

(1991) 08 BOM CK 0040

In the Bombay High Court

Case No : Criminal Applns. No's. 433, 448 and 569 of 1991

Pawankumar

APPELLANT

Vs

Ashish Enterprises and others

RESPONDENT

Date of Decision : 30-08-1991

Acts Referred:

Constitution of India, 1950 — Article 20
Criminal Procedure Code, 1973 (CrPC) — Section 204, 251, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 142, 5
Penal Code, 1860 (IPC) — Section 420

Citation : (1992) CriLJ 1619 : (1992) 3 RCR(Criminal) 521 : (1993) 2 RCR(Criminal) 237

Hon'ble Judges : B.U. Wahane, J

Bench : Single Bench

Advocate : B.M. Kasat, for the Appellant; Jugalkishor Gilda, for the Respondent

Judgement

1. These three criminal applications are directed against the order passed by Chief Judicial Magistrate, Amravati taking cognizance and registering the offence u/s 138 of the Negotiable Instruments Act, 1881 and u/S. 420 of I.P.C. and consequently the issuance of the summonses. In Criminal Application No. 433/91 the order dtd. 4-1-1991, in Criminal Application No. 448/91 the order dtd. 16-12-1989 and in Criminal Application No. 569/91 the order dtd. 7-12-1989, are under challenge.

2. In Criminal Application No. 433/91, the respondent No. 1 Ashish Enterprises - A registered partnership firm by its Partner, Bansilal Baijanath Jaju, filed a complaint case u/S. 138 of the Negotiable Instruments Act, 1881 under The Banking Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 and u/S. 420 of I.P.C. The complainant and the applicant/accused are the residents of Amravati having their business. The applicant/accused is running a shop for years together of purchasing and selling various seeds within the jurisdiction of City Kotwali, P. S. Amravati. The complainant i.e. the respondent No. 1 - partner and the applicant/accused are

acquainted to each other. The complainant advanced a hand loan of Rs. 25,000/- to the applicant on 6-6-1989 and in lieu there of the applicant executed a receipt infavour of the complainant on the very day. It was agreed that the loan amount would be refunded within a short period. Reposing confidence in the words of the applicant/accused, the hand loan was advanced.

The applicant/accused issued post-dated cheques from time to time. But, on all the occasions they were dishonored. The first post dated account payee cheque No. 0170611 of Rs. 25,000/- of the Bank of Maharashtra, was presented in the Bank on 23-6-1989 but it was not encashed and thus it was dishonored with an endorsement that the applicant/accused had no requisite amount to his credit in his Bank A/c. The complainant, therefore, through his counsel Shri Pandharpurkar served a registered notice on the accused, dtd. 10-8-1989 demanding the amount. The applicant/accused approached the complainant and expressed his helplessness to return the said amount immediately as agreed.

3. The accused issued a second post dated cheque No. ONH 365412 dtd. 20-10-89 of the Bank of Punjab National Bank, Branch Amravati. On presentation, it could not be encashed and was dishonored with an endorsement "Refer to Drawer". This fact was also intimated to the accused.

4. On the third occasion, a post dated cheque No. 0170621 dtd. 24-10-89 for Rs. 27,000/- of the Bank of Maharashtra, Branch Amravati was handed over to the complainant but the same cheque could not be encashed and it was dishonored on 2-11-89 with an endorsement that the "Suit filed against the said A/c". The complainant, therefore, was constrained to send a registered notice dtd. 9-11-1989 which was duly served on the accused on 19-11-89. The complainant demanded the principal amount and interest thereon within 15 days from the receipt of the notice. The accused did not comply the notice but sent a reply by registered post on 17-11-89 making false allegations.

5. The complainant, therefore, filed a complaint u/S. 138 of the Negotiable Instruments Act and u/S. 420 of I.P.C.

6. The criminal application No. 569/91 arose out of the Regn. Criminal Case No. 68/91 which was registered on the complaint of Shri Govind Bansilal Jaju. He too filed a complaint case u/S. 138 of the Negotiable Instruments Act under the Banking Public Financial Institutions Act and Negotiable Instrument Laws (Amendment) Act, 1988 and Section 420 of I.P.C. Initially the case was registered as a summary case No. 1567/89 but subsequently it was ordered to be tried as a warrant case and, therefore, it was registered as a criminal case No. 68/89.

The complainant took the accused as a trustworthy person and a reputed businessman and deposited a sum of Rs. 25,000/- with the accused on 25-6-89. The accused executed a deposit note (Dharwar Chithi) infavour of the complainant on the same day. It was agreed between the complainant and the accused that the interest " 1.75/- % p.m. be charged on the said amount of Rs.

25,000/- and it was further agreed by the accused to return the said amount with interest within a period of 2 months from the date of execution of the deposit note. According to the complainant, the accused failed to return the amount as agreed upon in spite of repeated demands.

The accused had issued a account payee cheque No. QNH 365411 dtd. 20-10-89 for the amount of Rs. 27,000/- including interest, of the Punjab National Bank, Branch Amravati. The cheque was presented in the Bank but it could not be encashed and it was returned to the complainant. This fact was brought to the notice of the accused and, therefore, he had issued another A/c payee cheque No. 0170622 dtd. 20-10-89 for the amount of Rs. 27,000/- including interest, of the Bank of Maharashtra, Branch Amravati infavour of the complainant but the same also could not be encashed and was dishonored as the accused had no requisite amount in the Bank. The cheque was dishonored and the endorsement was that "the case was filed against the accused". The complainant, therefore, sent a notice dtd. 8-11-89 to the accused which he received on 10-11-89. By this notice the demand was made and directed the accused to deposit the amount with interest within 15 days from the date of receipt. The accused did not comply with the notice. However, he sent the reply dtd. 17-11-89 making false averments in it. According to the complainant, as the accused committed the offence u/S. 138 of the Negotiable Instruments Act and u/S. 420 of I.P.C., he filed the complaint case against him.

7. The criminal application No. 448/91 arose out of the criminal case No. 67/91 which was registered on the complain of Subhash S/o Dwarkadasji Heda u/S. 138 of Negotiable Instruments Act and u/S. 420 of I.P.C.

Shri Subhash Heda is acquainted with the accused since many years. Taking the accused as trustworthy and reputed businessman, the complainant advanced a hand loan of Rs. 50,000/- on 5-6-89 to the accused. The accused in lieu thereof executed the receipt infavour of the complainant on the same day. It was agreed between the parties that the amount of Rs. 50,000/- would be paid within very short period. On 2-7-89 the accused handed over the A/c payee cheque No. 0179613 for Rs. 50,000/- of the Bank of Maharashtra, Branch Amravati but the cheque could not be encashed as it is dishonored and returned to the complainant with an endorsement that "the accused had no requisite amount to his credit in his bank A/c."

The complainant, therefore, issued a notice through his counsel Shri Pandharpurkar on 10-8-98 and thereby demanded the amount. The accused approached the complainant and expressed his inability to return the amount immediately. However, the accused issued a post dated cheque No. 0170620 dtd. 30-10-89 for Rs. 54000/- of the Bank of Maharashtra, Branch Amravati. On representation, the said cheque was not encashed and it was dishonored. The cheque was returned to the complainant with an endorsement "Suit filed by the Bank". Therefore, according to the complainant the accused has deceived and cheated the complainant by not making the payment within the agreed time.

Therefore the complainant was constrained to issue a registered notice dtd. 15-11-89 which was duly served on the accused on 16-11-89. By this notice, the demand of principal amount and interest was made. There was no compliance but the same was replied on 17-11-89 making false averments in it. The complainant, therefore, filed a complaint case u/S. 138 of the Negotiable Instruments Act and u/S. 420 of I.P.C.

8. There is no dispute in respect of the Acts mentioned in the preceding paras.

9. Shri Kasat, the learned counsel for the applicant/accused in all the three criminal cases submitted that, this Court has wide powers to quash the order of taking cognizance and issuance of process against the applicant/accused, there being no material to comply with the provisions of Sections 138 of the Negotiable Instruments Act and u/S. 420 of I.P.C.

10. Reliance has been placed on the case of Karnataka Theatres Ltd. v. S. Venkatesan reported in 1989 Cri LJ 74. His Lordship construing the provisions of Sections 204 and 482 of Cr.P.C. observed that :

"Issue of process - Main ingredients of offence though alleged in complaint not spoken of in sworn statement - Allegations in complaint cannot supplement omission - Order issuing process quashed."

11. On the contrary, Shri Gilda the learned counsel for the respondents Nos. 1 in all the three criminal cases submitted that in all the three complaints the ingredients of the Section 138 of the Negotiable Instruments Act and 420 of I.P.C. are complied with. At the time of taking the cognizance, the meticulous analysis is not called for and, therefore, according to him, the cognizance taken by the C.J.M., Amravati is proper and needs no interference. Reliance has been placed on the case of Dhanalakshmi Vs. R. Prasanna Kumar and Others, . In para 3 Their Lordships observed that :

"Section 482 of the Cr.P.C. empowers the High Court to exercise its inherent powers to prevent abuse of the process of Court. In proceedings instituted on complaint exercise of the inherent power to quash the proceedings is called for only in case where the "complaint" does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance is taken by the Magistrate it is open to the High Court to quash the same in exercise of the inherent powers u/S. 482. It is not, however, necessary that there should be a meticulous analysis of the case, before the trial to find out whether the case would end in conviction or not. The complaint has to be read as a whole. If it appears on a consideration of the allegations, in the light of the statement on oath of the complainant that ingredients of the offence/offences are disclosed, and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court."

In para 4 of the Judgment, Their Lordships observed that :

"The High Court without proper application of the principles that have been laid down by this Court in Dr. Sharda Prasad Sinha Vs. State of Bihar, , Sardar Trilok Singh and Others Vs. Satya Deo Tripathi, and Municipal Corporation of Delhi Vs. Purshotam Dass Jhunjunwala and Others, proceeded to analyse the case of the complainant in the light of all the probabilities in order to determine whether a conviction would be sustainable and on such premises arrived at a conclusion that the proceedings are to be quashed against all the respondents. The High Court was clearly in error in assessing the material before it and concluding that the complaint cannot be proceeded with. We find there are specific allegations in the complaint disclosing the ingredients of the offence taken cognizance of. It is for the complainant to substantiate the allegations by evidence at a later stage. In the absence of circumstances to hold prima facie that the complaint is frivolous when the complaint does disclose the commission of an offence there is no justification for the High Court to interfere."

Reliance has been placed on the case of Ravindra Sonusing Patil and another Vs. Smt. Rajendra Pandit Patil and others, it is observed that :

"In support of his first submission, Mr. Shah has placed strong reliance on the decision of the Supreme Court in Madhavrao Jiwajirao Scindia and Others Vs. Sambhajirao Chandrojirao Angre and Others, , wherein the Supreme Court had observed as follows : (at page 711) (of AIR) : at (p. 855 of Cri LJ).

"The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilised for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

12. Shri Kasat, the learned counsel for the applicant/accused submitted that there being no compliance of the provisions of Section 138 of the Negotiable Instruments Act, as he has not committed any offence. The notice issued by the complainants and consequently filing the complaints and the cognizance taken by the C.J.M., Amravati being unwarranted deserve to be quashed. Section 138 of the Negotiable Instruments Act, 1881 reads as under :

"dishonor of cheque for insufficiency etc. of funds in the account. Where any cheques drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of

the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque or with both :

Provided that nothing contained in this section shall apply unless, -

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier :

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation :- For the purposes of this section, "Debt or other liability means a legally enforceable debt or other liability."

Shri Kasat, the learned counsel for the applicant/accused submitted that for taking the cognizance u/S. 138 of the Negotiable Instruments Act, the complainant has to satisfy that the cheques issued by the accused were dishonored or returned back by the Bank unpaid either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank.

If these two ingredients are satisfied then only it is to be construed that the person concerned who issued the cheques and the cheques dishonored has committed the offence under this section. According to him, in all the three complaint cases the cheques issued by the accused, do not satisfy the aforesaid two ingredients. The cheques not encashed were returned to the drawer on different counts and, therefore, no offence is committed by the applicant/accused u/S. 138 of the Negotiable Instruments Act. To substantiate his submission the learned counsel relied upon the case of G. F. Hunasikathimath v. State of Karnataka reported in (1991) 1 Crim 226. In the case which was before His Lordship, the cheque was dishonored on the ground "Account closed". According to His Lordships no offence is committed u/S. 138 of the Negotiable instruments Act and the cognizance taken by the Magistrate was quashed u/S. 482 of Cr.P.C.

Further, reliance has been placed on the case of Abdul Samad v. Satya Naraiyan reported in (1991) 1 K LT 40 case No. 55 (Punj & Har). In case before His

Lordship under the provisions of Section 138 of the Negotiable Instruments Act, cheque returned unpaid with remarks "Payment stopped". According to his Lordship, this does not attract Section 138 of the Negotiable Instruments Act. It has been observed that :

"It is well known that a cheque may be returned by the Bank unpaid for various reasons. One of the reasons can be that there is no adequate amount available in the account on which the cheque is drawn to enable the bank to make the payment. The Parliament in its wisdom has confined the offence referred to in S. 138 only to bouncing of cheque on the ground of inadequate balance in the account concerned. Where the cheque is returned unpaid for other ground, the same has not been made an offence."

13. Shri Kasat, the learned counsel for the applicant/accused submitted that words and terms used in penal statute have to be construed strictly and in favour of subject as far as possible and that interpretation which the common man is liable to put upon the words used have to be preferred. Therefore, the provisions of Section 138 of the Negotiable Instruments Act are very specific that the provisions are attracted in the event of complying the two ingredients referred to above and no other. Reliance has been placed on the case of State of Maharashtra v. Laxmi Narsimham 1977 Mah LJ 715, Their Lordships observed that :

"The offence u/s 5(1)(e) read with Section 5(2) obviously deals with the criminal misconduct that can be committed by a public servant. The object of the Act is to provide for penalties so as to flush out and further check corruption from the system and stream of public administration. To keep the governmental processes unsullied and to enact penalties which will achieve that object are the twin motivating forces behind the present legislation. The terms used, therefore, in the defining sections will have to be understood in this context of the object and the public servant as understood by the Act. No doubt, while interpreting a penal statute, the words and terms will have to be strictly constructed and as far as possible infavour of the subject and that interpretation which the common man is liable to put upon the words used by the Legislature will have to be preferred. This is more so when the Court is called upon to deal with statutes of penalties. It is obvious that penal statutes are negative commands and the meanings attached to the words should, as far as possible, be the same as understood in popular parlance in preference to articulate or special or scientific connotations. While understanding the language of the Legislature in this manner, it is equally necessary to observe that the task of interpretation has to be performed to achieve the purposes and the objects of a given statute and suppress the mischief for which the prohibition or the penalty was enacted."

Further, reliance has been placed on the case of M.V. Joshi Vs. M.U. Shimpi and Another, . In this case Their Lordships of the Supreme Court also observed how to interpret the words expressed in the penal statute. Their Lordships observed as follows (Para 11) :

"When it is said that all penal statutes are to be construed strictly it only means that the Court must see that the thing charged is an offence within the plain meaning of the words used and must not strain the words. In construing a penal statute it is also a cardinal principle that in case of doubt, the construction favourable to the subject should be preferred. But these rules do not in any way affect the fundamental principles of interpretation, namely, that the primary test is the language employed in the Act and when the words are clear and plain the Court is bound to accept the expressed intention of the legislature."

14. Considering the ratio regarding the interpretation of the words in penal statute and the submissions made by Shri Kasat, the learned counsel for the applicant/accused without any interpretation or construing the words used in the Section 138 of the Negotiable Instruments Act, the plain meaning of the words, is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, is that either there is no sufficient amount in the bank in the account to honour the cheque or the demand is of excess amount than the amount standing in his credit. It is, therefore, crystal clear that no amount could be paid or the cheque be honoured if there is no sufficient amount to honour the cheque. It is true that the cheques are dishonored by the Bank for various reasons like :

1. Payee's endorsement required, (1a) Shareholder's discharge required in the place provided for (1b) Pleaded certify that the amount of cheque is credited to payee's account only.
2. Payee's endorsement irregular, will pay on bank's confirmation.
3. Payee's endorsement Bank's confirmation, (3a) Shareholder's discharge irregular.
4. Payee's endorsement irregular Prefix "For" "or" For and on behalf "of" or "per pro" required.
5. Payee's vernacular endorsement must be attested by a I.P. or Magistrate under Official seal.
6. Translation of vernacular writing requires Bank's Guarantee (6a) Guaranteed translation of vernacular writing required (6b) Collecting Bank's confirmation requires clearing Bank's guarantee, (6c) Collecting Bank's discharge required in your favour.
- (7) Post dated (7a) Out of dated (7b) Date doubtful (7c) Date irregularly written (7d) Date incomplete (7e) Cheque without date (7f) Dividend warrant out of date, please refer the Company (7g) Cheque mutilated requires Bank's guarantee.
8. Amount in words and figures differs.
9. ----- requires drawer's full signature.

10. Drawer's signature differs from specimen recorded with us.
11. Drawer's vernacular signature must be attested by our Bank Official.
12. Drawer's signature incomplete (12a) Drawer's signature required (12b) Title on the account required (12c) Cheque irregularly drawn.
13. Crossed cheque must be presented through a Bank (13a) This attached cheque will be received by us for collection (13b) This attached draft is marked Payee's account only."
14. Effects not cleared, please present again
15. Effect drawn against returned unpaid.
16. No provided for (16a) Not arranged for (16b) Exceed arrangements.
17. No advice, Present again.
18. Full cover not received (18a) Funds, expected please present again.
19. Refer to drawer (19a) Insufficient funds (19b) Account closed.
20. Payment stopped by the drawer (20a) Cheque number differs (20b) Cheque crossed to two Banks (20c) Please present, this Cheque on the counter for encashment (20d) stamp required to be cancelled under authenticated initials.
21. Today's Clearing House stamps required (21a) Receipt stamp required.

On such counts cheques are returned by the bank unpaid. but the provisions of S. 138 of the Negotiable Instruments Act, makes it clear that the provisions of this section are attracted when the person concerned who issued the cheque, has no adequate funds in his credit to honour the cheque.

In the instant case, the applicant/accused issued the cheques to the non-applicants and the cheques could not be encashed as they were dishonored and the main reason for the same is that the Bank filed the civil suit against the applicant. During the course of argument, the learned counsel Shri Kasat and Shri Gilda brought to my notice that the Bank has instituted the civil suit against the applicant for the recovery of the loan amount. The plain meaning of this is that the applicant/accused had no amount in his credit in the Bank. It is simple meaning of the words used. There can not be any other meaning other than this. Therefore, the submissions made by Shri Kasat, the learned counsel for the applicant/accused has no force and I do not agree with the view taken by His Lordship in the case of G. F. Hunasikathimath v. State of Karnataka (1991) 1 Crim 226 and in a case of Abdul Samad's case reported in (1991) 1 Ker LT 40 cas 55 (Punj & Har).

15. Shri Gilda, the learned counsel for the respondent No. 1 while contravening the submissions made by Shri Kasat, the learned counsel for the applicant/

accused placed reliance on the case of S. Prithviraj Kukkillayya Vs. Mathew Koshy and Another, their Lordships reproduced the S. 138 of the Negotiable Instruments Act as follows;

"In order to attract penalty provided u/s. 138 of the Act, the following ingredient have to be established.

1. Cheques should have been issued for the discharge, in whole or part, of any debt or other liability.
2. The cheque should have been presented within the period of six months or within the period of its validity, whichever is earlier.
3. The payee or the holder in due course should have issued a notice in writing to the drawer within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.
4. After the receipt of the said notice by the payee or the holder in due course, the drawer should have failed to pay the cheque amount within 15 days of the receipt of the said notice".

In Para 9, it is observed that;

"Section 142 of the Act provides that no court shall take cognizance of any offence punishable u/s. 138 except, upon a complaint, in writing made by the payee or as the case may be, the holder in due course of the cheque, within one month of the date on which the cause of action arises under clause (c) of proviso to S. 138 of the Act, before the metropolitan Magistrate or a J.M.F.C."

In the instant case, the State Bank of India dishonored the cheque with endorsement "refer to drawer" on the same day. Thereupon, the petitioner demanded payment of the amount through a registered notice dated 13-4-89. 1st respondent received the same on 17-4-1989. As there was no response to the notice, nor any payment, petitioner filed a complaint before the lower court on 19-5-1989 alleging that 1st respondent committed an offence u/s. 138 of Negotiable Instruments Act. The lower court did not take the cognizance of the complaint holding that the complaint would violate the Art. 20 of the Constitution. Their Lordships, in the instant case, quashed the order of the lower court being unsustainable and directed the lower court to proceed with the complaint in accordance with law."

16. Reliance has been placed on the case of Voltas Limited and Others Vs. Hiralal Agarwalla and Others, , His Lordship observed that;

"As against the above submission, the learned counsel for the opposite party has produced Xerox copies of 3 letters one from the General Manager, Allahabad Bank, one from the Assistant Secretary, Bharat Chamber of Commerce and one from the Branch Manager, State Bank of Bikaner and Jaipur. By these letters they have intimated that the remark "refer to drawer" necessarily means as per banking custom that the cheque has been returned for want of funds in the

account of the drawer of the cheque. In view of this clarification it is prima facie seen that the cheque in question bounced because of inadequacy of funds in the drawer's account. As the cheque in question bounced, the complainant requested the accused petitioners to make the full payment of the said cheque but the response of the accused petitioners were not at all helpful. Under the facts and circumstances, it would be premature to hold that the accused persons have not committed an offence u/s. 138 of the Act of 1881. That can be brought out only in the regular trial of the case. In my opinion, the learned Magistrate has not committed any illegality in proceeding with the trial of the case and directing examination of the accused u/s. 251 of the Cr.P.C."

17. Mr. Gilda, the learned counsel further placed reliance on the case on *Calcutta Sanitary Wares v. Jacob* (1991) 1 K LT 269. In para 2, it is observed that;

"The allegations in the complaints in my view do make out a prima facie case against the petitioners. Before filing the complaints respondent had taken care to abide by the relevant legal provisions. Indeed, it is not the case of the petitioner that no amount is due to the respondent. The issuance of cheques and their dishonor followed by notices of demand and failure to pay, are not matters which had been challenged. That payment was countermanded by a stop memo is of no consequence. That hardly affects the right of the respondent to initiate proceedings under the Act. It has the same effect as a closure of the account as far as he is concerned. The object of the provisions cannot be allowed to be defeated by such ingenuous action".

18. The next submission of Mr. Kasat, the learned counsel for the applicant/accused is that the applicant and the non-applicant in all the cases being the businessmen and they being acquainted with each other, it was nothing but the commercial loan transaction. Due to various circumstances, as the applicant could not satisfy the loan amount the non-applicants have taken the recourse of S. 138 of the Act, though it is a case of civil nature. The non-applicants have already instituted the civil proceedings for recovery of the amount advanced by them. The non-applicants, under the circumstances, can not be allowed to take recourse of criminal proceedings and, therefore, the instant proceedings instituted by all the 3 non-applicants for the offence u/s. 138 of the Negotiable Instruments Act and u/s. 420 of I.P.C. be quashed.

Reliance has been placed on the case of *Sardar Trilok Singh and Others Vs. Satya Deo Tripathi*, . In the case before Their Lordships there was a dispute between the parties regarding the purchase of truck by the complainant (respondent). A hire-purchase agreement was entered into between the respondent and a Finance corporation accused (appellants). The loan was payable in monthly instalments. According to the agreement, on default of any one instalment the financier had the right to terminate hire-purchase agreement even without notice and seize the truck. The complainant's case was that only a blank form was got signed by him. His further case was that on default of the third instalment the truck was forcibly seized and removed by the appellants. The respondent filed a

complaint against the appellants in this connection for certain offences. After enquiry the Magistrate directed the issue of summons. The appellants moved an application u/s. 482, Cr.P.C. Their case in the nutshell was that they had committed any offence was absolutely false and the proceeding should be quashed.

It is held by Their Lordships that (para 5);

"The proceeding initiated was clearly an abuse of the process of the Court. It was not a case where any process ought to have been directed to be issued against the accused (appellants) On the well settled principles of law it was a very suitable case where the criminal proceeding ought to have been quashed by the High Court in exercise of its inherent power. The dispute raised by the respondent was purely of a civil nature even assuming the facts stated by him to be substantially correct".

Reliance also has been placed on the case of Shyam Sundar and Another Vs. Lala Bhawan Kishore and Another, . Their Lordship held that;

"Return of post-dated cheques being dishonored - Absence of dishonesty at the initial stage of transaction or when cheque was issued - Accused not liable for cheating - It is a case of civil liability.

Absence of dishonesty or inducement at initial stage - accused not liable for cheating. It is a case of civil liability".

Their Lordships further observed that;

"If from the very inception of the contract the intention is of dishonesty and deception and in consequence thereof a person is induced to part with any property or to do or omit to do anything that he would not do or omit to do, but for that deception the offence of cheating is prima facie made out".

In case in which as a result of passing of some property or doing of an act or omission to do it, a post-dated cheque is issued with the full knowledge of both the parties that for the present the cheque was not encashable, there is no dishonesty or inducement at the very inception of the contract. And if subsequently for some reason or the other on the due date the cheques are dishonored, the case may not be covered u/s. 420 of I.P.C. It will only be a case of civil liability. The reason being that it was not the intention of the person issuing the cheque to make an immediate payment and the postdated cheque was only in the nature of a promise to pay which promise, if it is broken could give rise only to a civil liability".

19. Shri Gilda, the learned counsel for the non-applicant relied upon the case of Ravindra Patil v. Smt. Rajendra Pandit Patil 1991 Cri LJ 963 reliance was placed on the decision of Supreme Court in Madhavrao Jiwajirao Scindia and Others Vs. Sambhajirao Chandojirao Angre and Others, , wherein the Supreme Court had observed as follows :

"The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage".

In para 18, his Lordship observed that;

"In the light of the position that emerges from the record before me, and having regard to the case law on the point, it is clear that the present order of the learned Magistrate does not call for any interference at this point of time. It is correct that the present dispute initially started as a civil dispute. It is, however, equally true that in the course of the same or a subsequent transaction, the facts may disclose a dispute that is actionable before a Civil Court but the facts may also justify a parallel proceeding being instituted before a Criminal Court. In the present case, the transaction of 29-2-1988 which is the subject-matter of the criminal complaint has nothing to do with the earlier partnership litigation which was pending before the Civil Court and is quite distinct from that set of facts. As far as the present complaint is concerned, as indicated earlier, there was enough material before the learned Magistrate for purposes of issuing process and consequently, the petitioners are not entitled to challenge that order at this stage."

20. There is nothing in law to prevent the Criminal Courts from taking cognizance of the offence, provided the elements of an offence are made out on the face of the complaint-petition itself, merely because on the same facts, the persons concerned might to be also subjected to civil liability. It is not the function of the Criminal Courts to have anything to do with disputes relating to property. It is the function of Civil Court to decide case involving the right of property. The object of criminal law is the protection of the innocent and punishment of guilty. The criminal courts are not to entertain matters which are properly within the jurisdiction of Civil Courts. At the same time, it will be intolerable if men of position were to evade the law with impunity. Where the complaint shows only a "civil dispute" as to title or as to other civil claims, a Magistrate ought not to deal with them but should dismiss the complaint. If the allegations disclose a criminal offence, the complaint ought not to dismiss even if civil remedy is obtainable. That there is no possibility of conviction is no ground for dismissal.

It is no doubt, the tendency on the part of litigants to short circuit civil suits or proceedings by instituting complaints should be vigilantly checked by criminal courts and they should not lend aid to such short cuts. The parties should not be

allowed to appease their anger or return their vengeance by starting proceedings in criminal courts where the proper remedy is to resort to Civil Courts. Criminal Courts have to be on their guard to see that their processes are not abused for obtaining decisions on complicated matters of civil nature or for putting pressure on parties with a view to obtain settlement of disputed question.

21. Section 4 of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 has inserted Chapter XVII in the Negotiable Instruments Act, 1881. The statement of objects and reasons appended to the Bill explaining the provisions of the new chapter read as follows :

"This clause (clause 4 of the Bill) inserts a new Chapter XVII in the Negotiable Instruments Act, 1881. The provisions contained in the new chapter provide that where any cheque drawn by a person for the discharge of any liability is returned by the bank unpaid for the reason of the insufficiency of the amount of money standing to the credit of the account on which the cheque was drawn or for the reason that it exceeds the arrangements made by the drawer of the cheque with the bankers for that account, the drawer of such cheque shall be deemed to have committed an offence. In that case, the drawer, without prejudice to the other provisions of the said Act, shall be punishable 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."

It has also been provided that it shall be presumed, unless the contrary is proved, that the holder of such cheque received the cheque in the discharge of a liability. In order to ensure that genuine and honest bank customers are not harassed or put to inconvenience, sufficient safeguards have also been provided in the proposed new chapter.

22. It being an object, the provision must be construed in it's letter and spirit. Therefore, whenever the cheques are dishonored on the count of not sufficiency of the funds, the provisions of S. 138 of the Negotiable Instruments Act, would attract.

23. Shri Kasat, the learned counsel for the applicant further submitted that taking cognizance and issuance of process u/s. 420 of I.P.C. is erroneous as there is no whisper either in the complaint or in the verification statements as well as in the prayer that the applicant has committed the offence punishable u/s. 420 of I.P.C. Merely, there is no mention of section either in averments made in the complaint or verification statements, does not mean that the Magistrate is deprived of taking the cognizance u/s. 420 of I.P.C. The trial court while taking cognizance and issuing process has to see whether in the complaint or verification statements the ingredients are made out to take action u/s. 420 of I.P.C. Perusal of the complaint, verification statements makes it clear that an offence has made out u/s. 420 of I.P.C. and thereby the learned trial court committed no illegality.

24. Mr. Gilda, the learned counsel for the non-applicant took me through the

complaint and verification statements and pointed out that there is a specific averment to comply with the ingredients of S. 420 of I.P.C. It is not the solitary case pending against the applicant but about 7 cases are pending in the court of J.M.F.C., Amravati, u/s. 138 of the Negotiable Instruments Act. These circumstances are crystal clear to fathom the working of the mind of the applicant/accused that the applicant/accused is in the habit to obtain the loan dishonestly, but not to refund the loan amount inspite of the demands.

25. Considering the submissions of both the learned counsel, I do not find any substance in the submissions of Shri Kasat, learned counsel for the applicant and in view of the above discussion all the three applications are dismissed.

26. Applications dismissed.