Research Report

Index

Act & Sections

ACT : NEGOTIABLE INSTRUMENT ACT.1881 .

Section 4 :

"Promissory note".—A "promissory note" is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument. Illustrations A signs instruments in the following terms:—

(a) "I promise to pay B or order Rs. 500."
(b) ''I acknowledge myself to be indebted to B in Rs. 1,000, to be paid on demand, for value received."
(c) "Mr. B. I.O.U. Rs. 1,000."
(d) "I promise to pay B Rs. 500 and all other sums which shall be due to him."
(e) "I promise to pay B Rs. 500 first deducting there out any money which he may owe me."
(f) "I promise to pay B Rs. 500 seven days after my marriage with C."
(g) "I promise to pay B Rs. 500 on D's death, provided D leaves me enough to pay that sum."
(h) "I promise to pay B Rs. 500 and to deliver to him my black horse on 1st January next." The instruments respectively marked (a) and (b) are promissory notes. The instruments respectively marked (c), (d), (e), (f), (g) and (h) are not promissory notes.

Section 5 :

"Bill of exchange".—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. A promise or order to pay is not "conditional", within the meaning of this section and section 4, by reason of the time for payment of the amount or any instalment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary

expectation of mankind, is certain to happen, although the time of its happening may be uncertain. The sum payable may be “certain’’, within the meaning of this section and section 4, although it includes future interest or is payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an instalment, the balance unpaid shall become due. The person to whom it is clear that the direction is given or that payment is to be made may be a “certain person”, within the meaning of this section and section 4, although he is mis-named or designated by description only.

Section 6 :

“Cheque”. —A “cheque” is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form. Explanation I. —For the purposes of this section, the expressions—

(a) “a cheque in the electronic form” means a cheque which contains the exact mirror image of a paper cheque, and is generated, written and signed in a secure system ensuring the minimum safety standards with the use of digital signature (with or without biometrics signature) and asymmetric crypto system;
(b) “a truncated cheque” means a cheque which is truncated during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.
Explanation II. —For the purposes of this section, the expression “clearing house” means the clearing house managed by the Reserve Bank of India or a clearing house recognised as such by the Reserve Bank of India.

Section 14 :

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

Section 15 :

Indorsement.—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 "indorser".

Section 56 :

Indorsement for part of sum due.—No writing on a negotiable instrument is valid for the purpose of negotiation if such writing purports to transfer only a part of the amount appearing to be due on the instrument; but where such amount has been partly paid a note to that effect may be indorsed on the instrument, which may then be negotiated for the balance.

Section 138 :

Dishonour of cheque for insufficiency, etc., of funds in the account. —Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [19] [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [20] [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.
Explanation.— For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

Section 139 :

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

Section 141 :

Offences by companies. —

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence: [22] [Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation.— For the purposes of this section,—
(a) "company" means any body corporate and includes a firm or other association of individuals; and
(b) "director", in relation to a firm, means a partner in the firm.

Section 143 :

Power of Court to try cases summarily.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials: Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees: Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.
(2) The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.
(3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint.

Section 144 :

Mode of service of summons.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), and for the purposes of this Chapter, a Magistrate issuing a summons to an accused or a witness may direct a copy of summons to be served at the place where such accused or witness ordinarily resides or carries on business or personally works; for gain, by speed post or by such courier services as are approved by a Court of Session.
(2) Where an acknowledgment purporting to be signed by the accused or the witness or an endorsement purported to be made by any person authorised by the postal department or the courier services that the accused or the witness refused to take delivery of summons has been received, the Court issuing the summons may declare that the summons has been duly served.

Section 145 :

Evidence on affidavit.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.
(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

Section 146 :

Bank's slip prima facie evidence of certain facts.—The Court shall, in respect of every proceeding under this Chapter, on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved.

Section 147 :

Offences to be compoundable. —Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable.

ACT : CRIMINAL PROCEDURE CODE,1973.

Section 205:

Magistrate may dispense with personal attendance of accused.

(1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.
(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided.

Section 251:

Substance of accusation to be stated. When in a summons- case the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty or has any defense to make, but it shall not be necessary to frame a formal charge.

Section 252 :

Conviction on plea of guilty. If the accused pleads guilty, the Magistrate shall record the plea as nearly as possible in the words used by the accused and may, in his discretion, convict him thereon.

Section 258 :

Power to stop proceedings in certain cases. In any summons- case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage

without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge.

Section 264 :

Judgement in cases tried summarily. In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the

Section 273 :

Evidence to be taken in presence of accused. Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

Explanation.- In this section," accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.

Section 317:

Provision for inquiries and trial being held in the absence of accused in certain cases.

(1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.
(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit

and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.

Section 326(3) :

Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.

(1) Whenever any [1] Judge or Magistrate], after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another [1] Judge or Magistrate] who has and who exercises such jurisdiction, the [1] Judge or Magistrate] so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself: Provided that if the succeeding [1] Judge or Magistrate] is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of justice, he may re- summon any such witness, and after such further examination, cross- examination and re- examination, if any, as he may permit, the witness shall be discharged.
(2) When a case is transferred under the provisions of this Code [2] [from one Judge to another Judge or from one Magistrate to another Magistrate], the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter, within the meaning of sub- section (1).
(3) Nothing in this section applies to summary trials or to cases in which proceedings have been stayed under section 322 or in which proceedings have been submitted to a superior Magistrate under section 325.

Section 357(1)(b) :

Order to pay compensation.

(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-
(a) in defraying the expenses properly incurred in the prosecution;
(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;
(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.
(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.
(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.
(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.
(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

Section 357(3) :

Order to pay compensation.

(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-
(a) in defraying the expenses properly incurred in the prosecution;
(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;
(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying

compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;
(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.
(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.
(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.
(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.
(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

Sectio 431 :

Money ordered to be paid recoverable as fine. Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine: Provided that section 421 shall, in its application to an order under section 359, by virtue of this section, be construed as if in the proviso to sub- section (1) of section 421, after the words and figures" under section 357", the words and figures" or an order for payment of costs under section 359" had been inserted, E.- Suspension, remission and commutation of sentences

ACT : INDIAN PENAL CODE, 1860.

Section 64 :

Sentence of imprisonment for non-payment of fine.—1[In every case, of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable 2[with imprisonment or fine, or] with fine only, in which the offender is sentenced to a fine,] it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, in which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

ACT : THE CONSTITUTION OF INDIA,1949.

Article 21 :

Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 39A :

Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing

(a) that the citizens, men and women equally, have the right to an adequate means to livelihood;
(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
(d) that there is equal pay for equal work for both men and women;
(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment

Article 225 :

Jurisdiction of existing High Courts Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution: Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction.

Article 227 :

Power of superintendence over all courts by the High Court

(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories interrelation to which it exercises jurisdiction
(2) Without prejudice to the generality of the foregoing provisions, the High Court may
(a) call for returns from such courts;
(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and
(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts
(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein: Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor
(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.

Article 235 :

Control over subordinate courts The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

Court and Procedures

Court name : **Judicial Magistrate First Class / Metropolitan Magistrate**

Procedure

Steps	Description
Step 1	Issuing Demand Notice within 30 days from getting memo of dishonor of cheque.
Step 2	File a complaint before the court of JMFC within a month from the date of expiry of 15 days specified in the demand notice.
Step 3	Sworn Statement (Verification) of the complainant
Step 4	Issue summons to accused.
Step 5	Appearance of accused with bail and bond
Step 6	Recording Of Plea of accused
Step 7	Evidence of a complainant
Step 8	Cross Examination of the complainant and his witness
Step 9	Statement of accused
Step 10	Evidence of accused
Step 11	Cross examination of the accused and his witness
Step 12	Closing Statement of evidence from both parties
Step 13	Arguments
Step 14	Judgment

Relevant facts with judgment titles

Facts entered by you

Fact 1 : cheque amount more than debt

Fact 2 : after the dishonor of the cheque complainant has not received any amount from the accused till sending the notice

Fact 3 : the accused issued cheque in the name of complainant to discharge legal liability

Judgment Titles

TOTAL 3 JUDGMENTS

1) SHREE CORPORATION vs ANILBHAI PURANBHAI BANSAL DIRECTOR FOR AND BEHALF OF

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.

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

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

2) M.S. Narayana Menon @ Mani vs State of Kerala & Anr.

If the defence is acceptable as probable the cheque therefor cannot be held to have been issued in discharge of the debt as, for example, if a cheque is issued for security or for any other purpose the same would not come within the purview of Section 138 of the Act.

We in the facts and circumstances of this case need not go into the question as to whether even if the prosecution fails to prove that a large portion of the amount claimed to be a part of debt was not owing and due to the complainant by the accused and only because he has issued a cheque for a higher amount, he would be convicted if it is held that existence of debt in respect of large part of the

3) Rangappa vs Sri. Mohan

If the accused shows that in his account there was sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would

Dishonour of cheque for insufficiency, etc., of funds in the account. - Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that

The authority shows that even when the cheque is dishonoured by reason of stop payment instruction, by virtue of Section 139 the Court has to presume that the cheque was received by the holder for the discharge in whole or in part, of any debt or liability. Of course this is a rebuttable presumption.

Statistics

Facts Entered by you	Found	Favour of complainant	%
Fact 1 : cheque amount more than debt	200	20	!0%
Fact 2 : after the dishonor of the cheque complainant has not received any amount from the accused till sending the notice	950	447	47%
Fact 3 : the accused issued cheque in the name of complainant to discharge legal liability	1000	900	90%

Other Supporting Material

None

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.

Supreme Court of India
M.S. Narayana Menon @ Mani vs State Of Kerala & Anr on 4 July, 2006
Author: S.B. Sinha
Bench: S.B. Sinha, P.P. Naolekar

CASE NO.:
Appeal (crl.) 1012 of 1999

PETITIONER:
M.S. Narayana Menon @ Mani

RESPONDENT:
State of Kerala & Anr.

DATE OF JUDGMENT: 04/07/2006

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:

J U D G M E N T S.B. SINHA, J :

The Second Respondent was a member of the Cochin Stock Exchange. The Appellant used to carry on transactions in shares through the Second Respondent in the said Stock Exchange. They have been on business terms for some time. A complaint petition was filed on 19.11.1992 by the Second Respondent herein against the Appellant purported to be for commission of an offence under Section 138 of the Negotiable Instruments Act (for short "the Act"), on the following allegations:

The Second Respondent had been carrying on business of stock and share brokers under the name and style of "Midhu and Midhun's Co.". It is a sole proprietory concern. The Appellant also used to do transactions in shares through him in his capacity as a share broker. It has not been disputed that the Appellant had closed the account and, thus, when the cheque in question being dated 31.7.1992 (Ex. P-1) drawn on Ernakulam Banerji Road branch of the Syndicate Bank, was presented for encashment by the complainant through his bankers, namely, the Cochin Stock Exchange Extension Counter of the Syndicate Bank, it was returned on 4.8.1982 with the remarks "account closed".

Allegedly, a sum of Rs. 3,00,033/- was, thus, owing and due to him from the Appellant in relation to the said transactions. The Appellant is said to have paid a sum of Rs. 5000/- in cash and issued another cheque being dated 17.8.1992 drawn on Ernakulam Broadway Branch of the Vijaya Bank for a sum of Rs. 2,95,033/-. The said cheque being Exhibit P-3 was presented for encashment on 18.8.1992 through the same bankers, but it was dishonoured on 19.8.1992 as the funds in the account of the Appellant were found to be insufficient.

A notice was issued by the complainant on 27.8.1992 informing the Appellant about the dishonour of the said cheque. He sent a reply to the said notice. The defence of the Appellant had been that the first cheque was a blank cheque given by him to Respondent No. 2 by way of security. The second cheque was issued in February, 1992 and the same had been given for the purpose of discounting.

The Respondent is said to have not issued any contract note pertaining to the transactions the Appellant had with him.

At the trial, Respondent No. 2 has examined five witnesses including himself. The Appellant examined three witnesses. Respondent No. 2, however, did not produce the original books of accounts in order to prove the transactions he had with the Appellant.

The prosecution of the Appellant was confined to the dishonour of the cheque dated 17.8.1992 only.

In the said proceedings, the Appellant herein raised a plea that the Respondent No. 2 was in dire financial assistance and a cheque for a sum of Rs. 2,95,033/- was given by way of loan so as to enable him to tide over his difficulties. He also adduced his evidence before the Trial Court. The Trial Court in its judgment dated 15.7.1994 opined that the Appellant herein had failed to discharge the onus placed on him in terms of Section 139 of the Act stating:

"To the evidence adduced in this case, I have to hold that the accused failed to rebut the presumptions available to Ext. p3 cheque. The case of P.W.1 that the cheque was issued by the accused on the date mentioned therein for discharging a liability due to him, is supported by Ext. D2 to D9. The case of the complainant that the accused paid Rs. 5,000/- and thereafter he issued Ext. P3 cheque, is only to be accepted under this circumstance. I find that the cheque was issued by the accused for discharging a liability legally due to the complainant, point answered accordingly."

A verdict of guilt against the Appellant under Section 138 of the Act on the basis of the said findings was recorded. He was sentenced to undergo rigorous imprisonment for one year.

On an appeal preferred thereagainst by the Appellant herein, the said judgment of conviction and sentence was, however, set aside. The appellate court analysed the evidences on records in great details and concluded that explanation offered by the Appellant was more probable.

The complainant, however, aggrieved by and dissatisfied therewith filed a criminal appeal before the High Court which has been allowed by reason of a judgment dated 24.5.1999 which is impugned herein.

Submission of Mr. L. Nageswara Rao, learned senior counsel appearing on behalf of the Appellant is that the Trial Court and the High Court misconstrued and misinterpreted Section 139 of the Act and furthermore failed to take into consideration the principle of law that once the accused discharges the initial burden placed on him, the burden of proof would revert back to the prosecution.

The High Court, according to the learned counsel, acted illegally and without jurisdiction in arriving at the finding that it was for the accused to prove his innocence by adducing positive evidence for rebutting the statutory presumption that he had not received the cheque of the nature referred to under Section 138 of the Act for the discharge, in whole or in part, of any debt or other liability.

Mr. E.M.S. Anam, learned counsel appearing on behalf of the Respondent, on the other hand, argued that statutory presumption raised to the effect that an accused in terms of Section 139 of the Act although is a rebuttable one, the question will have to be determined upon taking into consideration another presumption drawn in terms of Section 118(a) thereof.

According to the learned counsel, the Appellant did not dispute the statement of accounts in relation to certain transactions. He had also acknowledged his liability in relation to some of the transactions. In that view of the matter, it was urged, that the dispute being only in relation to the quantum of debt, the impugned judgment of the High Court must be sustained against the Appellant as he rebutted the presumption arising against him under Section 118(a) read with Section 139 of the Act.

Before adverting to the propositions of law adverted to by the learned counsel, we may notice certain broad facts.

Issuance of three cheques being Ex. P-1, 2 and 3 by the Appellant is not in dispute. One of the cheques being Exhibit P-1, according to the accused, however, was a blank one.

Cochin Stock Exchange has been constituted under the Securities Contracts (Regulation) Act, 1956. It is governed by the provisions of the Securities and Exchange Board of India Act, 1992 as also the Securities Contracts (Regulation) Rules, 1957 framed under the 1956 Act.

The transactions carried out by the brokers in the Cochin Stock Exchange are governed by the bye-laws framed by it as also the regulations made under the provisions of the aforementioned Act. Indisputably, dealings in the stock exchange are governed by the bye-laws made under the statute which were marked as Exhibit D-15 in terms whereof inter alia trading sessions, meaning thereby, meetings of the members of the Cochin Stock Exchange must be held on the floor of the Exchange itself; entry wherefor is restricted only to its members. All transactions by the investors and speculators must be made through the members of the Exchange. Whereas the Second Respondent was a member of the Stock Exchange, the Appellant was not. They belong to different districts in the State of Kerala. Indisputably, the Appellant had been taking the services of the Second Respondent for transacting his business of purchase and sale of shares.

All bargains on securities carried on for a period of 14 days is known as settlement. A statement of accounts is furnished by a broker to the investor in prescribed form being Form A together with a contract note. The contract note contains accounts of the securities purchased or sold, its quantity, rate as also the date of transaction. The same is issued so as to enable an investor to compare the entries in the contract note with those made in the statement of accounts enabling him to confirm or deny the particulars contained therein. The dispute between the parties appears to be covered by settlement Nos. 15 to 22 during the years 1991-92. The Second Respondent in his evidence admitted that Exhibits D-2 to D-9 corresponded to P-10 series which pertained to settlement Nos. 15/91 to 22/92 showing transactions entered into by and between him and the Appellant for a sum of Rs. 3,00,033/-.

According to the Appellant, Exhibits D-2 to D-9 did not reflect the correct accounts of the transactions and the entries made therein are false. His further plea was that the date of the cheque (being Exhibit P-3) was not in his own handwriting which had been issued to the complainant so as to enable him to facilitate the complainant to discount the same and overcome his economic exigencies.

The learned appellate court noticed that it had been accepted that if Exhibits D-2 to D-9 accounts corresponding to Exhibit P-10 series cannot be relied on as true and correct accounts incorporating the particulars of various transactions, the complainant's case will fall to the ground as the story of issuance of the cheque by the Appellant could not have been founded thereupon. As regards the contention of the Second Respondent that the Appellant was estopped and precluded from disputing the correctness of Exhibit P-10 series as he having accepted and acknowledged the correctness thereof, it was held:

" On a close scrutiny I am of the view that the said contention on behalf of PW1 cannot be accepted. In the case of the statement of accounts dated 24-1-1992, 7-2-1992 and 21-2-1992 in Ext. P10 series pertaining to the 20th, 21st and 22nd settlements (corresponding to Exts. D7 to D9) there is an endorsement on the reverse to the effect that those accounts were received and accepted by the accused. But, there is no such endorsement in the case of the statement of accounts dated 8-11- 1991, 22-11-1991, 6-12-1991, 20-12-1991 and 10- 1-1992 pertaining to the 15th, 16th, 17th, 18th and 19th settlements corresponding to Exts. D2 to D6. That apart, if Exts. D2 to D9 accounts corresponding to Ext. P10 series are true then all the transactions entered therein should find a place in Ext. D11 series of accounts maintained by the Cochin Stock Exchange. With regard to Ext. D11 series of accounts there is no quarrel that the same are the officially maintained accounts prepared after every settlement the transactions of which are fed in to the computer by means of memos of confirmation like Ext. D1 memo. A comparison of Ext. P10 series of accounts with Ext. D11 series of officially approved accounts will show that transactions worth Rs. 14,63,555/- entered in Ext. D10 series go unaccounted in Ext. D11 series. This is not a small figure to be lightly ignored. There is no dispute that the column pertaining to contract number in Ext. P10 series of accounts is left blank both in the case of purchases as well as sales of shares. The specific case of the accused is that PW1 was not giving him copies of the contract notes pertaining to the transactions by which he had purchased and sold shares on behalf of the accused. The above version of the accused is probabilised by the blank columns regarding the contract number in Ext. P10 series. If, as asserted by PW1 he had been promptly giving contract notes to the accused, then the relevant columns in Ext. P10 series for entering the contract note number would have been filled up. Moreover, except the bald statements of PW1 that he is having in his possession carbon copies of the contract notes issued to the accused, there has been absolutely no gesture on his part to produce them before court. Without comparing the statement of accounts with the relevant contract note it is impossible for the accused or any speculator for that matter, to either confirm or deny the entries in the statement of accounts "

Admission or acknowledgement of three out of eight statements of accounts by the Appellant, the learned appellate court opined, by itself would not be sufficient to invoke the principle of estoppel. The appellate court noticed that the parties came to know each other personally at the Cochin Stock

Exchange and till the fifteen settlements they did not meet. It was further found that before such acquaintance ripened into thick business relations some security from the Appellant was sought for by the Second Respondent by way of abundant caution wherefor only according to the Appellant a blank cheque was given. The court having regard to the facts and circumstances of this case, came to the conclusion that the said version of the Appellant is quite credible and probable. In doing so, the business practice that some security is always asked for in similar transaction was noticed.

The appellate court further held that the stand of the Appellant was corroborated by the Assistant Secretary of the Cochin Stock Exchange as he had categorically stated that the members could carry on business in transactions within the Exchange itself. It was noticed that the said witness categorically stated that all its members were required to maintain prescribed books of accounts for a period of five years but the Second Respondent herein clearly and in unequivocal terms admitted that he had not been maintaining the prescribed books of accounts including register of transactions, general ledger, clients' ledger, journals and documents register showing full particulars of shares and securities received and delivered. In the aforementioned situation, it was held that when Exhibit P-10 series of the statement of accounts which were not traceable to any statutory rules would not have any probative value particularly when D-11 series of statement of accounts officially maintained by the Cochin Stock Exchange contained vital omissions in regard to transactions to the tune of Rs. 14 lakhs. Furthermore, the books of accounts having not been kept in the ordinary course of business were not admissible in evidence and, thus, the genuineness thereof was open to question. The learned Judge further came to the conclusion that the Second Respondent had not been able to prove that the discrepancies could be explained away as has been sought to be done by the Second Respondent when there were some other transactions which did not pertain to the Cochin Stock Exchange particularly when the Appellant had denied or disputed the same categorically stating that apart from the transactions in the Cochin Stock Exchange, the Second Respondent had never been engaged by him for purchasing or selling shares from other Stock Exchanges. The court further noticed that even a suggestion had been put on behalf of the Second Respondent to the Appellant while he was being examined as DW-5 that it was because brokerage, value of application forms and other transactions outside the Cochin Stock Exchange which are not included in D-11 series, those settlements did not tally with Exhibit P-10 series. Significantly it was held:

" When PW1 himself does not have such a case either in his oral evidence or in the averments in his complaint, the explanation for the wide discrepancy between Ext. P10 series and Ext. D11 series could have been offered by the defence. The trial Magistrate could explain away the above discrepancy by observing that there are certain variations. In the first place it was not open to the defence to put forward such an explanation which the complainant himself does not have either in his written complaint or in his testimony. Secondly, the discrepancy in figures runs into more than 14 lakhs of rupees. DW4, the Executive Director of Cochin Stock Exchange has credibly deposed before Court that a member of one exchange cannot transact outside the floor of the exchange and if one enters into any such transaction which is called "kerb transaction", he has to report the same to the exchange of which he is a member. PW1 has no case that he has reported any of the kerb transactions entered into by him to the Cochin Stock Exchange. Ext. D11 series of statement of accounts maintained by the Cochin Stock Exchange does not contain any of those kerb transactions.

When PW1 was admittedly engaged by the accused for purchasing and selling shares from the Cochin Stock Exchange only, Ext. P10 series of accounts which include kerb transactions entered into by PW1 outside the floor of the Cochin Stock Exchange cannot be put against the accused to prove any liability. Even according to PW1 his commission (that is, brokerage) ranges only from 0.25% to 0.75%. The accused examined as DW5 has asserted that even if brokerage was included in Ext. D11 statement of accounts maintained by the Cochin Stock Exchange still the said accounts will not tally with Ext. P10 series of accounts. As for the value of application forms, the same comes to only 2 rupees and this cannot tilt the balance to the tune of 14 and odd lakhs of rupees "

The High Court on the contrary did not go into the said contentions at all. It proceeded on the basis that the scope and ambit of the evidence to be adduced in the mater of prosecution of an offence punishable under Section 138 of the Act should not go beyond the requirements of law and that correctness of the accounts maintained by the Second Respondent in terms of the provisions of the Act and Rules could not have been a ground to disbelieve his case. It was held:

" The contention of the 1st respondent is that all the transactions mentioned in Ext. P10 series are not found in Ext. D11 series maintained by the Cochin Stock Exchange in the name of the appellant as share broker. The appellant has explained this contention of the respondent stating that the transactions conducted by him outside the Stock Exchange will not be found in the accounts maintained by the Cochin Stock Exchange and therefore there is difference in Ext. P10 series and Ext. D11 series."

The High Court, in view of the findings of fact arrived at by the appellate court, in our opinion, committed a manifest error in reversing the said judgment. The Second Respondent evidently had not been able to explain the discrepancies in his books of accounts. If except putting a suggestion to the witness, the Second Respondent has not been able to bring on records any material to show that the parties had any transactions other than those which had been entered into through the Cochin Stock Exchange, the explanation of the accused could not have been thrown over board. The High Court has furthermore committed a manifest error of record in arriving at a finding that the Appellant himself or through his agent has acknowledged as correct the statements appearing in Exhibit P-10 series dated 16.12.1991, 20.12.1991, 28.12.1991, 10.1.1992, 24.1.1992, 7.2.1992 and 21.2.1992. Admittedly there had been no acknowledgement in respect of five statements of accounts being Exhibits D-2 to D-6.

In view of the said error of record, the findings of the High Court to the effect that the Appellant had not been able to substantiate his contention as regard the correctness of the accounts of Exhibit P-10 series must be rejected.

In view the aforementioned backdrop of events, the questions of law which had been raised before us will have to be considered. Before, we advert to the said questions, we may notice the provisions of Sections 118(a) and 139 of the Act which read as under:

"118. Presumptions as to negotiable instruments - Until the contrary is proved, the following presumptions shall be made:

(a) of consideration - that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration."

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

Presumptions both under Sections 118(a) and 139 of the Act are rebuttable in nature.

What would be the effect of the expressions 'May Presume', 'Shall Presume' and 'Conclusive Proof' has been considered by this Court in Union of India (UOI) v. Pramod Gupta (D) by L.Rs. and Ors., [(2005) 12 SCC 1] in the following terms:

" It is true that the legislature used two different phraseologies "shall be presumed" and "may be presumed" in Section 42 of the Punjab Land Revenue Act and furthermore although provided for the mode and manner of rebuttal of such presumption as regards the right to mines and minerals said to be vested in the Government vis- `-vis the absence thereof in relation to the lands presumed to be retained by the landowners but the same would not mean that the words "shall presume" would be conclusive. The meaning of the expressions "may presume" and "shall presume" have been explained in Section 4 of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus, the expression "shall presume" cannot be held to be synonymous with "conclusive proof" "

In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words 'proved' and 'disproved' have been defined in Section 3 of the Evidence Act (the interpretation clause) to mean: -

"Proved A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

Disproved A fact is said to be disproved when, after considering the matters before it the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist."

Applying the said definitions of 'proved' or 'disproved' to principle behind Section 118(a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not

exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.

A Division Bench of this Court in Bharat Barrel & Drum Manufacturing Company v. Amin Chand Payrelal [(1999) 3 SCC 35] albeit in a civil case laid down the law in the following terms:

"Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non- existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt "

This Court, therefore, clearly opined that it is not necessary for the defendant to disprove the existence of consideration by way of direct evidence.

The standard of proof evidently is pre-ponderance of probabilities. Inference of pre-ponderance of probabilities can be drawn not only from the materials on records but also by reference to the circumstances upon which he relies.

Presumption drawn under a statute has only an evidentiary value. Presumptions are raised in terms of the Evidence Act. Presumption drawn in respect of one fact may be an evidence even for the purpose of drawing presumption under another.

The Second Respondent herein was a member of a Stock Exchange. The transactions in relation to the Stock Exchange are regulated by the statutes and statutory rules. If in terms of the provisions of a statute, a member of a Stock Exchange is required to maintain books of accounts in a particular manner, he would be required to do so, as non-compliance of the mandatory provisions of the Rules may entail punishment. It is not in dispute that transactions comprising purchases and sales of shares by investors is a matter of confidence. Both parties would have to rely upon one another. For the said purpose, the courts of law may also take judicial notice of the practice prevailing in such business. The learned Appellate Judge rightly did so.

The definite case of the second Respondent was that the cheque dated 17.8.1992 was issued by the Appellant in discharge of his debt. The said liability by way of debt arose in terms of the transactions. For proving the said transactions, the Second Respondent filed books of accounts. The books of accounts maintained by the Second Respondent were found to be not reflecting the correct state of affairs. A discrepancy of more than Rs. 14,00,000/- was found.

It was for the Appellant only to discharge initial onus of proof. He was not necessarily required to disprove the prosecution case. Whether in the given facts and circumstances of a case, the initial burden has been discharged by an accused would be a question of fact. It was matter relating to appreciation of evidence. The High Court in its impugned judgment did not point out any error on the part of the appellate court in that behalf.

What would be the effect of a presumption and the nature thereof fell for consideration before a Full Bench of the Andhra Pradesh High Court in G. Vasu v. Syed Yaseen Sifuddin Quadri [AIR 1987 AP 139]. In an instructive judgment, Rao, J. (as His Lordship then was) speaking for the Full Bench noticed various provisions of the Evidence Act as also a large number of case laws and authorities in opining:

"From the aforesaid authorities, we hold that once the defendant adduces evidence to the satisfaction of the Court that on a preponderance of probabilities there is no consideration in the manner pleaded in the plaint or suit notice or the plaintiff's evidence, the burden shifts to the plaintiff and the presumption 'disappears' and does not haunt the defendant any longer."

It was further held:

"For the aforesaid reasons, we are of the view that where, in a suit on a promissory note, the case of the defendant as to the circumstances under which the promissory note was executed is not accepted, it is open to the defendant to prove that the case set up by the plaintiff on the basis of the recitals in the promissory note, or the case set up in suit notice or in the plaint is not true and rebut the presumption under S. 118 by showing a preponderance of probabilities in his favour and against the plaintiff. He need not lead evidence on all conceivable modes of consideration for establishing that the promissory note is not supported by any consideration whatsoever. The words 'until the contrary is proved' in S. 118 do not mean that the defendant must necessarily show that the document is not supported by any form of consideration but the defendant has the option to ask the Court to consider the non-existence of consideration so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that consideration did not exist. Though the evidential burden is initially placed on the defendant by virtue of S. 118 it can be rebutted by the defendant by showing a preponderance of probabilities that such consideration as stated in the pronote, or in the suit notice or in the plaint does not exist and once the presumption is so rebutted, the said presumption 'disappears'. For the purpose of rebutting the initial evidential burden, the defendant can rely on direct evidence or circumstantial evidence or on presumptions of law or fact. Once such convincing rebuttal evidence is adduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the plaintiff who has also the legal burden. Thereafter, the presumption under S. 118 does

not again come to the plaintiff's rescue. Once both parties have adduced evidence, the Court has to consider the same and the burden of proof loses all its importance."

If for the purpose of a civil litigation, the defendant may not adduce any evidence to discharge the initial burden placed on him, a 'fortiori' even an accused need not enter into the witness box and examine other witnesses in support of his defence. He, it will bear repetition to state, need not disprove the prosecution case in its entirety as has been held by the High Court.

A presumption is a legal or factual assumption drawn from the existence of certain facts.

In P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd edition, at page 3697, the term 'presumption' has been defined as under:

"A presumption is an inference as to the existence of a fact not actually known arising from its connection with another which is known.

A presumption is a conclusion drawn from the proof of facts or circumstances and stands as establishing facts until overcome by contrary proof.

A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged but of which there is no direct proof. It follows, therefore that a presumption of any fact is an inference of that fact from others that are known". (per ABBOTT, C.J., R. v. Burdett, 4 B. & Ald,

161) The word 'Presumption' inherently imports an act of reasoning a conclusion of the judgment; and it is applied to denote such facts or moral phenomena, as from experience we known to be invariably, or commonly, connected with some other related facts. (Wills on Circumstantial Evidence) A presumption is a probable inference which common sense draws from circumstances usually occurring in such cases. The slightest presumption is of the nature of probability, and there are almost infinite shades from slight probability to the highest moral certainty. A presumption, strictly speaking, results from a previously known and ascertained connection between the presumed fact and the fact from which the inference is made."

Having noticed the effect of presumption which was required to be raised in terms of Section 118(a) of the Act, we may also notice a decision of this Court in regard to 'presumption' under Section 139 thereof.

In Hiten P. Dalal v. Bratindranath Banerjee [(2001) 6 SCC 16], a 3- Judge Bench of this Court held that although by reason of Sections 138 and 139 of the Act, the presumption of law as distinguished from presumption of fact is drawn, the court has no other option but to draw the same in every case where the factual basis of raising the presumption is established. Pal, J. speaking for a 3-Judge Bench, however, opined:

" Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, "after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists". Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man"."

The court, however, in the fact situation obtaining therein, was not required to go into the question as to whether an accused can discharge the onus placed on him even from the materials brought on records by the complainant himself. Evidently in law he is entitled to do so.

In Goaplast (P) Ltd. v. Chico Ursula D'Souza and Another [(2003) 3 SCC 232], upon which reliance was placed by the learned counsel, this Court held that the presumption arising under Section 139 of the Act can be rebutted by adducing evidence and the burden of proof is on the person who want to rebut the presumption. The question which arose for consideration therein was as to whether closure of accounts or stoppage of payment is sufficient defence to escape from the penal liability under Section 138 of the Act. The answer to the question was rendered in the negative. Such a question does not arise in the instant case.

In Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay [AIR 1961 SC 1316], Subba Rao, J., as the learned Chief Justice then was, held that while considering the question as to whether burden of proof in terms of Section 118 had been discharged or not, relevant evidence cannot be permitted to be withheld. If a relevant evidence is withheld, the court may draw a presumption to the effect that if the same was produced might have gone unfavourable to the plaintiff. Such a presumption was itself held to be sufficient to rebut the presumption arising under Section 118 of the Act stating:

" Briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact. We are not concerned here with irrebuttable presumptions of law."

Two adverse inferences in the instant case are liable to be drawn against the Second Respondent:

(i) He deliberately has not produced his books of accounts.

(ii) He had not been maintaining the statutory books of accounts and other registers in terms of the bye-laws of Cochin Stock Exchange.

Moreover, the onus on an accused is not as heavy as that of the prosecution. It may be compared with a defendant in a civil proceeding.

In Harbhajan Singh v. State of Punjab and another [AIR 1966 SC 97], this Court while considering the nature and scope of onus of proof which the accused was required to discharge in seeking the protection of exception 9 to Section 499 of the Indian Penal Code stated the law as under:

" In other words, the onus on an accused person may well be compared to the onus on a party in civil proceedings, and just as in civil proceedings the court trying an issue makes its decision by adopting the test of probabilities, so must a Criminal Court hold that the plea made by the accused is proved if a preponderance of probability is established by the evidence led by him..."

In V.D. Jhingan v. State of Uttar Pradesh, [AIR 1966 SC 1762], it was stated:

" It is well-established that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt "

[See also State of Maharashtra v. Wasudeo Ramchandra Kaidalwar, AIR 1981 SC 1186] In Kali Ram v. State of Himachal Pradesh [(1973) 2 SCC 808], Khanna, J., speaking for the 3-Judge Bench, held: " One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal."

In The State through the Delhi Administration v. Sanjay Gandhi [AIR 1978 SC 961], it was stated:

" Indeed, proof of facts by preponderance of probabilities as in a civil case is not foreign to criminal jurisprudence because, in cases where the statute raises a presumption of guilt as, for example, the Prevention of Corruption Act, the accused is entitled to rebut that presumption by proving his defence by a balance of probabilities. He does not have to establish his case beyond a reasonable doubt. The same standard of proof as in a civil case applies to proof of incidental issues involved in a

criminal trial like the cancellation of bail of an accused "

The evidences adduced by the parties before the trial court lead to one conclusion that the Appellant had been able to discharge his initial burden. The burden thereafter shifted to the Second Respondent to prove his case. He failed to do so.

The submission of the Second Respondent that the Appellant had not denied his entire responsibility and the dispute relating only to the quantum of debt cannot be accepted.

We in the facts and circumstances of this case need not go into the question as to whether even if the prosecution fails to prove that a large portion of the amount claimed to be a part of debt was not owing and due to the complainant by the accused and only because he has issued a cheque for a higher amount, he would be convicted if it is held that existence of debt in respect of large part of the said amount has not been proved. The Appellant clearly said that nothing is due and the cheque was issued by way of security. The said defence has been accepted as probable. If the defence is acceptable as probable the cheque therefor cannot be held to have been issued in discharge of the debt as, for example, if a cheque is issued for security or for any other purpose the same would not come within the purview of Section 138 of the Act.

We have gone through the oral evidences. The Second Respondent has even failed to prove that the Appellant had paid to him a sum of Rs. 5000/- by cash.

In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well-settled principles of law that where two views are possible, the appellate court should not interfere with the finding of acquittal recorded by the court below.

We, therefore, are of the opinion that the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed. The Appellant is on bail. He is discharged from the bail bonds. The Second Respondent shall pay and bear the costs of the Appellant. Counsels' fee assessed at Rs. 10,000/-.

Supreme Court Of India

Criminal Appeal No. 1020 Of 2010 [Arising Out Of Slp (Crl.) No. 407 Of 2006]

Judgment Date:
07-05-2010

Rangappa **..Petitioner**

Sri Mohan **..Respondent**

Bench :

{ HON'BLE CHIEF JUSTICE MR. K.G. BALAKRISHNANHON'BLE MR. JUSTICE P. SATHASIVAMHON'BLE MR. JUSTICE J.M. PANCHAL }

Citation :

(2010) 2 UC 752 ; (2010) 100 SCL 389 (SC) ; 2010 (2) ACR 1841 (SC) ; 2010 4 Bom CR 652 ; (2010) 11 SCC 441 ; AIR 2010 SC 1898 ; (2010) CRILJ 2871 ; (2011) 1 SCC (CRI) 184 ; (2010) 4 CTC 118 ; (2010) 2 ALD (CRI) 734 ; (2010) II BC 693 ; (2010) 3 RCR (CIVIL) 197 ; (2010) 3 RCR (CRIMINAL) 164 ; (2010) RLW 3 (SC) 2379 ; JT 2010 (5) SC 259 ; 2010 (5) SCALE 340 ; 2010 (III) MPJR (SC) 252 ; (2010) 2 KLT 682 (SC) ; 2010 (3) MLJ (CRL) 547 ; 2010 (5) SCJ 700 ; AIR 2010 SCW 2946 ; (2010) 2 MWN (CR) DCC 5 ; 2010 CRLJ 2871 ; 2010 (4) BCR 652 ; 2010 (2) BCR (CRI) 895 ; (2010) 3 RCR (CRI) 164 ; (2010) 2 BC 693 ; 2010 (2) CCR 433 ; (2010) 2 DLT (CRI) 699 ; 2010 (4) SLT 56 ; 2010 (46) OCR 562 ;

Judgment

K.G. Balakrishnan, C.J.

1. Leave granted.

2. In the present case, the trial court had acquitted the appellant-accused in a case related to the dishonour of a cheque under Section 138 of the Negotiable Instruments Act, 1881 [Hereinafter `Act']. This finding of acquittal had been made by the Addl. JMFC at Ranebennur, Karnataka in Criminal Case No. 993/2001, by way of a judgment dated 30-5-2005. On appeal by the respondent-complainant, the High Court had reversed the trial court's decision and recorded a finding of conviction while directing that the appellant-accused should pay a fine of Rs. 75,000, failing which he would have to undergo three months simple imprisonment (S.I.). Aggrieved by this final order passed by the High Court of Karnataka [in Criminal Appeal No. 1367/2005] dated 26-10-2005, the appellant-accused has approached this Court by way of a petition seeking special leave to appeal. The legal question before us pertains to the proper interpretation of Section 139 of the Act which shifts the burden of proof on to the accused in respect of cheque bouncing cases. More specifically, we have been asked to clarify the manner in which this statutory presumption can be rebutted.

3. Before addressing the legal question, it would be apt to survey the facts leading up to the present litigation. Admittedly, both the appellant-accused and the respondent-claimant are residents of Ranebennur, Karnataka. The appellant-accused is a mechanic who had engaged the services of the respondent-complainant who is a Civil Engineer, for the purpose of supervising the construction of his house in Ranebennur. The said construction was completed on 20-10-1998 and this indicates that the parties were well acquainted with each other.

4. As per the respondent-complainant, the chain of facts unfolded in the following manner. In October 1998, the accused had requested him for a hand loan of Rs. 45,000 in order to meet the construction expenses. In view of their acquaintance, the complainant had paid Rs. 45,000 by way of cash. On receiving this amount, the appellant-accused had initially assured repayment by October 1999 but on the failure to do so, he sought more time till December 2000. The accused had then issued a cheque bearing No. 0886322, post-dated for 8-2-2001 for Rs. 45,000 drawn on Syndicate Bank, Kudremukh Branch. Consequently, on 8-2-2001, the complainant had presented this cheque through Karnataka Bank, Ranebennur for encashment. However, on 16-2-2001 the said Bank issued a return memo stating that the `Payment has been stopped by the drawer' and this memo was handed over to the complainant on 21-2-2001. The complainant had then issued notice to the accused in this regard on 26-2-2001. On receiving the same, the accused failed to honour the cheque within the statutorily prescribed period and also did not reply to the notice sent in the manner contemplated under Section 138 of the Act. Following these developments, the complainant had filed a complaint (under Section 200 of the Code of Criminal Procedure) against the accused for the offence punishable under Section 138 of the Act.

5. The appellant-accused had raised the defence that the cheque in question was a blank cheque bearing his signature which had been lost and that it had come into the hands of the complainant who had then tried to misuse it. The accused's case was that there was no legally enforceable debt or liability between the parties since he had not asked for a hand loan as alleged by the complainant.

6. The trial judge found in favour of the accused by taking note of some discrepancies in the complainant's version. As per the trial judge, in the course of the cross-examination the complainant was not certain as to when the accused had actually issued the cheque. It was noted that while the complaint stated that the cheque had been issued in December 2000, at a later point it was conceded that the cheque had been handed over when the accused had met the complainant to obtain the work completion certificate for his house in March 2001. Later, it was stated that the cheque had been with the complainant about 15-20 days prior to the presentation of the same for encashment, which would place the date of handing over of the cheque in January 2001. Furthermore, the trial judge noted that in the complaint it had been submitted that the complainant had paid Rs. 45,000 in cash as a hand loan to the accused, whereas during the cross-examination it appeared that the complainant had spent this amount during the construction of the accused's house from time to time and that the complainant had realised the extent of the liability after auditing the costs on completion of the construction. Apart from these discrepancies on part of the complainant, the trial judge also noted that the accused used to pay the complainant a monthly salary in lieu of his services as a building supervisor apart from periodically handing over money which was used for the construction of the house. In light of these regular payments, the trial judge found it unlikely that the complainant would have spent his own money on the construction work. With regard to these observations, the trial judge held that there was no material to substantiate that the accused had issued the cheque in relation to a legally enforceable debt. It was observed that the accused's failure to reply to the notice sent by the complainant did not attract the presumption under Section 139 of the Act since the complainant had failed to prove that he had given a hand loan to the accused and that the accused had issued a cheque as alleged. Furthermore, the trial judge erroneously decided that the offence made punishable by Section 138 of the Act had not been committed in this case since the alleged dishonour of cheque was not on account of insufficiency of funds since the accused had instructed his bank to stop payment. Accordingly, the trial judge had recorded a finding of acquittal.

7. However, on appeal against acquittal, the High Court reversed the findings and convicted the appellant-accused. The High Court in its order noted that in the course of the trial proceedings, the accused

had admitted that the signature on the impugned cheque (No. 886322, dated 8-2-2001) was indeed his own. Once this fact has been acknowledged, Section 139 of the Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. This presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. With regard to the present facts, the High Court found that the defence raised by the accused was not probable. In respect of the accused's stand that he had lost a blank cheque bearing his signature, the High Court noted that in the instructions sent by the accused to his Bank for stopping payment, there is a reference to cheque No. 0886322, dated 20-7-1999. This is in conflict with the complainant's version wherein the accused had given instructions for stopping payment in respect of the same cheque, albeit one which was dated 8-2-2001. The High Court also noted that if the accused had indeed lost a blank cheque bearing his signature, the question of his mentioning the date of the cheque as 20-7-1999 could not arise. At a later point in the order, it has been noted that the instructions sent by the accused to his bank for stopping payment on the cheque do not mention that the same had been lost. However, the correspondence does refer to the cheque being dated 20-7-1999. Furthermore, during the cross-examination of the complainant, it was suggested on behalf of the accused that the complainant had the custody of the cheque since 1998. This suggestion indicates that the accused was aware of the fact that the complainant had the cheque, thereby weakening his claim of having lost a blank cheque. Furthermore, a perusal of the record shows that the accused had belatedly taken up the defence of having lost a blank cheque at the time of his examination during trial. Prior to the filing of the complaint, the accused had not even replied to the notice sent by the complainant since that would have afforded an opportunity to raise the defence at an earlier stage. All of these circumstances led the High Court to conclude that the accused had not raised a probable defence to rebut the statutory presumption. It was held that:

`6. Once the cheque relates to the account of the accused and he accepts and admits the signatures on the said cheque, then initial presumption as contemplated under Section 139 of the Negotiable Instruments Act has to be raised by the Court in favour of the complainant. The presumption referred to in Section 139 of the N.I. Act is a mandatory presumption and not a general presumption, but the accused is entitled to rebut the said presumption. What is required to be established by the accused in order to rebut the presumption is different from each case under given circumstances. But the fact remains that a mere plausible explanation is not expected from the accused and it must be more than a plausible explanation by way of rebuttal evidence. In other words, the defence raised by way of rebuttal evidence must be probable and capable of being accepted by the Court. The defence raised by the accused was that a blank cheque was lost by him, which was made use of by the complainant. Unless this barrier is crossed by the accused, the other defence raised by him whether the cheque was issued towards the hand loan or towards the amount spent by the complainant need not be considered.

...' Hence, the High Court concluded that the alleged discrepancies on part of the complainant which had been noted by the trial court were not material since the accused had failed to raise a probable defence to rebut the presumption placed on him by Section 139 of the Act. Accordingly, the High Court recorded a finding of conviction."

8. In the course of the proceedings before this Court, the contentions related to the proper interpretation of Sections 118(a), 138 and 139 of the Act. Before addressing them, it would be useful to quote the language of the relevant provisions:

"118. Presumptions as to negotiable instruments. – Until the contrary is proved, the following presumptions shall be made: (a) of consideration: that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration; ...

138. Dishonour of cheque for insufficiency, etc., of funds in the account. - Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is

insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for 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 in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation. - For the purposes of this section, `debt or other liability' means a legally enforceable debt or other liability. 139. Presumption in favour of holder.- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt, or other liability.“

9. Ordinarily in cheque bouncing cases, what the courts have to consider is whether the ingredients of the offence enumerated in Section 138 of the Act have been met and if so, whether the accused was able to rebut the statutory presumption contemplated by Section 139 of the Act. With respect to the facts of the present case, it must be clarified that contrary to the trial court's finding, Section 138 of the Act can indeed be attracted when a cheque is dishonoured on account of `stop payment' instructions sent by the accused to his bank in respect of a post-dated cheque, irrespective of insufficiency of funds in the account. This position was clarified by this Court in Goa Plast (Pvt.) Ltd. v. Chico Ursula D'Souza, (2003) 3 SCC 232, wherein it was held: “Chapter XVII containing Sections 138 to 142 was introduced in the Act by Act 66 of 1988 with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. These provisions were intended to discourage people from not honouring their commitments by way of payment through cheques. The court should lean in favour of an interpretation which serves the object of the statute. A post-dated cheque will lose its credibility and acceptability if its payment can be stopped routinely. The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of a post-dated cheque. In view of Section 139, it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of a post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138. A contrary view would render S. 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. ...“

10. It has been contended on behalf of the appellant-accused that the presumption mandated by Section 139 of the Act does not extend to the existence of a legally enforceable debt or liability and that the same stood rebutted in this case, keeping in mind the discrepancies in the complainant's version. It was reasoned that it is open to the accused to rely on the materials produced by the complainant for disproving the existence of a legally enforceable debt or liability. It has been contended that since the complainant did not conclusively show whether a debt was owed to him in respect of a hand loan or in relation to expenditure incurred during the construction of the accused's house, the existence of a legally enforceable debt or liability had not been shown, thereby creating a probable defence for the accused. Counsel appearing for the appellant-accused has relied on a decision given by a division bench of this Court in Krishna Janardhan Bhat v. Dattatraya G. Hegde, (2008) 4 SCC 54, the operative observations from which are reproduced below (S.B. Sinha, J. at Paras. 29-32, 34 and 45):

"29. Section 138 of the Act has three ingredients viz.: (i) that there is a legally enforceable debt (ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and (iii) that the cheque so issued had been returned due to insufficiency of funds.

30. The proviso appended to the said section provides for compliance with legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

31. The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct.

32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of the accused and that of the prosecution in a criminal case is different. ...

34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of the accused is `preponderance of probabilities'. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies." (emphasis supplied) Specifically in relation to the nature of the presumption contemplated by Section 139 of the Act, it was observed;

"45. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have been rebutted. Other important principles of legal jurisprudence, namely, presumption of innocence as a human right and the doctrine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same." (emphasis supplied)

11. With respect to the decision cited above, counsel appearing for the respondent-claimant has submitted that the observations to the effect that the `existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act' and that `it merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability' [See Para. 30 in Krishna Janardhan Bhat (supra)] are in conflict with the statutory provisions as well as an established line of precedents of this Court. It will thus be necessary to examine some of the extracts cited by the respondent-claimant. For instance, in Hiten P. Dalal v. Bratindranath Banerjee, (2001) 6 SCC 16, it was held (Ruma Pal, J. at Paras. 22-23): "22. Because both Sections 138 and 139 require that the Court `shall presume' the liability of the drawer of the cheques for the amounts for which the cheques are drawn, ..., it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption has been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused (...). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court may presume a

certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable probability of the non-existence of the presumed fact.

"23. In other words, provided the facts required to form the basis of a presumption of law exists, the discretion is left with the Court to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man." (emphasis supplied)

12. The respondent-claimant has also referred to the decision reported as Mallavarapu Kasiviswesware Rao v. Thadikonda Ramulu Firm & Ors., 2008 (8) SCALE 680, wherein it was observed: "Under Section 118(a) of the Negotiable Instruments Act, the court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the Court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal. ...

" This decision then proceeded to cite an extract from the earlier decision in Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pyarelal, (1993) 3 SCC 35 (Para. 12):

"Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbably or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that it did not exist." (emphasis supplied) Interestingly, the very same extract has also been approvingly cited in Krishna Janardhan Bhat (supra)."

13. With regard to the facts in the present case, we can also refer to the following observations in M.M.T.C. Ltd. and Anr. v. Medchl Chemicals & Pharma (P) Ltd., (2002) 1 SCC 234 (Para. 19):

"... The authority shows that even when the cheque is dishonoured by reason of stop payment instruction, by virtue of Section 139 the Court has to presume that the cheque was received by the holder for the discharge in whole or in part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus show that the `stop payment' instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there was sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused. ..." (emphasis supplied)

14. In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of `preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.

15. Coming back to the facts in the present case, we are in agreement with the High Court's view that the accused did not raise a probable defence. As noted earlier, the defence of the loss of a blank cheque was taken up belatedly and the accused had mentioned a different date in the `stop payment' instructions to his bank. Furthermore, the instructions to `stop payment' had not even mentioned that the cheque had been lost. A perusal of the trial record also shows that the accused appeared to be aware of the fact that the cheque was with the complainant. Furthermore, the very fact that the accused had failed to reply to the statutory notice under Section 138 of the Act leads to the inference that there was merit in the complainant's version. Apart from not raising a probable defence, the appellant-accused was not able to contest the existence of a legally enforceable debt or liability. The fact that the accused had made regular payments to the complainant in relation to the construction of his house does not preclude the possibility of the complainant having spent his own money for the same purpose. As per the record of the case, there was a slight discrepancy in the complainant's version, in so far as it was not clear whether the accused had asked for a hand loan to meet the construction-related expenses or whether the complainant had incurred the said expenditure over a period of time. Either way, the complaint discloses the prima facie existence of a legally enforceable debt or liability since the complainant has maintained that his money was used for the construction-expenses. Since the accused did admit that the signature on the cheque was his, the statutory presumption comes into play and the same has not been rebutted even with regard to the materials submitted by the complainant.

16. In conclusion, we find no reason to interfere with the final order of the High Court, dated 26-10-2005, which recorded a finding of conviction against the appellant. The present appeal is disposed of accordingly.