

(1999) 12 DEL CK 0111

In the Delhi High Court

Case No : Criminal Writ No. 828 of 1998

Rajinder Steels Ltd. and Others

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 03-12-1999

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226

Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 140, 141, 142

Citation : (2000) 1 AD 573 : (2000) 100 CompCas 274 : (2000) CriLJ 625 : (1999) 82 DLT 963

Hon'ble Judges : R.S. Sodhi, J; Dalveer Bhandari, J

Bench : Division Bench

Advocate : Mr. S.N. Gupta, for the Appellant; Mr. Neeraj Kishan Kaul, Mr. S.K. Manaktala, Mr. S.S. Gandhi, for the Respondent

Judgement

Dalveer Bhandari, J.—The petitioners have filed this writ petition under Article 226 of the Constitution of India for issuance of an order/directions thereby holding that Chapter XVII of the Negotiable Instrument Act as incorporated of Section 4 of the Banking Public Financial Institution and Negotiable Instrument Laws (Amendment Act) 1988 (66 of 1988) in ultra virus to the Constitution and rule making powers of the legislative and/or in the alternative to issue an appropriate writ or order for direction holding that Section 138 of the Negotiable Instrument Act 1881 (hereinafter called as Act) is ultra-vires of objects of the amending act and/or issue a declaration that section 138 of the Negotiable Instrument Act 1881 (hereinafter called as Act) is not applicable to the post dated cheques which are issued beyond the period of six months from the date when it is drawn.

2. The petitioners have approached this Court because a complaint u/s 138 of Negotiable Instrument Act against them have been filed by respondent No. 3 before the Metropolitan Magistrate, Patiala House, New Delhi. In this petition the Court has been called upon to decide only the constitutional validity of these provisions, Therefore, it is not necessary to recapitulate the detailed facts of this

case.

According to the petitioners this petition raises the following questions of law :

(i) Whether the provisions of Sections 138, 139, 140, 141 and 142 of the Negotiable Instruments Act, 1881, are ultra-vires and violative of Article 21 of the Constitution of India?

(ii) Whether the provisions of Sections 138 to 142 of the Negotiable Instrument Act, 1881, are ultra-vires of the powers of the Central Govt. to enact laws in this direction on account of the fact that this subject of legislation can only be made by the State Governments in view of Article 246(3) read with Entry 30 List II of the VII Schedule to the Constitution of India?

(iii) Whether mens-rea is an essential ingredient for an offence committed u/s 130 of the Negotiable Instrument Act?

(iv) Whether a person can be imprisoned and/or can be forced to face the rigour of criminal trial on account of his failure to comply with financial contractual liability which is purely of civil nature for reasons beyond his control and whether such imprisonment will be violative of the objects of Negotiable Instruments Act, 1881?

(v) Whether a person can be tried for an offence u/s 138 of the Negotiable Instruments Act for dishonour of the cheques which are issued beyond the period of six months from the date when those were drawn?

3. It may be pertinent to mention that by the Banking Public Financial Institutions & Negotiable Instrument Laws (Amendment Act) 1988 (66 of 1988) a new Chapter being Chapter XVII was added in the Negotiable Instrument Act, 1881 containing Section 138 to Section 142. For convenience, these sections are reproduced as under :

138. Dishonour of cheque for insufficiency, etc. of funds in the account :- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person 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 that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both :

Provided that nothing contained in this section shall apply unless -

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

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

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

139. Presumption in favor of holder : - It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.

140. defense which may not be allowed in any prosecution u/s 138: - It shall not be a defense in a prosecution for an offence u/s 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section.

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 as 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.

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

(a) 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;

(b) such complaint is made within one month of the date on which the cause of action arises under clause, (c) of the proviso to section 138;

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate

of the first class shall try any offence punishable u/s 138."

4. By introduction of this Chapter in the Negotiable Instruments Act, dishonour of cheques on account of insufficiency of funds has been made a penal offence. The object of introducing this Chapter in the Negotiable Instrument Act is to enhance the acceptability of cheques.

5. The learned counsel for the petitioners submitted that the provisions of Sections 138 to 140 of the Act are ultra virus and vocative of Article 21 of the Constitution of India. It is submitted that Section 140 of the Act takes away a very important and reasonable defense of the accused in a prosecution for an offence u/s 138 of the Act and that by itself makes the provisions contained in Section 138 and 140 of the said Act as unconstitutional. The petitioners submitted that there must be mind a fault before there can be a crime, is a settled position of law. The petitioners also submitted that it could not have been the object of introducing these sections in the Act. The Parliament, while enacting these laws, was aware that certain safeguards are required to prevent harassment to the honest drawers and contrary to that and instead of providing adequate safeguards to honest drawers, Section 140 was enacted, which takes away a very valuable defense of law. Therefore, according to the petitioners, the said provision of the Negotiable Instruments Act is arbitrary, unreasonable and ultra-vires to the constitution and is liable to be struck down.

6. The petitioners also submitted that no safeguard has been made in the entire Chapter so as to protect the borrower who is taking loan from a financial institution and the impugned provision makes everybody liable whose cheque has been dishonoured on account of insufficiency of funds. This cannot be the intention of the Legislature.

7. It is also incorporated in the petition that by virtue of Section 138 a person who has failed to discharge his contractual obligation is liable to imprisonment for a term which may extend to one year. It is further submitted that this type of provision is vocative of Article 21 of the Constitution of India and deprive the person of his personal liberty, merely because he has not discharged his contractual liability. It is further submitted that even Article 11 of the International Covenants on Civil and Political Rights states that no one shall be imprisoned merely on the ground on inability to fulfill a contractual obligation. It is submitted that Article 21 of the Constitution is in conformity with inherent dignity of human person in the light of Article 11 of the International Covenants on Civil and Political Rights.

8. The petitioners also submitted that in a prosecution, which is launched u/s 38 of the Negotiable Instrument Act, the accused is made to undergo the rigour of the criminal trial or a liability which is purely civil in nature. The Court trying the offence and in view of the provisions contained in Chapter XVII of the said Act will not even go to the question whether the accused has means to pay the amount and will punish the accused only on the finding that the cheque was

issued for the discharge of an enforceable debt or other liability which has been dishonoured for insufficiency of funds. According to the petitioners this can never be the intention of the legislature and as on date according to the law of the country no person will be convicted to imprisonment if he fails to pay the amount due and payable by him.

9. The petitioners also made an endeavor to place on parity, the provisions of this Act with the provisions of CPC regarding money decree against a person which is a conclusive proof of the liability of that person to pay the amount to the plaintiff yet he cannot be imprisoned if he has no means to pay such an amount and the law on this aspect is well settled by the Supreme Court. In view of the legal pronouncements, the provisions as contained in Chapter XVII of the Negotiable Instruments Act are ultra-vires to the Constitution of India and those provisions must be kept in mind by the Legislators while enacting the amending the Negotiable Instruments Act, 1881. The petitioners also submitted that the Negotiable Instruments Act is framed to define the process for conducting the business transactions.

10. According to the petitioners, business transactions fall in two categories : (a) cash transactions and (b) credit transaction. For both these transactions, different types of bills are drawn. For the purpose of cash transaction, a bill is payable on demand and for a credit transaction, the bill is paid on certain days eight. There is an essential difference in these two types of transactions. In the case of cash/demand payment transaction, the seller or the provider keeps the title and/or the possession of the goods of the service with him or his agent till he gets the payment, while in the credit transactions the title and/or their goods or the service are passed on to the buyer/availer/borrower, which are to be paid later on a mutually agreed date. In the case of credit transactions, there is always an inherent risk whether the payment will be made on the due date or not; there are several factors in each particular contract which contribute to the circumstances which decide whether the contract will be honoured or there could be unforeseen force majeure factors which may delay the performance of the contract resulting into non-honoring of the payment although agreed for. The Negotiable Instruments Act basically describes the cheque as a Bill of Exchange; hence it is important to appropriate that there are now two types of Bills of Exchange, and accordingly, there are two types of cheques. A demand payment bill of exchange is a current dated cheque where as the demand accepted bill leads to a post dated cheque. In the case of post dated cheque, the lender or the seller or the service provider clearly takes the business decision to provide money/goods/service to be paid by the user/borrower/buyer at a later date. It is hence implied that he is knowingly and willingly accepting the credit risk. Now due to several factors which have led to non-performance of the contract on the part of the buyer/borrower, there is no rigorous criminal prosecution involved in any law in the world for non-performance of a financial contract due to circumstances beyond control of any of the parties. The act of issuing a cheque is a promise to pay at a subsequent date, and an extension to the performance of a

financial contract and whereunder a contract cannot be performed due to reasons beyond control. It is submitted that it will not attract penal consequences and convicting a person and or imprisoning him for this violation is vocative of Article 21 of the Constitution of India and also of Article 11 of the Intervention Covenants on Civil and Political Rights. India is a signatory to this Covenant.

11. Article 51 of the Constitution of India foster respect for Inter- national law and, treaty obligations in the dealings of organized people with one another and Therefore, also the provision of Negotiable Instrument Act as contained in Chapter XVII is liable to be struck down.

12. The petitioners submitted that in the facts and circumstances of the present case, it is only a money lending transaction by virtue of Section 138 of the Negotiable Instrument Act. The relationship of the debtor and creditor and their mutual rights and liabilities are sought to be regulated. It is also submitted that by virtue of Article 246 read with Entry 30 of List II of the VII Schedule of the Constitution of India, only said legislature alone is competent to legislate and any legislation in this field will be ultra-vires of the powers of the Central Government for want of legislative competence.

13. Article 246 of the Constitution states that only legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule to the Constitution. List II to the Seventh Schedule, which is a State List, Entry 30 states "Money Lending and Money Lenders: Relief of Agricultural Indebtedness". The Union of India is not empowered to make laws which will affect the relationship of money lending and money lenders and Section 138 of the Negotiable Instruments Act necessarily affects the relationship of money lending and moneylenders and, Therefore, the same is liable to be struck down for the want of the competence of the Parliament to enact laws which affect the relationship of money lending and money lenders.

14. The petitioners also submitted that mens-rea is an important ingredient -of criminal jurisprudence. The petitioners took the financial assistance which was granted by respondent No. 3 and the assistance was based on the project of the petitioners. The intention of the petitioners was never dishonest and all through they have represented that they are in the proc- ess of repaying and only on account of some unforeseen circumstances they have not been able to comply with their contractual obligations.

15. The petitioners gave various dictionary meanings of the word "Dishonesty". The same are reproduced hereinbelow :

Black"s Law Dictionary describes dishonesty as disposition to lie, cheat, deceive, or, defraud; untrustworthiness; lack of integrity, lack of honesty, probity or integrity in principle; lack of fairness and straightforwardness; disposition to defraud, deceive or betray.

Section 24 of the Indian Penal Code defines dishonestly as whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to that thing dishonestly.

The Lexicon Websters Dictionary describes dishonesty as dishonest, not honest, inclined or apt to deceive, cheat, pilfer, embezzle, or defraud; arising from or characterised by lack of honesty, fraudulent.

The Oxford Dictionary defines, dishonesty as entailing dishonour or discharge; dishonourable, discreditable, discreditable, misbecoming, shameful, ignominious."

16. The petitioners submitted that a cumulative study of the aforesaid definition of "dishonesty" makes it clear that there must be an element to cheating and/or deceive and to defraud a person. Mere non-payment of a loan within the stipulated time which is advanced by the creditor and which is purely a business transaction for the creditor as well as he earns his profit by way of interest, cannot mean that the borrower is dishonest.

17. Section 138 of the Act was not intended and cannot be construed to cover a situation as in the present case, where post dated cheques are given pursuant to long term financial arrangements in order to facilitate the transfer of the installments of loan repayment. The object of the Act was to check the dishonest drawers. If the petitioner's intentions were dishonest, then they would not have issued post-dated cheques. The mere fact that post-dated cheques were issued reveal the intention of the petitioners to pay the amount. According to the petitioners, it could not have been the intention of the Parliament to convict a person who issued a post- dated cheque which for any reason was dishonoured.

18. This Court after hearing the learned counsel for the petitioners, issued show cause notice in the Petition. It may be pertinent to mention that the Criminal Miscellaneous Petition No. 5169/99 for interim relief was dismissed. The detailed reply have been filed by both the respondents (the Union of India and respondent No. 3, Escorts Financial Limited) separately.

19. It is submitted in the reply of the Union of India that the role of Union of India is limited to the legal position raised in the petition and the Union of India has nothing to do with the factual circumstances of the case. In reply it is submitted that challenge relating to legislative competence is totally misconceived. The Parliament has the competence to enact Sections 138 to 142 under entry 45 and 46 in list I of the 7th Schedule to the Constitution of India. Entry 45 relates to (1) Banking, and Entry 46 which provides for Bills of Exchange. Promissory notes and other like instruments, are couched in widest form and are wide enough to include the power and competence of the Central Government to provide for penal action and penalties in case of dishonour of certain cheques.

20. It is submitted on behalf of the UOI that while construing words conferring legislative powers, widest scope and amplitude should be given to the words

occurring in the entries. Each and every word deserves to be given comprehensive meaning, embracing all matters which can be fairly and reasonably included therein. Entries of the schedule have to be construed by giving most liberal interpretation to the words. It has been held by the Apex Court that, giving the entries a narrow and restricted meaning will defeat the very constitutional purpose, conferring legislative power to the Union or the State, as the case may be, to frame laws with respect to the items under the said lists. None of the items in the list is to be read in a narrow and restricted sense. The provisions of penalties in case of dishonour of certain cheques for insufficiency of funds in the account, prosecution and punishment relating thereto are ancillary and subsidiary to the provisions relating to cheques. It is submitted by the learned counsel for the Union of India that while giving the words occurring in Entries Nos. 45 & 46 the meaning of widest amplitude, it can be safely said that the matters relating to penalties and prosecution in connection thereto are fairly and reasonably comprehended in such words.

21. The legislation made by virtue of Section 4 of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment Act) 1988 (66 of 1988) does not deal with the subject of money lending and money lenders; and relief of agricultural indebtedness. The provisions do not deal with the debtor - creditor relationship. The Chapter XVII comprising of Sections 138 to 142 has been inserted with a view to enhance the accept- ability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques for the reasons provided in the said sections. The provisions in question only deal with a particular manner of discharge of debt or liability, i.e., by way of issuing cheques without having sufficient arrangement to meet the same. Thus, the provisions come within the ambit of entries 45 and 46 of List - I of the Constitution and the Parliament has power and competence to enact Chapter XVII containing Sections 138 to 142 in the Negotiable Instruments Act under the said Entries.

22. The Union of India also submitted that the contention of the petition- ers that the aforesaid Sections of the Act are vocative of Article 21 has no merit. The right to life and personal liberty guaranteed under Article 21, cannot be said to be violated or offended, when deprivation is in accordance with the procedure established by law.

23. The Union of India also submitted that it is mentioned that the scheme as laid down in Chapter XVII pertaining to Sections 138 to 142 of the Act is a comprehensive and an exhaustive scheme, providing a remedy to the situation where a cheque drawn by the payer, for the discharge of any debt or liability is returned by the bank unpaid. Before it can be deemed that the drawer has committed an offence, Section 138 of the Act provides for fulfillment of conditions mentioned in clauses (a), (b) and (c). It has also been provided that it shall be presumed unless the contrary is proved, that the holder of such a cheque, received the same in the discharge of a debt or a liability. The defenses

which can be as well as those which cannot be allowed in any prosecution for such an offence, have also been provided, in the relevant sections to make the provision effective. The usual provisions relating to the offences by companies have also been included in the said new chapter. The said provisions are comprehensive as they lay down the complete procedure setting out the grounds, conditions, punishment and the safeguards for the offence, of dishonour of a cheque.

24. An offence shall be deemed to have been committed only when the person issues the cheque without having sufficient amount in his account and fails thereafter to pay, even upon the expiry of the statutory period of notice.

25. The Union of India also submitted that the legislature has selected a limited area and brought it under, the penal provisions by laying down suitable prosecutions and inbuilt safeguards to protect honest drawers. This is very much in accordance with the preamble and object of the Act. It lays down that the Chapter is introduced is enhance the acceptability of cheque in settlement of liabilities by making the drawer liable for penal- ties in case of bouncing of cheques due to insufficient arrangements of funds with adequate safeguards to prevent harassment of honest drawers. Thus, keeping in mind the economic life of a developing country like India, the object of inculcating faith in the efficacy of banking operations and credibility in transacting business on Negotiable Instruments, was the need of the time and was necessary due to the malpractices prevalent in our society.

26. Therefore, since the offence has been brought into the statute book by a legislative enactment, having sufficient checks and balances, the same has to be treated as enacted in accordance with the procedure established by law. Hence, it cannot be said that the liberty of a person is being curtailed by the procedure set out under the said chapter or that such provisions are vocative of Article 21 of the Constitution of India.

27. Enactment of Sections 138 to 142 has been made to meet the creditors concern in a growing and developing country with liberal economic policy and opening of more avenues for trade, commerce and industry. Creation of strict liability is, Therefore an effective measure by encouraging greater vigilance to prevent unusual callous attitude of drawers of cheques in discharge of the debts or liabilities. The legislative object and purpose of Section 138 is clearly to regulate financial promises in growing business trade, commerce and industrial activities of the country and the strict liability u/s 138 promotes greater vigilance in the matters covered by it. The incorporation of the said provisions are designed to safeguard the faith of creditors in the drawing of the cheque, which is essential to the economic life of a developing country like India.

28. The criminal liability of imprisonment visualised u/s 138 of the Act will be invoked only in the case of dishonouring of a cheque and a consequential failure to repay even after the period of statutory notice. It is not an imprisonment

inflicted upon the person for mere failure to discharge a civil liability.

29. The punishment is inflicted only by an established procedure well set out under the provisions of Section 138 of the Act. When the Act imposes some duties, the accused must answer for the breach of duty. It is only after a drawer of the cheque fails to make payment within 15 days of the receipt of notice that he is deemed to have committed an offence. The failure of the accused to make good the payment even after the lapse of 15 days from the date of the receipt of the notice, fixes his liability. The accused incurs no liability if he is able to prove that he made good the payment on receipt of the notice or had no liability for making the payment of the amount shown in the cheque. Thus, the provisions makes reasonable classification between mere civil liability and a criminal offence under Sections 138. It is also submitted that in the present case the provisions of Article 11 of the International Covenants on Civil and Political rights are not at all applicable, as contended by the petitioners.

30. Section 138 of the Act does not provide for imprisonment merely for non-fulfilment of one's financial liabilities. The Section is attached only when the conditions laid down therein are satisfied. Section 138 clearly lays down that, dishonour of a cheque for the reasons stated in the section, is sufficient for commission of the offence. There is no ambiguity in the provisions of the said section. When a statute itself in clear and in unequivocal terms, defines an offence, and prescribes the punishment, the same cannot be declared as ultra-vires, as is alleged by the petitioners. It is submitted on behalf of the Union of India that in criminal law, the existence of guilty intent is an essential ingredient of a crime. However, the legislature can always create an offence of absolute liability or strict liability, where mens-rea is not at all necessary, as has been done with respect to Sections 138 to 142 of the Negotiable Instruments Act. Such a measure is resorted to in public interest and such laws of strict liability are justified and cannot be said to be unreasonable or ultra virus of the Constitution. Therefore, it is submitted on behalf of the Union of India that mens-rea is not an essential element in all such cases.

31. When the act imposes absolute duties, the accused, must answer for the breach of the said duty. Whether the breach was due to absence of mens-rea or not, is not a relevant factor. A statute can exclude mens-rea, and even otherwise the nature of mens-rea that would be implied in a statute creating an offence depends on the object of the Act and provisions thereof. It is immaterial for some one to believe that when he issued the cheque it may be dishonoured on presentation. For an offence under the said Section, mens-rea is not essential. This fact is clearly spelt out from a bare reading of Section 138 which clearly rules out mens-rea as a constituent part of the offence. Section 138 brings into operation the rule of strict liability, the fact that Section 140 of the Act bars certain defenses such as mens-rea, cannot itself be held as unreasonable.

32. Such provisions of the Act were introduced in public interest in order to remedy a peculiar malaise. Therefore, the said provisions were couched with the

Rule of strict liability which in an event, rules out the element of mensrea. Alternatively when the statute forbids the doing of a certain act or requires it to be done in a particular manner, the failure to do the said act in the manner provided in the statute itself supplied means rea.

33. According to the Union of India, the distinction which has been carved out by the petitioners regarding current dated cheques and post-dated cheques is untenable in view of the settled judicial pronouncement regarding the nature and character of the post-dated cheques. A post-dated cheque is one containing a later date than that of delivery. It differs from an ordinary cheque as a post-dated cheque carries implied notice that there are no present deposits to meet it and implied guarantee that funds will exist when it becomes due. It is not correct that once a post dated cheque is issued, the drawer has to necessarily keep the funds in his account from the date of the issuance of the cheque itself. Post-dated cheque means the demand will be postponed till the date on the face of the cheque. Hence, the date on the face of the cheque is the actual date for the demand of the cheque. On that date only the drawer has to make financial arrangements to meet the liability. Therefore, a post-dated cheque may be treated as a Bill payable at a future time and it becomes due on the date it bears and thus becomes a bill payable on demand and hence a cheque. The mere fact that the date of payment of a cheque is postponed to a future date does not make the cheque payable otherwise than on demand. Legally, it makes no difference to the rights and liabilities of the parties whether a cheque is ante-dated or post-dated. It is still payable on presentation after the date. The provisions of Section 138 of the Act do not deal with the contractual liability of the parties and repayment of loan or other commitments. It does not cover or deal with loan or repayment arrangement made in between the debtor and the creditor. The provision is intended to enhance the acceptability of the instrument of cheque in discharging the liability in commercial transactions. When the discharge of liability is acted upon the issuance of a cheque, the provisions of Section 138 come into play. Therefore, the distinction made between current dated and post-dated cheque is irrelevant and out of context and beyond the scope of the provisions of his chapter.

34. The reply has also been filed on behalf of respondent No. 3. At the outset, the respondent No. 3 Escorts Finance Limited submitted that this petition is a gross abuse of process of law of this Court. The petitioners have deliberately twisted and distorted the facts of the case so as to mislead the Court and have not approached the Court with clean hands. The petitioners have been avoiding appearance before the learned trial court and, in the last more than one year they had appeared only once. Repeatedly, non-bailable warrants of their arrest have been issued by the learned trial court and now even the proceedings under Sections 82 and 83 of the Criminal Procedure Code, 1973 have been initiated against the petitioners 2 and 4.

35. According to respondent No. 3, pre-requisites of the Act is as under :

- (i) that the cheque is drawn on a bank for the discharge of any legally enforceable debt or other liability;
- (ii) the cheque is returned by the bank unpaid;
- (iii) the cheque is returned unpaid because the amount available in that account is insufficient for making the payment of the cheque; or that the amount of the cheque exceeded the amount arranged to be paid from that account by an agreement made with the bank;
- (iv) that the payee gives a notice to the drawer claiming the amount within 15 days of the receipt of the information by the bank; and
- (v) the drawer fails to make payment within 15 days of the receipt of the notice.

36. The wording of Section 138 lays stress on the date of discounting of the cheque drawn by a person in discharge of legally enforceable debt, or other liability, and the Bank dishonors the same due to insufficient funds to honour the cheque, or it exceeds the amount of the drawer with the bank. The intention of the legislature is clearly to see that in the event of the amount not being paid on presenting the cheque due to insufficiency of funds or it exceeds the arrangement, the person is liable for prosecution. However, the further safeguard that has been made to prevent hasty action is that the payee, or the holder in due course of the cheque shall make a demand for the payment of the amount covered by the said cheque by giving a notice, in writing, to the drawer within fifteen days of the receipt of information by him from the Bank. It is well settled that the penal provisions have to be construed strictly. The Court will not extend the law beyond its meaning to take care of a broader legislative purpose. Here "strict" means merely that the Court will refrain from exercising its creative function to apply the rule announced in the statute to situations not covered by it even though such an extension would help to advance the manifest ulterior purpose of the statute. For an offence u/s 138 of the Act mens-rea is not essential, which is clearly spelt out by reading Section 138 of the Act.

37. It is submitted that provisions like Section 138 also exist in countries like United Kingdom and the United States. The object of incorporating such provisions is to inculcate a sense of seriousness in the commercial transaction on the part of the persons issuing cheques and to attach some amount of certainty and capacity to the fact that the cheque issued would be honoured on presentation. It is not merely a breach of civil/contractual obligation. In any event, even the civil/contractual obligation should also be met with all seriousness and should not be encouraged to be seen in exception rather than norm.

38. The respondent also submitted that the petitioners have failed to take note of the provisions of Order XXI Rules 37, 38 and 40 of the Code of Civil Procedure, where in the event of non payment of amount under execution of a decree, civil imprisonment of the judgment debtor is envisaged. There is,

Therefore, no gain saying that a person cannot be convicted to imprisonment if he fails to pay the amount due and payable by him. In fact, sufficient safeguards have been provided in the Act itself and the provisions under reference of the said enactment.

39. The petitioners and the respondents have also filed written submissions. Mr. Gupta, learned counsel for the petitioners placed reliance on the judgment Jolly George Varghese and Another Vs. The Bank of Cochin, . In this case, their lordships of the Supreme Court examined Section 51 and Order XXI Rule 37 of CPC, which envisages imprisonment of a debtor on his failure to pay the decretal amount. The said aspect was examined from the prospective of International law. Reference was made Article 11 of International Covenant on Civil and Political Rights, which states that no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation. The inference which has been drawn by the learned counsel for the petitioners is that in view of the bare reading of the judgment it is clear that it is improper to imprison a debtor to enforce a contractual liability. The petitioners further submitted that in view of this judgment, provisions of contents in Chapter XVII of the Negotiable Instruments Act are liable to be struck down.

40. Detailed written submissions have also been filed by Mr. Neeraj Kishan Kaul, learned counsel for respondent No. 2, Union of India. He has placed reliance on K.I. Shephard and Others Vs. Union of India (UOI) and Others, . The challenge of the petitioners with respect to the constitutional validity of Sections 138 to 142 of the Negotiable Instruments Act is in no way related to the facts of the present case and has been raised in the present writ petition merely to delay the prosecution initiated against the petitioners under the said sections. In view of the aforesaid judgment, it is well settled that a Court will not examine the question of ultra virus unless it is necessary to do so.

41. A reference has also been made to the judgment of Kerala High Court, i.e., Pradeep Chanan Vs. Nimmi Valappan: 1995 CrL L.J. 2768. The Court was also dealing with the said provisions of the Negotiable Instruments Act. It is mentioned that the Criminal liability envisaged under the section is invoked only in the case of dishonouring of cheques and a consequential failure to repay even after the period of statutory notice. The accused incurs no liability if he is able to prove that he made good the payment on receipt of notice or had no liability for making the payments of the amount shown in the cheque. Thus, the provision makes reasonable classification between more civil liability and a criminal offence u/s 138 and does not provides for imprisonment merely for non fulfillment of one's financial liability. The section is attracted only when the condition laid down therein are satisfied. Moreover, when the Act imposes some duties, the accused must answer for the breach of duty. One does not become liable only on issuance of a cheque or for non fulfillment of one's financial liability. Sufficient safeguard for honest drawers is provided.

42. It is incorporated in the written submissions of the Union of India that these

provisions were introduced in order to remedy a peculiar malaise. Therefore, the said provisions were couched with the Rule of strict liability which in any event, rules out the element of mens-rea. Alternatively when the statute forbids the doing of a certain act or requires it to be done in a particular manner, the failure to do the said Act in a manner provided in the statute, itself supplies mens-rea: Nathu Lal Vs. State of M.P.; AIR 1966 SC 45; K.S. Anto Vs. Union of India (UOI) and Others, Rakesh Nemkumar Porwal Vs. Narayan Dhondu Joglekar, .

43. Mr. Kaul also submitted that when the statute expressly excludes the concept of mens-rea the courts ought not to go into this aspect while interpreting the provisions of law, the intention of the legislature has to be ascertained and respected.

44. Mr. Kaul also submitted that the entire controversy of current dated and post dated cheque is not at all relevant under Chapter XVII. A post dated cheque is one that contains a later date than that of delivery, which means that the demand will be postponed till the date on the face of the cheque. Hence, the date on the face of the cheque, is the actual date for the demand of the cheque, and the drawer has to make financial arrangements to meet the liabilities from that date till the period of validity of the cheque. Thus, a post dated cheque may be treated as a bill of exchange at a future date, which becomes a cheque only on the date written on the face of the bill. Thus the provisions of Section 138 which applies only to a cheque, becomes applicable only from the date written on the face of the Bill of Exchange. Thus, the provisions of Section 138 which applies only to a cheque becomes applicable only from the date written on the face of the Bill of Exchange and not on the date of its issue, and the drawer has to make arrangements from such date only, and not from the date of its issue. Reference was made in Anil Kumar Sawhney Vs. Gulshan Rai, .

45. Reference has been made to Division Bench Judgment of the Bombay High Court, i.e., Rakesh Nemkumar Porwal Vs. Narayan Dhondu Joglekar, . In this judgment, the Court observed that there can be little doubt that Section 138 was intended to be a provision to curb instances of dishonouring of cheques. The legislative intent behind Section 138 was that cases of dishonour of a cheque would constitute a criminal offence unless the payment is made within the prescribed time.

46. Reference has also made to another Division Bench Judgment of Bombay High Court, i.e., Mayuri Pulse Mills & Others Vs. Union of India & Others, 1995 (1) Crimes 226. In this judgment also constitutional validity of Sections 138 to 141 was challenged. The Court observed that Entry No. 45 speaks of Banking and Entry No. 46 which provides for Bills of Exchange, cheques, promissory notes and other like instruments are couched in widest form and are wide enough to include the power and competence to the Central Government to provide for penal action and penalties in case of dishonor of certain cheques for insufficient funds. The prosecution and punishment relating thereto are ancillary and subsidiary to the provisions relating to cheque. Words "Banking, Bills of

Exchange, Cheques, Promissory Notes and other like instruments" occurring in Entries Nos. 45 and 46 the meaning of widest amplitude, it can be safely said that the matters relating to penal- ties and prosecution in connection thereto are fairly and reasonably comprehended in such words. The Court held that the Parliament had power and competence to enact Chapter XVII containing Sections 138 to 142 in the Negotiable Instruments Act under Entries Nos. 45 and 46 of List First of the Seventh Schedule to the Constitution. The Court came to the conclusion that there is nothing legally or morally wrong or constitution anathema in such an embargo as provided in section 140 and, Therefore, the Court held that sections 138 and 140 of the Negotiable Instruments Act are constitutionally valid.

47. The constitutional validity has also been challenged before the Allahabad High Court in the case of Smt. Ramawati Sharma Vs. Union of India & Others: 1998 (3) Crimes 280. The writ petition was challenged on the ground of violation of Article 14. The violation of Article 14 has been alleged only on the ground that the Negotiable Instruments Act speaks of promissory notes, bills of exchange and cheques, but Section 138 makes punishable certain acts committed in respect of cheques only. A promissory note, according to Section 4 of Negotiable Instruments act, is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay certain sum of money only to, or to the order of, a certain person on the bearer of the instrument. A bill of exchange is an instrument in writing containing an unconditional order signed by the maker sum of money only to or to the order to a certain person or to the bearer of the instrument. A cheque is also a bill of exchange but is one drawn on specified banker and not expressed to be payable otherwise than on demand. The Court observed that Section 138 does not punish every dishonour of a cheque. It must be a cheque for discharge in whole or any part of debt or other liability and the cheque is to be drawn upon a bank. This provision had to be introduced as in business transactions issuance of cheques to discharge a debt or other liability is a common transaction and it has also been found that to avoid immediate liability, people do take recourse to issuance of cheque which bounces on presentation at bank. The law may not, Therefore, be deemed discriminatory as a promissory note basically differ from a cheque and only a cheque out of possible bills of exchange have been chosen to come under the purview of Section 138. This law has been necessitated because of the malpractices prevalent in our society. The Court observed that Section 138 of the Negotiable Instruments Act is not ultra virus the Constitution and that writ petition was dismissed.

48. Reference was also made to K.S. Auto Vs. Union of India & Others, Vol. (1993) 76 Comp Cas 105. While dealing with the object, the learned Kerala High Court observed that Section 138 of the Negotiable Instruments Act, 1881 was introduced with a laudable public policy behind it. It is intended to prevent or curtail mischief which is likely to affect financial transactions and thereby trade and business and ultimately, the economy of the country. Even though the

normal rule is that an act or illegal omission, in order to constitute an offence, must have the requisite mental condition in the form of intention, knowledge or reasonable belief, that prerequisite could be statutorily dispensed with in appropriate cases by creating strict liability offences in the interest of the nation.

49. In *Nathulal Vs. State of Madhya Pradesh*, the Supreme Court had occasion to deal with the doctrine of mens-rea. The Court observed that mens-rea is an essential ingredient of criminal offence. A statute may exclude the element of mens-rea. It is, however, a sound rule of construction which is adopted in England and also accepted in India. to construe a provision which creates an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excludes mens-rea.

50. Mens-rea by necessary implication may be excluded from statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated. The nature of the mens-rea that would be implied in a statute creating an offence depends on the object of the Act.

51. In *M/S Modi Cements Limited Vs. Shri Kuchil Kumar Nandi*, also the Court observed that Section 138 of the Act is a penal provision wherein if a person draws a cheque on an account maintained by him with the banks for payment of an amount of money to another person from out of that account for the discharge, in whole or in part of any debt or other liability, is returned by the bank unpaid, on the ground either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence. The distinction between the deeming provision and the presumption is well discernible. To illustrate, if a person draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposits the amount thereafter before the cheque is put in the bank by the drawee, and the cheque is honoured, in such a situation drawing of presumption of dishonesty on the part of the drawer u/s 138 would not be justified. Section 138 of the Act gets attracted only when the cheque is dishonoured.

52. The Court in the instant case held that the relevant point of time for determining sufficiency of funds is not the date on which the cheque was drawn but the time when the cheque is to be encashed by the drawer's bank on presentation. Section 138 of the Act gets attracted only when the cheque is dishonoured. Since a cheque would not get dishonoured even if requisite funds were deposited at the last moment.

53. We have heard learned counsel for the parties and carefully perused the judgments cited at the bar. Banking, public financial institutions and Negotiable Instruments Laws (Amendment Act) 1988 and 66 of 1988 were inserted in the Act comprising of Sections 138 to 142 from 1st April, 1989. This chapter has

been inserted with a view to enhance the acceptability of cheque in settlement of dues and liabilities by making the drawer live to the penalties in case of dishonouring or bouncing of cheques due to insufficiency of funds in the accounts or for the reasons that it exceeds the arrangements made by the drawer with adequate safeguard to prevent harassment to the honest drawers. There are in-built safeguards for the honest drawers such as :

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

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him for 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.

54. The legislature by incorporating absolute liability or strict liability -has tried to accomplish the object sought to be achieved by insertion of these sections in the Act. Insertion of these sections without incorporating absolute liability would have been totally meaningless. The object and purpose of incorporating these sections in the Act would be defeated. If in the prosecution of the offence u/s 138 of this Act, the accused is permitted to raise defense, that he has no reason to believe when he issued the cheque that the cheque may be dishonoured when presented. In that situation, the creditors may have to chase the debtors indefinitely. That would adversely affect the entire commercial transactions of trade, business and industry. These provisions have been incorporated in the larger public interest. The Parliament possesses the powers and competence to enact Chapter XVII under entries 45 and 46 of the list of. Seventh Schedule of the Constitution. Therefore, we find no merit in the challenge to the constitutionality of Sections 138 to 142 of the Negotiable Instruments Act, 1881.

55. In view of our said conclusions, we do not find any merit in the submission of the petitioners that a statute pertaining to criminal law cannot exclude the element of mens-rea. Ordinarily, mens-rea is an essential ingredient of the criminal offence but the legislature can always create an offence of absolute or strict liability. The principle of strict liability has been introduced to encourage greater vigilance to prevent usual callous attitude of drawers of cheques in discharge or debt or liability. In the instant case, the element of mens-rea has been excluded in the larger public interest to curb the instances of dishonouring of cheques and to lend greater credibility to the commercial transactions which are vital for trade, business and industry in general and for internal business transactions in particular.

56. Insertion of these provisions in the Act is an apt illustration of balanced and pragmatic approach adopted by the legislature for the economic development of the country. There are built in safeguards to prevent harassment to the honest drawers.

57. We also do not find any merit in the submission of the petitioners that Section 138 of the Act is violative of Articles 14 or 21 of the Constitution of India.

58. On consideration of the totality of the facts and circumstances in our considered view the writ petition is devoid of any merit and accordingly the petition is rejected.