

(1995) 01 AP CK 0002

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 101, 3768 and 17587 of 1990, 10259, 10260, 10278, 10978, 15089 and 15587 of 1992, 482, 487, 1667, 1804, 2453, 2457, 2995, 3036, 3280, 3840, 3925, 3995, 3996, 3998, 4116, 4284, 4325, 4328, 4441, 4735, 4984, 5089, 5303, 5819, 5821, 5830

B. Mohan Krishna

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 27-01-1995

Acts Referred:

Constitution of India, 1950 — Article 14, 20(3)
Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 140, 141, 141(2)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : (1995) 1 ALT 468 : (1995) 1 ALT(Cri) 332 : (1995) 1 CivCC 480 : (1996) 86 CompCas 487 : (1996) CriLJ 636

Hon'ble Judges : S.V. Maruthi, J;M.N. Rao, J

Bench : Division Bench

Advocate : S. Satyanarayana Prasad, P. Venkateshwarlu, Gopal Reddy, Anil Kumar, V. Rajagopal Reddy, L. Nageshwara Rao, C. Malla Reddy, E.V.S.S. Acharyulu, A. Sridhar Reddi, A. Venkat Reddy, K. Suresh Reddi, Sudhendhar Kulkarni, Posani Venkateshwarlu, Ghanta Rama Rao, P. Veera Reddi, A. Narayana Reddi, Syed Shareef Ahmed, V.H.V.R.R. Swamy, P. Govind Reddi, T. Lakshminarayana, S. Vani, Y.S. Venkata Rao, C. Madhusudhana Rao, K. Jaya Kumar, P. Venugopal, D. Sunil Reddi, G. Bikshapathy, P. Keshava Rao, K. Kankaiah, P. Vittal Rao, S. Satyam Reddi, C. Trivikrama Rao, V.R. Bhadrarai, Rupendra Mahendra, Y. Ashok Raj, M. Sai Reddy, S.V. Muni Reddy, P. Sriram Murthy, P. Gangaiah Naidu, T. Subramanyam, G. Venkateshwarulu, T. Jagadish, Mohd. Ghulam Hussian, T. Seshagiri Rao, N. Saida Rao, I. Lakshmikanth Rao, M. Sreeramulu Reddy, V.S.R. Anjaneyulu and M.V. Bharathi, for the Appellant; C. Padmanabha Reddi, V.V.S. Rao, Innaya Reddi (Standing Counsel for Central Government), G.V.R. Mohan Rao, A. Satyanarayana Rao, J. Chananti, G.S. Dwarakeshwara Rao, H. Prahlada Reddi, (Addl. Standing Counsel for State Government), Shankar Rao Bilalkar, G. Vijayalakshmi, D. Krishna Murthy (Addl. Standing Counsel for State Government), A.T.M. Ranga Ramanujam, Srinivasa Rao, G. Ramachandra Rao, P.V. Narayana Rao, V. Raja Gopal Reddi, B. Adinarayana Rao, M. Sudhakar Reddi, P. Prabhakar, B. Viswanatha Reddi, P. Prabhakar Reddi, C. Ravichandra Reddi, J. Parthasarathy, L. Narasimbha Reddy, J. Prabhakar, C.V. Mohan Reddy, Noushad Ali, B. Krishna Rao, V. Ravikiran Rao, N. Satyanarayana, M. Ravindra Babu, B. Ravishankar, Pratap Narayan Sanghi and

Judgement

M.N. Rao, J.—The provisions of Chapter XVII of the Negotiable Instruments Act, 1881 (for short "the Act"), comprising sections 138 - 142, concerning penalties in cases of dishonour of certain cheques for insufficiency of funds in the accounts, inserted by section 4 of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (Act 66 of 1988) are under challenge in this batch of writ petitions.

2. The Statement of Objects and Reasons of Act 66 of 1988 says :

"... in the course of administering various laws relating to banks and public financial institutions, a need has arisen for some further amendments to the Act...". Section 4 was enacted for achieving the following objective :

"to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers."

Of the five sections comprising Chapter XVII of the Act (inserted by section 4 of Act 66 of 1988), section 138 creates a statutory offence in the matter of dishonour of cheques on the ground of insufficiency of funds in the account maintained by a person with a banker.

The main enacting clause of section 138 lays down that where a person issues a cheque drawn by him on an account maintained by him with a bank 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, he shall be deemed to have committed an offence if the cheque is returned by the bank unpaid either because of insufficiency of funds standing to the credit of his account or the cheque exceeds the amount arranged to be paid from the account by an agreement made with the bank. The drawer of the cheque is liable to 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 without prejudice to any other provisions of the Act. To constitute an offence incorporated in the main enacting clause, three conditions have to be satisfied; (i) the cheques 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 - proviso (a); (ii) the payee or the holder in due course of the cheque makes a demand for payment of the amount by giving a notice in writing to the drawer within 15 days from receiving information from the bank regarding the dishonour of the cheque - proviso (b); and (iii) the drawer of the cheque fails to make payment within 15 days from the date of receipt of the notice proviso (c).

The Explanation to the section says that the expression "debt or other liability" occurring in the main enacting clause means "a legally enforceable debt or other liability".

3. Section 139 of the Act incorporates a rule of presumption to the effect that until the contrary is proved, the holder of a cheque received the cheque of the nature referred to in section 138 of the discharge in whole or in part of any debt or liability. Section 140 lays down that when a person is prosecuted for an offence u/s 138, he is not entitled to plead in his defence that he had no reason to believe when he issued the cheque that it may be dishonoured on presentment for the reasons stated in section 138. Section 141 concerns offences by companies. Section 142 deals with cognizance of offences punishable u/s 138. To take cognizance of an offence u/s 138, the necessary pre-condition is a written complaint by the payee or the holder of the cheque in due course and the complaint must be within one month from the date of failure on the part of the drawer to make payment to the payee or the holder in due course from the date of receipt of the notice. No court inferior to that of a Metropolitan Magistrate or a Judicial First Class Magistrate is empowered to try an offence punishable u/s 138.

4. All the petitioners in these writ petitions are facing prosecutions for offences punishable u/s 138 of the Act.

5. Illustratively, we may refer to the facts in two cases. Writ Petition No. 101 of 1990 was filed by a firm consisting of two partners carrying on wholesale business in liquor in the city of Hyderabad. The third respondent is a liquor manufacturer. The petitioner is the distributor for supplying liquor manufactured by the third respondent to the retailers as per the agreement concluded between the two. The case of the petitioner is that it used to give blank cheques to the third respondent as per the trade practice in respect of the stocks of liquor supplied for distribution. In the month of February, 1987, 12 blank cheques were issued by the petitioner in favour of the third respondent. In February, 1989, 200 cases of several varieties of brandy were supplied by the third respondent and the same were found by the petitioner to be sedimented and spurious. When informed of the same, the third respondent deputed its marketing manager from Bangalore for inspection. Because of the nature of the quality of the liquor supplied, the third respondent informed the petitioner that payment would not be insisted upon. Anticipating that the third respondent might present the blank cheques issued earlier by the petitioner, a letter was addressed by the petitioner on September 21, 1989, to the third respondent reminding about the understanding arrived at between them that no payment would be insisted upon for the stocks supplied in February, 1989. On the same day, i.e., September 21, 1989, the petitioner gave a letter to the bank not to honour the cheques. In spite of this, the petitioner's case is that, the cheques were presented by the third respondent on October 24, 1989, and the same were dishonoured. A notice dated November 3, 1989, was issued by the third respondent to the petitioner

demanding payment and a reply was sent by the petitioner on November 15, 1989, disputing the liability. C. C. No. 227 of 1989 was instituted by the third respondent against the petitioner in the court of the XI Metropolitan Magistrate, Hyderabad; a suit O. S. No. 205 of 1992 also was filed against the petitioner in the court of the 3rd Additional Judge, Secunderabad. There is no dispute that the petitioner had no money in his account maintained with the bank.

6. Writ Petition No. 3925 of 1993 was filed by Sri Lakshmi Saraswathi Papers Ltd., which was declared as a sick unit by the Board for Industrial and Financial Reconstruction in Case No. 60 of 1988, dated October 11, 1989, u/s 15(1) of the Sick Industrial Companies (Special Provisions) Act. The fourth respondent is a dealer in petrol and diesel, who supplied oil to the petitioner on credit basis, for the discharge of which three cheques were issued in the month of June, 1992, aggregating to Rs. 64,345.28 and three other cheques on different dates in the year 1992, for a total of Rs. 52,214.79. All the six cheques were dishonoured as there was no amount to the credit of the petitioner's account in the bank. The fourth respondent, therefore, filed two criminal cases - C. C. Nos. 83 of 1993 and 84 of 1993 - against the petitioner in the court of the Additional Judicial First Class Magistrate, Nizamabad. In the writ petition, the case of the petitioner is that without the consent of the Board for Industrial and Financial Reconstruction, no prosecution can be launched u/s 17 of the Sick Industrial Companies (Special Provisions) Act and that no proceedings can be initiated against the petitioner.

7. On behalf of the petitioners, leading arguments have been advanced by Sri Satyanarayana Prasad supplemented by Sri P. Venkateshwarlu, Sri Gopal Reddy and Sri Anil Kumar. Sri Prasad's arguments are on the following lines : (i) the Union Parliament has no legislative competence to enact section 138 of the Act since what is incorporated in section 138 in pith and substance affects the relationship of debtor and creditor or the relationship of two private persons with reference to their mutual rights and liabilities and so, is not traceable to entries 45 and 46 of List I as is sought to be justified by the Union of India; (ii) mens rea is a necessary ingredient of a criminal offence and as section 138 dispensed with that indispensable ingredient, it is arbitrary being violative of articles 14, 19(1), 20 and 21 of the Constitution of India; (iii) proviso (c) to section 138 which refers to the failure of a drawer who issued the cheque which was dishonoured must be read down as the failure of the drawer without reasonable cause; and (iv) the presumption incorporated in section 139 is violative of the constitutional guarantee of an accused person under article 20(3) of the Constitution of India.

8. Sri Gopal Reddy, learned counsel appearing for Sri Lakshmi Saraswathi Paper Mills Ltd., has urged that the petitioner being a limited company and a sick unit, cannot be prosecuted since it enjoys absolute immunity under the provisions of the Sick Industrial Companies (Special Provisions) Act; even otherwise, no prosecution will lie against a company.

9. In opposition to this, Sri C. Padmanabha Reddi, learned senior advocate

appearing for respondent No. 4, in Writ Petitions Nos. 1667 and 1804 of 1993 has contended that section 138 of the Act incorporates the principle of strict liability, which is not unknown to enacted penal laws like the Prevention of Food Adulteration Act, the Essential Commodities Act, etc. Bona fide intention cannot be a valid defence in a prosecution concerning a "deemed offence", which excludes mens rea.

10. Sri Innayya Reddi, learned senior standing counsel for the Union of India, has argued that legislative competence for enacting the impugned law is traceable to entries 45, 46, 93 and 97 of List I. By statute, mens rea can be excluded and such exclusion is necessary in laws concerning social welfare. Whenever the mental element is statutorily excluded, such exclusion need not necessarily be explicit and it can be done by necessary implication also. In view of the necessary safeguards in section 142 of the Act with regard to limitation, taking of cognizance and the type of court empowered to try the offence, there is no possibility of any innocent person being subjected to harassment.

11. Sri V. V. S. Rao, learned counsel, appearing for the fourth respondent in Writ Petition No. 3925 of 1993, has urged that a legislative entry should be interpreted in a broad manner and in cases where the legislative competence of the Union Parliament is questioned, the court has to verify whether the subject-matter is covered by any of the entries in the State List and if the answer is in the negative, the enquiry into the question should proceed no further. Supporting the line of arguments advanced for the Union of India, Sri V. V. S. Rao has pleaded that section 139, which incorporates the presumption in favour of the holder of a cheque, is a rule of evidence falling within the realm of procedural law and it cannot be treated as an arbitrary one violative of articles 14 and 20(3) of the Constitution of India. The petitioner in Writ Petition No. 3925 of 1993, who is facing prosecution in C. C. Nos. 83 and 84 of 1993 launched by the fourth respondent in the court of the Additional Judicial First Class Magistrate, Nizamabad, is not entitled to take shelter under the provisions of the Sick Industrial Companies (Special Provisions) Act.

12. On the contentions urged by both the sides, the following points emerge for consideration :

- (i) whether the impugned legislation is ultra vires the powers of the Union Parliament on the ground of want of legislative competency;
- (ii) whether a statutory provision creating an offence without incorporating mens rea as a necessary ingredient is violative of article 14 of the Constitution of India;
- (iii) whether treating companies and individuals separately for fastening criminal liability is violative of article 14 of the Constitution;
- (iv) whether the words "fails to make payment" occurring in proviso (c) to section 138 imply "failure without reasonable cause";
- (v) whether the presumption in section 139 in favour of the holder of a cheque is

violative of the guaranteed fundamental right of an accused person under clause (3) of article 20 of the Constitution of India; and

(vi) whether section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, prohibits launching of prosecution u/s 138 of the Act?

Re. (1) : Clause (1) of article 246 of the Constitution of India confers exclusive power on the Union Parliament to make laws with respect to any of the matters enumerated in List I (Union List) of the Seventh Schedule to the Constitution. Clause (3) confers exclusive power on the Legislature of a State to make laws with respect to any of the matters enumerated in List II (State List). Both the Union Parliament and the Legislature of a State have power to make laws with respect to any of the matters enumerated in List III (Concurrent List). The substantive power to make laws is traceable to article 246 and the three lists enumerating the matters in respect of which laws can be enacted. With respect to matters not enumerated in List II or List III, Parliament has power to make laws as is explicit from entry 97 of List I. We are not concerned with the interpretation of any of the entries in the Concurrent List. Entries 45 and 46 of List I (Union List) are as follows :

"45. Banking.

46. Bills of exchange, cheques, promissory notes and other like instruments."

Entry 30 of List II (State List) reads :

"30. Money-lending and money-lenders; relief of agricultural indebtedness."

13. If the true subject-matter of section 138 of the Act is money-lenders and money-lending, the section is ultra vires; otherwise not.

14. Where an organic document effects division of the powers between the Union and the States and if there is an overlapping with respect to any subject-matter, a general power of the Union would override even a particular power of a State. (See Attorney-General of Alberta v. Attorney-General of Canada AIR 1939 PC 53). Where the subject-matter of legislation appears to fall both within the ambit of the Central Legislature and the Legislature of a province, it was held by the Privy Council in Attorney-General for Canada v. Attorney-General for Ontario [1937] AC 355, that the court should consider what is the pith and substance or the true nature and effect of the impugned legislation. The Federal Court of India followed this view in AIR 1939 1 (Federal Court) , where the question that arose by way of special reference was whether the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, was ultra vires the Legislature of Central Provinces and Berar. u/s 100(1) read with entry 45 of List I of Schedule VII to the Government of India Act, 1935, the Central Legislature had power with respect to duties of excise on tobacco and other goods manufactured or produced in India. By clause (3) of section 100 read with entry 48 of List II of the Seventh Schedule, the State Legislature had power with respect to "taxes on sale of goods and on advertisements". The Federal Court held that in its pith and

substance, the Central Provinces and Berar Motor Spirit Act was not an excise duty and, therefore, not ultra vires the powers of the State Legislature.

15. In AIR 1941 47 (Federal Court) , applying the doctrine of pith and substance, Gwyer C. J., held that the Madras Agriculturists Relief Act, 1938, was not a law with respect to promissory notes covered by entry 28 of List I of the Seventh Schedule to the Government of India Act, 1935, but fell within the ambit of entries 4 and 15 of List III and entry 2 of List II.

16. The aforesaid precedents were cited approvingly in *Union of India v. Harbhajan Singh Dhillon*, (1972) 83 ITR 582 (SC) . Speaking for the majority, Sikri C. J. laid down the test (page 1078) :

"... we have the three lists and a residuary power and, therefore, it seems to us that in this context if a Central Act is challenged, as being beyond the legislative competence of Parliament, it is enough to enquire if it is a law with respect to matters or taxes enumerated in List II. If it is not, no further question arises."

17. This statement of law was followed by a nine-judge Bench of the Supreme Court in *Attorney-General for India v. Amratlal Prajivandas* [1995] 83 Comp Cas 804.

18. The impugned legislation, according to the petitioners, in substance, concerns money-lending and money-lenders. The relationship of debtor and creditor and their mutual rights and liabilities are sought to be regulated by the impugned legislation for which, the State Legislature alone is competent to legislate by virtue of article 246(3) read with entry 30 of List II of the Seventh Schedule to the Constitution of India. The impugned legislation, which creates a statutory offence, in its pith and substance is outside the scope of entries 45 and 46 of List I which speak of banking and negotiable instruments. We do not agree.

19. The nature of the offence created by section 138 of the Act although, incidentally, affects the relations between a debtor and a creditor, in its true nature and character - pith and substance - it does not encompass money-lending and money-lenders envisaged by entry 30 of List II. It does not concern, in general, either the business of money-lending or persons who carry on the business of money-lending. A statutory offence is created by section 138 of the Act when a person issues a cheque for the discharge in whole or in part of any debt or other liability and if it is returned by the bank unpaid either because the amount of money standing to the credit of the account of the drawer is insufficient or the amount covered by the cheque is in excess of the amount to be paid from the account of the drawer by an agreement with the bank. Thus the limited sphere within which section 138 of the Act operates cannot, by any stretch of reasoning, be approximated to or equated with money-lending or activities concerned with money-lenders. The section concerns dishonour of cheques in certain circumstances and the resultant consequences. Banking and cheques (entries 45 and 46 of List I) are thus primarily the matters covered by section 138. Although, incidentally, the impugned legislation trenches upon the

debtor and creditor relationship, which is but an aspect of money-lending and money-lenders, it cannot be said that in its true nature and character, the legislation concerns money-lenders and money-lending.

20. We, therefore, hold that the impugned legislation is not ultra vires the powers of the Union Parliament. Point No. 1 is accordingly, answered in the negative and against the petitioners.

Re. (2) : The question for consideration is : whether a legislation creating a penal offence by excluding mens rea as a necessary ingredient is arbitrary and, therefore, violative of article 14 of the Constitution. According to Sri Prasad, learned counsel for the petitioners, it is the cardinal principal of criminal law that no one can be punished for an offence if he has no guilty mind.

21. One of the earliest cases that dealt with this question arose in 1895, before the Queen's Bench in *Sherras v. De Rutzen* [1895] 1 QB 918. Section 16(2) of the Licensing Act, 1872, prohibited supply of liquor or refreshment to any constable on duty unless authorised by an officer superior to that constable. A licensee of a public house was convicted u/s 16(2) for having supplied unlawfully liquor to a police constable on duty without having the authority of a superior officer for so doing. At the time when the liquor was served, the police constable was not wearing his armlet, which was an indication that he was off duty. Although it was proved that the constable was on duty, the question that fell for consideration was whether the innocent act committed by the appellant constituted an offence. Wright J. held (at page 921) :

"There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

22. It was pointed out by Day J., that the effect of the omission of the word "knowingly" is to shift the burden of proof as a result of which the defendant has to prove that he did not have the knowledge. The conviction was set aside on the view that the appellant did not have guilty knowledge which was necessary to constitute an offence u/s 16(2). This principle was restated in *Brend v. Wood* [1946] 62 TLR 462; 110 JP 317, and was accepted by Lord Goddard C. J. in *Harding v. Price* [1948] 1 KB 695 . After reviewing the case law on this question including *Sherras v. De Rutzen* [1895] 1 QB 918, Lord Goddard stated the rule thus :

"if a statute contains an absolute prohibition against the doing of some act, as a general rule mens rea is not a constituent of the offence; but there is all the difference between prohibiting an act and imposing a duty to do something on the happening of a certain event."

23. Humphreys J., in his separate but concurring judgment, recognised the

principle :

"... where the statute contains an absolute prohibition against the doing of some act, in which case ignorance of the true facts, even if founded upon reasonable grounds, affords no defence, though it may obviously be relevant upon the question of penalty."

24. The English decisions referred to supra, on which considerable stress was laid by learned counsel for the petitioners, do not support the proposition that absence of mens rea is fatal to any legislation creating an offence. Although there is a presumption that guilty mind is a necessary ingredient of an offence, it can be displaced either by the words of the statute creating the offence or by the subject-matter with which the offence deals and both these aspects must be considered by the court. The same is the position under the Indian law.

25. Section 138 of the Act excludes mens rea by creating strict liability and this is explicit from the words "such person shall be deemed to have committed an offence". The returning of the cheque by the bank either because the amount of money standing to the credit of the drawer of the cheque is insufficient or the amount covered by the cheque is in excess of the amount arranged to be paid from that account by an agreement with the bank are the two necessary conditions creating strict liability. If the cheque is dishonoured on any other ground, the offence is not made out.

26. Interpreting the provisions of sections 8, 23(1A) and 24 of the Foreign Exchange Regulation Act, 1947, Rajagopala Ayyangar J., speaking for the majority in State of Maharashtra Vs. Hans George, , held :

"Where the statute does not contain the word "knowingly", the first thing to do is to examine the statute to see whether the ordinary presumption that mens rea is required applies or not."

27. Following that test, it was held that the mere act of voluntarily bringing gold into India was sufficient to constitute an offence and no further mental condition was postulated and that the very object and purpose of the Act would be frustrated if a further condition was to be insisted upon that the prosecution should prove that the accused had knowledge that he was contravening the law.

28. In Nathulal Vs. State of Madhya Pradesh, , the question arose whether non-compliance with the provisions of the M. P. Food Grains Dealers Licensing Order, 1958, would amount to an offence u/s 7 of the Essential Commodities Act, 1955, which, at the relevant time, read as follows (page 44) :

"(1) If any person contravenes any order made u/s 3 -

(a) he shall be punishable, -

(ii) in the case of any other order, with imprisonment for a term which may extend to three years and shall also be liable to fine."

29. Subba Rao J. (as he then was), speaking for the majority, while rejecting the contention that since the act was made in the interests of the general public for the control of production, supply and distribution of trade and commerce in certain commodities, mens rea is not one of the essential ingredients for the commission of the offence, held (at page 45) :

"The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. Mens rea by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated. The nature of the mens rea that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof."

30. The dealer in that case had applied for a licence to the licensing authority but as no order of rejection was received by the dealer from the authority, he carried on business as dealer in food grains and continued submitting the relevant returns to the concerned authority. The storage of food grains was held to be under a bona fide belief and, therefore, there was no intentional contravention of the provisions of section 7 of the Essential Commodities Act, was the view taken by the majority.

31. As a direct consequence of the aforesaid decision, section 7 of the Essential Commodities Act was amended by incorporating the words "whether intentionally or otherwise" between the word "contravenes" and the words "any order made u/s 3". Later on, section 10C was added under which the court shall presume the existence of culpable mental state on the part of the accused but the accused in his defence can prove that he had no such mental state with respect to the act charged. In view of the presumption incorporated in section 10C, the Supreme Court in *State of Madhya Pradesh Vs. Narayan Singh and Others*, , agreeing with the law expounded in *Swastik Oil Industries v. State* [1978] 19 Guj LR 1117, set aside the decision of the Madhya Pradesh High Court.

32. As already noticed supra, section 138 of the Act creates strict liability. When the two requirements constituting the offence, as specified in the section, are present, then the drawer of the cheque shall be deemed to have committed the offence. Section 140 in clear terms excludes the defence that the drawer had no reason to believe, when he issued the cheque, that it may be dishonoured on presentment for the reasons stated in section 138. The exclusion of mens rea as a necessary ingredient of the offence u/s 138 is thus clear and explicit. There is no room for any ambiguity or doubt as regards the intention of the Legislature in creating the offence in question. A statute creating an offence excluding mens rea, in our considered view, cannot be said to be arbitrary falling within the inhibition of article 14 of the Constitution of India. The impugned legislation was enacted in public interest; its objective is to "enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in

certain cases while at the same time providing "adequate safeguards" to prevent harassment of honest drawers". As the evil practice of issuing cheques in settlement of liabilities without there being adequate amount in the accounts became rampant, the Union Parliament thought it fit to curb the same effectively by enacting a stringent law while at the same time taking care to safeguard the interests of honest drawers. An honest drawer can always avert the threat of prosecution by paying the amount due within 15 days from the date of receipt of notice from the payee or holder in due course in case the cheque issued by him was dishonoured on either of the grounds specified in section 138.

33. In the larger public interest, a law imposing penal liability without proof of guilty mind passes muster; the constitutionality of the Prevention of Food Adulteration Act which imposes liability without mens rea was upheld in *Andhra Pradesh Grain and Andhra Pradesh Grain and Seed Merchants Association Vs. Union of India (UOI)* and *Another*, . In special situations of strict liability, the English law principle that "intention to do a breach of a statute need not be shown; the breach in fact is enough" was accepted by the Supreme Court in *Pyarali K. Tejani Vs. Mahadeo Ramchandra Dange and Others*, , a case concerning the Prevention of Food Adulteration Act.

34. The ruling of the Supreme Court in *Gujarat Travancore Agency, Cochin Vs. Commissioner of Income Tax, Kerala, Ernakulam*, and *Akbar Badrudin Jiwani of Bombay Vs. Collector of Customs, Bombay*, , cited for the petitioners in support of the proposition about proof of mens rea, we think, are not in point. *Gujarat Travancore Agency, Cochin Vs. Commissioner of Income Tax, Kerala, Ernakulam*, , concerns the interpretation of section 271(1)(a) of the Income Tax Act which lays down that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income and section 276C which provides that if a person wilfully fails to furnish in due time the return of income required u/s 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. The Supreme Court held that the element of mens rea was not required to be proved in the proceedings taken by the Income Tax Officer u/s 271(1)(a). The analogy sought to be drawn by Sri Prasad, learned counsel for the petitioners, between the aforesaid two sections of the Income Tax Act and the impugned section 138 of the Negotiable Instruments Act is baseless. The difference in the language between the two is clearly discernible. The expressions "without reasonable cause" and "wilful failure" found in the two sections of the Income Tax Act, cannot be read into section 138. It is a settled rule of interpretation that the intention of the Legislature must be ascertained with reference to the language employed. The exception to this rule arises only in cases where the explicit language of the statute leads to perverse or absurd results. *Akbar Badrudin Jiwani of Bombay Vs. Collector of Customs, Bombay*, , arises under the Customs Act, wherein it was held that for imposition of penalty, the requisite mens rea must be established.

35. Another ruling of the Supreme Court cited for the petitioners - State of Gujarat and Another Vs. Acharya D. Pandey and Others, etc., , only reiterates the settled principle that unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of the crime, no one should be found guilty of an offence. Interpreting section 35(1) of the Bombay Public Trusts Act, 1950, the Supreme Court, after reviewing the case law on the subject including the British precedents - Lim Chin Aik v. The Queen [1963] AC 160 and Sweet v. Parsley [1969] 1 All ER 347 - held that the section creates a quasi-criminal offence punishable only with fine and the language makes its contravention an absolute liability and so, the requirement of mens rea cannot be read into it. Section 35(1) obligated a trustee to deposit the trust property consisting of money, which could not be applied immediately for the purpose of the public trust, in any bank. A-1 was the Acharya and A-10 was the Mahant of two trusts and the rest of the eight accused were the trustees of the two trusts. The allegation was that the first accused withdrew certain monies from the trust for meeting his Income Tax liabilities and reimbursed them later and that the other accused allowed him to utilise the amounts in contravention of law. A-1's case was that he withdrew the amounts from his own "khatha" and there was no contra evidence nor was there any evidence to show that the other accused knew about the withdrawals. On the evidence, it was ruled by the Supreme Court that there was nothing to fasten criminal liability but on the question of mens rea, it was held that it could not be read into the section as a necessary ingredient. In no way, this ruling is of any assistance to the petitioners.

36. We, therefore, hold that absence of mens rea in section 138 of the Act for fastening criminal liability is not arbitrary, violative of article 14 of the Constitution of India.

Re. (3) : Another facet of the argument founded on article 14 is that by treating individuals and companies differently, the impugned legislation has made an invidious discrimination in that section 141 of the Act, which concerns offences by companies, lays down that if the person committing an offence u/s 138 is a company, every person, who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business, shall be deemed to be guilty of the offence but if he exercised due diligence to prevent the commission of the offence, he is not liable to be punished. This safeguard, according to the petitioners, is excluded in the case of an individual charged u/s 138. We do not agree with this contention. Article 14, it is a firmly settled legal position, forbids class legislation but does not forbid reasonable classification vide, Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, . A company, in law, is different from its shareholders or members. It is a legal person. When wrongful acts are attributed to a legal person, they are, in reality, the acts of its agents. The same in effect would be the case with regard to any body comprising a plurality of persons like a firm or association of persons, comprehended by the definition of "company" u/s 141(2). Recognising this reality, modern penal law makes a distinction between natural persons and

legal persons in the matter of fastening criminal liability (see sections 10 of the Essential Commodities Act and section 17 of the Prevention of Food Adulteration Act, 1954). When a company is punished for an offence, the persons that must be identified as the wrong doers are those who were in charge of the business of the company and responsible for the conduct of the company. If something was done without their knowledge and despite the diligence exercised by them, the offence had taken place, they cannot be rendered liable to punishment individually. This classification, therefore, cannot be termed either irrational or unreasonable.

37. We, therefore, hold point No. 3 against the petitioners.

Re. (4) : Proviso (c) to section 138 lays down that the provisions of the main enacting clause, by which the offence is created, come into play only in the event, the drawer of the cheque "fails to make payment... within 15 days of the receipt of the said notice". The words "fails to make the payment", according to learned counsel for the petitioners, necessarily imply failure without reasonable cause; although the words "without reasonable cause" are not incorporated in proviso (c) to section 138, the same must be read into it, failing which the proviso is liable to be struck down as arbitrary.

38. The device of reading down is resorted to, according to Colin Howard, an Australian jurist :

"Reading down puts into operation the principle that so far as it is reasonably possible to do so, the legislation should be construed as being within power. It has the practical effect that where an Act is expressed in language of a generality which makes it capable, if read literally, of applying to matters beyond the relevant legislative power, the court will construe it in a more limited sense so as to keep it within power... Being no more than a technique of construction, reading down yields to any contrary intention appearing in the Act. The most obvious way in which a contrary intention can appear is by means of explicit language." See Colin Howard, Australian Federal Constitutional Law, second edition, page 18.

39. It is only when a provision of law when read literally falls outside the legislative competence or comes into conflict with any of the guaranteed fundamental rights, that the principle of reading down comes into play vide, All Saints High School, Hyderabad and Others Vs. Government of Andhra Pradesh and Others, . There is no necessity to invoke the doctrine of reading down in view of the explicit language in which the proviso is couched, the principle of strict liability incorporated in the main enacting clause and also the specific exclusion, by section 140, of any defence in respect of a prosecution u/s 138 that "the drawer had no reason to believe when he issued the cheque, that the cheque may be dishonoured on presentment for the reasons stated in that section". As we have already held that section 138 is not unconstitutional, it is not permissible to hold that the failure contemplated in proviso (c) to section 138

implies failure without reasonable cause.

40. The ruling of the Supreme Court in *Sanjay Dutt Vs. State through C.B.I., Bombay*, in which section 5 of the TADA Act fell for interpretation, on which strong reliance was placed for the petitioners, in our view, is not in point. Accepting the English principle as regards construction of a penal provision that if two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty, the Supreme Court explained that there is mental element in the concept of "possession" and that "the ingredient of possession in section 5 of the TADA Act means conscious possession". The court did not lay down the proposition that it was imperative for the prosecution to prove in a prosecution u/s 5 of the TADA Act that the accused was in conscious possession of arms. On the contrary, the court held (at page 433) :

"... the statutory presumption arising of the lesser offence u/s 5 on proof of the fact of unauthorised possession in a notified area would be rebuttable presumption enabling the accused to prove that the weapon was not meant for use for any terrorist or disruptive act."

41. In the present case, it would not be open to an accused in a prosecution u/s 138 to lead evidence that he had reasonable cause for issuing the cheque of the nature referred to in section 138; such a defence is excluded by section 140. When the drawer of the cheque is not entitled to lead evidence that he had no reason to believe when he issued the cheque that it may be dishonoured on presentment for the reasons mentioned in section 138, he cannot also lead evidence that he had reasonable cause for issuing such a cheque. "Reason to believe" is nothing but "reasonable cause". The decisions cited for the petitioners concerning penalty proceedings arising under the Employees' State Insurance Act, see [1979] 1 ALT 38 and the Orissa Sales Tax Act, see *Hindustan Steel Ltd. Vs. State of Orissa*, , are not of any help to them.

42. Point No. 4 is accordingly answered against the petitioners.

Re. (5) : Incorporating a rebuttable presumption, section 139 lays down that unless the contrary is proved, it shall be presumed by the court that "the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability". The term "presumption" in its largest and most comprehensive signification, according to *Gajendragadkar J.* (as he then was) who spoke for the majority in *Izhar Ahmad Khan Vs. Union of India (UOI)*, , may be defined to be an inference, affirmative or disaffirmative of the truth or falsehood of a doubtful fact or proposition drawn by a process of probable reasoning from something proved or taken for granted. The contention advanced is that the presumption is violative of the fundamental right guaranteed under clause (3) of article 20 of the Constitution of India. The expression "holder of a cheque" occurring in section 139 cannot be understood

as defined in section 8 of the Act which covers any person entitled in his own name to the possession thereof and to receive or recover the amount due on cheque from the parties thereto. The definition as contained in section 8 comprehends even an endorsee for consideration though he may not have property in the instrument. The presumption incorporated in section 139 is not intended to cover all kinds of holders; it covers only the holder of a cheque "of the nature referred to in section 138". Only in respect of a cheque which was issued in discharge, in whole or in part, of a debt or other liability, the presumption operates in favour of the payee and as well as in favour of a holder in due course as defined in section 9. This construction receives support from the language employed in clause (a) of section 142, which speaks of cognizance of offences, and provisos (b) and (c) of section 138.

43. Section 4 of the Evidence Act defines the expression "shall presume" as under :

"4. Whenever it is provided by this Act that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved".

44. It is, therefore, incumbent on the court, in a prosecution u/s 138, unless the contrary is proved, to draw the inference that the cheque received by its holder was a cheque of the nature referred to u/s 139 for the discharge, in whole or in part, of any debt or other liability. The presumption is displaced only when the truth of the inference is disproved on other evidence.

45. The fundamental right in questioned - clause (3) of article 20 of the Constitution of India - pressed into service for the petitioners incorporates the principle of immunity against self-incrimination by laying down that no person accused of any offence shall be compelled to be a witness against himself. Unless a person is compelled to be a witness against himself, this clause has no application. Expounding the meaning of the words "to be a witness", the Supreme Court held in *The State of Bombay Vs. Kathi Kalu Oghad and Others*, :

""To be a witness" means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said "to be a witness" to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy." (per Sinha C. J., who spoke for the majority).

46. The person charged u/s 138 is not compelled to be a witness against himself. The presumption of the nature incorporated in section 139 is a common feature in criminal statutes; for example, section 12 of the Protection of Civil Rights Act.

47. For these reasons, on point No. 5, we hold against the petitioners.

Re. (6) : Sri Gopal Reddy, one of counsel appearing for the petitioner in W. P. No. 3925 of 1993, has advanced the contention that as the petitioner-company - Sri Lakshmi Saraswathi Paper Mills Ltd. - was declared as a sick unit u/s 15(1) of the Sick Industrial Companies (Special Provisions) Act by the Board for Industrial and Financial Reconstruction in Case No. 60 of 1988, dated October 11, 1989, and the Board has prepared a scheme for the reconstruction of the company, neither the company nor any of its employees are liable to be prosecuted without the express permission of the Board. We do not agree.

48. Evidently, learned counsel for the petitioner, had in view section 22 of the Sick Industrial Companies (Special Provisions) Act. The section contemplates suspension of legal proceedings in respect of an industrial company when an enquiry u/s 16 is pending or a scheme u/s 17 is under preparation or sanctioned or where an appeal u/s 25 relating to an industrial company is pending. Notwithstanding anything contained in the Companies Act, 1956, no proceedings for winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of security against an industrial company or any guarantee in respect of any loans or advances granted to the industrial company shall lie or be proceeded with further except with the consent of the Board or, as the case may be, the appellate authority. What the section contemplates is that none of the things mentioned therein can be allowed to take place without the consent of the Board or the appellate authority despite any provisions to the contrary in the Companies Act, 1956. Its sphere of operation is confined to proceedings for the winding up of an industrial company. It does not in any way bar prosecution of a company or any of its employees under the provisions of the Negotiable Instruments Act, or any other penal law.

49. Point No. 6 is accordingly answered in the negative and against the petitioners.

50. In the course of the arguments, considerable stress was laid by learned counsel for the petitioners as to the manner in which sections 138, 139 and 142 should be construed. We, therefore, consider it appropriate to lay down guidelines as to how the three sections should be construed.

51. As section 138 incorporates strict liability, being a penal provision, it has to be construed strictly. Despite bona fide intentions, if a person has issued a cheque in favour of another person and it is returned unpaid by the bank, he is liable for prosecution provided the cheque was issued from out of the account maintained by the drawer with a banker for the discharge, in whole or in part, of any debt or other liability. The reasons for the returning of the cheque by the bank must be : (i) the amount standing to the credit of the account of the drawer is insufficient; or (ii) it exceeds the amount arranged to be paid from that account by an agreement made with the bank. The second condition is attracted normally in cases where the account holder is permitted to have overdraft facility

and if the amount for which the cheque was issued is in excess of the amount for which such overdraft facility was given.

52. Where a cheque is issued not for the purpose of discharge of any debt or other liability, the maker of the cheque is not liable for prosecution. For an example, if the cheque is given by way of a gift or present and if it is dishonoured by the bank, the maker of the cheque is not liable for prosecution. In *A. Bhogi Raju v. S. G. Ramayya* [1994] 1 AWR 73, four cheques issued by the accused were returned unpaid and the trial court acquitted the accused taking the view that the cheques were not issued for the discharge of any legally enforceable debt or other liability. A learned single judge of this court, after reviewing the evidence, came to the conclusion that "an independent assessment of the evidence adduced by the complainant, both oral and documentary, leads me to an irresistible conclusion that the cheques were issued by the accused in connection with the film distribution business as alleged by the complainant but not in connection with some other transaction as contended by the accused." After recording this finding, the learned judge made a further observation :

"Even otherwise, he should not have issued the cheques without sufficient funds in the bank to his credit."

53. These observations clearly imply that in every case where a cheque was issued without sufficient funds in the bank, the maker is liable for an offence u/s 138. Unless the two conditions set out in section 138 are satisfied, no criminal liability can be fastened. The aforesaid observations, therefore, are clearly unsustainable and so to that limited extent, we overrule the same.

54. Section 138 is not couched in precise language. Apart from being vague, it is likely to be mis-interpreted in a manner different from what was intended by the law-making body, and this is because of the words "payment of any amount of money to another person" appearing in the main enacting clause. The words "another person" are not explained. This at the first blush gives an incorrect impression that the words "another person" mean only a "payee" and that the sweep of the offence is confined to the drawer and the payee. We, therefore, hold that both the payee and holder in due course are covered by the expression "another person" but not a mere holder or endorsee without consideration.

55. The rebuttable presumption u/s 139 operates only in favour of the payee or a holder in due course but not in favour of a person, who, without consideration, became the holder of the cheque.

56. In a prosecution u/s 138, it is open to the accused to rely upon the other provisions of the Act in support of his plea of innocence except the defence that is specifically excluded by section 140. Where the complainant is a holder in due course, the rebuttable presumption is that the endorsement of the cheque in favour of the holder in due course was for consideration and that the cheque was issued for the discharge, in whole or in part, of a legally enforceable debt or any other liability. The drawer of the cheque can always take the plea that the

amount covered by the cheque was not for the discharge of any legally enforceable debt or liability. The initial burden is on the complainant to show that the cheque was issued for the discharge of a legally enforceable debt or other liability. Then the burden shifts to the respondent to establish that the cheque issued was not of the nature referred to the section 138. In doing so, he may also rely upon circumstantial evidence. See *Kundan Lal v. Custodian, Evacuee Property* AIR 1961 SC 1316. The following example will make the position clear :

"A issues a cheque in favour of B for a certain amount. B, for consideration, endorses the same in favour of C. The cheque is returned unpaid by the bank on the ground of insufficiency of funds. When C files a complaint against A, initially, C must show that there was consideration for his receiving the cheque from B. Thereafter, the burden shifts to A to lead evidence that the cheque was not issued in discharge of a legally enforceable debt or other liability and that C became the endorsee without consideration."

57. The punishment prescribed u/s 138 is imprisonment which may extend to one year or with fine which may extend to twice the amount of the cheque "or with both". Section 142, which speaks of cognizance of offences, reads :

"142. Cognizance of offences. - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), -...

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class shall try any offence punishable u/s 138."

58. One of the contentions advanced before us is that since the jurisdiction of a Magistrate of the First Class or a Metropolitan Magistrate is limited to passing a sentence of imprisonment for a term not exceeding three years or fine not exceeding Rs. 5,000 u/s 29 of the Code of Criminal Procedure, in a prosecution u/s 138, no Magistrate can impose a fine in excess of Rs. 5,000 notwithstanding the fact that the Magistrate of the First Class is empowered to try the offence u/s 138. We do not agree. When section 142 was enacted, the Union Parliament was aware of the fact that the jurisdiction of the Metropolitan Magistrate or a Judicial Magistrate of the First Class was limited to imposing a sentence of imprisonment for a term not exceeding three years and fine not exceeding Rs. 5,000. That is why, the section begins with a non-obstante clause. Further, u/s 4(2) of the Code of Criminal Procedure, offences under any law other than the Indian Penal Code, although to be tried in accordance with the provisions of the Code, the same shall be "subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences". Therefore, a Judicial First Class Magistrate or a Metropolitan Magistrate trying an offence u/s 138 has power to impose fine in excess of Rs. 5,000 if the fact situation so warrants.

59. Before closing the case, we would like to place on record our grateful appreciation of the able manner in which the case has been argued by learned counsel for both the sides, especially, Sri Satyanarayana Prasad, Sri Innayya

Reddi, Sri C. Padmanabha Reddi and Sri V. V. S. Rao.

60. For the foregoing reasons, subject to the guidelines indicated in regard to the interpretation of the impugned provisions, all the writ petitions are dismissed. No costs. Stay orders granted earlier shall stand vacated and the concerned Magistrates are directed to dispose of the cases expeditiously.

61. The Central Government advocate's fees in each case is fixed at Rs. 250 (two hundred and fifty).