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

Judgment reserved on: 19.02.2015

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Judgment delivered on: 29.06.2015

+ **CRL. L.P. 558/2014**

CREDENTIAL LEASING & CREDITS LTD Petitioner

Through: Mr. Ankur Sethia & Mr. Sameer
Chand, Advocates.

versus

SHRUTI INVESTMENTS & ANR Respondents

Through: Mr. Arun Sukhija, Advocate.

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI**

J U D G M E N T

VIPIN SANGHI, J.

1. After hearing learned counsel, leave granted.
2. Let the appeal be registered and numbered.

Crl.A. No. 729/2015

3. I heard learned counsel finally at the admission stage with their consent and reserved judgment. Accordingly, I now proceed to dispose of the appeal.

4. The present appeal is directed against the judgment and order dated 26.05.2014 passed by Sh. Vikram, MM-03, South-West District, Dwarka Courts, Delhi in CC No.1798/2014 under Section 138 of Negotiable Instruments Act (NI Act). The respondent/accused was acquitted by the impugned judgment and the complaint preferred by the appellant has been dismissed.

5. The case of the complainant, as set out in the complaint is that the complainant is a member of the National Stock Exchange (NSE) of India, dealing in capital market. Accused No. 1 is the name of a business enterprise of a Hindu Undivided Family (HUF), dealing in capital markets, through accused no. 2, its Karta. The complainant claims that at the request of accused no. 1 through accused no. 2, and in consideration of issuance of a cheque bearing No. 501416 dated 22.6.96 for Rs. 14 Lacs drawn on Oriental Bank of Commerce, Tagore Garden Branch, New Delhi – 110 027, and deposit of certain shares with the complainant as security, the accused were allowed to conduct the sale and purchase of shares on credit basis with the complainant, with the understanding that the aforesaid shares and cheque can be encashed by the complainant, in case of failure of the accused to meet its liability if and when it arises due to the share transactions undertaken by the accused through the complainant. The accused conducted several transactions of shares with the complainant as per the detailed bills and statement of Accounts placed on record, and more than Rs. 14 Lacs were found payable and outstanding against the accused. Hence as per the request of the Accused, the complainant presented the said cheque for encashment to its bank, i.e. the Bank of India, Rajouri Garden,

New Delhi (J-2/1, B.K.Dutta Market), New Delhi – 27 on 25.7.96 and the said cheque was dishonoured and returned unpaid due to ‘Insufficient Fund’ by the Accused’s Banker Oriental Bank of Commerce, Tagore Garden Branch, New Delhi – 110 027. An intimation in this regard vide Bank advice dated 27.7.96 along with cheque Return memo and said cheque were received by the complainant through its Bank on 27.7.96.

6. On their failure to pay the outstanding amount, a statutory notice dated 08.08.1996 was served upon the accused. The accused failed to pay the amount of the cheque within the prescribed statutory period. Accordingly, the complainant preferred the complaint under Section 138 NI Act through Sh. Dilip Kumar Agarwal, a Director duly authorised by its Board of Directors. The complainant had claimed that the security cheque of Rs.14 lacs was given to meet the liability which was likely to arise in future, and on the date of presentation there was a liability of more than Rs.14 lacs. The complainant claimed that the cheque was presented with prior notice to the accused.

7. Upon being summoned, the accused entered appearance. The accused was served with the notice on 08.10.1998 under Section 251 CrPC for the offence punishable under Section 138 NI Act, to which the accused pleaded not guilty, and claimed trial. The parties led their respective evidence.

8. Sh. Dilip Kumar Agarwal examined himself as CW-1 and Sita Ram Pratap was examined as CW-2. The statement of accused no. 2 was recorded under Section 313 Cr PC. He denied all the incriminating

evidence. He stated that the cheque was not issued to discharge any liability and that the complaint was false. He claimed that a blank cheque had been issued to the complainant. The accused opted to lead defence evidence. The accused summoned Gautam Gupta, Asstt. Manager of NSE as DW-1 and accused No.2 examined himself as DW-2.

9. The learned MM acquitted the accused on the premise that the cheque in question was given by the accused as security. Admittedly, on the date of cheque, i.e. 22.06.96 there was no transaction between the parties and, admittedly, there was no debt or other liability existing on that date. Therefore, it was held that the cheque in question was not issued in discharge of an existing debt or other liability. The learned MM relied on the decision of the Supreme Court in *M/s Indus Airways Pvt. Ltd. vs M/s Magnum Aviation Pvt. Ltd.*, IV (2014) SLT 321, wherein the Supreme Court had observed:

“...the fine distinction between civil liability and criminal liability under Section 138 of the N.I. Act. If at the time of entering into a contract, it is one of the conditions of the contract that the purchaser has to pay the amount in advance and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Section 138. For a criminal liability to be made out under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque.”

(Emphasis supplied)

10. Learned Counsel for the Petitioner submits that the Trial Court has wrongly placed reliance on *Indus Airways* (supra), as the facts of that case

were very different and the observations of the Supreme Court have to be viewed in the light of the background facts of the case. In that case, the purchase order had been cancelled by the drawer of the cheque given as advance, who was also the purchaser. The supply of goods had not been effected by the seller/ holder of the cheque. Therefore, there was no existing ascertained liability or debt against the accused on the date the cheque was presented for encashment to the Bank. Learned counsel submits that, in contrast, in the present case, on the date of presentation of the aforesaid cheque, there was an ascertained legal liability existing against the accused no. 1/ HUF. The liability was for an amount which was more than Rs. 14 Lakhs. Since the said liability was existing, the complainant was entitled to enforce the security furnished by the accused, on the strength of which the accused were permitted to transact the share purchase/ sale business by the complainant.

11. Ld. Counsel for Petitioner relies on *I.C.D.S. Ltd. vs. Beena Shabeer*, 2002 (2) SCC 426. He submits that in *Beena Shabeer* (supra), the Supreme Court held that security cheques would fall within the purview of Section 138 NI Act, and a person cannot escape his liability. As such, when there is an existing liability on the date of presentation of the cheque, and the ‘security cheques’ issued are be dishonoured, the accused will be liable under Section 138 NI Act. He submits that while making the above quoted observations in *Indus Airways* (supra) – which are obiter dicta, as they were not necessary for a decision of the case under consideration before the Supreme Court, the earlier decision in *Beena Shabeer* (supra) was not brought to the notice of the Supreme Court.

12. On the other hand, learned Counsel for the Respondent has placed reliance on ***Collage Culture vs. Apparel Export Promotion Council***, 2007 (99) DRJ 251 to submit that Courts have recognised the distinction between the two kinds of cheques – one, issued in discharge of a debt *in presenti*, but payable in future, and the other issued in respect of a debt which comes into existence on occurrence of a contingent event, and is not in existence on the date of issue of the cheque. The latter cheque would be by way of security cheque, and would not be covered by Section 138 of the NI Act.

13. He further submits that in ***Collage Culture*** (supra), this Court defined the word ‘due’ as ‘outstanding on the relevant date’. This court held that debt has to be in ‘existence’ as a crystallized demand akin to liquidated damages, and not a demand which may, or may not, come into existence.

14. Ld. Counsel for Respondent submits that the cheque in the present case is a security cheque as no liability existed on the date of its issuance, and the liability allegedly came into existence subsequently on account of alleged transactions undertaken by the accused. Since the liability depended on a contingency, the aforesaid cheque – issued as security, will not be covered under Section 138 of NI Act.

15. In ***Suresh Chandra Goyal Vs. Amit Singhal***, Crl. Appeal Nos.601/2015 decided on 14.05.2015, this Court had occasion to consider the defence of “security cheque”. In that case the complainant invested monies, from time to time, in the business of the accused. A sum of Rs.3 Lakhs was outstanding after accounting for the monies returned by the accused. The accused entered into a MOU for repayment of the said

outstanding amount in 6 monthly instalments of Rs.50,000/- each. The accused issued six security cheques of Rs.50,000/-, which were to be returned upon payment of the corresponding instalment. While three instalments were admittedly received by the complainant, he claimed that the remaining three were not paid. The corresponding security cheques were banked; dishonoured upon presentation, and; after issuance of statutory notice, the complaint under Section 138 NI Act filed due to non-payment. This Court, *inter alia*, observed as follows:

“28. There is no magic in the word “security cheque”, such that, the moment the accused claims that the dishonoured cheque (in respect whereof a complaint under Section 138 of the Act is preferred) was given as a “security cheque”, the Magistrate would acquit the accused. The expression “security cheque” is not a statutorily defined expression in the NI Act. The NI Act does not per se carve out an exception in respect of a ‘security cheque’ to say that a complaint in respect of such a cheque would not be maintainable. There can be mirade situations in which the cheque issued by the accused may be called as security cheque, or may have been issued by way of a security, i.e. to provide an assurance or comfort to the drawee, that in case of failure of the primary consideration on the due date, or on the happening (or not happening) of a contingency, the security may be enforced. While in some situations, the dishonor of such a cheque may attract the penal provisions contained in Section 138 of the Act, in others it may not.”

16. This Court analysed the meaning of the word “security” and the question as to what does the issuance of a security cheque entail, and, if there is no specific agreement touching upon the said aspect, what would the rights and obligations of the parties qua a security cheque, in case the

primary obligation to secure which the security cheque was given, is not discharged. The relevant extract reads as follows:

“57. The Black’s Law Dictionary (6th edition), *inter alia*, defines “security” to mean:

*“Protection; assurance; Indemnification. **The term is usually applied to an obligation, pledge, mortgage, deposit, lien, etc., given by a debtor in order to assure the payment or performance of his debt,** by furnishing the creditor with a resource to be used in case of failure in the principal obligation. Collateral given by debtor to secure loan. Document that indicates evidence of indebtedness. The name is also sometimes given to one who becomes surety or guarantor for another”.*

(Emphasis supplied)

58. Similarly, the word “security” is defined in the Shorter Oxford English Dictionary (5th edition), *inter alia*, to mean:

*“Property etc. deposited or pledged by or on behalf of a person as a guarantee of the fulfillment of an obligation (as an appearance in court or the payment of a debt) **and liable to forfeit in the event of default**”.*

(Emphasis supplied)

59. Thus, when one party gives a security to the other, implicit in the said transaction is the understanding that in case of failure of the principal obligation, the security may be enforced.

60. In **V.K. Ashokan v. CCE**, (2009) 14 SCC 85, the Supreme Court observed that:

“The term “security” signifies that which makes secure or certain. It makes the money more assured in its payment or more readily recoverable as distinguished from, as for example, a mere IOU, which is only evidence of a debt, and the word is not confined to a document which gives a charge on specific property, but includes personal securities for money. (See Chetumal Bulchand v. Noorbhoy Jafeerji, AIR 1928 Sind 89). It is a word of general import signifying an assurance”.

61. *Thus, in my view, it makes no difference whether, or not, there is an express understanding between the parties that the security may be enforced in the event of failure of the debtor to pay the debt or discharge other liability on the due date. Even if there is no such express agreement, the mere fact that the debtor has given a security in the form of a post dated cheque or a current cheque with the agreement that it is a security for fulfillment of an obligation to be discharged on a future date itself, is sufficient to read into the arrangement, an agreement that in case of failure of the debtor to make payment on the due date, the security cheque may be presented for payment, i.e. for recovery of the due debt. If that were not so, there would be no purpose of obtaining a security cheque from the debtor. A security cheque is issued by the debtor so that the same may be presented for payment. Otherwise, it would not be a security cheque.”*

17. This Court also analysed several decisions of the Supreme Court, of this Court, and of other High Courts relevant for determination of the issue – whether a dishonoured security cheque could be the foundation of a complaint under Section 138 of the NI Act. I consider it appropriate to extract the relevant portions from the said discussion:

“30. In ICDS Ltd. Vs. Beena Shabeer &Anr. (2002) 6 SCC 426, the cheque in question had been issued by the guarantor (wife) of the principal debtor (husband) in respect of a hire

*purchase agreement entered into by the principal debtor with the complainant for purchase of a car. The cheque in question was issued by the guarantor towards part payment to the appellant/complainant. The same was returned unpaid on account of insufficient funds. The issue raised before the Supreme Court was whether a complaint under Section 138 of the NI Act was maintainable in respect of the said cheque. The High Court had come to the conclusion that when a cheque was issued as security, no complaint would lie under Section 138 of the NI Act, since the cheque issued could not be said to be for the purpose of discharging any debt or liability. The High Court held that the cheque must be for payment of money from out of the drawer's account. In the case of a cheque issued by a guarantor or surety, it could not be said to be for immediate payment of money. The High Court placed reliance on the decision of the Kerala High Court in **Sreenivasan Vs. State of Kerala** (1999) 3 K.L.T. 849 wherein the Kerala High Court had observed:*

“A comparative reading of the principle laid down by the Andhra Pradesh High Court and the mandatory provisions laid down in Section 138 of the Negotiable Instruments Act is crystal clear that when a cheque has been issued as a security, no complaint will lie under Section 138 of the Negotiable Instruments Act.”

31. The Supreme Court reversed the decision of the High Court by placing reliance on the language of Section 138 of the NI Act. Section 138 begins with the word, ‘where any cheque.....’. These three words were held to be significant. In particular, emphasis was laid on the use of the word, ‘any’- which suggests that, if, for whatever reason a cheque drawn on an account maintained by the drawer with the banker in favour of another person for the discharge of any debt or other liability is dishonoured, the liability under Section 138 NI Act cannot be avoided. The Supreme Court also emphasized that the legislature had been careful enough to use not only the expression “discharge, in whole or in part, of any debt”, but

has also included the expression 'other liability' in the language of Section 138 NI Act. The Supreme Court held that the issue regarding the liability of a guarantor and the principal debtor being co-extensive, was out of purview of Section 138 of the NI Act and did not call for any discussion. The Supreme Court held:

“11.The language of the Statute depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act. 'Any cheque' and 'other liability' are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the Statute. Any contra interpretation would defeat the intent of the legislature. The High Court, it seems, got carried away by the issue of grantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act.”

Thus, the view taken by the Kerala High Court in **Sreenivasan** (supra) was clearly not approved by the Supreme Court. The Supreme Court rejected the wide proposition that the dishonour of a security cheque issued by a guarantor from his account would not attract Section 138 of the NI Act.

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40. I may take note of a decision of the Karnataka High Court in **M/s. Klen & Marshalls Manufacturers & Fertilisers Ltd. v. M/s Shri Ishar Alloy Steels Ltd.**, Crl A No.1610/2001 decided on 26.07.2006. The accused A-6 issued a hundi in favour of the accused A-1 towards supply of certain materials. Under an agreement between A-1 and the complainant, the

complainant discounted the hundi and paid an amount of Rs.50 lacs to A-1. In addition to the discounted hundi, A-1 also issued a cheque as security to bind himself, in case A-6 does not pay the hundi amount on the due date. Eventually, the hundi was not paid by A-6 and the cheque issued by A-1 was presented for encashment, but was dishonoured. Consequently, after issuance of statutory notice under Section 138 of NI Act, the complainant preferred the complaint. The accused raised several defences, including the defence that the cheque in question was a security cheque. In this regard, the accused relied on the judgment in **Sreenivasan** (supra). By referring to an earlier decision in the case of **Smt. Umaswamy v. K.N. Ramanath**, 2006 (5) AIR Kar R 171, wherein a contrary view had been taken, reliance on **Sreenivasan** (supra) was rejected. In **Umaswamy** (supra), the Karnataka High Court had taken the view that the cheque issued either for discharge of debt or as a security makes little distinction in law. Dishonour of cheque in both the situations attracts valid prosecution under Section 138 of N.I. Act. Criminal Appeal No.1842/2008 from the judgment of the Karnataka High Court in **M/s Klen & Marshalls** (supra) was dismissed by the Supreme Court on 17.08.2010 by observing that “Having heard learned counsel for the parties and perused the record, we find no infirmity in the impugned order”. Thus, the view of the Karnataka High Court in **M/s. Klen & Marshalls** (supra) was affirmed.

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44. In **Sai Auto Agencies through its partner Dnyandeo Ramdas Rane v. Sheikh Yusuf Sheikh Umar**, 2011 (1) Crimes 180, the defence of the respondent/accused was that, in relation to purchase of a tractor and equipments from the appellant, five blank cheques were given only as security. The respondent claimed that the complainant had already received the entire purchase consideration, and that the cheque in question was without consideration. The Court rejected the defence of the accused that the entire consideration stood paid to the appellant supplier. Relying upon **Beena Shabeer** (supra), the High Court observed:

*“7. Necessarily, the cheque given as a security, if bounced, shall be the subject-matter of a prosecution under Section 138 of the Act. **So, the contention of the accused that cheque (exhibit 28) was given only as a security will not enable him to escape from the clutches of law”.***

(emphasis supplied)

45. The High Court further held as follows:

“9. Even if blank cheque has been given towards liability or even as security, when the liability is assessed and quantified, if the cheque is filled up and presented to the bank, the person who had drawn the cheque cannot avoid the criminal liability arising out of Section 138 of the Negotiable Instruments Act”.

Thus, the myth that the dishonour of a cheque given as a security, cannot be the subject matter of a complaint under Section 138 NI Act was busted in this decision as well.

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55. I may refer to another decision of this Court in **Haryana Petrochemicals Ltd. & Anr. v. Indian Petrochemicals Ltd. & Anr.**, 2015 (1) JCC (NI) 11. The petitioner, Haryana Petrochemicals had issued cheques in lieu of supply of chemicals by the respondent Indian Petrochemicals, which had been dishonoured upon presentation. The learned Magistrate had convicted the petitioners under Section 138 of NI Act. The said judgment was endorsed by the learned Sessions Judge. Consequently, a revision has been preferred before the High Court. The primary submission of the petitioner was that the cheques in question were security cheques, as it was a regular trade practice that after the goods had been received by the petitioner company, fresh cheques in lieu of the security cheques were issued by the petitioners. It was argued that the security cheques, by themselves, would not constitute a legal

debt or liability of the petitioner towards the complainant. The Court observed that the manner in which the parties transacted their business was, that the complainant company would send the goods along with the invoices as per the value of the goods. The petitioner/purchaser enjoyed a credit facility, i.e. the payment was not to be made immediately upon receipt of goods. For this reason, the security cheques were issued by the petitioner at the time of taking delivery of the goods. However, they were to be returned upon receipt of payment by the respondent/seller. In case payment was not forthcoming, the security cheques were considered as consideration towards supply of goods, and the respondent would bank the cheques. The cheques in question had similarly been banked since payment was not otherwise made by the petitioner/accused on the expiry of the credit period.

56. This Court, by placing reliance on **Beena Shabeer** (*supra*), rejected the petitioner's submission that the cheques in question being security cheques could not be the foundation of a complaint under Section 138 of NI Act. ”

18. In **Suresh Chandra Goyal** (*supra*), the accused/ respondent had placed reliance on, *inter alia*, **M.S. Narayana Menon @ Mavi Vs. State of Kerala & Another**, (2006) 6 SCC 39. **M.S. Narayana Menon** (*supra*), incidentally, was also a case involving issuance of a security cheque for undertaking share transactions. The analysis of **M.S. Narayana Menon** (*supra*) undertaken by this Court reads as follows:

“32. The accused has placed reliance on **M.S.Narayana Menon** (*supra*). In this case, the cheque had been issued by the appellant – who was transacting shares with the share broker/second respondent/complainant. The appellant/accused disputed the statement of account relied upon by the complainant, on the basis whereof it was claimed that the cheque amount was due and outstanding. The Supreme Court examined the nature of the transactions undertaken between the

parties in the light of the evidence before it. The Supreme Court held that the complainant had not been able to explain the discrepancies in his books of accounts. The complainant did not bring on record any material to show that the parties had transactions, other than those which had been entered into through the Cochin Stock Exchange. The Supreme Court held that the so called acknowledgement, as correct, of some of the statements of account was not enough since, admittedly, there was no acknowledgement in respect of five statements of accounts. After examining the evidence, the Supreme Court observed as follows:

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

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

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

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

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

“138. While analyzing different decisions rendered by this Court, an attempt has been made to read the judgments as should be read under the rule of precedents. A decision, it is trite, should not be read as a statute.

139. A decision is an authority for the questions of law determined by it. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment as is well-known, must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it. (See Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr., [2002]1SCR621 , Union of India and Ors. v. Dhanwanti Devi and Ors. , (1996) 6 SCC 44 , Dr. Nalini Mahajan v. Director of Income Tax (Investigation) and Ors., [2002] 257 ITR 123(Delhi) , State of UP and Anr. v. Synthetics and Chemicals Ltd. and Anr. , 1991 (4) SCC 139 , A-One Granites v. State of U.P. and Ors., AIR 2001

SCW 848 and Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and Ors., (2003) 2 SCC 111.

140. Although, decisions are galore on this point, we may refer to a recent one in State of Gujarat and Ors. v. Akhil Gujarat Pravasi V.S. Mahamandal and Ors., AIR2004SC3894 wherein this Court held:

"... It is trite that any observation made during the course of reasoning in a judgment should not be read divorced from the context in which they were used.""

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

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

"It is to be noticed that the observation made by the apex court in **Narayana Menon's** case that "..... if a cheque is issued for security or for any other purpose the same would not come within the purview of Section 138 of the Act.....". This was a passing observation in that case with reference to the facts found therein. It cannot be

construed as an axiomatic statement of law to be mechanically applied, in all circumstances”.

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

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

19. The decision in **Indus Airways** (supra), relied upon by the respondent in the present case, was also taken note of and discussed as follows:

“50. In **Indus Airways Pvt. Ltd. & Ors. v. Magnum Aviation Pvt. Ltd.**, IV (2014) SLT 321, the question that arose for consideration before the Supreme Court was, whether the post dated cheques issued by the appellants (purchasers) as an advance payment in respect of purchase orders could be considered in discharge of a legally enforceable debt or other liability and, if so, whether the dishonour of such cheques amount to an offence under Section 138 of NI Act. The appellants before the Supreme Court were the purchasers who had placed purchase orders and issued post dated cheques in favour of the respondent towards advance payment. One of the terms and conditions of the contract was that the entire

payment would be made to the supplier in advance. The supplier claimed that the advance payment had to be made, as it had to procure the parts from abroad. The cheques were dishonoured upon presentation on the ground that the purchasers had stopped payment. Thereafter, the purchasers cancelled the purchase orders and requested for return of the cheques. The respondent/seller insisted on collecting payment and initiated a complaint under Section 138 of NI Act after sending a demand notice.

*51. This Court, following its decision in **Moji Engineering Systems Ltd. & Ors. v. A.B. Sugars Ltd.**, 154 (2008) DLT 579, held that the issuance of a cheque at the time of signing such a contract has to be considered against a liability, as the amount written in the cheque is payable by the person on the date mentioned in the cheque.*

52. The Supreme Court did not agree, and held that to attract an offence under Section 138, there should be a legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of existing or past adjudicated liability is a sine qua non for bringing an offence under Section 138 of the NI Act. It was held that if the cheque is issued as an advance payment for purchase of goods and, for any reason, purchase order is not carried to its logical conclusion either because of its cancellation or otherwise, and the material or goods for which the purchase order was placed is not supplied, the cheque could not be held to have been drawn for an existing debt or liability. It was held that the payment made by a cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability. While disagreeing with the view of this Court, the Supreme Court held as follows:

“.... If at the time of entering into a contract, it is one of the conditions of the contract that the purchaser has to pay the amount in advance and there is breach of such condition then purchaser may have to make good the loss that

*might have occasioned to the seller but that does not create a criminal liability under Section 138. **For a criminal liability to be made out under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque.** We are unable to accept the view of the Delhi High Court that the issuance of cheque towards advance payment at the time of signing such contract has to be considered as subsisting liability and dishonour of such cheque amounts to an offence under Section 138 of the N.I. Act.*

.... ..

*In what we have discussed above, **if a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise and material or goods for which purchase order was placed is not supplied by the supplier, in our considered view, the cheque cannot be said to have been drawn for an existing debt or liability.***

(emphasis supplied)

53. The Supreme Court referred to the decisions of the Andhra Pradesh High Court and Gujarat High Court as follows:

“14. In Swastik Coaters Pvt. Ltd v. Deepak Brothers and Ors., 1997 Cri.L.J. 1942 (AP), the single Judge of the Andhra Pradesh High Court while considering the explanation to Section 138 held:

*“... Explanation to Section 138 of the Negotiable Instruments Act clearly makes it clear that **the cheque***

shall be relateable to an enforceable liability or debt and as on the date of the issuing of the cheque there was no existing liability in the sense that the title in the property had not passed on to the accused since the goods were not delivered....

15. The Gujarat High Court in *Shanku Concretes Pvt. Ltd. and Ors. v. State of Gujarat and Anr.*, 2000 Cri.L.J. 1988 (Guj.) dealing with Section 138 of the N.I. Act held that **to attract Section 138 of the N.I. Act, there must be subsisting liability or debt on the date when the cheque was delivered. The very fact that the payment was agreed to some future date and there was no debt or liability on the date of delivery of the cheques would take the case out of the purview of Section 138 of the N.I. Act.** While holding so, Gujarat High Court followed a decision of the Madras High Court in *Balaji Seafoods Exports (India) Ltd. and Anr. v. Mac Industries Ltd.* 1999 (1) CTC 6”.

(emphasis supplied)

54. Reference was also made to the decision of the Kerala High Court in ***Supply House, represented by Managing Partner v. Ullas, Propreitor Bright Agencies & Anr.***, 2006 Cri. LJ 4330 (Kerala). In this case, the post dated cheque had been issued by the accused while placing the order for supply of goods. However, the supply of goods was not made by the complainant. Consequently, the accused first instructed the bank to stop payment of the cheque, and then requested the complainant not to present the cheque as the goods had not been supplied. The Kerala High Court held that the said cheque could not be said to be one issued in discharge of a liability.”

20. It is the observation made by the Supreme Court in *Indus Airways* (supra) – that the dishonoured cheque should be in relation to a debt or other liability subsisting on the date of drawal of the cheque, to be able to maintain a complaint under Section 138 of the NI Act, which is the cornerstone of the legal submission of the respondents/ accused.

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

was no debt or other liability existing relatable to the cheque, since the contracts stood terminated on the date of presentation of the cheque. At best, only a civil liability existed in damages.

22. However, in the present case, the liability or debt is claimed to have arisen under the contract in respect of which the dishonoured cheque was issued. The cheque was issued precisely to secure the debt/ liability that may arise under the contract on account of the accused undertaking the share sale/ purchase transactions on credit basis through the appellant broker. Thus, the decision in *Indus Airways* (supra) cannot be mechanically applied in the present case.

23. In *Indus Airways* (supra), the earlier decision in *Beena Shabeer* (supra) was not brought to the notice of the Supreme Court and was, therefore, not considered. Both *Indus Airways* (supra) and *Beena Shabeer* (supra) are decisions of co-equal benches. In *Beena Shabeer* (supra), the Supreme Court did not approve the decision in *Shreenivasan* (supra) wherein the High Court had held that when a cheque is issued as a security, no complaint will lie under Section 138 of the NI Act. Thus, if the observations made by the Supreme Court in *Indus Airways* (supra) are understood as laying down a general legal proposition that on the date of issuance of the cheque the debt/other liability should be subsisting to maintain a complaint under Section 138 of the NI Act, the same would not align with the ratio laid down in the earlier decision in *Beena Shabeer* (supra).

24. As noticed above, in *Indus Airways* (supra) the Supreme Court was considering the fact situation wherein the purchase order was not executed with supply of the contracted goods and, thus, the cheque issued by the purchaser towards advance payment was held as not covered by Section 138 of NI Act. But what happens, where the purchaser while placing the purchase order issues in advance a post-dated cheque; goods/ services are supplied in terms of the contract, and; the post-dated cheque upon presentation on the due date gets dishonoured. The Supreme Court was not dealing with such a fact situation. Could it be said that, because there was no pre-existing or pre-determined debt or other liability on the date of issue of the cheque by the purchaser (as the goods/ services were supplied only after the issuance of the post-dated cheque), a complaint under Section 138 NI Act would not lie?

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

26. The Explanation to Section 138 NI Act reads:

“Explanation –For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.”

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

28. In my view, therefore, the scope of Section 138 NI Act would cover cases where the ascertained and crystallised debt or other liability exists on the date that the cheque is presented, and not only to case where the debt or other liability exists on the date on which it was delivered to the seller as a post-dated cheque, or as a current cheque with credit period. The liability, though, should be in relation to the transaction in respect whereof the cheque is given, and cannot relate to some other independent liability. If, on the date that the cheque is presented, the ascertained and crystallised debt or other liability relatable to the dishonoured cheque exists, the dishonor of the cheque would invite action under Section 138 NI Act. There could be situations where, for example, an issue may be raised with regard to the quality, quantity, deficiency, specifications, etc. of the goods/services supplied, or accounting. It would have to be examined on a case to case basis, whether an ascertained or crystallised debt or other liability exists, which could be enforced by resort to Section 138 NI Act, or not.

29. The decision in *Collage Culture* (supra) is premised entirely on the decision of the Supreme Court in *M.S. Narayana Menon* (supra). It appears that the decision in *Beena Shabeer* (supra) was not cited before the Court. In the light of the aforesaid discussion, I am of the view that this decision does not come to the aid of the accused.

30. Thus, I am of the considered view that there is no merit in the legal submission of the respondent accused that only on account of the fact that the cheque in question was issued as security in respect of a contingent liability, the complaint under Section 138 of the NI Act would not be maintainable. At the same time, I may add that it would need examination on a case to case basis as to whether, on the date of presentation of the dishonoured cheque the ascertained and crystallised debt or other liability did not exist. The onus to raise a probable defence would lie on the accused, as the law raises a presumption in favour of the holder of the cheque that the dishonoured cheque was issued in respect of a debt or other liability. As settled by the Supreme Court, the said onus obliges the accused to raise a defence – either by picking holes in the case of the complainant and/ or by positively leading defence evidence which leads the Court to believe that there is a probable defence raised by the accused to the claim of the complainant with regard to the existence of the debt or other liability. The said onus does not cast as stringent an obligation on the accused, as it casts on the complainant, who has to prove beyond reasonable doubt the guilt of the accused.

31. Therefore, I now turn to the facts of the present case to examine as to whether, or not, the accused has been able to raise a probable defence to cast

a doubt on the claim made by the complainant with regard to the existence of an ascertained and crystallised debt or other liability in relation to the transactions in respect whereof the cheque in question had been issued as security.

32. The complainant has produced the daily sauda confirmation (Ex. CW1/10 to 15) and the cash difference bills (Ex. CW-1/16) in respect of the share transactions recorded in Ex.CW-1/10 to Ex.CW-1/15, on record to substantiate its claim. The cash difference bills (Ex. CW-1/16) are for the period of 02.07.1996 to 16.07.1996. CW-1, Dilip Kumar Aggarwal in his examination-in-chief stated that *“He allowed the transaction on line and detail of the transaction are Exhibited Ex CW1/10 to Ex CW1/15 and the difference bills are collectly Exhibited Ex CW1/16 (Page 17 to 37)”*.

33. CW-1 Dilip Kumar Agarwal also exhibited the letter dated 24.07.1996 of the accused as Ex. CW-1/17 along with which the accused tendered a cheque of Rs.50,000/- bearing no.412933 dated 24.07.1996 drawn on its Bank. In this letter, he inter alia, stated *“I am giving this cheque towards my liabilities”*. Pertinently, accused no.2 did not deny his signatures on the said letter. He only claimed that the said document was signed in blank and given as such to the complainant. This defence of the accused would be tested a little later. The aggregate of cash difference bills (Ex. CW-1/16) which consist of 21 pages, purports to project the liability of the accused as on 24.07.1996 to the tune of Rs. 14,42,789.50.

34. I may now turn to examine the defence of the accused. The accused produced DW-2 Satish Kumar Chugh as its prime witness. In his statement

recorded under Section 313 Cr PC, the accused DW-2 admitted his signatures on the cheque. He also admitted that he had filled the payee and the date himself. However, he denied having filled the amount. He stated that the rest of the particulars were not filled by him. He also admitted to have given the cheque to the complainant. He denied the transactions recorded in Ex CW-1/10 to CW-1/15. He claimed that the complainant was dealing with the said shares on its own. He claimed that he had given order to the complainant to purchase only 700 shares, i.e. 500 shares of English Indian Clays Limited and 200 shares of State Bank of India. He stated that he had no concern with the difference bills Ex. CW-1/16. He stated that the cheque in question was without any legally enforceable liability. In his examination in chief, DW-2 stated that the complainant Credential Leasing & Credits Limited took the signatures on certain blank papers and told him that the same were required as some formality with SEBI for making him as their sub-broker. He further deposed that Shruti Investments is in HUF business of which he is a Karta and that Shruti Investments was dealing only in secondary market of shares. He stated that Shruti Investment was doing its business of sale and purchase of shares through two or three brokers. DW-2 further deposed that:

“It is correct that for becoming a sub-broker with a member of National Stock Exchange, a margin money has to be deposited. The said margin money has to be deposited by the interested person who wants to become sub-broker to the member of National Stock Exchange. No other security is required except the margin money for the purpose of becoming a sub-broker with the member of NSE. Margin money is kept by the member of NSE to secure himself from the fluctuation in the share prices. I did not pay any margin money to complainant

company when I did formalities regarding the sub-brokership with the complainant company”.

35. The defence set up by the respondent/accused that accused no.2 had given blank signed papers to the appellant/complainant is unbelievable. Firstly, there is no contemporaneous record produced by the accused to show that the accused had delivered blank signed papers to the complainant for any purpose, much less for the purpose of becoming a sub-broker of the complainant. Secondly, a perusal of Ex. CW-1/10, 1/11, 1/13, 1/15 and 1/17 shows that the signatures of accused no.2 on the said documents are so positioned and placed as to rule out the possibility of the said documents being filled in later. Ex. CW-1/10, 1/11, 1/12, 1/13 and 1/15 are the daily sauda confirmation on a printed format. The signatures appear outside the printed area and are so placed as to suggest that they have been consciously engrossed on these documents close to the printed area. Ex. CW-1/17 is a hand written communication, and there is nothing to suggest that the writing in the said document is different from the signatures of DW-2, which he has admitted. Pertinently, Ex. CW-1/17 records that the accused issued a cheque of Rs.50,000/- towards his liabilities. The said letters along with the cheque were issued on the 24.07.1996, i.e. the same day on which the last of the cash difference bills were prepared. The cash difference bills, as noticed herein above, are premised on the daily sauda confirmation acknowledged by the accused.

36. While claiming that the complainant took his signatures on certain blank papers and *“told me that the same were required as some formality with SEBI for making me as sub-broker”*, the accused does not even disclose

as to who in the organisation of the complainant had held out such a representation to him. While he admits that to become a sub-broker of a member of the NSE margin money has to be deposited to secure the broker/member of NSE, DW-2 states that he did not give any margin money to the appellant member of NSE to become a sub-broker. It is not explained by DW-2, as to why such a preferential treatment was meted out to the respondents by the appellant, and why the appellant exposed itself to such a risk qua the respondents share transactions. This information was within the personal knowledge of DW-2, and his failure to disclose the same raises an adverse inference against the accused. The defence of the accused is merely an *ipsi dixi* of the accused and appears to be too farfetched and sham. It cannot be construed as a probable defence. A defence would be considered to be probable if it appeals to the Court as probable and reasonable keeping in mind the natural course of conduct of a prudent human being of reasonable intelligence. Thus, the debt/other liability of the accused to the tune of Rs.14.42 lacs stood ascertained, crystallised and established from Ex. CW-1/16 – being the cash difference bills as on 24.07.1996. The cheque in question when presented was in respect of a crystallised outstanding debt owed by the accused. Consequently, its dishonour coupled with the non payment of the cheque amount despite statutory notice led to the commission of the offence under Section 138 of the NI Act.

37. The learned Magistrate founded the impugned judgment on a wrong premise of law, holding that merely because the cheque in question was issued as a security cheque and held that the same could not be the basis of

a complaint under Section 138 of the NI Act. The learned Magistrate overlooked the legal position as discussed hereinabove, and in particular the judgment of the Supreme Court in *Beena Shabeer* (supra). Since the trial court has based its decision on an erroneous view of law, this Court is inclined to interfere with the judgment of acquittal in the light of the guidelines laid down by the Supreme Court in *Ghurey Lal v. State of U.P.*, (2008) 10 SCC 450. The impugned judgment is, accordingly, set aside and the respondents/accused are held guilty and convicted of the offences under Section 138 of the NI Act.

VIPIN SANGHI, J.

JUNE 29, 2015