GOA PLAST (P.) LTD. A

v.

CHICO URSULA D'SOUZA

NOVEMBER 20, 2003

[B.P. SINGH AND DR. AR. LAKSHMANAN, JJ.] B

Negotiable Instruments Act, 1881:

Ss. 138, 139 and 142—Dishonour of cheque—Instructions by drawer to stop payment—Liability of drawer—Presumption in favour of drawee— Absence of mercantile relationship between parties—Relevancy of—Object and ingredients of ss. 138 and 139—Held, cheque issued by drawer having been returned to drawee unpaid because of stop payment instructions, drawer shall be deemed to have committed offence punishable u/s 138—s.139 creates a presumption, unless contrary is proved, that holder of cheque received it for discharge of debt or any other liability—Drawer failed to rebut the presumption—For cases filed under s.142 relationship between drawer and drawee is not material because liability admitted is one which can be legally enforced by way of suit. C D

The respondent, a former Managing Director of the appellant-company, issued some post-dated cheques in favour of the appellant-company towards the liability of the amount misappropriated from the funds of the company. The first cheque deposited by the Company for encashment was dishonoured by the bank on the ground that the respondent had issued instruction to stop payment. After due notice to the respondent, a complaint under s.142 of the Negotiable Instruments Act, 1881 was filed against him for offence punishable under section 138 of the Act. The respondent wrote a letter dated 12.2.1993 to the Company denying his liability to pay the aforesaid sum and stated therein that a third person was responsible for the unexplained expenditure of the Company. The trial court acquitted the respondent holding that the complainant failed to prove the liability and that the respondent had rebutted the presumption under s.139 of the Act. The appeal of the Company was also dismissed by the High Court. Aggrieved, the company filed the present appeal. E F G

It was contended for the appellant-company that mere issuance of cheque in favour of the company was sufficient to show that the respondent owed

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A liability to the company and once the cheque was dishonoured nothing further was required to be proved by the complainant; and that the presumption had to be rebutted by leading evidence and not by mere explanation or statement.

Disposing of the appeal, the Court

B HELD: 1.1. Section 138 of the Negotiable Instruments Act, 1881 will be attracted in the facts of the case and a case for punishment under the provisions is made out. The cheque issued by the respondent had been stopped for payment on his instructions and the cheque was returned to the appellant unpaid. The respondent shall be deemed to have committed an offence. [849-C-D]

C

1.2. The High Court and the trial court have clearly misunderstood the object behind Section 138 of the Act. Sections 138 and 139 of the Act were enacted in view of the fact that cheques were issued for payment of admitted liability but the drawer used to dishonour the said liability by issuing instructions to the Bank for stop payment. To avoid the aforesaid and to create D an element of credibility and dependability, the aforesaid sections were enacted which provide a criminal remedy of penalty if the ingredients of the sections are satisfied. [841-E-F]

Modi Cements Ltd. v. *Kuchil Kumar Nandi,* [1998] 3 SCC 249, relied on.

E

2.1. The High Court and the trial court failed to give effect to Section 139 of the Act which creates a presumption, unless the contrary is proved, that the holder of cheque received the cheque for discharge in whole or in part of any debt or other liability. The courts below treated the proof adduced by the respondent, namely, the letter dated 12.2.1993 denying the liability and stating F therein that some other person is liable for it, as sufficient to rebut the presumption under Section 139 of the Act. Neither the said letter is proved nor its contents nor is the document produced in the proceedings of the Court. However, in the said letter the respondent did not deny the liability as such but merely shifted it on third person. The veracity of the contents of the letter could G only be verified if the contents of the letter were proved. Both the Courts have ignored the admission of the liability by the respondent who said that the liability did exist but he was not responsible for it. The Courts below have also not considered that the accused had admitted that he was the Managing Director of the appellant-Company when the liability arose. [841-B-D; 844-D]

H *Hiten P. Dalal* v. *Bratindranath Banerjee,* [2001] 6 SCC 16; *K.N. Beena*

v. *Muniyappan and Anr.*, [2001] 8 SCC 458; *Goaplast (P) Ltd.* v. *Chico Ursula D'Souza and Anr.*, [2003] 3 SCC 232 and *MMTC Ltd. and Anr.* v. *Medchi Chemicals and Pharma (P) Ltd. and Anr.*, [2002] 1 SCC 234, relied on.

2.2. The High Court and the trial court also failed to notice that the respondent was otherwise admitting the liability when the cheques were being issued. This was sufficient evidence to prove that there was a liability and as per the presumption under s. 139 of the Act, the cheques issued, therefore, were towards the liability even as per the version of the respondent.

[844-A-B]

3. For the cases filed under Section 142 of the Act for offence committed under the Act the relationship between the drawer and the drawee is not material because the liability admitted is one which can be legally enforced by way of suit. The High Court has failed to appreciate that on the facts of the case, the liability was a legally enforceable debt or liability as per the explanation to Section 138 of the Act. Therefore, the relationship between the appellant and the respondent was not at all a factor germane to the proceedings for an offence under Section 138 of the Act. The findings of the High Court that Section 138 of the Act has application only in the case of transactions involving mercantile relationship and that the appellant has failed to prove the liability are perverse. [842-G-H; 843-B; 844-F]

4. Keeping in view the object and ingredients under the provisions, in particular sections 138 and 139 of the Act, the plea for a lesser sentence and a lenient view cannot be countenanced. The transaction in question took place between the parties in the year 1993, therefore, Section 138 of the Act, as it stood at the relevant time, would be applicable to the present case. One month's time is granted to the respondent to pay twice the amount of the cheque by way of Demand Draft drawn in favour of the appellant. [849-E-F; 850-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1968 of 1996.

From the Judgment and Order dated 12.1.96 of the Bombay High Court, Panaji Bench at Goa in Crl. A. No. 37 of 1995.

Dhruv Mehta and Mohit Chaudhary for S.K. Mehta for the Appellant.

A.K. Sanghi for the Respondent.

The Judgment of the Court was delivered by

A **DR. AR. LAKSHMANAN, J.** This appeal is preferred by the appellant/ complainant against the order of the High Court of Judicature at Bombay, Panaji Bench in Criminal Appeal No. 37/1995 whereby the High Court confirmed the order of acquittal dated 25.08.1995 passed by the Judicial Magistrate, First Class in Pvt. N.C. Case No. 149/93/8 for offence punishable under Section 138 of the Negotiable Instruments Act.

B

The brief facts leading to the filing of the present appeal are as follows:

The respondent issued 10 post-dated cheques of Rs. 40,000 each in favour of the appellant totalling Rs.4 lakhs for payment towards the liability of the amount misappropriated from the funds of the appellant-Company. The
C respondent wrote a letter to the appellant denying liability to pay the aforesaid sum for the reasons given in the letter dated 12.02.1993 (Annexure P-1). The appellant deposited the first cheque for encashment. The said cheque was dishonoured by the Bank on the ground that the respondent had issued instructions to stop payment. The appellant sent a legal notice to the
D respondent regarding the dishonour of the cheque demanding payment of Rs. 40,000 within 15 days. As the respondent did not comply with the aforesaid notice, a complaint was filed against the respondent under Section 142 of the Negotiable Instruments Act (hereinafter referred to as "the Act") for offence punishable under Section 138 of the Act. According to the appellant, the respondent/accused was working as Managing Director of the appellant-
E Company. The services of the respondent were discontinued from the month of July, 1992. The appellant examined its General Manager on their behalf to prove the complaint. The respondent in defence did not examine any witness. The respondent also did not step in the witness box so as to subject himself to the cross-examination. He only brought on record the letter dated 12.02.1993
F written by him to the Company. True copy of the advice from the Bank dated 12.04.1993, true copy of the complaint dated 06.03.1996 and true copy of the deposition have been marked as Annexures P-2, P-3 and P-4.

The learned Judicial Magistrate, First Class vide order dated 25.08.1995 acquitted the respondent holding that the petitioner failed to prove the
G liability and also holding that the respondent had rebutted the statutory presumption under Section 139 of the Act. Aggrieved by the said order, the appellant preferred Criminal Appeal No. 37 of 1995 to the High Court of Judicature at Bombay which also dismissed the appeal holding that the appellant had failed to prove the liability on the part of the respondent to pay
H the sum in question. Aggrieved by the judgment and order dated 12.01.1996

of the High Court of Bombay in Criminal Appeal No. 37/1995, the present appeal was preferred by the appellant. A

We heard Shri Dhruv Mehta, learned counsel appearing for the appellant and Shri A.K. Sanghi, learned counsel appearing for the respondent.

Shri Dhruv Mehta, learned counsel appearing for the appellant, submitted B that the presumption has to be rebutted by leading evidence and not by mere explanation or statement and that mere issuance of a cheque in favour of the appellant-Company is sufficient to show that the respondent/accused owes liabilities of the appellant-Company. While construing the provisions of Section 138 of the Act, besides the fact that the cheque issued by the respondent was dishonoured, nothing further is required to be proved by the complainant C and it is for the accused to rebut the presumption under Section 139 of the Act. He would further submit that merely by sending a letter or a communication to the appellant-Company is not sufficient unless and until the presumption is rebutted by leading evidence and that the presumption cannot be said to be rebutted. Shri Dhruv Mehta would further urge that it was incumbent on D the respondent/accused to examine Rajan Kinnerkar as the respondent stated in his letter dated 12.02.1993 that Rajan Kinnerkar was responsible for the financial transactions of the Company and, therefore, he is responsible for the unexplained expenditure of the Company's Accounts. It was further contended that as soon as the respondent/accused presented or delivered the cheques to the appellant-Company, he admitted the liability and the cheque on E presentation to the Bank being dishonoured, the ingredients of Section 138 of the Act are satisfied and the accused committed an offence punishable under Section 138 of the Act.

Shri A.K. Sanghi, learned counsel appearing for the respondent/accused, F submitted that the appellant/complainant scrupulously avoided in the complaint and in the examination-in-chief of P.W.1 to state the relationship with the respondent/accused and there is also no whisper in the complaint as well as in the evidence led on behalf of the appellant regarding the receipt of the letter dated 12.02.1993. It was further submitted that the appellant has not placed before the trial Court any details or statement as to how the respondent G is liable for any dues alleged to be against the respondent. Shri A.K. Sanghi would further submit that mere presentation or delivery of the cheque, in the instant case, to the appellant by the respondent will not amount to acceptance of the debt or liability and on the contrary, the respondent has given the entire history in his letter dated 12.02.1993 before presentation of the cheque H

A in the month of April, 1993 to the Bank. It was further stated that the very letter was drafted by Rajan Kinnerkar and it was prepared, as directed by the appellant, as per the draft and, therefore, the respondent has rightly and specifically disowned the liability of Rs. 4 lakhs much less Rs.40,000 involved in the instant appeal.

B Before we advert to the respective contentions of the learned counsel appearing on either side, it is beneficial to quote Section 138 and Section 139 of the Act as it stood at the relevant time. Sections 138 and 139 of the Act read as under:

C "138. *Dishonour of cheque for insufficiency, etc., of funds in the account.*- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the Bank unpaid, either because of the amount of money standing to the credit D of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the E 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 F 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 fifteen days of the receipt of information by him G 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."

H "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." A

We have perused the pleadings, annexures, the order passed by the learned Judicial Magistrate and the judgment rendered by the High Court. In our view, the High Court and the learned Judicial Magistrate failed to give B effect to Section 139 of the Act which creates a presumption unless the contrary is proved that the holder of cheque received the cheque for discharge in whole or in part of any debt or other liability. We have perused the contents of the letter dated 12.02.1993. Neither the said letter is proved nor its contents nor is the document produced in the proceedings of the Court. It is pertinent C to note that in the said letter, the respondent/complainant did not, however, deny the liability as such but merely shifted it on third person. The veracity of the contents of the letter could only be verified if the contents of the letter were proved. The High Court and the learned Judicial Magistrate have ignored the admission of the liability by the respondent who said that the liability did exist but he was not responsible for it. While considering this, the High Court D and the learned Magistrate treated the proof adduced by the respondent, namely, the letter, denying the liability and that some other person is liable as sufficient to rebut the presumption under Section 139 of the Act. As already noticed, the appellant examined its General Manager on his side. The respondent did not examine any witness and also did not step in the witness box so as to step himself for the cross-examination. The respondent has E brought on record the letter dated 12.02.1993 written by him to the Company.

In our view, the High Court and the learned Judicial Magistrate have clearly misunderstood the object behind Section 138 of the Act. Sections 138 and 139 of the Act were enacted in view of the fact that cheques were issued F for payment of admitted liability but the drawer used to dishonour the said liability by issuing instructions to the Bank for stop payment. To avoid the aforesaid and to create an element of credibility and dependability, the aforesaid Sections were enacted which provide a criminal remedy of penalty if the ingredients of the Sections are satisfied. The High Court, in our view, gave an interpretation which would defeat the very purpose for which the provisions G were enacted. The impugned judgment wrongly interpreted Section 139 of the Act which is a presumption in favour of the holder. Reading the judgment with Section 139 of the Act, it would appear that the High Court has read in to Section 139 of the Act what is not contained in the Section. Many passages of the judgments of the High Court and of the learned Judicial Magistrate are H

A direct off shoot of the wrong interpretation placed upon Section 139 of the Act and the High Court and the learned Judicial Magistrate dwelt on extraneous factors and principles in order to bring the present case out of the purview of Section 138 of the Act.

The High Court while discussing the object of the Chapter dealing with B offences relating with dishonour of the cheque and extensively quoting commentary by Author Dr. P.W. Rege, however, has failed to consider the important aspect which is discussed at paragraph 16 which reads as under:

> "It is true that Negotiable Instruments Act has not failed to provide a remedy for the aggrieved party; but the foregoing provisions of the C Act lay down a procedure which is in the first place very elaborate and since the remedy would be merely of a civil nature, the process to seek civil justice, in the second place becomes notoriously dilatory. To ensure promptitude in remedy against defaulters, therefore, was the only way in which the element of credibility and dependability D could be re-introduced in the practice of issuing negotiable instruments in the form of cheques. The best way to do this was to provide a criminal remedy of penalty, which is just the thing that is sought to be done by the Amending Act."

To fulfil the objective, the Legislature while amending the Act has made E the following procedure:

> "(i) Under Section 138 a deeming offence is created.
>
> (ii) In Section 139, a presumption is ingrained that the holder of the cheque received it in discharge of liability.
>
> F (iii) Disallowing a defence in Section 140 that drawer has no reason to believe that cheque would be dishonoured.
>
> (iv) An explanation is provided to Section 138 to define the words "debt or other liability" to mean a legally enforceable debt or other liability."

G If the aforesaid are borne in mind then the findings of the High Court are legally perverse, namely, that Section 138 of the Act has application only in the case of transactions involving Mercantile relationship and the second being that the appellant has failed to prove the liability. Paragraph 18 of the judgment of the High Court contains both the findings which reads as under:

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"In this case no evidence or history being traced to show the relationship between the complainant and respondent accused. From the cross-examination it transpired that the respondent accused was working as the Manager of the Factory. Thus, relation were Master and Servant or employee or employer there being no business or commercial or mercantile relation between the parties."

The High Court, in our opinion, has failed to appreciate that on the facts of the instant case, the liability was a legally enforceable debt or liability as per the explanation to Section 138 of the Act, therefore, the relationship between the appellant and the respondent was not at all a factor germane to the proceedings for an offence under Section 138 of the Act. The liability was legally enforceable debt is clear from the finding of the High Court at paragraph 19 which is quoted below:

"The Appellant-Company has attempted to short circuit the suit by compelling the accused respondent to pay the amount."

Both the Courts, in our view, failed to consider the important aspect as to the stop payment instructions issued by the respondent. Ordinarily, the stop payment instructions are issued to the Bank by the account holder when there is no sufficient amount in the account. In the present case, the reason for stopping the payment, however, can be manifold. It is essential that to issue stop payment instructions, there must be funds in the accounts in the first place. On this aspect, the Courts below have failed to see whether as on the date of signing of the cheque dated 20.07.1992, the date of presentation of the cheque dated 10.01.1993, the date of writing of letter dated 12.02.1993 and the date on which stop payment instructions were issued to the Bank, the respondent has sufficient funds in the account. Both the Courts below have held that after issuing the letter, the respondent has stopped the payment, therefore, no *mala fide* can be attributed. It is pertinent to notice that the appellant made an application to the Bank Manager to ascertain whether or not there was sufficient amount in the account for the payment dated 02.06.1995. The learned Judicial Magistrate disallowed the said application without hearing the complainant holding that there is no dispute about the dishonour of the cheque by the accused, therefore, no purpose will be served by the Bank Manager as the dishonour is not in issue. Had the Bank Manager been examined it would have been clear whether the account had sufficient amount to pay the amount of the cheque or not. It would have enabled also to know on what date stop payment order was sent by the drawer to the Bank. The learned Magistrate committed a serious mistake in not allowing the application

A and the proceedings passed thereon have suffered from serious infirmity going to the root of the matter. The High Court and the learned Judicial Magistrate have also not noticed that the respondent was otherwise admitting the liability when the cheques were being issued. This was sufficient evidence to prove that there was a liability and as per the presumption under Section 139 of the Act, the cheques issued, therefore, were towards the liability even B as per the version of the respondent. The relevant Section which is Section 138 of the Act giving the ingredients of the offence. In the opening words of the Section it is stated:

> "Where any cheques drawn by a person on an account maintained C by him with a bank for payment of any amount of money to any person from out of that account for the discharge in whole or in part, of any debt or other liability."

Both the Courts below have ignored the admission of the liability by the respondent who stated that the liability did exist but he was not responsible D for it. While considering this, the Courts below treated the proof adduced by the respondent, namely, letter denying liability and that some other person is liable for it, as sufficient to rebut the presumption under Section 139 of the Act. The Courts below have also not considered that the accused had admitted that he was the Managing Director of the appellant-Company when the liability arose.

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Another reason given by the Courts below to reject the complaint was that the appellant has suppressed the fact about the letter dated 12.02.1993. 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.

F Certain comments were made by the High Court in regard to the relationship of the parties. For the cases filed under Section 142 of the Act for offence committed under the Act the relationship between the drawer and the drawee is not material because the liability admitted is one which can be legally enforced by way of suit.

G We have perused the complaint also. On the point of pleadings in the complaint, the complainant narrated all the necessary facts required to constitute offence under Section 138 of the Act, therefore, there was no question of suppression of facts in the case as held by the learned Judicial Magistrate and the findings endorsed by the High Court. The complainant H narrated that the respondent owed the appellant a sum of Rs.40,000. The

appellant has received post-dated cheque for the said amount. The cheque was presented to the Bank and was returned with the remark 'stop payment'. The statutory notice was issued and was received by the respondent. The respondent not having complied with the demand made, complaint was filed.

We shall now advert to the rulings cited at the time of hearing. 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:

> "It was, however, contended on behalf of the respondent that the decision in *Electronics Trade & Technology Development Corpn. Ltd.* 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 and Technology Development Corpn. Ltd.* : [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 supplied)
>
> 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:
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> "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."
>
> According to the learned counsel if the observations of this Court in *Electronics Trade & Technology Development Corpn. Ltd.* to the

A 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
B 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.

C 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
D 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
E observations of this Court in *Electronics Trade & Technology Development Corpn. Ltd.* 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
F 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."

Learned counsel relied on paragraph 38 of the judgment of this Court
G in the case of *Hiten P. Dalal* v. *Bratindranath Banerjee*, [2001] 6 SCC 16 which reads as under:

> "The burden was on the appellant to disapprove (sic disprove) the presumptions under Sections 138 and 139, a burden which he failed to discharge at all. The averment in the written statement of the
H appellant was not enough. Incidentally, the defence in the written

statement that the four cheques were given for intended transactions was not the answer given by the appellant to the notice under Section 138. Then he had said that the cheques were given to assist the Bank for restructuring (Ext.H). It was necessary for the appellant at least to show on the basis of acceptable evidence either that his explanation in the written statement was so probable that a prudent man ought to accept it or to establish that the effect of the material brought on record, in its totality, rendered the existence of the fact presumed, improbable. (Vide *Trilok Chand Jain* v. *State of Delhi*, [1975] 4 SCC 761. The appellant has done neither. In the absence of any such proof the presumption under Sections 138 and 139 must prevail."

Learned counsel also relied on paragraph 7 of the judgment of this Court in the case of *K.N. Beena* v. *Muniyappan and Anr.*, [2001] 8 SCC 458 which reads as under :

"In this case admittedly the Ist respondent has led no evidence except some formal evidence. The High Court appears to have proceeded on the basis that the denials/averments in his reply dated 21.5.1993 were sufficient to shift the burden of proof on to the appellant complainant to prove that the cheque was issued for a debt or liability. This is an entirely erroneous approach. The Ist respondent had to prove in the trial, by leading cogent evidence, that there was no debt or liability. The Ist respondent not having led any evidence could not be said to have discharged the burden of proving that the cheque was not issued for a debt or liability, the conviction as awarded by the Magistrate was correct. The High Court erroneously set aside that conviction."

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 and Anr.*, [2003] 3 SCC 232 which reads as 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 fact 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

A 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 B 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 C 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 D 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 E 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 overruled an earlier F decision of this Court in *Electronics Trade & Technology Development Corpn. Ltd.* v. *Indian Technologists & Engineers (Electronics) (P) Ltd.*, [1996] 2 SCC 739 which had taken a contrary view. We are in respectful agreement with the view taken in *Modi* 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 G 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."

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Reliance was also placed on paragraph 17 of the judgment of this Court in the case of *M.M.T.C. Ltd. and Anr.* v. *Medchl Chemicals and Pharma (P) Ltd. and Anr.*, [2002] 1 SCC 234 which reads as under:

> "There is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. Thus 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."

We are unable to agree with the reasonings adopted by the Courts below. The judgments of the High Court and the learned Judicial Magistrate are set aside. We hold that Section 138 of the Act will be attracted in the facts of the case and a case for punishment under the provisions is made out.

In the instant case, the cheque issued by the respondent has been stopped for payment on his instructions and the cheque was returned to the appellant unpaid. In view of our discussion in the foregoing paragraphs and on the consideration of the facts and circumstances of the case and the law on the subject, we hold that the respondent shall be deemed to have committed an offence. When the matter was taken up for further hearing on 17.11.2003, learned counsel for the respondent submitted that this Court may consider the case of the respondent and the reason for his inability to pay the amount and may consider imposing lesser sentence by taking a lenient view. We are unable to countenance the said submission for the various reasons stated supra. We have no doubt that the respondent has committed an offence punishable under the provisions of Section 138 of the Act and is liable to be punished. The transaction in question took place between the parties in the year 1993, therefore, Section 138, as it stood at the relevant time, would be applicable to the present case. Section 138 provides imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both. Section 138 has now been amended and the penalty of imprisonment for a term which may extend to one year has been substituted to two years as provided by the Amending Act of 2002 and the fine which may extend to twice of the amount of the cheque. This has been prescribed as the punishment for the offence under Section 138 of the Act.

The object and the ingredients under the provisions, in particular, Sections 138 & 139 of the Act cannot be ignored. Proper and smooth

A 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
B 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 set back. The 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
C long drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee.

We, therefore, grant one month's time from this date to the respondent herein to pay a sum of Rs. 80,000 (twice the amount of the cheque) by way of Demand Draft drawn in favour of the appellant and payable at Goa (in the
D address given in the paper book). In default thereof, the respondent shall suffer simple imprisonment for six months.

In the result, the appeal stands disposed of.

R.P. Appeal disposed of.