

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (C) No. 1351 of 2016**

1. Vikas Bafna S/o Late Lakshmipat Bafna, aged about 43 years, Director, Bigboss Steel & Allys Limited, 4/2A Waterloo Street, Kolkata, 700 069 West Bengal.
2. Bigboss Steel & Alloys Limited, 4/2A Waterloo Street, Kolkata, 700 069 West Bengal Through Director, Vikas Bafna S/o Late Lakshmipat Bafna, aged about 43 years, Bigboss Steel & Alloys Limited, Village Padampur, Post Jasipur, District Mayurbhanj, Odisha.

---- Appellants**Versus**

1. Union of India, Through its Secretary, Legislative Department, Ministry of Law and Justice, 4th Floor, A Wing, Shastri Bhawan, New Delhi, Delhi.
2. State of Chhattisgarh, Through Secretary, Law Department, Government of Chhattisgarh, Mantralaya, Capital Complex, Naya Raipur, Tahsil and District Raipur, Chhattisgarh.
3. Shri Bajrang Power & Ispat Limited, Village Borjhara, Urla Guma Road, Raipur Tahsil and District Raipur, Chhattisgarh.

---- Respondents

For Petitioners	: Shri Rajkamal Singh, Advocate.
For Respondent/Uol	: Shri Narendra Kumar Vyas, Assistant Solicitor General
For Respondent/State	: Shri Prafull N Bharat, Additional Advocate General.

Hon'ble Shri Deepak Gupta, Chief Justice
Hon'ble Shri Sanjay K. Agrawal, J.

Order on Board**Per Deepak Gupta, Chief Justice****05/07/2016**

1. By means of this petition, the Petitioners have challenged the constitutional validity of sub-section (2) of Section 142 and Section 142A of the Negotiable Instruments Act as amended by The Negotiable Instruments (Amendment) Act, 2015.
2. The Petitioners had issued a cheque in favour of private Respondent No. 3. The Bank of the Petitioners is Axis Bank situated at Kolkata. The

cheque was presented by Respondent No. 3 at Raipur and when the cheque was dishonoured, proceedings under the Negotiable Instruments Act (hereinafter called 'the Act') were initiated at Raipur in the year 2011. These proceedings continued till 2014. Thereafter, a three Judge Bench of the Apex Court decided a number of cases, lead case being *Dashrath Rupsingh Rathod v. State of Maharashtra*, (2014) AIR SCW 4798 and held that only that Court will have the jurisdiction to entertain the complaint under Section 138 of the Act where the Branch on which the cheque has been drawn, is situated. The effect of this judgment was virtually nullified by the Negotiable Instruments (Amendment) Ordinance, 2015 issued on 15.06.2016 which was replaced by the Negotiable Instruments (Amendment) Second Ordinance, 2015, issued on 22.09.2015 and finally both the ordinances were validated by Negotiable Instruments (Amendment) Act, 2015 which is the subject matter of challenge in this writ petition.

3. What should be the situs of the proceedings initiated by the holder of the cheque against the drawer of the cheque has been the subject matter of litigation in a large number of cases. Initially, a two Judge Bench of the Apex Court in case of *K. Bhaskaran v. Shankaran Vaidhyan Balan* {(1999) 7 SCC 510} held that the offence under Section 138 of the Negotiable Instruments Act is complete only with the concatenation of a number of acts and these acts are - (1) drawing of the cheque, (2) presentation of the cheque to the Bank, (3) returning the cheque unpaid by the drawee Bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount which has been dishonoured (5) failure of the drawer to make payment within 15 days of the receipt of the cheque. It was held that the proceedings under Section 138 of the Negotiable Instruments Act could be lodged even at the place where notice was issued or where the cheque was presented for payment. Thereafter the Apex Court dealt with this matter in *Harman Electronics Pvt. Ltd. v. National Panasonic India Pvt. Ltd.* {(2009) 1 SCC 720}

wherein emphasis was laid on the receipt of notice. It was further held that the cause of action cannot depend upon any act of omission or commission on the part of the accused which was read to be as "complainant". In most cases, the Apex Court applied Bhaskaran (supra) and therefore, the matter was referred to the larger Bench and settled by the Apex Court in Dashrath (supra).

4. The legal provisions as they stood at the relevant time were as follows:

"142. Cognizance of offences.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138;

Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138."

Code of Criminal Procedure, 1973

"177. Ordinary place of inquiry and trial.- Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.

178. Place of inquiry or trial.- (a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and partly in another, or

(c) where an offence is a continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas."

5. The Apex Court on analyzing the legal provisions held that civil law concepts, such as cause of action, were not strictly applicable to the criminal proceedings under Section 138 of the Negotiable Instruments Act. Thereafter, on a conjoint reading of Section 138 of the Negotiable Instruments Act and Section 177 of the Code of Criminal Procedure, the Apex Court held that the return of the cheque by the drawee Bank alone constitutes commission of an offence and indicates the place where the offence is committed. The relevant

portion of the judgment of the Apex Court reads as follows:

“16. Section 138 NI Act is structured in two parts – the primary and the provisory. It must be kept in mind that the Legislature does not ordain with one hand and immediately negate it with the other. The proviso often carves out a minor detraction or diminution of the main provision of which it is an appendix or addendum or auxiliary. Black Law Dictionary states in the context of a proviso that it is – “a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided. A clause or part of a clause in a statute, the office of which is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extent.” It should also be kept in perspective that a proviso or a condition are synonymous. In our perception in the case in hand the contents of the proviso place conditions on the operation of the main provision, while it does form a constituent of the crime itself, it modulates or regulates the crime in circumstances where, unless its provisions are complied with, the already committed crime remains impervious to prosecution. The proviso to Section 138 of the NI Act features three factors which are additionally required for prosecution to be successful. In this aspect Section 142 correctly employs the term “cause of action” as compliance with the three factors contained in the proviso are essential for the cognizance of the offence, even though they are not part of the action constituting the crime. To this extent we respectfully concur with Bhaskaran (AIR 1999 SC 3762) in that the concatenation of all these concomitants, constituents or ingredients of Section 138 NI Act, is essential for the successful initiation or launch of the prosecution. We, however, are of the view that so far as the offence itself the proviso has no role to play. Accordingly a reading of Section 138 NI Act in conjunction with Section 177, CrPC leaves no manner of doubt that the return of the cheque by the drawee bank alone constitutes the commission of the offence and indicates the place where the offence is committed.

17. In this analysis we hold that the place, situs or venue of judicial inquiry and trial of the offence must logically be restricted to where the drawee bank, is located. The law should not be warped for commercial exigencies. As it is Section 138 of the NI Act has introduced a deeming fiction of culpability, even though, Section 420 is still available in case the payee finds it advantageous or convenient to proceed under that provision. An interpretation should not be imparted to Section 138 which will render it as a device of harassment i.e. by sending notices from a place which has no casual connection with the transaction itself, and/or by presenting the cheque(s) at any of the banks where the payee may have an account. In our discernment, it is also now manifest that traders and businessmen have become reckless and incautious in extending credit where they would heretofore have been extremely hesitant, solely because of the availability of redress by way of criminal proceedings. It is always open to the creditor to insist that the cheques in question be made payable at a place of the creditor's convenience. Today's reality is that the every Magistracy is inundated with prosecutions under Section

138 NI Act, so much so that the burden is becoming unbearable and detrimental to the disposal of other equally pressing litigation. We think that Courts are not required to twist the law to give relief to incautious or impetuous persons; beyond Section 138 of the NI Act.

18. We feel compelled to reiterate our empathy with a payee who has been duped or deluded by a swindler into accepting a cheque as consideration for delivery of any of his property; or because of the receipt of a cheque has induced the payee to omit to do anything resulting in some damage to the payee. The relief introduced by Section 138 of the NI Act is in addition to the contemplations in the IPC. It is still open to such a payee recipient of a dishonoured cheque to lodge a First Information Report with the Police or file a Complaint directly before the concerned Magistrate. If the payee succeeds in establishing that the inducement for accepting a cheque which subsequently bounced had occurred where he resides or ordinarily transacts business, he will not have to suffer the travails of journeying to the place where the cheque has been dishonoured. All remedies under the IPC and CrPC are available to such a payee if he chooses to pursue this course of action, rather than a Complaint under Section 138 of the NI Act. And of course, he can always file a suit for recovery wherever the cause of action arises dependent on his choosing.

19. The interpretation of Section 138 of the NI Act which commends itself to us is that the offence contemplated therein stands committed on the dishonour of the cheque, and accordingly the JMFC at the place where this occurs is ordinarily where the Complaint must be filed, entertained and tried. The cognizance of the crime by the JMFC at that place however, can be taken only when the concomitants or constituents contemplated by the Section concatenate with each other. We clarify that the place of the issuance or delivery of the statutory notice or where the Complainant chooses to present the cheque for encashment by his bank are not relevant for purposes of territorial jurisdiction of the Complaints even though non-compliance thereof will inexorably lead to the dismissal of the complaint. It cannot be contested that considerable confusion prevails on the interpretation of Section 138 in particular and Chapter XVII in general of the NI Act. The vindication of this view is duly manifested by the decisions and conclusion arrived at by the High Courts even in the few cases that we shall decide by this Judgment. We clarify that the Complainant is statutorily bound to comply with Section 177 etc. of the CrPC and therefore the place or situs where the Section 138 Complaint is to be filed is not of his choosing. The territorial jurisdiction is restricted to the Court within whose local jurisdiction the offence was committed, which in the present context is where the cheque is dishonoured by the bank on which it is drawn.”

6. The Apex Court realized that the judgment in Bhaskaran (supra) had been followed by all the Courts and if the judgment in case of Dashrath (supra) was applied strictly, a large number of cases would have to be transferred.

The question before the Apex Court was whether the judgment in Dashrath (supra) should be made prospective or not. The Apex Court chose a middle path and held that those cases where the recording of evidence was still to commence under Section 145 of the Negotiable Instruments Act would be transferred and those cases where recording of evidence has started, would remain in the Courts where they had been filed regardless of the fact whether the Court had jurisdiction or not. The relevant portion of the judgment reads as follows:

“ 20. We are quite alive to the magnitude of the impact that the present decision shall have to possibly lakhs of cases pending in various Courts spanning across the country. One approach could be to declare that this judgment will have only prospective pertinence, i.e. applicability to Complaints that may be filed after this pronouncement. However, keeping in perspective the hardship that this will continue to bear on alleged accused/respondents who may have to travel long distances in conducting their defence, and also mindful of the legal implications of proceedings being permitted to continue in a Court devoid of jurisdiction, this recourse in entirety does not commend itself to us. Consequent on considerable consideration we think it expedient to direct that only those cases where, post the summoning and appearance of the alleged Accused, the recording of evidence has commenced as envisaged in Section 145(2) of the Negotiable Instruments Act, 1881, will proceeding continue at that place. To clarify, regardless of whether evidence has been led before the Magistrate at the pre-summoning stage, either by affidavit or by oral statement, the Complaint will be maintainable only at the place where the cheque stands dishonoured. To obviate and eradicate any legal complications, the category of Complaint cases where proceedings have gone to the stage of Section 145(2) or beyond shall be deemed to have been transferred by us from the Court ordinarily possessing territorial jurisdiction, as now clarified, to the Court where it is presently pending. All other Complaints (obviously including those where the accused/respondent has not been properly served) shall be returned to the Complainant for filing in the proper Court, in consonance with our exposition of the law. If such Complaints are filed/refiled within thirty days of their return, they shall be deemed to have been filed within the time prescribed by law, unless the initial or prior filing was itself time barred.”

7. Bhaskaran (supra) virtually held the field for a long time and most proceedings for dishonour of cheques had been initiated by the holder of the cheques in the Courts having jurisdiction over the place where the cheque had been presented for payment. The judgment of the Apex Court was obviously going to affect a very large number of cases.

8. The judgment in Dashrath (*supra*) was delivered on 01.08.2014. The Union of India stepped in and promulgated an ordinance on 15.06.2015 introducing number of amendments in the principal Act, but we are only concerned with sub-section (2) introduced in Section 142 and Section 142A of the Negotiable Instruments Act.

9. The ordinance dated 15.06.2015 was to outlive its life after six months but since the Parliament met in between fresh ordinance was issued on 22.09.2015 and finally, the Act itself was amended by the Negotiable Instruments (Amendment) Act, 2015. Section 142(2) and Section 142A as introduced by this Amendment Act have been made effective from 15.06.2015, the date of first ordinance and read as follows:

"3. In the principal Act, section 142 shall be numbered as sub-section (1) thereof and after sub-section (1) as so numbered, the following sub-section shall be inserted, namely:—

"(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.— For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account."

4. In the principal Act, after section 142, the following section shall be inserted, namely:—

"142A. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any judgment, decree, order or direction of any court, all cases transferred to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, shall be deemed to have been transferred under this Act, as if that sub-section had been in force at all material times.

(2) Notwithstanding anything contained in sub-section (2) of section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court

having jurisdiction under sub-section (2) of section 142 or the case has been transferred to that court under sub-section (1) and such complaint is pending in that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.

(3) If, on the date of the commencement of the Negotiable Instruments (Amendment) Act, 2015, more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, before which the first case was filed and is pending, as if that sub-section had been in force at all material times.”

10. Shri Rajkamal Singh, learned counsel for the Petitioners urges that these amendments take away a valuable right of the accused to defend himself properly. He also urges that the effect of this Amendment Act nullifies the judgment of the Apex Court and this Act is violative of Article 13 of the Constitution of India and as such is liable to be struck down.

11. Article 13 of the Constitution of India reads as follows:

“13. Laws inconsistent with or in derogation of the fundamental rights.- (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,-

(a) law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law;

(b) laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.”

12. What Article 13 of the Constitution prescribes is that no law can be enforced in the territory of India which is inconsistent with the provision of Part-III of the Constitution of India dealing with fundamental rights and such law would be void to the extent of such inconsistency.

13. The main argument of Shri Rajkamal Singh is that the Parliament has made a law which takes away and abridges the rights of an accused under Negotiable Instruments Act to properly defend himself and to that extent the new provisions are affecting the fundamental right of the Petitioners to defend themselves and therefore, being violative of the Constitution of India are liable to be struck down. His next submission is that being a procedural amendment, the same would be retrospective and would take away the rights of the accused which were his lawful rights under the provisions of law as interpreted in case of Dashrath (supra). He also contends that this amendment causes extreme hardship to the accused and this hardship has been recognized in Dashrath (supra) at paragraph 20.

14. On the other hand, Shri Narendra Kumar Vyas, learned Assistant Solicitor General submits that the Parliament is well within its rights to pass a law even if the effect of law is to nullify the law laid down by the Apex Court. He further submits that this law does not take away the fundamental rights of the accused. The accused will have a right to defend himself in accordance with law and merely because he may have to defend himself at a place which is far away from his normal place of residence, is not a ground to hold that the law violates his fundamental rights. His last submission is that balancing the rights of the persons in whose favour cheques have been drawn and the rights of the person who have issued the cheques which have been dishonoured, the Parliament stepped in and exercised its legislative powers to enact the law in question.

15. At the outset, we may state that there can be no doubt that the Parliament has authority to enact a law which nullifies the effect of the judgment of the Apex Court. This proposition is beyond doubt and reference may be made to the judgment of the Apex Court in the case of Amarendra Kumar Mohapatra & Others v. State of Orissa & Others {(2014) 4 SCC 583}.

16. The only issue is whether the amendments take away or in any manner curtail the fundamental rights of the accused.

17. Every accused has a right to defend himself. Speedy trial and the right of the accused to get legal aid have now been read to be part of Article 21 of the Constitution. There can be no manner of doubt that each and every person who is an accused of an offence, is entitled to defend himself in accordance with law.

18. The issue is whether the law can be said to be violative of Article 13 of the Constitution only because the accused is put to some hardship. We are unable to agree with the contention of Shri Rajkamal Singh, learned counsel for the Petitioners in this behalf.

19. Either a law violates the fundamental rights and if it does, the law has to be struck down. But if the law does not violate the fundamental rights, merely because some hardship may be caused, that cannot be a ground to hold that the law is constitutionally invalid. To hold a law ultra vires, the Court must either come to the conclusion that the Parliament or the Legislative Assembly which has enacted the law either lacks legal constitutional competence to enact such law or it must clearly show that the law violates any one of the fundamental rights guaranteed to the citizen of the country under Part-III of the Constitution.

20. Though, Shri Rajkamal Singh has argued at length, his only ground of attack appears to be hardship and not direct violation of fundamental rights.

Even with regard to hardship, there can be two different views. Is it only the hardship of the person who issued the cheque which is later dishonoured to be taken into consideration or should the hardship of the person in whose favour such cheque has been issued, should also be taken into consideration? This is not a matter for the Courts to decide and it is for the legislature to decide in what manner a law should be enacted. The law as enacted earlier was slightly ambiguous and different interpretations were given to it for many long years. Earlier, the law as interpreted by the Apex Court and applied by all the Courts in India was that the Court having jurisdiction of the area where the cheque is presented for payment would have the jurisdiction to entertain a complaint under Section 138 of the Negotiable Instruments Act. Because of difference of opinion, the matter was referred to a Larger Bench and the Larger Bench held that the Bank on which the cheque was drawn and where the cheque was initially dishonoured would have the jurisdiction and mere communication of dishonour to the Bank where the cheque was presented would not clothe the latter Court with jurisdiction.

21. The Apex Court itself realised that this judgment would lead to very serious repercussions and therefore in para 20, the Apex Court has dealt with the issue whether the judgment should be made prospective or not. The Apex Court decided to make its judgment partly prospective by holding that those cases where recording of evidence under Section 145(2) of the Negotiable Instrument Act has already started would not be transferred, but all other cases would be transferred if they had not been instituted in the Court of competent jurisdiction.

22. Though, the question with regard to constitutional validity was not strictly raised before the Apex Court in case the Apex Court had felt that non-transfer of cases which had not been filed before the competent Court as adjudicating by it would affect the fundamental rights of the accused, then obviously it

would not have ordered that those cases in which the evidence has commenced under Section 145(2) would remain in the earlier Courts.

23. We may point out that in *M/s. Bridgestone India Pvt. Ltd. v. Inderpal Singh* (2015 AIR SCW 6556) the Apex Court has taken note of the amendments made and held as follows:

"11. It is, however, imperative for the present controversy, that the appellant overcomes the legal position declared by this Court, as well as, the provisions of the Code of Criminal Procedure. Insofar as the instant aspect of the matter is concerned, a reference may be made to Section 4 of the Negotiable Instruments (Amendment) Second Ordinance, 2015, whereby Section 142A was inserted into the Negotiable Instruments Act. A perusal of Sub-section (1) thereof leaves no room for any doubt, that insofar as the offence under Section 138 of the Negotiable Instruments Act is concerned, on the issue of jurisdiction, the provisions of the Code of Criminal Procedure, 1973, would have to give way to the provisions of the instant enactment on account of the non-obstante clause in sub-section (1) of Section 142A. Likewise, any judgment, decree, order or direction issued by a Court would have no effect insofar as the territorial jurisdiction for initiating proceedings under Section 138 of the Negotiable Instruments Act is concerned. In the above view of the matter, we are satisfied, that the judgment rendered by this Court in *Dashrath Rupsingh Rathod's* case would also not non-suit the appellant for the relief claimed.

12. We are in complete agreement with the contention advanced at the hands of the learned counsel for the appellant. We are satisfied, that Section 142(2)(a), amended through the Negotiable Instruments (Amendment) Second Ordinance, 2015, vests jurisdiction for initiating proceedings for the offence under Section 138 of the Negotiable Instruments Act, inter alia in the territorial jurisdiction of the Court, where the cheque is delivered for collection (through an account of the branch of the bank where the payee or holder in due course maintains an account). We are also satisfied, based on Section 142A(1) to the effect, that the judgment rendered by this Court in *Dashrath Rupsingh Rathod's* case, would not stand in the way of the appellant, insofar as the territorial jurisdiction for initiating proceedings emerging from the dishonor of the cheque in the present case arises."

24. True it is that there was no challenge to the vires of the Amendment Act before the Apex Court, but the Apex Court has now clearly held that according to the amendments now made, the territorial jurisdiction to entertain the

complaint under Section 138 of the Negotiable Instruments Act would be of the Court having jurisdiction of the area where the cheque is delivered for collection through an account of the Branch of the Bank where payee and holder maintain their accounts.

25. On a careful analysis of the case laws cited before us and the provisions of law, we are clearly of the view that the Parliament was fully competent to amend the Negotiable Instruments Act, even if the result of this amendment was to nullify the judgment of the Apex Court in Dashrath (supra). We are also clearly of the view that this amendment does not take away any fundamental right of the accused. He still has a right to defend himself. Therefore, we are clearly of the view that the challenge to the constitutional validity of the amendment is totally without any merit and we reject the writ petition.

26. In view of above discussion, we hold that sub-section (2) of Section 142 and Section 142A of the Negotiable Instruments Act as amended by Negotiable Instruments (Amendment) Act, 2015, are valid piece of legislation.

27. Accordingly, the writ petition is dismissed.

Sd/-
(Deepak Gupta)
CHIEF JUSTICE

Sd/-
(Sanjay K. Agrawal)
JUDGE

Head Note

Sub Section (2) of Section 142 and Section 142-A of the Negotiable Instruments Act as amended are valid piece of legislation.

परक्राम्य लिखित अधिनियम, यथा संशोधित, की धारा 142 की उपधारा 2 तथा धारा 142—ए विधान के वैध अंश हैं।