

Case No. 33

(1998) 3 Supreme Court Cases 249

(BEFORE M.K.MUKHERJEE, S.P.KURDUKAR AND K.T.THOMAS, JJ.)

MODI CEMENTS LTD.

Appellants

Vs

KUCHIL KUMAR NANDI

Respondent

Criminal Appeals Nos. 244-46 of 1998, decided on March 2, 1998

Section 138 of the Negotiable Instruments Act - Stop payment instructions issued by drawer- cheque presented thereafter - Dishonoured - initiating prosecution under Section 138 of the Negotiable Instruments Act - Maintainable - Electronics Trade and technologies development corporation - 1996 (2) S C C 739 followed and K K Siddarthan case 1996 (6) S C C 369 overruled.

It was alleged by the appellant that the respondent had drawn three cheques in Feb. 1994 in favour of the appellant in partial discharge of liability/ dept. the appellant presented the cheques on 9-8-1994 for encashment through their banker. On 6-9-1994 the banker of the respondent returned the cheques as unpaid with the endorsement " payment stopped by the drawer" Later it transpired that the respondent by his letter dated 8-8-1994 to his banker had instructed to stop the payments. The appellant on 13-9-1994 sent a legal notice in terms of Section 138 of the Negotiable Instruments Act to the respondent demanding payment of the amounts under the cheques. Since the respondent failed and neglected to make the payment of the amount of the aforesaid three cheques within the stipulated period of 15 days which expired on 2-10-1994, the appellant filed three criminal complaints against the respondent under Section 138. The respondent filed applications for staying the proceedings which were rejected. The respondent then filed three petitions under Section 482 CrPC in the High Court for quashing the complaints. The High Court allowed the petitions and quashed the complaints on the following reasons:

(i) The appellant had not pleaded in his complaint that the cheques were returned by the bank unpaid "either because 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". The necessary ingredients of Section 138 of the Act having not been pleaded the Court could not have taken cognizance of the offence.

(ii) Mere endorsement of the bank " payment stopped" was not sufficient to entertain the complaint as that was not an ingredient of the offence under Section 138 of the Act.

Allowing the appeals

Held : Even if a cheque is dishonoured because of " Stop payment instruction to the bank, Section 138 would get attracted.

Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739 : 1996 SCC (Cri) 454; K.K. Sidharthan v. T.P. Praveena Chandran, (1996) 6 SCC 369 : 1996 SCC (Cri) 1340, affirmed on this point.

The position will not be different even if the drawer had instructed the bank to stop the payment prior to the presentation of the cheques for encashment as in the present case. The observations of the Supreme 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 returned on instructions, Section 138 does not get attracted", does not fit in with the object and purpose of the provision which is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. Acceptance of this proposition will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. 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.

Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739 1996 SCC (Cri) 454; *K.K. Sidharthan v. T.P. Praveean Chandran*, (1996) 6 SCC 369 : 1996 SCC (Cri) 1340, *overruled on this point* Further it is not possible to accept the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque merely because he without sufficient funds to his credit in his bank account to honour the cheque issues the same. Section 138 of the Act is a penal provision wherein if a person draws a cheque on an account maintained by him with the 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, on the ground 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. The distinction between the deeming provision and the presumption is well discernible. To illustrate, if a person draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposits the amount thereafter before the cheque is put in the bank by the drawee, and the cheque is honoured, in such a situation drawing of presumption of dishonesty on the part of the drawer under Section 138 would not be justified. Section 138 of the Act gets attracted only when the cheque is dishonoured.

Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739: 1996 SCC (Cri) 454, *overruled on this point*.

The Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. A petition under Section 482 CrPC is tenable when no offence even prima facie was made out in the complaint. But the application thereof will depend upon the averments made in the complaint. In this case the complaints of the appellant could not have been dismissed by the High Court at the threshold.

Kuchil Kumar Nandi v. Modi Cement Ltd., 1997 Cri LJ 805 (Cal), *reversed* R-M/19320/C

(Ed.: (1) While the legislature in introducing Section 138-142 has attempted to

promote the efficacy of banking operations and ensure credibility in transacting business through cheques, it is sad to note that the banks themselves have done little to amend their banking practices in keeping with the legislative change, though it is nearly a decade since the provisions were introduced. If only the language of the endorsements made while returning the unpaid cheque were amended and more details provided, many of the problems faced in cases under Section 138 would not have arisen.

Take the endorsement of "payment stopped by drawer" if it was made obligatory for banks to also specify in such instances whether funds or arrangement with the bank was sufficient or not at the time of returning the cheque it would lend transparency to the transaction which would help both in avoiding unnecessary litigation and in facilitating quick disposal of the complaint in case it is filed.

So also the endorsement "refer to drawer" should be substituted by a more explicit statement regarding insufficiency of funds or arrangement with the bank. Such euphemism or courtesy to the customer is misplaced and not in keeping with the object and purpose of Section 138. There has been some controversy about such endorsement.

In *Manohar v. Mahalingam*, 1992 LW (Cri) 367, it was held that the answer 'Refer to Drawer' often adopted by the bankers could mean anything from shortage of funds to death or insolvency of the drawer and could also include insufficiency of funds. It is seen therefore, that the nomenclature of the return by itself would not be decisive of the cause of return. Again in *Union Roadways v. Shah Raman Lal Satish Kumar*, (1992) 2 BC 216:76 Comp Cas (AP) 3151, it was held by the Andhra Pradesh High Court that from the endorsement "Refer to Drawer" the complainant cannot draw an inference that the cheque was issued without funds and that in such a case offence under Section 138 was not made. In *Dada Silk Mills .v. Indian Overseas Bank*, (1995) 82 Comp Cas 35, it has been held by the Gujarat High Court that the endorsement refer to drawer, necessarily in banking parlance means that "the cheque has been returned for want of funds in the account of the drawer of the cheque." Refer to Drawer in their ordinary meaning amounted to a statement by the Bank - "We are not paying, go back to the drawer and ask him why. *M.M.Malik v. Prem Kumar Goyal*, 1991 Cri LJ 2594.

Therefore it is high time the Reserve Bank of India or the association of Nationalized Banks intervened and made necessary change in banking practices and in the format/language of the memo attached while returning unpaid cheques to further

the object of Section 138.

(2) it is a welcome clarification from the Court in the present case that the relevant point of time for determining sufficiency of funds is not the date on which the cheque is drawn but the time when the cheque is to be encashed by the drawer's bank on presentation. The statement that "Section 138 of the Act gets attracted only when the cheque is dishonoured" is a clear pointer of the law. Keeping this in mind, since a cheque would not get dishonoured even if the requisite funds were deposited at the last moment, the statement in para 19 of the judgment to the effect: makes the arrangement or deposits the amount thereafter "*before the cheque is put in the bank by the drawee*" can be read as "before the cheque is considered for encashment by the bank of the drawer" This clarification in a future case may be necessary since in a local clearance the time between putting the cheque in the bank by the drawee and its presentation in the bank of the drawer may be 3-4 days, where as in case of outstation clearance, it could be much more. This time for depositing or arranging for sufficient funds should be available to the drawer suffering from no dishonest intentions, to do needful. He can make the necessary deposit or transfer of funds even at the last moment. In practice a friendly banker even informs the customer by phone of such contingency. What matters in the final analysis is whether the cheque was dishonoured or not irrespective of when the requisite funds were deposited or arranged with the banker.

Suggested Case Finder Search Text. (inter alia):

Cheque dishonor 138

Advocates who appeared in this case:

Ranjit Kumar And Ms Bina Tamta, Advocates, for the Appellant:

Ranjan Mukherjee, Advocate, for the Respondent.

Chronological list of cases cited

1. (1996) 6 SCC 369: 1996 SCC (Cri) 1340, *K.K.Sidharthan v. T.P. Praveena Chandram*

2. (1996) 2 SCC 739: 1996 SCC (Cri) 454, *Electronics Trade & Technology Development Corpn. Ltd. V. Indian Technologists & Engineers (Electronics) (P) Ltd.* 254h, 255fg, 256a, 256b, 256e, 257a, 257b, 257h

The Judgment of the Court was delivered by S.P.KURDUKAR, J. -Leave granted.

2. These three appeals are filed by the appellants/complainants challenging the legality and correctness of the judgment and order dated 21-11-1996 passed by the High Court In Criminal Revision Petitions Nos. 2303-04 of 1995.

3. The present proceedings arise out of a complaint filed by the appellant in the Court of Chief Judicial Magistrate, Calcutta under Section 138 of the Negotiable Instrument Act, 1881 (for short " the Act") against the respondent. The appellant-Company is a public limited company manufacturing and selling cement under the brand name " Modi Cement" throughout India.

4. The respondent/accused carries on business in the name and style of " Dubey Construction, M/s Nandi Traders, M/s Nandi Concerns, M/s Nandi and Co., M/s Nandi Enterprises, M/s S.K. Enterprises, M/s. S.K Trading and M/s Jupiter Art. The respondent/ accused is sole proprietor of all these business concerns.

5. It is alleged by the appellant in the complaint that the respondent purchased from them non-levy Modi Cement on credit against the orders placed on behalf of his concerns. These orders were placed by the respondent with the Calcutta office of the appellant and it was agreed that the price of the consignments was to be paid by the respondent at the said office. After taking accounts it was found that on 23-2-1994 the respondent incurred a liability. / debt of Rs, 1,10,53,520.30 payable to the appellant towards the purchased price of the cement supplied by them to the respondent. In partial discharge of the said liability/debt the respondent drew three cheques in favour of the appellant on 23-2-1994, 26-2-1994 and 28-2-1994 bearing Cheques Nos. 1308340-42 for a sum of Rs 2,00,000 each.

6. The appellant presented these three cheques on 9-8-1994 for encashment through their bankers, Bank of India, J.L.Nehru Road Branch, Calcutta. On 6-9-1994 the Indian Bank, Bankura, the banker of the respondent returned the said cheques as unpaid with an endorsement " payment stopped by the drawer". Later on it transpired that vide his letter dated 8-8-1994 the respondent had given such instruction. The appellant on 13-9-1994 sent a legal notice in terms of Section 138 of the Act to the respondent demanding payment of the aforesaid amounts under the cheques. The said notice was duly served on the respondent on 17-9-1994. Since the respondent failed and neglected to make the payment of the amount of the aforesaid three cheques within the stipulated period of 15 days, which expired on 2-10-1994, the

appellant filed three criminal complaints against the respondent under Section 138 of the Act. After entering appearance in obedience to the processes issued in connection with the above three cases the respondent filed applications for staying the proceedings, which were rejected.

7. The respondent then filed three petitions under Section 482 CrPC in the High Court of Calcutta for quashing the complaints. The learned Single Judge vide his common judgment and order dated 21-11-1996 allowed the petitions of the respondent and quashed the complaints. It is against this order passed by the High Court the appellant has filed these appeals. Section 138 of the Act reads thus:

"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 form 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 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 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 fifteen 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 purpose of this section, 'debt or other liability' means a legally enforceable debt or other liability.'

8. Briefly stated the reasons given by the High Court are as under:

(i) The appellant has not pleaded in his complaint that the cheques were returned by the bank unpaid " either because 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". The necessary ingredients of Section 138 of the Act having not been pleaded the Court could not have taken cognizance of the offence.

(ii) Mere endorsement of the bank" payment stopped" was not sufficient to entertain the complaint as that was not an ingredient of the offence under Section 138 of the Act

9. The High Court has laid much stress in its judgment to emphasize that a petition under Section 482 CrPC is tenable when no offence even prima facie was made out in the complaint. There can be no dispute regarding that legal proposition but the application thereof will depend upon the averments made in the complaint. But the second reasoning of the High Court is contrary to the decision of this Court (rendered by a Bench of two Judges) in *Electronics Trade & Technology Development Corpn Ltd. v. Indian Technologists & Engineers (Electronics)(p) Ltd.* While interpreting Section 138 of the Act, it firstly observed as under: (SCC pp. 741-42, para 5

"5. It would thus be clear that when a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the bank with the endorsement like (1) in this case,' refer to the drawer' (2) ' instructions for stoppage of payment' and stamped (3) exceeds arrangement it amounts to dishonor within the meaning of Section 138 of the Act. On issuance of the notice by the payee or the holder in due course after dishonor, to the drawer demanding payment within 15 days from the date of the receipt of such a notice, if he does not pay the same, the statutory presumption on dishonest intention, subject to any other liability, stands satisfied."

(10)It then took up for consideration a similar contention before them by learned counsel for the drawer of the cheques or that stoppage of payment due to instructions does not amount to an offence under Section 138 of the Act and repelling

the same observed;

“We find no force in the contention. The object of bringing Section 138 on statue appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments.”

The Court further observed: (SCC p. 742, para 6)

“It is seen that once the cheque has been drawn and issued to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the bank for non-payment and the cheque returned to the payee with such an endorsement, it amounts to dishonour of cheque and it comes within the meaning of Section 138.”

11. Another two-Judge Bench while dealing with the same section in *K.K.Sidharthan v. T.P.Praveena Chandran*. (SCC p 370)

“This shows that Section 138 gets attracted in terms of cheque dishonoured because of insufficient funds or where the amount exceeds the arrangement made with the bank. It has, however, been held by the Bench of this Court in *Electronics Trade and Technology Development Ltd. V. Indian technologies and Engineers (Electronics) (P) Ltd.* that even if a cheque is dishonoured because of ‘stop payment instruction to the bank, Section 138 would get attracted.”

We are in complete agreement with the above legal proposition.”

12. The learned counsel for the appellant vehemently urged that by these decisions of this Court clearly support the case of the appellant and trial Court had rightly issued the process and the High Court was totally wrong in taking a contrary view.

13. It was , however contended on behalf of the respondent that the decision in *Electronics Trade & Technology Development Corn Ltd.* does not support the appellant as far as the facts that emerged in the present cases insamuch as the drawer had intimated to the bank on 8-8-1984 to stop the payment whereas the cheques were [resented 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.para 6)

“Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encasement, notice is issued to him not to present the same for encasement and yet the payee or holder course presents the cheque to the bank for payment and when it is on instructions, Section 138 does not get attracted.
(Emphasis supplied)

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 and Technology Development Corpn Ltd.*, 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 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 intitled 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.* 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 instruction, 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.

17. The above view has been referred to in *K.K.Sidharthan as is clear from paras 5 and 6 of the judgment Para 5 and 6 read as under; (SCC P. 371)*

5. The above apart, though in the aforesaid case this Court held that even 'stop payment' instruction would attract the mischief of Section 138. it has been observed in Para 6, that if ' 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 present the cheque to the bank for payment and when it is returned on instruction, Section 13 does not get attracted'.

6. *From the facts mentioned above, we are satisfied that in the present case cheques were presented after the appellant had directed its bank to 'stop payment'* We have said so because thought it has been averred in the complaint that the cheque dated 10-10-1994 was presented for collection on that date itself through the bank of the respondent which is Catholic Syrian Bank Ltd., from the aforesaid letter of the Indian Overseas Branch, we find that the cheque was presented on 15-10-1994(in clearing). The lawyer's notice to the respondent being of 4th October, which had been replied on 12th from Cochi, which is the place of the respondent, whereas the Advocate who issued notice on behalf of the appellant was at Thrissur, *it would seem to us that the first cheque had even been presented after the instruction of 'stop payment' issued by the appellant had become known to the respondent".*
(emphasis supplied.)

With the above observations, the complaint under Section 138 of the Act was quashed.

18. The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of Sections 138 and 139 of the Act. If we are to accept this proposition it will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Further the following observations in para 6 in *Electronics Trade & Technology Development Coprn. Ltd.* (SCC p. 742.)

"Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account

maintained by him in a bank and induce the payee or holder in due course to act upon it. *Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly*"

In our opinion, do not also lay down the law correctly.

19. Section 138 of the Act is a penal provision wherein if a person draws a cheque on an account maintained by him with the 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, on the ground 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. The distinction between the deeming provision and the presumption is well discernible. To illustrate, if a person draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposits the amount thereafter before the cheque is put in the bank by the drawee, and the cheque is honoured, in such a situation drawing of presumption of dishonesty on the part of the drawer under section 138 would not be justified. Section 138 of the Act gets attracted only when the cheque is dishonoured.

20. On a careful reading of Section 138 of the Act, we are unable to subscribe to the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honour the cheque issues the same and therefore, this amounts to an offence under Section 138 of the Act. For the reasons stated hereinabove, we are unable to share the views expressed by this Court in the above two cases and we respectfully differ with the same regarding interpretation of Section 138 of the Act to the limited extent as indicated above,

21. It is needless to emphasize that the Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. It is for this reason we are of the considered opinion that the complaints of the appellant could not have been dismissed by the High Court at the threshold.

22. In the result the appeals succeed and the common order dated 21-11-1996 passed by the High Court in Criminal Revision Petitions Nos. 2303, 2304 of 1995 is quashed and set aside and the order passed by the Metropolitan Magistrate 11th Court, Clacutta on 6-4-1995 is restored. It is made clear that all the contentions are kept open.

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MODI CEMENTS LTD.

Appellants

Vs

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Respondent

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Section 138 of the Negotiable Instruments Act - Stop payment instructions issued by drawer- cheque presented thereafter - Dishonoured - initiating prosecution under Section 138 of the Negotiable Instruments Act - Maintainable - Electronics Trade and technologies development corporation - 1996 (2) S C C 739 followed and K K Siddarthan case 1996 (6) S C C 369 overruled.

It was alleged by the appellant that the respondent had drawn three cheques in Feb. 1994 in favour of the appellant in partial discharge of liability/ dept. the appellant presented the cheques on 9-8-1994 for encashment through their banker. On 6-9-1994 the banker of the respondent returned the cheques as unpaid with the endorsement " payment stopped by the drawer" Later it transpired that the respondent by his letter dated 8-8-1994 to his banker had instructed to stop the payments. The appellant on 13-9-1994 sent a legal notice in terms of Section 138 of the Negotiable Instruments Act to the respondent demanding payment of the amounts under the cheques. Since the respondent failed and neglected to make the payment of the amount of the aforesaid three cheques within the stipulated period of 15 days which expired on 2-10-1994, the appellant filed three criminal complaints against the respondent under Section 138. The respondent filed applications for staying the proceedings which were rejected. The respondent then filed three petitions under Section 482 CrPC in the High Court for quashing the complaints. The High Court allowed the petitions and quashed the complaints on the following reasons:

(i) The appellant had not pleaded in his complaint that the cheques were returned by the bank unpaid "either because 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". The necessary ingredients of Section 138 of the Act having not been pleaded the Court could not have taken cognizance of the offence.

(ii) Mere endorsement of the bank " payment stopped" was not sufficient to entertain the complaint as that was not an ingredient of the offence under Section 138 of the Act.

Allowing the appeals

Held : Even if a cheque is dishonoured because of " Stop payment instruction to the bank, Section 138 would get attracted.

Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739 : 1996 SCC (Cri) 454; K.K. Sidharthan v. T.P. Praveena Chandran, (1996) 6 SCC 369 : 1996 SCC (Cri) 1340, affirmed on this point.

The position will not be different even if the drawer had instructed the bank to stop the payment prior to the presentation of the cheques for encashment as in the present case. The observations of the Supreme 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 returned on instructions, Section 138 does not get attracted", does not fit in with the object and purpose of the provision which is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. Acceptance of this proposition will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues drawer 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.

Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739 1996 SCC (Cri) 454; *K.K. Sidharthan v. T.P. Praveean Chandran*, (1996) 6 SCC 369 : 1996 SCC (Cri) 1340, *overruled on this point* Further it is not possible to accept the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque merely because he without sufficient funds to his credit in his bank account to honour the cheque issues the same. Section 138 of the Act is a penal provision wherein if a person draws a cheque on an account maintained by him with the 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, on the ground 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. The distinction between the deeming provision and the presumption is well discernible. To illustrate, if a person draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposits the amount thereafter before the cheque is put in the bank by the drawee, and the cheque is honoured, in such a situation drawing of presumption of dishonesty on the part of the drawer under Section 138 would not be justified. Section 138 of the Act gets attracted only when the cheque is dishonoured.

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Kuchil Kumar Nandi v. Modi Cement Ltd., 1997 Cri LJ 805 (Cal), *reversed* R-M/19320/C

(Ed.: (1) While the legislature in introducing Section 138-142 has attempted to

promote the efficacy of banking operations and ensure credibility in transacting business through cheques, it is sad to note that the banks themselves have done little to amend their banking practices in keeping with the legislative change, though it is nearly a decade since the provisions were introduced. If only the language of the endorsements made while returning the unpaid cheque were amended and more details provided, many of the problems faced in cases under Section 138 would not have arisen.

Take the endorsement of "payment stopped by drawer" if it was made obligatory for banks to also specify in such instances whether funds or arrangement with the bank was sufficient or not at the time of returning the cheque it would lend transparency to the transaction which would help both in avoiding unnecessary litigation and in facilitating quick disposal of the complaint in case it is filed.

So also the endorsement "refer to drawer" should be substituted by a more explicit statement regarding insufficiency of funds or arrangement with the bank. Such euphemism or courtesy to the customer is misplaced and not in keeping with the object and purpose of Section 138. There has been some controversy about such endorsement.

In *Manohar v. Mahalingam*, 1992 LW (Cri) 367, it was held that the answer 'Refer to Drawer' often adopted by the bankers could mean anything from shortage of funds to death or insolvency of the drawer and could also include insufficiency of funds. It is seen therefore, that the nomenclature of the return by itself would not be decisive of the cause of return. Again in *Union Roadways v. Shah Raman Lal Satish Kumar*, (1992) 2 BC 216:76 Comp Cas (AP) 3151, it was held by the Andhra Pradesh High Court that from the endorsement "Refer to Drawer" the complainant cannot draw an inference that the cheque was issued without funds and that in such a case offence under Section 138 was not made. In *Dada Silk Mills .v. Indian Overseas Bank*, (1995) 82 Comp Cas 35, it has been held by the Gujarat High Court that the endorsement refer to drawer, necessarily in banking parlance means that "the cheque has been returned for want of funds in the account of the drawer of the cheque." Refer to Drawer in their ordinary meaning amounted to a statement by the Bank - "We are not paying, go back to the drawer and ask him why." *M.M.Malik v. Prem Kumar Goyal*, 1991 Cri LJ 2594.

Therefore it is high time the Reserve Bank of India or the association of Nationalized Banks intervened and made necessary change in banking practices and in the format/language of the memo attached while returning unpaid cheques to further

the object of Section 138.

(2) it is a welcome clarification from the Court in the present case that the relevant point of time for determining sufficiency of funds is not the date on which the cheque is drawn but the time when the cheque is to be encashed by the drawer's bank on presentation. The statement that "Section 138 of the Act gets attracted only when the cheque is dishonoured" is a clear pointer of the law. Keeping this in mind, since a cheque would not get dishonoured even if the requisite funds were deposited at the last moment, the statement in para 19 of the judgment to the effect: makes the arrangement or deposits the amount thereafter "*before the cheque is put in the bank by the drawee*" can be read as "before the cheque is considered for encashment by the bank of the drawer" This clarification in a future case may be necessary since in a local clearance the time between putting the cheque in the bank by the drawee and its presentation in the bank of the drawer may be 3-4 days, where as in case of outstation clearance, it could be much more. This time for depositing or arranging for sufficient funds should be available to the drawer suffering from no dishonest intentions, to do needful. He can make the necessary deposit or transfer of funds even at the last moment. In practice a friendly banker even informs the customer by phone of such contingency. What matters in the final analysis is whether the cheque was dishonoured or not irrespective of when the requisite funds were deposited or arranged with the banker.

Suggested Case Finder Search Text. (inter alia):

Cheque dishonor 138

Advocates who appeared in this case:

Ranjit Kumar And Ms Bina Tamta, Advocates, for the Appellant:

Ranjan Mukherjee, Advocate, for the Respondent.

Chronological list of cases cited

1. (1996) 6 SCC 369: 1996 SCC (Cri) 1340, *K.K.Sidharthan v. T.P. Praveena Chandram*

2. (1996) 2 SCC 739: 1996 SCC (Cri) 454, *Electronics Trade & Technology Development Corpn. Ltd. V. Indian Technologists & Engineers (Electronics) (P) Ltd.* 254h, 255fg, 256a, 256b, 256e, 257a, 257b, 257h

The Judgment of the Court was delivered by S.P.KURDUKAR, J. -Leave granted.

2. These three appeals are filed by the appellants/complainants challenging the legality and correctness of the judgment and order dated 21-11-1996 passed by the High Court In Criminal Revision Petitions Nos. 2303-04 of 1995.

3. The present proceedings arise out of a complaint filed by the appellant in the Court of Chief Judicial Magistrate, Calcutta under Section 138 of the Negotiable Instrument Act, 1881 (for short " the Act") against the respondent. The appellant-Company is a public limited company manufacturing and selling cement under the brand name " Modi Cement" throughout India.

4. The respondent/accused carries on business in the name and style of " Dubey Construction, M/s Nandi Traders, M/s Nandi Concerns, M/s Nandi and Co., M/s Nandi Enterprises, M/s S.K. Enterprises, M/s. S.K Trading and M/s Jupiter Art. The respondent/ accused is sole proprietor of all these business concerns.

5. It is alleged by the appellant in the complaint that the respondent purchased from them non-levy Modi Cement on credit against the orders placed on behalf of his concerns. These orders were placed by the respondent with the Calcutta office of the appellant and it was agreed that the price of the consignments was to be paid by the respondent at the said office. After taking accounts it was found that on 23-2-1994 the respondent incurred a liability. / debt of Rs, 1,10,53,520.30 payable to the appellant towards the purchased price of the cement supplied by them to the respondent. In partial discharge of the said liability/debt the respondent drew three cheques in favour of the appellant on 23-2-1994, 26-2-1994 and 28-2-1994 bearing Cheques Nos. 1308340-42 for a sum of Rs 2,00,000 each.

6. The appellant presented these three cheques on 9-8-1994 for encashment through their bankers, Bank of India, J.L.Nehru Road Branch, Calcutta. On 6-9-1994 the Indian Bank, Bankura, the banker of the respondent returned the said cheques as unpaid with an endorsement " payment stopped by the drawer". Later on it transpired that vide his letter dated 8-8-1994 the respondent had given such instruction. The appellant on 13-9-1994 sent a legal notice in terms of Section 138 of the Act to the respondent demanding payment of the aforesaid amounts under the cheques. The said notice was duly served on the respondent on 17-9-1994. Since the respondent failed and neglected to make the payment of the amount of the aforesaid three cheques within the stipulated period of 15 days, which expired on 2-10-1994, the

appellant filed three criminal complaints against the respondent under Section 138 of the Act. After entering appearance in obedience to the processes issued in connection with the above three cases the respondent filed applications for staying the proceedings, which were rejected.

7. The respondent then filed three petitions under Section 482 CrPC in the High Court of Calcutta for quashing the complaints. The learned Single Judge vide his common judgment and order dated 21-11-1996 allowed the petitions of the respondent and quashed the complaints. It is against this order passed by the High Court the appellant has filed these appeals. Section 138 of the Act reads thus:

"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 form 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 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 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 fifteen 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 purpose of this section, 'debt or other liability' means a legally enforceable debt or other liability.'

8. Briefly stated the reasons given by the High Court are as under:

(i) The appellant has not pleaded in his complaint that the cheques were returned by the bank unpaid " either because 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". The necessary ingredients of Section 138 of the Act having not been pleaded the Court could not have taken cognizance of the offence.

(ii) Mere endorsement of the bank" payment stopped" was not sufficient to entertain the complaint as that was not an ingredient of the offence under Section 138 of the Act

9. The High Court has laid much stress in its judgment to emphasize that a petition under Section 482 CrPC is tenable when no offence even prima facie was made out in the complaint. There can be no dispute regarding that legal proposition but the application thereof will depend upon the averments made in the complaint. But the second reasoning of the High Court is contrary to the decision of this Court (rendered by a Bench of two Judges) in *Electronics Trade & Technology Development Corpn Ltd. v. Indian Technologists & Engineers (Electronics)(p) Ltd.* While interpreting Section 138 of the Act, it firstly observed as under: (SCC pp. 741-42, para 5

"5. It would thus be clear that when a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the bank with the endorsement like (1) in this case,' refer to the drawer' (2) ' instructions for stoppage of payment' and stamped (3) exceeds arrangement it amounts to dishonor within the meaning of Section 138 of the Act. On issuance of the notice by the payee or the holder in due course after dishonor, to the drawer demanding payment within 15 days from the date of the receipt of such a notice, if he does not pay the same, the statutory presumption on dishonest intention, subject to any other liability, stands satisfied."

(10)It then took up for consideration a similar contention before them by learned counsel for the drawer of the cheques or that stoppage of payment due to instructions does not amount to an offence under Section 138 of the Act and repelling

the same observed;

“We find no force in the contention. The object of bringing Section 138 on statue appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments.”

The Court further observed: (SCC p. 742, para 6)

“It is seen that once the cheque has been drawn and issued to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the bank for non-payment and the cheque returned to the payee with such an endorsement, it amounts to dishonour of cheque and it comes within the meaning of Section 138.”

11. Another two-Judge Bench while dealing with the same section in *K.K.Sidharthan v. T.P.Praveena Chandran*. (SCC p 370)

“This shows that Section 138 gets attracted in terms of cheque dishonoured because of insufficient funds or where the amount exceeds the arrangement made with the bank. It has, however, been held by the Bench of this Court in *Electronics Trade and Technology Development Ltd. V. Indian technologies and Engineers (Electronics) (P) Ltd.* that even if a cheque is dishonoured because of ‘stop payment instruction to the bank, Section 138 would get attracted.”

We are in complete agreement with the above legal proposition.”

12. The learned counsel for the appellant vehemently urged that by these decisions of this Court clearly support the case of the appellant and trial Court had rightly issued the process and the High Court was totally wrong in taking a contrary view.

13. It was , however contended on behalf of the respondent that the decision in *Electronics Trade & Technology Development Corn Ltd.* does not support the appellant as far as the facts that emerged in the present cases insamuch as the drawer had intimated to the bank on 8-8-1984 to stop the payment whereas the cheques were [resented 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.para 6)

“Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encasement, notice is issued to him not to present the same for encasement and yet the payee or holder course presents the cheque to the bank for payment and when it is on instructions, Section 138 does not get attracted.
(Emphasis supplied)

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 and Technology Development Corpn Ltd.*, 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 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 intitled 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.* 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 instruction, 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.

17. The above view has been referred to in *K.K.Sidharthan as is clear from paras 5 and 6 of the judgment Para 5 and 6 read as under; (SCC P. 371)*

5. The above apart, though in the aforesaid case this Court held that even 'stop payment' instruction would attract the mischief of Section 138. it has been observed in Para 6, that if ' 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 present the cheque to the bank for payment and when it is returned on instruction, Section 13 does not get attracted'.

6. *From the facts mentioned above, we are satisfied that in the present case cheques were presented after the appellant had directed its bank to 'stop payment'* We have said so because thought it has been averred in the complaint that the cheque dated 10-10-1994 was presented for collection on that date itself through the bank of the respondent which is Catholic Syrian Bank Ltd., from the aforesaid letter of the Indian Overseas Branch, we find that the cheque was presented on 15-10-1994(in clearing). The lawyer's notice to the respondent being of 4th October, which had been replied on 12th from Cochi, which is the place of the respondent, whereas the Advocate who issued notice on behalf of the appellant was at Thrissur, *it would seem to us that the first cheque had even been presented after the instruction of 'stop payment' issued by the appellant had become known to the respondent".*
(emphasis supplied.)

With the above observations, the complaint under Section 138 of the Act was quashed.

18. The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of Sections 138 and 139 of the Act. If we are to accept this proposition it will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Further the following observations in para 6 in *Electronics Trade & Technology Development Coprn. Ltd.* (SCC p. 742.)

"Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account

maintained by him in a bank and induce the payee or holder in due course to act upon it. *Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly*"

In our opinion, do not also lay down the law correctly.

19. Section 138 of the Act is a penal provision wherein if a person draws a cheque on an account maintained by him with the 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, on the ground 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. The distinction between the deeming provision and the presumption is well discernible. To illustrate, if a person draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposits the amount thereafter before the cheque is put in the bank by the drawee, and the cheque is honoured, in such a situation drawing of presumption of dishonesty on the part of the drawer under section 138 would not be justified. Section 138 of the Act gets attracted only when the cheque is dishonoured.

20. On a careful reading of Section 138 of the Act, we are unable to subscribe to the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honour the cheque issues the same and therefore, this amounts to an offence under Section 138 of the Act. For the reasons stated hereinabove, we are unable to share the views expressed by this Court in the above two cases and we respectfully differ with the same regarding interpretation of Section 138 of the Act to the limited extent as indicated above,

21. It is needless to emphasize that the Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. It is for this reason we are of the considered opinion that the complaints of the appellant could not have been dismissed by the High Court at the threshold.

22. In the result the appeals succeed and the common order dated 21-11-1996 passed by the High Court in Criminal Revision Petitions Nos. 2303, 2304 of 1995 is quashed and set aside and the order passed by the Metropolitan Magistrate 11th Court, Clacutta on 6-4-1995 is restored. It is made clear that all the contentions are kept open.

Case No. 33

(1998) 3 Supreme Court Cases 249

(BEFORE M.K.MUKHERJEE, S.P.KURDUKAR AND K.T.THOMAS, JJ.)

MODI CEMENTS LTD.

Appellants

Vs

KUCHIL KUMAR NANDI

Respondent

Criminal Appeals Nos. 244-46 of 1998, decided on March 2, 1998

Section 138 of the Negotiable Instruments Act - Stop payment instructions issued by drawer- cheque presented thereafter - Dishonoured - initiating prosecution under Section 138 of the Negotiable Instruments Act - Maintainable - Electronics Trade and technologies development corporation - 1996 (2) S C C 739 followed and K K Siddarthan case 1996 (6) S C C 369 overruled.

It was alleged by the appellant that the respondent had drawn three cheques in Feb. 1994 in favour of the appellant in partial discharge of liability/ dept. the appellant presented the cheques on 9-8-1994 for encashment through their banker. On 6-9-1994 the banker of the respondent returned the cheques as unpaid with the endorsement " payment stopped by the drawer" Later it transpired that the respondent by his letter dated 8-8-1994 to his banker had instructed to stop the payments. The appellant on 13-9-1994 sent a legal notice in terms of Section 138 of the Negotiable Instruments Act to the respondent demanding payment of the amounts under the cheques. Since the respondent failed and neglected to make the payment of the amount of the aforesaid three cheques within the stipulated period of 15 days which expired on 2-10-1994, the appellant filed three criminal complaints against the respondent under Section 138. The respondent filed applications for staying the proceedings which were rejected. The respondent then filed three petitions under Section 482 CrPC in the High Court for quashing the complaints. The High Court allowed the petitions and quashed the complaints on the following reasons:

(i) The appellant had not pleaded in his complaint that the cheques were returned by the bank unpaid "either because 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". The necessary ingredients of Section 138 of the Act having not been pleaded the Court could not have taken cognizance of the offence.

(ii) Mere endorsement of the bank " payment stopped" was not sufficient to entertain the complaint as that was not an ingredient of the offence under Section 138 of the Act.

Allowing the appeals

Held : Even if a cheque is dishonoured because of " Stop payment instruction to the bank, Section 138 would get attracted.

Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739 : 1996 SCC (Cri) 454; K.K. Sidharthan v. T.P. Praveena Chandran, (1996) 6 SCC 369 : 1996 SCC (Cri) 1340, affirmed on this point.

The position will not be different even if the drawer had instructed the bank to stop the payment prior to the presentation of the cheques for encashment as in the present case. The observations of the Supreme 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 returned on instructions, Section 138 does not get attracted", does not fit in with the object and purpose of the provision which is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. Acceptance of this proposition will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues drawer 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.

Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739 1996 SCC (Cri) 454; *K.K. Sidharthan v. T.P. Praveean Chandran*, (1996) 6 SCC 369 : 1996 SCC (Cri) 1340, *overruled on this point* Further it is not possible to accept the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque merely because he without sufficient funds to his credit in his bank account to honour the cheque issues the same. Section 138 of the Act is a penal provision wherein if a person draws a cheque on an account maintained by him with the 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, on the ground 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. The distinction between the deeming provision and the presumption is well discernible. To illustrate, if a person draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposits the amount thereafter before the cheque is put in the bank by the drawee, and the cheque is honoured, in such a situation drawing of presumption of dishonesty on the part of the drawer under Section 138 would not be justified. Section 138 of the Act gets attracted only when the cheque is dishonoured.

Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739: 1996 SCC (Cri) 454, *overruled on this point*.

The Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. A petition under Section 482 CrPC is tenable when no offence even prima facie was made out in the complaint. But the application thereof will depend upon the averments made in the complaint. In this case the complaints of the appellant could not have been dismissed by the High Court at the threshold.

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Take the endorsement of "payment stopped by drawer" if it was made obligatory for banks to also specify in such instances whether funds or arrangement with the bank was sufficient or not at the time of returning the cheque it would lend transparency to the transaction which would help both in avoiding unnecessary litigation and in facilitating quick disposal of the complaint in case it is filed.

So also the endorsement "refer to drawer" should be substituted by a more explicit statement regarding insufficiency of funds or arrangement with the bank. Such euphemism or courtesy to the customer is misplaced and not in keeping with the object and purpose of Section 138. There has been some controversy about such endorsement.

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Therefore it is high time the Reserve Bank of India or the association of Nationalized Banks intervened and made necessary change in banking practices and in the format/language of the memo attached while returning unpaid cheques to further

the object of Section 138.

(2) it is a welcome clarification from the Court in the present case that the relevant point of time for determining sufficiency of funds is not the date on which the cheque is drawn but the time when the cheque is to be encashed by the drawer's bank on presentation. The statement that "Section 138 of the Act gets attracted only when the cheque is dishonoured" is a clear pointer of the law. Keeping this in mind, since a cheque would not get dishonoured even if the requisite funds were deposited at the last moment, the statement in para 19 of the judgment to the effect: makes the arrangement or deposits the amount thereafter "*before the cheque is put in the bank by the drawee*" can be read as "before the cheque is considered for encashment by the bank of the drawer" This clarification in a future case may be necessary since in a local clearance the time between putting the cheque in the bank by the drawee and its presentation in the bank of the drawer may be 3-4 days, where as in case of outstation clearance, it could be much more. This time for depositing or arranging for sufficient funds should be available to the drawer suffering from no dishonest intentions, to do needful. He can make the necessary deposit or transfer of funds even at the last moment. In practice a friendly banker even informs the customer by phone of such contingency. What matters in the final analysis is whether the cheque was dishonoured or not irrespective of when the requisite funds were deposited or arranged with the banker.

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The Judgment of the Court was delivered by S.P.KURDUKAR, J. -Leave granted.

2. These three appeals are filed by the appellants/complainants challenging the legality and correctness of the judgment and order dated 21-11-1996 passed by the High Court In Criminal Revision Petitions Nos. 2303-04 of 1995.

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4. The respondent/accused carries on business in the name and style of " Dubey Construction, M/s Nandi Traders, M/s Nandi Concerns, M/s Nandi and Co., M/s Nandi Enterprises, M/s S.K. Enterprises, M/s. S.K Trading and M/s Jupiter Art. The respondent/ accused is sole proprietor of all these business concerns.

5. It is alleged by the appellant in the complaint that the respondent purchased from them non-levy Modi Cement on credit against the orders placed on behalf of his concerns. These orders were placed by the respondent with the Calcutta office of the appellant and it was agreed that the price of the consignments was to be paid by the respondent at the said office. After taking accounts it was found that on 23-2-1994 the respondent incurred a liability. / debt of Rs, 1,10,53,520.30 payable to the appellant towards the purchased price of the cement supplied by them to the respondent. In partial discharge of the said liability/debt the respondent drew three cheques in favour of the appellant on 23-2-1994, 26-2-1994 and 28-2-1994 bearing Cheques Nos. 1308340-42 for a sum of Rs 2,00,000 each.

6. The appellant presented these three cheques on 9-8-1994 for encashment through their bankers, Bank of India, J.L.Nehru Road Branch, Calcutta. On 6-9-1994 the Indian Bank, Bankura, the banker of the respondent returned the said cheques as unpaid with an endorsement " payment stopped by the drawer". Later on it transpired that vide his letter dated 8-8-1994 the respondent had given such instruction. The appellant on 13-9-1994 sent a legal notice in terms of Section 138 of the Act to the respondent demanding payment of the aforesaid amounts under the cheques. The said notice was duly served on the respondent on 17-9-1994. Since the respondent failed and neglected to make the payment of the amount of the aforesaid three cheques within the stipulated period of 15 days, which expired on 2-10-1994, the

appellant filed three criminal complaints against the respondent under Section 138 of the Act. After entering appearance in obedience to the processes issued in connection with the above three cases the respondent filed applications for staying the proceedings, which were rejected.

7. The respondent then filed three petitions under Section 482 CrPC in the High Court of Calcutta for quashing the complaints. The learned Single Judge vide his common judgment and order dated 21-11-1996 allowed the petitions of the respondent and quashed the complaints. It is against this order passed by the High Court the appellant has filed these appeals. Section 138 of the Act reads thus:

"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 form 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 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 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 fifteen 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 purpose of this section, 'debt or other liability' means a legally enforceable debt or other liability.'

8. Briefly stated the reasons given by the High Court are as under:

(i) The appellant has not pleaded in his complaint that the cheques were returned by the bank unpaid " either because 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". The necessary ingredients of Section 138 of the Act having not been pleaded the Court could not have taken cognizance of the offence.

(ii) Mere endorsement of the bank" payment stopped" was not sufficient to entertain the complaint as that was not an ingredient of the offence under Section 138 of the Act

9. The High Court has laid much stress in its judgment to emphasize that a petition under Section 482 CrPC is tenable when no offence even prima facie was made out in the complaint. There can be no dispute regarding that legal proposition but the application thereof will depend upon the averments made in the complaint. But the second reasoning of the High Court is contrary to the decision of this Court (rendered by a Bench of two Judges) in *Electronics Trade & Technology Development Corpn Ltd. v. Indian Technologists & Engineers (Electronics)(p) Ltd.* While interpreting Section 138 of the Act, it firstly observed as under: (SCC pp. 741-42, para 5

"5. It would thus be clear that when a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the bank with the endorsement like (1) in this case,' refer to the drawer' (2) ' instructions for stoppage of payment' and stamped (3) exceeds arrangement it amounts to dishonor within the meaning of Section 138 of the Act. On issuance of the notice by the payee or the holder in due course after dishonor, to the drawer demanding payment within 15 days from the date of the receipt of such a notice, if he does not pay the same, the statutory presumption on dishonest intention, subject to any other liability, stands satisfied."

(10)It then took up for consideration a similar contention before them by learned counsel for the drawer of the cheques or that stoppage of payment due to instructions does not amount to an offence under Section 138 of the Act and repelling

the same observed;

"We find no force in the contention. The object of bringing Section 138 on statue appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments."

The Court further observed: (SCC p. 742, para 6)

"It is seen that once the cheque has been drawn and issued to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the bank for non-payment and the cheque returned to the payee with such an endorsement, it amounts to dishonour of cheque and it comes within the meaning of Section 138."

11. Another two-Judge Bench while dealing with the same section in *K.K.Sidharthan v. T.P.Praveena Chandran*. (SCC p 370)

"This shows that Section 138 gets attracted in terms of cheque dishonoured because of insufficient funds or where the amount exceeds the arrangement made with the bank. It has, however, been held by the Bench of this Court in *Electronics Trade and Technology Development Ltd. V. Indian technologies and Engineers (Electronics) (P) Ltd.* that even if a cheque is dishonoured because of 'stop payment instruction to the bank, Section 138 would get attracted."

We are in complete agreement with the above legal proposition."

12. The learned counsel for the appellant vehemently urged that by these decisions of this Court clearly support the case of the appellant and trial Court had rightly issued the process and the High Court was totally wrong in taking a contrary view.

13. It was , however contended on behalf of the respondent that the decision in *Electronics Trade & Technology Development Corn Ltd.* does not support the appellant as far as the facts that emerged in the present cases insamuch as the drawer had intimated to the bank on 8-8-1984 to stop the payment whereas the cheques were [resented 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.para 6)

“Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encasement, notice is issued to him not to present the same for encasement and yet the payee or holder course presents the cheque to the bank for payment and when it is on instructions, Section 138 does not get attracted.
(Emphasis supplied)

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 and Technology Development Corpn Ltd.*, 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 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 intitled 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.* 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 instruction, 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.

17. The above view has been referred to in *K.K.Sidharthan as is clear from paras 5 and 6 of the judgment Para 5 and 6 read as under; (SCC P. 371)*

5. The above apart, though in the aforesaid case this Court held that even 'stop payment' instruction would attract the mischief of Section 138. it has been observed in Para 6, that if ' 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 present the cheque to the bank for payment and when it is returned on instruction, Section 13 does not get attracted'.

6. *From the facts mentioned above, we are satisfied that in the present case cheques were presented after the appellant had directed its bank to 'stop payment'* We have said so because thought it has been averred in the complaint that the cheque dated 10-10-1994 was presented for collection on that date itself through the bank of the respondent which is Catholic Syrian Bank Ltd., from the aforesaid letter of the Indian Overseas Branch, we find that the cheque was presented on 15-10-1994(in clearing). The lawyer's notice to the respondent being of 4th October, which had been replied on 12th from Cochi, which is the place of the respondent, whereas the Advocate who issued notice on behalf of the appellant was at Thrissur, *it would seem to us that the first cheque had even been presented after the instruction of 'stop payment' issued by the appellant had become known to the respondent".*
(emphasis supplied.)

With the above observations, the complaint under Section 138 of the Act was quashed.

18. The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of Sections 138 and 139 of the Act. If we are to accept this proposition it will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Further the following observations in para 6 in *Electronics Trade & Technology Development Coprn. Ltd.* (SCC p. 742.)

"Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account

maintained by him in a bank and induce the payee or holder in due course to act upon it. *Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly*"

In our opinion, do not also lay down the law correctly.

19. Section 138 of the Act is a penal provision wherein if a person draws a cheque on an account maintained by him with the 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, on the ground 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. The distinction between the deeming provision and the presumption is well discernible. To illustrate, if a person draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposits the amount thereafter before the cheque is put in the bank by the drawee, and the cheque is honoured, in such a situation drawing of presumption of dishonesty on the part of the drawer under section 138 would not be justified. Section 138 of the Act gets attracted only when the cheque is dishonoured.

20. On a careful reading of Section 138 of the Act, we are unable to subscribe to the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honour the cheque issues the same and therefore, this amounts to an offence under Section 138 of the Act. For the reasons stated hereinabove, we are unable to share the views expressed by this Court in the above two cases and we respectfully differ with the same regarding interpretation of Section 138 of the Act to the limited extent as indicated above,

21. It is needless to emphasize that the Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. It is for this reason we are of the considered opinion that the complaints of the appellant could not have been dismissed by the High Court at the threshold.

22. In the result the appeals succeed and the common order dated 21-11-1996 passed by the High Court in Criminal Revision Petitions Nos. 2303, 2304 of 1995 is quashed and set aside and the order passed by the Metropolitan Magistrate 11th Court, Clacutta on 6-4-1995 is restored. It is made clear that all the contentions are kept open.

Case No. 33

(1998) 3 Supreme Court Cases 249

(BEFORE M.K.MUKHERJEE, S.P.KURDUKAR AND K.T.THOMAS, JJ.)

MODI CEMENTS LTD.

Appellants

Vs

KUCHIL KUMAR NANDI

Respondent

Criminal Appeals Nos. 244-46 of 1998, decided on March 2, 1998

Section 138 of the Negotiable Instruments Act - Stop payment instructions issued by drawer- cheque presented thereafter - Dishonoured - initiating prosecution under Section 138 of the Negotiable Instruments Act - Maintainable - Electronics Trade and technologies development corporation - 1996 (2) S C C 739 followed and K K Siddarthan case 1996 (6) S C C 369 overruled.

It was alleged by the appellant that the respondent had drawn three cheques in Feb. 1994 in favour of the appellant in partial discharge of liability/ dept. the appellant presented the cheques on 9-8-1994 for encashment through their banker. On 6-9-1994 the banker of the respondent returned the cheques as unpaid with the endorsement " payment stopped by the drawer" Later it transpired that the respondent by his letter dated 8-8-1994 to his banker had instructed to stop the payments. The appellant on 13-9-1994 sent a legal notice in terms of Section 138 of the Negotiable Instruments Act to the respondent demanding payment of the amounts under the cheques. Since the respondent failed and neglected to make the payment of the amount of the aforesaid three cheques within the stipulated period of 15 days which expired on 2-10-1994, the appellant filed three criminal complaints against the respondent under Section 138. The respondent filed applications for staying the proceedings which were rejected. The respondent then filed three petitions under Section 482 CrPC in the High Court for quashing the complaints. The High Court allowed the petitions and quashed the complaints on the following reasons:

(i) The appellant had not pleaded in his complaint that the cheques were returned by the bank unpaid "either because 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". The necessary ingredients of Section 138 of the Act having not been pleaded the Court could not have taken cognizance of the offence.

(ii) Mere endorsement of the bank " payment stopped" was not sufficient to entertain the complaint as that was not an ingredient of the offence under Section 138 of the Act.

Allowing the appeals

Held : Even if a cheque is dishonoured because of " Stop payment instruction to the bank, Section 138 would get attracted.

Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739 : 1996 SCC (Cri) 454; K.K. Sidharthan v. T.P. Praveena Chandran, (1996) 6 SCC 369 : 1996 SCC (Cri) 1340, affirmed on this point.

The position will not be different even if the drawer had instructed the bank to stop the payment prior to the presentation of the cheques for encashment as in the present case. The observations of the Supreme 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 returned on instructions, Section 138 does not get attracted", does not fit in with the object and purpose of the provision which is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. Acceptance of this proposition will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues drawer 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.

Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739 1996 SCC (Cri) 454; *K.K. Sidharthan v. T.P. Praveean Chandran*, (1996) 6 SCC 369 : 1996 SCC (Cri) 1340, *overruled on this point* Further it is not possible to accept the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque merely because he without sufficient funds to his credit in his bank account to honour the cheque issues the same. Section 138 of the Act is a penal provision wherein if a person draws a cheque on an account maintained by him with the 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, on the ground 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. The distinction between the deeming provision and the presumption is well discernible. To illustrate, if a person draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposits the amount thereafter before the cheque is put in the bank by the drawee, and the cheque is honoured, in such a situation drawing of presumption of dishonesty on the part of the drawer under Section 138 would not be justified. Section 138 of the Act gets attracted only when the cheque is dishonoured.

Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739: 1996 SCC (Cri) 454, *overruled on this point*.

The Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. A petition under Section 482 CrPC is tenable when no offence even prima facie was made out in the complaint. But the application thereof will depend upon the averments made in the complaint. In this case the complaints of the appellant could not have been dismissed by the High Court at the threshold.

Kuchil Kumar Nandi v. Modi Cement Ltd., 1997 Cri LJ 805 (Cal), *reversed* R-M/19320/C

(Ed.: (1) While the legislature in introducing Section 138-142 has attempted to

promote the efficacy of banking operations and ensure credibility in transacting business through cheques, it is sad to note that the banks themselves have done little to amend their banking practices in keeping with the legislative change, though it is nearly a decade since the provisions were introduced. If only the language of the endorsements made while returning the unpaid cheque were amended and more details provided, many of the problems faced in cases under Section 138 would not have arisen.

Take the endorsement of "payment stopped by drawer" if it was made obligatory for banks to also specify in such instances whether funds or arrangement with the bank was sufficient or not at the time of returning the cheque it would lend transparency to the transaction which would help both in avoiding unnecessary litigation and in facilitating quick disposal of the complaint in case it is filed.

So also the endorsement "refer to drawer" should be substituted by a more explicit statement regarding insufficiency of funds or arrangement with the bank. Such euphemism or courtesy to the customer is misplaced and not in keeping with the object and purpose of Section 138. There has been some controversy about such endorsement.

In *Manohar v. Mahalingam*, 1992 LW (Cri) 367, it was held that the answer 'Refer to Drawer' often adopted by the bankers could mean anything from shortage of funds to death or insolvency of the drawer and could also include insufficiency of funds. It is seen therefore, that the nomenclature of the return by itself would not be decisive of the cause of return. Again in *Union Roadways v. Shah Raman Lal Satish Kumar*, (1992) 2 BC 216:76 Comp Cas (AP) 3151, it was held by the Andhra Pradesh High Court that from the endorsement "Refer to Drawer" the complainant cannot draw an inference that the cheque was issued without funds and that in such a case offence under Section 138 was not made. In *Dada Silk Mills v. Indian Overseas Bank*, (1995) 82 Comp Cas 35, it has been held by the Gujarat High Court that the endorsement refer to drawer, necessarily in banking parlance means that "the cheque has been returned for want of funds in the account of the drawer of the cheque." Refer to Drawer in their ordinary meaning amounted to a statement by the Bank - "We are not paying, go back to the drawer and ask him why." *M.M. Malik v. Prem Kumar Goyal*, 1991 Cri LJ 2594.

Therefore it is high time the Reserve Bank of India or the association of Nationalized Banks intervened and made necessary change in banking practices and in the format/language of the memo attached while returning unpaid cheques to further

the object of Section 138.

(2) it is a welcome clarification from the Court in the present case that the relevant point of time for determining sufficiency of funds is not the date on which the cheque is drawn but the time when the cheque is to be encashed by the drawer's bank on presentation. The statement that "Section 138 of the Act gets attracted only when the cheque is dishonoured" is a clear pointer of the law. Keeping this in mind, since a cheque would not get dishonoured even if the requisite funds were deposited at the last moment, the statement in para 19 of the judgment to the effect: makes the arrangement or deposits the amount thereafter "*before the cheque is put in the bank by the drawee*" can be read as "before the cheque is considered for encashment by the bank of the drawer" This clarification in a future case may be necessary since in a local clearance the time between putting the cheque in the bank by the drawee and its presentation in the bank of the drawer may be 3-4 days, where as in case of outstation clearance, it could be much more. This time for depositing or arranging for sufficient funds should be available to the drawer suffering from no dishonest intentions, to do needful. He can make the necessary deposit or transfer of funds even at the last moment. In practice a friendly banker even informs the customer by phone of such contingency. What matters in the final analysis is whether the cheque was dishonoured or not irrespective of when the requisite funds were deposited or arranged with the banker.

Suggested Case Finder Search Text. (inter alia):

Cheque dishonor 138

Advocates who appeared in this case:

Ranjit Kumar And Ms Bina Tamta, Advocates, for the Appellant:

Ranjan Mukherjee, Advocate, for the Respondent.

Chronological list of cases cited

1. (1996) 6 SCC 369: 1996 SCC (Cri) 1340, *K.K.Sidharthan v. T.P. Praveena Chandram*

2. (1996) 2 SCC 739: 1996 SCC (Cri) 454, *Electronics Trade & Technology Development Corpn. Ltd. V. Indian Technologists & Engineers (Electronics) (P) Ltd.* 254h, 255fg, 256a, 256b, 256e, 257a, 257b, 257h

The Judgment of the Court was delivered by S.P.KURDUKAR, J. -Leave granted.

2. These three appeals are filed by the appellants/complainants challenging the legality and correctness of the judgment and order dated 21-11-1996 passed by the High Court In Criminal Revision Petitions Nos. 2303-04 of 1995.

3. The present proceedings arise out of a complaint filed by the appellant in the Court of Chief Judicial Magistrate, Calcutta under Section 138 of the Negotiable Instrument Act, 1881 (for short " the Act") against the respondent. The appellant-Company is a public limited company manufacturing and selling cement under the brand name " Modi Cement" throughout India.

4. The respondent/accused carries on business in the name and style of " Dubey Construction, M/s Nandi Traders, M/s Nandi Concerns, M/s Nandi and Co., M/s Nandi Enterprises, M/s S.K. Enterprises, M/s. S.K Trading and M/s Jupiter Art. The respondent/ accused is sole proprietor of all these business concerns.

5. It is alleged by the appellant in the complaint that the respondent purchased from them non-levy Modi Cement on credit against the orders placed on behalf of his concerns. These orders were placed by the respondent with the Calcutta office of the appellant and it was agreed that the price of the consignments was to be paid by the respondent at the said office. After taking accounts it was found that on 23-2-1994 the respondent incurred a liability. / debt of Rs, 1,10,53,520.30 payable to the appellant towards the purchased price of the cement supplied by them to the respondent. In partial discharge of the said liability/debt the respondent drew three cheques in favour of the appellant on 23-2-1994, 26-2-1994 and 28-2-1994 bearing Cheques Nos. 1308340-42 for a sum of Rs 2,00,000 each.

6. The appellant presented these three cheques on 9-8-1994 for encashment through their bankers, Bank of India, J.L.Nehru Road Branch, Calcutta. On 6-9-1994 the Indian Bank, Bankura, the banker of the respondent returned the said cheques as unpaid with an endorsement " payment stopped by the drawer". Later on it transpired that vide his letter dated 8-8-1994 the respondent had given such instruction. The appellant on 13-9-1994 sent a legal notice in terms of Section 138 of the Act to the respondent demanding payment of the aforesaid amounts under the cheques. The said notice was duly served on the respondent on 17-9-1994. Since the respondent failed and neglected to make the payment of the amount of the aforesaid three cheques within the stipulated period of 15 days, which expired on 2-10-1994, the

appellant filed three criminal complaints against the respondent under Section 138 of the Act. After entering appearance in obedience to the processes issued in connection with the above three cases the respondent filed applications for staying the proceedings, which were rejected.

7. The respondent then filed three petitions under Section 482 CrPC in the High Court of Calcutta for quashing the complaints. The learned Single Judge vide his common judgment and order dated 21-11-1996 allowed the petitions of the respondent and quashed the complaints. It is against this order passed by the High Court the appellant has filed these appeals. Section 138 of the Act reads thus:

"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 form 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 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 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 fifteen 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 purpose of this section, 'debt or other liability' means a legally enforceable debt or other liability.'

8. Briefly stated the reasons given by the High Court are as under:

(i) The appellant has not pleaded in his complaint that the cheques were returned by the bank unpaid " either because 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". The necessary ingredients of Section 138 of the Act having not been pleaded the Court could not have taken cognizance of the offence.

(ii) Mere endorsement of the bank" payment stopped" was not sufficient to entertain the complaint as that was not an ingredient of the offence under Section 138 of the Act

9. The High Court has laid much stress in its judgment to emphasize that a petition under Section 482 CrPC is tenable when no offence even prima facie was made out in the complaint. There can be no dispute regarding that legal proposition but the application thereof will depend upon the averments made in the complaint. But the second reasoning of the High Court is contrary to the decision of this Court (rendered by a Bench of two Judges) in *Electronics Trade & Technology Development Corpn Ltd. v. Indian Technologists & Engineers (Electronics)(p) Ltd.* While interpreting Section 138 of the Act, it firstly observed as under: (SCC pp. 741-42, para 5

"5. It would thus be clear that when a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the bank with the endorsement like (1) in this case,' refer to the drawer' (2) ' instructions for stoppage of payment' and stamped (3) exceeds arrangement it amounts to dishonor within the meaning of Section 138 of the Act. On issuance of the notice by the payee or the holder in due course after dishonor, to the drawer demanding payment within 15 days from the date of the receipt of such a notice, if he does not pay the same, the statutory presumption on dishonest intention, subject to any other liability, stands satisfied."

(10)It then took up for consideration a similar contention before them by learned counsel for the drawer of the cheques or that stoppage of payment due to instructions does not amount to an offence under Section 138 of the Act and repelling

the same observed;

“We find no force in the contention. The object of bringing Section 138 on statue appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments.”

The Court further observed: (SCC p. 742, para 6)

“It is seen that once the cheque has been drawn and issued to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the bank for non-payment and the cheque returned to the payee with such an endorsement, it amounts to dishonour of cheque and it comes within the meaning of Section 138.”

11. Another two-Judge Bench while dealing with the same section in *K.K.Sidharthan v. T.P.Praveena Chandran*. (SCC p 370)

“This shows that Section 138 gets attracted in terms of cheque dishonoured because of insufficient funds or where the amount exceeds the arrangement made with the bank. It has, however, been held by the Bench of this Court in *Electronics Trade and Technology Development Ltd. V. Indian technologies and Engineers (Electronics) (P) Ltd.* that even if a cheque is dishonoured because of ‘stop payment instruction to the bank, Section 138 would get attracted.”

We are in complete agreement with the above legal proposition.”

12. The learned counsel for the appellant vehemently urged that by these decisions of this Court clearly support the case of the appellant and trial Court had rightly issued the process and the High Court was totally wrong in taking a contrary view.

13. It was , however contended on behalf of the respondent that the decision in *Electronics Trade & Technology Development Corn Ltd.* does not support the appellant as far as the facts that emerged in the present cases insamuch as the drawer had intimated to the bank on 8-8-1984 to stop the payment whereas the cheques were [resented 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.para 6)

“Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encasement, notice is issued to him not to present the same for encasement and yet the payee or holder course presents the cheque to the bank for payment and when it is on instructions, Section 138 does not get attracted.
(Emphasis supplied)

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 and Technology Development Corpn Ltd.*, 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 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 intitled 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.* 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 instruction, 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.

17. The above view has been referred to in *K.K.Sidharthan as is clear from paras 5 and 6 of the judgment Para 5 and 6 read as under; (SCC P. 371)*

5. The above apart, though in the aforesaid case this Court held that even 'stop payment' instruction would attract the mischief of Section 138. it has been observed in Para 6, that if ' 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 present the cheque to the bank for payment and when it is returned on instruction, Section 13 does not get attracted'.

6. *From the facts mentioned above, we are satisfied that in the present case cheques were presented after the appellant had directed its bank to 'stop payment'* We have said so because thought it has been averred in the complaint that the cheque dated 10-10-1994 was presented for collection on that date itself through the bank of the respondent which is Catholic Syrian Bank Ltd., from the aforesaid letter of the Indian Overseas Branch, we find that the cheque was presented on 15-10-1994(in clearing). The lawyer's notice to the respondent being of 4th October, which had been replied on 12th from Cochi, which is the place of the respondent, whereas the Advocate who issued notice on behalf of the appellant was at Thrissur, *it would seem to us that the first cheque had even been presented after the instruction of 'stop payment' issued by the appellant had become known to the respondent".*
(emphasis supplied.)

With the above observations, the complaint under Section 138 of the Act was quashed.

18. The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of Sections 138 and 139 of the Act. If we are to accept this proposition it will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Further the following observations in para 6 in *Electronics Trade & Technology Development Coprn. Ltd.* (SCC p. 742.)

"Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account

maintained by him in a bank and induce the payee or holder in due course to act upon it. *Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly*"

In our opinion, do not also lay down the law correctly.

19. Section 138 of the Act is a penal provision wherein if a person draws a cheque on an account maintained by him with the 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, on the ground 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. The distinction between the deeming provision and the presumption is well discernible. To illustrate, if a person draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposits the amount thereafter before the cheque is put in the bank by the drawee, and the cheque is honoured, in such a situation drawing of presumption of dishonesty on the part of the drawer under section 138 would not be justified. Section 138 of the Act gets attracted only when the cheque is dishonoured.

20. On a careful reading of Section 138 of the Act, we are unable to subscribe to the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honour the cheque issues the same and therefore, this amounts to an offence under Section 138 of the Act. For the reasons stated hereinabove, we are unable to share the views expressed by this Court in the above two cases and we respectfully differ with the same regarding interpretation of Section 138 of the Act to the limited extent as indicated above,

21. It is needless to emphasize that the Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. It is for this reason we are of the considered opinion that the complaints of the appellant could not have been dismissed by the High Court at the threshold.

22. In the result the appeals succeed and the common order dated 21-11-1996 passed by the High Court in Criminal Revision Petitions Nos. 2303, 2304 of 1995 is quashed and set aside and the order passed by the Metropolitan Magistrate 11th Court, Clacutta on 6-4-1995 is restored. It is made clear that all the contentions are kept open.

Case No. 33

(1998) 3 Supreme Court Cases 249

(BEFORE M.K.MUKHERJEE, S.P.KURDUKAR AND K.T.THOMAS, JJ.)

MODI CEMENTS LTD.

Appellants

Vs

KUCHIL KUMAR NANDI

Respondent

Criminal Appeals Nos. 244-46 of 1998, decided on March 2, 1998

Section 138 of the Negotiable Instruments Act - Stop payment instructions issued by drawer- cheque presented thereafter - Dishonoured - initiating prosecution under Section 138 of the Negotiable Instruments Act - Maintainable - Electronics Trade and technologies development corporation - 1996 (2) S C C 739 followed and K K Siddarthan case 1996 (6) S C C 369 overruled.

It was alleged by the appellant that the respondent had drawn three cheques in Feb. 1994 in favour of the appellant in partial discharge of liability/ dept. the appellant presented the cheques on 9-8-1994 for encashment through their banker. On 6-9-1994 the banker of the respondent returned the cheques as unpaid with the endorsement " payment stopped by the drawer" Later it transpired that the respondent by his letter dated 8-8-1994 to his banker had instructed to stop the payments. The appellant on 13-9-1994 sent a legal notice in terms of Section 138 of the Negotiable Instruments Act to the respondent demanding payment of the amounts under the cheques. Since the respondent failed and neglected to make the payment of the amount of the aforesaid three cheques within the stipulated period of 15 days which expired on 2-10-1994, the appellant filed three criminal complaints against the respondent under Section 138. The respondent filed applications for staying the proceedings which were rejected. The respondent then filed three petitions under Section 482 CrPC in the High Court for quashing the complaints. The High Court allowed the petitions and quashed the complaints on the following reasons:

(i) The appellant had not pleaded in his complaint that the cheques were returned by the bank unpaid "either because 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". The necessary ingredients of Section 138 of the Act having not been pleaded the Court could not have taken cognizance of the offence.

(ii) Mere endorsement of the bank " payment stopped" was not sufficient to entertain the complaint as that was not an ingredient of the offence under Section 138 of the Act.

Allowing the appeals

Held : Even if a cheque is dishonoured because of " Stop payment instruction to the bank, Section 138 would get attracted.

Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739 : 1996 SCC (Cri) 454; K.K. Sidharthan v. T.P. Praveena Chandran, (1996) 6 SCC 369 : 1996 SCC (Cri) 1340, affirmed on this point.

The position will not be different even if the drawer had instructed the bank to stop the payment prior to the presentation of the cheques for encashment as in the present case. The observations of the Supreme 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 returned on instructions, Section 138 does not get attracted", does not fit in with the object and purpose of the provision which is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. Acceptance of this proposition will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues drawer 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.

Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739 1996 SCC (Cri) 454; *K.K. Sidharthan v. T.P. Praveean Chandran*, (1996) 6 SCC 369 : 1996 SCC (Cri) 1340, *overruled on this point* Further it is not possible to accept the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque merely because he without sufficient funds to his credit in his bank account to honour the cheque issues the same. Section 138 of the Act is a penal provision wherein if a person draws a cheque on an account maintained by him with the 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, on the ground 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. The distinction between the deeming provision and the presumption is well discernible. To illustrate, if a person draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposits the amount thereafter before the cheque is put in the bank by the drawee, and the cheque is honoured, in such a situation drawing of presumption of dishonesty on the part of the drawer under Section 138 would not be justified. Section 138 of the Act gets attracted only when the cheque is dishonoured.

Electronics Trade & Technology Development Corpn. Ltd. v. Indian Technologists & Engineers (Electronics) (P) Ltd., (1996) 2 SCC 739: 1996 SCC (Cri) 454, *overruled on this point*.

The Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. A petition under Section 482 CrPC is tenable when no offence even prima facie was made out in the complaint. But the application thereof will depend upon the averments made in the complaint. In this case the complaints of the appellant could not have been dismissed by the High Court at the threshold.

Kuchil Kumar Nandi v. Modi Cement Ltd., 1997 Cri LJ 805 (Cal), *reversed* R-M/19320/C

(Ed.: (1) While the legislature in introducing Section 138-142 has attempted to

promote the efficacy of banking operations and ensure credibility in transacting business through cheques, it is sad to note that the banks themselves have done little to amend their banking practices in keeping with the legislative change, though it is nearly a decade since the provisions were introduced. If only the language of the endorsements made while returning the unpaid cheque were amended and more details provided, many of the problems faced in cases under Section 138 would not have arisen.

Take the endorsement of "payment stopped by drawer" if it was made obligatory for banks to also specify in such instances whether funds or arrangement with the bank was sufficient or not at the time of returning the cheque it would lend transparency to the transaction which would help both in avoiding unnecessary litigation and in facilitating quick disposal of the complaint in case it is filed.

So also the endorsement "refer to drawer" should be substituted by a more explicit statement regarding insufficiency of funds or arrangement with the bank. Such euphemism or courtesy to the customer is misplaced and not in keeping with the object and purpose of Section 138. There has been some controversy about such endorsement.

In *Manohar v. Mahalingam*, 1992 LW (Cri) 367, it was held that the answer 'Refer to Drawer' often adopted by the bankers could mean anything from shortage of funds to death or insolvency of the drawer and could also include insufficiency of funds. It is seen therefore, that the nomenclature of the return by itself would not be decisive of the cause of return. Again in *Union Roadways v. Shah Raman Lal Satish Kumar*, (1992) 2 BC 216:76 Comp Cas (AP) 3151, it was held by the Andhra Pradesh High Court that from the endorsement "Refer to Drawer" the complainant cannot draw an inference that the cheque was issued without funds and that in such a case offence under Section 138 was not made. In *Dada Silk Mills v. Indian Overseas Bank*, (1995) 82 Comp Cas 35, it has been held by the Gujarat High Court that the endorsement refer to drawer, necessarily in banking parlance means that "the cheque has been returned for want of funds in the account of the drawer of the cheque." Refer to Drawer in their ordinary meaning amounted to a statement by the Bank - "We are not paying, go back to the drawer and ask him why." *M.M. Malik v. Prem Kumar Goyal*, 1991 Cri LJ 2594.

Therefore it is high time the Reserve Bank of India or the association of Nationalized Banks intervened and made necessary change in banking practices and in the format/language of the memo attached while returning unpaid cheques to further

the object of Section 138.

(2) it is a welcome clarification from the Court in the present case that the relevant point of time for determining sufficiency of funds is not the date on which the cheque is drawn but the time when the cheque is to be encashed by the drawer's bank on presentation. The statement that "Section 138 of the Act gets attracted only when the cheque is dishonoured" is a clear pointer of the law. Keeping this in mind, since a cheque would not get dishonoured even if the requisite funds were deposited at the last moment, the statement in para 19 of the judgment to the effect: makes the arrangement or deposits the amount thereafter "*before the cheque is put in the bank by the drawee*" can be read as "before the cheque is considered for encashment by the bank of the drawer" This clarification in a future case may be necessary since in a local clearance the time between putting the cheque in the bank by the drawee and its presentation in the bank of the drawer may be 3-4 days, where as in case of outstation clearance, it could be much more. This time for depositing or arranging for sufficient funds should be available to the drawer suffering from no dishonest intentions, to do needful. He can make the necessary deposit or transfer of funds even at the last moment. In practice a friendly banker even informs the customer by phone of such contingency. What matters in the final analysis is whether the cheque was dishonoured or not irrespective of when the requisite funds were deposited or arranged with the banker.

Suggested Case Finder Search Text. (inter alia):

Cheque dishonor 138

Advocates who appeared in this case:

Ranjit Kumar And Ms Bina Tamta, Advocates, for the Appellant:

Ranjan Mukherjee, Advocate, for the Respondent.

Chronological list of cases cited

1. (1996) 6 SCC 369: 1996 SCC (Cri) 1340, *K.K.Sidharthan v. T.P. Praveena Chandram*

2. (1996) 2 SCC 739: 1996 SCC (Cri) 454, *Electronics Trade & Technology Development Corpn. Ltd. V. Indian Technologists & Engineers (Electronics) (P) Ltd.* 254h, 255fg, 256a, 256b, 256e, 257a, 257b, 257h

The Judgment of the Court was delivered by S.P.KURDUKAR, J. -Leave granted.

2. These three appeals are filed by the appellants/complainants challenging the legality and correctness of the judgment and order dated 21-11-1996 passed by the High Court In Criminal Revision Petitions Nos. 2303-04 of 1995.

3. The present proceedings arise out of a complaint filed by the appellant in the Court of Chief Judicial Magistrate, Calcutta under Section 138 of the Negotiable Instrument Act, 1881 (for short " the Act") against the respondent. The appellant-Company is a public limited company manufacturing and selling cement under the brand name " Modi Cement" throughout India.

4. The respondent/accused carries on business in the name and style of " Dubey Construction, M/s Nandi Traders, M/s Nandi Concerns, M/s Nandi and Co., M/s Nandi Enterprises, M/s S.K. Enterprises, M/s. S.K Trading and M/s Jupiter Art. The respondent/ accused is sole proprietor of all these business concerns.

5. It is alleged by the appellant in the complaint that the respondent purchased from them non-levy Modi Cement on credit against the orders placed on behalf of his concerns. These orders were placed by the respondent with the Calcutta office of the appellant and it was agreed that the price of the consignments was to be paid by the respondent at the said office. After taking accounts it was found that on 23-2-1994 the respondent incurred a liability. / debt of Rs, 1,10,53,520.30 payable to the appellant towards the purchased price of the cement supplied by them to the respondent. In partial discharge of the said liability/debt the respondent drew three cheques in favour of the appellant on 23-2-1994, 26-2-1994 and 28-2-1994 bearing Cheques Nos. 1308340-42 for a sum of Rs 2,00,000 each.

6. The appellant presented these three cheques on 9-8-1994 for encashment through their bankers, Bank of India, J.L.Nehru Road Branch, Calcutta. On 6-9-1994 the Indian Bank, Bankura, the banker of the respondent returned the said cheques as unpaid with an endorsement " payment stopped by the drawer". Later on it transpired that vide his letter dated 8-8-1994 the respondent had given such instruction. The appellant on 13-9-1994 sent a legal notice in terms of Section 138 of the Act to the respondent demanding payment of the aforesaid amounts under the cheques. The said notice was duly served on the respondent on 17-9-1994. Since the respondent failed and neglected to make the payment of the amount of the aforesaid three cheques within the stipulated period of 15 days, which expired on 2-10-1994, the

appellant filed three criminal complaints against the respondent under Section 138 of the Act. After entering appearance in obedience to the processes issued in connection with the above three cases the respondent filed applications for staying the proceedings, which were rejected.

7. The respondent then filed three petitions under Section 482 CrPC in the High Court of Calcutta for quashing the complaints. The learned Single Judge vide his common judgment and order dated 21-11-1996 allowed the petitions of the respondent and quashed the complaints. It is against this order passed by the High Court the appellant has filed these appeals. Section 138 of the Act reads thus:

"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 form 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 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 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 fifteen 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 purpose of this section, 'debt or other liability' means a legally enforceable debt or other liability.'

8. Briefly stated the reasons given by the High Court are as under:

(i) The appellant has not pleaded in his complaint that the cheques were returned by the bank unpaid " either because 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". The necessary ingredients of Section 138 of the Act having not been pleaded the Court could not have taken cognizance of the offence.

(ii) Mere endorsement of the bank" payment stopped" was not sufficient to entertain the complaint as that was not an ingredient of the offence under Section 138 of the Act

9. The High Court has laid much stress in its judgment to emphasize that a petition under Section 482 CrPC is tenable when no offence even prima facie was made out in the complaint. There can be no dispute regarding that legal proposition but the application thereof will depend upon the averments made in the complaint. But the second reasoning of the High Court is contrary to the decision of this Court (rendered by a Bench of two Judges) in *Electronics Trade & Technology Development Corpn Ltd. v. Indian Technologists & Engineers (Electronics)(p) Ltd.* While interpreting Section 138 of the Act, it firstly observed as under: (SCC pp. 741-42, para 5

"5. It would thus be clear that when a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the bank with the endorsement like (1) in this case,' refer to the drawer' (2) ' instructions for stoppage of payment' and stamped (3) exceeds arrangement it amounts to dishonor within the meaning of Section 138 of the Act. On issuance of the notice by the payee or the holder in due course after dishonor, to the drawer demanding payment within 15 days from the date of the receipt of such a notice, if he does not pay the same, the statutory presumption on dishonest intention, subject to any other liability, stands satisfied."

(10)It then took up for consideration a similar contention before them by learned counsel for the drawer of the cheques or that stoppage of payment due to instructions does not amount to an offence under Section 138 of the Act and repelling

the same observed;

“We find no force in the contention. The object of bringing Section 138 on statue appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments.”

The Court further observed: (SCC p. 742, para 6)

“It is seen that once the cheque has been drawn and issued to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the bank for non-payment and the cheque returned to the payee with such an endorsement, it amounts to dishonour of cheque and it comes within the meaning of Section 138.”

11. Another two-Judge Bench while dealing with the same section in *K.K.Sidharthan v. T.P.Praveena Chandran*. (SCC p 370)

“This shows that Section 138 gets attracted in terms of cheque dishonoured because of insufficient funds or where the amount exceeds the arrangement made with the bank. It has, however, been held by the Bench of this Court in *Electronics Trade and Technology Development Ltd. V. Indian technologies and Engineers (Electronics) (P) Ltd.* that even if a cheque is dishonoured because of ‘stop payment instruction to the bank, Section 138 would get attracted.”

We are in complete agreement with the above legal proposition.”

12. The learned counsel for the appellant vehemently urged that by these decisions of this Court clearly support the case of the appellant and trial Court had rightly issued the process and the High Court was totally wrong in taking a contrary view.

13. It was , however contended on behalf of the respondent that the decision in *Electronics Trade & Technology Development Corn Ltd.* does not support the appellant as far as the facts that emerged in the present cases insamuch as the drawer had intimated to the bank on 8-8-1984 to stop the payment whereas the cheques were [resented 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.para 6)

“Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encasement, notice is issued to him not to present the same for encasement and yet the payee or holder course presents the cheque to the bank for payment and when it is on instructions, Section 138 does not get attracted.
(Emphasis supplied)

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 and Technology Development Corpn Ltd.*, 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 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 intitled 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.* 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 instruction, 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.

17. The above view has been referred to in *K.K.Sidharthan as is clear from paras 5 and 6 of the judgment Para 5 and 6 read as under; (SCC P. 371)*

5. The above apart, though in the aforesaid case this Court held that even 'stop payment' instruction would attract the mischief of Section 138. it has been observed in Para 6, that if ' 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 present the cheque to the bank for payment and when it is returned on instruction, Section 13 does not get attracted'.

6. *From the facts mentioned above, we are satisfied that in the present case cheques were presented after the appellant had directed its bank to 'stop payment'* We have said so because thought it has been averred in the complaint that the cheque dated 10-10-1994 was presented for collection on that date itself through the bank of the respondent which is Catholic Syrian Bank Ltd., from the aforesaid letter of the Indian Overseas Branch, we find that the cheque was presented on 15-10-1994(in clearing). The lawyer's notice to the respondent being of 4th October, which had been replied on 12th from Cochi, which is the place of the respondent, whereas the Advocate who issued notice on behalf of the appellant was at Thrissur, *it would seem to us that the first cheque had even been presented after the instruction of 'stop payment' issued by the appellant had become known to the respondent".*
(emphasis supplied.)

With the above observations, the complaint under Section 138 of the Act was quashed.

18. The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of Sections 138 and 139 of the Act. If we are to accept this proposition it will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Further the following observations in para 6 in *Electronics Trade & Technology Development Coprn. Ltd.* (SCC p. 742.)

"Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account

maintained by him in a bank and induce the payee or holder in due course to act upon it. *Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly*"

In our opinion, do not also lay down the law correctly.

19. Section 138 of the Act is a penal provision wherein if a person draws a cheque on an account maintained by him with the 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, on the ground 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. The distinction between the deeming provision and the presumption is well discernible. To illustrate, if a person draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposits the amount thereafter before the cheque is put in the bank by the drawee, and the cheque is honoured, in such a situation drawing of presumption of dishonesty on the part of the drawer under section 138 would not be justified. Section 138 of the Act gets attracted only when the cheque is dishonoured.

20. On a careful reading of Section 138 of the Act, we are unable to subscribe to the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honour the cheque issues the same and therefore, this amounts to an offence under Section 138 of the Act. For the reasons stated hereinabove, we are unable to share the views expressed by this Court in the above two cases and we respectfully differ with the same regarding interpretation of Section 138 of the Act to the limited extent as indicated above,

21. It is needless to emphasize that the Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. It is for this reason we are of the considered opinion that the complaints of the appellant could not have been dismissed by the High Court at the threshold.

22. In the result the appeals succeed and the common order dated 21-11-1996 passed by the High Court in Criminal Revision Petitions Nos. 2303, 2304 of 1995 is quashed and set aside and the order passed by the Metropolitan Magistrate 11th Court, Clacutta on 6-4-1995 is restored. It is made clear that all the contentions are kept open.