

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL WRIT PETITION NO.886 OF 2019
ALONG WITH
CRIMINAL WRIT PETITION NO.887 OF 2019
ALONG WITH
CRIMINAL WRIT PETITION NO.888 OF 2019
ALONG WITH
CRIMINAL WRIT PETITION NO.889 OF 2019**

Mr. Nazim Karim Mumbrawala	]	
Adult, Indian Inhabitant, R/a	]	
Sea Shell Apartments, B-Wing,	]	
304, 7, Bunglows, Versova, Mumbai	]	 Petitioner/
Age 61	]	Ori. Accused.

Versus

1]	Mr. Keshava Prasad H. A.	]	
	At Flat No.103, C/26, Newakash Ganga,	]	
	Yamuna Nagar, Oshivara, Andheri (W)	]	
	Mumbai 400 053	]	
		]	
2]	State of Maharashtra	]	
	Through Ld. Public Prosecutor,	]	
	High Court, Mumbai	]	 Respondents.

Mrs. Mallika A Ingale for the Petitioner.
Mr. Aditya Mehta for Respondent No.1.
Mrs. Rutuja Ambekar, APP for the Respondent/State.

CORAM : S. S. SHINDE J.
Reserved On : 17th September 2019
Pronounced on : 03rd October 2019

COMMON JUDGMENT :

1 The above group of Petitions filed by the Petitioner, who is original accused, challenging the orders passed by the learned Magistrate thereby issuing process against the Petitioner in four Complaints filed by Respondent

No.1 herein under Section 138 of the Negotiable Instruments Act on account of dishonour of the post dated cheques mentioned in the Consent Terms arrived at between the Petitioner and Respondent No.1. It is submitted across the bar that the facts involved in all the above Writ Petitions are similar. In all the four Writ Petitions the Petitioner challenges the orders of issuing process against him. The Petitioner-Accused and Respondent No.1-Complainant are the same in all the four Writ Petitions. However the complaints and cheques are different. In Writ Petition No.886 of 2019 the Complainant No. is 2505/SS/2017 and Cheque Nos. are 000043 dated 18/10/2016 and 000044 dated 18/12/2016; in Writ Petition No.887 of 2019 the Complainant No. is 4531/SS/2017 and Cheque No. is 000047 dated 18/04/2017, in Writ Petition No.888 of 2019 the Complainant No. is 3589/SS/2017 and Cheque No. is 000046 dated 18/02/2017 and, in Writ Petition No.889 of 2019 the Complainant No. is 6623/SS/2016 and Cheque No. is 000042 dated 18/08/2016. Therefore, by consent of the learned counsel for the parties, all the four Writ Petitions are heard together and being disposed of by this common judgment and, Writ Petition No.886 of 2019 is being treated as a lead matter.

2 Rule in all the Writ Petitions, with the consent of the learned counsel for the parties made returnable forthwith and heard finally at the admission stage.

3 Writ Petition No.886 of 2019 takes an exception to the order dated 27/04/2018 (actual date is 27/04/2017) passed by the learned Metropolitan Magistrate, 48th Court, Andheri, Mumbai thereby issuing process against the Petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act.

4 The facts giving rise to filing of Writ Petition No.886 of 2019, can in brief, be stated as under :-

 The Petitioner herein is original accused in the complaint being CC No.2505/SS/2017 filed by Respondent No.1 before the Metropolitan Magistrate, 48th Court, Andheri, Mumbai for the offence Punishable under Section 138 of the Negotiable Instruments Act. Respondent No.1 herein is the original complainant. It is the case of the complainant in the said complaint that, he had paid the huge amount, which was transferred by the mother of complainant directly in the account of the accused and his wife, for purchasing the flat for the complainant himself in Mumbai, but the accused had cheated the complainant for their wrongful gain. The Complainant i.e. Respondent No.1 herein therefore had lodged FIR vide CR No.104 of 2011 on 16/02/2011 against the Petitioner, his wife Mrs. Zubeda Nazim Mumbrawala and his daughter Ms. Samina Nazim Mumbrawala initially for the offence under Section 420, 34 of the Indian Penal Code, however, later on added Sections

406, 465, 467, 468 of the Indian Penal Code. It is further the case of the complainant that the Petitioner-accused and his wife were arrested in the said case at the initial stage and subsequently the daughter was arrested. It is further the case of the complainant that the accused approached him and requested to settle the entire dispute, and for that the accused agreed to pay Rs.12 Lakhs as full and final settlement. Accordingly the Consent Terms dated 17/06/2016 was executed between the complainant and the accused, which was submitted in the Court proceedings wherein the accused had admitted the liability of Rs.12 Lakhs in favour of the complainant. It is also the case of the complainant that as per clause 1(a) of the said consent terms, the accused paid Rs.2 Lakhs by pay order, and towards the payment of balance amount of Rs.10 Lakhs the accused issued five post dated cheques in favour of the complainant, each amounting to Rs.2 Lakhs. According to the complainant, the first cheque dated 18/08/2016 issued by the accused as per consent terms on its presentation was dishonoured for which the complainant has filed complaint bearing CC No.6623/SS/2016 (subject matter of Writ Petition No.889 of 2019) against the accused under Section 138 of the Negotiable Instruments Act which is pending before the learned Metropolitan Magistrate, 44th Court, Andheri for hearing and disposal. The complainant has alleged that the accused had issued Cheques bearing Nos. 000043 and 000044 dated 18/10/2016 and 18/12/2016 respectively each amounting to Rs.2 Lakhs. When the said cheques were to be deposited by the complainant on due dates for encashment, the accused

requested the complainant to wait for little more time, therefore, considering the said request of the accused, the complainant did not deposit the said cheques on the due dates. However, finally the complainant deposited both the cheques on 10/01/2017 in his bank viz. HDFC Bank, Indralok Branch, Lokhandwala Complex, Andheri (W), Mumbai for encashment, but the said cheques were dishonoured due to the reason "Payment Stopped by Drawer", and bank was accordingly informed the complainant about the same vide two separate Bank Memos dated 11/01/2017. Thereafter the complainant issued statutory demand notice to the accused through his advocate's letter dated 08/02/2017 by calling upon the accused to make the payment of both the cheques totally amounting to Rs.4 Lakhs within 15 days from the receipt of the said demand notice. It is alleged that the notice sent to the accused at his first address was returned as undelivered with postal remark "unclaimed, return to sender", however, according to the complainant, the notice sent to the accused at his second address was neither return nor the advocate of the complainant has received acknowledgment thereof. It is the case of the complainant that in spite of the receipt of demand notice dated 08/02/2017, the accused failed to make the payment of the said cheques within the stipulated period.

5 On the basis of the aforesaid allegations, the complainant has filed the aforesaid complaint against the accused in the Court of the learned

Metropolitan Magistrate for the offence punishable under Section 138 of the Negotiable Instruments Act. As stated herein above, the learned Magistrate after recording verification, by its order dated 27/04/2017 issued process against the accused. Hence this Petition.

6 In Writ Petition No.886 of 2019 it is the case of the Petitioner/Accused that though it is alleged in the complaint that the FIR No.104 of 2011 has been lodged against the Petitioner, his wife and his daughter, the said allegation is false as the said FIR has been lodged against the accused and his wife only, and the daughter of the Petitioner was not impleaded as accused at all. The accused nowhere in the consent terms has admitted his liability of Rs.12 Lakhs. The Petitioner and his wife were arrested on 06/03/2011 and they were granted bail. During the investigation the Petitioner/accused showed the documentary proof of having paid the entire amount to the complainant by giving him bearer cheques in his name which was encashed by the complainant from the bank by signing on the backside of the bearer cheques in the presence of the bank's employee. The Petitioner/accused and his wife also showed the receipts executed by the complainant while taking the amount. It is further the case of the Petitioner that the complainant identified his signature, but the police officer then present Mr. Desai gestured the complainant not to identify, and added offence under Sections 465, 467, 468, 34 of the Indian Penal Code. The said police

officer also seized the deposit amount from the landlord of the house where the Petitioner was residing and hence they had to shift to the address mentioned in the title. It is further averred that after completing the investigation, the charge sheet was filed before the Trial Court vide CC No.1417/PW/2011 on 25/05/2011 wherein the daughter of the Petitioner was shown as wanted on the basis of the lame allegations. It is further averred that even the daughter of Petitioner used to visit the police station as her parents were detained in the police station, but she was never interrogated. Thereafter the investigating officer arrested the daughter of the Petitioner from her place of work on 16/06/2016, and during her detention in the police station, the police officer Gunmai and the complainant threatened the Petitioner of getting her detained in custody for a long period by opposing the bail application, if they do not agree to settle the matter. It is further averred in the Petition that under the threat of detention of the daughter, the police officer and Respondent extorted pay order of Rs.2 Lakhs and five cheques for a sum of Rs.2,00,000/- each from the Petitioner and compelled to sign the documents prepared by them, and the Petitioner and his wife were succumbed to their pressure though they were not liable to pay the amount to the complainant. It is averred that the police officer Gunmai was pressurizing the Petitioner to encash the cheques before getting the complaint withdrawn or quashed, therefore, the Petitioner addressed a letter dated 12/08/2016 to his banker to stop the payment in respect of the cheques obtained under duress and coercion

by the complainant. Thereafter the daughter of the Petitioner filed Criminal Writ petition No.2241 of 2016 before this Court for quashing of FIR against her as there was no allegation against her of whatsoever nature. During the course of hearing of the said Petition, the Investigating Officer gave a statement that he is filing report under Section 169 of the Criminal Procedure Code though he was earlier contemplating to file chargesheet against the daughter of accused. Hence the said Petition was disposed of with liberty to take appropriate action against the erring police officer. Thereafter the Petitioner received summons from the learned Magistrate, 44th Court, Andheri. Thereafter accused remained present before the court and executed bail bond on 21/09/2018. In the month of September 2018 the accused received summons in three more cases under Section 138 of the Negotiable Instruments Act. Thereafter the Petitioner filed application for certified copy of the complainant which was received by the Petitioner on 29/12/2018. It is averred that since the notice of demand was sent at the previous address from where the Petitioner had already shifted, they did not receive it and hence the demand notice has not been replied to. However, the notice sent subsequently at the new address for dishonour of the other cheques have been replied to. Therefore, according to the Petitioner, the complainant has lodged FIR by concocting false story with ulterior motive to take revenge as the Petitioner and his wife had reprimanded the complainant for coming to their house in their absence to meet their teenage daughter.

7 The learned counsel appearing for the Petitioner submits that there exists no legally enforceable debt or liability as asserted by Respondent No.1, hence offence under Section 138 of Negotiable Instruments Act is not made out. She submits that the allegation of the complainant that the Petitioner/accused admitted liability of Rs.12 Lakhs and executed consent terms dated 17/06/2016 is false as it is clear from the consent terms that nowhere in the consent terms the accused has admitted his liability. It is submitted that because of arrest of daughter and, the threats given by the police officer and complainant of getting her detained in custody, the Petitioner was compelled to execute the said consent terms and, extorted pay order and cheques from the Petitioner. According to her, the said consent terms were executed under duress and coercion which can be inferred from the fact that the date of consent terms is 17/06/2016 and the date of arrest of the daughter of accused is 16/06/2016. It is also submitted that the Petitioner has been victimized by the complainant with the aid and abetment of the police officer. It is further submitted that admittedly the cheques were not issued towards legally enforceable debt or liability. She submits that the post dated cheques issued in a criminal case in a compromise between the parties cannot be considered as payment of any debt or liability which is legally enforceable. She further submits that, any cheque received in settlement in any criminal case cannot be treated as being issued in discharge of liability unless the said case has been quashed and/or decided upon settlement. It is submitted that the

cheques were dishonoured for reason “payment stopped by drawer”, and not for insufficient funds. She further submitted that though as per the allegations the total amount misappropriated by the accused is Rs.36 Lakhs, the complainant agreed to settle the same after a period of six years by accepting Rs.12 Lakhs. In the consent terms it is only agreed that the Petitioner will pay Rs.12 Lakhs as per schedule mentioned therein and the complainant will give consent for bail for Petitioner’s daughter and also give consent for quashing of the case. There is no allegation against the daughter of the Petitioner nor she is named as accused, however, the daughter of Petitioner was arrested on the ground that the amount wrongfully earned by the Petitioner is used for buying gold ornaments for daughter and the same is in possession of the daughter. In support of her contentions, the learned counsel for the Petitioner sought to place reliance on the following judgments :- (i) Harish Kapoor Versus Akansha Gupta¹; (ii) Gunmala Sales Private Limited *Versus*. Anu Mehta and Others and connected Criminal Appeals thereto²; (iii) Lalit Kumar Sharma and Ors. Vs. State of U.P. and Ors³. (iv) Rakesh Verma Versus M/s. Harsha Associates Pvt. Ltd. and others⁴; (v) Indus Airways Pvt. Ltd. & Ors. Vs. Magnum Aviation Pvt. Ltd. & Ors⁵. The learned counsel for the Petitioner therefore prays that the Writ Petition may be allowed.

1 Delhi High Court- Crl. M.C.3869 of 2007

2 (2015) 1 SCC 103

3 Supreme Court of India-Criminal Appeal No. 818 of 2008;

4 High Court of Punjab and Haryana at Chandigarh- CRM No. A-325-MA of 2015 (O & M)

5 MANU/SC/0288/2014

8 On the other hand, the learned counsel appearing for Respondent No.1 – complainant submits that huge amount has been given by the complainant to the accused and his wife for purchasing the flat in Mumbai and the mother of the Complainant has directly transferred the said amount in the account of the Petitioner and his wife, but the accused cheated the complainant for their wrongful gain. It is further submitted that on 17/06/2016 the Petitioner has entered into consent terms with the complainant to settled the dispute in question, and pursuant to the said consent terms, the Petitioner issued post dated cheques in favour of the complainant. It is also submitted that the said cheques when presented for encashment, were dishonoured. It is also submitted that stopping the payment of the said cheques on the part of the Petitioner is totally contrary to the terms and conditions as mentioned in the consent terms and the said act of the Petitioner amounts to cheating. Petitioner and his wife are the agent, and the Petitioner misappropriated the amount of the complainant and used the said amount for their personal purpose . The learned counsel for the complainant further submits that there are bank statements and records showing that the Petitioner has withdrawn the amount. The learned counsel for the Respondent No.1 submits that by signing the consent terms, the Petitioner has admitted his liability to pay the amount of Rs.12 Lakhs to the Complainant. He submits that the basis for filing the complainant is the consent terms, and the Court has clearly taken a view that cheques issued as a part of consent terms can constitute and/or form the basis

of a complaint under Section 138 of the Negotiable Instruments Act. It is also submitted that the instructions on the part of the Petitioner to stop the payment of post dated cheques prior to date of cheques does not absolve the Petitioner of the liability under Section 138 of the Negotiable Instruments Act . In support of his aforesaid contentions, the learned counsel for Respondent No.1 sought to place reliance on the following judgments (i) Banwarilal L Sani v/s. State of Maharashtra⁶; (ii) M Mohan Rao v. Bheemshetty Shreedhar⁷; (iii) Suryakant V. State of Maharashtra⁸; and (iv) Goaplast Pvt. Ltd. v. Chico Ursula D'Souza⁹. The learned counsel for Respondent No.1 prays that the Writ Petition may be rejected.

9 I have heard the learned counsel for the parties. With their able assistance perused the pleadings and grounds taken in the Writ Petition and annexures thereto. I have also perused the reasons assigned by the learned Magistrate in the impugned order.

10 It is not in dispute that the parties have entered into the consent terms dated 17/06/2016. The said consent terms have been signed by the complainant, Petitioner and his wife, and their respective advocates. Pursuant to the said consent terms, the Petitioner and his wife have agreed to pay

6 2012 Bom CR (Cri) 658

7 IV (2017) BC 583 (AP)

8 III (2012) BC 144

9 AIR 2003 SC 2035

amount of Rs.12 Lakhs to the complainant and accordingly issued a pay order amounting to Rs.2 Lakhs and, five cheques amounting to Rs.2 Lakhs each in favour of the Complainant. The petitioner does not dispute his signature on the said cheques. It is an admitted position that the said cheques, on presentation for encashment by the complainant, were dishonoured on the instructions of the Petitioner to stop the payment of the said cheques. As agreed in the consent terms, according to the complainant, the Petitioner did not fulfill his admitted liability to pay the amount to the complainant and thereby cheated the complainant. In the context of the allegations made in the complaint, it would be apt to reproduce clause 1 to 6 of the consent terms which read thus :-

“1 That the party of the second part have agreed to pay the total amount of Rs.12,00,000/- (Rupees Twelve Lac only) to the party of the first part in the following manner :-

- | | | |
|----|---------------|--|
| a. | Rs.2,00,000/- | On execution of this consent terms by Pay order. |
| b. | Rs.2,00,000/- | On 18.08.2016 |
| c. | Rs.2,00,000/- | On 18.10.2016 |
| d. | Rs.2,00,000/- | On 18.12.2016 |
| e. | Rs.2,00,000/- | On 18.02.2017 |
| f. | Rs.2,00,000/- | On 18.04.2017 |

2 That Mr. Nazim Karim Mumbrawala of the party of the second part shall issue the post dated account payee cheques in favour of the party of the first part towards the above stated payment as defined in sub-clause (b), (c), (d), (e) and (f) of Para (1) of this consent term with an undertaking that the said cheques shall be honoured by his bankers on the due dates as appear on the said cheques, moreover the party of the second part further undertake that they shall not instruct their bankers to stop the payment of the said cheques, nor they shall close their bank account till realization of the said cheques.

- 3 That in the event of dishonor of the said cheque/s, the party of the second part shall make the payment of the equal amount of the bounced cheque to the party of the first part, failing which the party of the first part shall have rights to proceed legally against the party of the second part in the said case.
- 4 That the party of the first part shall give his consent and NOC for bail of the said Ms. Samina Nazim Mumbrawala.
- 5 That the party of the first part shall have no any other and further claim from the party of the second part beyond the said final settlement amount of Rs.12,00,000/- (Rupees Twelve Lac only), which shall always be paid through pay orders only.
- 6 That the party of the first part shall make his signature upon all the applications to be moved before the Hon'ble Court for compounding the charges which are compoundable U/s. 320 of Cr.PC and shall extend his co-operation and positive support in favour of the party of the second part for getting the party of the second part and Ms. Samina Nazim Mumbrawala acquitted/discharged in the said case. That in case if any Writ is filed before the Hon'ble High Court for quashing the said case by the party of the second part and Ms. Samina Nazim Mumbrawala, in such event also the party of the first part shall provide his consent in favour of the party of the second part. It is categorically agreed that the party of the first part shall not take any step, which would be harmful to the party of the second part and said Ms. Samina Nazim Mumbrawala.

In so far as clause 2 of the consent terms is concerned, by the said clause the Petitioner has given an undertaking that the said cheques shall be honoured by his bankers on the due dates as appear on the said cheques, moreover the party of the second part further undertakes that they shall not instruct their bankers to stop the payment of the said cheques, nor they shall

close their bank account till realization of the said cheques. In clause 3 of the consent terms it is specifically stated that in the event of dishonor of the said cheque/s, the party of the second part shall make the payment of the equal amount of the bounced cheque to the part of the first part, failing which the party of the first part shall have rights to proceed legally against the party of the second part in the said case. It is an undisputed position that on the basis of the undertaking given by the Petitioner, the cheques were presented for encashment by the complainant and therefore the Petitioner was required to see that the said cheques will get honoured and they should not have instructed their bankers to stop the payment of the said cheques. Admittedly the cheques were issued by the Petitioner in terms of the consent terms. The said cheques were admittedly signed by the Petitioner. According to the Petitioner, under the threat of detention of the daughter, the police officer and Respondent extorted pay order of Rs.2 Lakhs and five cheques for a sum of Rs.2,00,000/- each from the Petitioner and compelled to sign the documents prepared by them, and they were not liable to pay the amount to the complainant as also the police officer Gunmai was pressurizing the Petitioner to encash the cheques before getting the complaint withdrawn or quashed, and therefore, the Petitioner addressed a letter dated 12/08/2016 to his banker to stop the payment in respect of the cheques, which according to them, were obtained under duress and coercion by the complainant. Admittedly on the instructions of the Petitioner, the payment of the said cheques was stopped

though in terms of consent terms the Petitioner has undertaken not to stop the payment of the said cheques.

11 In order to appreciate legal submissions vis-a-vis subject matters involved in the Petitions, it would be apt to advert to the provisions of Sections 138 and 139 of the Negotiable Instruments Act which read as follows :-

138. Dishonour of cheque for insufficiency, etc. of funds in the account-----

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is going returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless--

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of

the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]

139. Presumption in favour of holder :- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.”

As indicated herein above, the cheques issued by the Petitioner in favour of the complainant have been presented by the complainant in his bank within a period of six months. On their presentation, the same were dishonoured on account of stoppage of payment. Thereafter the complainant issued demand notice to the Petitioner, however, the Petitioner fails to make the payment of the said amount to the complainant. Therefore there is a compliance of mandate of Section 138 of the Negotiable Instruments Act by the Complainant.

12 The question that remains to be considered is, whether there is legally enforceable debt existed as asserted by the complainant, and the cheques in question were issued in discharge of the said liability/debt.

According to the learned counsel appearing for the Petitioner, there exists no legally enforceable debt or liability as asserted by Respondent No.1, hence offence under Section 138 of Negotiable Instruments Act is not made out, and nowhere in the consent terms the accused has admitted his liability. In support of the said contention the learned counsel for the Petitioner sought to place reliance on Lalit Kumar Sharma's case (supra), Indus Airways Pvt. Ltd's case (supra) and Rakesh Kumar's case (supra).

(i) In Lalit Kumar Sharm's case, the question arose before the Supreme Court was, whether dishonour of second cheque created a new liability? In the said case the cheques issued on 30.11.1999 and 10.11.1999, on their presentation, were returned unpaid with the remarks "insufficient fund". In the said case proceedings under Section 138 were initiated against a company and its directors Manish Arora and Ashish Narula. In that proceedings, consent terms were entered into wherein Manish Arora undertook to repay the entire debt, and when the cheques issued by Manish Arora as part of the consent terms bounced, another 138 proceedings were initiated against Manish Arora as well as the directors of the company including the Appellants therein and process was issued. The Appellants therein approached the Supreme Court and prayed that proceedings against them may be quashed on the ground that the Appellants, in the said case, were not signatories to the cheques. Appellant No.1 became a director of the said company only on

15/02/2000 and Appellant No.2 became a director on 1.12.1994. Both of them are said to have resigned from the post of directorship on 30.11.2000. In the said case the Supreme Court considered that the Appellants were neither party to the initial complaint nor were they party to the settlement, and the settlement entered into was entered into by Manish Arora and it is specifically stated that he is responsible for paying the amount by cheque. Therefore there was no liability for the Appellant as per the settlement terms. As the initial 138 case against Manish Arora led to a conviction, the Supreme Court stated that a legally enforceable debt with respect to the same could not lie. However, the facts of the present case are different from the facts in Lalit Kumar Sharma's case. In the case in hand, the accused i.e. the Petitioner herein himself instructed his bankers to stop the payment of the said cheques. Moreover, the Petitioner did not dispute his signature on the cheques in question. The learned Magistrate on the basis of verification statement and documents placed on record issued process against the Petitioner. Therefore the facts before the Supreme Court in Lalit Kumar Sharm's case and the facts of the present case are clearly distinguishable. This Court therefore finds considerable force in the submission of the learned counsel appearing for Respondent No.1 complainant that when the complainant filed a criminal case and the daughter of the accused was arrested, the Petitioner entered into a settlement deliberately thereby handing over post dated cheques to the complainant, and having the daughter of the Petitioner released on bail, the Petitioner then stopped the

payment of their post dated cheques.

(ii) Now coming to Indus Airways Pvt. Ltd.'s case (supra). In the said case the question that was arose before the Supreme Court for consideration is, 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 legally enforceable debt or other liability, and, if so whether the dishonour of such cheques amounts to an offence under Section 138 of the Negotiable Instruments Act, 1881. In the said case the purchasers issued two post dated cheques towards two purchase orders for supply of certain aircraft parts with Respondent No.1 therein. The said cheques got dishonoured when they were presented on the ground that the purchasers had stopped payment. However, in the said case, the supplier i.e. Respondent No.1 received letter dated 22/03/2007 from the purchasers i.e. the appellants cancelling the purchase orders and requesting the supplier to return both the cheques. The supplier sent a notice to the purchasers and then filed a complaint against the purchasers under Section 138 of the Negotiable Instruments Act. The magistrate took cognizance and issued summons to the purchasers. The purchasers challenged that order in revision. The Additional Sessions Judge after hearing the parties quashed the order of Magistrate issuing the process against the Purchasers. In the petition before the High Court filed by supplier, the order of the Additional Sessions Judge was quashed

and set aside, and the order of the Magistrate was restored. Therefore the purchasers preferred Appeal before the Supreme Court. The Supreme Court in paragraph 19 of the said judgment observed as under (relevant excerpt) :-

“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.”

In the facts of the said case, the Supreme Court has made the aforesaid observations. The facts of the present are clearly distinguishable. In the present case, neither the complainant had placed any order for purchase of goods nor the accused had issued cheques as an advance payment or requested the complainant to return the cheques. In the said case there was no settlement and there was no act on the part of the purchasers to act in furtherance of the settlement terms. In the present case the cheques were issued by the accused in favour of the complainant in terms of the consent terms executed between them. Therefore the ratio laid down in the case of Indus Airways Pvt. Ltd. is not applicable to the facts of the present case.

(iii) In the case of Rakesh Verma (supra), the complainant approached the Punjab and Haryana High Court against the judgment passed

by the Magistrate whereby the accused were acquitted of the charges. In the present case, the Petitioner/accused has filed the Writ Petitions against the orders of issuance of process passed by the learned Magistrate. Therefore, legal consideration at the stage of issuance of process and while considering the case after conviction/acquittal are different inasmuch as at the time of an issuance of process the Court has to find out from the averments in the complainant, whether an alleged offence/offences are disclosed or otherwise? However, when the case is decided after trial and resulted in conviction or acquittal, the higher courts including an appellate court can look into the entire evidence so as to arrived at a proper conclusion.

13 In order to rebut the contention of the learned counsel appearing for the Petitioner that, there exists no legal enforceable liability, the learned counsel appearing for the Respondent No.1 complainant invites attention of this Court to the letter dated 10/09/2009 addressed by the mother of the Complainant to the wife of Petitioner Mrs. Zubeda Nazim Mumbrawala. By the said letter the mother of the complainant issued some account payee cheques to his son i.e. the complainant with the consent to hand over the said cheques to the wife of the Petitioner to deposit in her account and pay cash on realization of the said cheques, and the said cheques were issued by the mother of the complainant for the needs and requirements during his stay in Mumbai as he does not have any bank account since he was residing in Mumbai as

Paying Guest and does not have any residential proof in Mumbai. According to the complainant, the Petitioner misappropriated the amount of the complainant and used the said amount for their personal purpose, and there are bank statements and records showing that the Petitioner has withdrawn the said amount.

14 In support of the contention that the settlement terms can constitute the basis of proceedings under Section 138 of the Negotiable Instruments Act, the learned counsel for Respondent No.1 sought to place reliance on Banwarilal L Sani's case (supra) wherein it is observed that the cheques issued as a part of consent terms can form the basis of a complaint under Section 138 of the Negotiable Instruments Act. As indicated herein above, according to the complainant, firstly the accused misappropriate the huge amount of the Complainant, and when the complainant filed a criminal case and their daughter was arrested, the Petitioner entered into a settlement deliberately including post dated cheques, and based on the same, the complainant gave his no objection before the Court and the Petitioner's daughter was released on bail. However, having achieved their own ends, the Petitioner then stopped the payment of the cheques though there is a specific undertaking given by the Petitioner in the consent terms as regards encashment of the cheques.

In support of his contention that the cheques issued by the Petitioner in favour of the complainant as a part of consent terms is for discharging his liability, the learned counsel for Respondent No.1 Complainant also sought to place reliance on M. Mohan Rao's case (supra). Paragraph 11 of the judgment in M. Mohan Rao's case is relevant and, for the sake of ready reference the same is reproduced herein under :-

Now coming to the legality and correctness of the concurrent findings of the conviction judgments of the Courts below impugning by the appellant concerned, undisputedly the Ex.P10 undertaking letter executed by the accused to compensate the complainant for the sale agreement consideration and out of part payment of which, the cheque in question issued from his account. It is proved by complainant by said evidence of the cheque issued is for legally enforceable debt or other liability covered by Ex.P10. For Ex.P11-cheque when presented returned dishonoured even outcome of stop payment, it is within the meaning of the provisions of the Act and even after dishonour when statutory notice issued for any dispute of not served when shows unclaimed from the presumption under Section 27 General Clauses Act of due service available therefrom it is of deemed service and also held in this regard by the Three Judge Bench in C.C. Alavi Haji Vs. Palapetty Muhammed to said conclusion for not even after filing of the private complaint case taken cognizance and service of summons accused not chosen to pay the said cheque amount, even the sale agreement mentioned with reference to compromise in the statutory notice when it is clear of the cheque issued for Rs.5,00,000/- returned dishonoured in which demand to pay also if other amounts mentioned the notice no way invalid therefrom as rightly concluded by the Courts below."

The learned counsel for Respondent No.1 also placed reliance on

the judgment of the Supreme Court in Goaplast Pvt. Ltd. in support of his contention that instructions on the part of the Petitioner to stop the payment of post dated cheques prior to date of cheques does not absolve the Petitioner of the liability under Section 138 of the Negotiable Instruments Act as the presumption under Section 139 is attracted. Paragraph 6 of the said judgment is relevant and, for the sake of ready reference the same is reproduced herein under :-

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 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 "it shall be presumed that, 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, or 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. Vs Kuchil Kumar Nandi* [1998 (3) SCC 249]. On same facts is the decision of this Court in *Ashok Yeshwant Badave Vs. Surendra Madhavrao Nighojakar and another* [2001 (3) SCC 726]. The decision in Modi's case overruled an earlier decision of this Court in *Electronics Trade & Technology Development Corpon. Ltd. Vs. Indian Technologists & Engineers* [AIR 1996 SC 2339] which had taken a contrary view. We are in respectful agreement with the view taken in Modi's case. 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.”

In the aforesaid judgment, the Supreme Court considering the provisions of Sections 138 and 139, held that the presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. It is also held by the Supreme Court that this presumption coupled with the object of chapter XVII of the Act which is of 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. It is also held that once a cheque is issued

by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawer 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.

15 Though it is the case of the Petitioner that they have documentary proof of having paid the entire amount to the complainant by giving him bearers cheques in his name which was encashed by the complainant from the bank by signing on the backside of the bearer cheques in the presence of bank employee, and the complainant has identified his signature, that will have to be proved in the trial by adducing necessary evidence in that regard. It is a settled law that at the stage of taking cognizance and summoning or issuing process, the Magistrate is required to apply his judicial mind only with a view to taking cognizance of the offence, In other words, the Magistrate has to find out whether a prima facie case has been made out or not, and the Magistrate is not required to evaluate the merits of the material or evidence in support of the complaint. In this context a useful reference could be made to the recent judgment of the Supreme Court in the matter of *Sau. Kamal Shivaji Pokarnekar v/s. State of Maharashtra and others*¹⁰ wherein the Supreme Court has taken a view that quashing the criminal proceedings is called for only in a case where the complaint does not disclose any offence, or is frivolous, vexatious, or oppressive. Paragraphs 4, 5 and 6 and 9 of the Judgment are relevant and for

10 AIR 2019 SC 847

the sake of ready reference the same are reproduced herein under :-

- 4 The only point that arises for our consideration in this case is whether the High Court was right in setting aside the order by which process was issued. It is settled law that the Magistrate, at the stage of taking cognizance and summoning, is required to apply his judicial mind only with a view to taking cognizance of the offence, or in other words, to find out whether a prima facie case has been made out for summoning the accused persons. The learned Magistrate is not required to evaluate the merits of the material or evidence in support of the complaint, because the Magistrate must not undertake the exercise to find out whether the materials would lead to a conviction or not.

- 5 Quashing the criminal proceedings is called for only in a case where the complaint does not disclose any offence, or is frivolous, vexatious, or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same. It is not necessary that a meticulous analysis of the case should be done before the Trial to find out whether the case would end in conviction or acquittal. If it appears on a reading of the complaint and consideration of the allegations therein, in the light of the statement made on oath that the ingredients of the offence are disclosed, there would be no justification for the High Court to interfere.

- 6 Defences that may be available, or facts/aspects which when established during the trial, may lead to acquittal, are not grounds for quashing the complaint at the threshold. At that stage, the only question relevant is whether the averments in the complaint spell out the ingredients of a criminal offence or not.

- 9 Having heard the learned Senior Counsel and examined the material on record, we are of the considered view that the High Court ought not to have set aside the order passed by the Trial Court issuing summons to the

Respondents. A perusal of the complaint discloses that prima facie, offences that are alleged against the Respondents. The correctness or otherwise of the said allegations has to be decided only in the Trial. At the initial stage of issuance of process it is not open to the Courts to stifle the proceedings by entering into the merits of the contentions made on behalf of the accused. Criminal complaints cannot be quashed only on the ground that the allegations made therein appear to be of a civil nature. If the ingredients of the offence alleged against the accused are prima facie made out in the complaint, the criminal proceeding shall not be interdicted.”

(underlines added)

16 In the recent judgment in Bir Singh v/s. Mukesh Kumar¹¹ the Supreme Court has taken a view that a person who signs a cheque and makes it over to the payee remains liable unless he adduced evidence to rebut the presumption that the cheque had been issued for payment of debt or in discharge of a liability. Paragraphs 33 and 36 of the said judgment are relevant and are reproduced herein under :-

“33 A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

36 Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139

11 (2019) 4 SCC 197

of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.”

Considering the ratio laid down by the Supreme Court in the aforesaid judgment, the Petitioner/Accused in the present case has to adduce evidence to rebut the presumption that the cheques have been given by the Petitioner to the complainant in discharge of his debt/liability in the trial.

17 In this context, a useful reference could also be made to the another judgment of the Supreme Court in *MMTC Ltd and another v/s. MEDCHL Chemicals and Pharma (P) Ltd and another*¹². The Supreme Court in the said case held that the High Court could not examine the merits of the complaint pending in trial Court and could not merely because application did not contain a specific allegation to the contrary hold that the cheques were not issued for any debt or existing liability, and the onus to prove the non-existence of a debt or liability lay on the drawer and had to be discharged at the trial. The Supreme Court in Paragraph 17 of the said judgment observed as under :-

“There is therefore no requirement that the complainant must specifically allege in the complaint that there was subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage merely on the basis of averments in the Petitions filed by them the High Court could not have concluded that there was no existing debt or liability.”

12 (2002) 1 SCC 234

In the present case, prima facie it appears that the cheques were signed by the Petitioner and issued in favour of the complainant in discharging his debt. Admittedly when the cheques were presented by the complainant, they were dishonoured on the instructions of the Petitioner to stop payment. The Petitioner in clause (2) has given an undertaking that the said cheques shall be honoured by his bankers on the due dates as appear on the said cheques. The Petitioner has given further undertaking that they shall not instruct their bankers to stop the payment of the said cheques nor they shall close their bank account till realization of the said cheques. Having regard to the material on record and having regard to the said undertaking given by the Petitioner in the consent terms, this Court is of the prima facie opinion that the Petitioner has admitted his liability.

18 Considering the material on record, the complainant has succeeded in showing that all the essential ingredients of offence under Section 138 have been attracted. It is a settled law that onus lies upon the accused to rebut the presumption and to establish that the cheques in question were not given in respect of any debt or liability, with the standard of proof being preponderance of probabilities. As the signature in the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. Section 139 of the Act enjoins on the court

to presume that the holder of the cheque received it for the discharge.

19 In view of the aforesaid facts and circumstances, prima facie the complainant has succeeded in showing that the accused has issued the cheques in discharge of legally enforceable liability, which were dishonoured on their presentation, and that the Petitioner accused failed to make payment of the cheques. The complainant has issued demand notice dated 08/02/2017 calling upon the accused to make the payment of the cheques, and when the notice was returned as undelivered with post remarked unclaimed, the complainant sent a notice on the second address of the Petitioner which was neither return nor the advocate of the complainant has received any acknowledgment thereof. According to the complainant in spite of the receipt of demand notice dated 08/02/2017, the accused failed to make the payment of the said cheques within the stipulated period. On the face of the complaint and, considering the act of the Petitioner by stopping the payment of the cheques issued in favour of the complainant, and having regard to the material and documents placed on record, it can be said that the ingredients of the alleged offences have been attracted. Whether the cheques obtained by the complainant from the Petitioner under duress or coercion and/or whether the documents signed by the Petitioner under pressure will be the issue that has to be decided in the trial after adducing evidence by parties. Hence the orders of issuance of process passed by the learned Magistrate do not require any

interference.

20 In the light of the aforesaid discussion, this Court is of the considered opinion that, no case for interference in the impugned orders is made out. There is no merit in the Writ Petitions. The Writ Petitions stand rejected. Rule in all the Writ Petition stands discharged.

21 Needless to state that the observations made herein above are prima facie in nature and confined to the adjudication of the present Writ Petitions.

[S.S. SHINDE, J.]