

(2016) 02 GUJ CK 0179

In the Gujarat High Court

Case No : Criminal Misc. Application (For Quashing & Set Aside Fir/Order)
No. 18025 of 2014 and Criminal Misc. Application Nos. 19615 to
19618 of 2014

Ratilal Harmanbhai Patel

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 23-02-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 118(g), Section 13, Section 138,
Section 139, Section 14, Section 140, Section 141, Section 142, Section 15, Section
16, Section 26, Section 28,

Citation : (2016) 02 GUJ CK 0179

Hon'ble Judges : J.B. Pardiwala, J.

Bench : Single Bench

Advocate : Kunal S. Shah, Advocate, for the Appellant; Hansa Punani, APP, for
the Respondent

Final Decision : Dismissed

Judgement

J.B. Pardiwala, J.—1. Since the issues raised in all the captioned applications are more or less the same, those were heard analogously and are being disposed of by this common judgment and order.

2. By these applications, the applicant - original accused No. 3 seeks to invoke the inherent powers of this Court praying for quashing of the proceedings of the Criminal Cases referred to in the prayer clause of each of the applications pending in the Court of the learned Principal Civil Judge and Judicial Magistrate First Class, Borsad, District: Anand.

3. The Criminal Miscellaneous Application No. 18025 of 2014 is treated as the lead matter.

4. The facts of the case are as under:

"4.1 The respondent No. 2 - original complainant filed a private complaint for the offence punishable under Section 138 of the Negotiable Instruments Act as well as for the offence punishable under Sections 420 read with 114 of the Indian Penal Code against the applicant herein and two other co-accused in the Court of the learned Judicial Magistrate First Class, Borsad.

4.2 It appears from the averments made in the complaint that the original accused No. 1, namely, Manoj Jayantibhai Patel, proprietor of a proprietary concern running in the name of M/s. Hina Tobacco issued a cheque drawn in the name of the accused No. 2, namely, Ramesh Chhotabhai Thakore dated 13th January, 2009 for the amount of Rs. 1,00,000/- (Rupees one lac only) drawn on the Dena Bank, Bhadran. The cheque issued by the accused No. 1 in favour of the accused No. 2 was towards the discharge of some debts incurred by the accused No. 1 towards the accused No. 2.

4.3 It appears that the accused No. 2 also had some transaction with the applicant herein. The accused No. 2 in turn indorsed the cheque in favour of the applicant herein.

4.4 The applicant, in turn, indorsed the cheque and got it discounted through the complainant. The complainant is one of the partners of a partnership firm engaged in the business of finance and discounting.

4.5 It is the case of the complainant that the applicant herein, after indorsing the cheque, received Rs. 1,00,000/- from the complainant. It is also averred in the complaint that the applicant herein also signed few vouchers acknowledging the receipt of the amount. The applicant herein is also said to have issued a promissory note in favour of the complainant in that regard.

4.6 It is the case of the complainant that, according to the instructions of the applicant herein, he presented the cheque for encashment in the account maintained with the Dena Bank, Bhadran Branch. The bank returned the cheque to the complainant with an endorsement "not arranged for".

4.7 It is the case of the complainant that the dishonour of the cheque was brought to the notice of all the three accused persons, but they failed to make the payment. After completing the necessary legal formalities and issue of notice, the complainant thought fit to file five different complaints as five cheques were involved.

4.8 It appears that the Judicial Magistrate First Class took cognizance upon all the five complaints and issued process for the offence punishable under Section 138 of the Negotiable Instruments Act.

4.9 The complaints culminated in five different criminal cases.

4.10 The applicant - original accused No. 3 has come up with five applications under Section 482 of the Code of Criminal Procedure, 1973, praying for quashing of the criminal proceedings."

5. Mr. Kunal S. Shah, the learned advocate appearing for the applicant vehemently submitted that the complaint under Section 138 of the Negotiable Instruments Act against his client is not maintainable. He submitted that his client is not the drawer of the cheque. According to Mr. Shah, it is the accused No. 1, who had issued the cheque in favour of the accused No. 2, and the accused No. 2, after indorsing the cheque, handed it over to his client. His client, in turn, indorsed the cheque and got it discounted through the complainant.

6. According to Mr. Shah, the complainant cannot be termed as a "holder in due course" and even if he is believed to be the "holder in due course", a complaint under Section 138 of the Act is not maintainable at the instance of a holder in due course.

7. According to Mr. Shah, merely because his client got the cheques discounted and received the amount from the complainant, he cannot be made liable under Section 138 of the Act. He submitted that a holder in due course of a Negotiable Instruments Act cannot maintain a complaint under Section 138 of the Act in the absence of a legal enforceable debt between the parties, and hence, the proceedings may be quashed.

8. Mr. Shah submitted that to attract the ingredients of Section 138 of the Act, the complainant must prove that there was a legal enforceable debt between the complainant and his client. In the present set of facts, it would disclose that there was no legal enforceable debt between the accused applicant herein and the complainant. It is purely a commercial transaction between the complainant and the applicant accused.

9. Mr. Shah submitted that on a true and fair construction of the language of Section 138 of the Act, it is clear that the Act has not envisaged any vicarious liability, except under Section 141 of the Act and, therefore, the prosecution against the applicant herein is not maintainable.

10. Mr. Shah, in support of his submission s, placed strong reliance on a judgment rendered by a learned Single Judge of the Andhra Pradesh High Court in the case of Shridi Sai Steel, Balu Complex and others, etc v. State of A.P. And another [, 2002 Criminal Law Journal 3193].

11. On the other hand, all these applications are vehemently opposed by Shri P.S. Chaudhary, the learned advocate appearing for the complainant. He submitted that a complaint under Section 138 of the Act is maintainable at the instance of a holder in due course. He submitted that the Andhra Pradesh High Court judgment in the case of Shridi Sai Steel (supra) relied upon by the learned counsel appearing for the applicant is not a good law after the decision of the Supreme Court reported in Punjab & Sind Bank v. Vinkar Sahakari Bank Ltd. and others [, (2001) 7 SCC 721]. Mr. Chaudhari submitted that in view of the Supreme Court decision, the payee or holder in due course can always make a demand for payment of the requisite amount for which the cheque has been issued by giving notice in writing. He submitted that it is the payee or the holder

in due course that are entitled to present the complaint under Section 142 of the Act. He submitted that the complaint is certainly maintainable by a holder in due course when the cheque was indorsed and presented to his client who paid the amount after purchasing the cheque.

12. He submitted that there being no merit in the issue raised by the applicant, all the applications deserve to be rejected.

13. Having heard the learned counsel appearing for the parties and having considered the materials on record, the following questions fall for my consideration:

"(I) Whether in the facts of the case, the complainant could be said to be a holder in due course within the meaning of Section 9 of the Act?

(II) Whether a complaint for the offence punishable under Section 138 of the Act is maintainable at the instance of a holder in due course?

(III) Whether the criminal proceedings should be quashed at this stage?"

14. Let me first look into the decision of the Andhra Pradesh High Court in the case of Shridi Sai Steel (supra). The complaint was filed by the Karur Vysya Bank Limited, Visakhapatnam. The 4th accused in the said case on behalf of the 3rd accused issued cheques in favour of the 1st accused drawn on the bank and the said cheques were discounted by the accused 1 and 2 with the complainant at the Shivajipalem Branch and received the amount covered under the cheques. The 5th accused and 7th accused on behalf of the 4th accused issued cheques in favour of the accused 1 and accused 1 to accused 3 respectively who discounted the cheques with the complainant. However, when the cheques were negotiated by the complainant with the Karur Vysya Bank Limited, Gajuwaka Branch, the cheques in question were dishonoured and returned with the indorsement "account closed". After issuing legal notices to the accused demanding to pay the amount received under the cheques which were bounced and since the accused failed to comply with the demand, the complainant filed the criminal cases against the accused therein and when the said cases were taken on file and summons were issued, the petitioners therein filed applications to quash the proceedings under Section 482 of the Cr.P.C. The learned Single Judge of the Andhra Pradesh High Court while allowing the applications observed as under:

"6. The learned Advocate appearing for the petitioners submitted at the Bar that a holder in due course of a negotiable instrument cannot maintain a complaint under Section 138 of the Negotiable Instruments Act since there is no legally enforceable debt between the parties and thereby, the criminal proceedings are liable to be quashed. The learned Advocate appearing for the petitioners relied on a decision of this Court in K. Seetharam Reddy v. K. Radhika Rani, , II (2001) BC 429 : , 2001 (1) ALT (CrI.) 175 (A.P.), wherein it was held as under

"The Act has not envisaged any penal consequences for the conspiracy, abetment and attempt to commit the said offence. The expressions used in Section 138

viz., "by a person", "on an account maintained by him", and "such person" make it manifest that the person who has drawn the cheque on an account maintained by him alone is liable.

The invariable conclusion that emerges from the above discussion is that the Act has not envisaged any vicarious liability. In the event of the drawer of the cheque being a juristic person, the juristic person as well as the persons in-charge of are responsible to the juristic person for the conduct of the business are liable."

7. The learned Counsel for the petitioners further relied on the decisions of this Court in K. Janakimanoharan and Anr. v. Gayatri Sugar Complex Limited, Hyderabad, and in V. Balaji and Anr. v. D. Vijaya gopala Reddy, wherein the same proposition of law, as extracted above, is enunciated.

8. Now the question that arises for consideration is whether the holder in due course can maintain a complaint under Section 138 of the Negotiable Instruments Act ?

9. Admittedly, the 4th accused on behalf of the 3rd accused in some cases and 5th accused on behalf of the 4th accused and 7th accused on behalf of 4th accused in other cases issued cheques in favour of the 1st accused and that the accused 1 and 2 in some cases and A. 1 to A.3 in other cases discounted the cheques with the complainant Bank and when the cheques were negotiated they were dishonoured and returned with the endorsement account closed. As per the allegations contained in the complaint, there is no legally enforceable debt between the complainant and the accused. In fact, A.3 and A.4 or A.4 to A.7 did not issue cheques in favour of the complainant. Cheques were issued in favour of A.1 and A.1 and A.2 or A.1 to A.3 discounted the cheques with the complainant. The cheques were drawn on Vysya Bank Limited, Gajuwaka. The facts on record would disclose that the cheques were not issued for any legally enforceable debt and therefore the complainant cannot maintain the complaint under Section 138 of the Negotiable Instruments Act. To attract the ingredients of Section 138 of the Negotiable Instruments Act, the complainant must prove that there was a legally enforceable debt between the complainant and the accused. In the present set of facts, it would disclose that there was no legally enforceable debt between the accused and the complainant. It is purely a commercial transaction between the complainant and the accused. The complainant is only a holder in due course and he cannot maintain a complaint under Section 138 of the Negotiable Instruments Act. From a true and fair construction of the language of Section 138 of the Negotiable Instruments Act, it is clear that the Act has not envisaged any vicarious liability and therefore the prosecution against the petitioners is not maintainable. For the above said reasons, it is held that a holder in due course of a negotiable instrument cannot maintain a complaint under Section 138 of the Negotiable Instruments Act and therefore the prosecution against the petitioners/accused is liable to be quashed."

15. For the reasons, I shall record hereinafter. it is extremely difficult for me to

subscribe the view taken by the learned Single Judge of the Andhra Pradesh High Court referred to above.

16. Before I proceed to answer a neat question of law raised in these applications, let me first look into few relevant provisions of the Act.

17. Section 8 of the Act explains the term "holder". The same reads thus:

"The "holder" of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction."

18. Section 9 of the Act explains the term "holder in due course". The same reads thus:

"Holder in due course" means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if a [payable to order,] before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title."

19. Section 13 of the Act explains the term "negotiable instrument". The same reads thus:

"(1) A "negotiable instrument" means a promissory note, bill of exchange or cheque payable either to order or to bearer.

Explanation (i).--A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

Explanation (ii).--A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank.

Explanation (iii).--Where a promissory note, bill of exchange or cheque, either originally or by endorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

(2) A negotiable instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees."

20. Section 14 of the Act explains the term "negotiation". The same reads thus:

"When a promissory note, bill of exchange or cheque is transferred to any

person, so as to constitute that person the holder thereof, the instrument is said to be negotiated."

21. Section 15 of the Act explains the term "indorsement". The same reads thus:

"When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same, and is called the "indorser"."

22. Section 16 of the Act explains the term "in blank" and "in full" - "indorsee". The same reads thus:

"[(1)] If the indorser signs his name only, the indorsement is said to be "in blank", and if he adds a direction to pay the amount mentioned in the instrument to, or to the order of, a specified person, the indorsement is said to be "in full", and the person so specified is called the "indorsee" of the instrument.

[(2) the provisions of this Act relating to a payee shall apply with the necessary modifications to an indorsee.]"

23. Section 35 explains the liability of indorser. The same reads thus:

"In the absence of a contract to the contrary, whoever indorses and delivers a negotiable instrument before maturity, without, in such indorsement, expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor or maker, to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given to, or received by, such indorser as hereinafter provided.

Every indorser after dishonour is liable as upon an instrument payable on demand."

24. Section 50 explains the effect of an indorsement. The same reads thus:

"The indorsement of a negotiable instrument followed by delivery transfers to the indorsee the property therein with the right of further negotiation; but the indorsement may, by express words, restrict or exclude such right, or may merely constitute the indorsee an agent to indorse the instrument, or to receive its contents for the indorser, or for some other specified person.

Illustrations

B signs the following indorsements on different negotiable instruments payable to bearer :

(a) "Pay the contents to C only."

(b) "Pay C for my use."

(c) "Pay C or order for the account of B."

(d) "The within must be credited to C."

These indorsements exclude the right of further negotiation by C.

(e) "Pay C."

(f) "Pay C value in account with the Oriental Bank."

(g) "Pay the contents to C, being part of the consideration in a certain deed of assignment executed by C to the indorser and others."

These indorsements do not exclude the right of further negotiation by C."

25. Section 51 laws down who may negotiate. The same reads thus:

"Every sole maker, drawer, payee or indorsee, or all of several joint makers, drawers, payees or indorsees, of a negotiable instrument may, if the negotiability of such instrument has not been restricted or excluded as mentioned in section 50, indorse and negotiate the same.

Explanation.--Nothing in this section enables a maker or drawer to indorse or negotiate an instrument, unless he is in lawful possession or is holder thereof; or enables a payee or indorsee to indorse or negotiate an instrument, unless he is holder thereof.

Illustration

A Bill is drawn payable to A or order. A indorses it to B, the indorsement not containing the words "or order" or any equivalent words. B may negotiate the instrument."

26. Section 52 explains indorser to exclude his own liability or makes it conditional:

"The indorser of a negotiable instrument may, by express words in the indorsement, exclude his own liability thereon, or make such liability or the right of the indorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen. Where an indorser so excludes his liability and afterwards becomes the holder of the instrument, all intermediate indorsers are liable to him.

Illustrations

(a) the indorser of a negotiable instrument signs his name, adding the words- "Without recourse".

Upon this indorsement he incurs no liability.

(b) A is the payee and holder of a negotiable instrument. Excluding personal liability by an indorsement "without recourse", he transfers the instrument to B, and B indorses it to C, who indorses it to A. A is not only reinstated in his former

rights, but has the rights of an indorsee against B and C."

27. The primary concept lurking behind the expression "holder in due course" is that of a bona fide transferee for value who usually stands protected against the defective ownership of his predecessors in title. The two principal and negative features of a holder in due course, therefore, are that, in the first place, he should not have acquired his right, title and interest in gratis and that he should not have any ground to suspect a defect in the title of his predecessors. Analysing the language of the section one finds, therefore, that a holder in due course must satisfy the following conditions:

"[1] He has acquired title for consideration,

[2] He has become :

(a) the possessor of any negotiable instrument, if payable to bearer, or

(b) the payee or indorsee of a negotiable instrument, if payable to order,

[3] He has acquired title in the aforesaid manner before the negotiable instrument became payable, and

[4] He did not, at the time of acquiring such title, have sufficient cause to believe that any defect existed in the title of the person from whom he derived his title."

28. The material distinction between a holder and a holder in due course, as stated earlier, is that a holder in due course alone can have protection against the defects in the title of the previous holders of the negotiable instrument as substantially stated in the Indian and the English law on the subject.

29. A mere reference to Section 9 of the Act makes it clear that a "holder in due course" means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof. Thus, a purchaser of the cheque is a holder in due course and it is not necessary that in favour of purchaser of the cheque, there should be an indorsement also. A complaint under Section 138 of the Act, by such holder in due course, is maintainable.

30. Under Section 139 of the Act, a presumption is drawn in favour of holder of a cheque, it shall be presumed, unless the contrary is proved, that the holder in due course 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. Whereas, under Section 118(g) of the Act, the burden of proving that the holder is a holder in due course lies upon him under Section 139, burden lies upon the drawer of the cheque to rule out the existence of the debtor - creditor relationship.

31. Section 138 is not couched in a precise language. Apart from being vague, it is likely to be mis-interpreted in a manner different from what was intended by the law-making body, and this is because of the words "payment of any amount of money to another person" appearing in the main enacting clause. The words

"another person" are not explained. This at the first blush gives an incorrect impression that the words "another person" mean only a "payee" and that the sweep of the offence is confined to the drawer and the payee. I, therefore, hold that both the payee and holder in due course are covered by the expression "another person" but not a mere holder or indorsee without consideration.

32. The rebuttable presumption under Section 139 operates only in favour of the payee or a holder in due course but not in favour of a person, who, without consideration, became the holder of the cheque.

33. In a prosecution under Section 138, it is open to the accused to rely upon the other provisions of the Act in support of his plea of innocence except the defence that is specifically excluded by Section 140. Where the complainant is a holder in due course, the rebuttable presumption is that the endorsement of the cheque in favour of the holder in due course was for consideration and that the cheque was issued for the discharge, in whole or in part, of a legally enforceable debt or any other liability. The drawer of the cheque can always take the plea that the amount covered by the cheque was not for the discharge of any legally enforceable debt or liability. The initial burden is on the complainant to show that the cheque was issued for the discharge of a legally enforceable debt or other liability. Then the burden shifts to the respondent to establish that the cheque issued was not of the nature referred to in Section 138. In doing so, he may also rely upon circumstantial evidence. See *Kundan Lal v. Custodian, Evacuee Property*, , AIR 1961 SC 1316. The following example will make the position clear :

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

34. Mr. Shah tried to develop an argument by placing reliance on Section 139 of the Act that the complainant is not a holder in due course. He also submitted that a presumption under Section 139 would not apply even if the complainant is believed to be a holder in due course.

35. It is true that the definition of "holder" and "holder in due course", is given in two different sections. According to Section 8, the "holder" of a cheque means any person entitled in his own name to the possession thereof. The definition of "holder in due course" as mentioned in Section 9 of the Act gives the meaning that any person who for consideration, became the possessor of cheque, if payable to bearer. Section 139 of the Act would indicate that "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 of the Act for the discharge,

in whole or in part, or any debt or other liability.

36. A conjoint reading of Sections 8, 9 and 138 of the Act would include "holder in due course" also, as he alone would be entitled to initiate the criminal proceedings under Section 138 of the Act as soon as he gets the said cheque from the holder as an indorser for the purpose of consideration. According to the provision of Section 15 of the Act referred to above, the maker or holder of a cheque can sign for the purpose of negotiation, in favour of a third party and the said transaction is called the "indorsement". Section 138 of the Act would postulate that where any cheques were drawn by a person on an amount maintained by him for payment of any amount of money to any other person from out of his account for the discharge of his liability, is returned by the Bank as the same is insufficient to honour the cheque, such person shall be deemed to have committed the offence. In the case in hand, the cheques were issued by the original accused No. 1 in favour of the accused No. 2. The accused No. 2 indorsed those cheques in favour of the accused No. 3 i.e. the applicant herein, and the applicant No. 3, in turn, further indorsed in favour of the complainant for consideration.

37. The stage is right for me to refer and rely upon the decision of the Supreme Court in the case of Punjab & Sind Bank (supra), wherein the Court observed in paras, 20, 21, 22 and 23 as under:

"20. The third ground for quashing the complaint is that the complainant was not "a holder in due course" in the absence of an endorsement made on the instrument in the manner prescribed under S. 50 of the Act. This ground was adopted by the learned single Judge without regard to certain relevant provisions of the Act.

21. Section 142 of the Act envisages a complaint to be made in writing "either by the payee or the holder in due course of the cheque, as the case may be". Section 8 of the Act defines "holder" as any person entitled in his own name to the possession of the cheque and to receive or recover the amount due thereon from the parties thereto. We have no doubt that complainant-bank was well within its right to possess the cheque and to receive or recover the amount covered by the instrument. "Holder in due course" means a person who for consideration became the possessor of a cheque if payable to bearer before the amount became payable. (vide Section 9).

22. In this context reference has to be made to S. 118(g) of the Act which contains a mandate that until the contrary is proved the holder of a negotiable instrument shall be presumed to be a holder in due course. Thus there is no escape for the Court from drawing such presumption.

23. It is undisputed that the complainant-company is the holder of the instrument on its own right. As such it could be a holder in due course also until the concerned party adduces evidence to rebut the presumption. It is of course open to the respondents to rebut the presumption in the trial but till then the

High Court could not say that the complainant is not a holder in due course at all."

38. In *Gaddam Venkataraju v. Andhra Bank (Nationalised)*, Hyderabad and another, reported in , AIR 2000 Andhra Pradesh 379, J. Chelameswar, J. (as His Lordship then was) has very succinctly explained the effect of indorsement and also "discounting". I may quote the observations made from paras 12 to 29 as under:

"12. It is already noticed from the history of Negotiable Instruments that bills of exchange have always been negotiable. Section 14 of the Negotiable Instruments Act, defines the expression "negotiation" and in the context of a cheque it reads thus: "when a cheque is transferred to any person so as to constitute that person the holder thereof", the cheque is said to be negotiated. Under Section 8 of the Negotiable Instruments Act, the holder of a cheque is defined to be "any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto."

13. To understand the concept of negotiation, the expression "transfer" in the context of property and the concept as to who is entitled to the possession of the property require examination. There are various modes of transfer of property known to law. They are sale, exchange, gift, mortgage, lease etc. Some of these modes are peculiar only to immovable property. As far as movable property is concerned, sale, exchange and gift are also known modes of transfer. Whether the other modes of transfer available in the context of immovable property are also available to transfer of movable property is not required to be gone into in this case having regard to the facts of the case. When the property is transferred either by sale or exchange, there is a consideration, which could be computed in terms of money whereas when the property is transferred by way of gift, such a consideration is absent.

14. As a proposition of law it is well settled that a cheque is movable property. Therefore, normally it is capable of being transferred by way of either "sale" or "exchange" or "gift". In all the abovementioned categories of transfer, the transferee becomes the absolute owner of the cheque. Possession is one of the necessary incidents of ownership.

15. But possession and ownership of property need not always go together. Anglo Saxon Jurisprudence recognizes that the owner of the property always need not be in possession of the property. The owner can permit some other person to be in possession. At times the possession of property can lie with persons who have no title or claim to ownership of the property even without the permission of the owner. It is also settled principle of law that whoever is in possession of the property is entitled to, the enjoyment of the said property and if any person interferes with such enjoyment of the property or deprives the possessor of his possession of the property, the possessor is entitled to bring an action in law to recover his possession.

16. The cheque being movable property, any person who is in possession of a cheque would also normally be entitled to seek protection of law for enjoying the property. Normally a person who is in possession of a cheque, should be able to receive the amount due thereon from the persons who are liable to make payment if they pay voluntarily or recover the same by initiating appropriate legal proceedings if it is not voluntarily paid.

17. But the legislature imposed limitation on such a right by stipulating that the holder of cheque would only be a person who is "entitled in his own name to the possession thereof". Though in realm of immovable property, a person who is in adverse possession of the immovable property can resist even real owner from interfering with the property, subject to the law of limitation, the legislature obviously having regard to the nature of the property in a cheque chose to define the expression "holder" as meaning only a person "entitled to in his own name" thereby implying by some means legally recognized - to the possession of the cheque.

18. When a cheque is transferred without consideration by the previous holder, the transferee becomes holder. On the other hand if a cheque is transferred for consideration, the transferee becomes holder in due course. As can be seen from the definitions of "holder" and "holder in due course" that every holder in due course is also a holder, but every holder is not necessarily a holder in due course.

19. Once a person is a holder, he should be entitled to receive the amount due on the cheque if paid voluntarily by the persons liable to make the payment and recover the same by appropriate action in law if the amount is not paid voluntarily by such persons.

20. The next question is that from whom such amount can be recovered. Section 8 of the Act says that the amount can be recovered from the parties to the cheque. The expression "parties to the cheque" or "bill of exchange" is not defined under the Act. But Chapter III of the Act deals with the same. Under the various Sections of Chapter III, legislature defined the liability of the various persons dealing with the bills of exchange, cheques etc., Section 26 of the Act declares that every person who makes, draws, accepts, endorses, delivers, or negotiates may bind himself and be bound. Section 28 of the Act deals with agent signing Negotiable Instrument on behalf of any person making, drawing, accepting, endorsing, delivering, or negotiating the negotiable instruments. Similarly Section 29 of the Act deals with the liability of the legal representative of any of the persons mentioned above when he signs negotiable instrument. Section 30 deals with the liability of the drawer. The liability of every one of the person who would have an occasion to deal with a cheque/bill of exchange, in various capacities is clearly spelt out by the legislature in the succeeding sections. The legislature also spelt out the various circumstances under which such liability accrues to such person. Therefore, from any one of the persons, who deals with a negotiable instrument, contemplated under Chapter III of the Act, who are the parties to the negotiable instrument, the amount can be

recovered subject to the limitations imposed under the relevant provision.

21. In the context of a cheque, there is always drawer, drawee and payee. Apart from them, any one of the abovementioned persons can negotiate the cheque thereby creating rights and obligations in third parties. As already noticed from the definition of the expression "cheque" and "Bill of exchange" a cheque can be drawn and payable to a specified person or ordered to be payable to the specified persons or to the bearer. Depending on the fact that as to whom the cheque is payable, the mode of negotiation varies.

22. Section 47 of the Act, stipulates that a cheque payable to the bearer is negotiable by delivery thereof. Section 48 of the Act stipulates that a cheque (payable to order) is negotiable by the holder by endorsement and delivery thereof. The expression "indorsement" is defined under Section 15 of the Act and according to the said definition, whenever the maker or the holder of the negotiable instrument signs the same for the purpose of negotiation, then the instrument is said to be endorsed. Section 35 of the Act stipulates that any person who endorses and delivers a negotiable instrument is bound himself thereby to the subsequent holder to compensate such holder for any loss or damage caused to him, in case, the instrument eventually is dishonoured by that person who is legally liable to make the payment. Ofcourse, Section itself provides that the indorsee may at the time of indorsement expressly exclude or make his liability conditional.

23. The legal position in common law, with respect to delivery of a negotiable instrument without indorsement, fell for consideration before the English Courts in a judgment, reported in Fenn and Harrison, (1790) 100 ER 842. In the following factual background :

"Where the holder of a bill of exchange desired A to get it discounted, but positively refused to indorse it, and A delivered it to B for the same purpose, informing him to whom it belonged, and B, finding that he could not dispose of it without indorsing it, was prevailed upon to do so by A's telling him that he would indemnify him; but the indorsee took it upon the credit of the names on the bill without any knowledge of the real owner.

24. In an action against the holder, the Court by majority held that such holder is not liable. Buller, J. held :

"..... I consider this action as a new attempt; and it is difficult to say to what extent it may be carried, if it be encouraged. In the case of a bill of exchange, we know precisely what remedy the holder has, if the bill be not paid; his security appears wholly on the face of the bill itself; the acceptor, the drawer and the indorsers, are all liable in their turns, but they are only liable because they have written their names on the bill. But this is an attempt to make some other persons liable, whose names do not appear on the bill, and that under circumstances very alarming to mercantile houses through whose hands bills of exchange pass,..... "

25. Section 35 of the Act embodies the principle of law merchant to the extent that any person indorsing a negotiable instrument is liable thereon. However, either Section 35 or the other provisions of the Negotiable Instruments Act are silent about the liability of a party to the negotiable instrument which he chose not to indorse. Therefore, the principle of law merchant enunciated in the above referred case still holds good.

26. A Division Bench of Madras High Court, in the case of Valjee Kanjee and Co. v. Horsookdas, , AIR 1932 Mad 323, while interpreting with Section 35 of the Act, held :

"Further, the defendants were not endorsers of the bills. They were transferors by delivery; and a transferor by delivery is not liable on the instrument; vide Section 58(2), Bills of Exchange Act. It is true that there is no provision in the Negotiable Instruments Act corresponding to Section 58(2). But this Section simply embodies the law merchant which was explained by Abbott, C. J. in Van Wart v. Woolley, (1824) 3 B and C 439 at page 445 as follows :

"If a person delivers a bill to another without endorsing his own name upon it, he does not subject himself to the obligations of the law merchant, he cannot be sued on the bill either by the person to whom he delivers it or by any other....."

27. Coming to the facts of the case, as already noticed, the appellant who is the payee of the cheque in dispute did not indorse the same, but, only delivered it to the first respondent-bank. The cheque being a bearer cheque could be negotiated by delivery in view of Section 47 of the Act. The first respondent admittedly discounted the cheque. The expression "discounting" is defined by the celebrated author on banking; Paget, in the following terms.

"To discount a bill is to buy it to become the transferee of it by having it endorsed or transferred by delivery by the holder giving him a price settled either by agreement or by current rate in the money market and based on the time the bill has to render."

28. The said definition is quoted with approval by the Division Bench of Madhya Pradesh High Court in the case of Dena Bank v. M.P.N.T. Corporation Limited, , AIR 1982 Madh Pra 85, their Lordships held that discounting is nothing but purchasing. Their Lordships further held as under (Paras 16 and 17) :

"..... It is clear that if the bills and the relevant documents presented by its drawer are accepted by a banker with endorsement in its favour and the same are immediately discounted by the banker without waiting for its collection, by giving full credit for the entire amount of the document, so presented, the banker itself becomes a purchaser and the holder thereof for full value....."

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..... that the defendant Bank was not only a collecting agent of the documents

presented to it by the plaintiff company but the documents on presentation were discounted by the Bank and the value was credited to the account of the plaintiff immediately without waiting for its collection from the drawee. These facts and circumstances clearly make out a case that the Bank was purchaser of title documents and it was holder thereof for full value..... "

On the facts of the case before their Lordships, it appears that the bill of exchange in question was in fact indorsed by the holder. In such a case, having regard to the language of Section 35 of the Negotiable Instruments Act, their Lordships should have reached a conclusion that the indorsee was liable and the result of the appeal should have been otherwise. Apparently, Section 35 of the Act was not brought to the notice of their Lordships, I am in entire agreement with the view of the opinion of their Lordships insofar as the effect of discounting is concerned. With respect to the conclusions reached by their Lordships, for the reasons mentioned above, I mostly humbly disagree.

29. If that is the legal effect of discounting, the first respondent-bank has become a holder in due course and, therefore, is entitled to recover the amount from the parties to the cheque. It is doubtful whether the appellant can be called a party to the cheque in view of the fact that he is the payee, but definitely a party to the cheque in view of the fact that he delivered the same to the first respondent bank, that he could not be mulcted with the liability in view of the above discussion as he did not endorse the cheque in question, nor he bind himself to be liable by a contract (as no such contract was either pleaded or proved by the respondent;) nor there is anything in the Negotiable Instrument Act which fastens the liability on the appellant. For all the above reasons, the appeal deserves to be allowed."

39. In my view, more than a prima facie case is made out against the accused to put him to trial for the offence punishable under Section 138 of the Act.

40. In the result, all these applications fail, and are, hereby, rejected. Notice discharged. The ad-interim orders are vacated forthwith.