

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.M.C.No. 1328/2007**

% Date of Decision : 06.05.2008

Shri Vijay Chaudhary Petitioner
Through: Mr. Ruchir Batra, Mr. Sandeep
Chaudhary and Mr. Vijay Chaudhary
Advocates

versus

Shri Gyan Chand Jain Respondent
Through: Mr. D.K.Thakur, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

VIPIN SANGHI, J. (Oral)

1. This petition u/s 482 of the Cr.P.C (for short 'the Code') has been preferred for quashing the proceedings initiated u/s 138 of the Negotiable Instruments Act titled "Gyan Chand Jain Vs. Vijay Chaudhary", earlier pending in the Court of Ms. Navita Kumari Bagha and now pending in the Court of Mr. Sudesh Kumar, M.M., Patiala House, New Delhi.

2. The case of the complainant/respondent in his aforesaid complaint is that on 8.8.2004 (which according to the counsel for the

respondent should be read as 6.8.2004), the accused/petitioner visited the shop of the complainant and took some diamonds and diamond studded jewellery worth Rs.1,52,35,000/- on consignment/sale basis and in lieu thereof, the accused/petitioner issued a cheque bearing no.061630 for a sum of Rs.1,52,35,000/- drawn on Federal Bank, Overseas Branch, New Delhi dated 10.4.2006. It is further alleged that the complainant presented the said cheque through its banker for collection and the same has been returned unpaid with the remarks "**funds insufficient**" and "**payment stopped by attachment order/court order**".

3. The submission of the petitioner is that even according to the complainant, the said cheque was a post dated one, which was presentable for encashment after nearly one year and eight months from the date of its alleged issue. He submits that in the meantime, the operation of the account on which the cheque was allegedly issued was stopped on account of an attachment order/court order in relation to FIR No.283/2005 u/s 406/420/467/468/471/120-B IPC registered against the petitioner with P.S Connaught Place. On account of the said attachment order, it was not possible for the petitioner to operate the said account either to deposit any amount in the account, or to withdraw any amount therefrom. For an offence to be made out u/s 138 of the Negotiable Instruments Act, the account must be "*maintained*" by the drawer with his banker for payment of the amount for which the cheque is drawn. He submits that on the date of the dishonour, it could not be said that *the*

account was maintained by the petitioner and, therefore, there was no question of the offence u/s 138 of the Negotiable Instruments Act having been committed by the petitioner.

4. There are various other allegations and cross-allegations between the parties with regard to the alleged theft of the said cheque; its being filled up by the respondent; and also with regard to the dealings between the parties. However, I am not concerned with any of those issues in the present proceedings. I am only confronted with the issue whether, in a case where the payment has to be stopped because of attachment of the bank account on which the cheque is drawn by an order of the Court, in respect of a post dated cheque, which attachment has taken place between the date of issuance of the cheque and the date when the payment under the cheque became due, the offence u/s 138 of the Negotiable Instruments Act can be said to have been committed, if the cheque is dishonoured for the reason "*payment stopped by attachment order/court order*", apart from the reason of the funds being insufficient.

5. Learned counsel for the petitioner has placed reliance on the following decisions in support of his submissions:

1. *Ramesh Kumar Vs. State of Kerala*, 2008(2) Civil Court Cases 099 (Kerala);

2. *Standard Chartered Bank & Anr. Vs. State & Anr.*, 2008(1) Civil Court Cases 442 (DELHI), and;

3. *Nagaraja Upadhya Vs. M. Sanjeevan*, 2007(4) Civil Court Cases 387 (Karnataka).

6. On the other hand, the submission of the learned counsel for the respondent is that while interpreting the provision of Section 138 of the Negotiable Instruments Act, the Court has to keep in view the mischief that the said provision intends to remedy. He submits that the Courts have, from time to time, interpreted Section 138 so as to meaningfully apply the same to cases where the drawer of the cheque resorts to ways and means to avoid payment of the cheque by creating grounds other than those mentioned in Section 138, such as, issuance of stop-payment instructions, closure of the bank account and the like. In support of his submissions, learned counsel for the respondent has relied upon the following decisions:-

1. **Pawan Kumar V. Ashish Enterprises & Others**, 1993(1) Crimes 51.
2. **M/s. Modi Cement Ltd. V. Kuchil Kumar Nandi**, IR 1998 SC 1057;
3. **NEPC Micon Ltd & Others V. Magma Leasing Ltd.**, 1999 Cri L.J. 2883;
4. **Yogendra Kumr Gupta V. Ram Prakash Agarwal**, 2007(2) Crimes 467 (M.P);
5. **Vinod Tanna & Another V. Zaheer Siddqui**, 2002(1) Crimes 104;
6. **Bishan Dayal V. Dinesh Kumar Singal** II(2007) DLT(Cri) 630.
7. **D. Vinod Shivappa V. Nanda Belliappa**, 130(2006) DLT 534(SC)

7. I proceed to examine the cases cited by the petitioner and thereafter I shall examine the cases cited by the respondent. In **Ramesh Kumar** (supra), on the same date on which

the accused issued cheques i.e. on 25.9.2000, the Company Court at Thiruvananthapuram passed orders for winding up of the accused company. One of the cheques was dishonoured for the reason "*funds insufficient*", while other two were dishonoured assigning the reasons "*operations stopped by the Court*". In relation to the cheque which had been dishonoured on account of "*funds insufficient*", the High Court rejected the challenge to the complaint made by the accused. However, it drew a distinction when it came to the complaints filed in respect of the two cheques which have been dishonoured with the reason "*operations stopped by the Court*". The Court held that when, by reason of an order of a Court, the bank was necessarily required not to make any payment from out of the account of the accused company, it is unjust and illegal to say that an employee of the company, who had issued the two cheques on behalf of the accused company can be held liable for an offence u/s 138 of the Act. In ***Standard Chartered Bank*** (supra), the Tax Recovery Officer on 30.1.2003 issued warrants of attachment, attaching the account of A.D Exports Private Ltd. On 11.2.2003, the Tax Recovery Officer required the petitioner, Standard Chartered Bank to remit the money lying in the account of A.D Exports Private Ltd in pursuance of the attachment. On 3.3.2003, A.D Exports Pvt. Ltd got prepared a banker's cheque for Rs.4,86,000/- in favour of the complainant M/s. Omni Plast Private Ltd and handed over the same to the said company. When the bankers cheque was presented for encashment, the same was returned unpaid with return memo having the instructions "*refer to drawer*". M/s Omniplast Private Ltd filed the

complaint u/s 138 of the Act against the Standard Chartered Bank. This Court took the view that since the banker's cheque was issued after debiting the account of the customer, but after the account had been lawfully attached by an authority competent to attach the account, issuance of the pay order being the result of an oversight or negligence would not give the complainant the right to prefer a complaint u/s 138 of the Act, since such a complaint cannot be founded on the tort of negligence. The *sine qua non* for fastening liability u/s 138 of the Act is return of a cheque unpaid by the bank either because the amount of money standing to the credit of that account is insufficient to honour the cheque, or that the cheque amount exceeds the amount arranged to be paid from that account under an agreement between the account holder of the bank. Consequently, the complaint filed by M/s Omni Plast Pvt. Ltd. was quashed. In **Nagaraja Upadhyay** (supra), the Karnataka High Court took the view that where the account of the accused had been closed by the bank at the instance of the bank, and not at the instance of the accused, the provisions of Section 138 of the Act are not attracted. In this case the Court found as a matter of fact that the bank account had been closed by the bank under its Rules on 25.6.1996 without intimation to the account holder/accused, who had thereafter proceeded to issue a cheque dated 3.6.1997. Since the account had not been closed by the accused, but by the bank on its own without intimation to the account holder, the Court held that the complaint u/s 138 of the Act was not maintainable.

8. The respondent has relied on **Pawankumar** (supra) to contend that Section 138 of the Act is attracted when the person concerned who has issued the cheque does not have adequate funds in his credit to honour the cheque. In this case the Bank had filed a recovery suit against the drawer/account holder. The drawer/account holder had no amount to his credit in his bank account. This decision does not deal with a situation like the present, and is therefore of hardly any assistance in deciding the present controversy. The material difference was that the drawer did not have any amount in his account on which the cheque was drawn and the suit was filed by the same bank precisely for the same reason, that the drawer/account holder had even not repaid the loan that he had taken from the Bank. The real reason for dishonour was the insufficiency of funds.

9. In **M/s Modi Cements Ltd** (supra), the Supreme Court held that once the cheque is issued by the drawer, a presumption u/s 139 of the Act arises in favour of the holder, and merely because the drawer issues a notice to the drawee or to the bank for stoppage of payment, it will not preclude an action u/s 138 of the Act by the drawee, or the holder of the cheque in due course. The Supreme Court, while reversing its earlier view in **Electronics Trade and Technology Development Corporation Ltd., Secundrabad vs. Indian Technologists & Engineers (Electronics) (P) Ltd.** (1996) 2 SCC 739 wherein the Court had taken the view that “.....after the cheque is issued to the payee or to the holder in due course and

*before it is presented for encashment, **notice is issued to him not to present the same for encashment** and yet the payee or holder in due course presents the cheque to the bank for payment and **when it is returned on instructions**, Section 138 does not get attracted"* (emphasis supplied), observed that if this proposition is accepted Section 138 would be rendered a dead letter "**for by giving instructions to the Bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed.**" Once again, this decision does not appear to be of much relevance to the present fact situation. It is not the respondent's case that the cheque has been dishonoured on account of stop payment instructions given by the petitioner. Similarly, the decision of the Supreme Court in **NEPC MICON Ltd** (supra) is of no avail to the respondents, since the fact situation was materially different from the facts of the present case. In that case the drawer of the cheque had closed the account from which the cheque was issued. The Supreme Court in that decision observed:

"After issuing the cheque drawn on an account maintained, a person, **if he closes that account** apart from the fact that it may amount to another offence, it would certainly be an offence under S.138 as there was insufficient or no fund to honour the cheque in 'that account.'" (emphasis supplied)

10. From the aforesaid, it appears that to rope in the drawer of the cheque within the ambit of Section 138 of the Act, when the cheque is dishonoured for ostensible reasons different from those

specifically provided under the Act, it is necessary to establish that the ostensible reason is one attributable to a voluntary act/omission of the drawer, and that the same is merely a ruse to avoid payment of the cheque and the real reason is the insufficiency of funds in the account, or that the amount of the cheque exceeds the arrangement that the drawer has with the bank under an agreement.

11. In **Yogendra Kumar Gupta** (*supra*) the Madhya Pradesh High Court has expressed the view that the reason for dishonour of cheque is wholly irrelevant, and if the amount remained unpaid despite demand notice being served upon accused, he can be held liable under Section 138 of the Act. With due respect, the interpretation given by the Madhya Pradesh High Court in the aforesaid decision does not appeal to me. For arriving at its aforesaid conclusion, the Madhya Pradesh High Court has relied upon the decision in **Modi Cements Limited** (*supra*), which was a case where the drawer of the cheque had issued stop payment instructions after drawing the cheque and before its presentation by the drawee. With respect to the Madhya Pradesh High Court, the Supreme Court in this decision does not appear to have laid down a general and broad proposition that irrespective of the reason for the dishonour of the cheque, the offence under Section 138 is made out if the drawer of the cheque does not make payment despite issuance of statutory notice by the payee. The Madhya Pradesh High Court also relies upon a decision of a Division Bench of the Bombay High Court in **Rakesh Nemkumar Porwal v. Narayan Dhondu Joglekar** 1993 CrL LJ 680.

The various observations made in the decision of the Bombay High Court in **Rakesh Nemkumar Porwal**(supra), no doubt supports the proposition laid down by the Madhya Pradesh High Court in **Yogendra Nath Gupta** (supra). The Bombay High Court in **Rakesh Nemkumar Porwal** (supra) observed:

“21. A clear reading of section 138 leaves no doubt in our mind that the circumstances under which such dishonour takes place are required to be totally ignored. In this case, the law only takes note of the fact that the payment has not been forthcoming and it matters little that any of the manifold reasons may have caused that situation. If, for instance, the closure of an account or the stoppage of payment or any other of the commonplace reasons for dishonour were to be justifiable, then, the Legislature would have set these out in the section as exceptions not constituting an offence. No such intention can be read into section 138, as none exists. The solitary exception made by the Legislature is with regard to the drawer being offered a final opportunity of paying up the amount within 15 days from the receipt of notice which, in other-words, provides a last opportunity to prove one's bona fides. It is obvious, that having regard to the widespread practice of issuing cheques which are dishonoured and the many ingenious methods of avoiding payment that are practiced, the Legislature has opted for a non-nonsense situation. The possibility has not been overlooked whereby an account may inadvertently be overdrawn or a dishonour may be for technical reasons or where a genuine mistake has occurred and the grace period provided for by the Legislature after service of notice on the drawer is in order to afford an opportunity to the drawer to rectify these. Undoubtedly, even when the dishonour has taken place due to the dishonesty of the depositor, the drawer is still given a last chance to act otherwise. Consequently, the reasons for dishonour even if they be very valid as was sought to be pointed out in this case, should not and cannot be taken into account by a Magistrate when such a complaint is presented.”

“28. The wording and the endorsement from the bank or the circumstances under which a cheque is returned are not the guiding criterion but the fact that on presentation of the cheque, the payment was not made. There could be a host of reasons for this (i.e. for the dishonour of the cheque) but the bottom line of the situation is that the payment could not be made by the banker and the mechanics of the reasons apart, the irresistible conclusion that, had the funds been available, the payment would have been made leads back to the position that dishonour, therefore, implies insufficiency of funds. We are reinforced in this view by the definition of a cheque as appears in section 6 of the Negotiable Instruments Act which defines it as a bill of exchange drawn on a specified banker. A bill of exchange is defined in section 5 which reads 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 bearer of the instrument."

12. It may be pertinent to analyze the dispute before the Bombay High Court in **Rakesh Nemkumar Porwal**(supra) and the circumstances in which these observations were made by the Court. The Court was dealing with a situation where a complaint under Section 138 the Act had been filed by the complainant within the notice period of 15 days after dishonour as provided by the Section. In this factual background, the real controversy that arose for consideration was whether the complaint when filed was premature or not. However, it appears that arguments were advanced on various other issues, which strictly were not even required to be gone into, to decide the primary issue arising in the case. The Court had framed the following questions for its considerations:

“(a) Whether it is open to a complainant to invoke the process of a criminal court alleging an offence under section 138 of the Negotiable Instruments Act at any point of time earlier to that as it prescribed in the section and whether this infirmity is at all curable or whether it is fatal to the prosecution ?

(b) What is the correct manner in which the time-frame as is prescribed in sections 138 and 142 of the Negotiable Instruments Act is required to be computed ?

(c) Whether it would be open to the complainant, in the course of proceedings under section 482 of the Code of Criminal Procedure, to produce material before the High Court for purposes of effectively amending statements or the factual position or as has happened in the present case, the material date set out in the complaint or conversely, whether the record of the lower court is sacrosanct and cannot be altered at this stage ?

(d) Is section 138 to be afforded restrictive application by confining it to the narrow category of cases where the rejection slip reads "insufficiency of funds" or was it prescribed as an antidote for the malignant trade practice of indiscriminately issuing cheques that are dishonoured without any compunction, in other words, would dishonour of a cheque attract criminal consequences in the normal course ?”

13. The Court answered the first question against the complainant, and held that the complaint was premature and liable to be dismissed. Therefore, in my humble view, question(d) was not required to be considered. The decision of the Court on question(d) was, in my view an obiter dicta.

14. Even otherwise, the above extracted observations do not seem to be in consonance with the clear and unambiguous language of the Statute. Section 138 of the Act is a comprehensive provision. It firstly creates the offence that defines the ingredients that must exist

for the offence to get completed and thereafter also prescribes the punishment with which the offender can be punished. The Section is divided into two parts. The first part deals with the essential ingredients which constitute the offence. The second part is a proviso, which lays down certain preconditions which must be fulfilled before the Section can be applied. The essential preconditions found in the main body of the Section cannot be obliterated by focussing only on the preconditions laid down in the proviso, for the application of the Section.

15. The Legislature, in its wisdom has cautiously not used the expression *“irrespective of the reasons for dishonour”* and instead has used the words *“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”*.

16. The necessary ingredients of the offence have been noticed by the Supreme Court in ***Kusum Ingots & Alloys Ltd V. Pennar Peterson Securities Ltd.***, (2000) 2 SCC 745 and the same read as follows: -

- “(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;
- (ii) that 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;

- (iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;
- (iv) the payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;
- (v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice."

17. *I may also refer to Section 140 of the Act, which states that "It shall not be a defence in a prosecution for an offence under section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured or presentment **for the reasons stated in that section.**"(emphasis added). The intention of the Parliament is, therefore, not to create the offence under Section 138 of the Act in all cases of Dishonour of Cheque, but only in such cases where the dishonour is "for reasons stated in that Section."*

18. I am in respectful disagreement with the aforesaid view of the Division Bench of the Bombay High Court. In my view one cannot ignore the language used by the Parliament in the Statute and stretch its meaning to such an extent as to obliterate the express words used by the Parliament. Moreover, if this decision is understood as laying down the correct law, then the same is irreconcilable with

the decision of the Supreme Court in **Kusum Ingots**(supra) wherein the Supreme Court has held that proceedings under Section 138 read with Section 142 of the Act would not lie where, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of BIFR under Section 22A of the SICA was passed against the company. In such a case it may reasonably be said that the dishonouring of the cheque by the bank and failure to make payment of the amount by the company and/or its directors is for reasons beyond the control of the accused. This Court has also held in **M.L.Gupta & Anr. V. Ceat Financial Services Ltd.**, 136(2007) DLT 308 that once the Company Court passes an order for winding up of a company and appoints a provisional liquidator, in respect of cheques which may have been issued prior to the passing of such an order by the Court, which became payable after the passing of the winding up orders, no offence under Section 138 of the Act would be made out.

19. No doubt, the said provision has to be construed in a meaningful way so as to advance the purpose for which it has been enacted. However, the interpretation of the said section cannot be stretched to such limits so as to render the drawer of a cheque liable for penal action wherever the cheque has been returned by the bank unpaid for whatever reason. It is well settled that penal Statutes have to be construed strictly.

20. Chapter XVII of the Act is engrafted to discipline those who discredit the system of making payment through cheques in

certain cases. While it creates legal sanction against the dishonour of cheques and the subsequent failure to make payment in certain circumstances, the objective of the said Chapter is not to provide a remedy for recovery of the amount due. It is not that the payee or the holder of the cheque in due course has no other remedy available in law to enforce his claim. He has a remedy by way of filing a civil suit, may be even a summary suit under Order 37 C.P.C to enforce his claim independently. He may even initiate action for winding up u/s 433 of the Companies Act. Invariably, the dishonour of the cheque may also involve the offence of cheating. Therefore, a complaint under Section 420 IPC may also be maintainable.

21. The decision in **Vinod Tanna** (supra), in turn, relies upon the decision of the Bombay High Court in **Rakesh Nemkumar Porwal** (supra). Since I have expressed my disagreement with the said decision, I do not feel persuaded to follow the decision of the Bombay High Court in **Vinod Tanna** (supra). The decision of this Court in **Bishan Dayal** (supra) has no application to the facts of the present case. In **Bishan Dayal** (supra) the quashing petition had been filed on the ground that the petitioner did not owe any amount to the complainant. This Court held that it is not for the Court while exercising jurisdiction u/s 482 of the Code to go into the veracity of this assertion. As aforesaid, I am only concerned with the aforesaid legal issue, and I am not going into the factual disputes between the parties in the present case. The last decision relied upon by the respondent is of the Supreme Court in **D.Vinod Shivappa** (supra).

The same has been cited to contend that the object of Section 138 of the Act is to punish unscrupulous persons, who purport to discharge their liability by issuing cheques without intending to do so which is demonstrated by insufficient balance in account to discharge their liability. In para 13 of the said decision, the Supreme Court held as follows:-

“13. Section 138 of the Act was enacted to punish those unscrupulous persons who purported to discharge their liability by issuing cheques without really intending to do so, **which was demonstrated by the fact that there was no sufficient balance in the account to discharge the liability**. Apart from civil liability, a criminal liability was imposed on such unscrupulous drawers of cheques. The prosecution, however, was made subject to certain conditions. With a view to avoid unnecessary prosecution of an honest drawer of a cheque, or to give an opportunity to the drawer to make amends, the proviso to Section 138 provides that after dishonour of the cheque, the payee or the holder of the cheque in due course must give a written notice to the drawer to make good the payment. The drawer is given 15 days time from date of receipt of notice to make the payment, and only if he fails to make the payment he may be prosecuted. The object which the proviso seeks to achieve is quite obvious. It may be that on account of mistake of the bank, a cheque may be returned despite the fact that there is sufficient balance in the account from which the amount is to be paid. In such a case if the drawer of the cheque is prosecuted without notice, it would result in great in-justice and hardship to an honest drawer. One can also conceive of cases where a well intentioned drawer may have inadvertently missed to make necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within the prescribed period. It is for this reason that Clause (c) of proviso to Section 138 provides

that the section shall not apply unless the drawer of the cheque fails to make the payment within 15 days of the receipt of the said notice. To repeat, the proviso is meant to protect honest drawers whose cheques may have been dishonoured for the fault of others, or who may have genuinely wanted to fulfil their promise but on account of inadvertence or negligence failed to make necessary arrangements for the payment of the cheque. The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their modus operandi to cheat unsuspecting persons.”(emphasis added).

22. A perusal of the above extract shows that the Supreme Court consciously used the words “*which was demonstrated by the fact that there was no sufficient balance in the account to discharge their liability*”. This observation of the Supreme Court also reaffirms my view that whatever be the reason for dishonour of the cheque, it has to be co-related to the insufficiency of funds in the account or to the lack of arrangement made by the drawer with his bank under an agreement.

23. Turning to the facts of the present case, one finds that the attachment by an order of the Court in this case was after the alleged issuance of the cheque, but prior to its presentation for encashment. The attachment of the bank account of the petitioner had the effect of disabling the petitioner from operating or maintaining the said account. The petitioner could not exercise his right either to deposit into or withdraw from the said account. Even if it were to be assumed for the sake of argument, that the cheque was in fact issued in discharge of the petitioner's liability owed to the

respondent, and that at the time of issuance of the cheque, he did not have sufficient balance in the account, or an arrangement with his banker, in case the bank account had not been attached under the orders of a Court, nothing prevented the petitioner from either depositing money in his account or entering into an agreement with his bank to arrange for sufficient funds in the account, to be able to honour the cheque in question by the date when the said cheque could have been presented for payment at the earliest. This is so because there was sufficient time gap i.e of nearly one year and eight months between the date of alleged issue of cheque and the date of its presentation. As held by the Hon'ble Supreme Court in **Modi Cements** (supra), the issuance of the cheque without having sufficient balance in the account of the drawer does not by itself tantamount to the commission of an offence u/s 138 of the Act. However, in the facts of this case, the petitioner could not have, even if he would have so desired, either deposited funds in his account or otherwise made arrangements for the payment of the cheque upon its presentation by entering into an agreement with the bank, since there was a Court attachment on the bank account of the drawer. This Court attachment was by a Court ceased of the case arising out of FIR No.283/2005 u/s 406/420/467/468/471 & 120-B IPC registered with P.S. Connaught Place. The act of attachment of the bank account of the drawer/petitioner cannot be said to be a voluntary act of the drawer. It cannot be said that the petitioner contrived to have the account attached only for the purpose of warding off the penal consequences u/s 138 of the Act. It also cannot be said that after the

attachment of the bank account, the same was being maintained by the petitioner. For an account to be maintained by an account holder, it is essential that he is in a position to operate the said account by either depositing monies therein or by withdrawing money therefrom. He should be in a position to give effective instructions to his banker with whom the account is maintained. However, in the present case, once the account has been attached by an order of the Court, the said account could not be operated by the petitioner. He could not have issue any binding instructions to his banker, and the banker was not obliged to honour any of his instructions in relation to the said account, so long as the attachment under the court orders continued.

24. For all the aforesaid reasons, in my view, even if the contents of the complaint are accepted in toto, no offence under Section 138 of the Act can be said to have been committed against the accused, this petition deserves to succeed. I, therefore, allow the petition and quash the complaint filed by the respondent before the learned Metropolitan Magistrate, New Delhi.

May 06, 2008
as

VIPIN SANGHI, J.