

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

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Reserved on: 20th December, 2016

Decided on: 17th March, 2017

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CRL.M.C. 2863/2016 & Crl.M.A. 12262/2016 (stay)

PADMA VATHY & ANR

..... Petitioners

Represented by: Mr. Siddharth Luthra & Mr. Manoj Ohri, Sr. Advs. with Mr. Manik Dogra, Mr. Haruy Chawla, Mr. Siddharth Das, Ms. Astha Nigam, Advs.

versus

STATE NCT OF DELHI & ANR

..... Respondents

Represented by: Mr. Ashok Kumar Garg, APP for State.

Mr. Sandeep Sethi & Mr. Sanjeev Puri, Sr. Advs. with Mr. Neeraj Sharma, Mr. Rushil Chandra, Mr. Dakshayani Saxena, Advs. for R2.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Aggrieved by the order dated 9th July, 2016 passed by the learned Metropolitan Magistrate, Dwarka Courts summoning the petitioners for the offence punishable under Section 138 Negotiable Instruments Act (in short the NI Act), the petitioners prefer the present petition seeking quashing of the said order as well as Complaint Case No.5002432/2016 titled as '*Religare Finvest Limited Vs. Strategic Credit Capital Private Limited & Others*'.

2. Before adverting to the legal issues it would be appropriate to give a brief background of the case. The Religare Finvest Limited (in short 'Religare') entered into an Assignment Agreement dated 25th July, 2015 with the petitioner No.2/ Strategic Credit Capital Private Limited (in short 'the Strategic') through its Director Padma Vathy/petitioner No.1, for assignment of the loans and receivables along with all rights, title and interest therein for a total consideration of ₹530,02,40,678/- (Rupees five hundred and thirty crore two lakh forty thousand six hundred and seventy eight only). The Assignment Agreement obligated Strategic to issue a Standby Letter of Credit (in short 'the SBLC') for a sum of ₹540 crores in favour of Religare, to guarantee the balance purchase consideration. Religare received an initial purchase consideration of ₹10 crores from Strategic on June 24, 2015 and the balance purchase consideration was required to be given within a period of 90 days from the initial purchase consideration. However, Strategic failed to pay the balance purchase consideration under the Assignment Agreement. So around 22nd October, 2015 Religare informed Strategic that it would invoke the SBLC on account of default in payment of the balance purchase consideration. On the representation of Strategic, SBLC was not invoked and time was agreed to be extended subject to payment of ₹60 crores out of the balance purchase consideration and a Supplemental Agreement was entered in this regard on 30th December, 2015. The SBLC was extended till June 22, 2016. Pursuant to the Assignment Agreement and Supplemental Agreement, Religare transferred the loans, receivables and securities in favour of Strategic as per its demand, however Strategic even failed to pay ₹60 crores as promised. Later to meet the payment obligations, Strategic handed-over a cheque dated 21st March, 2016 bearing No.709845 drawn on

HDFC Bank for a sum of ₹180 crores only (in short the cheque in question) in favour of Religare and assured that the balance payment would be made before the agreed date.

3. It is the case of Religare that in order to avoid the payment, Strategic sent an e-mail communication dated 9th June, 2016 to the Religare purporting to terminate the Assignment Agreement and Supplemental Agreement which was duly replied by Religare on 10th June, 2016. When the cheque in question was presented by Religare, the same was returned unpaid by the bankers of Strategic for the reasons 'Refer to Drawer' on the same date i.e. 15th June, 2016. Hence a notice dated 19th June, 2016 was issued to Strategic and other accused asking them to pay within 15 days of receipt of notice failing which Religare will institute legal proceedings including under Section 138 read with Section 141 of the NI Act.

4. Besides the facts noted in the complaint, one of the two further facts on which parties have argued in extenso is the letter dated 21st March, 2016 (in short 'the letter in question') from Strategic to Religare which reads as under:

"March 21, 2016

*Religare Finvest Limited
Saket New Delhi*

Dear Sir or Madam,

We are giving you cheque number 709845 drawn on HDFC Bank dated March 21, 2016 in the amount of INR 180 crores. Kindly note that the payment under this cheque is subject to receipt of certain funding of even amount which is currently under closure. By accepting this cheque you agree 1) that you will not deposit the cheque prior to our written confirmation to

do so and 2) that this cheque will duly returned in the event you receive a RTGS of even amount.”

Kindly acknowledge your acceptance.

Regards

For Strategic Credit Capital Pvt. Ltd.

*Accepted by: Religare Finvest Limited
Authorized Signatory.”*

5. This letter dated 21st March, 2016 is the bone of contention between the parties and major portion of the arguments have revolved on this letter which does not form part of the complaint.

6. Besides the letter dated 21st March, 2016 the other major fact brought to the notice of this Court by Religare is that despite the fact that Strategic sought to terminate the Assignment Agreement and the Supplemental Agreement vide e-mail communication dated 9th June, 2016, Strategic further assigned the loans, receivables and interest to Eleos Finvestia Acquisition Trust (in short ‘the Eleos’) vide Assignment Agreement dated 25th July, 2015 pursuant where to Eleos filed a petition being OMP(I)(COMM) No.294/2016 before this Court against Religare and its authorized representative. The pleadings in the said petition of Religare are being relied upon by learned counsel for Strategic whereas learned counsel for Religare submits that despite terminating the Agreement with Religare, Strategic entered into a further Assignment Agreement with Eleos for an aggregate consideration of ₹1260 crores in cash on 28th June, 2016.

7. Legal issues raised by Strategic in the present petition are:

- i) that no cognizance of the complaint could have been taken by the learned Metropolitan Magistrate as it was not filed by a duly authorized person.
- ii) that in view of the SBLC being valid till 22nd June, 2016 no debt or liability arose when the cheque was issued, hence no complaint for a non-existing liability could have been entertained.
- iii) that the cheque in question is a non-negotiable instrument in terms of letter dated 21st March, 2016 which is an admitted document.
- iv) that the document dated 21st March, 2016 is required to be read as it is and no oral explanation or evidence can be given in view of Section 91/92 of the Indian Evidence Act to contend that the signatures of Ankur Gupta on the letter in question were only an acknowledgement of receipt of the letter and did not admit or were in lieu of an Agreement of the terms of the letter.
- v) that the terms of the letter in question were specific and no reply having been given to the said letter, the pleas now being taken are after-thought.

8. Challenging the very maintainability of the present petition, learned counsel for Religare submits that the conduct of the petitioners warrants this petition to be dismissed as after terminating the Agreement with Religare, Strategic entered into an Assignment Agreement with Eleos on 25th July, 2015 which is the mirror image of the Agreement between Religare and Strategic and having paid only ₹10 crores out of ₹540 crores agreed to Religare, Strategic assigned the contract agreement to Eleos for a consideration of ₹1260 crores which sum has admittedly been received by Strategic in cash. It is contended that such a party who misconducts should not be heard the exercise of its discretionary jurisdiction under Section 482 Cr.P.C. by this Court.

9. Since legal issues have been raised in the present petition despite the fact that the conduct of Strategic may not be above board having paid only ₹10 crores to Religare out of ₹540 crores agreed and after terminating the Assignment Agreement and Supplemental Agreement entered into a further Assignment Agreement with Eleos for a sum of ₹1260 crores, which sum has been taken in cash as per the pleadings of the parties, this Court does not find it fit to dismiss the present petition on this count alone.

10. In respect of issue No. (i) regarding maintainability of the complaint, relying upon the decision of the Supreme Court reported as (2015) 12 SCC 203 A.C. Narayan Vs. State of Maharashtra & Anr., learned counsel for the petitioners contends that a criminal complaint cannot be filed by an employee of a company unless he is duly authorized by a resolution of the company and the employee filing the complaint must affirm and depose that he has personal knowledge of the facts. Rebutting the plea learned counsel for Religare submits that no such plea has been taken in the present petition which could have been replied by Religare, even otherwise in the complaint in Para 1 itself it is stated that Ankur Gupta is the authorized signatory on behalf of the complainant and has been duly authorized to sign, verify and institute the proceedings by way of a Board Resolution/ Power of Attorney dated 7th July, 2016. Pursuant to the resolution passed at the meeting of the Board of Directors of Religare on 27th May, 2015 Ankur Gupta has been duly authorized and as per Clause 8 of the Power of Attorney he is competent to sign, verify and file complaint/cases under Section 138 of the NI Act on behalf of Religare against the borrowers before Courts of competent jurisdiction and represent the company. Further in view of the decision of the Supreme Court reported as (2014) 4 SCC 704 Haryana State

Cooperative Supply and Marketing Federation Limited Vs. Jayam Textiles and Anr. a complaint cannot be dismissed if there is any error in the authority to swear the fact or affirm the facts as the party can be given a chance to correct the same. Thus, this objection of learned counsel for Strategic that the complaint was without due authority deserves to be rejected.

11. In A.C. Narayan (supra) relied upon by learned counsel for the petitioners, the Supreme Court held that filing of the complaint under Section 138 of the NI Act through Power of Attorney is perfectly legal and the Power of Attorney holder can depose and verify on oath before the Court in order to prove the contents of the case, however the Power of Attorney holder must have witnessed the transaction as an agent of the payee/ holder of the instrument in due course or possess due knowledge regarding the said transaction. In the present case the Power of Attorney holder of Religare is Ankur Gupta who has been duly authorized by Board Resolution/Power of Attorney dated 7th July, 2016 and in the complaint itself it is stated that he is aware of the facts and circumstances of the present case on the basis of records of the complainant company/Religare. In fact, as noted above in the contentions and issues raised, the defence of Strategic revolves around the signatures of Ankur Gupta on the document dated 21st March, 2016. Hence the objection of Strategic that the complaint was not maintainable is liable to be rejected.

12. As regards issue No. (ii) to contend that in view of the SBLC there was no liability to pay at the time of issuance of the cheque, the dishonour of which would not maintain a complaint under Section 138 of the Negotiable Instruments Act, learned counsel for Strategic relies upon the decision

reported as (2014) 12 SCC 539 Indus Airways Private Limited & Ors. Vs. Magnum Aviation Private Limited & Anr. and seeks quashing of the complaint. Rebutting the said contention learned counsel for Religare submits that once a cheque is issued, Section 139 NI Act raises a presumption of indebtedness and whether the cheque issued is in discharge of a liability or not is an issue which is required to be gone into at the stage of trial and cannot be decided in the present petition. The terms of the Assignment Agreement clearly stipulate that if Strategic fails to pay, the SBLC can be encashed. Thus the SBLC was only a guarantee and not in discharge of the liability.

13. Before adverting to this issue it would be appropriate to note the terms in the Agreement in respect to the SBLC. In the Assignment Agreement SBLC was defined as “*SBLC means a standby letter of credit for an amount aggregating INR 520,00,00,000 (Rupees Five Hundred and Twenty Crores) issued by LA FINANCIERE (EUROPE), UNICREDITO BANCA S.A, in favour of the Assignor (in a form and manner acceptable to the Assignor) on behalf of the Assignee*”. Further Clause 2.3(c) of the Assignment Agreement noted that “*If the Assignee fails to pay the Outstanding Balance Purchase Consideration on the Balance Purchase Consideration Payment Date, the Assignor shall be entitled to invoke the SBLC in accordance with the terms of the SBLC to the extent of the Outstanding Balance Purchase Consideration*”. It is thus apparent that SBLC was not issued as a consideration of the Assignment Agreement but was a guarantee to be invoked in case the assignee failed to pay the outstanding balance purchase consideration.

14. Though there are provisions relating to “contract of guarantee” and “liability of the guarantee” under the Indian Contract Act, however, the word “Guarantee” has not been defined therein. The word “Guarantee” has been explained in the book ‘Indian Contract and Specific Relief Act’ by Pollock & Mulla, 13th EDITION Vol. II as:

“A guarantee is often termed a ‘collateral’ or ‘conditional’ contract, in order to distinguish it from one that is ‘original’ or ‘absolute’. Its description as a ‘collateral’ contract is not a happy one. The strict literal interpretation of ‘collateral’ is ‘parallel’ or ‘additional’, and it does not signify the meaning ‘secondary’. To describe a guarantee as a ‘collateral contract’ does not sufficiently emphasise its accessory character, although it would seem that the words ‘collateral security’ might do so, as the word ‘security’ – even by itself-ordinarily means something auxiliary to an antecedent obligation. The obligation of a guarantor may not necessarily be conditional, except in the broad sense that he will be discharged if the principal-debtor performs the guaranteed obligation. There are two classes of guarantee: a promise which becomes effective if the debtor fails to perform his obligations, and a promise that the debtor will perform his obligation. Guarantees in the latter class are effectively unconditional.

An agreement will not be a guarantee unless there exists or is contemplated some other principal, obligation of some other principal obligor, to which the guarantee is to be ancillary and subsidiary. There can be no suretyship, unless there be a principal-debtor, who, of course, may be constituted in the course of a transaction by matters ex-post facto, and need not be so at the time; but until there is a principal-debtor there can be no suretyship; nor can a man guarantee anybody else’s debt, unless there is a debt of some other person to be guaranteed. The principal obligation guaranteed may be contractual, or also non-contractual, viz, such as those resulting from bailment, tort, or unsatisfied judgments.

A Guarantee is an undertaking to indemnify, if some other person does not fulfill his promise. The liability under a contract of guarantee is conditional on the default of the principal-debtor, and hence does not amount to a 'promise to pay'."

15. Supreme Court in the decision reported as (1992) 2 SCC 330 Syndicate Bank Vs. Vijay Kumar describing the liability of a guarantee held:

"10. It is in common parlance that the issuance of guarantee is what that a guarantor creates to discharge liability when the principal debtor fails in his duty and guarantee is in the nature of collateral agreement to answer for the debt. It is well-settled that the Bank guarantee is an autonomous contract and imposes an absolute obligation on the Bank to fulfill the terms and the payment in the Bank guarantee becomes due on the happening of a contingency on the occurrence of which the guarantee becomes enforceable.

11. Guarantee has been defined in Halsbury's Laws of England, 4th Edn., Vol. 20, page 49, para 101 as: "A guarantee is an accessory contract whereby the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person whose primary liability to the promise must exist or be contemplated."

12. In the banking system it is understood that Bank guarantee has a dual aspect. In the case of a Bank guarantee the banker is the promisor. It is a contract between the Bank and the beneficiary of the guarantee and it is also a security given to the beneficiary by a third party. Now, it is a well-known business transaction in the world of commerce and it has become the backbone of the banking system. Now coming to its enforceability the same depends upon the terms under which the guarantor has bound himself. He cannot be made liable for more than what he has undertaken. Therefore the Bank guarantee, as already noticed, is in the nature of a special contract depending upon the happening of a specific event and when once it is discharged the guarantee comes to an end. It has to be borne in mind that the obligations arising under the

Bank guarantee are independent of the obligations arising out of a specific contract between the parties. Therefore the endorsement of the words “Lien to BG 11/80” cannot have a bearing on the banker's lien on the two FDRs. Merely because on the basis of the security of the two FDRs the appellant Bank gave a guarantee it cannot be said that the banker had only a limited particular lien and not a general lien on the two FDRs. In our view this finding of the High Court is erroneous.”

16. As noted above a guarantee is an ancillary contract whereby the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person whose primary liability to the promisee must exist or be contemplated. Thus merely because the SBLC was valid on the date of presentation of cheque in question, it cannot be held that there was no existing liability, which fact is also fortified by Clause 2.3 (c) of the Assignment Agreement which provided that assignor will be entitled to invoke SBLC if the assignee fails to pay Outstanding Balance Purchase Consideration on the payment date. Thus the contention of learned counsel for Strategic that the complaint was not maintainable for a non-existing liability deserves to be rejected.

17. An incidental argument of learned counsel for Strategic on the second issue is that as there is no liability of Strategic to pay, thus cheque in question is without consideration, hence in terms of Section 43 of the NI Act it is not a negotiable instrument. This contention of learned counsel is also liable to be rejected as the consideration for the cheque in question was the assignment of loans, interest, receivables etc. and not the SBLC. In any case as per the decision of the Supreme Court reported as (2001) 6 SCC 16 Hiten P. Dalal Vs. Bratindranath Banerjee in view of the presumption raised under Section 139 NI Act the issue whether the cheque was in discharge of a

liability wholly or partly or not is an issue to be decided at the stage of trial.

It was held:

“21. The appellant's submission that the cheques were not drawn for the “discharge in whole or in part of any debt or other liability” is answered by the third presumption available to the Bank under Section 139 of the Negotiable Instruments Act. This section provides that:

“139. 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.”

The effect of these presumptions is to place the evidential burden on the appellant of proving that the cheque was not received by the Bank towards the discharge of any liability.

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, as noted in State of Madras v. A. Vaidyanatha Iyer [AIR 1958 SC 61 : 1958 Cri LJ 232] it is obligatory on the court to raise this presumption in every case where the factual basis for the raising of the presumption had 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.” (Ibid. at p. 65, para 14.) 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 possibility 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 exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when,*

“after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists”
[Section 3, Evidence Act] .

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’ .”

18. The main issue raised by the petitioners is the issue No. (iii) that the cheque in question is a non-negotiable instrument in terms of letter dated 21st March, 2016. Referring to Sections 13 and 130 of NI Act it is contended that a negotiable instrument without consideration or with an endorsement thereon cannot be negotiated and is not capable of transferring a better title to another person. Even an endorsement on a slip of paper has been held to change the nature of the instrument to non-negotiable in terms of Section 15 of the NI Act. Reliance is placed on the decisions reported as 2005 SCC OnLine AP 1081 M. Ethirajulu vs. Rangam Adinarayana and Others and (1938) 2 KB 384 Hibernian Bank Limited vs. Gysin & Hanson.

19. In the Kings Bench decision the instrument itself was marked as not negotiable, which is not the case in the present case. Even in M. Ethirajulu (supra) relied upon by learned counsel for Strategic it was held that the

endorsement should either be on the instrument or on a separate paper annexed thereto. It was held:

“11. A combined reading of the above provisions clearly shows that a promissory note, bill of exchange or a cheque can be negotiated or transferred by making an endorsement either on the instrument or on a separate paper annexed thereto. The transferee of such instrument becomes the holder if that person is entitled in his own name to the possession thereof when it is transferred in his favour by making the necessary endorsement. The holder of a cheque becomes holder in due course only when he has become the possessor thereof for consideration without knowing any defect existed in the title of the person from whom he derived the title.”

20. In the present case neither was there any endorsement on the cheque nor a document annexed thereto. Letter dated 21st March, 2016 was given separately and thus the change of character of the document was not capable of being intimated to the third party who may have been a holder in due course. Hence the letter dated 21st March, 2016 did not change the character of the cheque in question to a non-negotiable instrument.

21. Since the present petition is under Section 482 Cr.P.C. and the parties are yet to lead their evidence it is not open for this Court to draw any conclusion on the issue between the two parties as to whether the signatures of Ankur Gupta on the letter in question were only in acceptance of the letter or it would be deemed that he had accepted the contents of the letter in question as well. This is an issue to be determined during trial. Thus the argument of the learned counsel for the Strategic that the letter in question has to be read as it is and no oral evidence can be led to give a meaning to it also deserves to be rejected.

22. Since a presumption arises under Section 139 of the NI Act with regard to the liability once a cheque has been issued which presumption has to be rebutted during the course of trial at this stage it is not for this Court to come to a conclusion in exercise of its jurisdiction under Section 482 Cr.P.C. that since no reply was given to the letter in question by Religare its contents are deemed to be admitted. The decision of this Court in the Pradeshia Industrial & Investment Corporation of U.P. Ltd. vs. M/s Pacquik Industries Ltd. & Ors. Co. Appl No.54/2013 decided on 28th January, 2016 in relation to implied acceptance has no relevance at this stage as it would be for the parties to lead evidence at the stage of trial in this regard and only then it can be determined whether it was a case where the terms of the letter in question had been impliedly accepted by Religare as the same were not rebutted.

23. Learned counsel for the petitioners referring to the reply of Religare to the petition being OMP (I) (Comm) 294/2016 filed by Eleos submits that an admission having been made in a proceedings inter-parties is required to be looked into by the Court. Firstly the document relied, that is, the reply affidavit does not form part of the Trial Court record and is thus beyond the pleadings and cannot be gone into as is the letter dated 21st March, 2016 however, still it would be appropriate to note that Ankur Gupta, the authorised representative of Religare, who also filed an affidavit in response to the reply to Eleos stated that signatures of Ankur Gupta on the letter in question were only acknowledgment of receipt of the cheque and not acceptance of the contents or the terms of the letter in question.

24. The Supreme Court in the decision reported as 2004 (2) SCC 235 Goa Plast Pvt. Ltd. vs. Chico Ursula D'Souza while dealing with the similar issue on a contention of the accused therein that the complaint should be rejected,

because the accused had suppressed the fact about the letter dated 12th February, 1993 held that there was no obligation on the part of the appellant to reply to such letter as per the scheme of Section 138 of NI Act. It was held:

16. Another reason given by the courts below to reject the complaint was that the appellant has suppressed the fact about the letter dated 12-2-1993. In our view, there is no obligation on the part of the appellant to reply to such letter as per the scheme of Section 138 of the Act.

19. We shall now advert to the rulings cited at the time of hearing. The learned counsel relied upon paragraphs 13 to 16 of the judgment of this Court in the case of Modi Cements Ltd. v. Kuchil Kumar Nandi [(1998) 3 SCC 249] (three-Judge Bench), which read as under: (SCC pp. 256-57, paras 13-16)

“13. It was, however, contended on behalf of the respondent that the decision in Electronics Trade & Technology Development Corpn. Ltd.[Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739 : 1996 SCC (Cri) 454] does not support the appellant as far as the facts that emerged in the present cases inasmuch as the drawer had intimated to the bank on 8-8-1984 to stop the payment whereas the cheques were presented for encashment on 9-8-1994 although the same were drawn on 23-2-1994, 26-2-1994 and 28-2-1994. The learned counsel for the respondent strongly relied upon the following observations in Electronics Trade & Technology Development Corpn. Ltd.[Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739: 1996 SCC (Cri) 454]: (SCC p. 742, para 6)

‘Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions, Section 138 does not get attracted.’

(emphasis in original)

14. The learned counsel for the appellant submitted that if the attention of the Court was drawn to the provisions of Section 139 of the Act which according to him, had an important bearing on the point in issue, the Court would certainly not have made the above observations. The said section reads as under:

‘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.’

15. According to the learned counsel if the observations of this Court in *Electronics Trade & Technology Development Corpn. Ltd. [Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739; 1996 SCC (Cri) 454]* to the effect, (SCC p. 742, para 6)

‘[s]uppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions, Section 138 does not get attracted’

is accepted as good law, the very object of introducing Section 138 in the Act would be defeated.

16. We see great force in the above submission because once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues a notice to the drawee or to the bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of a cheque in due course. The object of Chapter XVII, which is intituled as 'OF PENALTIES IN CASE OF DISHONOUR OF CERTAIN CHEQUES FOR INSUFFICIENCY OF FUNDS IN THE ACCOUNTS' and contains Sections 138 to 142, is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. It is for this reason we are of the considered view that the observations of this Court in Electronics Trade & Technology Development Corpn. Ltd. [Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739 : 1996 SCC (Cri) 454] in para 6 to the effect 'suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions, Section 138 does not get attracted', does not fit in with the object and purpose for which the above chapter has been brought on the statute-book."

22. The learned counsel placed reliance on paragraph 6 of the judgment of this Court in the case of Goaplast (P) Ltd. v. Chico Ursula D'Souza [(2003) 3 SCC 232 : 2003 SCC (Cri) 603], which reads as under: (SCC pp. 237-38, para 6)

"6. In the present case the issue is very different. The issue is regarding payment of a post-dated cheque being countermanded before the date mentioned on the face of the cheque. For the purpose of considering the

issue, it is relevant to see Section 139 of the Act which creates a presumption in favour of the holder of a cheque. The said section provides that:

‘139. 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.’

Thus 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 which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 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. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. This was the view taken by this Court in Modi Cements Ltd. v. Kuchil Kumar Nandi [(1998) 3 SCC 249] . On same facts is the decision of this Court in Ashok Yeshwant Badave v. Surendra Madhavrao Nighojakar [(2001) 3 SCC 726] . The decision in Modi case [(1998) 3 SCC 249] overruled an earlier decision of this Court in Electronics Trade & Technology Development

Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd. [Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739: 1996 SCC (Cri) 454] which had taken a contrary view. We are in respectful agreement with the view taken in Modi case [(1998) 3 SCC 249]. The said view is in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138 of the Act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date.”

26. The object and the ingredients under the provisions, in particular, Sections 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in a civil court is a long-drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee.

25. In view of the discussion aforesaid this Court finds no reason to quash the complaint or set aside the order summoning the petitioners.

26. Petition and application are dismissed.

(MUKTA GUPTA)
JUDGE

MARCH 17, 2017
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