(1995) 01 MAD CK 0058

In the Madras High Court

Case No : Criminal Miscellaneous Petitions No''s. 17963 and 19169 of 1990 and Criminal Original Petitions No''s. 12900 of 1991, 3075 and 3085 of 1993 and 5147, 8110 and 8152 of 1994

N. Doraisamy and others — APPELLANT

Vs

Archana Enterprises
Vedamurthy Vs Vijaya Productions P. Ltd.
R.M. Meyyappan Vs Unique Enterprises
N. Gunasekaran and another Vs Chinnaswamy
A.K. Tayal and others Vs K.K. Perumal Raja
Short Loom Movies International and others Vs S. Amirthalingam — RESPONDENT

Date of Decision : 13-01-1995

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 142

Citation : (1999) 97 CompCas 129

Hon'ble Judges : Janarthanam, J

Bench : Single Bench

Advocate : M. Karpagavinayagam, Ramesh, R.M. KannappaRajendran, K. Govindarajan, V. Gopinath and T. Surendran, for the Appellant; A.S. Vijayaraghavan and N. Thiagarajan, for the Respondent

Judgement

Janarthanam, J.—In all these actions, I rather feel, there is no need or necessity to advert to the facts of each case, inasmuch as, what is

challenged is the alleged commission of offence by certain companies, u/s 138 of the Negotiable Instruments Act, 1881 (Act No. 26 of 1881 as

subsequently amended for short ""the NI Act""), for dishonour of cheques on account of either of the two contingencies or eventualities, as

contemplated therein, viz., ""insufficiency of the amount of money standing to the credit of the account of the person"", or ""it exceeded the amount

arranged to be paid from the account of a person by an agreement with that bank"" for which, prosecution had been launched by preferring individual complaints before competent courts of jurisdiction purely on questions of law relatable to the interpretation of the relevant provisions of

the Negotiable Instruments Act, by raising the following grounds :

(1) The offence was committed by the company and not by the petitioner;

(2) The prosecution of the petition, without the company being made an accused, is not sustainable in law; and

(3) Even if the prosecution can be launched against the petitioner, the individual complaint is devoid of necessary averments to constitute the

offence u/s 138 of the Negotiable Instruments Act. To put it otherwise, and that too specifically, what is sought to be projected, is in the absence

of specific averment in the complaint, that the petitioner is either in charge of, and is responsible to, the company for the conduct of its business, or,

the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary

or other officer, the court, before which the complaint had been launched or filed, cannot take cognizance of the complaint. Even if the complaint

so filed, prima facie, discloses that the cheque issued by the company had been dishonoured, for either of the two contingencies or eventualities as

specified in section 138 of the Negotiable Instruments Act, and if cognizance had been taken, such complaint is liable to be quashed lock, stock

and barrel, as not disclosing any offence having been made out.

2. Points Nos. 1 and 2 so raised may now fall for consideration in the arena of discussion. Section 141 of the Negotiable Instruments Act dealing

with 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 in charge of, and was responsible to the company for the conduct of the business of the company, as well is the company, shall be

deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without

his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence

under this Act has been committed by a company and it is proved

that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager,

secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and

shall be liable to be proceeded against and punished accordingly.

Explanation. - For the purposes of this section, -

(a) ''company'' means any body corporate and includes a firm or other association of individuals; and

(b) ''director'' in relation to a firm, means a partner in the firm.

3. By a cursory glance or look at the provisions of section 141, as extracted above, it is rather crystal clear that if an offence u/s 138 is committed

by a company for such commission of the offence, by the company, every person, who at the time of the commission of the offence, was in charge

of, and was responsible to, the company for the conduct of the business of the company, is also liable along with the company by a legal fiction.

This apart, if the offence had been committed with the consent or connivance of, or, is attributable to, any neglect on the part of any director,

manager, secretary or other officer of the company, such director, manager, secretary or other officer, shall be deemed to be guilty of the offence

and he shall be liable to be proceeded against along with the company. Thus, in the face of the express and explicit provision contained in section

141, to say that the company, which commits the offence, alone is liable to be prosecuted and punished leaving out the person in charge of, and

was responsible to, the company for the conduct of its business, or the person, with whose consent or connivance or due to any neglect on his

part, the offence had been committed, cannot be acceded to. Contrary opinions, however, came to prevail.

4. So moot and vexed a question it is, as to whether a person, who is in charge of and is responsible to the company for the conduct of its

business, or a person, with whose consent or connivance or due to any neglect on his part, the offence had been committed alone is to be

prosecuted, in the absence of the company. It is not as if such a question had not been raised at any anterior point of time before this court and the

fact so plain is that such a question had been raked up and considered independently by two learned judges of this court.

5. In Krishan Bai Vs. Arti Press, Padmini Jesudurai J. has said (at page 754 of 80 Comp Cas) :

Unless the company is made an accused, the person who is in charge of, and responsible to, the company for the conduct of the business of the

company, cannot be made an accused. This is a settled position of law reiterated by the Supreme Court in U.P. Pollution Control Board v. Modi

Distillery , where a complaint against the chairman, vice-chairman, managing director and members of the board of directors of the company and

the unit of the company but without the company was quashed by the High Court on the ground that there could be no vicarious liability on the

chairman and others, unless there was a prosecution of the company and the Supreme Court upheld that part of the legal finding but, on the facts of

that case, remitted the matter to the trial court to give a direction to the complainant to make a formal amendment of the complaint to make the

company also an accused. In the instant case, the offence is committed by Mudra Graphics Private Limited which is not an accused in this case. In

such circumstances, there can be no prosecution of the managing director, when the company is not prosecuted.

6. In S. Krishnamoorthy v. B. S. Kesavan 1994 80 Comp Cas 755; 1994 38 MLJ (Crl.) 147, Pratap Singh J. following the dictum laid down by

Padmini Jesudurai J. in Krishan Bai Vs. Arti Press, expressed that when the offence was committed by the company, the person responsible alone

cannot be prosecuted, leaving the company.

7. Padmini Jesudurai J. in Krishan Bai Vs. Arti Press, adopted the view on the reasoning that the legal position had been settled by the Supreme

Court in U.P. Pollution Control Board v. Modi Distillery . In the latter case, prosecution was launched against the chairman, vice-chairman,

managing director and members of the board of directors of the company for the offence under the Water (Prevention and Control) of Pollution

Act, 1974 (for short ""Act 6 of 1974""). Section 47 thereof is worded, similar to section 141 of the Negotiable Instruments Act. A learned single

judge (K. C. Agarwal J.) of the Allahabad High Court quashed the process issued to the accused in that case holding that there was no sufficient

ground to proceed against them, inasmuch as the allegations in the complaint did not constitute an offence u/s 44 of the Act 6 of 1974, The said

learned single judge relied on the decision of the Supreme Court in State (Delhi Admn.) Vs. I.K. Nangia and Another, , interpreting a similar

provision contained in sub-section (4) of section 17 of the Prevention of Food Adulteration Act, 1954. The said decision of the Allahabad High

Court was challenged in the Supreme Court and a Bench consisting of their Lordships A. P. Sen and S. Natarajan JJ. set aside the judgment and

restored the prosecution proceedings.

(a) A. P. Sen J., who rendered the judgment of the Bench, made the following observations, as reflected in Navrattan Singh Chauhan and Others

Vs. Mandi Director, U.P. and Others, :

Although as a pure proposition of law in the abstract, the learned single judge''s view that there can be no vicarious liability of the chairman, vice-

chairman, managing director and members of the board of directors under sub-section (1) or (2) of section 47 of the Act unless there was a

prosecution against Modi Industries Limited, the company owning the industrial unit, can be termed as correct, the objection raised by the

petitioners before the High Court ought to have been viewed not in isolation or vacuum but in the conspectus of facts and events.

(b) It was the said observation, which Padmini Jesudurai J. in Krishan Bai Vs. Arti Press, regarded as settling the law on the point. With great

respect, I may point out that the Supreme Court made the said observation, on the facts of the said case and it cannot be regarded as one settling a

point of law.

8. As such, the purport of the aforesaid decision of the Supreme Court is not what Padmini Jesudurai J. has stated in Krishan Bai Vs. Arti Press,

which was followed by Pratap Singh J. in S. Krishnamoorthy Vs. B.S. Kesavan, . Sub-section (1) of section 141 of the Negotiable Instruments

Act, makes the company as well as the person in charge of, and responsible to, the company for the conduct of the business of the company, liable

to punishment. Sub-section (2) thereof fastens the officers enumerated therein with liability, if it is proved that such an officer has either consented

to or with whose connivance of, or, is attributable to, any neglect the offence has been committed. The liability envisaged in sub-section (1) of that

section on the person so in charge of, and responsible to, the company for the conduct of its business he is directly responsible for the offence. He

can escape from his liability only if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to

prevent the commission of such an offence.

9. No firm or company can act without the help of human agency. The man in charge of the business of the company, is, in most cases, responsible

for the conduct of such business. Hence, sub-section (1) of section 141 of the Negotiable Instruments Act makes it clear that when the offence

was committed by the company, the person who was in charge of, and was responsible to, the company for the conduct of its business, is also

liable. Sub-section (2) thereof is enacted to make the officers enumerated therein liable, if the officer is found guilty of commission or omission

mentioned in the said sub-section. Of course, the liability created in sub-sections (1) and (2) is vicarious in nature. But, yet, there is some difference

in the two. When the offence is committed by the company, proceedings can be initiated against either or both, viz., the company and/or the

person in charge of the business of the company. The latter need not have done any specific overt act or omitted to do anything to make him liable

for the offence committed by the company. The very fact that the company has committed the offence, is sufficient to make the latter also liable,

unless he proves one of the two defences specified in the proviso. But the officer mentioned in sub-section (2) can be made liable only if the

prosecution further proves that the company committed the offence with the consent or connivance of the officer or due to any neglect attributable

to him. However, it is not correct to hold that the prosecution against the person in charge of the conduct of the business of the company is

sustainable only if the company is also made an accused. Either the company can be prosecuted or the person mentioned in sub-section (1) or (2)

can be prosecuted, or both can be prosecuted together in the same proceeding.

10. In the aforesaid context, reference can be made to an earlier decision of the Supreme Court rendered by a Bench consisting of O. Chinnappa

Reddy J. and D. P. Madon J. in Sheoratan Agarwal and Another Vs. State of Madhya Pradesh, . The point considered there was, whether the

prosecution against the managing director and production manager of a company for an offence under the Essential Commodities Act, 1955 (for short ""the EC Act""), was maintainable without making the company an accused. Section 10(1) of the Essential Commodities Act says :

If the person contravening an order made u/s 3 is a company, every person who, at the time the contravention was committed, was in charge 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

contravention and shall be liable to be proceeded against and punished accordingly.

11. (The proviso to sub-section (1) of section 10 of the Essential Commodities Act is identical to the provision contained in the proviso to sub-

section (1) of section 141 of the Negotiable Instruments Act). The Supreme Court has held that there is no justification for the submission that the

prosecution of the board of directors, officers and servants of the company is precluded, unless the company itself is prosecuted -

(a) Chinnappa Reddy J., who rendered the judgment of the Bench, has made the following observations in the said decision, in support of the said

conclusion (page 1825 of AIR) :

Any one or more or all of them may be prosecuted and punished. The company alone may be prosecuted. The person-in-charge only may be

prosecuted. The conniving officer may individually be prosecuted. One, some or all may be prosecuted. There is no statutory compulsion that the

person-in-charge or an officer of the company may not be prosecuted unless he be ranged alongside the company itself. Section 10 indicates the

persons, who may be prosecuted where the contravention is made by the company. It does not lay down any condition that the person-in-charge

or an officer of the company may not be separately prosecuted if the company itself is not prosecuted. Each or any of them may be separately

prosecuted or along with the company.

12. In view of the clear exposition of law, the law stands settled that the prosecution proceedings against the persons in charge of, and responsible

to, the company for the conduct of its business, or, the persons, with whose consent on connivance of, or an act attributable to, or due to any

neglect on their part, the offence had been committed, are maintainable irrespective of whether the company is prosecuted or not. Thus, the

decisions of the two learned judges of this court in Krishan Bai Vs. Arti Press, and

S. Krishnamoorthy''s case [1994] 80 Comp Cas 755, in my

opinion, cannot be regarded as laying down the correct proposition of law, in the light of the Supreme Court''s decision in Sheoratan Agarwal and

Another Vs. State of Madhya Pradesh, . Both the points are thus answered.

13. Better it is, I feel, before delving deep into consideration of point No. 3, on its face value, to advert to certain fundamental canons of criminal

jurisprudence, which, if stated, would enable one to understand, with ease and grace, the pith and substance of the legal submission couched

therein. Such fundamental canons of criminal jurisprudence revolve on :

(1) Meaning, substance and form of complaint, taking cognizance of offence complained of, issuance of process against persons accused of, on

ascertaining their prima facie involvement in the commission of the offence complained of and cognizance taken thereof, and what not-procedural

aspects;

(2) Ingredients of the offence complained of, if proved, resulting in the flowing of penal consequence thereof - penal aspect;

(3) Manner and methodology of proof of offence complained of - evidence aspect; and

(4) Period, within which the commission of offence to be complained of - limitation aspect.

14. The major enactments of our criminal jurisprudence, viz., the Code of Criminal Procedure, 1973 (Act No. 2 of 1974 - for short ""the Code""),

the Indian Penal Code (Act No. XLV of 1860 - for short ""the Penal Code"") and the Evidence Act (Act No. 1 of 1872), are based on the Anglo-

Saxon model.

(a) Section 2(d) of the Code defines, ""complaint"", as meaning, any allegation made orally or in writing to a Magistrate, with a view to his taking

action under the Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

The explanation therein states that a report made by a police officer in a case which discloses, after investigation, the commission of a non-

cognizable offence shall be deemed to be a complaint and the police officer by whom such report is made shall be deemed to be the complainant.

(b) Section 2(g) thereof defines ""inquiry"", as meaning, ""every inquiry, other than a trial, conducted under the Code by a Magistrate or court.

(c) u/s 2(h), ""investigation"" is said to include all proceedings under the Code for the collection of evidence conducted by the police officer or by

any person (other than a Magistrate) who is authorised by a Magistrate in that behalf.

(d) u/s 2(n), ""offence"" is defined to mean any act or omission made punishable by any law, for the time being in force and includes any act in

respect of which a complaint may be made u/s 20 of the Cattle-Trespass Act, 1871 (1 of 1871).

(e) Apart from the definition of the word, ""offence"" as above in the Code, the Penal Code also defines the word, ""offence"" in section 40 thereof, as

meaning, ""except in the Chapters and sections, mentioned in clauses 2 and 3 of that section, the word, ""offence"" denotes a thing made punishable

by the Penal Code. It has been further stated in the Penal Code in Chapters IV and V-A and in sections 64 to 67, 71, 109, 110, 112, 114 to 117,

187, 194, 195, 203, 211, 213, 214, 221 to 225, 327 to 331, 347, 348, 388, 389 and 445, the word ""offence"" is denoted to be a thing

punishable under the Penal Code or under any special or local law, as defined therein and in sections 141, 176, 177, 201, 202, 212, 216 and 441,

it has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six

months or upwards, whether with or without fine.

15. Under sections 41 and 42 of the Penal Code, ""special law"" and ""local law"" are defined to mean as under :

A ''special law'' is a law applicable to a particular subject, and ''local law'' is a law applicable only to a particular part of India.

16. From what has been extracted above, it is rather crystal clear that a complaint has to be given, relating to an offence, either under the Penal

Code, or, under special law or local law, for setting the wheels of law in motion : Such a complaint may be made either orally or in writing, to a

Magistrate, with a view to his taking action under the Code. Further, the persons, against whom the commission of an offence complained of may

be known or unknown, but such a complaint does not include a police report. However, by adding an Explanation to the said sub-section, the

Code has prescribed that a report made by a police officer under certain circumstances shall be deemed to be a complaint and the police officer, by whom such a report is made, shall be deemed to be the complainant. A report made by a police officer in a given case, which discloses, after

investigation, the commission of a non-cognizable offence, is, by a fiction of law, deemed to be a complaint.

17. Section 4 of the Code deals with trial of offences under the Penal Code and other laws. Sub-section (1) thereof prescribes, that all offences

under the Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions contained in the Code. Sub-

section (2) thereof provides that all offences under any other law, shall be investigated, inquired into, tried and otherwise dealt with according to

the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or

otherwise dealing with such offences.

18. Section 5 of the Code states that nothing contained in the Code shall, in the absence of a specific provision to the contrary, affect any special

law or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed by any

other law for the time being in force.

19. In pith and substance, the combined effect of the salient provisions adumbrated under sections 4 and 5 of the Code is that the Code will

govern the trial of offences either under the Penal Code or in any special or local law, except to the extent otherwise indicated in such special or

local law, as respects the trial of offences thereunder.

20. Section 190 of the Code, figuring in Chapter XIV, deals with cognizance of offences, by Magistrates. Sub-section (1) thereof prescribes that

subject to the provisions of that Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in that

behalf under sub-section (2) thereof, may take cognizance of any offence -

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

21. Under sub-section (2) thereof, the Chief judicial Magistrate inheres the power to empower any Magistrate of the second class to take

cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

22. Section 192 deals with the procedure relatable to making over of cases to Magistrates. Under sub-section (1) thereof, any Chief judicial

Magistrate may, after taking cognizance of an offence, make over the case for inquiry or trial to any competent Magistrate subordinate to him.

Under sub-section (2) thereof, any Magistrate of the first class empowered in that behalf by the Chief Judicial Magistrate, may, after taking

cognizance of an offence, make over the case for inquiry or trial to such other competent Magistrate as the Chief Judicial Magistrate may, by

general or special power, specify and thereupon such Magistrate may hold the inquiry or trial.

23. Section 193 circumscribes the power of court of session in taking cognizance of an offence. It prescribes that except as otherwise expressly

provided by the Code or by any other law for the time being in force, no court of session, shall take cognizance of any offence as a court of

original jurisdiction unless the case has been committed to it by a Magistrate under the Code.

24. Section 200 prescribes the procedure for taking cognizance of an offence on complaint. It states that a Magistrate taking cognizance of an

offence on complaint, shall examine, upon oath, the complainant and the witnesses present, if any, and the substance of such examination shall be

reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate. That section also provides the

contingencies of the circumstances under which the Magistrate need not examine the complainant and the witnesses.

25. Section 201 deals with the procedure by Magistrate not competent to take cognizance of the case.

26. u/s 202, the postponement of issue of process is dealt with stating that any Magistrate, on receipt of a complaint of an offence, of which he is

authorised to take cognizance or which has been made over to him u/s 192, may, if he thinks fit, postpone the issue of process against the accused

and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the

purpose of deciding whether or not there is sufficient ground for proceeding. In the process of making an inquiry under this section, the Magistrate is also clothed with the power to take evidence of witnesses on oath, if he thinks fit, on the facts and in the circumstances of the case. He can also

make an order directing an investigation to be made by a police officer u/s 156(3) of the Code. In case the investigation is made by a person, not

being a police officer, he shall have, for that investigation, all the powers conferred by the Code on an officer-in-charge of a police station, except

the power to arrest without warrant.

27. u/s 203, the Magistrate, after considering the statements on oath, if any, of the complainant and of the witnesses and the result of the inquiry or

investigation, if any, u/s 202, is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint by recording briefly his

reasons for doing so.

28. u/s 204, if in the opinion of the Magistrate, taking cognizance of an offence, there is sufficient ground for proceeding and the case appears to

be a summons case, he shall issue his summons for the attendance of the accused, or if it is a warrant case, he shall issue a warrant, or, if he thinks

fit, a summons for causing the accused to be brought or to appear at a certain time before such Magistrate, or, if he has no jurisdiction himself

some other Magistrate having jurisdiction. This section also prescribes certain mandates to be complied with before the issuance of the warrant or

the summons. It, however, shall not restrain the power of the Magistrate to issue warrant in lieu of or in addition to the summons u/s 87.

29. Sub-sections (1) and (4) of section 319, dealing with the power to proceed against other persons appearing to be guilty of an offence, relevant

for the present purpose, may now be seen. Sub-section (1) thereof prescribes that where, in the course of any inquiry into, or trial of, an offence, it

appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the

accused, the court may proceed against such person for the offence which he appears to have committed. Sub-section (4) provides that, where the

court proceeds against any person under sub-section (1), then the proceedings in respect of such person shall be commenced afresh and the

witnesses re-heard and the case may proceed as if such person had been an accused person, whom the court took cognizance of an offence, upon

which the, inquiry or trial was commenced.

30. Sub-section (1) of section 313, relevant for the present purpose, is couched in the following terms :

(1) In every inquiry or trial for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him,

the court. -

(a) may at any stage, without previously warning the accused, put such questions to him as the court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case :

Provided that in a summons case, where the court has dispensed with the personal attendance of the accused, it may also dispense with his

examination under clause (b)

31. From what has been extracted above, it is rather crystal clear that the court making the inquiry or trial has the necessary and requisite power to

put questions to the accused as it considers necessary to explain any circumstance appearing in evidence against him. An option is given to the

court to exercise such a power at any stage of the inquiry or trial, without previously warning the accused and this is indicated by the use of the

expression ""may"" in clause (a) to sub-section (1) thereof. However, there is no option given to the court after the witnesses for the prosecution

have been examined and before the accused is called on for his defence and in such a circumstance, it is mandatory upon the court to put questions

to the accused generally on the case, so as to enable him to explain any circumstance appearing in the evidence against him and this is indicated by.

the word ""shall"" in clause (b) to the said sub-section.

32. Section 305 of the Code codifies the procedure to be followed in cases of trial, when a corporation or registered society is an accused. Under

sub-section (1) thereof, ""corporation"" is defined as an incorporated company or other body corporate and includes a society registered under the

Societies Registration Act, 1860 (Act 21 of 1860).

33. Chapter XXXVI of the Code, under the caption ""limitation for taking cognizance of certain offences"", containing sections 467 to 473, has been

inserted in the Code by the Criminal Procedure, 1973 (Act No. II of 1974), which was not available till then.

34. How far the above-quoted salient provisions adumbrated in the Code are

made applicable to the trial of offences arising u/s 138 of the

Negotiable Instruments Act, figuring in Chapter XVII, a special law, will hereinafter be seen, in the light of the provisions relatable to the

procedural and other aspects contained in the said Chapter.

35. Before the introduction of Chapter XVII of the Negotiable Instruments Act, by section 4 of the Banking, Public Financial Institutions and

Negotiable Instruments Laws (Amendment) Act, 1988 (Act 66 of 1988), under a new nomenclature for the Chapter ""of penalties in case of

dishonour of certain cheques for insufficiency of funds in the accounts"", dishonour of a cheque was not at all a penal offence. The objects and

reasons for the introduction of such a Chapter, are manifold.

36. Negotiable instruments were devised by the mercantile community as a safe and very dependable method of discharging pecuniary liabilities

and as a substitute for cash payment, which would always involve an element of sample risk due to either the magnitude of the amount sought to be

paid, or, the geographical distance between the payer and the payee. Such instruments could also be cleverly and conveniently used by several

persons to discharge their financial liabilities, inter se. However, a smooth working of the system of negotiable instruments primarily depended upon

the honesty and the integrity of the parties thereto. The experience, however, of the mercantile community, particularly in India, has been far from

adorable in recent times. The number of cheques dishonoured on the apparent ground of insufficiency of funds with the bankers in the accounts of

the drawer, has mounted to such an alarming proportion as to create a justifiable doubt and misgiving about the good faith and bona fide intentions

of the givers, i.e., the drawers of the cheques and other endorsers. A practice, it is said, has already crept into the several metropolitan markets in

India to give cheques merely as a device to stall for time being the undesirable contingency of being prevailed upon to make the payment on the

spot, thus substantially eroding the credibility of cheques as a trust-worthy substitute for cash payment. There was already a big clamour in the

mercantile community about the element of insincerity and lightheartedness, which has crept into the practice of issuing cheques and a fairly

effective, though not highly deleterious remedies had to be provided for to eradicate the evil, which had incarcerated the operational anatomy of the business world. A cheque that is dishonoured may cause incalculable loss, injury or inconvenience to the payee or endorsee thereof, in view of the

fact that due to the latter''s unexpected disappointment, he has also to bite the dust while meeting his own future commitments to other persons. It

is true that the Act, prior to the introduction of Chapter XVII by Act 66 of 1988, has not failed to provide remedy for the aggrieved party. But it

was merely of a civil nature and the process to seek civil justice is notoriously dilatory. To ensure promptitude in remedy against defaulters,

therefore, was the only way in which the element of credibility and dependability could be reintroduced in the practice of issuing negotiable

instruments in the form of cheques. The best way to do this is to provide a criminal remedy of penalty, which is the just thing that is said to be done

by the amending Act.

37. Clause (xi) of the objects and reasons clause in the Bill, which is relevant for the present purpose is couched in the following terms :

(xi) 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 safe-guards to

prevent harassment of honest drawers.

38. Chapter XVII has five sections, viz., sections 138 to 142. They may be classified as under :

(i) Section 138, prescribing ingredients of the offence of dishonour of cheque and specifying punishment therefor-may be stated to fall under penal

aspect'' :

(ii) (a) Section 139, dealing with the presumption that the holder of a cheque received it in discharge in whole or in part of any debt or liability;

(b) Section 140 negativing the defence of no fault on the part of the drawer that he had no reason to believe when he issued the cheque that it may

be dishonoured on its presentment; and

(c) Section 141 dealing with offence by companies prescribing different burden and onus of proof between persons in charge of and responsible to

the company for the conduct of its business and persons, with whose consent or connivance or due to neglect on his part, the offence had been

committed, may be stated to fall under ''evidence aspect''.

(iii) Section 142 dealing with the cognizance of an offence prescribing the method or mode of preferring a complaint and the forum before which

the complaint has to be preferred, besides prescribing the period, within which the complaint is to be preferred from the time of accrual of the

cause of action, notwithstanding anything contained in the Code-may be stated to fall under ''procedural'' and ''limitation'' aspects.

39. That the Negotiable Instruments Act is a special law is not in dispute, as defined u/s 41 of the Indian Penal Code. The provisions contained in

Chapter XVII, a special law make certain deviations relatable to the mode or method of preferring the complaint; the forum before which the

complaint has to be made; the period within which the complaint has to be preferred from the time of accrual of the cause of action for the

commission of an offence u/s 138 to be taken cognizance of from the relevant provisions in the Code, a general law, prescribing the procedure for

trial of offences arising under the Penal Code, as well as special or local laws. Such a deviation is made permissible by salient provisions

adumbrated under sections 4 and 5 of the Code. Excepting the deviation so made, the other provisions of the Code are applicable to the trial of an

offence u/s 138 of the Negotiable Instruments Act. I may hasten to add that the procedure prescribed u/s 305 of the Code, where a corporation of

a registered society figures as an accused, is not applicable to the offences committed by the companies under the Negotiable Instruments Act, in

view of the special definition of ""company"" given under Explanation (a) to section 141 of the Negotiable Instruments Act. According to the said

definition, ""company"" means any body corporate and includes a firm or other association of individuals, which is not akin to the definition given u/s

305 of the Code (extracted supra).

40. An offence u/s 138 of the Negotiable Instruments Act shall be deemed to have taken place, if the following conditions exist :

(a) A cheque has been drawn by a person on an account maintained by him for payment of any sum of money to another person from out of that

account;

(b) The cheque must have been issued for the discharge, either in whole or in part, of any debt or other liability, though, in the absence of proof to

the contrary, it shall be presumed that it was issued for the same

(c) The cheque is returned by the bank unpaid -

(i) either, because the amount of money standing to the credit of that account is insufficient to honour the cheque; or

(ii) because it exceeds the amount arranged to be paid from the account by an agreement with that bank.

41. Thus, the dishonour of the cheque by the bank under the abovementioned circumstances shall constitute an offence and the offender is liable to

be punished u/s 138 of the Negotiable Instruments Act with imprisonment, which may extend to one year, or with fine, which may extend to twice

the amount of cheque, or with both.

42. There are two ways, in which the Legislature has further helped the cause of the aggrieved party by facilitating the application of section 138 to

his case, namely,

(1) u/s 139, a presumption is created, whereby it is presumed, unless the contrary is proved, that the holder of the cheque, i.e., the aggrieved party

received the cheque for the discharge in whole or in part of any debt or liability; and

(2) u/s 140, the drawer cannot adopt the mere defence of good faith"", i.e., the defence that he had no reason to believe when he issued the

cheque, that the cheque may be dishonoured on presentation, for the reasons stated in that section.

43. However, an honest or an innocent drawer is sought to be protected by that Chapter in the following manner, viz.,

(i) Under clause (a) of the proviso to section 138, the drawer will not be liable, unless the cheque is presented for payment within a period of six

months from the date on which it is drawn, or, within a period of its validity, whichever is earlier. This means that the payee or the holder in due

course, who has himself been guilty of what may be legally called ""contributory negligence"" by his own procrastination, would not be able to reap

the benefit of the penal provisions in section 138 of the Act. This provision also indirectly suggests that the drawer of the cheque is under an

obligation to keep in his account such funds as would meet the demands of the cheque only till the period of its validity or till a period of six months

from the date of its issue, whichever is earlier. If the cheque is presented and dishonoured thereafter, the remedy stated in that section will not be available to the payee or the holder of the cheque.

(ii) Under clause (b) of the proviso to section 138, the payee or the holder of the cheque has to make a demand for the payment of the amount

under the cheque by giving in writing a notice to the drawer of the cheque within fifteen days of the receipt of the information by him from the bank

regarding the return of the cheque unpaid. The statutory requirement of notice in writing demanding the payment of cheque money indicates that the

penal provisions of that section will not be applicable, if notice is not given within the statutory period, or, in the alternative, not given at all. Of

course, violation of clause (b) of the proviso to this section, would not cause the payee or the holder in due course of the cheque to forfeit his other

remedies stated in the Negotiable Instruments Act. However, clause (b) of the proviso to section 138, or, clause (c) thereof, indicates that an

honest and sincere drawer of a cheque is not expected to be taken unawares and is given ample opportunity of remedying the situation created by

his default before he is exposed to the penal provisions of the section. And that remedy is nothing more than the liability, which he had already

undertaken through the modicum of the cheque. Thus, if he performs his duty even after the dishonour of the cheque, his honour cannot be put at

stake by the penal provisions of the Act. Therefore, the Legislature avowedly wants to treat as not the ""immediate"", but ""ultimate"" remedy, knowing

fully well that applying criminal remedy in respect of every dishonour of cheque, would create unprecedented pandemonium in the mercantile circle,

thus resulting in ultimately discouraging people from making payment through cheque due to even a slight or slender fear that it is likely to be

dishonoured by even inadvertent calculations of his account by the drawer himself. In a number of situations, the drawer of a cheque may not,

either due to lack of appropriate means of communication or because of the apathy of the banker, even be able to know the exact balance in his

account at the time of issuing the cheque and must, therefore, be given an opportunity of having a second chance to settle the score before being

dragged into the portals of a criminal court.

(iii) According to clause (c) of the proviso to section 138, the drawer is not liable under that section, unless he fails to pay the money, as aforesaid,

to the payee or the holder in due course within fifteen days of the receipt of such notice. This again indicates that the drawer of the cheque has

been given - enough time margin to so arrange his fiscal resources as to enable him to make the payment of the money under the cheque to the

concerned person, which, by itself would avoid all the undesirable contingencies contemplated by the provisions of the said section. Therefore it is,

that section 138 provides ample opportunity to an honest drawer to prove his bona fides through ""conduct"" and saves him from the punishment, It

must be added, however, that even a fraudulent and mala fide drawer may also seek exoneration from criminal liability by making likewise payment

in accordance with clause (c) of the proviso to section 138 of the Negotiable Instruments Act.

(iv) It may further be noted that under clause (a) of section 142, no court shall take cognizance of any offence punishable u/s 138, except upon a

complaint in writing made by the payee or the holder in due course. Thus, a mere dishonour of the cheque, for reasons envisaged in section 138,

does not ipso facto expose the drawer to the penalty stated therein. If the drawer of a cheque claims the trust and confidence of the payee, the

latter would automatically give the former an opportunity to give another cheque by way of substitute or ask for payment in cash, instead of filing a

criminal complaint. And in the absence of the payee or the holder resorting to the ultimate stage of filing a criminal complaint in writing, no one else

can set the wheels of criminal law in motion against the drawer of the cheque. The Legislature has, therefore, struck a fairly good balance between

drawers, on the one hand, who are recklessly and irresponsibly issuing cheques, regardless of whether or not they would be dishonoured, or, oven

with a sly hope and expectation that they would be dishonoured, and honest drawers, on the other hand, whose cheques are dishonoured by some

miscalculations made in good faith and who are immediately prepared to honour their commitment by making payment of money.

44. On the two questions, viz.,

(1) will a Magistrate be competent to take cognizance of a private complaint, when the return by the bank of the cheque, bears an endorsement of

contingencies or eventualities"" other than the ones mentioned in section 138 of the Negotiable Instruments Act ? and

(2) will it be permissible to invoke the inherent power of this court u/s 482 of the

Code to put an end to the prosecution merely because certain

words in the statute, had not been reproduced in the complaint, notwithstanding the fact that the complaint discloses, taken in its totality, the

ingredients of the offence alleged ? divergent views emerged from various High Courts, inclusive of this court and consequently, the above two

questions had been referred to a Division Bench for an authoritative pronouncement in the case of J. Veeraraghavan v. Lalith Kumar 1994 2 LW

(Crl.) 663; [1995] 83 Comp Cas 853, 880 (Mad) and the Division Bench (to which I was a party), has answered the questions as below :

(1) It shall be competent for a Magistrate to take cognizance of a private complaint, when the return by the bank of the cheque bears an

endorsement of any of the contingencies or eventualities other than the ones mentioned in section 138 of the Negotiable Instruments Act.

(2) Invoking the inherent power u/s 482 of the Code of Criminal Procedure, is not permissible to put an end to the prosecution, merely because

the averments in the complaint as relatable to insufficiency of funds, not being specifically mentioned, especially when the details as to the factum of

dishonour of a cheque, whatever be its reason, issued in discharge of a debt or other liability, in whole or in part, after its presentation within its

period of validity or six months from the date of such issue, whichever is earlier, coupled with the non-compliance by the drawer with the demand

made on him and the institution of the prosecution within one month from such non-compliance, are all specifically mentioned in the complaint, as

those alone will constitute factors making out a prima facie case for an alleged offence u/s 138 of the Act to be taken cognizance of by the

competent court.

45. It is thus clear from the authoritative pronouncement of the Division Bench that once a cheque is dishonoured, whatever be the reason therefor,

it behoves the payee or holder in due course to issue a notice in writing to the drawer of the cheque within fifteen days from the date of receipt of

such return of the cheque unpaid, intimating the latter, as has been provided under clauses (b) and (c) to the proviso to section 138, the factum of

such return and requiring him to comply with the demand within fifteen days from the date of receipt of such notice and the demand so made, if not

complied with, gives rise to a cause of action for launching prosecution against such drawer of cheque and the cause of action so arising, would

enure for a period of one month, enabling the payee or holder in due course, to file a complaint before the competent criminal court.

46. Pertinent it is to mention at this juncture that cognizance is taken of an ""offence"" and ""not offenders. In Raghubans Dubey Vs. State of Bihar, , a

three-judge Bench of the apex court has held as follows :

In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes

cognizance of an offence, it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons

sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is

part of the proceeding initiated by him taking cognizance of an offence. As pointed out by this court in Pravin Chandra Mody Vs. State of Andhra

Pradesh, , the term ''complaint'' would include allegations made against persons unknown. If a Magistrate takes cognizance u/s 190(1)(a) on the

basis of a complaint of facts, he would take cognizance and a proceeding would be instituted even though persons who had committed the offence

were not known at that time. The same position prevails, in our view, u/s 190.

47. The view, as expressed above, has been reiterated by the Supreme Court in Hareram Satpathy Vs. Tikaram Agarwala and Others, . In Smt.

Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, , the Supreme Court, while laying down the categories of cases, in which an order of

a Magistrate issuing process against the accused, can be quashed, observed as under (at page 1950 of AIR) :

It is well-settled by a long catena of decisions of this court that at the stage of issuing process the Magistrate is mainly concerned with the

allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient

grounds for proceeding against the accused. It is not the province of the Magistrate to enter into a detailed discussion of the merits or demerits of

the case nor can the High Court go into this matter in its revisional jurisdiction which is a very limited one.

48. Once cognizance is taken of an offence u/s 138 of the Negotiable Instruments Act, within the parameters u/s 142 thereof, which, as already

indicated, makes deviation in certain aspects as respects the taking of cognizance of an offence as contained in the Code, the general law, it is

competent for the court thereafter to find out who the real offender/offenders is/are to be summoned to, face the trial. In such a process, it is

permissible for the court to look forward to the sanguine provisions adumbrated u/s 202 of the Code for the postponement of the issue of process

and either inquire into the case himself or direct an investigation to be made by a police officer, or, by such other person, as he thinks fit, for the

purpose of deciding whether or not there is insufficient ground for proceeding further, inasmuch as Chapter XVII of the Negotiable Instruments

Act does not contain the procedure as to the ascertainment of the offender/offenders responsible for the commission of the offence, before the

issuance of the process. If the offender/offenders responsible for the commission of the offence u/s 138 is/are specifically referred to in the

complaint by name, there is no further need for the court to enter into a further enquiry either by itself or direct an investigation to be made by a

police officer, or other person competent to do so.

49. At this stage, it is too much to expect from the aggrieved complainant, that is to say, the payee or holder in due course, in whose favour the

cheque issued by the drawer-company had been dishonoured, to precisely state in the complaint in the case of offence committed by the

companies, as to which of the officials connected with the company, who shall be duly liable for the offence committed by the company, or, who

was in charge of and responsible to the company for the conduct of its business, at the time when the offence was committed, or, whether the

offence had been committed by specified individuals, other than the person in charge of and responsible to the company for the conduct of its

business, by actually conniving or consenting to the commission of the offence, or, due to neglect on his part, the commission of offence had taken

place, when especially there is no mandate cast upon the drawer-company to disclose at any point of time to the payee or holder in due

course/aggrieved complainant, as to who was in charge of and responsible to its business under the relevant provisions of the Act. Such being the

case, as already indicated, it is but fair and reasonable for the court to issue process to the persons arrayed as accused in the complaint or in the absence of any named persons as accused, to make an enquiry by the court itself or direct an investigation to be made by a police officer or other person, before ever a process is issued.

50. It may, however, be reiterated at this juncture to bring home the point that at any stage, the court cannot have a roving enquiry as to who were all the actual culprits and that sort of a feat can very well be undertaken only during the course of trial. After the summoning of the persons arrayed as accused, suspected to have been involved in the commission of the offence, on an enquiry made by the court or by investigation by a police officer, it is permissible for the court, utilising the salutary provisions contained in section 313 of the Code, as indicated already, to put questions to the accused so summoned before ever trial starts and derive solidified satisfaction that the persons summoned were prima facie involved in the commission of the offence. In the process of such an enquiry, if the court is satisfied that the persons arrayed as accused were not solely or wholly responsible for the commission of the offence and some other person/persons is/are involved, it is equally permissible for the court to summon those persons involved in the commission of the offence, u/s 319 of the Code.

51. Worthy it is to reiterate, by way of recapitulation, that section 141 of the Negotiable Instruments Act is not relatable to the penal aspect, but only the evidence aspect. In such an eventuality, it goes without saying that the penal aspect of the ingredients of the offence, besides the relevant matters relating to limitation for taking cognizance of the offence alone can be stated in a prima facie fashion in the complaint and not to state the evidential aspects of the matter, which can figure very well during the trial alone and not otherwise. Under sub-section (1) to section 141, it is possible to presume that every person, who, at the time when the offence was committed, was in charge of, and was responsible to the company, for the conduct of its business, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Such a presumption is, however, rebuttable and this aspect of the matter is made crystal clear by the proviso appended to the said sub-section, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such an offence.

52. Even assuming that he is not in charge of and responsible to the company for the conduct of its business, it cannot be stated that he is not

prosecutable for the offence committed by the company, on the face of the salient provisions adumbrated under sub-section (2) thereof. The said

sub-section starts with a non-obstante clause by the incorporation of the phraseology, ""notwithstanding anything contained in sub-section (1).

53. The non-obstante clause has to be given its due meaning in the context in which it is used. It makes quite plausible to give interpretation in a

pragmatic way to the provisions adumbrated in sub-sections (1) and (2) of the said section. Under sub-section (1), every person in charge of and

responsible to the company for the conduct of the business of the company, shall be presumed to be guilty of the offence and shall be liable to be

proceeded against and punished accordingly and such person charged of an offence, can rebut such a presumption, by proving that the offence

was committed without his knowledge or that he exercised all due diligence to prevent the commission of such an offence.

54. Under sub-section (2), it is legitimately permissible to prosecute even persons, who were not stated to be in charge of or/and responsible to

the company for the conduct of its business, if it is proved that the offence has been committed with the consent or connivance of, or, is attributable

to, any neglect on the part of those persons. To put it otherwise, in the case of prosecution of persons under sub-section (2), presumption of their

guilt cannot at all be inferred by virtue of their positions in such company, as in the case of the presumption to be drawn in the case of persons,

who had been in charge of and responsible to the company for the conduct of its business; the question of proof for the involvement of persons in

the offence committed by the company, would be expected to come only during the course of the trial and even in the case of persons prosecuted

under sub-section (2), a deeming provision had been incorporated therein in a limited way, in the sense of such of those persons, being deemed to

be guilty of the offence committed by the company.

55. The crux of the appreciable difference between the provisions adumbrated under sub-section (1) and sub-section (2) of section 141, bristles to

this :

Under sub-section (1), the burden is on the person charged of the offence to rebut the presumption to be drawn against him, while under sub-

section (2), the burden of proof never shifts and it is always on the prosecution to prove by placing proper evidence before the court that the

person charged had been guilty of the offence.

56. This sort of an interpretation alone, in my view, will tend to give sense to the statutory provisions to achieve the purpose for which the said

provisions had been introduced.

57. In the case on hand, there is no pale of controversy that the cheques issued by the companies had bounced and the demands made by the

aggrieved complainants/payees or holders in due course had not been complied with, resulting in the launching of prosecution by preferring a

private complaint before the competent court of jurisdiction. Of course, it is true that in these cases, specific averments in the complaints, as to the

persons responsible to and in char of the company in relation to its business, or persons with whose consent or connivance, or due to any neglect

on his part, the offence had been committed, have not been specifically mentioned, although certain named officials of the company had been

arrayed as accused. In view of the discussion, as above, the absence of such averments in the complaints, is of little consequence and such being

the case, it goes without saying that the prosecution launched against those companies and/or other individual officials named therein, cannot at all

be quashed and the trial must proceed further in accordance with law.

58. Even though innumerable decisions emerging from various High Courts and of the apex court had been cited, inasmuch as none of them dealt

with the aspect, as has now been urged in these cases for consideration, those decisions are not referred to herein and the point that came up for

consideration has been decided on the fundamental canons of criminal jurisprudence in the process of interpretation of the provisions relatable to

launching of prosecution for the commission of offence by companies u/s 141 of the Negotiable Instruments Act, as a first impression of mine.

59. For the above reasons, the third point raised herein also is found against the petitioners.

60. Before parting with these cases, I may state that I will be failing in my duty, if I do not pen down a word of appreciation as to the scintillating

fashion, in which, N. T. Vanamamalai, learned senior counsel and M. Karpaga

Vinayagam, V. Padmanabhan, and P. N. Prakash, learned counsel

and E. Raja, learned Government advocate have put forth their respective points of view and participated in the lively discussion, either in the

capacity of representing the petitioner/s or respondent/s, or in the capacity of assisting the court as amicus curiae, to enable this court to arrive at a

just decision in these cases. I may, however, hasten to add a special mention, as to the Himalayan efforts undertaken by V. Padmanabhan and P.

N. Prakash, learned counsel, in assisting the court to solve the knotty legal problem posed for consideration, with ease and grace, by their

pragmatic and practical approach from a new angle, as to the interpretation of the relevant provisions of the Negotiable Instruments Act, hitherto

not raised or decided by any of the courts of superior jurisdiction, daunted by the laudable objective of averting a nonsense situation, being created

by making the provisions of law-enacted with an avowed purpose of remedying a mischief in existence a dead letter.

61. In fine, all these petitions deserve to be dismissed and accordingly, they are dismissed.

