This is application for direction to defendant No.1 that the rent of the premises occupied by defendant No.1 bank be paid.

The claim in the application is for payment of Rs.1,02,600.00 per month.

(3) It is stated in the reply that a part of the roof had collapsed on 13.10.1990, and the building was sealed by the New Delhi Municipal Committee on 05.10.1990, by declaring it to be unsafe. Section 108(e) of the Transfer of Property Act, 1882, has remained unchanged since 1882. If the defendant/ tenant was so minded, it had the option of voiding the lease. It has not done so. So long as the lease has not been voided, the defendant bank is liable to pay the rent.

(4) MR.J.K. Seth relies on the case reported as 1973 Rajdhani Law Reporter (Note) 68, being S.A.O. No.30 of 1969 (Chamber of Colour and Chemical Pvt. Ltd. v. Trilok Chand) , where it was held by this Court that a tenant cannot treat a lease as subsisting and suspend payment of rent. I am in respectful agreement.

(5) The defendant bank has not voided the leas we in question. It continues to regard itself as tenant. As a tenant it has to pay the agreed rent. I, Therefore, direct the defendant to deposit the rent of Rs.1,02,600/ -per month, which has admittedly not been paid since 31.10.1990, in Court within ten days, as it is said by the defendant's counsel that there is no difficulty in paying the rent.

(6) The sealing of the premises by the New Delhi Municipal Committee has no bearing on the matter, as the defendant bank has chosen not to void the lease. Case be listed before the Joint Registrar on 04.08.1994."

[emphasis supplied]

31. Thus, the fact that the leased premises was sealed on two occasions - firstly on 13.04.2009 (when a portion of the basement & third floor were sealed) and, secondly on 12.09.2009, (when the entire premises was sealed), is of no relevance for the simple reason that the respondent/tenants did not choose to avoid the lease as they could have done. It is wholly irrelevant for the present purpose, as to who was responsible for the sealing of the premises on both the occasions. Even if one were to proceed on the assumption that the appellant and the other co-owners had made excess coverage on the basement and upper floors of the leased premises even prior to the grant of the lease, and it was that excess coverage which led to the sealing of the leased premises, that would not provide justification to the respondent/tenants to deny their liability to pay the rent, if they choose to continue to hold the leased premises as tenants.

32. The lease agreement in clause 15 provides that:

> "15. That the Lessee has verified and has fully satisfied itself regarding the soundness, nature, extent and quality of the construction, structure, fixtures and fittings of the building, purpose for which the Demised Premises can be used etc. and has also verified and fully satisfied himself about the soundness of the title of the Lessor.

> Hereafter, no claim and/ or demand of any nature whatsoever on any ground shall lie upon the Lessor."

33. The respondent/lessees took the premises on lease with open eyes. Even if it were to be accepted for the sake of argument, that the premises was taken by them on lease unmindful of the excess coverage on the basement and upper floors, and that the said illegality was latent, the consequent sealing of the leased premises would not entitle the respondent/lessee to suspend their obligation to pay the rent unilaterally when the lease has not been avoided. Their only option was to surrender the lease and claim damages for the losses that they may have suffered on account of them being leased a premises with such defects. It is this aspect which has been completely overlooked by the learned MM and this fundamental error of law has led to grave miscarriage of justice in the present case.

34. The submission of Mr. Wadhwa premised on clause 7(b) of the lease agreement which contains the warranty and representation made by the lessors, at best, may entitle the lessees to enforce the same and to claim damages and losses, if any, suffered by them on account of the defects in the leased premises. The same does not entitle the respondent/lessees to suspend the payment of rent.

35. There is no merit in the submission of Mr. Wadhwa that the appellant and the other co-owners choose not to terminate the lease despite non- payment of rent and, therefore, the non-payment of rent could not be considered to be a breach of the terms of the lease. The appellant and the other co-owners were entitled to enforce the lease, and they were not obliged to terminate the same on account of non-payment of rent.

36. There is no merit in the submission of Mr. Wadhwa that the object of the lease agreement was illegal and that the same was void. The learned MM has comprehensively discussed the aforesaid aspect under issue no.2 and I agree with the said reasoning as well as conclusion of the learned MM. Moreover, Ld. Counsel for the respondents has advanced no argument to claim that the lease agreement was void ab-initio, or to show that the finding of the Ld.MM on the said aspect in erroneous. Consequently, no reliance can be placed on the decision of this Court in Virender Singh (supra).

37. The decisions of the Supreme Court in Sanwat Singh (supra) and K. Prakashan (supra) are of no avail in the facts of the present case, since this Court is of the considered view that the impugned judgment is based on an erroneous view of the law, and it would result in grave miscarriage of justice, if permitted to be sustained.

38. The decision in Shreyas Agro (supra) has no application in the facts of the present case. This is for the reason that the accused in this case had admitted the principal amount due but, however, disputed the interest claimed and stated that the amount reflected in the cheques was not the legally enforceable liability. The amount had been filled up by the drawee on a blank signed cheque. The Court held:

> "5. .... In the case of a signed blank cheque, the drawer gives authority to the drawee to fill up the agreed liability. If the drawee were to dishonestly fill up any excess liability and the extent of liability if it becomes bona fide matter of civil dispute in such case, the drawer has no obligation to facilitate the encashment of cheque. In the instant case the reply Ex. P. 40 discloses that long before presentation of cheque, the extent of liability was disputed but ignoring the objection, the company filled up the cheque for an amount not admitted by the drawer. If the accused were to prove that there is a bona fide dispute with regard to extent of liability, the dishonour of cheque under such circumstance does not attract prosecution Under Section 138 of N.I. Act. The dismissal of complaint is sound and proper. The appeal is dismissed.

39. However, the position in the present case is entirely different. There is no dispute with regard to the essential facts, namely, that the appellant and the other co-owners are the owners and the landlords of the premises in question; that the premises in question was leased out by five different lease deeds to the respondent/lessees by the five co-owners in respect of their undivided 1/5th share each on a monthly rent of Rs.1,10,000/- for each of the co-sharers, i.e. Rs.5,50,000/- in the aggregate; that the lease had not been surrendered by the lessee, and; the advance cheques issued by the lessee towards payment of rent were dishonoured upon presentation. Pertinently, the lease agreements also provided for payment of interest on the overdue amount of arrears of rent @ 18% p.a. However, the cheques in question did not pertain to the said claim for interest. They pertained only to the monthly rent, which is an ascertained and crystallized liability. It is equally pertinent to note that the respondents admitted their liability in their reply dated 23.05.2009 (Ex. DW-2/C3) and conveyed their intention to clear the cheques and stated that they were dishonoured due to their tight financial position.

40. Reliance placed by Mr. Wadhwa on the judgment of the Supreme Court in M.S. Narayana Menon (supra) is of no avail. This Court had the occasion to consider the judgment in M.S. Narayana Menon (supra) in a recently delivered judgment in Suresh Chandra Goyal Vs. Amit Singhal, Crl. Appeal Nos.601/2015 decided on 14.05.2015. I consider it appropriate to extract herein below the relevant discussion relating to M.S. Narayana Menon (supra). The same reads as follows:

> "32. The accused has placed reliance on M.S.Narayana Menon (supra). In this case, the cheque had been issued by the appellant - who was transacting shares with the share broker/second respondent/complainant. The appellant/accused disputed the statement of account relied upon by the complainant, on the basis whereof it was claimed that the cheque amount was due and outstanding. The Supreme Court examined the nature of the transactions undertaken between the parties in the light of the evidence before it. The Supreme Court held that the complainant had not been able to explain the discrepancies in his books of accounts. The complainant did not bring on record any material to show that the parties had transactions, other than those which had been entered into through the Cochin Stock Exchange. The Supreme Court held that the so called acknowledgement, as correct, of some of the statements of account was not enough since, admittedly, there was no acknowledgement in respect of five statements of accounts. After examining the evidence, the Supreme

Court observed as follows:

> "26. In view of the said error of record, the findings of the High Court to the effect that the appellant had not been able to substantiate his contention as regards the correctness of the accounts of Ex.P10 series must be rejected."

33. The Supreme Court then proceeded to delve into Sections 118(1) and 139 of the NI Act which raise a presumption against the drawer of a cheque. In para 52 of the judgment, the Supreme Court, inter alia, observed;

> "……..The appellant clearly said that nothing is due and the cheque was issued by way of security. The said defence has been accepted as probable. If the defence is acceptable as probable the cheque therefore cannot be held to have been issued in discharge of the debt as, for example, if a cheque is issued for security or for any other purpose the same would not come within the purview of Section 138 of the Act." (emphasis supplied)

34. The aforesaid observations made by the Supreme Court in Narayana Menon (supra) have been relied to urge that in respect of a cheque issued by way of security, a complaint under Section 138 NI Act is not maintainable.

35. The aforesaid observations have to be read in the context in which they were made. It is well settled that a judgment cannot be read like a Statute. Construction of a judgment should be made in the light of the factual matrix involved therein. What is more important is to see the issues involved in a given case, and the context wherein the observations were made by the Court while deciding the case. Observation made in a judgment, it is trite, should not be read in isolation and out of context. [See Goan Real Estate & Construction Ltd. v. Union of India, (2010) 5 SCC 388]. It is the ratio of the judgment, and not every observation made in the context of the facts of a particular case under consideration of the court, which constitutes a binding precedent. The Supreme Court in P.S. Sathappan v. Andhra Bank Ltd., AIR 2004 SC 5152 has held as follows:

> "138. While analyzing different decisions rendered by this Court, an attempt has been made to read the judgments as should be read under the rule of precedents. A decision, it is trite, should not be read as a statute.
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> 139. A decision is an authority for the questions of law determined by it. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment as is well-known, must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it. (See Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr., [2002]1SCR621 , Union of India and Ors. v.

> Dhanwanti Devi and Ors. , (1996) 6 SCC 44 , Dr. Nalini Mahajan v. Director of Income Tax (Investigation) and Ors., [2002] 257 ITR 123(Delhi) , State of UP and Anr. v. Synthetics and Chemicals Ltd. and Anr. , 1991 (4) SCC 139 , A- One Granites v. State of U.P. and Ors., AIR 2001 SCW 848 and Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and Ors., (2003) 2 SCC 111.
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> 140. Although, decisions are galore on this point, we may refer to a recent one in State of Gujarat and Ors. v. Akhil Gujarat Pravasi V.S. Mahamandal and Ors., AIR2004SC3894 wherein this Court held:
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> "... It is trite that any observation made during the course of reasoning in a judgment should not be read divorced from the context in which they were used.""

36. The Supreme Court in Narayana Menon (supra) was not particularly dealing with the issue as to whether, or not, a cheque issued for security or for any other purpose would come within the purview of Section 138 of the NI Act. The observation of the Supreme Court as extracted above cannot, therefore, be understood as laying down a general proposition that a cheque issued as security would not come within the purview of Section 138 of the NI Act in all cases. Such reading of the judgment would go contrary to the express language used in Section 138 of the NI Act, which uses the expression, „where any cheque..... for payment of any amount of money.....of any debt or other liability..... .

37. The Karnataka High Court in M/s Shree Ganesh Steel Rolling Mills Ltd. v. M/s STCL Limited, Criminal Petition No.4104/2009 decided on 21.05.2013, 2013 SCC OnLine Kar 9939 : (2013) 4 AIR Kant R 70, inter alia, observed in relation to Narayana Menon (supra):

> "It is to be noticed that the observation made by the apex court in Narayana Menon s case that "..... if a cheque is issued for security or for any other purpose the same would not come within the purview of Section 138 of the Act.....".

This was a passing observation in that case with reference to the facts found therein. It cannot be construed as an axiomatic statement of law to be mechanically applied, in all circumstances".

38. I may also observe that in Narayana Menon (supra), the earlier decision of the Supreme Court in Beena Shabeer (supra) was not cited or brought to the notice of the Court, and has not been considered by the Court. In fact, on a reading of Narayana Menon (supra), it is clear that the said decision was rendered in the specific facts of that case, and upon examination of the evidence led before the Court by holding that the accused had been able to discharge his initial burden of raising a probable defence, and that the complainant had failed to establish that the cheques in question have been issued in discharge of a legal debt or other liability.

39. Thus, the decision in Narayana Menon (supra) is of no avail, as it cannot be said to have laid down any general proposition that a complaint under Section 138 NI Act would not be maintainable in respect of a security cheque or a cheque given as a security to assure the performance of another

obligation."

41. M.S. Narayana Menon (supra) is a case like Shreyas Agro (supra), where the extent of the outstanding debt/liability was under serious dispute. It was in this background that the Supreme Court had held that the accused had been able to raise a probable defence, as the liability of the accused/debtor was not ascertained and crystallized. The same cannot be said about the present case in view of the aforesaid discussion. The decision in M.S. Narayana Menon (supra), therefore, has no application to the facts of the present case.

42. Reliance placed on the order dated 07.04.2014 in CCP No.111/2012 in C.S. (OS) No.735/2010 is of no avail whatsoever. It has no bearing on the issue of the respondent/lessees liability to pay rent. Thus, reliance placed on K. Prakashan (supra) is misplaced in the facts of the present case.

43. The learned MM has placed heavy reliance on the judgment of the Supreme Court in Indus Airways (supra). This Court had the occasion to consider Indus Airways (supra) in another recent decision in Credential Leasing & Credits Ltd v. Shruti Investments & Anr, Crl. Appeal No. 729/2015 decided on 28.06.2015 I may set out herein below the relevant extract from the said decision:

> "20. It is the observation made by the Supreme Court in Indus Airways (supra) - that the dishonoured cheque should be in relation to a debt or other liability subsisting on the date of drawal of the cheque, to be able to maintain a complaint under Section 138 of the NI Act, which is the cornerstone of the legal submission of the respondents/ accused.
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> 21. On a closer scrutiny of the decision in Indus Airways (supra), it appears to me that Indus Airways (supra) has no application to the facts of the present case as the above extracted observations were made in a materially different factual background. I have consciously extracted paragraph 35 from the decision in Suresh Chandra Goyal (supra), wherein this Court has taken note of the settled legal position on the aspect as to how the observations in an earlier judgment of the Supreme Court have to be read and applied in subsequent cases. As noticed above, in Indus Airways (supra), the purchaser issued advance cheques with the two purchase orders. Before the supplies under the purchase orders was made, the purchaser/accused cancelled the two purchase orders (which was not in dispute), and requested the complainant to return the cheques. The cheque was presented and dishonoured. As a result, a complaint was preferred. The Supreme Court dismissed the complaint on the ground that there was no existing liability between the parties since the contract had been terminated. Thus, on the date of presentation of the cheques for encashment, there was no existing ascertained and liquidated liability or debt. The cheques had been given in advance towards the sale consideration, and not for realisation of unascertained damages that may arise on account of wrongful termination of the purchase order by the purchaser. It was held that there was no debt or other liability existing relatable to the cheque, since the contracts stood terminated on the date of presentation of the cheque. At best, only a civil liability existed in damages.

> 22. However, in the present case, the liability or debt is claimed to have arisen under the contract in respect of which the dishonoured cheque was issued. The cheque was issued precisely to secure the debt/ liability that may arise under the contract on account of the accused undertaking the share sale/ purchase transactions on credit basis through the appellant broker. Thus, the decision in Indus Airways (supra) cannot be mechanically applied in the present case.
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> 23. In Indus Airways (supra), the earlier decision in Beena Shabeer (supra) was not brought to the notice of the Supreme Court and was, therefore, not considered. Both Indus Airways (supra) and Beena Shabeer (supra) are decisions of co-equal benches. In Beena Shabeer (supra), the Supreme Court did not approve the decision in Shreenivasan (supra) wherein the High Court had held that when a cheque is issued as a security, no complaint will lie under Section 138 of the NI Act. Thus, if the observations made by the Supreme Court in Indus Airways (supra) are understood as laying down a general legal proposition that on the date of issuance of the cheque the debt/other liability should be subsisting to maintain a complaint under Section 138 of the NI Act, the same would not align with the ratio laid down in the earlier decision in Beena Shabeer (supra).
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> 24. As noticed above, in Indus Airways (supra) the Supreme Court was considering the fact situation wherein the purchase order was not executed with supply of the contracted goods and, thus, the cheque issued by the purchaser towards advance payment was held as not covered by Section 138 of NI Act. But what happens, where the purchaser while placing the purchase order issues in advance a post-dated cheque; goods/ services are supplied in terms of the contract, and; the post-dated cheque upon presentation on the due date gets dishonoured.

The Supreme Court was not dealing with such a fact situation. Could it be said that, because there was no pre-existing or pre- determined debt or other liability on the date of issue of the cheque by the purchaser (as the goods/ services were supplied only after the issuance of the post-dated cheque), a complaint under Section 138 NI Act would not lie?

25. In my view, it would defeat the object of Section 138 NI Act to hold that the seller/ service provider cannot enforce his right conferred by Section 138 NI Act in such a situation, as it would encourage dishonest buyers to evade their penal liability. It would erode the efficacy and credibility of commercial transactions undertaken on the basis of post-dated cheques, or cheques issued towards advance payment, with a credit period. The view of the Supreme Court in Indus Airways (supra) does not appear to take out from the scope of Section 138 NI Act cases of this nature, as what fell for examination was a fact situation where the advance cheque had been issued along with the purchase order, and the supply of goods was not made for whatever reason.

26. The Explanation to Section 138 NI Act reads:

> "Explanation -For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

27. Thus, the "debt or other liability" has to be a legally enforceable debt or other liability. Neither the main provision of Section 138, nor the explanation suggest that the debt or other liability should be in existence on the date of issuance of the cheque, i.e. on the date of its delivery to the drawee or someone on his behalf or, on the date that the cheque bears. The only reference to time in the Section, is the point of time when the cheque is returned unpaid by the drawers bank."

44. Thus, the decision in Indus Airways (supra) too had no application in the facts of the present case as that was a case where advance cheques had been issued against the purchase order, which was cancelled before its execution. Consequently, the consideration had not passed from the seller to the buyer - who was the drawer of the cheque. It could not be said that the said cheque had been issued in discharge of a debt or other liability. The same cannot be said about the present case for the reason that the advance cheques had been issued towards payment of rent by the respondent/lessees. The respondents continued to remain tenants and incurred the liability to pay rent month to month. The advance cheques issued towards payment of rent when deposited for realization of the rent for the said period were dishonoured upon presentation. The respondent/lessees incurred the liability to pay the rent as they continued to retain possession even though the same had been sealed by the municipal authorities. Thus, reliance placed on Indus Airways (supra) by the learned MM is completely misplaced and this is yet another serious error of law found in the impugned judgment.

45. For all the aforesaid reasons, the present appeal is allowed and the impugned judgment is set aside. The respondents are convicted of the offences under Section 138 of the NI Act.

(VIPIN SANGHI) JUDGE JULY 01, 2015