

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

+ **Crl. M.C. No. 239/2010**

% **Decided on: 8th July, 2011**

M. ARUN AHLUWALIA Petitioner
Through: Mr. D.S. Narula, Sr. Advocate with
Ms. Vandana & Mr. A.S. Narula,
Advocates

versus

ARUN OBEROI & ANR Respondents
Through: Mr. Avi Singh & Mr. Anya Singh,
Advocates

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

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

MUKTA GUPTA, J.

1. This is a petition for quashing of order dated 19th March, 2009 summoning the petitioner in criminal complaint No. 92/5/08 under Section 138 Negotiable Instrument Act (hereinafter referred as NI Act) and the said complaint.

2. Before proceeding further, it would be relevant to note the brief facts of the case. The Respondent No. 1 and his wife along with M/s May Co.

Freight & Travels Pvt. Ltd. were shareholders of M/s Kausauli Resorts Pvt. Ltd. Co. registered at Jalandar City. They were holding 35,000 shares of M/s Kausauli Resort in totality and were Promoter/Directors of the said company. On 25th August, 2003 the Respondent No.1 along with his wife & M/s May Co. Freight & Travels Pvt. Ltd. sold their shareholding to Captain NP Ahluwalia i.e. Brother of the petitioner & Captain P.S. Chimni for ₹1,49,79,000 as per MOU dated 25th August, 2003. It is alleged that the petitioner had discharged this liability in part for purchasing the share holding of M/s Kasauli Resort Pvt. Ltd. of the Respondent. The petitioner had issued 2 post dated cheques bearing No. 624695 dated 31st January, 2004 for a sum of ₹3,50,000/- drawn on State Bank of India and other bearing No. 624696 dated 31st December, 2004 for a sum of ₹20,00,000/- drawn on State Bank of India, Malviya Nagar, New Delhi. The 1st cheque bearing No. 624695 was duly encashed but the 2nd cheque became the bone of contention between the parties and for the dishonour of the said cheque Respondent No.1 filed the complaint case under Section 138 of NI Act. On 19th March, 2009 Ld. Senior Civil Judge in Complaint Case No. 92/5/08 issued summons to the petitioner which is the order impugned in the present petition.

3. Learned counsel for the petitioner contends that on the averments contained in the complaint and the documents filed therein, no offence under Section 138 NI Act is made out as the cheque issued by the

petitioner had not been dishonoured for the reason of insufficient funds or that the amount due thereon exceeds the amount arranged to be paid from that account. It is contended that for an offence to be made out under Section 138 NI Act the dishonoured cheque must be in discharge of a legal liability whereas in the present case there are no particulars contained in the complaint which disclose the alleged liability of the petitioner towards the complainant for which the cheque is said to have been issued. It is urged that the petitioner is nowhere involved in the transaction which took place between the respondent and the brother of the petitioner. The petitioner is not even a signatory to the MOU signed by the respondent and petitioner's brother Captain NP Ahluwalia and Captain PS Chimni. Therefore, there is no legal liability of the petitioner to pay any amount to the Respondent No.1. Reliance is placed on *Kusum Ingots & Alloys Ltd. Vs. Pennar Peterson Securities Ltd. & Ors.*, (2000) 2 SCC 745 . It is further contended that the date mentioned on the cheque issued was 31st December, 2004 which was a loan to the respondent and the same was to be first declared and then presented for encashment. Respondent did not raise the said loan amount till the year 2005 and out of nowhere in the year 2008 issued a notice u/s 138 N.I. Act to the Petitioner. No legal liability of the petitioner existed for which he ought to have paid the money. The said date of 31st December, 2004 has been altered to 30th September, 2008 to defraud and blackmail the petitioner. There arises no question of

revalidation of the said cheque. Also this aspect has been categorically denied by petitioner in his response to the notice dated 3rd November, 2008 sent to him by the Respondent No.1 under Section 138 of NI Act. Reliance is placed on *Vinod Tanna vs. Zaher Siddiqui*, (2002) 7 SCC 541 to contend that where the cheque was dishonoured only due to incomplete signature of drawer the same would not attract the provision of Section 138 NI Act. Reliance has been placed upon *Om Prakash Bhojraj Maniyar vs. Swati Girish Bhido and others*, (78) 1993 Company Cases 797 Bombay High Court; *Mustafa Surka vs. State of Gujarat*, Special Criminal Application Nos. 2118 to 2143 of 2009 decided by the Gujarat High Court to contend that for an offence contemplated under Section 138 of NI Act exists only in two contingencies and therefore if the cheque is dishonoured for any third contingency or eventuality the same would not be covered under the provisions of Section 138 of NI Act. Thus, where the cheque is dishonoured due to incomplete signature/illegible or no image found signature or closure of account it would not attract the provision of Section 138 of the Act and hence cannot afford a ground for taking penal action under the said section. Reliance is placed on *Raj Kumar Khanna vs. State*, (2009) 6 SCC 72 to contend that the parameters for invoking Section 138 of the Act are limited and a penal provisions created by reason of a legal fiction must receive strict construction. Such a penal provision enacted in terms of the legal fiction drawn would be attracted when a cheque is

returned by the Bank unpaid and such non-payment should be for either of the two reasons embodied therein.

4. Per contra learned Counsel for the Respondent vehemently opposing the present petition contends that the petitioner had issued 2 cheques out of which the 2nd cheque bearing No. 624696 dated 31st December, 2004, which was dishonoured, is the subject matter of the present petition. It is contended that there existed a legal liability on the part of the petitioner as he had in part purchased the shares of M/s Kausauli Resort Pvt. Ltd. from the respondent and his wife. Further, the said cheque was revalidated by the petitioner in the month of April, 2008 when the respondent visited Singapore and discussed the matter about the payment of said cheque. Thereafter the date of the said cheque was changed from 31st December, 2004 to 30th September, 2008 and duly signed by the petitioner. On presentation of the said cheque on 1st October, 2008 the cheque was dishonoured and was returned vide Memo dated 3rd October, 2008 by the Bank. Though the reason assigned in the said Memo was the alteration in cheque, however, the said cheque was dishonoured not only due to alternation in signatures but also due to the fact that the account balance of the petitioner on the said date was nil and due to insufficiency of funds the cheque was dishonoured. CW1 Prabhat Kumar, the Branch Manager of State Bank of India, Malviya Nagar has been examined and has deposed in this regard. Since it is a case of dishonour of cheque due to insufficiency

of funds, therefore, provisions of Section 138 are clearly attracted. Learned counsel places reliance on *Rangappa vs. Sri Mohan*, AIR 2010 SC 1898 to contend that in view of Section 139 it has to be presumed that a cheque is issued in discharge of any debt or liability and the presumption can be rebutted by way of evidence but burden is on the person who wants to rebut it. Reliance is also placed on *R.Vinod Shivappa vs. Nanda Belliappa*, 130 (2006) DLT 534 (SC) to contend that the proviso to Section 138 is not meant to protect the unscrupulous drawers who do not intend to honour the cheques issued by them. Learned counsel further relies on *Veera Exports Vs. Kalavathy*, (2002)1 SCC 97 to contend that revalidation of the Negotiable Instrument is a material alteration which fact has to be established by the way of evidence at the trial and the same cannot be determined on the mere assertion of the accused. Hence no case for quashing of the summoning order is made out in the present case. It is only the assertion made by the petitioner that he did not revalidate the cheque as he owed no legal liability towards Petitioner. This fact needs to be ascertained by way of evidence and the same can be done at the trial and not in a petition under Section 482 Cr.P.C. Reliance is also placed on *Gopalast Pvt. Ltd. Vs. Chico Ursula D'Souza*, AIR 2003 SC 2035 to contend the though Sec 138 is a penal provision still it is a duty of the court to interpret it consistent with the legislative intent, purpose of which is to suppress the mischief and advance the remedy which in such cases is to

stop the menace of not honouring the issued cheques. Therefore, the present petition is meritless and liable to be dismissed.

5. I have heard the learned counsel for the parties and perused the records. The questions to be determined in the present petition are two fold. Firstly, whether the provisions of Section 138 N.I. Act would be attracted in a case where there are no sufficient funds in the account on the date of dishonour of the cheque though the cheque has been returned with a return memo “due to alteration”. Secondly, that where there is an alteration in the cheque and the same is not admitted to by the petitioner whether the court hearing a petition under Section 482 Cr.P.C. can ascertain the veracity of the same without a trial.

6. The contention of the learned counsel for the Petitioner that there existed no legal liability for him to honour the cheque as there was no privity of contract between the Petitioner and Respondent No. 1 and that the Respondent’s group had received the entire sale consideration for the shares of Captain N.P. Ahluwalia and Captain P.S. Chinni in terms of the M.O.U. and that the cheque issued was a loan to the Petitioner as he was running into losses, are disputed questions of fact which need determination at the stage of trial because in the complaint it is alleged by the Respondent that the Petitioner had issued the said cheque for ₹20,00,000/- in order to discharge its liability in part for purchasing the

share holding of M/s Kausauli Resort Pvt. Ltd. of the Respondent and his Company.

7. The reliance of the learned counsel for the petitioner on *Vinod Tanna's Case* (Supra) is misconceived as the Hon'ble Supreme Court was considering a case where there was only alteration in the cheque and there was no allegation of insufficiency of funds. However in the present case the Complainant/Respondent has led evidence and CWI Prabhat Kumar, the Branch Manager of State Bank of India has deposed that as per the Bank Statement of the petitioner there was no balance to honour the cheque on the day it was presented. Thus there was a ground available with the Respondent that an offence under Section 138 N.I. Act has been committed as there was also insufficient funds due to which the said cheque could not be honoured.

8. The Hon'ble Supreme Court in case of *Rangappa* (Supra) has at length discussed the scope and legislative intent of the sections 118, 138 & 139 of the NI Act as follows:

“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 Kasivisweswara Rao v. Thadikonda Ramulu Firm and 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*, (1999) 3 SCC 35: (AIR 1999 SC 1008) (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."

9. In *R. Vinod Shivappa (Supra)* their Lordship's have interpreted Section 138 of NI Act as under:

"12. It is well settled that in interpreting a statute the court must adopt that construction which suppresses the mischief and advances the remedy. This is a rule laid down in *Heydon's case* (76 ER 637) also known as the rule of purposive construction or mischief rule.

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 fulfill 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.”

10. This court in *Vijay Chaudhary vs. Gyan Chand Jain*, 2008(2) DCR 685 dealt with a similar situation and held that where a cheque is dishonored for any reason it has to be co-related to the insufficiency of funds in the account. I agree with the same as the legislative intent is to stop the dishonoring of cheque and adopt a no-nonsense situation and punish the unscrupulous person who purport to discharge this liability by issuing cheques, not intending to do honour it by insufficiency of funds in their accounts. I find force in the contention of learned counsel for the respondent that the summoning order of the trial court cannot be quashed merely on the assertion of the Petitioner that he did not revalidate the cheque. It is a matter which needs to be proved at trial and hence this court

cannot go into the said issue. Reliance in this regard on the case of *Veera*

Exports (Supra) is well placed, wherein their Lordship's held:

9. The High Court has also placed reliance on Section 87 of the Negotiable Instruments Act, which reads as follows:

"87. Effect of material alteration - Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties;

Alteration by indorsee - Any such alteration, if made by an indorsee, discharges his indorsee from all liability to him in respect of the consideration thereof.

The provisions of this section are subject to those of sections 20, 49, 86 and 125."

The first paragraph of Section 87 makes it clear that the party who consents to the alteration as well as the party who made the alteration are disentitled to complain against such alteration, e.g. if the drawer of the cheque himself altered the cheque for validating or revalidating the same instrument he cannot take advantage of it later by saying that the cheque became void as there is material alteration thereto. Further, even if the payee or the holder of the cheque made the alteration with the consent of the drawer thereof, such alteration also cannot be used as a ground to resist the right of the payee or the holder thereof. It is always a question of fact whether the alteration was made by the drawer himself or whether it was made with the consent of the drawer. It requires evidence to prove the aforesaid question whenever it is disputed.

10. It is held by the High Court that a change of date is a material alteration which affected the interests of the Respondent. It is held that the Respondent not being a willing party to the said alteration, the cheques were void as contemplated by Section 87 of the Negotiable Instruments Act. At this stage there is no basis for arriving at such a

conclusion. In the earlier part of the impugned Judgment it has been correctly held that this is a question of fact. This is a fact which will have to be established on evidence during trial. At this stage the High Court could not have quashed the complaint merely on the basis of an assertion in the reply.

11. Under the circumstances the impugned order is set aside. The Petition filed by the Respondent stands dismissed. The Judicial Magistrate II, Karur shall now proceed with the complaint in accordance with law.”

11. Thus, in view of the decisions noted above and the fact that petitioner’s contention that he did not revalidate any cheque and had no legal liability to pay is a question of fact which needs to be proved and determined at trial by way of evidence, the petition is dismissed.

(MUKTA GUPTA)
JUDGE

JULY 8th, 2011
dk