

(2001) 11 BOM CK 0059

In the Bombay High Court

Case No : Criminal Writ Petition No's. 27, 123, 124 and 125 of 2001

Atlaz Degi-Tel Pvt. Ltd. and Others

APPELLANT

Vs

Atlaz Technology Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 29-11-2001

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11
Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 139

Citation : (2002) 3 BomCR 70 : (2002) BomCR(Cri) 325

Hon'ble Judges : D.S. Zoting, J

Bench : Single Bench

Advocate : D.G. Aras, for A.D. Shinde, in Cri.W.P. Nos. 27, 123, 124 and 125/2001, for the Appellant; A.P. Mundargi, in Cri.W.P. No. 27, 123, 124 and 125/2001 and J.P. Akolkar, Assistant Public Prosecutor for respondent 2 in Cri.W.P. Nos. 27, 123, 124 and 125/2001, for the Respondent

Final Decision : Dismissed

Judgement

D.S. Zotting, J.—Criminal Writ Petition Nos. 27/2001, 123/2001, 124/2001 & 125/2001 have a common grievance & hence, these petitions can be disposed of by a common judgment and learned Counsel for the respective parties also agree for the same.

2. Heard Mr. D.G. Aras, Advocate, holding for Mr. A.D. Shinde, learned Counsel for the petitioners, Mr. A.P. Mundargi, learned Counsel for the respondent No. 1 and Mrs. J.P. Akolkar, learned A.P.P. for the respondent No. 2-State.

3. In Criminal Writ Petition No. 27/2001, Rule has already been issued.

Rule in Cri.W.P. Nos. 123/2001, 124/2001 & 125/2001. With consent of the parties, rule is made returnable forthwith.

4. The above petitions have been filed by the original accused. They pray this

Court to invoke powers under Article 227 of the Constitution of India as well as inherent powers u/s 482 of Cri.P.C. for the purpose of quashing complaints in Criminal Case Nos. 1572/2000, 1218/1999, 1685/2000 and 2625/2000; filed u/s 138 of the Negotiable Instruments Act, 1881.

Facts relevant for decision of these petitions may be summarized as under:

5. The petitioners are the original accused in the above referred criminal cases which are filed by the respondent No. 1 company. The petitioner Nos. 2 to 4 are the directors of the petitioner No. 1 company. The respondent No. 1 has filed the said criminal cases alleging that the petitioners have entered into an agreement with the respondent No. 1 company to purchase its business unit known as "Atlas Digi-Tel Pvt. Ltd." which manufactures certain telecom products. An agreement was entered into between the parties on 2-8-1997, for purchasing the said unit, wherein, postdated cheques were given to the respondent No. 1.

Particulars of cheques involved in the criminal case giving rise to the petitions may be stated as under:

Cri.W.P.	No.	Particulars	of	Cri. Case No.
				1. 1572/1998
27/2001	196947, dt. 30-3-1998	for Rupees 150 lacs.	2. 1218/1999	123/2001
196950, dt. 30-12-1998	for Rupees 37 lacs.	3. 1785/1998	124/2001	196948,
dt. 30-12-1998	for Rupees 37 lacs.	4. 2625/1998	125/2001	196949, dt.
30-9-1998	for	Rupees	37	lacs.

The respondent No. 1 presented the said cheques to the bank at Jalgaon, but the cheques were dishonoured with remarks either as "Referred to the Drawer", due to stop payment order or "Fund insufficient". Thereafter, the same was intimated to the respondent No. 1 by the concerned bank. The respondent No. 1, therefore, issued notices to the petitioners. The notices were received by the petitioners. It has been contended by the respondent No. 1 that a false reply was given by petitioners though they are liable to pay same. They committed offence u/s 138 read with section 141 of the Negotiable Instruments Act, 1881 and therefore, the said criminal cases are filed by the respondent No. 1 in the Court of CJM, Jalgaon. Thereafter, the petitioner were served with summonses. The petitioners have appeared in the said criminal cases and these cases are pending.

6. The petitioners submit that they are builders, however, they were looking for an alternative business. They came in contact with Mr. Anil Jain, the Director of the respondent No. 1 company. Mr. Anil Jain impressed upon the petitioners that he has a complete team of experts and know technical know how in EPABX System and other telecom products. It was also impressed upon the petitioners, particularly the petitioner No. 4, that the respondent No. 1 company has a team of experts headed by Dr. Y. Chandrashekhar and they have research facility, however, because of lack of working capital, they are unable to make the said

unit profitable otherwise, if some money is put in the company, the said company would be fetching turn over of Rupees twenty crores within short span and would also fetch turn over of Rupees one hundred crores. Therefore, according to the petitioners, an agreement was entered into for purchasing the said unit at Rs. 311 lacs and therefore, the petitioners gave five post dated cheques, including the above referred four cheques. All the cheques have been signed only by the petitioner No. 4, as the Director of the petitioner No. 1 company. However, it is found that impression given to the petitioners was totally incorrect as the said unit was found to be worthless.

According to the petitioners, they have been deceived as the said Dr. Y. Chandrashekhar was not having knowledge of technical know-how and he was unable to cope up with the products already sold by the company and there were several complaints from customers and the said so called expert staff was unable to solve the difficulties of the customers. Therefore, on 2-6-1998, the petitioners informed Mr. Anil Jain as to how fraud has been played upon them and they do not want to continue with the said unit. On 29-9-1999, the petitioner No. 4 informed Mr. Anil Jain that payment has been stopped as there is non-compliance of the terms & conditions of the said agreement. The petitioners issued instructions to the bankers to stop the payment.

7. Under such circumstances when the respondent No. 1 issued a notice to the petitioners they sent reply to the respondent No. 1, mentioning that the payment of cheques has been stopped by them by giving intimation to the banker as the respondent No. 1 company has failed to fulfil its obligations under the terms & conditions of the said agreement which has been entered into and it was further informed that unless the obligations under the said agreement have been fulfilled or complied with, payment will not be made and the cheques should not be encashed. It is further submitted by the petitioners that the respondent No. 1 has, after realizing that the petitioners are put in difficulty, revised the consideration thereby reducing the price of the unit from Rs. 311 lacs to Rs. 175 lacs.

8. The petitioners have also decided to settle the dispute by referring it to an arbitrator. They have filed an Arbitration Application No. 153/2001, u/s 11 of the Arbitration & Conciliation Act, 1996, for making appointment for an arbitrator. Thereafter, the respondent No. 1 company filed a Summary Suit No. 3938/2000 on the original side of the High Court of Judicature at Bombay, invoking the personal guarantee of the petitioner No. 4 for performance of the said agreement.

9. It is pertinent to note that pending decision of the arbitration application filed u/s 11 of the Arbitration & Conciliation Act, so also, the said summary suit, the respondent No. 1 filed the above referred criminal cases against the petitioners in the Court of the learned CJM, Jalgaon. Process was issued by the learned CJM, Jalgaon, against the petitioners for an offence u/s 138 of Negotiable Instruments Act, 1881 and the petitioners are therefore, challenging the said order of issuance of process and for quashing the said criminal case proceedings in as

much as when there is an agreement between the parties entered into on 2-9-1997 and a specific clause i.e. Clause No. 20 has been provided.

10. It has been submitted on behalf of the petitioners that in view of the Arbitration & Conciliation Act and the Clause No. 20 of the said agreement to settle a dispute through arbitration process, the criminal cases filed by the respondent No. 1- company u/s 138 of the Negotiable Instruments Act, 1881 are not maintainable.

11. It may be noted at the outset that the Arbitration Application No. 153/2001 filed by the petitioners u/s 11 of the Arbitration & Conciliation Act, came to be rejected on 22-6-2001, holding that the disputes which are tried to be raised are not covered by the arbitration clause. The respondent No. 1 has filed a certified copy of the said order. In the said arbitration application, the petitioners had prayed for declaring that all the five post dated cheques were and are liable to be treated as null & void and duly cancelled for failure of consideration. The learned Counsel for the petitioners submitted that the petitioners have preferred an appeal against the said order and since the appeal is continuation of the original proceedings, the arbitration proceedings should be treated as pending. However, the learned Counsel for the respondent No. 1 submitted that the respondent No. 1 has not received any notice regarding the appeal and as such, the respondent No. 1 has no idea regarding filing of any appeal against the said order of rejection of the Arbitration Application No. 153/2001.

12. The learned Counsel for the petitioners has mainly put forth the following contentions;

(i) The dispute is purely of civil nature and hence, no criminal prosecution should be permitted.

(ii) As there is an arbitration clause in the memorandum of understanding arrived at between the parties, and as the parties have also resorted to arbitration proceedings to settle the dispute, Criminal Court is not competent to adjudicate the said matter by issuance of process for an offence punishable u/s 138 of Negotiable Instruments Act, 1881 Act.

(iii) The Court of CJM at Jalgaon has no territorial jurisdiction to entertain the complaint and to take cognizance of the offence as, according to the petitioners, the transaction had taken place at Mumbai.

(iv) The petitioner Nos. 2 and 3 are unnecessarily joined as parties to the prosecution and the prosecution should be quashed so far as it relates to the petitioner Nos. 2 and 3.

13. As regards the facts of the case, the learned Counsel for the petitioners has contended that the dispute essentially is of civil and nature and the criminal proceedings have been initiated by the respondent No. 1 by way of short cuts of other remedies available in law only with a view to harass the petitioners. It is, therefore, contended that this Court should exercise its jurisdiction u/s 482 of

the Code of Criminal Procedure to prevent the abuse of process of Court by the respondent No. 1. He had drawn my attention to the observations of the Apex Court made at para 8 in the case of G. Sagar Suri and Another Vs. State of U.P. and Others, as under:

"8. Jurisdiction u/s 482 of the Code has to be exercised with a great care. In exercise of its jurisdiction High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a Criminal Court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction u/s 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

The learned Counsel for the respondent No. 1 has not disputed the proposition laid down by the Supreme Court as above. He has contended that the facts of the above referred case are altogether different from the facts of the present case and as such the above case is of no avail to the petitioners. In this regard, it is to be noted that in the above referred case criminal proceedings u/s 138 of the Negotiable Instruments Act for dishonour of cheque were already initiated against the accused, however, separate first information report under sections 406/420 of the Indian Penal Code was also filed subsequently in respect of the same transaction against the accused together with some other relatives of the accused and none of the respondents (complainants) has been able to explain as to why offence u/s 406/420 of the Indian Penal Code was not added in complaint filed u/s 138 of the Negotiable Instruments Act and why resort could be had to filing separate first information report and, therefore, it is held that there would be no occasion for the complainant to prosecute the appellants (accused) under sections 406/420 of the Indian Penal Code and in his doing so it is clearly abuse of process of Court and the prosecution against the appellants/accused for those offences is liable to be quashed and the prosecution was accordingly quashed.

In the present case, no such occasion arises. Thus, the facts being different, the said case relied upon by the petitioners is of no avail to them.

14. The learned Counsel for the respondent No. 1 has submitted that the petitioners have committed the offence u/s 138 of the Negotiable Instruments Act and the Arbitrator is not competent to adjudicate an offence. In this regard, he has placed reliance on Trisuns Chemical Industry Vs. Rajesh Agarwal and others, . The learned Counsel for the respondent No. 1 submits that he relies on same case as regards the other contentions raised by the petitioners. The relevant facts of the said case are as under:

"The Chairman of the appellant company filed a complaint before the Judicial Magistrate of the First Class alleging that the Directors of another company offered to supply "toasted soyabean extractions" for a price higher than the

market price. The appellant had to pay the price in advance as demanded by the accused. So the same was paid through cheques. But the accused sent the commodity which was of the most inferior and sub-standard quality, thereby the complainant suffered a loss of Rs. 17 lakhs. According to the appellant he was induced to pay the price on the representation that the best quality commodity would be supplied and the price was paid on such representation. But by supplying the most inferior quality the accused deceived the complainant. The Magistrate forwarded the complaint of the appellant for investigation as per his order passed u/s 156(3) Cri.P.C. The accused Directors thereupon moved the High Court of Gujarat u/s 482 of Cri.P.C. for quashing the complaint. The respondent's Counsel in the High Court put forward mainly two contentions. The first was that the dispute was purely of a civil nature and hence no prosecution should have been permitted, and the second was that the Judicial Magistrate of the First Class had no jurisdiction to entertain the complaint. On the first count the Single Judge pointed out that there was a specific clause in the memorandum of understanding arrived at between the parties that disputes, if any, arising between them in respect of any transaction could be resolved through arbitration. The High Court took the view that the question whether the complainant company did suffer the loss as alleged by it are matters to be adjudicated by the Civil Court and cannot be the subject matter of criminal prosecution. The Single Judge also accepted the alternative contention regarding want of jurisdiction of the Magistrate."

Allowing the appeal, the Supreme Court held that:

"(1) Quashing of FIR or a complaint in exercise of the inherent powers of the High Court should be limited to very extreme exceptions. Merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. The provisions incorporated in the agreement for referring the dispute to arbitration is not an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amount to an offence albeit the same act may be connected with the discharge of any function under the agreement. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigation agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases.

(2) It is an erroneous view that the Magistrate taking cognizance of an offence must necessarily have territorial jurisdiction to try the case as well. The provisions of sections 177 and 179 Cri.P.C. do not trammel the powers of any Court to take cognizance of the offence. The only restriction contained in section 190 is that the power to take cognizance is "subject to the provisions of this chapter". Section 193 imposes a restriction on the Court of Session to take cognizance of any offence as a Court of original jurisdiction. But "any" Magistrate

of the First Class has the power to take cognizance of any offence, no matter that the offence was committed within his jurisdiction or not. There is nothing in Chapter XIV of the Code to impair the power of a Judicial Magistrate of the First Class taking cognizance of the offence on the strength of any territorial reason. It is, therefore, impermissible to deprive such a Magistrate of the power to take cognizance of an offence-of course, in certain special enactments special provisions are incorporated for restricting the power of taking cognizance of offences falling under such Acts.

The jurisdictional aspect becomes relevant only when the question of enquiry or trial arises. It is therefore a fallacious thinking that only a Magistrate having jurisdiction to try the case has the power to take cognizance of the offence. If he is a Magistrate of the First Class his power to take cognizance of the offence is not impaired by territorial restrictions. After taking cognizance he may have to decide as to the Court which has jurisdiction to enquire into or try the offence and that situation would reach only during the post-cognizance stage and not earlier."

Applying the principles laid down by the Apex Court in the above referred case relied upon by the learned Counsel for the respondent No. 1, I do not find any substance in the contention raised by the learned Counsel for the petitioner, that as the matter is referred to arbitrator, criminal proceedings u/s 138 of the Negotiable Instruments Act initiated by the respondent No. 1 are not maintainable and that Jalgaon Court has no territorial jurisdiction to entertain the said complaint.

15. As regards the territorial jurisdiction, the learned Counsel for the petitioners has further submitted that there is a specific clause in the agreement as regards the jurisdiction of the Court in case any dispute between the two parties arises and as per the agreement, Court at Mumbai has jurisdiction to entertain the complaint. He has further submitted that even at the stage of post-cognizance stage, the courts at Mumbai have jurisdiction and not the Criminal Court at Jalgaon.

As against this, the learned Counsel for the respondent No. 1 has submitted that Criminal Court at Jalgaon has jurisdiction to try the case at pre-cognizance as well as post-cognizance stage as the cheque was presented before the Bank at Jalgaon, he has placed reliance in support of his contention on the decision of our High Court in the case of Yashomala Engineering Private Limited and others v. Tata SSL Limited, reported in 1998 (3) M.L.J. 822 and the decision of the Apex Court in the case of K. Bhaskaran v. Sankaran Vaidhyan Balan and another, reported in 2000 (5) B.C.R. 178 : 2000 (1) M.L.J. 193. In the first case relied upon by the respondent No. 1, it is observed by this Court at paras 14, 15 and 16 as under :---

"14. In the event of payee being a company, when the money is to be paid to the person named in the instrument, payment to the company would be sufficient

compliance of the proviso. This would necessarily mean that the institution of complaint will be restricted to the place where the registered office of the company is situated. If this be the consequence of the provision of section 138 read with its proviso, it could well be and that could not be a ground for interpreting the section and to restrict the jurisdiction of the Court only where the cheque was issued and where it was returned unpaid.

15. In this background if section 178 of the Code of Criminal Procedure is read, Clause (b) thereof will make the position clear. If part of the offence has occurred at one place and part at the other, courts at both the places will have jurisdiction.

16. The cheque was issued at Pune and credited at Pune and it having returned, that part of offence is taken place in Pune. However; when the notice has been served from Bombay, registered office of the company i.e. payee is at Bombay and when the amount was required to be paid to the payee, obviously Bombay Court does have jurisdiction as per section 178 Clause (b)."

Moreover, the decision of the Apex Court in the case of K. Bhaskaran, cited supra is a direct authority regarding the principles pertaining to territorial jurisdiction of courts as regards offence u/s 138 of the Negotiable Instruments Act. In the said case, it is held that:

"The offence u/s 138 of the Negotiable Instruments Act can be completed only with the concatenation of a number of Acts. The following are the acts which are components of the said offence:

- (1) drawing of the cheque,
- (2) presentation of the cheque to the bank,
- (3) returning the cheque unpaid by the drawee bank,
- (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, &
- (5) failure of the drawer to make payment within 15 days of the receipt of the notice.

It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at five different localities. But a concatenation of all the above five is a sine qua non for the completion of the offence u/s 138. Thus it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence u/s 138 of the Act in view of section 178(d) of the Code of Criminal Procedure. In other words, the complainant can choose any one of those courts having jurisdiction over any one the local areas within the territorial limits of which any one of those five acts was done".

In view of this decision, as the cheque was dishonoured at Jalgaon, Jalgaon

Court has jurisdiction. Consequently, I find that there is no substance in the contention raised by the learned Counsel for the petitioners that Jalgaon Court has no jurisdiction to take cognizance and to try this case.

16. The learned Counsel for the respondent No. 1 has contended that averments made in the complaint filed by the respondents prima facie makes out a case for investigation. Therefore, the complaint does not deserve to be quashed. He further contended that complaint cannot be quashed even if one or two ingredients of the offence have not been stated in detail. He has place reliance on the decision of the Apex Court reported in *Rajesh Bajaj Vs. State NCT of Delhi and Others*, . In this case, the Apex Court has observed at para No. 9 as under:---

"It is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Splitting up of the definition into different components of the offence to make a meticulous scrutiny, whether all the ingredients have been precisely spelled out in the complaint, is not the need at this stage. If factual foundation for the offence has been laid in the complaint the Court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one of two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence."

It is further observed at para No. 10 as under:

"It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions."

These observations are squarely applicable to the facts of present case and as such, though the transaction in question may be a commercial transaction arising out of the agreement, offence u/s 138 apparently appears to have been committed in the course of such transaction and as such, Process issued u/s 138 of Negotiable Instruments Act does not deserve to be quashed.

17. During the course of arguments, the lawyers have agreed to the following chronology of events in respect of the events.

1. Cheque No. 196947 2. Date of Cheque 30-03-1998 3. Presented to Bank 18-06-1998 4. Date of dishonour 25-06-1998 5. Notice to drawer u/s 138 of Negotiable Instruments Act, 1881 03-07-1998 6. Date of receipt of notice by drawer 08-07-1998 7. Reply by the drawer 17-07-1998 8. Complaint filed on 23-09-1998 *****

1. Cheque No. 196950 2. Date of cheque 30-12-1998 3. Presented to Bank on 16-03-1999 4. Date of dishonour 16-03-1999 5. Notice to drawer u/s 138 of Negotiable Instruments Act, 1881 30-03-1999 6. Date of receipt of notice by drawer 03-04-1999 7. Reply by the drawer 16-04-1999 8. Complaint filed on 19-05-1999 *****

1. Cheque No. 196948 2. Date of cheque 30-06-1998 3. Presented to Bank on 06-07-1998 4. Date of dishonour 06-07-1998 5. Notice of drawer u/s 138 of Negotiable Instruments Act, 1881 14-07-1998 6. Date of receipt of notice by drawer 20-07-1998 7. Reply by the drawer 8. Complaint filed on 19-09-1998 *****

1. Cheque No. 196949 2. Date of cheque 30-09-1998 3. Presented to Bank on 20-10-1998 4. Date of dishonour 20-10-1998 5. Notice to drawer u/s 138 of Negotiable Instruments Act, 1881 03-11-1998 6. Date of receipt of notice by drawer 06-11-1998 7. Reply by the drawer 8. Complaint filed on 29-12-1998

18. It is to be noted that to constitute an offence u/s 138 of the Negotiable Instruments Act,

(a) the person sought to be held responsible has, to have a bank account,

(b) he issues a cheque drawn on that account for discharge of any debt or other liability and;

(c) the cheque is returned by the bank because funds are insufficient or it exceeds the arrangement made for the purpose. In the event of occurrence of the three different set of facts, the rule of evidence will come into play namely the person responsible shall be deemed to have committed the offence as defined.

The person responsible for the act will not be answerable unless requirements of proviso (a), (b) & (c) as u/s 138 of Negotiable Instruments Act, 1881 are fulfilled.

Proviso (a), (b) & (c) read as under:

"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."

19. After having considered the chronology, there cannot be any doubt that the impugned prosecution launched does not suffer for want or compliance of proviso (a), (b) & (c) of section 138 of Negotiable Instruments Act, 1881. The only grievance of the petitioners is that the debt in respect of which the cheques have been issued is not legally enforceable debt or liability. He has submitted that there is a dispute regarding the terms and conditions of the agreement between the two parties and even otherwise the liability from Rs. 3.11 crores, on discussion between the parties, was reduced to Rs. 1.75 crores, whereas the alleged default in cheque is committed prior to the settlement of such liability. Therefore, according to the petitioners, the debt in respect of which the cheques are issued are not legally enforceable.

20. The learned Counsel for the respondent No. 1 has submitted that the respondent is the holder of the cheque in regular course and the signature on cheque is admitted to be of the petitioner. Therefore, presumption envisaged u/s 118 of the Negotiable Instruments Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. He further submitted that section 139 of the Act also enjoins on the Court to presume that the holder of cheque received it for the discharge of any debt or liability and, therefore, the burden is on the accused to rebut the said presumption and the presumption can only be rebutted in evidence and not at this stage.

21. The learned Counsel for the petitioners wanted the Court to be persuaded to believe that amount due from the petitioners is not yet finalised. According to him, unless the dues are enforceable, i.e. either those are settled or decree in favour of the respondent No. 1 by the competent Court or authority or petitioners have admitted liability to certain extent those cannot be termed as "any debt or other liability" as contemplated u/s 138 of Negotiable Instruments Act, 1881.

In this context, a reference to section 139 of Negotiable Instrument Act, 1881 as also section 118(a) of Negotiable Instruments Act, 1881 will have to be made.

Section 139 of Negotiable Instruments Act, 1881 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."

Thus, when it is not disputed by the petitioners that the cheque was issued in favour of the respondent No. 1 it cannot be open for petitioners to contend that the cheque was not for "amount due". Presumption u/s 139 of Negotiable

Instruments Act, 1881 would arrest the respondent No. 1 in this region, although presumption being rebuttable, it may be open for the petitioners to establish in the trial Court that this much was not the amount due, etc.

22. The presumption in favour of drawee also stands strengthened by virtue of section 118(a) of the Negotiable Instruments Act, 1881 Act, which also indicates the presumption being rebuttable by leaving a margin for rebuttal of the presumption with opening phrase.

Section 118 of Negotiable Instruments Act, 1881 reads as under:

"118. Presumption as to negotiable instrument.---Until the contrary is proved, the following presumptions shall be made --

(a) of consideration, that every negotiable instrument, was made or drawn for consideration and that every such instrument, when it has been accepted, endorsed negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

(b) as to date, that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance, that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer, that every transfer of a negotiable instrument was made before its maturity;

(e) as to the order of endorsements, that the endorsements, appearing upon negotiable instrument were made in the order in which they appear thereupon;

(f) as to stamps, that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that the holder of a negotiable instrument is a holder in due course, provided that where the instrument has been obtained from its lawful owner, or from any person in lawful custody there, by means of an offence or fraud or has been obtained from the maker or acceptor thereof by means of an offence or fraud; or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him."

23. It can be seen that presumption u/s 118 of Negotiable Instruments Act, 1881 would favour the respondent No. 1 until petitioners prove contrary that the cheque was not drawn for consideration and until the presumption u/s 118 of Negotiable Instruments Act, 1881 is not rebutted, it will not be open for the petitioners to say that section 138 of Negotiable Instruments Act, 1881 is not attracted because the cheque was not issued for discharge, in whole or in part or any debt or other liabilities. In other words, having issued the cheque, it may not be open to the petitioners to claim that the same was not towards amount due.

24. Considering the provisions of sections 118(a) and 139 of the Act, it cannot be

said that no foundation for offence has been laid in the complaint. The question of rebuttal of the presumption will arise at the stage of the trial. The averments made by the petitioner would prima facie make out a case for investigation by the Judicial Magistrate, First Class. Whether it is legally enforceable or not, such an endeavour may be justified during trial but certainly not during the stage of investigation and considering the facts, it is too premature a stage for this Court to step in and stall the investigation by declaring that it is only commercial transaction, simpliciter wherein no semblance of criminal offence is involved.

25. The learned Counsel for the petitioners took objection regarding joinder of two directors i.e. petitioner Nos. 2 and 3 as co-accused in the above referred criminal cases and submitted that they are not in charge of the conduct of the business of company and they have not signed the cheques and as such are not liable to be proceeded for charge u/s 138 of Negotiable Instruments Act, 1881. He contended that under such circumstances, the criminal proceedings against them should be quashed and set aside.

The learned Counsel for the respondent No. 1 has drawn my attention to memorandum of understanding dated 29-3-1997 entered into by the directors, including the petitioner Nos. 2 and 3 to show that they are also responsible for managing the business of company, whereas, the learned Counsel for the petitioners submitted that the said agreement was cancelled and fresh agreement has been entered into on 2-8-1997 and in view of this agreement only the petitioner No. 4 is in charge of business of petitioner No. 1 company. It is not disputed that the petitioner Nos. 2 to 4 are the directors of the petitioner No. 1 company. Section 141 of Negotiable Instrument Act, 1881 which covers the topic of "Offences by Companies" reads as follows:

"141. Offences by companies.---(1) If the person committing an offence u/s 138 is a company, every person who, at the time the offence was committed, was incharge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly."

While explaining the scope of section 141 with reference to the similar question, the Apex Court in the case of P. Rajanathiram v. State of Maharashtra, 2000(10) Supreme Court Cases 529 at para 4 of judgment observed that:

"A bare reading of the provision mandates that some facts must come on the record in order to figure as to who should answer the charge ultimately. Necessarily, pre-charge evidence assumes importance. The complainant will have to put his side of the case as given out in the complaint and the persons summoned would have to put on the record all what is material to extricate themselves out. In any cases, the crucial time would be when framing charge whereas a decision in that respect would be required to be made by the Court."

26. This decision is a direct answer to the said contention raised by the learned Counsel for petitioners in these petitions. And in view of the said decision, the

complaint (respondent No. 1 company) will have to put its side of the case as given out in the complaints and the petitioner Nos. 2 and 3, who are also summoned have to put on the record all what is materialize to extricate themselves out. Thus, in view of the above referred decision of the Apex Court, in any case, the crucial time for deciding the point would be the stage of framing charge when a decision in that respect would be required to be made by the trial Court. Therefore, the contention raised by the learned Counsel for the petitioners in this regard cannot be considered at this stage.

27. However, the learned Counsel for the petitioners submitted that in complaint filed against the petitioners except the bald statement that the petitioner Nos. 2 and 3 are directors of the company, there is no other allegation to indicate even a prima facie that they were in charge of the business of the company or responsible to the company for conduct of its business. He further submitted that under similarly circumstances, the Apex Court upheld the quashing of prosecution against directors not in charge of the business of company in case of State of Haryana Vs. Brij Lal Mittal and Others, . In the said case, the complaint was u/s 27 of Drugs & Cosmetics Act, 1940, while deciding the case view expressed by the Division Bench in Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, , was accepted, in the said case.

28. In this regard, it is to be noted that the issue as regards the proper stage for determination of such person's vicarious liability was referred to a larger Bench of Supreme Court in P. Rajarathinam Vs. State of Maharashtra and Others, , as already discussed above for resolving of alleged conflict between Delhi Municipality v. Ram Kisan Rastogi's case and Modi Distillery's, case and it is held by the larger Bench that it was not necessary to advert to that question at this stage and the proper stage would be after pre-charge evidence for proving of charge. Therefore, the contention raised by the learned Counsel for the petitioners cannot be accepted.

29. Thus, taking into consideration averments in the complaint unrebutted and on their face value, it cannot be said that no offence is made out. Thus, these writ petitions, praying to quash the private complaints filed by the respondent No. 1, therefore, deserve to be dismissed and accordingly, stand dismissed. Rule discharged. Ad interim relief granted in Cri.W.P. No. 27/2001 stands vacated. Considering the peculiar facts and circumstances of these matters, there shall be no order as to cost.