High Court Of Gujarat At Ahmedabad

Special Criminal Application No. 3653 Of 2012, 3654 Of 2012, 3655 Of 2012, 3656 And 3657 Of 2012

Judgment Date:

23-03-2018

SHREE CORPORATION **..Petitioner**

ANILBHAI PURANBHAI BANSAL - DIRECTOR FOR AND BEHALF OF **..Respondent**

Bench :

{ HON'BLE JUSTICE J.B. PARDIWALA, J. }

Citation :

2018 ACD 1002 ; 2018 (2) GujLH 105 ;

Judgment

J.B. Pardiwala, J—As the issues raised in all the captioned applications are interconnected and the parties are also the same, those were heard analogously and are being disposed of by this common judgment and order.

2. For the sake of convenience, the Special Criminal Application No.3653 of 2012 is treated as the lead matter.

3. By this writ application under Article 226 of the Constitution of India, the writ applicants-original accused Nos.2 to 4, have prayed for the following reliefs;

"(A) To quash the process, complaint and proceedings of Criminal Case No.1241 of 20078 pending in the Court of the learned Metropolitan Magistrate (N.I. Court No.8) Ahmedabad after setting aside the order dated 21.07.2011 passed on Exh.30 of Criminal Case No.1241 of 2008 by the learned Metropolitan Magistrate (N.I. Court No.8) Ahmedabad which is confirmed by the City Sessions Court by the order dated 17.02.2012 passed in Criminal Revision Application No.447 of 2011;

(B) To stay the further proceedings of Criminal Case No.1241 of 2008 pending in the Court of the learned Metropolitan Magistrate (N.I. Court No.8) Ahmedabad till the final disposal of this petition;

(C) To grant any further relief that may be deemed fit in the facts and circumstances of the matter."

4. The case of the writ applicants, in their own words, as pleaded in their writ applications, is as under;

"1) The respondent No.1(the complainant for short) has filed below described five private complaints in the Court of the learned Metropolitan Magistrate, Ahmedabad which are pending as on date in N.I. Court No.8, for the offence punishable under section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (the act for short). The particulars of the said five complaints are as under;

Sr. No. C.C. No. (New) Cheque No. Amount Date of cheque 1 1239/08 122305 18, 00, 000 19.10.96 2

1242/08 122304 22, 00, 000 19.10.96 3 1240/08 122261 18, 00, 000 17.10.96 4 1241/08 122262 22, 00, 000 17.10.96 5 1243/08 122203 28, 43, 786 19.10.96 Total= 1.08.43, 786

The above mentioned five complaints were initially numbered as Criminal Case No.104 to 108 of 1997 respectively.

2. The petitioners have filed this petition for quashing of the complaint of Criminal Case No.1241 of 2008. Annexed herewith and marked as ANNEXURE-A is a copy of the said complaint.

3. After issuing all the five cheques mentioned in paragraph No.1 above, the petitioners have paid on 30.10.1996 Rs.12, 40, 000/- by two cheques to the complainant and hence from before and on 10.01.1997, when the above said complaints were filed, the petitioners owed to the complainants Rs.96, 03, 766/- and not Rs.1, 08, 43, 706/- for which he filed the above said complaints which are registered as the above described five criminal cases.

4. Apart from the complainant there were and are 7 other creditors of the petitioners. Particulars of the said 8 creditors in all including the complainant are as under; Name of creditors Amount settled under MOU

1. Zaveri & Co. Exports 1, 49, 48, 720/- 2. M/s. M.D. Textile Industries Ltd. (Complainant) 96.03, 276/- 3. M/s. Modern Impex 92, 54, 277/- 4 M/s. Mahavir Bullion (Bhavnagar) 83, 32, 550/- 5 Deep Exports 29, 18, 700/- 6 M/s. H. Kumar Jems Pvt. Ltd. 26, 45, 458/- 7 M/s. Maneklal Soni (Dahod) 39, 08, 750/- 8. Girishkumar Lalchand Shroff 42, 24, 000/- Total= 5, 58, 35, 731/-

All the above 8 creditors are herein after referred to as the “Syndicate“

5. Thereafter on 07.12.1996, said syndicate of the creditors, including the complainant, entered into and executed an agreement titled as Memorandum of Understanding (MOU for short) with the petitioners and one Bhanumatiben Bhailalbhai Dahyabhai, the mother of the petitioners Nos.2 to 4. Annexed herewith and marked as and marked as ANNEXURE-B is a coy of the MOU dated 07.12.1996. Under and by the said MOUU the parties determined, fixed and recored the final amounts to be paid by the petitioners to the syndicate and also the mode, method and manner by and under which the amounts so determined were to be paid to the syndicate.

6. Some of the material terms settled by the said MOU (Annexure-B) are as under;

i) The total amount of debts to be paid by the petitioners to the syndicate was determined and settled at Rs.5, 58, 35, 731/- and out of that Rs.96, 03, 278/- was to be paid to the complainant.

ii) The amounts of the said debts of the syndicate were to be paid by cheques and by giving vacant possession of the properties bearing Bungalow No.5/C and 5/A/1 of EII is Bridge area of Ahmedabad to the syndicate with right of the syndicate to sell, transfer, assign etc. the properties and to credit the sale amount towards the debt to be paid by the petitioners to the syndicate and the value of purchase price of the said bungalows was fixed, determined and settled at Rs.2, 10, 00, 000/-.

iii) Some other immovable properties were to remain under the charge of the syndicate and the petitioners were not to create any burden or charge over it nor to transfer and assign the same.

iv) The cheques issued by the petitioners to the members of the syndicate which were dishonoured and the papers of title of the bungalows and the shop at Manekchawk were to remain in custody of the advocate Shri B. J. Mehta of M/s. H. Desai & Co. Advocates and Solicitors, of Ahmedabad. v) That for any dispute between the parties to the said MOU, one Girishbhai Ramanlal Choksi and Yogendrabhai Ambalal Sarkar and one Jagmohandas Himatlal of Padra were appointed as arbitrators and it was agreed that if the said three arbitrators do not agree to any point or issue in dispute, Shri Dolatram Pahelajani of M/s. Bherumal Samantdas Vala of Mumbai was to be the sole arbitrator to decide that point and issue and the award given

by him was to be final and binding o the parties of the MOU.

vi) Thereafter and before 09.09.1997, the petitioners in performance and execution of the said MOU paid to the member of the syndicate amounts as stated below by cheques, Jewellery, shares and handing over vacant possession of the immovable properties described as under;

I Payment of Cheques Sr. NO. Paid to Amount Cheque No. Bank Date of Cheque 1 Zaveri & Co. Export 43, 15, 000 122351 MCB 07/04/97 2 Modern Impex 26, 72, 00 0 122352 MCB 07/04/97 3 Mahavir Bullion 24, 05, 00 0 122353 MCB 07/04/97 4 Deep Exports 8, 43, 000 122354 MCB 07/04/97 5 H. Kumar Jems Pvt. Ltd. 7, 65, 000 122355 MCB 07/04/97 6 Zaveri & Co. Export 10, 00, 00 0 426465 AMC 22.4.97 7 Zaveri & Co. Exports 5, 66, 500 482186 OBC 01/05/97 8 Deep Exports 3, 06, 000 16.5.97 9 Deep Exports 5, 00, 000 406066 BOB 09/04/97 10 Deep Exports 4, 00, 000 417651 BOB 09/04/97 11 Deep Exports 11, 00, 000 411650 BOB 09/06/97 II Jewellery By jewellery valued at Rs.10, 00, 000 paid to the syndicate through arbitrator Yogendra Ambalal Sarkar. III Shares By shares of the value of Rs.10, 00, 000/- transferred to the members of the syndicate through arbitrator Yogendra Ambalal Sarkar. IV Payments by way of Immovable Properties

The syndicate has already taken the possession of the immovable properties considering of residential bungalow No.5-A/1 and have already placed their boards on the properties.

8. Thereafter on 05.09.1998 one of the members of the syndicate i.e. M/s. Zaveri & Co. Exports filed Civil Suit No.4470 of 1998 in the City Civil Court, Ahmedabad for execution and performance of the said MOU paying for a decree for Rs.3, 48, 00, 000/-

9. Some of the very basic and material averments made and reliefs prayed for in Civil Suit No.4470 of 1998 are as under;

“A. In paragraph No.1 of the plaint it is pleaded that the plaintiff and defendant Nos.6 to 12 (other members of the syndicate) are dealing in gold, silver, bullion and doing sharafi transactions at the respective address in the cause title of the plaint. The interest in the present suit of the plaintiff and that of defendants Nos.6 to 12 are not conflicting one but as defendant Nos.6 to 12 are not available in town they are referred to as the supporting defendants and no relief is sought against them.

B. It is pleaded in paragraph No.1 of the plaint that “a memorandum of Understanding (MOU) was entered into by and between the parties including defendant No.5, who accepted to share the liability of the defendants Nos.1 to 4 as mentioned in the MOU. The outstanding amount of Rs.5, 58, 35, 731/- was agreed to be repaid partly in cash and partly by way of sale of immovable properties as mentioned hereinafter“.

C. In paragraph No.3 of the plaint it is pleaded that “out of the said amount of Rs.5, 58, 35, 731/- part of the amount of Rs.2.20 crore were agreed to be paid to the plaintiff and the defendant Nos.6 to 12 by Udaikumar B. Choksi and defendant No.5 as and when by way of sale of the properties bearing No.5-A/1 and 5-C situated as Shantiniketan Society Near Gujarat College, Ahmedabad.

D. In paragraph No.3 of the plaint it is pleaded that “the possession and certain documents of bungalow No.5-A/1 are handed over by defendant No.5 with knowledge and consent of defendant Nos.2 to 4. But so far bungalow No.5-A/2 is concerned, defendant No.5 with her son Ashokbhai is residing therein. The said property is agreed to be kept as and when by way of continuing society for the due performance of the terms and conditions of the said MOU. The MOU also provide that until the entire clearance of the dues agreed to be paid by defendant Nos.1 to 5 they shall not sale, mortgage, part with or encumber the said bungalow No.5-A/2 in any manner whatsoever in favour of any person whomsoever.

E. In paragraph No.4 of the plaint, it is pleaded that “in clause 12 of the said MOU the parties have also agreed for stipulation regarding restrictions on the rights of the defendants Nos.1 to 5 in relation to the

properties mentioned herein above."

F. In paragraph No.5 of the plaint, it is pleaded that "the plaintiff and the defendant Nos.6 to 12 were and are ready and willing to perform their part of compliance as per the said MOU and have also shown their willingness to the defendant No.13 (M/s. H. Desai & Co.) but defendant Nos. 1 to 5 jointly and severally with a view to delay and defeat the claim of the plaintiff and defendant No.6 to 12 have committed breach of terms of the said MOU, which is driven the present plaintiff and defendant Nos. 6 to 12 to file the present suit for specific performance of the terms of the said MOU and also the present suit praying for decree for outstanding amount admittedly due and payable by defendant Nos.1 to 5 jointly and severally."

G. In paragraph No.6 of the plaint, it is pleaded that "the cause of action has arisen within the jurisdiction of this Hon"""""ble Court when the plaintiff and defendant Nos.6 to 12 sold gold/bullion to defendant Nos. 1 to 4 and on when a huge outstanding amount of Rs. 5, 58, 35, 731/~ become due and payable as on 30.11.1996 when the parties to the suit entered into MOU creating rights and liabilities in relation to the said outstanding dues and on when the parties have placed the relevant documents with M/s H. Desai & Co., defendant No. 13 and on when the defendant Nos. 1 to 5 have not acted fully in consonance with the terms and conditions of the said MOU."

H. In paragraph No. 7 of the plaint, following reliefs are prayed for;

"The plaintiff therefore prays:-

A. Hon"""""ble Court be pleased to issue a permanent injunction restraining defendant Nos. 1 to 5 jointly and severally from transferring or parting with property bearing No. 5- A/2 and 5-C of Shantinagar co-operative Housing Society, Near Gujarat College, Ahmedabad or transfer possession in favour of any person in any manner and be further pleased to restrain defendant Nos. 4 and 5 from further encumbering the said properties or doing any act or omission tending to reduce the security and interest of the plaintiff and defendant Nos. 6 to 12 in light of the MOU dated 07.12.1996. B. Be further pleased to attach by declaring that the plaintiff and defendant Nos. 6 to 12 are having charge over the property bearing bungalow No.5-A/2 and 5-C of Shantiniketan Co-op. Housing Society, Near Gujarat College, Ahmedabad.

C. Be pleased to pass a decree against the defendant No. 4 to convey the title and possession of the property bearing No. 5-C at Shantiniketan Co op. Housing Society, Near Gujarat College, Ahmedabad as agreed to in the MOU dated 07.12.1996 in favour of the plaintiff and defendant Nos. 6 to 12 or heir order and decree for specific performance of the contract to the above effect be passed.

D. Be pleased to pass a decree for specific performance of contract be passed against defendant Nos. 5 to convey clear and marketable title in relation to the bungalow No. 5-A/1 and 5-A/2 and directing the defendant No. 5 not to 0 transfer bungalow No. 5-A/2 of Shantiniketan Co-op. Housing Society, Near Gujarat College, Ahmedabad in any manner in favour of any person nor shall part with or encumber the said property in any manner till the outstanding dues as agreed in MOU dated 07.12.1996 are paid of.

E. A decree for Rs. 3, 48, 00, 000/- be passed against the person and properties of the defendant Nos. 1 to 5 together with interest at the rate of 24%. from the date of breach of terms of the MOU dated 07.12.1996 till realisation.

F. Any other and further reliefs as the Hon"""""ble Court deem fit may pleased be granted."

The Civil Court had granted the order to maintain status quo.

10. Thereafter the complainant on 21.09.1998 also filed Summary Suit No. 5402 of 1998 in the City Civil Court Ahmedabad against the petitioners for recovery of Rs. 96, 03, 766/- determined and fixed by the said MOU. But designedly and malaflde and with oblique motive the complainant suppressed the execution and existence of the above said MOU and intentionally avoided making slightest reference to the arriving of and

existence of the said MOU and the material part performance and execution of the said MOU,

11. On 17.11.1996 the complainant gave a notice to the petitioners under Section 138 of the Act demanding from the petitioners as stated in paragraph No. 11 of the notice as under;

"11. You are therefore requested to pay the amount of cheques (5) so dishonoured within 15 days from the receipt of this notice failing which legal action as provided under Section 138 read with Section 141 of the Act, besides other legal action available to my client will be taken, please take notice"

[Total amount of the said 5 cheques totals to Rs, 1, 08, 43, 766/ though Rs. 12, 40, 000/ was paid to the complainant by the petitioners by cheque on 30.10.96 and the remaining amount payable to the complainant and determined and fixed by the said MOU was only Rs. 96, 03, 299/-]"

12 In the proceedings of the said five complaints, the petitioners submitted applications in the trial Court at Ex. 11 stating and praying as under;

A. That the MOU produced at Annexure-A is acted upon and substantial part performance of the same has been performed by the parties.

B. Dishonoured cheques were to be handed over and kept in the custody of advocate Shri B.J.Mehta of defendant No. 13 M/s H. Desai & Co. Advocate & Solicitors of Ahmedabad and hence were not to be used.

C. By execution of and substantial part performance of the said MOU the legal liability to pay any amount of the said 5 cheques had ceased and the said 5 cheques had become devoid 0f any consideration, invalid, unusable and non negotiable.

D, The rights of the complainant to negotiate the said 5 cheques had extinguished as the same were waived and surrendered by execution of the MOU and substantial part performance of it and the complainant was estopped from using the said cheques.

E. All disputes about performance of the said MOU were to be decided by the arbitrators as provided in the said MOU.

F. That all the issues raised in the said application Ex. 11 were to be adjudicated upon by the Civil Court in the said Civil Suits and hence the criminal proceedings of the said 5 complaints be stayed till the suits are finally decided.

13. The learned Magistrate rejected the said applications Ex. 11 of the petitioners submitted in all the 5 criminal cases by his order dated 26.07.2000. The petitioners then preferred Criminal Revision Applications Nos. 28 to 32 of 2001 before the City Sessions Court Ahmedabad. The learned Additional City Sessions Judge, Court No. 17 Ahmedabad by his order dated 04.10.2001 rejected the said Revision Applications only on legal technical ground that the order of staying or not staying criminal proceedings is an interlocutory order and that no revision lies against it.

14. It is stated that during the pendency of the revisional proceedings the petitioners and the complainant exchanged their statement of accounts showing the extent of the performance of the said MOU as per their respective versions. The statement of the complainant proves that amount of Rs. 1, 48, 72, 500/ is paid to the syndicate of creditors by the petitioners through cheques and further Rs. 20, 00, 000/- is paid to the syndicate of the creditors by way of shares while the statement of the petitioners shows that they have paid Rs. 4, 44, 27, 300/-.

15. The petitioners thereafter filed Criminal Misc. Application Nos 721 to 725 of 2002 in this Hon""""" ble Court with prayer to quash and set aside the proceedings of said five criminal cases and in the alternative to

stay the proceedings of said 5 criminal cases till the said Civil Suit No.4470 of 1998 is finally decided by the City Civil Court, Ahmedabad. Criminal Misc. Application Nos. 721 to 724 of 2002 were disposed of on 07.10.2004 and Criminal Misc. Application No. 725 of 2002 was disposed of on 21.02.2005 by this Hon""""ble Court. The identical orders passed by this Hon""""ble Court in the above applications are produced herewith and marked as ANNEXURE-C collectively.

16. The petitioners in view of the order passed in above mentioned Criminal Misc. Application Nos. 721 to 725 of 2002 by this Hon""""ble Court, submitted applications dated 23.03.2006 in 5 criminal cases before the learned Metropolitan Magistrate (N.I. Court No. 8) Ahmedabad for staying the proceedings till Civil Suit No. 4470 of 1998 was decided and or to drop the criminal proceedings in view of the MOU between the parties. The learned Magistrate by his order dated 21.07.2011 was pleased to reject the said applications filed by the petitioners. Annexed herewith and marked as ANNEXURE-D is a copy of the order dated 21.07.2011 passed by the learned Metropolitan Magistrate (N.I. Court No. 8) Ahmedabad.

17. The petitioners then preferred Criminal Revision Application Nos. 444 to 448 of 2011 before the City Sessions Court, Ahmedabad against the order passed by the learned Metropolitan Magistrate, Ahmedabad. All the above said Criminal Revision Applications were decided by the City Sessions Court by a common order dated 17.02.2012 and the same were dismissed. Annexed herewith and marked as ANNEXURE-E is a copy of the order dated 17.02.2012 passed by the City Sessions Court in Criminal Revision Application No. 447 of 2011.

18. The petitioners submit that in view of the above stated undisputed position of the facts and looking to the annexure(s) legal position has been basically, virtually and substantially changed and altered. After the MOU dated 07.12.1996 the petitioners have as far as possible fulfilled and performed the material and important part as per the terms and conditions of the MOU.

19. It is submitted that the considerations of and the complainant""""s rights thereon of the said 5 dishonoured cheques were extinguished on 07.12.1996 as being surrendered, waived and merged in the said MOU and the said cheque had been invalid, unusable and not negotiable from and onwards 07.12.1996 on the execution of the said MOU and there was no legal liability of the petitioners for and of or concerning the legally non existent negotiability of the said 5 cheques.

20. The petitioner state that on or before 05.09.1998 when the said Civil Suit No. 4470 of 1998 was filed for the specific performance the said agreement contract (MOU) the petitioners and the syndicate had made material and substantial part performance of it and the petitioners had made payments of huge amounts and handed over possession of valuable immovable properties of crore of rupees as detailed and described above.

21. The said Civil Suit was filed for specific performance of only a part of the said MOU as admittedly the other substantially part of the MOU was already performed by the petitioners by the syndicate having received the amount of Rs. 2, 10, 35, 331/- under the MOU. The said Civil Suit No.4470 of 1998 was ultimately withdrawn by the syndicate and its member who filed the Suit.

22. The said 5 dishonoured cheques and documents of immovable properties were to remain in the custody of advocate Shri B. J. Mehta of M/s H. Desai & Co. Advocates and Solicitors of Ahmedabad (defendant No. 13} and were not usable. The said cheques were kept as security with M/s. H. Desai & Co. as per the MOU and it was never to be utilized. The cheques Which were given by way of security when misused, deposited and dishonoured can not attract offence punishable under Section 138 of the Act and the prosecution for it is clear abuse of the process of law.

23. All the above issues were purely legal issues required to be determined by the City Civil Court and if decided as urged by the petitioners, the result would finally and conclusively terminate the said 5 complaints.

24. The petitioners further submit that for the amount of cheques for which the complainant has filed

complainant, the MOU was executed and agreement and terms were decided a fresh with regard to the payment of the amount of the aforesaid cheques. Thus since the MOU was executed and commitment was made between the petitioners and the complainant and his syndicate, the consideration of the cheques for which the complaints have been filed is merged in the MOU which was executed on 07.12.1996. Thus the legal position would be that all the cheques after the execution of the MOU on 07.12.1996 are of no consideration i.e. instrument without consideration and the complaint concerning the said cheques is not maintainable.

Whatever contentions, claims or causes that may be, if any, regarding and pertaining to those cheques have been merged in into the MOU on 07.12.1996 and in law all the same have been surrendered, released, relinquished, waived and extinguished by virtue of and under the MOU. Thus, the complaint filed by the complainant on the allegations which are concocted and by suppressing material facts is nothing but the abuse of the process of law and the same is required to be quashed by this Hon"""ble Court. The complainant was estopped from taking back the said cheques from advocate Shri B.J. Mehta and fraudulently and illegally using them.

25. That the complainant was informed and intimated by M/s H. Desai & Co. by its communication dated 10.04.2008 that the petitioners were proposed to dispose of the bungalows given by way of security as per the MOU and other members of the syndicate namely Modern Impex, Bombay and Zaveri & Co. Exports Pvt. Ltd, Ahmedabad had given their consent for the sale, subject to the complainant"""s right and interest if any in upon or to the said property and the interest of the complainant was being taken care of. The complainant was also informed by the said communication that if it had any objection to the proposed transaction it should do so within a period of seven days or else it would be presumed that the complainant had no objection to proceed further in the matter of sale as aforesaid.

Annexed herewith and marked as ANNEXURE-F is a copy of the communication dated 10.04.2008 sent to the complainant by M/s H. Desai & Co.

26. The immovable properties i.e. residential bungalows were then sold with the consent of other members of the syndicate and arbitrator Yagendra Sarkar. The proportionate share of the complainant has been put and deposited in the Escrow Account and thus the interest of the complainant is also taken care of.

27. That even otherwise the criminal proceedings are bad at law. “

5. Thus, it appears from the above that Shri Corporation is a partnership firm and the three applicants herein are the partners of the said firm. The complainant was selling silver and gold bullion to the writ applicants and raised bills against the respective supply. A part-payment was also made by the writ applicants. The writ applicants, vide bill No.44 dated 8th October, 1996, purchased 51 bars of silver, weighing 1516.55 k.g valued at Rs.1.05, 61, 405/- and issued cheques for the amount of Rs.25, 61, 405/- and Rs.26, 00, 000/- respectively. Both the cheques were cleared and thus, the outstanding amount against the Bill No.44 on 10th October, 1996 was Rs.54, 00, 000/-. The writ applicants issued three post dated cheques towards the balance amount of Rs.54, 00, 000/- against the Bill No.44, one for the amount of Rs.9, 00, 000/-, second for the amount of Rs.25, 00, 000/- and the third for the amount of Rs.20, 00, 000/-. Out of these three cheques, two cheques were deposited on 12th October, 1996 and the third cheque was deposited on 14th October, 1996. All the three cheques got cleared and in such circumstances, there was no outstanding amount against the Bill No.44.

6. The writ applicants, thereafter, purchased silver bar (48 pieces) from the complainant vide Bill No.47 dated 11th October, 1996 valued at Rs.1, 04, 71, 325/-. Against the said bill, the writ applicants issued cheques for the amount of Rs.30, 00, 000/-, Rs.34, 00, 000/-, Rs. 22, 00, 000/-, Rs.18, 00, 000/- and Rs.71, 325/-. From the aforesaid five cheques, two cheques of Rs.30, 00, 000/- and Rs.34, 00, 000/- respectively came to be realized. Thus, against the Bill No.47, Rs.64, 00, 000/- came to be realized and after crediting the amount received from the writ applicants, the outstanding balance of Rs.40, 71, 325/- remained legally recoverable by the complainant as on 16th October, 1996. The remaining three cheques of

Rs.22, 00, 000/-, Rs.18, 00, 000/- and Rs.71, 325/- respectively were deposited by the complainant on 17th October, 1996 against the outstanding balance of Rs.40, 71, 325/-. The cheque for the amount of Rs.71, 325/- was realized, however, the other two cheques bearing Nos.122262 and 122261 for Rs.22, 00, 000/- and Rs.18, 00, 000/- respectively got dishonoured. Thus, an amount of Rs.40, 00, 000/- was outstanding against the Bill No.47. On 16th October, 1996, the writ applicants purchased silver bars (31 pieces) vide Bill No.49 valued at Rs.68, 43, 766/-. Thus, a sum of Rs.1, 08, 43, 766/- became legally due and payable by the writ applicants herein towards the purchase of the silver from the complainant. Against the outstanding dues, three post dated cheques came to be issued against the Bill No.49. The details are as under;

Cheque No. Date Amount Rs. Drawn on 122303 18/10/96 28, 43, 766 Manek Chowk Co-op. Bank 122304 19/10/96 22, 00, 000 -do- 122305 19/10/96 18, 00, 000 -do- Total Rs. 68, 43, 766/-

7. The said three cheques, on presentation by the complainant, got dishonoured on account of funds insufficient in the account maintained by the writ applicants. The case of the complainant appears to be that on account of the five cheques getting dishonoured, an amount of Rs.1, 08, 43, 766/- remained outstanding as on 24th October, 1996. It appears that pursuant to the efforts made by the complainant, two cheques for a sum of Rs.2, 40, 000/- and Rs.10, 00, 000/- dated 30th October, 1996 came to be issued by the writ applicants, which upon presentation, came to be cleared. Therefore, an amount of Rs.96, 03, 766/- remained due and payable as on 30th October, 1996 besides the interest thereon from the due date till its realization. It appears that the complainant, thereafter, once again, presented all the above referred five cheques in his Bank, however, the same came to be dishonoured with the remarks “funds insufficient“.

8. In such circumstances, the five criminal complaints came to be lodged for the offence under section 138 of the N.I. Act, 1881.

9. The writ applicants are here before this Court with the five writ applications praying for quashing of the criminal proceedings.

10. On 22nd August, 2013, a Coordinate Bench of this Court passed the following order;

“1. Mr. Nitin Amin, learned advocate for the petitioners in each of the petitions has invited attention to the findings recorded by the learned Sessions Judge in the revision applications filed by the petitioners to submit that what has weighed with the learned Judge is that the MOU is not signed by the complainant and is, therefore, not binding upon him. Attention was invited to the written statement/evidence of the complainant under section 145 of the Negotiable Instruments Act in Criminal Case No.106/1997 wherein the respondent No.1 original complainant has categorically stated that after service of the legal notice, with a view to see that the accused can do the same business in the market in good faith, they had entered into MOU dated 7th December, 1996. Therefore by the admission of the complainant, it is apparent that he had signed the MOU in question. It was pointed out that in the same proceedings, the first respondent has made an affidavit wherein also, he has reiterated that the Memorandum of Understanding dated 7th December, 1996 was signed in good faith. Unfortunately, the accused violated the terms and conditions of the MOU. It was submitted that, therefore, it is not even the case of the complainant that he had not signed the MOU. Mr. Amin, under instructions of the petitioner No.3, submitted that the original MOU is with Solicitor H. Desai & Company.

2. Having regard to the submissions advanced by the learned advocate for the petitioners, issue notice in each of the petitions, returnable on 16th September, 2013. Adinterim relief is granted in terms of paragraph 30B of each petition. Direct Service is permitted. Mr. Himanshu Patel, learned Additional Public Prosecutor waives service of notice on behalf of respondent No.2 in each petition.

3. Liberty to place on record additional documents in support of the case of the petitioners.“

11. The principal argument of Mr. Sanjay Amin, the learned counsel appearing for the writ applicants is that

after the issuance of the cheques, as there was a change in the obligations between the parties, whereby the extent and the quantum of the debt got altered, the writ applicants are not liable to be prosecuted for the offence punishable under section 138 of the N.I. Act. To put it in other words, the argument of Mr. Amin is that on the due date, the debt was of a lesser amount then the amount of the cheques which were dishonoured. The said cheques did not represent either the entire debt or part of the debt on the due date.

12. Mr. Amin, in support of his submissions, has placed reliance on one decision of this Court in the case of Arvind Maneklal Tailor vs. State of Gujarat & Anr., (2000) 3 GLH 442 and another of the High Court of Andhra Pradesh in the case of Voruganti Chinna Gopaiah & etc. vs. M/s. Godavari Fertilizers & Chemicals Ltd. & Anr., (1999) CriLJ 1184.

13. In such circumstances, referred to above, the learned counsel prays that there being merit in all the five writ applications, those be allowed and the proceedings be quashed.

14. On the other hand, all the five writ applications have been vehemently opposed by Mr. P.A. Mehd, the learned counsel appearing for the respondent No.1-original complainant. Mr. Mehd would submit that there is no merit worth the name in the principal argument of the learned counsel appearing for the writ applicants. Mr. Mehd would submit that, at no point of time, the MOU was implemented or acted upon by the writ applicants and his client. The amount of Rs.96, 03, 766/- remains due and payable till this date.

15. Mr. Mehd placed reliance on the averments made in the affidavit-in-reply filed on behalf of the respondent No.1. The relevant contents of the reply are extracted hereunder;

“It is pertinent to note that, till date, an amount of Rs. 96, 03, 766 remains outstanding since the date of deposit of the cheques and not a penny has been paid to the respondent no. 1 by the petitioners thereafter, either by way of the alleged MOU or otherwise. And yet, the petitioners have the audacity to file the present petition and make out a case as if the whole of the debt is settled and discharged. As a matter of fact, nowhere in the 17 pages of the memorandum of the petition have the petitioners ever stated that the amount of Rs. 96, 03, 766 remained outstanding till today or that no amount is paid to the respondent no. 1 pursuant to the so called MOU or otherwise, despite these being relevant and material facts for complete adjudication of the present petition.

The respondent no.1 therefore states that the present petition is clearly a case of abuse of process of the Hon"""ble Court and suffers from the vice of suppression of material facts and deserves to be dismissed with exemplary costs.

4) The respondent no. 1 states that the present petition is nothing but an effort on the part of the petitioners to delay and stall the proceedings. It is pertinent to note that the cheques have been dishonored in 1996 and prosecution has been launched in 1997. A period of 18 years has already passed since the cheques came to be dishonored. The petitioners are well aware that they have no real defense in the matter and that at the end of the proceedings, they are bound to be convicted. It is an admitted proposition that there was a legally valid and recoverable debt due on the date of the deposit of the cheques and that out of the total amount of Rs. 1, 08, 43, 786, an amount of Rs. 96, 03, 766/- remained outstanding on the date of deposit of the cheques and that not a penny has been paid to the respondent no. 1 by the petitioners thereafter. It is therefore only a matter of time that the petitioners would be faced with a conviction in the proceedings. Consequently, the petitioners are abusing the only alternative left with them, which is to delay the conviction by filing one application after another. This would be apparent by the numerous applications, appeals and other proceedings filed by the petitioners from time to time. As a matter of fact, since 1997, when the proceedings first came to be filed, till today, the petitioner has filed proceedings after proceedings and has successfully stalled all attempts to let the matter proceed further. Now, when the stage is one of recording of evidence, the petitioners have filed the present petition as one more effort to stall the present proceedings. It is therefore apparent that the present petition is one more attempt by the petitioners to delay the proceedings and the petition deserves to be rejected with exemplary costs. The petitioners have already listed some of the proceedings in the memorandum of the petition. However, the respondents crave leave to give further details

of the proceedings, if necessary, at the time of hearing of the present petition.

5) The respondent no. 1 states that the present petition suffers from the vice of delay, latches and acquiescence and deserves to be dismissed with costs.

6) With reference to paragraph 1 and 2 of the petition, the respondent no.1 states that the same being a narration of the record the respondent no. 1 does not deal with it at this stage and craves leave to deal with the same if and when required.

7) With reference to paragraph 3 of the petition, the respondent admits that an amount of Rs. 12, 40, 000 is paid after issuance of the Cheques stated in paragraph 1.

However, as already admitted by the petitioners, this does not satisfy the whole of the debt of the petitioners and an amount of Rs. 96, 03, 766 remains due and payable by the petitioners and consequently the proceedings initiated by the respondent no. 1 are maintainable and all the ingredients for prosecuting the petitioners are still surviving. The other contentions, averments, assertions and submissions made in the paragraph under reply are denied.

8) With reference to paragraph 4 of the petition, the respondent no. 1 denies the contents thereof. The respondent no. 1 is not Concerned with what other creditors the petitioners had and the said fact is completely irrelevant for the purpose of the present case. lt is pertinent to note that the respondent no. 1 is not a part of the “syndicate of creditors“ and nothing is received by the respondent no. 1 as a part of the “syndicate of creditors“. The other contentions, averments, assertions and submissions made in the paragraph under reply are denied.

9) With reference to paragraph 5 to 7 of the petition, the respondent no. 1 denies the contents thereof. The respondent no. 1 states that at no point of time has the MOU been implemented or acted upon by and between the petitioners and the respondent no. 1 and consequently a detailed analyses of its clauses is an exercise in futility. It is pertinent to note that not a penny is received by the respondent no.1, either under the so called MOU or otherwise till date, and the principal amount of Rs. 96, 03, 766 remains due and payable till date. It is also pertinent to note that, knowing fully well that the alleged MOU is not implemented or subsisting or valid, no proceedings are preferred by the petitioners for specific performance of the alleged MOU against the respondent no. 1 and any such proposed action has now become time barred. It is also pertinent to note that even the cheques which came to be dishonored were never deposited with Shri B.J. Mehta of M/s. H. Desai &. Co. As a matter of fact, the contents of paragraphs 5 to 7 would further indicate that admittedly no amounts were ever paid to the respondent no. 1 under the alleged MOU and as far as the petitioners and the respondent no.1 are concerned, the alleged MOU was never implemented or acted upon by either the petitioners or the respondent no.1. Consequently, the question of existence and validity of the said MOU is of no relevance at this stage since even if such an MOU was in existence and was validly executed, it was never acted upon or implemented by and between the petitioners and the respondent no. 1 and has therefore lost its significance. It is further humbly submitted that the Hon"""""ble Court may not enter into or decide such disputed questions of fact and such contentious factual issues in a quashing petition at this stage. The other contentions, averments, assertions and submissions made in the paragraphs under reply are not true and hence denied.

10) With reference to paragraph 8 and 9 of the petition, the respondent no.1 denies the contents thereof. The respondent no. 1 states that the claim made by one M / s. Zaveri & Co. Exports, who is not even party to the present proceedings and is completely unconnected with the transaction which resulted in the issuance of the cheques that were dishonored and the debt which is admittedly due and payable by the petitioners to the respondent no. 1, is of no significance whatsoever in the facts of the present case and consequently the respondent no. 1 does not deal with the same at this stage. Suffice to say, the respondent no. 1 has already filed a separate claim against the petitioners before the Hon"""""ble Civil Court, being Summary Civil Suit No. 5402 of 1998 and which is pending till today. The other contentions, averments, assertions and submissions made in the paragraphs under reply are not true and hence denied.

11) With reference to paragraph 10 of the petition, it is pertinent to note that the respondent no. 1 has already filed a separate claim against the petitioners before the Hon""""ble Civil Court, being Summary Civil Suit No. 5402 of 1998 and which is pending till today. It is also pertinent to note that, in the said Summary Civil Suit, in the order below Summons for Judgment, the Hon""""ble Civil Court did not believe the case of the petitioners and observed that the defense raised by the petitioners in the said Summary Civil Suit No. 5402 of 1998 is a sham and is moonshine and the petitioners were asked to deposit an amount of Rs. 50, 00, 000 as condition precedent for defending the said Summary Civil Suit No. 5402 of 1998.

The petitioners have challenged the said order by filing Special Civil Application No. 8601 of 2013. In the said matter, as a condition precedent to grant of ad~interim relief, the petitioners were ordered to deposit an amount of Rs. 25, 00, 000. The respondent has also filed Special Civil Application No. 17153 of 2013 challenging the order passed in Summary Civil Suit No. 5402 of 1998 on the ground that no leave to defend deserves to be granted to the petitioners and even if such leave is granted, the full admitted amount of Rs. 96, 03, 766 with interest thereon should be deposited. All the aforesaid proceedings are pending. The other contentions, averments, assertions and submissions made in the paragraphs under reply are not true and hence denied.

12) With reference to paragraph 11 of the petition, the respondent no. 1 states that the same are a narration of the contents of the notice given by the respondent no.1 to the petitioners. The respondent no. 1 denies the said narration and craves leave to refer to and rely upon the notice of the respondent no.1 for its true meaning and effect.

13) With reference to paragraphs 12, 13, 15, 16 and 17 are a narration and interpretation of the various applications filed by the parties and the various orders passed therein. The respondent no. 1 denies the said narration and interpretation and craves leave to refer to the said applications and orders passed therein for their true meaning, effect and interpretation.

14) With reference to paragraph 14 of the petition, the respondent no. 1 denies the contents thereof. The respondent no. 1 denies that any such statement was exchanged as alleged. Even otherwise, it is not even the case of the petitioners in the paragraph under reply that the amount of the respondent no. 1 was paid by the petitioners to the respondents. The respondent no. 1 is not concerned with what payments are made to other creditors. Moreover, the so called MOU was never implemented or performed between the petitioners and the respondent no. 1 and the even if it is assumed that the petitioners performed the MOU qua some other creditors, that would have no bearing or relevance in the facts of the present case. The other contentions, averments, assertions and submissions made in the paragraphs under reply are not true and hence denied.

15) With reference to paragraph 18 and 19 of the petition, the respondent no.1 denies the contents thereof. The respondent no. 1 vehemently denies all the factual and legal propositions raised in the petition and it is not open for the petitioners to state that any of the factual or legal propositions are undisputed. It is denied that the “legal position has basically, virtually and substantially changed and altered“ as alleged or otherwise. The respondent no.1 denies that the so called MOU has been implemented or acted upon by and between the petitioners and the respondent no.1 or that any amount out of the remaining outstanding amount of Rs. 96, 03, 766 has been paid to the respondent no. 1, either under the alleged MOU or otherwise. It is specifically denied that the consideration of and the complainant""""s rights thereon of the 5 dishonored cheques were in any way extinguished either as being surrendered or waived or that they have merged in the alleged MOU. It is specifically denied that the cheques have become either invalid or unusable or not negotiable either on the alleged execution of the MOU on 7.12.1996 or at any time or for any reason before or after that date.

It is specifically denied that there is no legal liability of the petitioners for the said cheques. The other contentions, averments, assertions and submissions made in the paragraphs under reply are not true and hence denied.

16) With reference to paragraph 20, 21, 22 and 23 of the petition, the respondent no. 1 denies the contents thereof. The respondent no. 1 states that the respondent no. 1 has not filed the Civil Suit No. 4470 of 1998. The respondent no. 1 further states that the respondent no. 1 has not filed any proceedings for specific performance of the so called MOU. The respondent no. 1 is not concerned with what the so called "syndicate" has done and the facts of Civil Suit No. 4470 of 1998 have no connection with the present case and are completely irrelevant for the purpose of deciding the present dispute. It is also pertinent to note that no part of the said MOU has been performed qua the respondent no.1 and the respondent no.1 has sued the petitioners for recovery of the original claim. It is specifically denied that the five cheques in question were ever given to Shri B.J. Mehta of M/s. H. Desai and company as alleged or that they were every in custody of the said person at any point of time, either as "security" or otherwise. It is specifically denied that the said cheques were never to be utilized. It is denied that the cheques were either misused as alleged or otherwise. It is denied that the facts of the present case do not attract offence punishable under Section 138 of the Negotiable Instruments Act or that the complains are an abuse of the process of law. It is specifically denied that the issues involved in the present case are issues which are to be determined by the City Civil Court only or that any of the facts or issues urged by the petitioners is such that it can conclusively terminate the 5 complains in favor of the petitioners. The other contentions, averments, assertions and submissions made in the paragraphs under reply are not true and hence denied.

17) With reference to paragraph 24 of the petition, the respondent no. 1 denies the contents thereof. It is specifically denied that any MOU is subsisting between the parties or that any agreement or terms were decided afresh with regard to payment of the amount of the aforesaid cheques. It is further submitted that, even otherwise, no amount is paid to the respondent no. 1 till date, either under the MOU or otherwise, and the principal amount outstanding continues to remain Rs. 96, 03, 766 and therefore, even in this background, the contentions raised by the petitioners are completely misconceived and baseless. It is specifically denied that the consideration for giving of the cheques has either merged with the MOU or has otherwise been lost. It is specifically denied that the cheques are without consideration as alleged or otherwise or that the complains are not maintainable. It is specifically denied that any of the rights and claims of the respondent no. 1 have merged into the MOU as alleged or have extinguished or have been surrendered or released or relinquished or waived as alleged or otherwise. It is specifically denied that any of the submissions of the respondent no. 1 have been concocted or that there is any Suppression of material facts at the hands of the respondent no. 1 or that the complains are an abuse of the process of law or that the said complains deserve to be quashed. In light of the fact that the cheques were never handed over to Shri B.J. Mehta in the first place, it is specifically denied that the respondent no. 1 has taken back the cheques from Shri B.J. Mehta or that the said cheques were fraudulently or illegally deposited by the respondent no.1. The other contentions, averments, assertions and submissions made in the paragraphs under reply are not true and hence denied.

18) With reference to paragraph 25 of the petition, the respondent no.1 denies the contents thereof. The respondent no. 1 denies the interpretation sought to be made of the communication dated 104.2008 and craves leave to refer to the same for its true meaning, effect and interpretation. It is however submitted that the said communication would be of no relevance for the purpose of the present case.

19) With reference to paragraph 26 of the petition, the respondent no. 1 denies the contents thereof. The respondent no. 1 is not aware of the actions taken by the petitioners or the syndicate or the arbitrator. It is pertinent to note that, till date, no such alleged amount is received by the respondent no. 1. It is specifically denies that the petitioners have done anything to protect the interest of the respondent no.1 or to discharge their debt or to pay the dues of the respondent no.1. The other contentions, averments, assertions and submissions made in the paragraphs under reply are not true and hence denied."

16. Mr. Mehd, in support of his submissions, placed reliance on two decisions of the Kerala High Court; (I) R. Gopikuttan Pillai vs. Sankara Narayanan Nair, (2004) 1 DCR 222 and (ii) M/s. Thekkan & Co. vs. Smt. M. Anita, (2004) CriLJ 58.

17. In such circumstance, referred to above, Mr. Mehd prays that there being no merit in any of the writ applications, those be rejected.

18. Having heard the learned counsel appearing for the parties and having considered the materials on record, the only question that falls for my consideration is whether the criminal proceedings should be quashed.

19. Both the sides have not disputed the following table;

16.06.1996 Total due 1.09, 15, 091 17.06.1996 2 cheques issued 18, 00, 000 (122261) 22, 00, 000(122262) _____ 40, 00, 000 Cheque honoured 71, 325 Oct, 1996 Total Due (1, 09, 15, 091-71, 325) = 1, 08, 43, 766 18/19.10.96 3 cheques issued 22, 43, 766(122303) 22, 00, 000(122304) 18, 00, 000(122303) _____ 68, 43, 766 Five cheques totaling (complaint for) 1, 08, 43, 766 30.10.96 Accused paid total vide 2 cheques 12, 40, 000 30.10.96 As on total due payable 96, 03, 766 11/11/96 All 5 cheques of 1, 08, 43, 766 Deposited again 13.11.96 5 cheques returned 17.11.96 Notice u/s 138 07/12/96 MOU executed wherein total dues of 96, 03, 766 accepted and admitted 10/01/97 Present complaint filed for 1, 08, 43, 766 1998 Summary Suit No.5402/98 filed in Ahmedabad City Civil Court for dues of 96, 03, 766 based on MOU.

20. I need to answer the contention raised by the learned counsel appearing for the writ applicants that since the amount due and payable to the complainant was less than the amount represented by the cheques, on the date these cheques were presented for encashment, the writ applicants were not legally required to honour those cheques, and consequently, no offence under section 138 of the NI Act is made out against them.

21. Section 138 of Negotiable Instruments Act reads as under:-

“138. Dishonour of cheque for insufficiency, etc., of funds in the accounts Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may extend 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 induce 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 cheques 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.“

22. The following are the components of the offence punishable under Section 138 of Negotiable Instrument Act:-

(1) drawing of the cheque by a person on an account maintained by him with a banker, for payment to another person from out of that account for discharge in whole/part any debt or liability,

(2) presentation of the cheque by the payee or the holder in due course to the bank,

(3) returning the cheque unpaid by the drawee bank for want of sufficient funds to the credit of the drawer or any arrangement with the banker to pay the sum covered by the cheque,

(4) giving notice in writing to the drawer of the cheque within 15 days of the receipt of information by the payee from the bank regarding the return of the cheque as unpaid demanding payment of the cheque amount,

(5) failure of the drawer to make payment to the payee or the holder in due course of the cheque, of the amount covered by the cheque within 15 days of the receipt of the notice.

23. The question which comes up for consideration is as to what the expression "amount of money means in a case " where the admitted liability of the drawer of the cheque gets reduced, on account of the part payment made by him, after issuing but before the presentation of cheque in question. No doubt, the expression "amount of money would mean the amount of the cheque alone in case the amount payable by the drawer, on the date of presentation of the cheque, is more than the amount of the cheque. But, can it be said the expression "amount of money would always mean the amount of the cheque, even if the actual liability of the drawer of the cheque has got reduced on account of some payment made by him towards the discharge of the debt or liability in consideration of which the cheque in question was issued. If it is held that the expression "amount of money would necessarily mean the amount of cheque in every case, the drawer of the cheque would be required to make arrangement for more than the admitted amount payable by him to the payee of the cheque. In case he is not able to make arrangement for the whole of the amount of the cheque, he would be guilty of the offence punishable under Section 138 of Negotiable Instruments Act. Obviously this could not have been the intention of the legislature to make a person liable to punishment even if he has made arrangements necessary for payment of the amount which is actually payable by him. If the drawer of the cheque is made to pay more than the amount actually payable by him, the inevitable result would be that he will have to chase the payee of the cheque to recover the excess amount paid by him. Therefore, I find it difficult to take the view that even if the admitted liability of the drawer of the cheque has got reduced, on account of certain payments made after issue of the cheque, the payee would nevertheless be entitled to present the cheque for the whole of the amount, to the banker of the drawer, for encashment and in case such a cheque is dishonoured for want of funds, he will be guilty of offence punishable under Section 138 of Negotiable Instrument Act.

24. In taking the aforesaid view, I am conscious of the implications. The drawer of a cheque may make payment of a part of the amount of the cheque only with a view to circumvent and get out of his liability under Section 138 of Negotiable Instrument Act. But, this can easily be avoided by payee of the cheque, either by taking the cheque of the reduced amount from the drawer or by making an endorsement on the cheque acknowledging the part payment received by him and then presenting the cheque for encashment of only the balance amount due and payable to him. In fact, Section 56 of Negotiable Instrument Act specifically provides for an endorsement on a Negotiable Instrument, in case of part-payment and the instrument can thereafter be negotiated for the balance amount. It would, therefore, be open to the payee of the cheque to present the cheque for payment of only that much amount which is due to him after giving credit for the part-payment made after issuance of cheque. The view being taken by me was also taken by a Division Bench of Kerala High Court in Joseph Sartho vs. Gopinathan Nair, (2009) 2 Crimes(HC) 463 (Kerala). I shall discuss the Kerala High Court decision in Joseph a little later. As noted by the Supreme Court in Rahul Builders vs. Arihant Fertilizers & Chemicals And Another, (2008) 2 SCC 321, that the Negotiable Instruments Act envisages application of the penal provisions which needs to be construed strictly.

Therefore, even if two views in the matter are possible, the Court should lean in favour of the view which is beneficial to the accused. This is more so, when such a view will also advance the legislative intent, behind enactment of this criminal liability.

25. I am conscious of the fact that out of the total liability of Rs. 1, 08, 43, 766/- the liability only to the extent Rs.12, 40, 000/- came to be discharged. The amount of Rs.96, 03, 766/- still remained due and payable by the writ applicants to the complainant. However, I am of the view that the quantum of the amount would not be a relevant factor in the case at hand.

To put it in other words, whether a substantial amount was paid or a meager amount was paid. A notice of

demand which requires the drawer of the cheque to make payment of the whole of the cheque amount, despite receiving some amount against that very cheque, much before issue of notice, cannot be said to be a legal and valid notice envisaged in Section 138(b) of Negotiable Instrument Act. The expression "amount of money used in " Section 138(b) of Negotiable Instrument Act, to my mind, in a case of this nature would mean the amount actually payable by the drawer of the cheque to the payee of the cheque. Of course, if the payee of the cheque makes some demands on account of interest, compensation, incidental expenses etc, that would not invalidate the notice so long as the principal amount demanded by the payee of the cheque is correct and is clearly identified in the notice. When the principal amount claimed in the notice of demand is more than the principal amount actually payable to the payee of the cheque and the notice also does not indicate the basis for demanding the excess amount, such a notice cannot be said to be a legal and valid notice envisaged in Section 138(b) of Negotiable Instrument Act. In such a case, it is not open to the complainant to take the plea that the drawer of the cheque could have escaped the liability by paying the actual amount due from him to the payee of the cheque. In order to make the notice legal and valid, it must necessarily specify the principal amount payable to the payee of the cheque and the principal amount demanded from the drawer of the cheque should not be more than the actual amount payable by him though addition of some other demands in the notice by itself would not render such a notice illegal or invalid. (see M/s. Alliance Infrastructure vs. Vinay Mittal, Cri. M.C. No.2224 of 2009, decided on 18th January, 2018)

26. Mr. Mehd, the learned counsel appearing for the complainant vehemently submitted that the contention of the learned counsel appearing for the applicants as regards failure on the part of the complainant to put an endorsement as regards the part payment on the cheques is without any merit.

According to Mr. Mehd, in the case at hand, there were five cheques which were presented by the complainant in the Bank and, therefore, at the best, he could have put an endorsement on one of the cheques. However, so far as the other four cheques are concerned, they having got dishonoured, the complaints could be said to be maintainable in law.

27. I am not much impressed with the submission canvassed on behalf of the complainant. It is not in dispute that all the five cheques were presented by the complainant in his Bank together at one point of time. What the complainant could have done was to annex a slip along with the five cheques with the endorsement as regards the part payment of Rs.12, 00, 000/-

28. The term "endorsement" has been defined under Section 15 of the Negotiable Instruments Act, which reads as under :

"15. Endorsement.--When the 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 endorser."

29. This clearly shows that the holder of a cheque for the purpose of negotiation of the same shall sign on the back or face of the cheque or on a separate slip annexed thereto. Then only he is said to have endorsed the same for the purpose of negotiation.

30. The word "negotiation" is again defined under Section 14, which reads as under :

"14. Negotiation.--When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated."

31. In fact, the issue with regard to sections 56 and 15 of the N.I. Act will have to be decided, sooner or later, by the Supreme Court in an appropriate case or may be, if this very judgement travels to the Supreme Court, the Supreme Court may answer the question accordingly. In fact, I take notice of the fact that this issue came up for consideration before the Supreme Court in the case of M/s. Moser Baer Photo Voltaic Ltd. vs. M/s. Photon Energy Systems Ltd. & Ors., Criminal Appeal No.235 of 2016, disposed of on 18th

March, 2016. I may quote the relevant observations of the Supreme Court;

"An interesting question of law as to whether in view of payments or settlements made after the issuance of a cheque, a complainant can disclose the true state of affairs and issue a demand for a lesser amount and whether in such circumstances the criminal prosecution for dishonour of a cheque for higher amount is legally sustainable or not, did arise in this case. However, on account of subsequent talks between the parties, an amicable settlement has been arrived at and hence there is no requirement now to answer the aforesaid question of law in the present proceedings and hence the same is left open for adjudication in any other appropriate case."

32. What has weighed with me is the submission as regards the ominous notice issued by the complainant before filing of the complaints.

33. At this stage, let me reproduce the statutory notice issued by the complainant to the accused/applicants dated 27th November, 1996. The notice reads thus;

"Notice U/s.138 Negotiable Instruments Act.

Dear Sir,

Under instructions from and on behalf of my clients M/s M.D Textile Industries Ltd. , 2238, Manek Chowk, Ahmedabad, I do hereby serve you with the following notice:-

1. That my clients deal in the import and sale of silver Bars and is a Government recognised Export House.

2. That you have been purchasing Silver Bars from my clients making payments on delivery of the goods.

3. That on 10.10.1996, the amount due to my clients from you was Rs.54, 00, 000.00 and on 11.10.1996, you again purchased silver bars (48 pieces) from my clients vide Bill No.47 dated 11.10.1996, valuing Rs. 1, 04, 71, 325.00 on credit basis.

4. That after crediting the amount received in you account, there was an outstanding balance of Rs.40, 71, 35.00 in your account on 16.10.1996 and on that date you again purchased Silver Bars (31 pieces) from my clients vide Bill No.49 dated 16.10.1996 valuing Rs. 68, 43, 766.00 and as such a sum of Rs.1, 09, 15, 091.00 became due to my clients from you as the price of the silver bars purchased by you from my clients.

5. That you issued cheque no.122261 dated 17.10.1996 for Rs.18, 00, 000.00 drawn on the Manek Chowk Co-operative Bank Ltd., Manek Chowk, Branch Ahmedabad and cheque No.122262 dated 17.10.1996 for Rs.22, 00, 000.00 also drawn on The Manek Chowk Cooperative Bank Ltd., Ahmedabad as pert price of the goods supplied which my clients deposited for collection in their Bank Account in Canara Bank, Ahmedabad, but both the cheques remained uncashed and were returned with the remarks on the Bank Memos "Funds Expected, please present again."

6. That cheque No.122303, 122304, 122305 for Rs.28, 43, 766.00, Rs.22, 00, 000/- and Rs. 18, 00, 000 dated 19.10.96 respectively all drawn on the ManekChowk Cooperative Bank Ltd., by you in favour of my clients as part price of the goods supplied also remained uncashed and were returned with the regards on the bank memos dated 23.10.96 "Funds insufficient".

7. That on persistent demand from my clients, you issued two cheques No.510585 and 510595 dated 30.10.1996 for Rs.2, 40, 000.00 and Rs.10, 00, 000.00 respectively both drawn on the Manek Chowk Cooperative Bank Ltd., Ahmedabad as part payment of the amount due and promised to pay the balance amount next week. Both these cheques were deposited by my clients and were cleared on 30.10.1996.

8. That after giving credit of this amount in your account, a sum of Rs.96, 03, 766.00 remained due besides

interest from you to my clients, which you did not pay as promised and as such my clients made persistent demand for the payment of the balance amount, which was legally recoverable.

9. That on your solemn assurance, my clients again deposited for collection all the five valid cheques of which my clients were holder in due course, No.122305 for 10, 00, 000.00, No.122304 for Rs.22, 00, 000.00, No.122303 for Rs.28, 43, 766.00 No.122262 for Rs.22, 00, 000/- and No.122261 for Rs.18, 00, 000.00 but all these cheques, remained uncashed and were returned with remarks on the Bank memos dated 13.11.1996 "Funds Insufficient".

10. That this legal notice has been sent within 15 days from the date when the intimation from the Bank was received about the dishonourment of the cheques on account of insufficient fund in your account.

11. You are, therefore, requested to pay the amount of the cheques so dishonoured within 15 days from the receipt of this Notice, failing which, legal action as provided u/s. 138 read with section 141 of the Negotiable Instruments Act besides other legal action available to my clients will be taken. Pleace take notice.

A copy of this Notice has been kept in my office for record and further necessary action."

34. Thus, the plain reading of the statutory notice would indicate that in Para-8, the complainant acknowledged the part payment to the tune of Rs.12, 00, 000/-, and as such, in clear terms that the sum of Rs.96, 03, 766/- remained due over and above the interest. In para-9 of the notice, there is a reference of all the five cheques with the requisite amount. In para-11, ultimately, the accused were called upon to make the payment of the cheques within 15 days. The aggregate amount, so far as the cheques are concerned, comes to Rs.1, 08, 43, 766/-. It is fairly conceded by the learned counsel appearing for the complainant that the demand in the statutory notice was for the aggregate amount of the cheques and not Rs.96, 03, 766/- which was due and payable.

35. The applicants replied to the aforenoted notice as under;

"To,

M/s. M.D. Textile Industries Ltd.

2238, Manekchowk,

Ahmedabad.

Under the instructions of my clients M/s. Shree Corporation, 2342/1 Manek Chowk, Ahmedabad and its partners I hereby reply to your notice dated 27.11.1996 which is as follows:-

1. My clients are in receipt of your notice dated 27.11.1996. M/s. Shree Corporation is a partnership firm

2. My clients say that you have no legal right and cause to give any notice under section 138 of the Negotiable Instrument Act.

3. My clients say and submit that they do not dispute the contents of paras 1 and 2 of your notice, but they dispute the contents of paras 3, 4 and 8 of your notice.

4. My clients say and submit that they they do not dispute the contents of paras 5 and 6 of your notice.

5. My clients further say and submit that a memorandum of understanding had taken place between my clients"""" partnership HUP firm, their partners mother and firms creditors in which details of payment to my clients"""" creditors is stated and prescribed. It is understood through this Memorandum of Understanding, in which you are also one of the part, to understanding that, towards the five cheques which were dishonoured

and which were more specifically mentioned in your notice para 5 and 6, two new cheques which are more specifically mentioned in your notice para 7 were given, it was further understood that all the five cheques which were earlier given to you, are not to be presented again and were to be given and deposited to Mr. Bhadreshbhai Mehta, Above said two cheques which are already honoured were given to you in the presence of Mr. Girishchandra Ramanlal Chokshi and Mr. Yogendra Ambalal Sarkar, both of whom are Arbitrators to said Memorandum of Understanding along with other Arbitrator. Mr. Jagmohandas Himmatlal Chokshi. Hence my clients deny the contentions of your notice para 7 that on persistent demand above said two cheques were given to you, but were given to you under above said Memorandum of Understanding.

6. Now as per above understanding between my clients and you among others, you were supposed to deposit above said five cheques to Mr. Bhadresh Mehta and instead of doing the same you acted against the Memorandum of Understanding and hence committed breach of agreement.

7. My clients say and submit, that they denied contents of para 9 of your notice that on my clients solemn assurance, you redeposited above said five cheques. My clients had never given any type of solemn assurance to redeposit those five cheques again, because towards those five cheques another two cheques were given and were honoured. Hence your act of redepositing above said five cheques is entirely illegal.

My clients were never intimated about it, nor my clients ever consented it and that my clients were never supposed to honour those five cheques after you received another two cheques from my clients and also that the Memorandum of Understanding had taken place as stated above.

8. Looking to the facts and circumstances and terms of Memorandum of Understanding you have no right to give any notice u/s. 138 of Negotiable Instruments Act. Your act of redepositing those five cheques is mischievous and an act to pressurize my clients.

9. My clients lastly submit that they are not supposed to make payment of those five cheques as per your notice and hence they are not paying the same. It is already subimtted that you have no cause to give notice u/s. 138 of Negotiable Instruments Act and hence any prosecution under the same Act would be false and malicious.“

36. In Central Bank of India & Another vs. Saxons Farms & Others, (1999) 8 SCC 221, the Supreme Court observed that the object of the notice under Section 138(b) of Negotiable Instrument Act is to give a chance to the drawer of the cheque to rectify his omission and also to protect the honest drawer. If the drawer of the cheque is asked to pay more than the principal amount due from him and that amount is demanded as the principal sum payable by him, it is not possible for an honest drawer of the cheque to meet such a requirement.

37. In Suman Sethi vs. Ajay K. Churiwala, (2000) 2 SCC 380, the Supreme Court held that where the notice also contains a claim by way of cost, interest etc. and gives breakup of the claim of the cheque amount, interest, damages etc., which are separately specified, the claim for interest, cost etc. would be superfluous and these additional claims being severable would not invalidate the notice. It was further held that if an ominous demand is made in a notice as to what was due against a dishonoured cheque, the notice might fail to meet the legal requirement and may be regarded as bad.

38. The same consequence, in my view, would follow where the principal sum demanded in the notice is more than the actual amount payable to the payee of the cheque as a principal sum.

39. In K.R.Indira vs. Dr.G.Adinarayana, (2003) 3 JCC 273 (NI), a consolidated notice was sent in respect of four cheques. Two of which were issued in the name of the husband and the two were in the name of the wife. It was noted by the Supreme Court that the cheque amounts were different from the alleged loan and the demand made was not of the cheque amount but was of the loan amount. It was held that the complainant was required to make demand for the amount recovered by the cheque which was conspicuously absent in the notice and, therefore, the notice was imperfect. The same would be the legal

effect when a part-payment against a cheque is made, after its issue. The amount covered by the cheque would necessarily mean the principal amount due to the payee after giving credit for the part-payment received by him and, therefore, if the notice does not specifically demand that particular amount, it would not be a valid notice and would not fasten criminal liability on account of its non-compliance. The relevant observations of the Supreme Court are extracted hereunder;

"8. As was observed by this Court in Central Bank of India and Anr. v. Saxons Farms and Ors., (1999) 8 SCC 221, the object of the notice is to give a chance to the drawer of the cheque to rectify his omission. The demand in the notice has to be in relation to """"said amount of money"""" as described in the provision. The expression """"payment of any amount of money"""" as appearing in the main portion of Section 138 of the Act goes to show it needs to be established that the cheque was drawn for the purpose of discharging in whole or in part of any debt or any liability, even though the notice as contemplated may involve demands for compensation, costs, interest etc. The drawer of the cheque stands absolved from his liability under Section 138 of the Act if he makes the payment of the amount covered by the cheque of which he was the drawer within 15 days from the date of receipt of notice or before the complaint is filed.

9. In Suman Sethi v. Ajay K. Churiwal and another, (2000) 2 SCC 380, it was held that the legislative intent as evident from Section 138 of the Act is that if for the dishonoured cheque the demand is not met within 15 days of the receipt of the notice the drawer is liable for conviction. If the cheque amount is paid within the above period or before the complaint is filed, the legal liability under Section 138 ceases to be operative and for the recovery of other demands such as compensation, costs, interests etc. separate proceedings would lie. If in a notice any other sum is indicated in addition to the amount covered by the cheque, that does not invalidate the notice.

[10] The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence : (1) drawing of the cheque by a person on an account maintained by him with a banker, for payment to another person from out of that account for discharge in whole/part any debt or liability, (2) presentation of the cheque by the payee or the holder in due course to the bank, (3) returning the cheque unpaid by the drawee bank for want of sufficient funds to the credit of the drawer or any arrangement with the banker to pay the sum covered by the cheque, (4) giving notice in writing to the drawer of the cheque within 15 days of the receipt of information by the payee from the bank regarding the return of the cheque as unpaid demanding payment of the cheque amount, (5) failure of the drawer to make payment to the payee or the holder in due course of the cheque, of the amount covered by the cheque within 15 days of the receipt of the notice.

[11] Strong reliance was placed by learned Counsel for the appellants in Suman Sethi""""s case to contend that if the indication in the notice of other amounts than that covered by the cheque issued, does not as held by this Court invalidate the notice, there is no reason as to why a consolidated notice for two complainants cannot be issued. The extreme plea as is sought to be raised in this case based upon Suman Sethi""""s case is clearly untenable. Though no formal notice is prescribed in the provision, the statutory provision indicates in unmistakable terms as to what should be clearly indicated in the notice and what manner of demand it should make. In Suman Sethi""""s case on considering the contents of the notice, it was observed that there was specific demand in respect of the amount covered by the cheque and the fact that certain additional demands incidental to it, in the form of expenses incurred for clearance and notice charges were also made did not vitiate the notice. In a given case if the consolidated notice is found to provide sufficient information envisaged by the statutory provision and there was a specific demand for the payment of the sum covered by the cheque dishonoured, mere fact that it was a consolidated notice, and/or that further demands in addition to the statutorily envisaged demand was also found to have been made may not invalidate the same.

This position could not be disputed by learned Counsel for the respondent. However, according to the respondent, the notice in question is not separable in that way and that there was no specific demand made for payment of the amount covered by the cheque. We have perused the contents of the notice. Significantly, not only the cheque amounts were different from the alleged loan amounts but the demand was made not of the cheque amounts but only the loan amount as though it is a demand for the loan amount and not the

demand for payment of the cheque amount; nor could it be said that it was a demand for payment of the cheque amount and in addition thereto made further demands as well. What is necessary is making of a demand for the amount covered by the bounced cheque which is conspicuously absent in the notice issued in this case. The notice in question is imperfect in this case not because it had any further or additional claims as well but it did not specifically contain any demand for the payment of the cheque amount, the non-compliance with such a demand only being the incriminating circumstance which expose the drawer for being proceeded against under Section 138 of the Act. That being the position, the ultimate conclusion arrived at by the trial Court and the High Court do not call for interference in these appeals, though for different reasons indicated by us. The appeals are, accordingly dismissed."

40. In the aforesaid context, let me look into the two decisions relied upon by the learned counsel appearing for the writ applicants in support of his submissions.

41. In Arvind Maneklal Tailor , the accused had issued a cheque in favour of the complainant dated 15th March, 1991 of Rs.2, 00, 000/-representing part of the purchase price of their shops, purchased by the accused from the complainant, who was a builder and developer of the shops in question.

Thereafter, i.e., after the cheque was issued, certain events took place, whereby the very same cheque was altered by the drawer so as to change the date from 15th March, 1991 to 15th September, 1991. Certain events between 15th March, 1991 and 15th September, 1991 of some significance were taken note of by the court. It was argued before this Court in the said matter that the cheque which was dishonoured did not represent either the entire debt or part of the debt on the due date, and in such circumstances, section 138 of the N.I. Act would not furnish a cause of action for the criminal prosecution and/or conviction. This Court, while affirming the judgment and order of acquittal passed by the court below, held as under;

"7. The crux of the matter in the present appeal is the appropriate construction of section 138 of the Act when seen in the context of the presumptions raised by sections 118 and 139 of the said Act. There is no doubt that section 118 as also section 139 create presumptions.

7.1 Section 118 creates a presumption in favour of consideration behind the issuance of the cheque. In other words, it creates a presumption that the drawer of a cheque is a debtor in respect of the amount of the cheque, wherein the drawee is the creditor. Section 139 creates a corresponding presumption in favour of the holder of the cheque. It would, therefore, appear that the presumptions created by section 118 and section 139 are only permissible presumptions in law from different perspectives. However, there cannot be any controversy and in fact there is no controversy that both presumptions are rebuttable.

8. Now coming to the crux of the matter and the factual controversy involved in the present appeal, the impugned judgement of acquittal is based upon the acceptance on the part of the trial court of the defence put up by the accused to the effect that the dishonoured cheque was not in respect of "discharge, in whole or in part, of any debt or other liability" within the meaning of section 138 of the said Act. The trial court, after discussing all the facts and factual materials on record, came to the conclusion that the cheque issued for Rs.2 lacs did not represent either the whole of the debt or other liability of the drawer towards the drawee, nor did it represent part of such debt or liability.

8.1 No doubt, the trial court has in its judgement (delivered in Gujarati) has very often used the phrase to the effect that the cheque does not represent the "legal dues" of the drawer to the drawee. However, there cannot be any controversy that the entire factual evidence is based upon not the issue as to whether there is any debt or not, but on the defence of the accused that after the issuance of the cheque, but before due date, there was a change of circumstances and change in the obligations between the parties whereby the extent of the debt and the quantum thereof was substantially altered, and that on the due date the debt if any of the drawer to the drawee was of a far smaller figure. Obviously it was neither the function of the criminal court nor necessary to decide the legal issue as to what was the precise extent of the debt. If the evidence in rebuttal which is found acceptable by the court justifies a conclusion that the cheque which was dishonoured, did not represent either the entire debt or part of the debt on the due date, section 138 would not furnish a

cause of action for the criminal prosecution and/or conviction. It is in the context of this limited controversy that the evidence in rebuttal led by the accused has been examined and found to be acceptable by the court.

9. So far as the facts of the case are concerned and so far as the appreciation of evidence is concerned, I see no reason to take another view of the matter, so far as the findings of fact are concerned. Suffice it to say that the finding of fact based on the evidence on record is to the effect that when the cheque was issued, the same represented an amount due and payable to the drawee in respect of the outstanding consideration in respect of the shops sold by the drawee to the drawer. However, subsequently, after the issuance of the cheque, but before the due date, the parties readjusted their mutual obligations as evidenced by Exh.24, etc., and the drawer of the cheque made payments in respect of the then outstanding amount in respect of the shops purchased by him by instalments as also interest, which payment has been accepted by the drawee. The evidence on record discloses that the cheque was originally issued on the understanding that the drawer as a purchaser of the shops would be able to obtain bank loans, on the basis of supporting documents to be provided by the complainant; however, since the complainant did not or could not provide the necessary documents, the bank loan although sanctioned, was not disbursed, and therefore the accused was unable to get the amount and therefore could not redeem the cheque from the drawee before the due date. It was for this reason that the drawer of the cheque followed the alternate arrangements and instead of making the lumpsum payment from the loan amount expected, made payments towards his debt in smaller sums by way of the instalments and also paid interest. This finding is based on a concrete documentary evidence in the form of an agreement between the parties at Exh.24 which contemplates that if the bank loan is not sanctioned, the purchaser (the drawer of the cheque) would make payments by monthly instalments. There is no dispute that the bank loan, although sanctioned in principle, was not disbursed, and this was because the relevant documents were not or could not be provided by the complainant. It was for this reason that the accused made payments by instalments as contemplated by Exh.24. It is also not in controversy that payments by instalments together with interest has been accepted by the complainant, impliedly as of right under Exh.24, and without protest.

10. It requires to be noted that as a result of these readjustments between the parties, the accused made monthly payments by instalments by cheques. It is stated that two of such cheques were honoured and subsequent cheques were dishonoured. Specifically in respect of these dishonoured cheques further complaints under section 138 have been filed. Furthermore, the complainant has also filed a civil suit against the accused in respect of these civil transactions between the parties.

11. The sum and substance of the findings of fact recorded by the trial court are found in paragraph 22 of the impugned judgement. It only requires to be clarified that when the trial court uses the phrase “legal dues“ in the context of the cheque in question, it only meant, and it could only mean that the amount of the cheque did not represent “in whole or in part of any debt or other liability“ of the drawer to the drawee.“

42. In Voruganti Chinna Gopaiah , an identical issue had arose before a learned Single Judge of the Andhra Pradesh High Court. While acquitting the accused, the court held as under;

“10. There is no dispute in the fact that the accused are the customers of the complainant. The issuance of the cheque (Ex.Pl dated 5-10-1991) in favour of the complainant in respect of the amount due on the running account is not disputed. The fact of dishonour and intimation under Ex.P2 dated 14-10-1991 and Ex.P3 dated 8-10-1991 and the subsequent Phonogram Ex.P4 dated 14-10-1991 are not in dispute. It is also not in dispute that the complainant issued Ex.P5 dated 21-10- 1991 (office copy of the notice issued by the complainant). The said notice was received by the accused under acknowledgment Ex.P6 dated 22-10-1991.

11. The learned Counsel appearing for the appellant/A2 submitted that though there was outstanding amount and though Ex.P1 cheque was issued towards payment of the said amount to the 1 st respondent/complainant, that was replaced by Ex.D1 agreement under which the complainant/1st respondent agreed to receive the amount in instalments.

12. The terms of Ex.D1 agreement are brought to my notice. Ex.D1 indicates that the 1st respondent/complainant agreed to receive the amount in three instalments. On this aspect, the evidence of PW1 who represented the complainant is very important. PW1 though denied the suggestion that as per Ex.D1 the accused need not pay the amount in lumpsum and that they have no right to proceed against the accused, in the cross-examination he admitted the execution of Ex.D1. Ex.D1 is dated 19-11-1991. In the Cross-examination PW1 admitted that a letter was addressed to the accused on 28-12-1991 by the Head Office stating that as per the terms undertaken by the accused dated 19-11 -1991 the accused were to pay the entire amount of Rs.8, 21, 029.12 in four instalments and a sum of Rs.2, 71, 029.12 is payable on or before 31-12-1991 towards the first instalment and that the Head Office demanded the accused to pay the first instalment as per Ex.D1, the terms of which are proposed by the accused themselves.

This indicates that the complainant-Company itself had agreed for the entire amount to be paid in four instalments and the first instalment was to be paid on or before 31-12-1991. In such a case, the liability to pay in lumpsum in lieu of which, Ex.P1 was issued is wiped out and in its place the terms of Ex.D1 were conslituted.

When the complainant itself was insisting upon payment of the amount due in instalments, it does not lie in its mouth to file a complaint on the basis of Ex.Pl which was issued on 5-10-1991 and consequently the subsequent documents Exs.P2, P3 and P4 came into existence.

Further in this case, the complaint was filed on 20-11- 1991. Ex.DI is dated 19-11-1991. So, when the complaint was given there was no cause of action for the complainant to rely upon Ex.P1.

13. On the other hand the learned Counsel for the complainant/1 st respondent submitted that the Company itself is not a party to Ex.D1. Therefore, the terms of Ex.D1 are not binding. Further he submitted that PW1 was not authorised to speak on the terms of Ex.D1. Whatever PWi submitted in respect of Ex.Dl is unauthorised and cannot be taken into consideration.

The learned Counsel further submitted that the amount was due as on 13-11-1991. On that day, Ex.D1 was not in existence. Therefore, no reliance can be placed on the contents of Ex.D1. His further contention is that the introduction of Ex.D1 terms is invalid. Ex.P5 notice was given to the accused on 21-10-1991. To this there was no reply from the accused. Therefore, the subsequent stand taken by the accused is only an after thought and no importance can be given to the contents of Ex.D1.

14. I am unable to agree with this contention. It is true that the amount in lieu of which Ex.P1 was given was outstanding amount in the running account as on 13-11- 1991. Ex.Pl was given by the accused in discharge of that debt. But subsequently the accused wrote letter and that was acted upon. PW1 clearly stated that the Company/lst respondent wrote letter on 28-12-1991 demanding payment of first instalment. This clearly indicates that the terms of Ex.D1 were accepted by the 1st respondentCompany and they were acting upon those terms. The contention that PW1 was not authorized to speak of Ex.D1 is also devoid of any merit. PW1 is representing the complainant- Company. Therefore, the complainantCompany cannot turn round and say that the evidence of PW1 in respect of Ex.D1 is not binding on them.

15. The lower Court applied the rule of thumb that once the cheque is issued and it is subsequently dishonoured, the offence under Section 138 of Negotiable Instruments Act is made out. This is erroneous. When the complainant itself agreed for the terms of Ex.Dl, about which PW1 gave replies in favour of the accused/ appellant it cannot be held that the accused/ appellant is guilty for the offence punishable under Section 138 of Negotiable Instruments Act. “

43. Let me now look into the two decisions of the Kerala High Court relied upon by the learned counsel appearing for the complainant.

44. In R. Gopikuttan Pillai , it was argued that after the issue of the cheque and before the date shown on the cheque was reached, the payments were made to discharge the liability under the cheque. The court took

notice of the fact that there was no dispute in that regard. However, the court proceeded to take the view that such part payment would not make any difference and would not absolve the accused from his liability under section 138 of the N.I.Act. I may quote the relevant observations made by the court in the judgment.

"11. In a prosecution under Section 138 of the Negotiable Instruments Act an accused/ drawer of the cheque is bound to prove payment of the amount due under the cheque to the payee within 15 days from the date of receipt of the notice. But this does not mean that the accused who had already made part payments in discharge of the liability under the cheque prior to the presentation of the cheque cannot plead and prove such discharge prior to the presentation of the cheque and prior to the receipt of the notice of demand. In the instant case we have convincing evidence to show that under Exts. D1 and D2 an amount of Rs. 45, 631/-was paid to and received by the complainant. The complainant would contend that these amounts are received under a totally different transaction. But I find merit in the contention of the learned Counsel for the respondent-accused, which contention was accepted by the learned Magistrate, that the complainant has not succeeded in establishing this plea. At least for the sake of arguments, therefore, I accept the contention that an amount of Rs. 45, 631/-has been paid to and received by the complainant towards the liability under Ext. P1 cheque.

12. But even this cannot be a valid plea for exculpation. Part payment of the amount due under the cheque whether before or after the date of receipt of the notice of demand under Section 138 cannot absolve the accused of his culpability. Definitely he has to pay, to avoid liability, the entire amount due within 15 days of receipt of the notice (including, of course, the amount if any paid earlier.)

13. In the instant case even if payments under Exts. D1 and D2 were taken into account, the accused cannot succeed for the reason that those payments, even if accepted, do not amount to discharge of liability contemplated under Section 138. Still an amount exceeding Rs. 27, 000/- (72, 750--45, 361) remains to be paid even if I accept the plea of discharge under Exts. D1 and D2.

14. Undaunted, the learned Counsel for the respondent contends that Ext. D3 evidences payment of a total amount of Rs. 79, 260/-. The plea of discharge must certainly be proved by the accused. Of course the standard which would be applicable to an accused pleading such discharge is not as heavy and as onerous as the initial paramount burden on the prosecution. But at least by the test of preponderance of possibilities and probabilities, as in a civil case, the accused has to discharge his burden to prove payment of the amount due under the cheque. Ext. D3 series are self-serving documents. They do not contain any acknowledgement by the complainant. When acknowledgement was admittedly insisted regarding the payments under Exts. D1 and D2, it would be puerile for a Court to assume that no acknowledgement would have been insisted for the payments made under Ext. D3 series. It must therefore be held that the payments allegedly made by the accused under Ext. D3 cannot be accepted at all. The contention that anything more than what is borne out by Exts. D1 and D2 had been paid cannot be accepted at all.

15. It follows therefore that even if the case of the accused regarding discharge under Exts. D1 and D2 were accepted, that cannot be a valid and successful defence in this prosecution under Section 138 of the Negotiable Instruments Act. The learned Magistrate did not pointedly and specifically consider these relevant aspects. I am satisfied that the impugned verdict of not guilty and consequent acquittal do in these circumstances warrant appellate interference.

16. The interesting question whether the remedy under Section 138 of the Negotiable Instruments Act would be available to a complainant who has bona fide accepted part payments, towards the cheque amount before presentation of the cheque for encashment deserves to be considered. No precedent--binding or persuasive--on this specific aspect has been brought to my notice. According to me it would be unreasonable to deny the advantage/benefit of Section 138 of the Negotiable Instruments Act to such a payee merely because he had indulgently accepted part payment towards the liability under the cheque before the cheque was presented for encashment. Such an interpretation would defeat and stultify the ultimate purpose of Section 138 of the Negotiable Instruments Act."

The expression "the said amount of money" appearing in the section cannot lead me to the conclusion that Section 138 of the Negotiable Instruments Act will not be applicable in such a situation.

Harmonising the purpose and object of the statutory provision, the language employed and the interests of justice I am of opinion that the expression "the said amount of money" appearing in Clauses (b) and (c) of the proviso to Section 138 of the Negotiable Instruments Act must certainly refer to the amount of money due under the cheque less amounts if any paid already towards the liability. At any rate the payment contemplated under Clause (c) of the proviso must certainly include payments if any made towards, the liability after the issue of the cheque and before the cheque is presented for, encashment as also payments made after the receipt of the notice. The expression "the said amount of money" must certainly yield to a reasonable and purposive interpretation.

17. I am conscious that in an appropriate case the question may arise for consideration whether dishonour of the cheque was on the ground of insufficiency of funds if the funds were sufficient to pay the outstanding liability but not the entire liability under the cheque. That question does not specifically arise for consideration in this case. According to me the dishonour of the cheque, even in such a case where the amount available in the amount is sufficient to cover the outstanding liability but not sufficient to cover the entire amount liable to be paid under the cheque, would be for want of sufficient funds. As the drawer can, as indicated earlier, avoid culpable liability by proving discharge under proviso (c) of the entire amount (including the payments made prior to the dishonour of the cheque), this interpretation is not likely to result in any failure/miscarriage of justice. If the honouring of the cheque for the entire amount by the Bank were to result in any excess payments being made, civil remedy to claim return of the amount would be available to the drawer. If the purpose of Section 138 of the Negotiable Instruments Act is to ensure that the cheque transaction has as much credibility as a cash transaction, the interpretation that partial discharge of liability under the cheque prior to presentation of the cheque for encashment would extinguish the remedy under Section 138 of the Negotiable Instruments Act for a payee must certainly be avoided. Such a myopic interpretation would not advance the purpose and object of this legislation which attempts to usher in a new commercial morality essential for the health and growth of the economy.

18. There is no contention before me that any other ingredient of Section 138 of the Negotiable Instruments Act has not been established. In the absence of contention it is not necessary for me to advert to that aspect in any detail. Suffice it to say that I am satisfied that all ingredients of the offence punishable under Section 138 of the N.I. Act have been established. The accused is liable to be found guilty, convicted and sentenced under Section 138 of the Negotiable Instruments Act. "

45. In M/s. Thekkan & Co. , the complainant preferred an appeal against the acquittal of the respondent-accused in a prosecution under section 138 of the NI Act. The Court, while allowing the appeal filed by the complainant and holding the accused guilty of the offence, held as under;

"[13] Naturally the next question arises whether the accused could have avoided culpable liability under Section 138 of the N.I. Act if he paid the balance amount which were due on receipt of the notice. Under the proviso (c) to Section 138 of the Act, the drawee of the cheque has the obligation to pay "the said amount of money" "within 15 days of receipt of the said notice". The question is whether payments made prior to the receipt of the notice or even prior to the presentation of the cheque can be reckoned as sufficient discharge of this obligation to pay the amount. According to me, there is nothing in the language of Section 138 which precludes a Court from taking into account prior payments made - before the presentation of the cheque or before the receipt of the notice in deciding whether the amount due under the cheque has been paid. It will be open to the accused to show that he had made payment of the amount due under the cheque either before or after the presentation of the cheque on receipt of the notice. If he satisfies Court that within 15 days of receipt of the notice the entire amount or the outstanding amount due under the cheque has been paid and discharged, he would certainly be entitled to avoid culpable liability under Section 138 of the Act. Prior discharge - even prior to the notice of demand under Section 138 of the Act - must certainly be accepted as a valid defence under Section 138 of the Act. The mere fact that such discharge is prior to the notice of demand or even prior to the presentation and dishonour of the cheque would not disentitle an accused to

contend that the amount due under the cheque has been paid and discharged. The expression "the said amount of money" and "within 15 days of receipt of the said notice" cannot lead a Court machanically to the conclusion that any payment made in part or in full prior to the date of receipt of the notice cannot be given credit to. It would be unjust to read proviso (c) to Section 138 in such a mechanical and literal manner. The court was in these circumstances bound to consider the plea of discharge urged by the accused.

[14] A plea of discharge must certainly be proved by the person raising such plea whether the proceedings be civil or criminal. According to the accused she had paid a total amount of Rs. 87, 500/- which is equal to seven installments which she had agreed to be paid. According to her four such payments were made by cheques. Three such payments were made by cash. Three payments - a total of Rs. 37, 500/- admittedly remained undischarged.

We have evidence from Exts. D1 and D2 and the oral evidence of DW2 that three such payments were made by cheques. Those cheques are produced in Exts. D1 and D2 series. There is significant absence of evidence to show that any other cheque issued by the accused to the complainant was actually encashed. There is significant and total absence of evidence to show that the three remaining installments have been paid by cash. Such pleas of discharge remain unsubstantiated. No Court can accept and act upon such a plea.

[15] It follows from the above discussions that the accused had paid Rs. 37, 500/- by three cheques to discharge the liability under Ext. P4 cheque. The balance amount of Rs. 87, 500/- remained unpaid even after the expiry of 15 days from the date of receipt of notice. It follows, in these circumstances, that the complainant has succeeded in establishing the offence alleged under Section 138 of the N.I. Act.

[16] Acceptance of a contra plea would lead to the ridiculous conclusion that a complainant, who had indulgedly accepted part-payment will not be entitled to resort to the provisions of Section 138 of the Act. More dangerously, an accused who has made part payment will not be entitled to raise the same as a defence in a prosecution under Section 138 of the Act. Both results would be unjust and unconscionable and therefore such interpretation cannot certainly be preferred.

[17] The above discussions lead me to the conclusion that the learned Magistrate was in gross error in coming to the conclusion that Ext. P4 cheque was not issued for the due discharge of a legally enforceable debt/liability. In view of the presumption under Section 139 of the N.I. Act and in view of the proved circumstances that the cheque (Ext. P4) was issued on the specific understanding that the same can be presented and encashed if the entire amounts were not otherwise paid before the date of the cheque, it cannot be held that Ext. P4 was not issued for the discharge of a legally enforceable debt/liability. The judgment of acquittal therefore does warrant interference. The challenge succeeds."

46. Thus, in both the above referred two decisions, the court took the view that even if the accused has made part payment and the complainant has acknowledged the same, the same will not be sufficient for the accused to exonerate himself from his liability under section 138 of the N.I. Act. To put it in other words, an accused who has made the part payment, will not be entitled to raise the same as a defence in a prosecution under section 138 of the Act.

47. However, the principle explained and laid down in both the above referred decisions, did not find favour with a Division Bench of the very same High Court and both the judgements referred to above came to be over ruled.

48. In Joseph Sartho , a Division Bench of the Kerala High Court took the view that once the part payment is received by the complainant, the cheque in question would no longer remain one for payment of money for discharge in whole or in part of any debt or other liability. Let me quote the relevant observations of the Division Bench;

"[5] We heard the learned counsel on both sides. In this case, the facts of the case were not disputed before us by both sides. So, we may state that it is common case that a cheque dated 4.6.1999 was issued by the

accused to the complainant in discharge of a debt. Thereafter, the complainant received an amount of Rs, 2, 26, 400 on 9.6.1999 towards the debt. The complainant did not make any endorsement regarding receipt of the said amount on the cheque, but, later, presented the cheque for collection, claiming the entire amount shown in it.

When the cheque was dishonoured, a lawyer notice was caused to be sent to the accused only for the balance amount. The accused failed to repay the amount demanded. The point that arises for decision is whether on the facts, the accused has committed the offence under Section 138 of the Act.

[6] The learned counsel for the appellant Sri Sabu George relied on the decisions of this Court in R Gopikuttan Pillai v. Sankara Narayanan Nair Cri. A. No. 270/1997, and Thekken & Co. v. Anitha., (2003) 3 KLT 870. The learned counsel further submitted that upon receipt of notice, the accused should have paid the balance amount due under the cheque to escape from the offence under Section 138 of the Act. If the contention of the 1st respondent is accepted, any drawer of the cheque can pay some amount to the drawee and escape from the liability under Section 138. The purpose of the amendment introduced to the Negotiable Instruments Act, in making the dishonour of a cheque an offence is certain circumstances, is to maintain transparency in commercial transactions and also to sustain the credibility of transactions by cheques. So, an interpretation which serves the purpose of the statute should be adopted. In support of that submission, the learned counsel for the appellant relied on the decisions of the Apex Court in NEPC Micon Ltd. v. Magma Leasing Ltd., (1999) AIR SC 1952. and M/s. Dalmia Cement (Bharat) Ltd. v. M/s. Galaxy Traders and Agencies Ltd., (2001) AIR SC 676. On the other hand, the learned counsel for the 1st respondent Sri C.K. Sajeev submitted that Section 138 being a penal provision, the same should be interpreted strictly and if there is any doubt, it should go in favour of the accused. The learned counsel relied on the decision of this Court in Supply House v. Ullas . He also relied on the decision of the Apex Court in Rahul Builders v. Arihant Fertilizers & Chemical., (2008) 2 SCC 321. wherein, at para 10, it was observed that penal provisions contained in Section 138 should be construed strictly. The learned counsel also submitted that Section 138 is not a substitute for a suit for money. He brought to our notice Section 56 of the Act. Since the appellant did not make any endorsement of the amount received, on the cheque, it has lost its negotiability, it is submitted.

The learned Public Prosecutor Sri. P. Ravindra Babu supported the above submission of the learned counsel for the 1st respondent, " made relying on Section 56 of the Act. He submitted that in view of Section 56, the appellant could have claimed only the balance amount due under the cheque. Since be presented the cheque for collection of the entire amount, the offence under Section 138 is not made out, submitted the learned Public Prosecutor.

[7] Before dealing with the rival contentions, we think, it will be fruitful to refer to some of the relevant provisions of the Negotiable Instrument Act. Section 6 of the Act defines cheque as follows:

"A """"cheque""""" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand ..." Bill of exchange is defined is Section 5 as follows:

"A """"bill of exchange""""" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order, of a certain person or to the bearer of the instrument.

" Section 4 defines negotiation in the following manner:

"When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated".

Section 15 defines endorsement as follows:

"When the maker or holder or 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 """"endorser".

The above Section envisages any number of endorsements on the reverse of the cheque and if there is not sufficient space to make further endorsements, a slip of paper can be annexed to it, to get over the said difficulty. Section 56 of the Act, which is very relevant in this case, reads as follows:

"Endorsement 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."

In this case, admittedly, a portion of the amount covered by the cheque was repaid. The same was not indorsed by the drawee on the cheque. In view of the above position. the appellant could not have negotiated that cheque for the full amount. For the very same reason, he also could not have presented it for collection of the full amount. He was entitled to get only the balance amount. Therefore, he must have made an endorsement of the amount received and presented the cheque, to collect the balance amount due.

[8] Section 138 of the Act is quoted below for convenient reference:

"138. Dishonour of cheque for insufficiency, etc., of funds in the account- Where 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 hounour 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 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 of 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 purpose of this section, """"debt or other liability"""" means a legally enforceable debt or other liability.

Going by the above provision, a cheque must be for payment of any amount of money to another person for discharging in whole or in part of any debt or other liability. In this case, once part payment was received, the cheque no longer was one for payment of money for discharging in whole or in part of any debt or other liability. In fact, the amount covered by the cheque was admittedly larger than the amount of debt or liability. The whole amount of debt or liability was lesser than the amount represented by the cheque. So, if the cheque for such an amount was dishonoured, the same will not be an offence under Section 138 of the Act. Normally a penal law has to be interpreted strictly. If there is any vagueness in the law, the benefit of the same should go to the accused. The Apex Court in NEPC Nicon Ltd. v. Naguma Leasing Ltd and M/s. Dalmia Cement (Bharat) Ltd. v. M/s. Galaxy Traders and Agencies Ltd. has not stated anything against the above general principle. What was stated in the facts of those cases was that though Section 138 is a penal statute, the Court should interpret it, taking into account the legislative intent and purpose, so as to suppress

the mischief and advance the remedy. But in Rahul Builders, (2008) 2 SCC 321, the Hon"""""ble Supreme Court re-stated the settled principle of penal law that a penal provision like Section 138 should be interpreted strictly. In this case, we feel that there is not much scope for interpreting the provisions in the statute. Going by the plain words of the Section, the cheque presented for encashment should be one for payment in full or part of the debt due. In this case, admittedly, the cheque was for an amount higher than the amount due on the date it was presented for encashment. The law contemplates making of an endorsement by the drawee on the back of the cheque regarding the part payment received. So, we are of the view that the 1st respondent cannot be found guilty of the offence under Section 138 of the Act, for not making arrangement to honour the cheque for an amount more than what is due from him. If he had made arrangement for honouring the cheque, he would have to be after the appellant to get back the substantial amount paid by him earlier. Therefore, we find it difficult to subscribe to the view that the accused has committed the offence, as he failed to pay the balance amount, on issuance of notice by the appellant.

[9] The appellant points out that in the account of the 1st respondent, there was not sufficient amount to pay the balance amount due under the cheque. Further, he could have escaped from the liability by paying the balance amount, pursuant to the lawyer notice. We think, the liability to pay the amount on receipt of notice arises, if only the cheque was for an amount to discharge in whole or in part of the liability of the accused. In this cause, the above essential ingredient of the offence is absent. But, the learned counsel for the appellant relied on the observation of the learned Single Judge in para 17 of the judgment in R. Gopikuttan Pillai, Cri. Appeal No. 270/1997, which reads as follows:

“17. I am conscious that in an appropriate case the question may arise for consideration whether dishonour of the cheque was on the ground of insufficiency of funds if the funds were sufficient to pay the outstanding liability but not the entire liability under the cheque. That question does not specifically arise for consideration in this case. According to me the dishonour of the cheque, even in such a case where the amount available in the account is sufficient to cover the outstanding liability but not sufficient to cover the entire amount liable to be paid under the cheque, would be for want of sufficient funds.

As the drawer can, as indicated earlier, avoid culpable liability by proving discharge under proviso (c) of the entire amount (including the payments made prior to the dishonour of the cheque), this interpretation is not likely to result in any failure/miscarriage of justice. If the honouring of the cheque for the entire amount by the bank were to result in any excess payments being made, civil remedy to claim return of the amount would be available to the drawer. If the purpose of Section 138 of the Negotiable Instruments Act is to ensure that the cheque transaction has as much credibility as a cash transaction, the interpretation that partial discharge of liability under the cheque prior to presentation of the cheque for encashment would extinguish the remedy under Section 138 of the Negotiable Instruments Act for a payee must certainly be avoided. Such a myopic interpretation would not advance the purpose and object of this legislation which attempts to user in a new commercial morality essential for the health and growth of the economy.“

We think that for effectuating the purpose of the Act, the words of the state cannot be stretched, to make a conduct an offence, when the essential ingredient of the offence that the cheque should represent the amount due to the payee or part of it, on the date of presentation of it for collection/ encashment is absent. It is one of the fundamental principles for law that penal law should not be vague. The injunctions of a penal law must be clear and specific. In this context, it is apposite to quote the words of Douglas, J. in Krishan v. Board of R e g e n t s, (1994) 3 SCC 569. which reads as follows:

“...a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case....Certainly one of the basic purpose of the Due Process Clause has always been to protect a person against having the Government to impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that Courts must enforce.“ The same view has been expressed by our Apex Court in Kartar Singh v. State of Punjab, (1994) 3 SCC 569. The relevant portion of the judgment reads as follows.

"130. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasised that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitable lead citizens to steer for wider of the unlawful zone.... than if the boundaries of the forbidden areas were clearly marked."

[10] In R. Gopikuttan Pillai"""""s case , we notice that by interpreting Section 138, it has been made vague. Its injunctions were made wider. Based on that interpretation, the commissions/ omissions of the accused have been made the basis of an offence. In view of Section 56, the appellant could have claimed only the balance amount. Towards the amount due under a cheque, if some amount is received, the same has to be endorsed on the reverse of the cheque. The law of banking contemplates several such endorsements and if there is no space for making any endorsement on the reverse of the cheque, it may be made on a slip of paper annexed thereto, which is called along in banking circles.

In Bhashyam & Adiga"""""s Negotiable Instruments Act (18th Edition revised by Justice Ranganath Misra) allonge is described as follows: "Allonge-The signature to operate a negotiation must be written on the instrument itself, for, an assignment in writing not on the instrument itself is not an endorsement. But it may sometimes happen that by rapid circulation, the back of the paper is completely covered by inducements, then the holder may tack onto or paste a piece of paper and the endorsements may be made thereon, it then become part of the bill. Such addition is called an allonge which is thus described by Couch, C.J., an Allonge is a slip of paper annexed to a bill upon which, there being no legal limit to the number of endorsements, when there is no room to write them all distinctly on the back of the bill, the supernumerary endorsements may be written. It is annexed by the holder in order that he may write the endorsement and they do not require fresh stamps"""". Allonges are found in countries where the Geneva Convention No.3313 of 7.6.1930 has been adopted."

In India, attachment of a slip of paper to the cheque is statutorily recognized in Section 15 of the Act.

[11] The attempt of the appellant to encash the cheque without endorsing the amount already received is perilously bordering dishonesty. It appears, the appellant thinks, if some endorsement is made on the reverse of the cheque, it may become invalid. Under this misapprehension, the appellant has contended that the drawer of the cheque, by making some payment to the drawee, can make the cheque invalid. With great respect, we may point out that the learned Judge also fell into the very same error in R. Gopikuttan Pillai , while dealing with the contention that part payment will be the remedy under Section 138. So, the action of the appellant in this case, of presenting the cheque claiming the entire amount, is plainly illegal and the same cannot be spring board for an action against the 1st respondent accused under Section 138 of the Act.

[12] We are not referring in detail the other decisions cited, as they are not strictly relevant on the facts of this case. As mentioned earlier, we have no doubt in our mind that for the bouncing of a cheque, when did not represent the amount or part of the amount due to the appellant, the accused cannot be made liable. The reasons given by the learned Judge for taking the contrary view in R. Gopikuttan Pillai and the apprehensions voiced by the learned counsel for the appellant to concerning part payment, cannot be accepted, in view of the provisions contained in Section 56 read with Section 15 of the Act. If the drawee made endorsement regarding the part payment on the cheque and claimed only the balance amount and if it bounced, the offence under Section 138 would have been made our and the 1st respondent accused would have liable for punishment. In the absence of any vagueness in the provision, we find it difficult to accept any other view. In the result, we overrule the decisions in R. Gopikuttan Pillai v. Sankara Narayanan Nair, Cri. Appeal No. 270/1997; and Thekkan and Co. v. Anitha, (2003) 3 KLT 870. We find nothing wrong with the judgment of the Trial Court acquitting the 1st respondent. Accordingly, the criminal appeal is dismissed."

49. In view of the above, I hold that the criminal proceedings initiated by the complainant against the writ applicants deserve to be quashed.

50. All the five writ applications are hereby allowed. The proceedings of the Criminal Case No.1241 of 2008, Criminal Case No.1240 of 2008, Criminal Case No. 1239 of 2008, Criminal Case No. 1242 of 2008 and Criminal Case No. 1243 of 2008 pending in the court of the learned Metropolitan Magistrate (N.I. Court No.8) Ahmedabad are hereby quashed.

51. I would like to inform the learned Magistrates that before issuing the order of process, they should take the pains of not only reading the complaint, but should read the legal notice and verify whether the same is in accordance with law or not.

To put it in other words, if the Magistrates finds the demand in the notice to be absolutely "ominous", then the order of process should not be issued. If the legal notice as envisaged under the provisions of the N.I. Act is found to be not in accordance with law, then the complaint should fail. The service of a valid legal notice in a case under section 138 of the N.I. Act, is mandatory. Service of a valid notice, it is trite, is imperative in character for maintaining a complaint. It creates a legal fiction. The operation of section 138 of the Act is limited by the proviso. When the proviso applies, the main section would not. Unless a notice is served in conformity with the proviso (b) appended to section 138 of the N.I. Act, the complaint would not be maintainable. Therefore, I am putting a word of caution for the Magistrates in this regard while dealing with the complaint under section 138 of the N.I. Act. Direct service is permitted.