



LL.B VI Term

LB-6032-Insurance and Banking Law

Cases Selected and Edited by

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LL.B. VI Term

Paper: LB – 6032 –Insurance and Banking

PART A : INSURANCE

Prescribed Legislations:

1. The Insurance Act, 1938
2. The Marine Insurance Act, 1963
3. The Life Insurance Corporation Act, 1956
4. The General Insurance Business (Nationalization) Act, 1972
5. The Insurance Regulatory and Development Authority Act, 1999

Prescribed Books:

1. Sumeet Malik, *J.V.N. Jaiswal's Law of Insurance- Vols 1&2* (2ndedn., 2016)
2. GauravVarshney, *Insurance Laws*, (1st ed., 2017)
3. M.N. Srinivasan & K. Kannan (Revised by Justice K. Kannan) *Principles of Insurance Law* (10th ed., 2017)
4. M.N. Mishra, *Law of Insurance* (9th ed., 2012)
5. Birds, John, *Modern Insurance Law* (2003)
6. M.B. Shah, *Landmark Judgments on Insurance* (2004)
7. E.R. Hardy Ivamy, *General Principles of Insurance Laws*, (6th ed.,1993)
8. Vandana Singh, K. B. Agrawal, *Insurance Law in India*, (2012)
9. Evan James MacGillivray, *MacGillivray on Insurance Law: Relating to All Risks Other Than Marine*, (1997)
10. K.S.N. Murthy & K.V.S. Sarma, *Modern Law of Insurance in India* (4th ed., 2002)

Topic 1: Contract of Insurance

- Insurance Contracts as indemnity contracts
- Mitigation of Risk
- Premium
- Kinds of Insurance :
 - Marine Insurance
 - Fire Insurance
 - Life Insurance
- Formation, performance and discharge of contract

Topic 2: Principles of Insurance Contract

- Contract of Insurance
- General Principles – General Essentials of a valid contract :
 - Offer and Acceptance,
 - Consideration,
 - Intention to create legal relationship
 - Capacity to Contract
 - Legality of Object
- Special Principles –

- Uberrimae Fidei
- Causa Proxima
- Insurable Interest
- Subrogation
- Contribution

1. <i>Pink v. Fleming</i> (1890) 25 QBD 396	01
2. <i>Mithoolal Nayak v. Life Insurance Corporation of India</i> .AIR 1962 SC 814	02
3. <i>Kasim Ali Bulbul v. New India Assurance Co.</i> AIR 1968 J & K 39	10
4. <i>Smt. Krishna Wanti Puri v. Life Insurance Corporation of India</i> ,AIR 1975 Del. 19	19
5. <i>Smt. Dipashri v. Life Insurance Corporation of India</i> , AIR 1985 Bom 192	28
6. <i>Life Insurance Corporation of India v. Asha Goel</i> , AIR 2001 SC 549	36

Topic 3: Rules of Construction of Insurance Policy

7. <i>New India Assurance Co. Ltd. v. M/s Zuari Industries Ltd.</i> (2009) 9 SCC 70	40
8. <i>Simmonds v. Cockell</i> (1920) All ER Rep. 162	46
9. <i>Harris v. Poland</i> (1941) All ER 204: 1 K.B.D. 204	48

PART – B: BANKING

Prescribed Legislation: The Banking Regulation Act, 1949 (B.R. Act)

Reserve Bank of India Act, 1934

Prescribed Books:

1. Dr. Bimal N. Patel, Dr. Dolly Jabbal, &Prachi V. Motiyani, ***Banking Law*** (1st ed., 2014)
2. C.R. Datta& P.M. Bakshi, **M.L. Tannan’s *Banking - Law and Practice in India*** (21th ed., 2008)
3. R.K. Gupta, ***Banking - Law and Practice*** (2nd ed. 2008)
4. Mark Hapgood, **Paget’s*Law of Banking*** (13th ed., 2007)
5. M.L. Tannan, Revised by Vinod Kothari, ***Tannan’s Banking Law and Practice in India***, (26th ed., 2017)
6. S.N. Gupta, ***The Banking law in Theory and Practice, Vol. 1, 2&3***, (6th ed., 2017)

Topic 4: The Evolution of Banking Services and its History in India

- History of Banking in India
- Bank Nationalization and social control over banking
- Various types of Banks and their functions
- Contract between banker and customer: their rights and duties
- Role and functions of Banking Institutions
- Banking Sector Reforms in India (Narasimham Committee Report I (1991) and II (1998)

Topic 5: Banking System in India and Control by Reserve Bank of India

Banking Regulations Act, 1949

- Definition of ‘bank’, ‘banker’, ‘banking’, ‘banking companies’
- Development of banking business and companies;
- Regulations and restrictions;

- Powers and control exercised by the Reserve Bank of India (B.R. Act, sections 5-36AD)
- The Banking Regulation (Amendment) Act, 2017 – Provisions regarding Non-performing Assets (NPAs)

Reserve Bank of India Act, 1934

- Establishment and Incorporation of Reserve Bank – Sec 3
- Central Banking Functions – Sections 20-28A, 38-43
- Collection and Furnishing of Credit Information – Sections 45A-45F
- Amendments brought into the Act through Finance Act, 2018 and Finance Act, 2019

10. *R.C. Cooper v. Union of India*, AIR 1970 SC 564

11. *Sajjan Bank (Private) Ltd. v. Reserve Bank of India*, AIR 1961 Mad. 8 58

PART C: NEGOTIABLE INSTRUMENTS

Prescribed Legislations:

1. The Negotiable Instruments Act, 1881 (N.I. Act)
2. The Information Technology Act, 2000 (I.T. Act)

Prescribed Books:

1. Bimal N. Patel, Dolly Jabbal, Prachi V. Motiyani, *Banking Law and Negotiable Instruments Act*, (2015)
2. O. P. 'Faizi' & Ashish Aggarwal, *Khergamvala on The Negotiable Instruments Act* (20th ed., 2008)
3. Ranganath Misra, *Bhashyam & Adiga's The Negotiable Instruments Act* (18th ed., 2008)
4. Dr. Rajesh Gupta & Dr. Gunjan Gupta (revised), *S.P. Tyagi's Commentary on The Negotiable Instruments Act, 1881* (2019)
5. Dr. Rajesh Gupta & Dr. Gunjan Gupta, *Law of Dishonour of Cheques* (5th ed., 2019)
6. Avtar Singh, *Negotiable Instruments* (4th ed., 2005)
7. S. Krishnamurti Aiyar, *Law Relating to the Negotiable Instruments Act* (10th ed., 2009)
8. Dr. H.K. Saharay, *Negotiable Instruments Act 1881 (With Special Emphasis on Dishonour of Cheques)*, (3rd ed., 2011)
9. D.K. Sharma, *Dishonour of Cheques*, (2012)

Recommended Readings:

1. Law Commission of India, *Eleventh Report on the Negotiable Instruments Act, 1881* (1958)
2. Law Commission of India, *One Hundred and Twenty Fifth Report Relating to Establishment of Evening Courts* (1988)
3. Law Commission of India, *Two Hundred Thirteenth Report on Fast Track Magisterial Courts for Dishonoured Cheque Cases* (2008)

Topic 6: Negotiable Instruments- Kinds and Important Concepts

- Negotiable Instruments – Section 13
- Promissory Note – Section 4
- Bill of Exchange – Section 5
- Cheque – Section 6
- Parties to Negotiable Instruments – Section 7
- Holder and Holder in Due Course – Sections 8 and 9
- Material Alteration – Sections 87-89
- Liability of Banker – Section 131

12. <i>Ponnuswami Chettiar v. P. Vellaimuthu Chettiar</i> , AIR 1957 Mad. 355	64
13. <i>Ashok Yeshwant Badeve v. Surendra Madhavrao Nighojakar</i> , AIR 2001 SC 1315	66
14. <i>Lachmi Chand v. Madanlal Khemka</i> , AIR 1947 All. 52	69
15. <i>Singheshwar Mandal v. Gita Devi</i> , AIR 1975 Pat. 81	74
16. <i>Nunna Gopalan v. Vuppuluri Lakshminarasamma</i> , AIR 1940 Mad. 631	76
17. <i>Canara Bank Ltd. v. I.V. Rajagopal</i> (1975) 1 M.L.J. 420	79
18. <i>London Joint Stock Bank, Ltd. v. Macmillan</i>	88
19. <i>Shivalingappav. P.B. Puttappa</i> , AIR 1971 Mys. 273	92

Topic 8: Special Provisions relating to Dishonour of Cheques

- Chapter XVII- Of Penalties In Case Of Dishonour Of Certain Cheques For Insufficiency Of Funds In The Accounts
- The Negotiable Instruments (Amendment) Act, 2015 – Relating to Territorial Jurisdiction
- Negotiable Instruments (Amendment) Act, 2018 – Relating to Interim Compensation

20. <i>C.C. Alavi Haji v. Palapetty Muhammed</i> , 2007 (7) SCALE 380	94
21. <i>Rangappav. Sri. Mohan</i> (2010) 11 SCC 441	101
22. <i>Laxmi Dyechem v. State of Gujarat and Ors.</i> (2012) 13 SCC 375	111
23. <i>MSR Leathers v. S. Palaniappan</i> , 2012 ALL SCR 3025	124
24. <i>G. J. Raja v. Tejraj Surana</i> , AIR 2019 SC 3817	128
25. <i>Surinder Singh Deswal and Ors. v. Virender Gandhi</i> , (2019) 8 SCALE 445	135

IMPORTANT NOTE:

1. The students are advised to read only the books prescribed above along with legislations and cases.
2. The topics and cases given above are not exhaustive. The teachers teaching the course shall be at liberty to add new topics/cases.
3. The students are required to study the legislations as amended up-to-date and consult the latest editions of books.

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PART – A : INSURANCE

Pink v. Fleming

(1890) 25 Q.B.D. 396

LORD FISHER, J. - It is well settled that by the law of England there is a distinction in this respect between cases of marine insurance and those of other liabilities. In cases of marine insurance the liability of the underwriters depends upon the proximate cause of the loss. In the case of an action for damages on an ordinary contract, the defendant may be liable for damage, of which the breach is an efficient cause or *causa causans*; but in cases of marine insurance only the *causa proxima* can be regarded. This question can only arise where there is a succession of causes, which must have existed in order to produce the result. Where that is the case, according to the law of marine insurance, the last cause only must be looked to and the others rejected, although the result would not have been produced without them. Here there was such a succession of causes. First, there was the collision. Without that no doubt the loss would not have happened. But would such loss have resulted from the collision alone? Is it the natural result of a collision that the ship should be taken to a port for repairs, and that the cargo should be removed for the purposes of the repairs, and that, the cargo being of a kind that must be injured by handling, it should be injured in such removal? A collision might happen without any of these consequences. If it had not been for the repairs, and for the removal of the cargo for the purposes of such repairs, and for the consequent delay and handling of the fruit, the loss would not have happened. The collision may be said to have been a cause, and an effective cause, of the ship's putting into a port and of repairs being necessary. For the purpose of such repairs, it was necessary to remove the fruit, and such removal necessarily caused damage to it. The agent, however, which proximately caused the damage to the fruit was the handling, though no doubt the cause of the handling was the repairs, and the cause of the repairs was the collision. According to the English law of marine insurance only the last cause may be regarded. There is nothing in the policy to say that the underwriters will be liable for loss occasioned by that. To connect the loss with any peril mentioned in the policy, the plaintiffs must go back two steps, and that, according to English law, they are not entitled to do.

For these reasons I think that the judgment of Mathew, J., was right. The case of ***Taylor v. Dunbar*** [LR 4 C.P. 206], seems to me to have been decided upon substantially the same view as that which I have endeavoured in somewhat different terms to state, and it appears to me to be really an express authority in favour of our decision. With regard to the American authorities, the American law on the subject seems to differ materially from our law, and therefore it is not necessary to consider them.

LINDLEY, J. - It appears to me that the judgment of Mathew, J., was correct. It has long been the settled rule of English law with regard to marine insurance that only the *causa proxima* or immediate cause of the loss must be regarded. The rule is well known, and people must be taken to have contracted on that footing. In principle the case appears to me to be governed by the decision in ***Taylor v. Dunbar***. The evidence shows that the damage to the fruit was due to the joint operation of the handling and the delay.

* * * * *

Mithoolal Nayak v. Life Insurance Corporation of India

AIR 1962 SC 814

S.K. DAS, J. - The appellant is Mithoolal Nayak, who took an assignment on 18-10-1945 of a life insurance policy on the life of one Mahajan Deolal for a sum of Rs 25,000 in circumstances that we shall presently state. Mahajan Deolal died on 12-11-1946. Thereafter, the appellant made a demand against the respondent Company for a sum of Rs 26,000 and odd on the basis of the life insurance policy, which had been assigned, to him. This claim or demand of the appellant was repudiated by the respondent Company by a letter dated 10-10-1947, which in substance stated that the insured Mahajan Deolal had been guilty of deliberate misstatements and fraudulent suppression of material information in answers to questions in the proposal form and the personal statement, which formed the basis of the contract between the insurer and the insured. On the repudiation of his claim, the appellant brought the suit out of which this appeal has arisen. The suit was originally instituted against the Oriental Government Security Life Assurance Co. Ltd., Bombay, which issued the policy in favour of Mahajan Deolal on 13-3-1945. Later, on the passing of the Life Insurance Corporation Act, 1956, there was a statutory transfer of the assets and liabilities of the controlled (life) business of all insurance companies and insurers operating in India to a Corporation known as the Life Insurance Corporation of India. By an order of this Court made on 16-2-1960 the said Corporation was substituted in place of the original respondent. For brevity and convenience we shall ignore the distinction between the original respondent and the said Corporation and refer to the respondent in this judgment as the respondent Company. The suit was decreed by the learned Additional District Judge of Jabalpur by his judgment dated 7-5-1949. The respondent Company then preferred an appeal to the High Court of Madhya Pradesh. This appeal was heard by a Division Bench of the said High Court and by a judgment dated 28-8-1956, the appeal was allowed and the suit was dismissed with costs.

2. We now proceed to state some of the relevant facts relating to the appeal and the contentions urged on behalf of the appellant. Mahajan Deolal was a resident of Village Singhpur, Tahsil Narsinghpur. It appears that he was a small landholder and possessed several acres of land. Sometime in December 1942, Mahajan Deolal submitted a proposal through one Rahatullah Khan, an agent of the respondent Company at Narsinghpur, for the insurance of his life with the respondent Company for a sum of Rs 10,000 only. Mahajan Deolal's age at that time was about 45 as stated by him. In the proposal form that was submitted to the respondent Company, Mahajan Deolal mentioned the name of one Motilal Nayak, by profession a doctor, as a personal friend who best knew the state of the health and habits etc. of the insured. This Motilal Nayak, be it noted, is a brother of the appellant, the evidence in the record showing that the two brothers lived together in the same house. When Mahajan Deolal made the proposal for insurance of his life in December 1942, a doctor named Dr D.D. Desai examined him. This doctor submitted two reports about Mahajan Deolal: one report, it appears, was submitted with the proposal form through the agent of the respondent Company; another report was sent in a confidential cover along with a letter from the doctor. In this letter the doctor explained why he was submitting two medical reports. In substance he said that the report submitted with the proposal form at the instance of the agent, Rahatullah Khan,

was not a correct report and the correct report was the one that he enclosed in the confidential cover. In that report Dr Desai said that Mahajan Deolal was anaemic, looked about 55 years old, had a dilated heart and his right lung showed indications of an old attack of pneumonia or pleurisy. The doctor further said that the general health of Mahajan Deolal was very much run down and he was a total physical wreck. The doctor opined that Mahajan Deolal's life was an uninsurable life. It appears that nothing came out of the proposal made by Mahajan Deolal for the insurance of his life in December 1942. The evidence of the Inspector of the respondent Company shows that on receipt of Dr Desai's reports, the respondent Company directed that Mahajan Deolal should be further examined by the Civil Surgeon, Hoshangabad and District Medical Officer, Railways at Jabalpur. Mahajan Deolal could not, however, be examined by the two doctors aforesaid and according to the rules of the respondent Company the proposal lapsed on the expiry of six months for want of completion of the medical examination as required by the respondent Company. Then, on 16-7-1944, a second proposal was made through the same agent of the respondent Company for the insurance of the life of Mahajan Deolal, this time for a sum of Rs 25,000. The Inspector of the respondent Company said in his evidence that this second proposal was made at the instance of the same agent, Rahatullah Khan, inasmuch as the proposal of 1942 had not been rejected but had only lapsed. It appears that at the time of the first proposal in 1942 Mahajan Deolal had paid a sum of Rs 571 and odd towards the first premium due in case the proposal was accepted. In the personal statement accompanying the second proposal of 16-7-1944, it was stated that an earlier proposal for insuring the life of Mahajan Deolal was pending with the respondent Company. Now, in the proposal form there was a question to the following effect:

“Have you within the past five years consulted any medical man for any ailment, not necessarily confining you to your house? If so, give details and state names and addresses of medical men consulted.”

The answer given to the question was - “No”. This answer, according to the case of the respondent, was false and deliberately false, because, according to the evidence of one Dr P.N. Lakshmanan, Consulting Physician at Jabalpur, Mahajan Deolal was examined and treated by the said doctor between the dates 7-9-1943, and 6-10-1943, when the doctor found that Mahajan Deolal was suffering from anaemia, oedema of the feet, diarrhoea and panting on exertion. We shall advert in greater detail to the evidence of Dr Lakshmanan at a later stage. In his personal statement accompanying the second proposal Mahajan Deolal answered in the negative Question 12(b), the question being as to when he was last under medical treatment and for what ailment and how long. In the same personal statement with regard to questions, for example, Question 5(a), 5(b) etc., as to whether he suffered from shortness of breath, anaemia, and asthma etc., Mahajan Deolal gave negative answers. The contention on behalf of the respondent Company was that these answers in the personal statement were also deliberately false and constituted a fraudulent suppression of material particulars relating to the health of the insured. With regard to the second proposal and the personal statement accompanying it, Dr Motilal Nayak, brother of the appellant, gave a friend's report, in which he said that Mahajan Deolal's health was good and that he had never heard that Mahajan Deolal suffered from any illness. It is worthy of note here that Dr Motilal Nayak himself took Mahajan Deolal to Dr Lakshmanan for treatment at Jabalpur in September-October, 1943. On

receipt of the second proposal in July 1944, Mahajan Deolal was examined by Dr Kapadia, who was the District Medical Officer of the Railways at Jabalpur. Dr Kapadia reported that Mahajan Deolal was a healthy man and looked about 52 to 54 years old. He recommended that Mahajan Deolal might be given a policy for fourteen years. In his report Dr Kapadia noted that Mahajan Deolal had stated that he had suffered from pneumonia four or five years ago, and that he had also cholera some years ago. No mention, however, was made of anaemia, asthma, shortness of breath etc. On 29-12-1944 Mahajan Deolal, made a further declaration of his good health and so also on 12-2-1945. On 13-3-1945, the respondent Company issued the policy. It contained the usual terms of such life insurance policies, one of which was that in case it would appear that any untrue or incorrect averment had been made in the proposal form or personal statement, the policy would be void. The first premium due on the policy was taken from the amount that was already in deposit with the respondent Company in connection with the proposal made in 1942. Then, on 22-5-1945, Mahajan Deolal wrote a letter to the respondent Company in which he said that his financial condition had become suddenly worse and that he would not be able to pay the premium for the policy. He requested that the policy be cancelled. In the meantime the premium for 1945 not having been paid, the policy lapsed. Then, on 28-10-1945 Mahajan Deolal made a request for revival of the policy, but a few days before that, namely on 18-10-1945, the policy was assigned in favour of the appellant, by an endorsement made on the policy itself. This assignment was duly registered by the respondent Company by means of its letter dated 1-11-1945 in which the respondent Company said that it accepted the assignment without expressing any opinion as to its validity or effect.

The respondent Company also made an enquiry from the appellant as to whether the latter had any insurable interest in the life of the insured and what consideration had passed from him to the insured. To this the appellant replied that he had no insurable interest in the life of Mahajan Deolal, except that the latter was a friend and he (the appellant) had purchased the policy for a sum of Rs 427.12 n.p. being the premium paid by him so far, because Mahajan Deolal did not wish to continue the policy. On his request for a revival of the policy Mahajan Deolal was again medically examined, this time by one Dr Belapurkar. Later on 25-2-1946 he was examined by Dr Clarke. The policy was then revived on payment of all arrears of premium, these arrears having been paid by the present appellant. On receipt of the revival fee, the policy appears to have been revived some time in July 1946. We have already stated that Mahajan Deolal died in November, 1946. The certificate of Dr Clarke, who was the medical attendant at the time when Mahajan Deolal died, showed that the primary cause of death of Mahajan Deolal was malaria followed by severe type of diarrhoea; the secondary cause was anaemia, chronic bronchitis and enlargement of liver. In the certificate that Dr Clarke gave there was mention of certain other medical practitioners who had attended Mahajan Deolal at the time of his death. One of such medical practitioners mentioned in the certificate was Dr Lakshmanan. On receipt of this certificate the respondent Company got into touch with Dr Lakshmanan and discovered from him that Mahajan Deolal had been treated in September-October 1943 by Dr Lakshmanan for ailments which, according to the doctor, were of a serious nature.

3. Several issues were tried between the parties in the trial court. But the four questions which were argued in the High Court and on which the fate of the appeal depends were these:

(1) Whether the policy was vitiated by fraudulent suppression of material facts by Mahajan Deolal?

(2) Whether the present appellant had no insurable interest in the life of the insured, and if so, can he sue on the policy?

(3) Whether the respondent Company had issued the policy with full knowledge of the facts relating to the health of the insured and if so, is it estopped from contesting the validity of the policy? and

(4) Whether in any event the appellant is entitled to refund of the money he had paid to the respondent Company?

5. So far as the first question is concerned, the learned trial Judge found that though Mahajan Deolal had given a negative answer to Question 13 in the proposal form and to Questions 5(a), 5(b), 5(f) and 12(b) in the personal statement, these answers though not strictly accurate, furnished no grounds for repudiating the claim of the appellant by the respondent Company, inasmuch as Section 45 of the Insurance Act, 1938 (Act 4 of 1938) applied and the answers did not amount to a fraudulent suppression of material facts by the policy-holder within the meaning of that section. The learned trial Judge found that the ailments for which Dr Lakshmanan treated Mahajan Deolal in September-October 1943 were of a casual or trivial nature and the failure of the policy-holder to disclose those ailments did not attract the second part of Section 45 of the Insurance Act. The High Court came to a contrary conclusion and held that even applying Section 45 of the Insurance Act, the policy-holder was guilty of a fraudulent suppression of material facts relating to his health within the meaning of that section and the respondent Company was entitled to avoid the contract on that ground.

7. We shall presently consider the evidence, but it may be advantageous to read first Section 45 of the Insurance Act, 1938, as it stood at the relevant time. The section, so far as it is relevant for our purpose, is in these terms:

“No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose....”

It would be noticed that the operating part of Section 45 states in effect that no policy of life insurance effected after the coming into force of the Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground

that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false; the second part of the section is in the nature of a proviso which creates an exception. It says in effect that if the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose, then the insurer can call in question the policy effected as a result of such inaccurate or false statement. In the case before us the policy was issued on 13-3-1945 and it was to come into effect from 15-1-1945. The amount insured was payable after 15-1-1968 or at the death of the insured, if earlier. The respondent Company repudiated the claim by its letter dated 10-10-1947. Obviously, therefore, two years had expired from the date on which the policy was affected. We are clearly of the opinion that Section 45 of the Insurance Act applies in the present case in view of the clear terms in which the section is worded, though learned counsel for the respondent Company sought, at one stage, to argue that the revival of the policy some time in July 1946 constituted in law a new contract between the parties and if two years were to be counted from July, 1946, then the period of two years had not expired from the date of the revival. Whether the revival of a lapsed policy constitutes a new contract or not for other purposes, it is clear from the wording of the operative part of Section 45 that the period of two years for the purpose of the section has to be calculated from the date on which the policy was originally effected; in the present case this can only mean the date on which the policy (Ex. P-2) was effected. From that date a period of two years had clearly expired when the respondent Company repudiated the claim. As we think that Section 45 of the Insurance Act applies in the present case, we are relieved of the task of examining the legal position that would follow as a result of inaccurate statements made by the insured in the proposal form or the personal statement etc. in a case where Section 45 does not apply and where the averments made in the proposal form and in the personal statement are made the basis of the contract.

8. The three conditions for the application of the second part of Section 45 are -

- (a) the statement must be on a material matter or must suppress facts which it was material to disclose;
- (b) the suppression must be fraudulently made by the policy-holder; and
- (c) the policy-holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose.

The crucial question before us is whether these three conditions were fulfilled in the present case. We think that they were. We are unable to agree with the learned trial Judge that the ailments for which Mahajan Deolal was treated by Dr Lakshmanan in September-October 1943 were trivial or casual ailments. Nor do we think that Mahajan Deolal was likely to forget in July 1944 that he had been treated by Dr Lakshmanan for certain serious ailments only a few months before that date. This brings us to a consideration of the evidence of Dr Lakshmanan. That evidence is clear and unequivocal. Dr Lakshmanan says that Dr Motilal Nayak brought the patient to him at Jabalpur. We have already referred to the fact that Dr Motilal Nayak had himself made a false statement in his friend's report dated 17-7-1944, when he said that he had never heard that the insured had suffered from any illness. It is

impossible to believe that Dr Motilal Nayak would not remember that he had himself taken the insured to Jabalpur for treatment by Dr Lakshmanan who was an experienced consulting physician. Dr Lakshmanan said that when he first examined Mahajan Deolal on 7-9-1943 he found that his condition was serious as a result of the impoverished condition of his blood, and that Mahajan Deolal was suffering from anaemia, oedema of the feet, diarrhoea and panting on exertion. The doctor asked for an examination of the blood. The pathological report supported the diagnosis that Mahajan Deolal was suffering from secondary anaemia meaning thereby that anaemia was due to lack of iron and malnutrition. Dr Lakshmanan further found that from the symptoms disclosed the disease was a major one. Mahajan Deolal had also cardiac asthma, which was a symptom of anaemia and due to dilatation of heart. Dr Lakshmanan saw the patient again on 9-9-1943, and then again on 16-9-1943. On 6-10-1943, Mahajan Deolal himself went to Dr Lakshmanan. On that date Dr Lakshmanan found that anaemia had very greatly disappeared. In cross-examination Dr Lakshmanan admitted that the anaemia, dilatation of heart and cardiac asthma from which Mahajan Deolal was suffering constituted a passing phase that might disappear by treatment. He further admitted that he did not mention cardiac asthma in his letter addressed to the respondent Company. We have given our very earnest consideration to the evidence of Dr Lakshmanan and we are unable to hold that the ailments from which Mahajan Deolal was then suffering were either trivial or casual in nature. The ailments were serious though amenable to treatment. Mahajan Deolal's son gave evidence in the case and he said in his evidence that though Dr Lakshmanan prescribed some medicine, his father did not take it. He further said that his father was a strict vegetarian. This evidence was given by the son with regard to what the doctor had said that he prescribed fresh liver juice made at home according to his directions three times a day. He also prescribed iron sulphate in tablet form with plenty of water. The son further said that during his stay at Jabalpur his father felt weak, though he used to move about freely and was never confined to bed. The son tried to make it appear in his evidence that his father was suffering from nothing serious. Dr Lakshmanan said in his evidence that his fees for visiting a patient at Jabalpur were Rs 16 per visit. We agree with the High Court that if Mahajan Deolal was not suffering from any serious ailment, he would not have been taken by his physician, Dr Motilal Nayak, from his village to Jabalpur nor would he have consulted Dr Lakshmanan, a consulting physician of repute, for so many days on payment of Rs. 16 per visit. No doubt, Mahajan Deolal's son now tries to make light of the illness of his father, but Dr Lakshmanan's evidence shows clearly enough that in September-October 1943 Mahajan Deolal was suffering from a serious type of anaemia for which he was treated by Dr Lakshmanan. Mahajan Deolal could not have forgotten in July, 1944 that he was so treated only a few months earlier and furthermore, Mahajan Deolal must have known that it was material to disclose this fact to the respondent Company. In his answers to the questions put to him he not only failed to disclose what it was material for him to disclose, but he made a false statement to the effect that he had not been treated by any doctor for any such serious ailment as anaemia or shortness of breath or asthma. In other words, there was a deliberate suppression fraudulently made by Mahajan Deolal.

9. We may here dispose of the third question. Learned counsel for the appellant has argued before us that Mahajan Deolal was examined under the direction of the respondent Company by as many as four doctors, namely, Dr Desai, Dr Kapadia, Dr Belapurkar and Dr

Clarke. It is further pointed out that Mahajan Deolal had correctly disclosed that he had suffered previously from malaria, pneumonia and cholera. Dr Kapadia, it is pointed out, was specifically asked to examine Mahajan Deolal in view of the conflicting reports that Dr Desai had earlier submitted. On these facts, the argument has been that the respondent Company had full knowledge of all facts relevant to the state of health of Mahajan Deolal and having knowledge of the full facts, it was not open to the respondent Company to call the policy in question on the basis of the answers given by Mahajan Deolal in the proposal form and the personal statement, even though those answers were inaccurate. Learned counsel for the appellant has referred us to the Explanation to Section 19 of the Indian Contract Act in support of his argument. We are unable to accept this argument as correct. It is indeed true that Mahajan Deolal was examined by as many as four doctors. It is also true that the respondent Company had before it the conflicting reports of Dr Desai and it specially asked Dr Kapadia to examine Mahajan Deolal in view of the reports submitted by Dr Desai.

Yet, it must be pointed out that the respondent Company had no means of knowing that Mahajan Deolal had been treated for the serious ailment of secondary anaemia followed by dilatation of heart, etc., in September-October 1943 by Dr Lakshmanan. Nor can it be said that if the respondent Company had knowledge of those facts, they would not have made any difference. The principle underlying the Explanation to Section 19 of the Contract Act is that a false representation, whether fraudulent or innocent, is irrelevant if it has not induced the party to whom it is made to act upon it by entering into a contract. We do not think that that principle applies in the present case. The terms of the policy make it clear that the averments made as to the state of health of the insured in the proposal form and the personal statement were the basis of the contract between the parties, and the circumstance that Mahajan Deolal had taken pains to falsify or conceal that he had been treated for a serious ailment by Dr Lakshmanan only a few months before the policy was taken shows that the falsification or concealment had an important bearing in obtaining the other party's consent. A man who has so acted cannot afterwards turn round and say: "It could have made no difference if you had known the truth." In our opinion, no question of waiver arises in the circumstances of this case, nor can the appellant take advantage of the Explanation to Section 19 of the Indian Contract Act.

10. Our finding on the first question makes it unnecessary for us to decide the second question, namely, whether the present appellant merely gambled on the life of Mahajan Deolal when he took the assignment on 18-10-1945. The contention of the respondent Company was that the appellant had no insurable interest in the life of Mahajan Deolal and when he took the assignment of the policy on 18-10-1945 he was merely indulging in a gamble on Mahajan Deolal's life; the contract was, therefore, void by reason of Section 30 of the Indian Contract Act. On behalf of the appellant, however, the contention was that Section 38 of the Insurance Act provided a complete code for assignment and transfer of insurance policies and the assignment made in favour of the appellant by Mahajan Deolal was a valid assignment in accordance with the provisions of Section 38 aforesaid. The High Court, it appears, proceeded on the footing that from the very inception the policy was taken for the benefit of the appellant on the basis of a gamble on the life of Mahajan Deolal; it said that the appellant and his brother, Dr Motilal Nayak, knew very well that Mahajan Deolal was not

likely to live very long and when the policy was taken out in 1944, it was really for the benefit of the present appellant, who soon after took an assignment on payment of the premium already paid by Mahajan Deolal and such arrears of premium as were then outstanding. It is unnecessary for us to give our decision on these contentions; because if Mahajan Deolal was himself guilty of a fraudulent suppression of material facts on which the respondent Company was discharged from performing its part of the contract, the appellant who holds an assignment of the policy cannot stand on a better footing than Mahajan Deolal himself. It was argued before us that if the policy was valid in its inception, that is to say, if it was in fact effected for the use and benefit of Mahajan Deolal, who undoubtedly had an insurable interest in his own life, it could not afterwards be invalidated by assignment to a person who had no interest but who merely took it as a speculation. As we have stated earlier, on our conclusion on the first question, the appellant is clearly out of Court and cannot claim the benefit of a contract which had been entered into as a result of a fraudulent suppression of material facts by Mahajan Deolal.

11. This brings us to the last question, namely, whether the appellant is entitled to a refund of the money he had paid to the respondent Company. Here again one of the terms of the policy was that all moneys that had been paid in consequence of the policy would belong to the Company if the policy was vitiated by reason of a fraudulent suppression of material facts by the insured. We agree with the High Court that where the contract is bad on the ground of fraud, the party who has been guilty of fraud or a person who claims under him cannot ask for a refund of the money paid. It is a well-established principle that courts will not entertain an action for money had and received, where, in order to succeed, the plaintiff has to prove his own fraud. We are further in agreement with the High Court that in cases in which there is a stipulation that by reason of a breach of warranty by one of the parties to the contract, the other party shall be discharged from the performance of his part of the contract, neither Section 65 nor Section 64 of the Indian Contract Act has any application.

12. For the reasons given above we have come to the conclusion that there is no merit in the appeal. The appeal is accordingly dismissed with costs.

* * * * *

Kasim Ali Bulbul v. New India Assurance Co.

AIR 1968 J & K 39

J.N. BHAT, J. – The plaintiff, Kasim Ali Bulbul, carries on business in wood carving and paper machine under the name and style of K.A. Bulbul in Lambert Lane, Residency Road, Srinagar. On 8th June 60 he got his stock-in-trade consisting of wood carving, paper machine, business furniture and two pieces of carpet contained in the shop insured with the defendant company for one year from 8th June 60 to 8th June 61 for a sum of Rs. 30,000.

A policy No. 155860356 was issued in his favour by the defendant company. The plaintiff's shop caught fire on the night between 4/5th February 1961 while he was asleep in Zadaibal. Next morning he came on the scene and found that the shop had been taken possession by the local officials of the defendant company and the police. It was sealed. The plaintiff gave tentative information of this fire to the defendant company. The plaintiff's books were seized by the police. The police inquired into the matter and declared the fire accidental. Later on a Surveyor was deputed by the defendant company who made a report. The loss that he sustained on this account was Rs. 27340.31.

2. The shop remained in possession of the defendant company when on the night of 3rd November 61 another fire broke out which destroyed the remaining articles in the shop. There were some un-insured goods of the value of Rs. 564.50. The total claim of the plaintiff thus comes to Rs. 27,904.81.

3. According to the plaintiff, on the basis of the insurance effected on his goods, the defendant company was liable to make good the loss to him, but did not do so. As the keys of the shop remained with the defendant upto 3rd November 61, the defendant was further liable for the loss of uninsured goods valuing Rs. 564.50. The plaintiff therefore claimed a decree for the above-mentioned amount, i.e., Rs. 27,904.81.

4. In defence the defendant company has taken a number of pleas. They are that the defendant has not been properly sued; the plaint is not properly verified and the suit is time-barred. All the benefits under the policy and the suit stand forfeited because (1) the claim is fraudulent; (2) A false declaration has been made in support of the claim; (3) the loss or damage was occasioned by the wilful act and connivance of the plaintiff; (4) the plaintiff has not complied with the terms and conditions of the policy; (5) the plaintiff is not entitled to any relief as the suit was not commenced within three months after the rejection of his claim by the defendant company; and (6) the plaintiff did not comply with condition 11 of the policy and did not submit any claim within the period of 15 days from the date of the alleged loss. Condition 11 is quoted in extenso in the written statement. The plaintiff was notified by letter dated 25-2-61 that as the claim was not submitted in accordance with this condition, his claim could not be entertained.

5. On facts the defendant did not deny the insurance of the articles of the plaintiff with the defendant company as alleged by the plaintiff. But the defendant alleged that this contract was entered into by the defendant on the basis of false representation and suppression of material facts by the plaintiff which vitiated the whole contract. It was admitted that the plaintiff informed the defendant company at Srinagar on 5.2.61 that his shop had been gutted on the

night between 4/5th February 61. On 5.2.61 the plaintiff was asked to submit his claim, account books, pass books and submit his claim form. He was reminded by another letter dated 16.2.61. But the plaintiff did not do anything. It is admitted that the defendant company locked the shop but the plaintiff's lock also was there. On 25.2.61, the defendant rejected the claim of the plaintiff. The plaintiff did not submit his account books, nor submit his claim in writing. The plaintiff replied the letter of the defendant of 25.2.61 that he could not ascertain the damages as the account books and other documents were lying with the police. By letter dated 28.2.61 the plaintiff was again referred to the letter of the defendant dated 25.2.61. On 27.6.61 the Chief Regional Manager of the defendant company New Delhi notified the plaintiff that he had forfeited all benefits under the policy and his claim stood rejected. The conclusion of the police that the fire was accidental was not correct. Mr. Sarin of Messrs. V.N. Sarin and Co. was appointed as the Surveyor. The survey report was also against the plaintiff. There was further correspondence between the parties. On 9-5-61 the plaintiff submitted a list of goods destroyed by fire but that was beyond time. The plaintiff had been guilty of suppression of facts in the proposal form while replying questions 8(a) and (b) in the proposal form. He had formerly insured the same goods in the year 1957 with the Ruby General Insurance Co. Ltd. and the shop was gutted in that year and the plaintiff's claim which was a huge amount was settled by that company at Rs. 14860/-. The plaintiff had not complied with conditions 11 and 13 of the policy. Therefore he was not entitled to any amount. The presence of the uninsured goods in the shop was also denied. Even if there were any such goods the defendant was not liable for the loss alleged to have been caused to the plaintiff by the fire of 5.11.61.

6. On these pleadings my learned predecessor-in-office framed the following issues in the case:

- (1) Is the suit properly stamped? OPP
- (2) Is the plaint properly verified? OPP
- (3) What was the value of the goods lying in the shop of the plaintiff at the time of the fire on the night of 4/5th February 1961 and what was the value of the goods damaged or destroyed by the fire?
- (4) Is the plaintiff's right to claim extinguished by lapse of time?
- (5) Is the plaintiff's suit not within time?
- (6) Has the plaintiff been guilty of suppression of material facts and false representation at the time of obtaining the policy from the defendant and as such is the policy of insurance void and unenforceable and not binding on the defendant?
- (7) Has the plaintiff not filed claim within the time stipulated in the policy and as such he has forfeited all rights and claims under the policy?
- (8) Is the claim of the plaintiff fraudulent?
- (9) Was the fire occasioned by the connivance or wilful act of the plaintiff?
- (10) Has the plaintiff's goods of the value of Rs. 500/- been damaged or destroyed in the fire of November 1962 in the same premises and if so, is he entitled to get the sum of Rs. 500 from the defendant?
- (11) Is the plaintiff not entitled to any relief as he has not filed the suit within 3 months of the rejection of his claim by the defendant as provided in the policy?
- (12) To what relief is the plaintiff entitled?

7. One additional issue was framed by order of this court dated 4.10.62 which is to the following effect:

(13) Is the declaration made in support of the suit claim made by the plaintiff true and correct and if not has he forfeited all the benefits under the policy?

11. Before me some of the issues were not at all pressed. For instance, issues 1 and 2 were not at all discussed before me. Therefore, they will be deemed to have been waived. The third issue relates to the value of the goods lying in the shop of the plaintiff at the time of the fire on the night between 4/5th February 61 and the value of the goods damaged or destroyed by fire. The plaintiff in support of this issue has produced the following witnesses:

12. Ama Shah states that the value of goods which were gutted by fire on the night between 4/5th February 1961 in the shop of the plaintiff at Lambert Lane was of the value of thirty to thirty-two to thirty-five thousand rupees. This witness states that he has been carrying on the polishing of the wood carving articles of the plaintiff for a number of years. Mohd. Shaban, who is a broker, states that the goods that were gutted by fire on the relevant night were worth about Rs. 30,000/-. Similarly G.M. Mir who supplied paper machine goods to the plaintiff states that the value of the goods destroyed by fire in the shop of the plaintiff was between Rs. 25 to 30 thousand rupees. The plaintiff's son also places the value of the gutted goods between 25 to 30 thousand rupees. The plaintiff also in his own statement places the same valuation. The evidence of these witnesses is based on their own estimate of the valuation of the goods. No witness has or could possibly state the correct value of the goods gutted. The plaintiff has produced some books, i.e., the sale book, the stock book and the Counter-foils of certain cash memos. According to the plaintiff on the basis of these documents he has fixed the valuation of the goods gutted as given by him in the plaint. Although this evidence is not full proof, yet there is no direct evidence produced by the defendant to contradict this evidence. The surveyor produced by the defendant Mr. V.N. Sarin proprietor of Messrs. V.N. Sarin and Co. puts the estimated loss of goods at Rs. 6508.20, and the furniture at Rs. 150/-.

13. The learned counsel for the defendant has criticized the account books produced by the plaintiff and has stated that they were not genuine. They were prepared for the sake of this case. The plaintiff from the very beginning had an evil design of setting fire to this shop which contained a small quantity of goods, and to inflate and bolster up his false claim he got those account books prepared. He has argued that the account books start right from the date the insurance was effected. He has at length cross-examined the plaintiff's son who has admitted that he writes the accounts of the plaintiff alongwith another clerk, Mohd. Ishaq. According to the learned counsel for the defendant the accounts have been prepared at one time, being in the same ink and hand though covering a sufficiently long period of time. This argument of the learned counsel for the defendant is not without force, but in view of the ultimate fate that the case is to meet at any hands, I do not think I should very seriously probe into the matter of the valuation of the goods that were gutted. I must therefore accept the figure of loss sustained by the plaintiff as put by him as correct. Therefore issue 3 is decided in favour of the plaintiff.

15. The case of the defendant is that under the terms of the policy of insurance the plaintiff had to intimate the details of the loss to the defendant company within 15 days of its occurrence. Further he had to institute a suit within three months of the rejection of the claim by the defendant. The fire broke out admittedly on the night of 4/5th February. 61 The plaintiff did in fact inform the defendant company's branch at Srinagar on the morning of 5th February. The then SHO Kothibagh Mr. Abdul Rashid seized the books of the plaintiff from his house on 5-2-61 and prepared a seizure list Ex. PW2/2. The books remained in the custody of the police till 5-5-61. When the plaintiff moved the ADM Srinagar on 3-6-61; the books were returned to him by means of a receipt Ex. PW 1/2 on 5-5-61, vide the statement of Shambu Nath Head Constable Thana Kothibagh PW 1. It is therefore conceivable that the plaintiff was not in a position to give a detailed list of the articles which were burnt to the defendant company within 15 days. The plaintiff has however given a detailed list of the loss caused to him on 9th May 61. The defendant's contention was based on condition 11 of the policy which runs as under:

"On the happening of any loss or damage the insured shall forthwith give notice thereof to the company and shall within 15 days after the loss or damage or such further time as the company may in writing allow in that behalf, deliver to the Company.

(a) A claim in writing for the loss or damage containing as particulars an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss and damage thereto respectively, having regard to their value at time of the loss or damage not including the profit of any kind.

(b) Particulars of all other insurances, if any the insured shall also at all time at his own expense produce, procure and give to the company all such further particulars, plans, specifications, books, vouchers, invoices, duplicate or copies thereof, documents, proof and informations with respect to the claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the company as any, be reasonably required by or on behalf of the company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.

No claim under this policy shall be payable unless the terms of this condition have been complied with."

16. According to the defendant the plaintiff did not supply the detailed list within 15 days of the occurrence of the fire, and therefore the plaintiff forfeited his right under the policy. Emphasis was laid on the last portion of this condition which says that no claim under this policy shall be payable unless the terms of this condition have been complied with. But I think it was physically impossible for the plaintiff till the 5th of May 61, to give a complete and detailed list of the loss sustained by him as his books were with the police. Therefore to that extent the plaintiff has an explanation or a justification in not supplying the detailed list to the company within 15 days of the damage. But there is the second part of this matter which is covered by condition 13 of the policy. This condition runs as under:

“If the claim be in any respect fraudulent or if any false declaration be made or used by the insured or anyone acting on his behalf to obtain any benefit under this policy, or if the loss or damage be occasioned by the wilful act or with the connivance of the insured, or if the claim be made and rejected and an action or suit be not commenced within three months of such rejection, or in case of an arbitration taking place in pursuance of the 18th condition of this policy within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefits under this policy shall be forfeited.”

17. In this case we have it in the evidence of Mr. Jaipal Bahadur D.W. 2 Chief Regional Manager of the defendant company Northern India that the claim of the plaintiff was rejected by means of a letter of the company dated 25.2.61. The same thing has been testified to by Mr. R.N. Dubash D.W. 5 who has been an employee in this concern from 1957 and is now the O/c of the Company at Srinagar. According to him the company rejected the claim of the plaintiff on 25.2.61. There are a number of letters also which reiterate and refer to the initial letter of the defendant dated 25.2.61. All these letters are signed by Mr. K.B. Pestonjee who was then incharge of the Srinagar branch and is now in Manila and therefore incapable of appearing before the court. His signatures have been identified by Mr. R.N. Dubash.

18. The suit was instituted on 1-2-62 which is clearly about a year after the rejection of the claim of the plaintiff by the defendant. Therefore in terms of this policy the right of the plaintiff to recover the suit amount is extinguished. In the proposal form Ex. D.W. 4/1 the condition is that the declaration made in this form shall be the basis of the contract between the parties. The insurance company agrees to compensate the insured only subject to the conditions mentioned in the policy which appear on the back of the policy.

19. An argument has been advanced that the condition of instituting legal proceedings within three months of the rejection of the claim of the insured by the insurance company is against section 23 and 28 of the Contract Act. Section 28 reads as under:

“Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.”

20. Section 23 of the Contract Act makes the following agreements as unlawful: If they are forbidden by law or are of such a nature that if permitted would defeat the provisions of any law, or are fraudulent, or involve or imply injury to the person or property of another, or if the court regards them as immoral or opposed to public policy. A list of illustrations is appended to this section.

22. Section 28 makes all agreements in restraint of legal proceedings void.

23. It is argued that such an agreement is immoral and opposed to public policy and further it curtails the ordinary period of limitation. I need not consider these sections in detail because the matter is completely covered by authority. It will surely be a waste of time to embark on a discussion of the points raised. The following authorities may be mentioned:

In Porter's *Law of Insurance* (6th Edn.) page 195 it is stated that insurance may lawfully limit the time within which an action may be brought to a period less than that allowed by the statute of limitation and that the true ground, on which the clause limiting the time of claim rests and is maintainable is that, by the contract of the parties the right to indemnity in case of loss and the liability of the Company therefor do not become absolute, unless the remedy is sought within the time fixed by the condition in the policy. In AIR 1924 Cal 186 some English cases were discussed and condition No. 13 of the policy as in the present case was there. The condition amongst other things stated:

"If the claim be made and rejected and an action or suit be not commenced within 3 months after such rejection and in the case of arbitration taking place in pursuance of the 18th condition of this policy within three months of the arbitration when the arbitrator or the umpire shall have made the award, all benefits under the policy shall be forfeited."

In this case an action commenced after the stipulated period of three months was held to contravene neither section 23 nor section 28 of the Contract Act.

27. The latest authority on the subject is AIR 1966 All 385 wherein according to a clause in the loss-cum-fire insurance policy the insured had to file within 15 days of the loss a complete claim giving full particulars. The loss occurred on 18-8-47. Insured sent a telegram on 21-8-1947 as "sugar is looted. Please note." The company replied on 25.8.47 asking for policy number and circumstances of loss. The insured sent reply on 8.9.47 giving some particulars. Even this did not give all particulars. The company ultimately rejected the claim. On these facts it was held that the communication was beyond 15 days. The mere fact that the application under section 13 of the Displaced Persons (Debts Adjustment) Act 1951 regarding the claim of the insured who was a displaced person was within time, would not entitle him to get any relief in respect of the loss.

28. In this case even if the plaintiff was entitled to any relief he had forfeited all rights under the policy when he failed to bring his suit within three months of 25th February 61 when his claim was rejected by the insurance company. The claim was not rejected only once, but the basic stand taken by the company in its letter of 25.2.61 was repeated in a number of letters, for instance, D.W. 5/2 dated 28.2.61, D.W. 5/3 dated 27.12.61, D.W. 5/4 dated 21.11.61 and D.W. 2/1 dated 27.6.61. The plaintiff had no justification to wait till 1.2.62 to file the suit. By that time his right had been completely extinguished.

29. In this way issues 4, 5, 7 and 11 are decided against the plaintiff. His suit is clearly time-barred.

30. The second group of issues that can be conveniently taken up together is Nos. 6, 8, and 13. The case of the defendant is that the plaintiff has been guilty of suppression of material facts and has made a false representation at the time of obtaining the policy from the defendant. His claim cannot therefore be entertained. Emphasis on this aspect of the case is laid on the reply of the plaintiff to question 8(a) and 8(b) of the proposal Ex. D.W. 4/1 which is as under:

8 (a) Has the property been insured in the past or at the present time? If so, give full particulars.

8(b) Have you sustained loss. Give full particulars.

To both these queries the plaintiff has said 'No.'

31. The contention of the learned counsel for the defendant is that the plaintiff had insured the goods of his shop with another insurance company in the year 1957 namely, the Ruby General Insurance Co. During that year also his shop was gutted by fire. He made a claim for Rupees 25,000/- from the Insurance Company, but his claim was settled at Rs. 14807/-. According to the Manager of the Ruby General Insurance Co., Mr. D.N. Chopra, the settlement was arrived at on 24.2.58. The shop of the plaintiff had caught fire on 24.4.57 and the policy of insurance with that company had come into force for one year from 9.10.56 to 9.10.57. The plaintiff and his son admitted this previous insurance, but their case was that the plaintiff is an illiterate person who does not know English. He only know how to sign 'K.A. Bulbul' and at the time of entering into the present contract he was not explained the terms of the proposal form or of the insurance policy. D.W. 4 Abdul Ahad Sheikh, Inspector of the New India Assurance Co. has deposed on solemn affirmation that he filed in the form Ex. D.W. 4/1 on 5th June 60 and the answer that he entered against each query in the proposal form was at the instance of the plaintiff. He made the plaintiff understand all the questions and recorded his answers. Col. No. 8 was also filled at the instance of the plaintiff. The plaintiff signed the proposal form after knowing the contents thereof. The plaintiff however tried to negative this evidence by the statement of Gulla Khan who says that the plaintiff is an illiterate person. In view of the statement of Abdul Ahad Sheikh and reading in between the lines the statement of the plaintiff himself, it is difficult to hold that the plaintiff was not put a specific question whether he had not insured this property with another insurance company earlier. I feel that the plaintiff purposely withheld this information from the insurance agent because when previously he had insured the goods of the shop with the Ruby G. Insurance Co. and his shop had caught fire he had claimed Rs. 25000 but was given only Rs. 14000 and odd. Feeling somewhat apprehensive about the state of affairs then, he wilfully suppressed this fact from the defendant insurance company. So on facts it is proved that the plaintiff has made a false statement in reply to question No. 8.

32. Now we have to see what is the legal effect of this false statement. The law on this point is so well settled both in England and India that it does not require any elaborate discussion. Anyhow the following authorities may be mentioned.

33. The effect of non-disclosure or misrepresentation is that the insurers have the right to repudiate, that is to say, to avoid contract.

34. Where, however, insurers answer a claim by repudiating the policy on the ground of fraud, misrepresentation or non-disclosure, they are not bound to offer a return of premium

39. The matter has again been fully discussed in AIR 1962 SC 814 where a policy holder who had been treated a few months before he submitted his proposal for the insurance of his life with the insurance company by a physician of repute for certain serious ailments as anaemia, shortness of breath and asthma, not only failed to disclose in his answers to the questions put to him by the insurance company that he suffered from these ailments but he made a false statement to the effect that he had not been treated by any doctor of any such serious ailment, it was held that judged by the standards laid down in section 17 Contract Act,

the policy holder was guilty of a fraudulent suppression of material facts when he made his statements, which he must have known were deliberately false and hence the policy issued to him relying on those statements was vitiated. In the circumstances of the case it was held that no advantage could be taken of the Explanation to section 19 of the Contract Act. In this case it was further held:

“Where, according to terms of the life insurance policy, all moneys that had been paid in consequence of policy would belong to the insurance company if the policy was vitiated by reason of a fraudulent suppression of material facts by the insured, and the contract is bad on the ground of fraud, the party who has been guilty of fraud or a person who claims under him cannot ask for a refund of the money paid. It is a well established principle that courts will not entertain an action for money had and received where, in order to succeed, the plaintiff has to prove his own fraud. Further in cases where there is a stipulation that by reason of a breach of warranty by one of the parties to the contract, the other party shall be discharged from the performance of his part of the contract, neither S. 65 nor S. 64 of the Contract Act has any application.”

40. In view of all these authorities, it is clear that the plaintiff simply on the ground that he gave a false reply to questions 8(a) and (b) in the proposal form cannot claim any compensation for fire having been caught by the goods in his shop. In this case the question was very material and withholding of the real information from the insurance company would automatically absolve the insurance company from any liability under the contract. As already remarked, the Privy Council has gone to the length of holding that the answers to a question being material or immaterial, would not make any difference. The plaintiff's suit would therefore fail on this account alone.

41. Issue 8 is not very clear but I have grouped it with issues 6 and 13. In my opinion this issue is based on the fraud alleged to have been committed by the plaintiff in suppressing the material information regarding the previous insurance of the goods of his shop with the Ruby General Insurance Co. in the year 1957. But if this issue is construed as suggesting that the claim of the plaintiff is not bonafide, I have given my finding already that all the weaknesses that the plaintiff's case may have, it can be safely held that it is proved that he lost goods of the valuation mentioned in the plaint during the fire. So these observations dispose of issues 6, 8 and 13.

42. The learned counsel for the defendant has laid great stress on the fact that the fire was caused by the wilful act of the plaintiff. No doubt the plaintiff's conduct is somewhat not above suspicion. According to the plaintiff and his witness Ama Shah, his son Safdar Ali and the plaintiff himself they closed the shop as usual at about 7.30 in the evening. The shop caught fire in the night. The plaintiff or anybody on his behalf did not repair to the scene of occurrence till 10 the next morning. The plaintiff says that he did not know about the occurrence. Although this statement would seem improbable, but there is nothing on the file to clearly contradict this statement of the plaintiff. The police registered the case as a suspicious one and conducted investigation but later on the police also discovered that the fire was accidental (Vide the statement of Abdul Rashid P.W. 2). The defendant has led no positive evidence to show that the plaintiff himself set the goods of his shop on fire. The

defendant's case is based on certain suspicious entries in the account books of the plaintiff and on the conduct of the plaintiff. But that by itself is not sufficient to hold that the plaintiff himself wilfully set his shop on fire or connived at it. In my opinion this issue should be decided against the defendant.

43. The plaintiff claims Rs. 564.50 as the value of uninsured goods which caught fire on November 3, 1961 because according to him the keys of the shop were still with the defendant company. In the first place the plea of the plaintiff that the shop remained under the possession and lock and key of the defendant up to 3rd November 61 is not established. Apart from that fact unless it is shown that the destruction by fire of this uninsured goods was the result of the negligence of the defendant, no responsibility can be fastened upon the defendant. If the plaintiff's case were that he was present on the scene of occurrence on November 3, 1961 to salvage his merchandize, but for the fact that the shop was locked by the defendant, there was some case for the plaintiff. But there is no such suggestion on the part of the plaintiff. Even if the shop was under the lock and key of the defendant and it caught fire which was accidental the defendant would not by the mere fact of the destruction of the goods therein be liable for the damage. Therefore, in my opinion, the plaintiff cannot even claim this amount.

44. From the finding on the issues recorded above, the plaintiff's suit has to be dismissed and is hereby dismissed.

* * * * *

Smt. Krishna Wanti Puri v. Life Insurance Corporation of India

AIR 1975 Del. 19

AVADH BEHARI ROHTAGI, J. – On February 19, 1968, Smt. Krishna Wanti Puri, widow of Late Dharam Pal Puri instituted an action against the Life Insurance Corporation for the recovery of Rs. 85,000/- and profits and interest on the four policies.

2. Dharam Pal Puri when he was alive insured his life with the Corporation and took out four policies.

3. Dharam Pal Puri died on 5th August 1964. The widow claims the amount of the four policies from the Corporation on the ground that she is the assignee. The Corporation resists the suit. The main ground of defence is that Dharam Pal Puri was suffering from heart disease, that he knew about his ailment, that he had consulted doctors about his disease but fraudulently suppressed these facts. In the proposal forms and the personal statements, he made declarations knowing them to be false because he never disclosed to the Corporation that he was suffering from heart disease.

4. On the pleadings of the parties the following issues were framed on merits on 19th August, 1969:

- (1) Is the plaintiff entitled to recover the amount, if any, due to her on the policies mentioned in the plaint on the allegations made in the plaint? O.P.P.
- (2) Who is the assignee of these policies? O.P.P.
- (3) Are the defendants entitled to deny payment to the plaintiff on the grounds stated in the written statement? O.P.D.
- (4) Relief?

Issue No. 3:

5. The only question that arises for decision is whether the widow is entitled to recover the amount of the four policies from the defendant Corporation or whether the Corporation is entitled to avoid the policies and refuse to pay the amount to her on the ground that the deceased fraudulently concealed and suppressed material facts which were necessary for the insurer to know.

6. The chief issue in the case is Issue No. 3 and clearly the onus of this issue was on the defendant Corporation to prove fraudulent concealment and material suppression of facts. In support of their case, the Corporation examined three doctors. They are Dr. Santosh Singh who was examined on commission. Dr. (Miss) S. Padmavati (D.W. 3) and Dr. V.K. Dewan (D.W. 10). In order to appreciate their evidence, it is necessary to set out the relevant questions which were required to be answered by the deceased in the personal statements and the answers given by him thereto.

Question

Answer

What has been your usual state of health?

Good

Have you consulted a medical practitioner within the last five Years?

If so, give details

No

Have you ever suffered from any of the following ailments -

No

Fainting attacks, pain in chest, breathlessness, palpitation or any disease of the heart?	No
Any other illness within the last five years requiring treatment for more than a week	No
Have you ever had any electric cardiogram, X-ray or fluoroscopic examination made or your blood examined. If so, give details.	No
Have you ever been in any hospital, asylum or sanatorium, check up, observation, treatment or an operation.	No

7. In identical terms were the answers of the deceased in all the four policies. On the basis of these statements the Corporation issued the policies.

8. On the death of Dharam Pal Puri the widow made a claim and gave to the Corporation the certificate of death of her husband. From the certificate the Corporation came to know that the deceased was admitted in Sir Ganga Ram Hospital on 4th August, 1964 and died there on 5th August 1964. The Corporation also learnt that the deceased was suffering from Mitral Stenosis with auricular fibrillation and that he died of this disease in the hospital. The Corporation made certain investigations and as a result came to the conclusion that Dharam Pal Puri was suffering from this heart disease since 1959 in any case, if not earlier. The Corporation contacted the three doctors named above and took from them certificates stating that the deceased was suffering from this heart disease.

9. Dharam Pal Puri consulted Dr. (Miss) S. Padmavati on 29th May, 1959 and 25th of September, 1959. Dr. Padmavati appeared in the witness-box and deposed to this effect. She had at the request of the Corporation issued a certificate on 11th December, 1964, in which she had stated that the deceased was examined by her on these two occasions and that he suffered from Mitral Stenosis with auricular fibrillation. In the certificate she had also said that the deceased was suffering since 1946 according to the statement of the patient himself which was made to her. The Doctor never saw the patient after 25th September, 1959. When Dr. Padmavati was examined in court on 9th October, 1970 she said that she verified the contents of certificate (D-6) issued by her from the records of the Lady Harding Hospital which were supplied to her. It appears that on 11th December, 1964, when she gave the certificate the records of the Lady Harding Hospital were available to her. She was Professor of Medicine in Lady Harding Medical College at that time. She is F.R.C.P. of London and F.R.C.P. of Edinburgh. She also deposed that before she signed the document she verified the name, address and age of the patient from the record. As regards the nature of the disease, she said this:

“Mitral stenosis is a type of rheumatic heart disease. Auricular Fibrillation is a complication of mitral stenosis in which an abnormal rhythm is superimposed. According to entry made in Col. 5 the patient's case was a case of serious form of heart disease. This disease can be checked without doing the electro cardiogram. This disease can be checked by a stethoscope. Normally a general medical practitioner should be able to check this disease.”

10. The next medical man who was approached by the Corporation to find out the nature of the disease from which Dharam Pal Puri was suffering was Dr. V.K. Dewan. He had also

similarly certified on 17th November, 1964, that Dharam Pal Puri suffered from the very ailment of which Dr. Padmavati deposed. He also said that deceased had been suffering from this disease for about five or seven years before his death. Dr. Dewan is an honorary physician in Sir Ganga Ram Hospital. He attended on the deceased when he was admitted to the hospital on 4th August, 1964. In his evidence before the court he stated that the contents of his certificate (D-7) were correct and the entire form had been filled up by him in his own hand. He derived the information from the hospital record where the patient was admitted.

11. Dr. Santosh Singh was examined on commission at Ranchi. When the deceased was admitted to the hospital in August 1964, Dr. Santosh Singh was the Registrar of Sir Ganga Ram Hospital. He also attended on the deceased on the 4th and 5th of August, 1964, and similarly gave two certificates regarding the hospital treatment. In the two certificates (B-2 and B-3) Dr. Santosh Singh stated that Dharam Pal Puri was suffering from Mitral stenosis and died as a result of heart failure. He said that the deceased had been suffering from this disease for about seven years before his death and the symptoms of this illness were first observed by the deceased about seven years ago. Both these certificates were signed by Dr. Santosh Singh. He solemnly declared that the foregoing statements were true and correct to the best of his knowledge and that the information was correct as per records of the hospital. These certificates are dated 31st October, 1964. Dr. Santosh Singh also signed a report regarding the deceased wherein too he stated that the deceased was suffering from this ailment for the last 7½ years. These certificates and report were obtained by Shri P.C. Puri, the brother of the deceased, and were passed on to the Corporation. These certificates set the Corporation thinking and put the officials on enquiry regarding the cause, place and the date of his death.

12. Later on it appears that Dr. Santosh Singh was prevailed upon by the relatives of the deceased and he issued another certificate of hospital treatment dated 24th October, 1964 and a report dated 28th November, 1964. In the certificate and report Dr. Santosh Singh stated that some attendant on the deceased had reported to him that Dharam Pal Puri had been suffering from the disease only for the last years. The relative also procured another medical attendant certificate dated 30th October 1964, purported to be signed by Dr. Santosh Singh wherein it was stated that the deceased had been suffering from this disease for about 1½ years before his death. A photostat copy of this certificate dated 30th October, 1964, was produced during the examination of Dr. Santosh Singh on commission. The original of this document has not been placed on the record. In his examination Dr. Santosh Singh admitted the correctness of all the documents. He also admitted that Dr. V.K. Dewan was the physician incharge who was attending on the deceased in the hospital. He admitted that the records of the hospital were available to him at the time of signing the two certificates (B-2 and B-3). When it was pointed out to the witness that in some certificates he had given the duration of the disease 7½ years and in some 1½ years, the witness said:

“It appears that certain entries in Exhibit B-2 and Exhibit ‘E’ different. I cannot assign any reason unless I see the original records. Without reference to the original record it is not possible to say whether the entries in the certificates are correctly made.”

13. This is the evidence of the three doctors and the counsel for the Corporation strongly relies on their evidence to show that the deceased had been suffering from heart disease since 1946 and, as has been proved in the evidence of Dr. Padmavati, that Dharam Pal knew about the same and that is the very disease of which he ultimately died. On the ground of fraud and suppression of material facts, the counsel urges that the Corporation is entitled to avoid all the four policies.

15. In *Mithoolal Nayak v. Life Insurance Corporation of India* [AIR 1962 SC 814], it was held that the three conditions for the application of the second part of Section 45 are:

- (a) the statement must be on a material matter or must suppress facts which it was material to disclose;
- (b) the suppression must be fraudulently made by the policy holder; and
- (c) the policy holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose.

16. The crucial question before me is whether these three conditions were fulfilled in the present case.

17. Now what is the nature of a contract of insurance? Contracts of insurance are *uberrima fides* and therefore the insured owes a duty to disclose before the contract is made every material fact of which he knows or ought to know. If a material fact is not so disclosed, the insurers have the right at any time to avoid the contract. As Lord Mansfield demonstrated in *Carter v. Boehm* [(1763) 5 Sm 546, 550], insurance is a contract upon speculation where the special facts upon which the contingent chance is to be computed lie generally in the knowledge of the assured only, so that good faith requires that he should not keep back anything which might influence the insurer in deciding whether to accept or reject the risk. A fact is material if it is one that would affect the mind of a prudent man, even though the assured does not appreciate the materiality. In the words of Bayley, J.:

“I think that in all cases of insurance whether on ships, houses or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is, whether any particular circumstance was in fact material, and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to show that the party neglecting to give the information thought it material. But if it be held that all material facts must be disclosed, it will be in the interest of the assured to make a full and fair disclosure of all the information within their reach.”

18. In India, the duty of disclosure in the case of marine insurance is prescribed as follows in the Marine Insurance Act, 1963:

“S. 20(1) Subject to the provisions of this section, the assured must disclose to the insurer before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known to him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.”

19. A similar duty of disclosure exists in the case of non-marine insurances. Whether the policy is taken out for a life, fire, burglary, fidelity or accidental risk, it is the duty of the assured to give full information of every material fact; and it has been held by the Court of Appeal in England that the definition of “material” contained in the Marine Insurance Act, 1906 namely, every circumstance which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk is applicable to all forms of insurance.

20. Life Insurance stands on the same footing. The provisions of Marine Insurance Act in India are in *par materia* with the English Act in this respect. I would, therefore, similarly hold that the test of what is a material fact and the degree of good faith, which is required, is otherwise the same in all classes of insurance.

23. Any material fact that comes to the knowledge of the proposer; the would-be assured, before the contract is made must be disclosed. The duty to disclose all material facts to the insurer arises from the fact that many of the relevant circumstances are within the exclusive knowledge of one party, and it would be impossible for the insurer to obtain the facts necessary for him to make a proper calculation of the risk he is asked to assume without this knowledge. It has been for centuries in England the law in connection with insurance of all sorts, marine, fire, life, guarantee and every kind of policy, that, as the underwriter knows nothing and the would-be assured knows everything, it is the duty of the assured to make a full disclosure to the underwriters of all the material circumstances.

24. The words ‘prudent insurer’ in Section 20(2) of Marine Insurance Act should be noted. They mean that in a dispute the court must apply the objective standard of business usage and disregard the exacting standard of a particular insurer. Circumstances that need not be disclosed include those diminishing the risk and matters of common knowledge generally or in the insurer’s business. The prospective assured must disclose material circumstances that he knows or ought to know: (See Section 20, Marine Insurance Act, 1963).

25. Whether the omission to disclose any particular circumstance is material so as to render the contract voidable is a question of fact in each case.

26. The present case, however, presents no difficulty. If the assured had truly disclosed his illness that fact would have certainly influenced “the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk.”

27. If the insured makes a statement containing certain information and the policy contains a term to the effect that the proposal form constitutes the “basis of the contract,” the insurers are entitled to avoid liability if any answer in the proposal form is incorrect, whether it is material or not. The insurers are entitled to avoid liability if any answer in the proposal form is incorrect irrespective of whether the insured made the answers fraudulently or innocently and irrespective of whether the answer relates to a material fact.

31. In India, the Legislature has enacted in Section 45 of the Insurance Act that no policy of life insurance shall be called in question by an insurer on the ground that a statement made

in the proposal form “leading to the issue of the policy” was inaccurate or false “unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy holder and that the policy holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose.” The statute therefore, superimposes the test of materiality on the terms and conditions of the proposal. The contractual freedom of the insurers has been severely restricted by the Indian Legislature. The insured has thus been sufficiently protected and the resulting contract cannot be rescinded merely upon proof that the information is inaccurate, unless all the three conditions of Section 45 are satisfied. In this sense Indian Law is a distinct advance upon the English Law.

32. In this case it is clearly provided in the proposal form of the Corporation that the declarations of the assured shall be the “basis of the contract” and that

“If any untrue averment be contained therein the said contract shall be absolutely null and void and all moneys which shall have been paid in respect thereof shall stand forfeited to the Corporation.”

33. In view of the term of the policy the insurer is entitled to avoid the contract as there was misrepresentation and concealment by the assured. No one will doubt that the questions in the proposal form regarding state of health were on a material matter and that the answers given by the assured were fraudulent and false. Insurers are generally well able to take care of their own interests by requiring a prospective insured to complete an application form giving information on a wide range of matters. But the important thing is that answers to material questions must be accurate and true. From the very necessity of the case, the assured alone possessed full knowledge of all the material facts and the law required him to show *uberrima fides*. The insurer contracts on the basis that all material facts have been communicated to him; and it is a condition of the contract that the disclosure shall be made and that if there has been a non-disclosure, he shall be entitled to avoid.

35. To use the language of the Indian Statute, a contract of insurance is a “contract based upon the utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the opposite party” (Section 19, Marine Insurance Act).

36. The general principle of good faith governing insurance is tersely stated by Lord Chorley:

“The general principle governing insurance is that of good faith. In a sense this applies to all contracts, but an insurer can insist on a more stringent requirement - utmost good faith. The terminology is unfortunate, for good faith, in ordinary parlance, is an absolute term; it cannot be graded. Ordinarily a person has acted either in good faith or in bad faith. But in insurance law utmost good faith has a precise meaning and a genuine purpose.

In negotiations for an ordinary contract no party must say anything that misleads the other party. If he does the other party can avoid the contract... In insurance, however, the cards are stacked against the insurer. The buyer can inspect the goods, and the employer can obtain references about a candidate for employment, but the insurer has very few means of discovering the nature and magnitude of the risk.

Accordingly, in law prospective assured refrain from actively misleading the insurer he must also disclose all material circumstances”.

37. Dharam Pal Puri must have known that it was material to disclose the fact of his ailment to the Corporation. In the answers to the questions put to him he not only failed to disclose what it was material for him to disclose, but he made a false statement to the effect that he had never suffered from any disease of the heart. In other words, there was a deliberate suppression fraudulently made by Dharam Pal. Fraud, according to Section 17 of the Indian Contract Act, means and includes *inter alia* any of the following acts committed by a party to a contract with intent to deceive another party or to induce him to enter into a contract.

(1) The suggestion as to a fact of that which is not true by one who does not believe it to be true; and (2) The active concealment of a fact by one having knowledge or belief of the fact.

Judged by the standard laid down in Section 17, Dharam Pal Puri was clearly guilty of a fraudulent suppression of material facts when he made declarations in the proposal form, statements, which he must have known, were deliberately false.

38. The counsel for the plaintiff has argued that the statement of Dr. (Miss) Padmavati should not be believed as the original record of the Lady Hardinge Medical College and Hospital was not produced in court at the time she made her statement. This is true that she gave her deposition in court with the help of the certificate that she had issued in 1964, though she was examined on November 9, 1970. In the course of arguments I ordered that the original record of the hospital should be produced. Today the medical record keeper appeared in court and stated that the record of outdoor patients was maintained in the hospital only for a period of five years and was destroyed thereafter. Dharam Pal Puri was examined by Dr. (Miss) S. Padmavati as an outdoor patient obviously. Dr. (Miss) S. Padmavati did not depose that Dharam Pal Puri was admitted to the hospital. The record of outdoor patients, therefore, could not be produced. Probably by 1970 when Dr. (Miss) S. Padmavati was examined in court the record of the hospital had been destroyed because she examined the patients in 1959. The fact of the destruction of the record does not destroy the probative value of Dr. (Miss) S. Padmavati's evidence. In her statement she unequivocally stated that she examined Dharam Pal Puri on two occasions and had referred to the record before signing the statement and that the deceased was suffering from heart disease. I have not reason to disbelieve the testimony of a doctor of the eminence of Dr. (Miss) S. Padmavati. What axe she had to grind, what motive to perjure herself? I feel confident to base my conclusion on her evidence because similar was the evidence of Dr. V.K. Dewan and of Dr. Santosh Singh in his two earlier certificates dated October 31, 1964, and the report dated August 4, 1964.

39. The Plaintiff's counsel then argued that no reliance should be placed on the testimony of Dr. V.K. Dewan and Dr. Santosh Singh as they were never told by the deceased that he was suffering from heart trouble for the last seven years. It is true, as appears from the evidence, that Dharam Pal Puri was unconscious when he was admitted to the hospital on August 4, 1964, and his brother who accompanied him gave his past medical history. It is so stated in Exhibit B-2, certificate dated October 31, 1964, of Dr. Santosh Singh. When the deceased was unconscious, his brother was the best person to give the past history of his brother. At that

time his brother was telling the truth because he was interested in saving somehow the life of Dharam Pal his brother. He knew that without disclosing correctly the illness and its past history doctors in the hospital would not be able to give treatment to his brother. It is only later on that Dr. Santosh Singh was prevailed upon to issue certificate and report wherein the doctor changed his stand and said that the illness was of only 1½ years standing before the death. Since I had some doubts on the veracity of the certificates issued by Dr. Santosh Singh for he issued as many as five certificates and reports, I ordered that the original record of Sir Ganga Ram Hospital be produced before me. Today Shanti Swarup Sharma (P.W. 3) brought the original record. I have examined the original record and found that some one had written on the case sheet 7½ years originally. This figure of 7½ was obliterated and in its place 1½ years was written. The two writings are quite different. The entire case-sheet, it is in the evidence of Shanti Swarup Sharma (P.W. 3) is in the hand of Dr. Santosh Singh, who actually made this obliteration is not clear because Dr. Santosh Singh could not be examined with reference to the original case-sheet which I have today before me and which the witness did not have at the time of making his statement on commission. On a consideration of the entire evidence, no doubt is left in my mind that the deceased was suffering from this heart disease since 1946 as deposed by Dr. (Miss) S. Padmavati, for five or seven years as deposed by Dr. V.K. Dewan or for about seven years as was certified by Dr. Santosh Singh in his two certificates and 7½ years as stated by him in his report. In view of the incontrovertible evidence on the record I will discard from consideration the certificate dated August 24, 1964, and the report dated November 28, 1964 of Dr. Santosh Singh. Similarly, the photostat copy of the certificate dated October 31, 1964 is no piece of evidence in this case as the original was never produced in court.

40. On behalf of the plaintiff two witnesses were examined. The first was P.C. Puri, the brother of the deceased. He merely stated that his brother died on August 5, 1964 and that he entered into correspondence with the Corporation after the death of his brother for the purpose of claiming the amount from them. The insurance agents who had come to insure the deceased, he said, filled the proposal forms for these policies, in his presence.

41. The next witness examined by the plaintiff was the widow Krishna Wanti Puri. She completely denied that her husband ever consulted Dr. (Miss) S. Padmavati prior to his death. She also said that she did not know the name of the doctor who attended on the deceased at the time of his death and what was the result of the doctor's examination. As regards the deceased's illness, she simply said that her husband developed pain in the hip on the morning of August 4, 1964, and he had to be removed to the hospital. As regards other questions put to her she stated that the deceased's elder brother was dealing with the matter of insurance and that she knew nothing about these matters. The cumulative result of the evidence adduced on both sides is that there is no evidence of the doctors examined on behalf of the Corporation to show that the deceased's illness was of the heart and that he suffered from the same since 1946 and that he actually died of it. There is no rebuttal to this evidence on behalf of the plaintiff. Mere denial by the widow takes us nowhere. The brother of the deceased who, according to the widow, knew everything about his own brother said nothing in evidence to disprove the testimony of the doctors. The main plank of the plaintiff's claim is the certificate and the report of Dr. Santosh Singh wherein the doctor had given the period of illness as 1½

years. The certificates and the report, I have already said, are not worth relying upon for the rest of the evidence on the record which in my opinion is overwhelming, contradicts the correctness of the certificate and the report dated November 24, 1964 and November 28, 1964, respectively.

42. The plaintiff's counsel lastly urged that before the deceased was insured he was examined by as many as three doctors of the Corporation Dr. Uppal, Dr. R.N. Rohtagi and Dr. Kartar Singh. All these doctors appeared in the witness-box on behalf of the Corporation. It is true that all of them deposed that in their opinion the deceased was fit to be insured at the time of their examination but their evidence does not advance the case of the plaintiff. The corporation did not know that there was a fraudulent suppression of facts by the deceased. The terms of the policy make it clear that the averments made as to the state of health of the insured in the proposal form and the personal statement were the basis of contract between the parties and the circumstances that Dharam Pal Puri had taken pains to conceal that he had ever been treated for this serious ailment by Dr. (Miss) S. Padmavati when in fact he had been treated only a few months before he took out the first policy dated October 12, 1959, shows that the fraudulent suppression and concealment had an important bearing in obtaining the consent of the Corporation.

43. On the whole case my conclusion is that the declarations made by the deceased in the personal statement were on a material matter and that he suppressed fraudulently facts which were material to disclose and that the deceased knew at the time of making the statement that it was false and that he suppressed facts which it was his duty to disclose.

44. I, therefore, hold that the Corporation is entitled to avoid the policies on the grounds available to the insurers under Section 45 of the Act, which I have reproduced above.

Issue No. 2:

45. In view of my decision on Issue No. 3, this issue does not arise.

Issue No. 1:

46. I have already held that the Corporation is entitled to avoid the policies and therefore, the plaintiff is not entitled to claim the amount on the four policies from them.

Issue No. 4:

47. As a result of my finding on Issue No. 3, I dismiss the suit of the plaintiff, leaving the parties to bear their own costs.

48. As regards the premium paid by the deceased on the four policies, the rule of law is that if the policy is voidable owing to fraudulent misrepresentation, the insurer can have the policy set aside without having to return the premiums. The Supreme Court has held in *Mithoolal Nayak* that in a case of fraud the plaintiff cannot claim or ask for the refund of the money paid. It was held that the courts would not entertain an action for money had and received where in order to succeed the plaintiff has to prove his own fraud. Above all the policy contains the term that if the policy is void the premium shall be forfeited and this term will prevent the premiums from being recoverable.

Smt. Dipashri v. Life Insurance Corporation of India

AIR 1985 Bom. 192

PENDSE, J. – The unfurling of the facts would disclose the sorrow plight of a young widow who had to bring up three minor children when her husband died in an unfortunate accident. The petitioner's husband was employed as a Clerk in Mackinnon Mackenzie Private Limited for about 19 years. The deceased husband of the petitioner took out a double benefit policy while in the employment. The deceased husband submitted to respondent 1 a proposal for issue of an Endowment Policy under Table 25 for 20 years for Rs. 30,000/- on July 5, 1975. The monthly premiums of the said policy were to be paid directly through the salary saving scheme of Messrs. Mackinnon Mackenzie. The policy was taken out by the deceased husband as "Provision for future" and the monthly premiums were paid regularly as per the contract of Insurance. Prior to the acceptance of the Policy by the Life Insurance Corporation, the deceased husband of the petitioner was examined by doctors on the panel of the Corporation and after the doctors certified about the sound health of the petitioner's husband, the proposal was accepted by the Corporation and the policy was issued on July 7, 1975. On Oct. 4, 1977, the petitioner's husband while lighting the Stove in the Kitchen, accidentally sustained severe burns. The petitioner's husband was removed to the Nursing Home and from there to Cooper Hospital but succumbed to his injuries on Oct. 8, 1977. The Coroner issued a certificate certifying that the death occurred due to toxæmia following 50% burns sustained accidentally by the deceased. It is not in dispute that the burns were suffered in an accident when the Stove caught fire.

3. On Oct. 24, 1977, the petitioner addressed a letter to the Senior Divisional Manager - respondent 2 - requesting to settle the Insurance claim under the policy. The Agent of the Corporation who had insured the deceased also requested respondent 2 to pay the amount under the Policy. The Senior Divisional Manager called upon the petitioner to fill up certain forms and return the same along with original Policy. The petitioner was nominated by her husband as the person entitled to receive the amount. The petitioner carried the requirements of the Corporation but was informed by the Senior Divisional Manager by letter D/- Aug. 25, 1978 that the Corporation repudiates all liabilities under the policy as the deceased had deliberately made misstatements and withheld material information regarding the health at the time of effecting assurance with the Life Insurance Corporation. The letter, inter alia, recites that the answers to the following questions given by the deceased were incorrect and false:

<u>Q. No. 4(d):</u> Have you consulted a medical practitioner within the last five years? If so, give details	<u>Answers</u> No
<u>Q. No. 6:</u> Have you ever suffered from any of the following ailments?	
<u>Q. No. 6(a):</u> Giddiness, fits, neurasthenia, paralysis, insanity, nervous breakdown or any other disease of the brain or the nervous system	No
<u>Q. No. 6(d):</u> Sprue, Jaundice, Anaemia, Dysentery, Cholera, Abdominal pain, Appendicitis or any disease of the stomach, liver, spleen or intestine?	No
<u>Q. No. 8(b):</u> Have you remained absent from your work on	

grounds of health during the last two years?

If so, when, how long and what ailments?

No

The letter further recites that the answers to the questions set out hereinabove were false and the Corporation holds indisputable evidence to establish that before the date of proposal, the deceased suffered from bleeding from fissure cuts, inflamed piles and rectum in April-May 1972, from low blood-pressure, giddiness and weakness in Dec. 1972 and from Influenza in July 1973, Nov. 1973, Sept. 1974, Nov. 1974 and Feb. 1975 for which the deceased was under treatment of doctors and had also availed of leave on Medical grounds. It was claimed by the Corporation that as the deceased did not disclose these facts in the personal Statement form and instead gave false answers in terms of Policy contract and the declaration contained in the form of proposal for assurance and personal statement, the Corporation repudiates the claim and accordingly are not liable for any payment under the policy and all moneys paid as premiums under the policy stand forfeited. The petitioner appealed to the Corporation that the Corporation should not repudiate the contract and decline to pay the amount to the poor widow who had to bring up three minor children, including two daughters, in life. The petitioner pointed out that her husband died at a very young age of 43 years and the Corporation should not jump to the conclusion that the deceased was suffering from piles, giddiness and Influenza merely from the fact that the deceased had taken sick leave from his office.

"Sick Leave	30 days	14-4-72	to	14-5-72
"	8 days	18-12-72	to	26-12-72
Sick	6 days	24-7-73	to	29-7-73
"	3 days	17-9-73	to	19-9-73
"	9 days	20-11-73	to	28-11-73
"	14 days	9-9-74	to	22-9-74
"	2 days	5-11-74	to	6-11-74
"	7 days	26-11-74	to	1-12-74
"	7 days	17-2-75	to	23-2-75
"	2 days	21-7-75	to	22-7-75
"	7 days	15-9-75	to	21-9-75
"	2 days	17-11-75	to	18-11-75

4. At this juncture, it would be convenient to make reference to a certificate given by the Assistant Manager of Messrs. Mackinnon Mackenzie Private Limited and which was forwarded by the petitioner to the Corporation in pursuance of the demand made by the Corporation. The certificate sets out the sick leave obtained by the deceased while in employment and it would be convenient to set out the relevant portion of the certificate:

<u>Pain on a/c.</u>	<u>Medical certificate</u>	<u>Pain on a/c.</u>	<u>Medical certificate</u>
Piles	produced	Fever	produced
Hypertension	Yes	Influenza	Yes
Influenza	Yes	Influenza	Yes
Dysentery	Yes	Diarrhoea	Yes
Influenza	Yes	Sprain in leg	Yes

Influenza

Yes

Fever

Yes

For privilege leave, staff is not required to submit any reasons. Casual leave and privilege leave are not granted when the staff becomes sick. They take sick leave as per the Company's rules".

As the appeals made by the petitioner for grant of the amount under the policy fell on the deaf ears, the petitioner was driven to file the present petition under Art. 226 of the Constitution of India in this Court on April 19, 1980 for writ of mandamus directing the respondents to pay the petitioner the amount due under the Policy including all the benefits and bonuses accruing thereon.

5. In an answer to the petition, the respondents filed a return dt. July 31, 1980 sworn by Naresh Chander Gautam, Administrative Officer of the Corporation. The Corporation claims that the dispute pertains to contractual obligations and as such a right cannot be enforced in the writ petition. It is claimed that it would be a gross abuse to issue a high prerogative writ as claimed by the petitioner. It is further claimed that the remedy of the petitioner is to file a suit. On merits, it is claimed that the Corporation was perfectly justified in repudiating the contract as the deceased had made false statements as regards his health and in case the deceased had disclosed the correct facts of his ailments at the time of submitting the proposal papers, then the Corporation would not have entered on the risk. The Corporation further pleads that although the Corporation had in its possession undisputable evidence to hold that the deceased made false and inaccurate statements, the Corporation is not willing to give inspection of the evidence in its possession because it is extremely dangerous to disclose such evidence as it could be spirited away or destroyed. The Corporation declines to produce the evidence even in this petition and claims that the same would be produced from the proper custody when evidence is led in a suit, which the petitioner should file. The Corporation, therefore, claims that the petition should be dismissed with costs.

6. Mrs. Singhvi, learned counsel appearing on behalf of the petitioner, submitted that the entire conduct of the Corporation, right from the inception till the hearing of the petition, smacks of high-handedness and the public body like the Corporation should not indulge in raising false defences and defeating the claim of an unfortunate young widow with three minor children. The learned counsel urged that it is a common knowledge that while submitting the proposal, the insured does not refer to the trivial or minor ailments and it is futile on the part of the Corporation to claim that the amount under the policy cannot be claimed by the petitioner and the Corporation can repudiate the contract merely on the ground that the Corporation finds some material which possibly might indicate that the statements were inaccurate. Mrs. Singhvi submits, and in my judgment with considerable merit, that the mere fact that the sick leave was obtained by the deceased by producing medical certificate cannot lead to the conclusion that the deceased was suffering from serious ailments and such ailments would have reduced his life span. It was also urged that the deceased died due to accidental fire and the ailment, which the Corporation claims the deceased was suffering, had no nexus to the death of the husband of the petitioner. Mrs. Singhvi placed strong reliance upon S. 45 of the Insurance Act, which, inter alia, provides that the Policy cannot be called in question on the ground of mis-statement after two years. Shri Taleyarkhan, learned counsel appearing on behalf of the Corporation, on the other hand, submitted that the basis of the

contract is the statement made by the insured and once it is found that the statements were not correct, then the contract is void and the Corporation is perfectly justified in repudiating the same. Shri Taleyarkhan places strong reliance upon the declaration made by the insured at the time of submitting the proposal form.

7. The first submission of Shri Taleyarkhan that it would be a gross abuse to issue a writ in favour of the petitioner is required to be repelled with the contempt it deserves. The Life Insurance Corporation is a public body and it is regrettable that such contentions are raised to defeat the claim of a poor widow. It has been repeatedly pointed out that the writ jurisdiction is exercised by the Courts for advancing the cause of justice and the public body like the Corporation should not raise frivolous defence to defeat the claim of a citizen on technical consideration. The contention that the dispute pertains to contractual obligations and, therefore, the petitioner should be driven to file a suit is repeatedly raised by the public Corporations and it would be advantageous to refer to certain observations of the Supreme Court in the case of *Gujarat State Financial Corporation v. Lotus Hotels Pvt. Ltd.* [AIR 1983 SC 848]. Shri Justic Desai speaking for the Bench observed (at p. 851):

“It is next contended that the dispute between the parties is in the realm of contract and even if there was a concluded contract between the parties about grant and acceptance of loan, the failure of the Corporation to carry out its part, of the obligation may amount to breach of contract for which a remedy lies elsewhere but a writ of mandamus cannot be issued compelling the Corporation to specifically perform the contract. It is too late in the day to contend that the instrumentality of the State which would be ‘other authority’ under Art. 12 of the Constitution can commit breach of a solemn undertaking on which other side has acted and then contend that the party suffering by the breach of contract may sue for damages but cannot compel specific performance of the contract”.

8. In spite of the dictum laid down by the Supreme Court on more than one occasion, it is unfortunate that the Corporation should raise such defense to refuse the claim. It is high time that the Corporation should mend its ways and desist from raising such technical contentions and wasting the time of the Court. The contention of the Corporation that the grant of relief to the petitioner would be a gross abuse of the powers is entirely misconceived. The Corporation may very well choose to deny the relief to the citizen and defeat the justice, but in my judgment, the refusal of the Corporation to pay a pittance of an amount to the widow is, in fact, the gross abuse of the powers.

9. Shri Taleyarkhan submitted that the printed form of proposal contains a declaration of the proposal and it reads as under:-

“I, Shri Anandrao Talpade the person, whose life is hereinbefore proposed to be assured, do hereby declare that the foregoing statements and answers are true in every particular and agree and declare that those statements and this declaration along with the further statements made or to be made before the Medical Examiner and the declaration relative thereto shall be the basis of the contract of assurance between me and the Life Insurance Corporation of India and that if any untrue averment be

contained therein the said contract shall be absolutely null and void and all moneys which shall have been paid in respect thereof shall stand forfeited to the Corporation.”

The learned counsel urged that the contract between the Corporation and the deceased husband makes it clear that if any untrue averments are contained in the proposal, then the contract should be absolutely null and void and the amount of premium can be forfeited. It was urged that the deceased husband of the petitioner had made false statement as regards his health and before considering whether any such false statements were at all made, it would be appropriate to make reference to S. 45 of the Insurance Act, 1938. Section 43 of the Life Insurance Corporation of India Act, 1956, inter alia, provides that S. 45 of the Insurance Act shall apply to the Corporation as it applies to any other insurer. Shri Taleyarkhan did not dispute that under the provisions of S. 45 of the Insurance Act, it is not open for the Corporation to question any policy on the ground that the statement made in the proposal was inaccurate or false. Shri Taleyarkhan submits that the Corporation can repudiate the policy provided it is shown that such statement by the policyholder was on a material matter and was fraudulently made. It is obvious that in view of the statutory provisions of S. 45 of the Insurance Act, it is not permissible for the Corporation to repudiate the policy merely on the ground that an inaccurate or false statement was made by the policy-holder at the time of taking out the policy. The power of the Corporation to repudiate the contract comes to an end after the expiry of two years from the date of commencement of the policy. The policy was taken out by the deceased husband of the petitioner on July 7, 1975 and the deceased died after the passage of two years from the date and obviously the provisions of S. 45 of the Insurance Act come into play.

10. The Supreme Court considered the ambit of S. 45 of the Insurance Act in ***Mithoolal Nayak v. Life Insurance Corporation of India*** [AIR 1962 SC 814] and laid down that the three conditions for the application of the second part of S. 43 are:

- (a) the statement must be on a material matter or must suppress facts which it was material to disclose,
- (b) the suppression must be fraudulently made by the policy holder, and
- (c) the policy holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose.

It is necessary now to ascertain whether the deceased made any inaccurate or false statement in the proposal submitted to the Corporation and even assuming that such statement was made whether the second part of S. 45 of the Insurance Act has application to the facts of the case. Column 4 of the proposal form requires the deceased to state what is the usual state of his health and the deceased had answered that it was good. The deceased had also answered that he had not consulted the Medical Practitioner within the last five years prior to the date of making the proposal. The deceased had also stated in Col. 8 that he had not remained absent from the work on the ground of health during previous two years. The Corporation claims that all these statements were false or inaccurate and in support of the claim, the sole reliance by Shri Taleyarkhan is on the certificate issued by the employer and forwarded by the petitioner to the Corporation. It was urged that the certificate sets out in detail the ailments suffered by the deceased from April 14, 1972 onwards till Nov. 18, 1975 and the sick leave secured by the deceased from his office. Shri Taleyarkhan submits that the

deceased had taken sick leave on production of medical certificate and that clearly establishes that the deceased was suffering from ailment and had consulted Medical Practitioner. It is impossible to accept the contention of Shri Taleyarkhan that the deceased had made deliberate false statements. In the first instance, it must be remembered that before the Corporation accepted the proposal of the deceased, a confidential report of the Medical Examiner was secured by the Corporation. The Medical Officer, Dr. Sahil Dipchand, is a Doctorate in Medicine and is attached to the General Hospital at Borivli and is on the panel of the Corporation. The confidential report submitted by the Medical Examiner was made available by Shri Taleyarkhan after I called upon the learned counsel to produce the original and the report unmistakably establishes that the deceased was enjoying sound health. The report was made by the Medical Examiner after examining the deceased thoroughly and it is obvious that the Corporation has not proceeded to accept the proposal of the deceased only on the statements made in the printed form but on the basis of the report received from the Medical Officer. Secondly, the deceased had disclosed in the proposal form that he was operated for appendicitis in the year 1959 and had not hidden the fact of operation from the Corporation. What is urged by Shri Taleyarkhan is that the deceased did not disclose that he was suffering from bleeding piles, hypertension and influenza.

11. Now, even assuming that the certificate issued by the employer is correct and the deceased had in fact secured sick leave on the relevant dates by production of Medical Certificate, it cannot be concluded that the deceased was in fact suffering from the bleeding piles or hypertension. In my judgment, the ailment of bleeding piles, influenza and dysentery are very minor and trivial ailments and the failure to disclose such ailments in the proposal form cannot be treated as a suppression of the relevant particulars. The deceased might have very well felt that it is not necessary to state that he had suffered from flue, dysentery or common cold because such ailment has no bearing whatsoever to the longevity of the person. It is well known that people in Bombay do not consult Medical Practitioners for such petty ailments like flue, fever or dysentery but the medical certificates are required to be produced before the employer in accordance with the service conditions and the mere fact that the medical certificate is produced for obtaining sick-leave cannot lead to the conclusion that the deceased had taken treatment from the Medical Practitioner. Shri Taleyarkhan made reference to paragraph 11 of the return wherein it is claimed that the deceased was suffering from low blood pressure, giddiness and weakness in Dec. 1972. There is no material on record whatsoever to substantiate this claim. The reliance on the certificate issued by the employer would not help the Corporation because the medical certificate issued in Dec. 1972 merely recites that the deceased was suffering from hypertension. It nowhere refers to the deceased suffering from giddiness or blood pressure or weakness. The certificate discloses only one occasion in 1972 when leave was secured on ground of hypertension and piles. The Corporation has stoutly claimed that it is not bound to produce any material which it holds in support of the claim that the deceased had made false and inaccurate statements and the excuse given for such non-production of evidence is that the disclosure may lead to the destruction or spiriting away of the said material. The Corporation cannot take shield behind such vague excuses and sustain its claim that it holds undisputable evidence in its custody. It is obvious that the Corporation has no material in its custody save and except the certificate issued by the employer of the deceased. The action of the Corporation in concluding from that

certificate that the deceased was suffering from serious ailments or illness and thereby repudiating the contract is wholly illegal. The Corporation has raised false bogie of inaccurate statements only to defeat the just claim of the poor widow and the action of the Corporation deserves to be deplored.

12. Even assuming that the deceased had made incorrect or false statements about his ailment, still that fact itself would not suffice for the Corporation to repudiate the contract in view of the clear-cut provisions of S. 45 of the Insurance Act. Realizing this position, Shri Taleyarkhan urged that the suppression of ailment was a material matter and the deceased suppressed that fact fraudulently. It was urged that the deceased knew at the time of making the statement that it was false and, therefore, it is open for the Corporation to repudiate the contract. In my judgment, the submission is entirely misconceived. In the first instance, there was no suppression whatsoever by the deceased. It was not necessary for the deceased to disclose trivial ailments like fever, flu or dysentery. There is nothing to warrant the conclusion that the deceased had consulted Medical Practitioner within five years prior to the taking out of the Policy. The concept of consultation with the Medical Practitioner is entirely different from securing medical certificate on the ground that the person is down with fever. The perusal of the proposal form leaves no manner of doubt that it is not each and every petty ailment which has to be disclosed by the proposer and what it required to be disclosed is a serious ailment. The deceased was not suffering from any serious ailment and was a young man of 41 years age at the time of taking out of the policy. The Medical Practitioner on the panel of the Corporation had examined him and in these circumstances, it is futile for the Corporation to claim that the deceased was suffering from any serious ailment. In my judgment, the non-disclosure of the fact that the deceased was suffering from fever or down with flue on some occasions is not material matter and, therefore, the failure to disclose the same cannot be construed as suppression of the relevant fact. As laid down by the Supreme Court, it is not suppression of the fact which is sufficient to attract second part of S. 45 of the Insurance Act but what is required is that such suppression should be fraudulently made by the policyholder. The expression "fraudulently" connotes deliberate and intentional falsehood or suppression and some strong material is required before concluding that the policyholder had played a fraud on the Corporation. In my judgment on the facts and circumstances of the present case, it is impossible to come to the conclusion that the deceased had suppressed any material facts and such suppression was done fraudulently. The Corporation cannot deny its liability by a raising hopeless defence that the deceased was suffering from fever, flu and dysentery from time to time. In my judgment, the second part of S. 45 of the Insurance Act is not, at all, attracted to the facts of the case and it is not open for the Corporation to repudiate the contract. The petitioner is entitled to the claim under the policy along with the bonuses and other benefits accrued thereon.

13. In my judgment, the request made by the learned counsel is correct and deserves acceptance. The petitioner husband died on Oct. 8, 1977 and the claim was lodged by the petitioner on Oct. 24, 1977. The Corporation raised false and frivolous pleas to deny the claim of the petitioner who has deprived the petitioner of a small amount though it is quite large to the petitioner, what I am told, is serving as a maid servant to bear up her three minor children. The Corporation has enjoyed the advantage of the amount which was due to the petitioner and

the Corporation is duty bound to pay the said amount with interest to the petitioner who was deprived her just dues. In my judgment, the Corporation should pay the amount due under the policy along with interest at the rate of 15% from the date of lodging of the claim i.e. Oct. 24, 1977 till payment. The Corporation has not only denied payment to the petitioner but has also raised frivolous pleas in answer to the petition and has persisted in defending the petition without any just reasons. In my judgment, this is a fit case to award compensatory costs of Rs. 1,000/- to the petitioner in addition to the normal costs.

14. Accordingly, rule is made absolute and the respondents are directed to pay to the petitioner the amount due under Policy No. 18251483 issued on July 7, 1975 including all the bonuses and other benefits accrued thereon.

* * * * *

Life Insurance Corporation of India v. Asha Goel

(2001) 2 SCC 160 : AIR 2001 SC 549

D.P. MOHAPATRA, J. - These appeals, filed by Life Insurance Corporation of India (“the Corporation”), are directed against the judgment of a Division Bench of the Bombay High Court in Writ Appeal No. 843 of 1985 allowing the appeal on the ground that the appellant should have had an opportunity of leading evidence relevant to their contention that the insurance policy was obtained by misrepresentation, and therefore, avoidable at the instance of the Corporation, and remitting the writ petition to the writ court for fresh decision after allowing the Corporation to lead evidence. The Division Bench did not accept the objection raised by the Corporation against maintainability of the writ petition on the ground that the case involves enforcement of contractual rights for adjudication of which a proceeding under Article 226 of the Constitution is not the proper forum. The contention on behalf of the Corporation was that the writ petition should be dismissed as not maintainable leaving it to the writ petitioner, Respondent 1 herein, to file a civil suit for enforcement of her claim.

2. Late Naval Kishore Goel, husband of Smt Asha Goel - Respondent 1, was an employee of M/s Digvijay Woollen Mills Limited at Jamnagar as a Labour Officer. He submitted a proposal for a life insurance policy at Meerut in the State of U.P. on 29-5-1979 which was accepted and the policy bearing No. 48264637 for a sum of Rs 1,00,000 (Rs one lakh) was issued by the Corporation in his favour. The insured passed away on 12-12-1980 at the age of 46 leaving behind his wife, a daughter and a son. The cause of death was certified as acute myocardial infarction and cardiac arrest. Respondent 1 being nominee of the deceased under the policy informed the Divisional Manager, Meerut City, about the death of her husband, submitted the claim along with other papers as instructed by the Divisional Manager and requested for consideration of her claim and for making payment. The Divisional Manager by his letter dated 8-6-1981 repudiated any liability under the policy and refused to make any payment on the ground that the deceased had withheld correct information regarding his health at the time of effecting the insurance with the Corporation. The Divisional Manager drew the attention of the claimant that at the time of submitting the proposal for insurance on 29-5-1979 the deceased had stated his usual state of health as good; that he had not consulted a medical petitioner within the last five years for any ailment requiring treatment for more than a week; and had answered the question if remained absent from place of your work on ground of health during the last five years in the negative. According to the Divisional Manager, the answers given by the deceased as aforementioned were false. Since Respondent 1 failed to get any relief from the authorities of the Corporation despite best efforts, she filed the writ petition seeking a writ of mandamus directing the Corporation and its officers to pay the sum assured and other accruing benefits with interest.

10. Article 226 of the Constitution confers extraordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of the fundamental rights or for any other purpose. It is wide and expansive. The Constitution does not place any fetter on exercise of the extraordinary jurisdiction. It is left to the discretion of the High Court. Therefore, it cannot be laid down as a general proposition of law that in no case the High Court can entertain a writ petition under Article 226 of the Constitution to enforce a claim under a life insurance

policy. It is neither possible nor proper to enumerate exhaustively the circumstances in which such a claim can or cannot be enforced by filing a writ petition. The determination of the question depends on consideration of several factors like, whether a writ petitioner is merely attempting to enforce his/her contractual rights or the case raises important questions of law and constitutional issues, the nature of the dispute raised; the nature of inquiry necessary for determination of the dispute etc. The matter is to be considered in the facts and circumstances of each case. While the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution cannot be denied altogether, courts must bear in mind the self-imposed restriction consistently followed by High Courts all these years after the constitutional power came into existence in not entertaining writ petitions filed for enforcement of purely contractual rights and obligations which involve disputed questions of facts. The courts have consistently taken the view that in a case where for determination of the dispute raised, it is necessary to inquire into facts for determination of which it may become necessary to record oral evidence a proceeding under Article 226 of the Constitution, is not the appropriate forum. The position is also well settled that if the contract entered between the parties provide an alternate forum for resolution of disputes arising from the contract, then the parties should approach the forum agreed by them and the High Court in writ jurisdiction should not permit them to bypass the agreed forum of dispute resolution. At the cost of repetition it may be stated that in the above discussions we have only indicated some of the circumstances in which the High Court have declined to entertain petitions filed under Article 226 of the Constitution for enforcement of contractual rights and obligation; the discussions are not intended to be exhaustive. This Court from time to time disapproved of a High Court entertaining a petition under Article 226 of the Constitution in matters of enforcement of contractual rights and obligation particularly where the claim by one party is contested by the other and adjudication of the dispute requires inquiry into facts.

11. The position that emerges from the discussions in the decided cases is that ordinarily the High Court should not entertain a writ petition filed under Article 226 of the Constitution for mere enforcement of a claim under a contract of insurance. Where an insurer has repudiated the claim, in case such a writ petition is filed, the High Court has to consider the facts and circumstances of the case, the nature of the dispute raised and the nature of the inquiry necessary to be made for determination of the questions raised and other relevant factors before taking a decision whether it should entertain the writ petition or reject it as not maintainable. It has also to be kept in mind that in case an insured or nominee of the deceased insured is refused relief merely on the ground that the claim relates to contractual rights and obligations and he/she is driven to a long-drawn litigation in the civil court it will cause serious prejudice to the claimant/other beneficiaries of the policy. The pros and cons of the matter in the context of the fact-situation of the case should be carefully weighed and appropriate decision should be taken. In a case where claim by an insured or a nominee is repudiated raising a serious dispute and the Court finds the dispute to be a bona fide one which requires oral and documentary evidence for its determination then the appropriate remedy is a civil suit and not a writ petition under Article 226 of the Constitution. Similarly, where a plea of fraud is pleaded by the insurer and on examination is found prima facie to have merit and oral and documentary evidence may become necessary for determination of the issue raised, then a writ petition is not an appropriate remedy.

12. Coming to the question of scope of repudiation of claim of the insured or nominee by the Corporation, the provisions of Section 45 of the Insurance Act is of relevance in the matter. The section provides, inter alia, that no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose. The proviso which deals with proof of age of the insured is not relevant for the purpose of the present proceeding. On a fair reading of the section it is clear that it is restrictive in nature. It lays down three conditions for applicability of the second part of the section namely: (a) the statement must be on a material matter or must suppress facts which it was material to disclose; (b) the suppression must be fraudulently made by the policy-holder; and (c) the policy-holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose. Mere inaccuracy or falsity in respect of some recitals or items in the proposal is not sufficient. The burden of proof is on the insurer to establish these circumstances and unless the insurer is able to do so there is no question of the policy being avoided on ground of misstatement of facts. The contracts of insurance including the contract of life assurance are contracts uberrima fides and every fact of material (*sic* material fact) must be disclosed, otherwise, there is good ground for rescission of the contract. The duty to disclose material facts continues right up to the conclusion of the contract and also implies any material alteration in the character of the risk which may take place between the proposal and its acceptance. If there are any misstatements or suppression of material facts, the policy can be called into question. For determination of the question whether there has been suppression of any material facts it may be necessary to also examine whether the suppression relates to a fact which is in the exclusive knowledge of the person intending to take the policy and it could not be ascertained by reasonable enquiry by a prudent person.

15. Life Insurance Corporation was created by the Life Insurance Corporation Act, 1956 with a view to provide for nationalisation of life insurance business in India by transferring all such business to a corporation established for the purpose and to provide for the regulation and control of the business of the Corporation and for matters connected therewith or incidental thereto. The said Act contains various provisions regarding establishment of Life Insurance Corporation of India; the functions of the Corporation, the transfer of existing life insurance business to the Corporation, the management of the establishment of the Corporation, the finance, accounts and audit of the Corporation and certain other related matters. Section 30 of the Act provides that except to the extent otherwise expressly provided in this Act, on and from the appointed day the Corporation shall have the exclusive privilege of carrying on life insurance business in India; and on and from the said day any certificate of registration under the Insurance Act held by any insurer immediately before the said day shall cease to have effect insofar as it authorises him to carry on life insurance business in India.

16. In course of time the Corporation has grown in size and at present it is one of the largest public sector financial undertakings. The public in general and crores of policy-holders in particular, look forward to prompt and efficient service from the Corporation. Therefore, the authorities in charge of management of the affairs of the Corporation should bear in mind that its credibility and reputation depend on its prompt and efficient service. Therefore, the approach of the Corporation in the matter of repudiation of a policy admittedly issued by it, should be one of extreme care and caution. It should not be dealt with in a mechanical and routine manner.

17. With the above discussions and observations regarding the questions raised before us, we dispose of the appeals with the direction that the sum, as directed by the learned Single Judge in favour of the claimant, will be paid by the Corporation expeditiously, if it has not already been paid. In view of the above order/direction, it is not necessary to proceed with the case pending before the High Court any further.

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New India Assurance Company Ltd. v. M/s. Zuari industries Ltd.
(2009) 9 SCC 70

MARKANDEY KATJU, J. - This appeal has been filed against the impugned judgment of the National Consumer Disputes Redressal Commission, New Delhi dated 26.3.2004 in Original Petition No.196 of 2001.

3. The facts of the case were that the complainant (respondent in this appeal) had taken Insurance Policies from the appellant on 1.4.1998 in respect of its factory situated in Jauhari Nagar, Goa.

One policy was a fire policy and the other was a consequential loss due to fire policy.

4. On 8.1.1999 at about 3.20 p.m. there was a short circuiting in the main switch board installed in the sub-station receiving electricity from the State Electricity Board, which resulted in a flashover producing over currents. The flashover and over currents generated excessive heat. The paint on the panel board was charred by this excessive heat producing smoke and soot and the partition of the adjoining feeder developed a hole. The smoke /soot along with the ionized air traveled to the generator compartment where also there was short circuiting and the generator power also tripped. As a result, the entire electric supply to the plant stopped and due to the stoppage of electric supply, the supply of water/steam to the waste heat boiler by the flue gases at high temperature continued to be fed into the boiler, which resulted in damage to the boiler.

5. As a result the respondent - complainant approached the Insurance Company informing it about the accident and making its claim. Surveyors were appointed who submitted their report but the appellant-Insurance Company vide letter dated 4.9.2000 rejected the claim. Hence the petition before the National Commission.

6. The claimant-respondent made two claims (i) Rs.1,35,17,709/- for material loss due to the damage to the boiler and other equipments and (ii) Rs.19,11,10,000/- in respect of loss of profit for the period the plant remained closed.

7. The stand of the appellant- Insurance Company was that the loss to the boiler and other equipments was not caused by the fire, but by the stoppage of electric supply due to the short circuiting in the switch board. It was submitted that the cause of the loss to the boiler and the equipments was the thermal shock caused due to stoppage of electricity and not due to any fire. It was submitted that the proximate cause has to be seen for settling an insurance claim, which in the present case, was the thermal shock caused due to stoppage of electricity. However, the National Commission allowed the claim of the respondent and hence this appeal.

8. Ms. Meenakshi Midha who argued this case with great ability submitted that the loss to the boiler and to the equipments did not occur due to any fire. Hence she submitted that the claim of damages did not fall under the cover of the Insurance Policy. She submitted that for a claim relating to fire insurance policy to succeed it is necessary that there must be a fire in the first place. In the absence of fire the claim cannot succeed. She submitted that in the present case (1) there was no fire and (2) in any case it was not the proximate cause of the damage.

9. On the other hand, Shri K.K. Venugopal, learned senior counsel, supported the judgment of the National Commission and stated that the judgment was correct.

10. We have therefore to first determine whether there was a fire. Admittedly there was a short circuit which caused a flashover.

11.. Wikipedia defines flashover as follows :

“A flashover is the near simultaneous ignition of all combustible material in an enclosed area. When certain materials are heated they undergo thermal decomposition and release flammable gases. Flashover occurs when the majority of surface in a space is heated to the autoignition temperature of the flammable gases.”

12. In this connection, it is admitted that the short circuit in the main switch board caused a flashover. The surveyor Shri M.N. Khandeparkar in his report has observed :

“Flashover, can be defined as a phenomenon of a developing fire (or radiant heat source) radiant energy at wall and ceiling surfaces within a compartment.... In the present case, the paint had burnt due to the said flashover ... Such high energy levels, would undoubtedly, have resulted in a fire, causing melting of the panel board....”

13. The other surveyor P.C. Gandhi Associates has stated that "Fire of such a short duration cannot be called a 'sustained fire' as contemplated under the policy".

14. In our opinion the duration of the fire is not relevant. As long as there is a fire which caused the damage the claim is maintainable, even if the fire is for a fraction of a second. The term 'Fire' in clause (1) of the Fire Policy 'C' is not qualified by the word 'sustained'. It is well settled that the Court cannot add words to statute or to a document and must read it as it is. Hence repudiation of the policy on the ground that there was no 'sustained fire' in our opinion is not justified.

15. We have perused the fire policy in question which is annexure P-1 to this appeal. The word used therein is 'fire' and not 'sustained fire'. Hence the stand of the Insurance Company in this connection is not acceptable.

16. Shri K.K. Venugopal invited our attention to exclusion (g) of the Insurance Policy which stated that the insurance does not cover :

“(g) Loss of or damage to any electrical machine, apparatus, fixture or fitting (including electric fans, electric household or domestic appliances, wireless sets, television sets and radios) or to any portion of the electrical installation, arising from or occasioned by over running, excessive pressure short circuiting, arcing self-heating or leakage of electricity from what ever cause (lightning included), provided that this exemption shall apply only to the particular electrical machine apparatus, fixtures, fittings or portion of the electrical installation so affected and not to other machines, apparatus, fixture, fittings or portion of the electrical installation which may be destroyed or damaged by fire so set up.”

17. A perusal of the exclusion clause (g) shows that the main part of the exclusion clause which protects the insurer from liability under the policy covers loss of damage to any electrical machinery, apparatus, fixture or fittings including wireless sets, television sets,

radio and so on which themselves are a total loss or a damage or damaged due to short circuiting, arcing, self heating or leakage of electricity. However, the proviso to the said clause through inclusion of any other machinery, apparatus, fixture or fitting being destroyed or damaged by the fire which has affected any other appliances such as television sets, radio, etc. or electrical machines or apparatus are clearly included within the scope of the Fire Policy for whatever damage or destruction caused by the fire. If for example the short circuiting results in damage in a television set through fire created by the short circuiting in it the claim for it is excluded under the fire policy. However, if from the same fire there is a damage to the rest of the house or other appliances, the same is included within the scope of the Fire Policy by virtue of the proviso. In other words, if the proximate cause of the loss or destruction to any other including other machines, apparatus, fixtures, fittings etc. or part of the electrical installation is due to the fire which is started in an electrical machine or apparatus all such losses because of the fire in other machinery or apparatus is covered by the Policy.

18. The main question before us now is whether the flashover and fire was the proximate cause of the damage in question.

19. To understand this we have to first know the necessary facts. The insurance company pointed out the chain or sequence of events as under :

“Short-circuiting takes place in the INCOMER 2 of the main switchboard receiving electricity from the State Electricity Board possibly due to the entry of a vermin. ? Short-circuiting results in a flashover. Short-circuiting and flashover produced over-currents to the tune of 8000 amperes, which in turn produced enormous heat. The over currents and the heat produced resulted in the expansion and ionization of the surrounding air.

The electricity supply from the State Electricity Board got tripped. The paint of the Panel Board charred by the enormous heat produced above and the MS partition of the adjoining feeder connected to the generator power developed a hole. It also resulted in formation of smoke/soot. The smoke/soot and the ionized air crossed over the MS partition and entered into the compartment receiving electricity from the generator.

Consequently the generator power supply also got tripped. The tripping of purchased power and generator power resulted in total stoppage of electricity supply to the plant. The power failure resulted in stoppage of water/steam in the waste heat boiler. The flue gases at high temperature continued to enter the boiler, which resulted in thermal shock causing damage to the boiler tubes.”

20. In this connection, it may be noted that in its written submission before the National Commission the appellant has admitted that there was a flashover and fire. The relevant portion of the written statement of the appellant before the National Commission is as follows:

(a) Para 1 of the Preliminary Objections wherein it is stated: ... On 8th January, 99, there was a short circuiting... which resulted in flash over.... The cause of loss to the boiler and equipment is the thermal shock caused due to stoppage of electricity.... The stoppage of electricity was due to the fire... short circuiting results in a flash over....

(b) Para 3(iv) of the Preliminary Objections wherein it is stated: ... Due to this flash over and over currents excessive heat energy was generated which resulted in the evolution of marginal fire....

(c) Para 3(vi) of the Preliminary Objections wherein it is stated: ... The surveyors observed that the experts in all the reports submitted by the complainant admitted that a flash over took place ...;

(d) Para 3(viii) of the Preliminary Objections wherein it is stated: ... Fire of extremely short duration followed and preceded by short circuit...;

(e) Para 7 of the reply wherein it is stated: ... It is correct that on 8th January, 1999, short circuit occurred on INCOMER-2 of the 3.3 KV main switch board in the electrical sub station which resulted in a flash over.....

(f) Para 10 of the reply wherein it is stated: ... Due to this flash over and over currents excessive heat energy was generated which resulted in the evolution of marginal fire....

(g) Para 21 of the reply wherein it is stated: ... A reference of fire, as opposed to sustained fire, in the opinion of M/s. P.C. Gandhi & Associates has been made.... It is in this context that M/s. P.C. Gandhi & Associates have referred to the possible fire after the flash over being of a very short duration.

21. Thus it is admitted in the written statement of the appellant before the National Commission that it was the flashover/fire which started the chain of events which resulted in the damage.

22. Apparently there is no direct decision of this Court on this point as to the meaning of proximate cause, but there are decisions of foreign Courts, and the predominant view appears to be that the proximate cause is not the cause which is nearest in time or place but the active and efficient cause that sets in motion a train or chain of events which brings about the ultimate result without the intervention of any other force working from an independent source.

23. Thus in *Lynn Gas and Electric Company v. Meriden Fire Insurance Company* [158 Mass. 570; 33 N.E. 690; 1893 Mass. LEXIS 345] Supreme Court of Massachusetts was concerned with a case where a fire occurred in the wire tower of the plaintiff's building, through which the wires of electric lighting were carried from the building. The fire was speedily extinguished, without contact with other parts of the building and contents, and with slight damage to the tower or its contents. However, in a part of the building remote from the fire and untouched thereby, there occurred a disruption by centrifugal force of the fly wheel of the engine and their pulleys connected therewith, and by this disruption the plaintiff's building and machinery were damaged to a large extent. It was held that the proximate cause was not the cause nearest in time or place, and it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end. The question always is :

Was there an unbroken connection between the wrongful act and the injury, a continuous operation? In other words, did the facts constitute a continuous succession of events, so linked

together as to make a natural whole, or there was some new and independent cause intervening between the wrong and the injury?

24. The same view was taken in *Krenie C. Frontis et al. v. Milwaukee Insurance Company* [156 Conn. 492; 242 A.2d 749; 1968 Conn. LEXIS 629]. The facts in that case were that the plaintiffs owned the northerly half of a building that shared a common wall with a factory next door. A fire broke out in the factory and damaged that building. Minimal fire damage occurred to the plaintiffs' building. However, due to the damage next door, the building inspector ordered the removal of the three upper stories of the factory building, which left the common wall insufficiently supported. Due to the safety issue, the inspector ordered the third and fourth floors of plaintiffs' building to be demolished. On this fact it was held that the fire was the active and efficient cause that set in motion a chain of events which brought about the result without the intervention of any new and independent source, and hence was the proximate cause of the damage.

25. In *Farmers Union Mutual Insurance Company v. Blankenship* [231 Ark.127; 328 S.W..2d 360; 1959 Ark. LEXIS 474; 76 A.L.R..2d 1133] the claimant's goods were damaged after a fire originated in his place of business. The goods were not damaged by the flames but by a gaseous vapour caused by the use of a fire extinguisher in an effort to put out the fire. On these facts the Supreme Court of Arkansas upheld the claim of the claimant.

26. In *Leyland Shipping Company Limited v. Norwich Union Fire Insurance Society Limited* [(1917) 1 K.B. 873] the facts of the case were that a ship was insured against perils of the sea during the first world war by a time policy containing a warranty against all consequences of hostilities. The ship was torpedoed by a German submarine twenty five miles from Havre. With the aid of tugs she was brought to Havre on the same day. A gale sprang up, causing her to bump against the quay and finally she sank. The House of Lords upheld the claim for damages observing that the torpedoing was the proximate cause of the loss even though not the last in the chain of event after which she sank.

27. In *Yorkshire Dale Steamship Company Ltd. v. Minister of War Transport (The Coxwold)* [(1942) AC 691 : [1942] 2 All ER 6] during the Second World War a ship in convoy was sailing carrying petrol for use of the armed forces. There was an alteration of the course of the ship to avoid enemy action, and an unexpected and unexplained tidal set carried away the ship and she was stranded at about 2.45 a.m. It was held that the loss was the direct consequence of the warlike operation on which the vessel was engaged.

28. In *The Matter of an Arbitration between Etherington and the Lancashire and Yorkshire Accident Insurance Company* [(1909) 1 K.B. 591] by the terms of the policy (an accident) the insurance company undertook that if the insured should sustain any bodily injury caused by violent, accidental, external and visible means, then, in case such injuries should, within three calendar months of the causing of such injury, directly cause the death of the insured, damages would be paid to his legal heirs. There was a proviso in the policy that this policy only insured against death where the accident was the proximate cause of the death. The assured while hunting had a fall and the ground being very wet he was wetted to the skin. The effect of the shock lowered the vitality of his system and being obliged to ride home afterwards, while wet, still further lowered his vitality. As a result he developed

pneumonia and died. The Court of Appeal uphold the claim holding that the accident was the proximate cause of death.

29. In the present case, it is evident from the chain of events that the fire was the efficient and active cause of the damage. Had the fire not occurred, the damage was also would not have occurred and there was no intervening agency which was an independent source of the damage.

30. Hence we cannot agree with the conclusion of the surveyors that the fire was not the cause of the damage to the machinery of the claimant.

31. Moreover, in *General Assurance Society Ltd. v. Chandmull Jain* [AIR 1966 SC 1644] it was observed by a Constitution Bench of this Court that in case of ambiguity in a contract of insurance the ambiguity should be resolved in favour of the claimant and against the insurance company.

32. Learned counsel for the appellant relied on the decision of the British High Court in *Everett v. The London Assurance* [S.C. 34 L.J.C.P. 299; 11 Jur. N.S. 546; 13 W.R. 862]. By the terms of the policy the premises in question was insured against “such loss or damage by fire to the property.” It was held by the High Court that this did not cover damage resulting from the disturbance of the atmosphere by the explosion of a gunpowder magazine a mile distant from the premises insured. We are in respectful disagreement with the said judgment as the predominant view of most Courts is to the contrary.

33. For the reasons given above, we see no merit in this appeal and it is dismissed.

* * * * *

Simmonds v. Cockell

(1920) All ER Rep. 162

ROCHE, J. – The plaintiff sues one of the underwriting members of Lloyd’s under a Lloyd’s policy of insurance against burglary, housebreaking and theft, dated May 1, 1919. During the currency of the policy the premises were broken into, and about £475 worth of the plaintiff’s goods were stolen. The action is brought to establish the liability of the defendant and the other underwriter of the policy. The defence is a short one, and turns on one point only - not an easy one to decide.

The policy contains the following clause: “Warranted that the premises are always occupied.” I have to decide whether that warranty has been broken by the plaintiff. It is alleged that the warranty has been broken in this case, and that therefore the underwriters are not liable. The facts are that on June 22 the premises were broken into. The plaintiff and his wife, who were the only persons resident on the premises, were absent from the premises on the afternoon of the day of the burglary. The plaintiff was away partly on business, and his wife spent the afternoon at a garden party and fete, where she was joined later by the plaintiff, and they both spent the evening at the fete. During their absence the shop and premises were left unattended between 2.30 p.m. and 11.30 p.m., except for an interval about seven o’clock p.m. when the plaintiff himself returned to change his clothes. If the warranty means, as the defendant contends, that the premises are never to be left unattended, and that there must be some continuous attendance on the premises, then there has undoubtedly been a breach of the warranty for both the plaintiff and his wife were absent from the premises for some hours on the day in question. But, in my judgment, that is not the meaning of the warranty. I think it means that the premises are to be used, continuously and without interruption, for occupation, that is to say, as a residence, and not merely as a lock-up shop which is left unoccupied after business hours. That is the construction I should put on the words, and I am fortified in arriving at this conclusion by the judgment of Bray, J., in *Winicofski v. Army and Navy General Assurance Association, Ltd.* [(1919) 88 J.K.B. 1171] and by the American decisions cited by counsel for the plaintiff, most of which are collected in Mr. Macgillivray’s most useful book on Insurance Law, at p. 887.

But the matter does not rest there, for if the warranty does not bear the meaning which I have given to it, I should hold, that the language used is very ambiguous; and it is a well-known principle of insurance law and other matters, that if the language of a clause drawn by a party himself for his own protection is ambiguous it must be construed against him, and if the words of a warranty in a policy are ambiguous they must be construed against the underwriter who has inserted the warranty in it for his own protection. Therefore the defence, on the whole, fails. The only materiality which attached to the question whether the plaintiff returned to the premises about seven o’clock is that it fixes the time when the burglary happened, because the premises were all right then. It was contended for the defendant that if the warranty is to be construed in a way I suggest, it affords very little protection to the underwriters. I do not agree. If the premises are used for residential as well as for business purposes, it is obvious that a thief would never know at what moment the occupier might return from a temporary absence and disturb his operations. It is that kind of occupation

which this warranty requires and which has been secured. The defendant has not stipulated for the continuous presence of some one in the premises, which he could have done by providing that the premises were never to be left unattended. I therefore give judgment for the plaintiff with costs.

* * * * *

Harris v. Poland

(1941) All ER 204

ATKINSON, J. - The plaintiff lives in a flat at 4, Chartfield Avenue, London. In Jan., 1939, she took out a Lloyds comprehensive policy insuring her against loss by fire, burglary and housebreaking and other causes at her flat. There was an attempted burglary at her flat during the summer, which made her nervous about the safety of her jewellery while she was out and the flat was empty. She had jewellery worth about £500. On Dec. 2, she was going out for the day. She had over £100 in banknotes, and, therefore, felt more uneasy than usual about the safety of her empty flat. It occurred to her that perhaps the least likely place which a burglar would suspect as a hiding-place would be in the fireplace in the sitting-room amongst the paper and sticks under the coalite. She was probably quite right. She got a piece of newspaper and wrapped the money and the jewellery in it. Particulars of the latter are given in the statement of claim. The notes were in a registered envelope, the pearl necklace was in a soft leather *suit* case, the wrist-watch was wrapped in tissue paper, the watch set in diamonds was in a grey leather case lined with velvet, the links were in tissue paper, and were in a cotton bag along with the wrist-watch, while the rings were in tissue paper. She wrapped the articles in a newspaper and hid the parcel in the fireplace under the coalite, mixed up with the paper already there. It may be observed that this care was very much in the interests of the under-writers on whom would fall any loss suffered from burglary.

The plaintiff returned home late in the afternoon, and, feeling cold, lighted the fire, forgetting all about what she had done. Early the following morning, she remembered the hiding of her jewellery and money. Two of the pieces were repairable, but the rest of them and the notes had been completely destroyed by fire. The plaintiff seeks to recover the loss – agreed at £460 – from the underwriters. The relevant words in the policy are to insure her “from loss or damage caused by fire... burglary, housebreaking, theft or larceny” and various other causes. The plaintiff says that the loss she has suffered comes within that plain and simple language. Goods insured against loss by fire have been unintentionally either totally destroyed or badly damaged by fire, and, therefore, she says, her claim comes exactly within the language used.

The view presented on her behalf is that, while the burning of something intended to be consumed by fire is, of course, not fire under the policy, the moment one gets the accidental burning of something not intended to be consumed by fire, there is damage by fire within the meaning of the policy, and, therefore, if insured property not intended to be consumed by fire is ignited and thereby damaged or lost, or if insured property is damaged by heat, smoke, water or demolition caused by the burning of property not intended to be consumed by fire, there is loss or damage by fire within the meaning of the policy.

The underwriters very properly want it to be made quite clear that they are not disputing liability on the ground of negligence, or on the ground that the loss was due to an act of forgetfulness on the part of the plaintiff, or on the ground that the loss was the inevitable result of her own act. In their view, the position is just the same as if a maid instructed by the plaintiff not to light the fire had forgotten or misunderstood her instructions and lighted it and so caused the loss. They agree that there has been accidental loss which would be covered by

an all risks policy, but they dispute that this loss is a loss by fire within the meaning of the policy. Their case and the principle they seek through the defendant to establish is that, where damage is done to insured property by a fire in a place where fire is intended to be – where fire has not broken bounds – the loss is not covered, because such a fire is not a fire within the meaning of the policy. It is said that there must be ignition where no ignition ought to be in order to create liability. The argument is that there must be a fortuitous fire somewhere where fire ought not to be, that it is only damage caused by such an accidental fire which comes within the policy, and that the actual burning of the insured property does not in itself constitute fire within the meaning of the policy. The idea presented is that there must be an unintentional coming of fire from its proper place to the insured property and that the policy is not concerned with the coming of insured property to a fire which is behaving itself with perfect propriety in a place where it is intended to be.

Counsel for the defendant urges that the first question which I ought to ask myself is whether there was a fire within the meaning of the policy, and that only if I find that there was does there arise the question whether or not such fire caused damage to insured property, and he contends that it is impossible to hold that the fire, intentionally lighted, and burning quite properly in the grate, was a fire within the meaning of the policy. According to this view, the short and simple words in the policy against “loss or damage caused by fire” mean loss or damage caused to insured property by a fortuitous fire of something not intended to be consumed by fire in a place where fire is not intended to be.

The whole difference between the parties lies in those last few words. Unless there is spontaneous combustion, and apart from fires caused by electricity or lighting, the unintentional burning of insured property must, I suppose, always be caused directly or indirectly by, or must be due to, fire created intentionally of matter intended to be consumed, as, for example, domestic fires, lighted candles, oil lamps, gas jets, matches, tapers, cigarettes. Of course, one does not insure against the happening of such intended fires. One insures against the risk of insured property getting burned by unintentional contact with some such fire, or with fire started by some such fire. A householder has of necessity to make use of fire in his house for heating and lighting. He knows that fire is a source of danger, not merely from the escape of fire from its legitimate place but also from things coming in contact with it in its legitimate place in any of the forms I have just enumerated. I have no doubt that, when the ordinary man insures against loss by fire, he believes that he is insuring against every kind of loss which he may suffer from the more or less compulsory use of fire by himself or his neighbour. If he were told that the words in a Lloyds policy meant only loss from contact with fire where no fire ought to be, many questions would spring his mind, as they spring to mine. Am I not covered, he would ask, if the wind blows something – say a valuable manuscript or a sheet of foreign stamps – into the fire in the grate, or if a careless servant drops something into the fire, or if my wife stumbles and causes her lace scarf or silver fox tie to get caught by a flame in the fire grate? To all these questions the answers of counsel for the defendant is: “No.” But what if part of the scarf is consumed in the grate and the rest of it is consumed outside the grate on the hearth-rug? Do I get compensation for the part burnt outside the grate, though not for the part burnt in the grate? Also, what if the burning scarf burns a hole in the carpet? That is not the fault of the fire in the grate, which has not broken

bounds. Am I covered for that? Again, what is the position if the lace catches fire by coming in contact with a lighted candle on the dinner-table? The flame of the candle is in the exact place where it is intended to be. Is it on a par with the fire in the grate? Moreover, what if the wind blows a curtain against a lighted gas jet and the curtain catches fire? I imagine that the ordinary man would say: "Your policy is no use to me. I shall never know where I am. I want an underwriter who knows what he means and says what he means." There certainly ought to be some clear understanding as to the meaning of these apparently simple words, so that persons insuring may know where they stand, and – if the defendant is right – not continue in a fool's paradise believing that they have a protection which in fact they have not.

There are one or two well-settled rules of construction with regard to policies. One is that the construction depends, not upon the presumed intention of the parties, but upon the meaning of the words used. In *Nelson Line (Liverpool), Ltd. v. Nelson & Sons, Ltd.* [(1908) AC 16], LORD LOREBURN, L.C., said, at p. 20:

I know of only one standard of construction, except where words have acquired a special conventional meaning, namely, what do the words mean on a fair reading, having regard to the whole document.

There is another rule which I find summarised in *Hamlyn & Co. v. Wood & Co.* [(1891) 2 Q.B. 488], where LORD ESHER, M.R., said, at p. 491:

I have for a long time understood that rule to be that the court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned.

Another rule of construction is that, as a policy is prepared by the underwriters, any ambiguity therein must be taken most strongly against the underwriters by whom it has been prepared. If a policy is reasonably susceptible of two constructions, that one which is more favourable to the insured will be adopted. Again, in *West India Telegraph Co. v. Home & Colonial Insurance Co.* [(1880) 6 Q.B.D. 51], BRETT, L.J., said, at p. 58:

An English policy is to be construed according to the same rules of construction; which are applied by English courts to the construction of every other mercantile instrument. Each term in the policy, and each phrase in the policy, is *prima facie* to be construed according to its ordinary meaning.

Guided by these principles, I can see no reason whatever for limiting the indemnity given by the policy in the way claimed by the defendant. In my judgment, the risks against which the plaintiff is insured include the risk of insured property coming unintentionally in contact with fire and being thereby destroyed or damaged, and it matters not whether that fire comes to the insured property or the insured property comes to the fire. The words of the policy are just as descriptive of one as they are of the other, and I cannot read into the contract a limitation which is not there. To enable me to accept the contention of the underwriters, I should have to read something into the contract, some such words as "unless the insured property is burned by coming in contact with fire in a place where fire is intended to be."

Why should I? What justification can there be for so doing? To what absurdities would it lead? A red hot cinder jumps from the fire and sets on fire some paper of value. Admittedly, there is liability. A draught from the window blows the same paper into the same fire. Is that any less an accidental loss by fire? Are the words in the policy any less applicable to the latter than they are to the former? A draught blows the flame of a candle against a curtain. Admittedly, there is liability. What if the curtain is blown against the flame of the candle, however? Surely the result must be the same. If it is not the same, the result is an absurdity. If it is the same, why should the result be different if one substitutes a fire in a grate for the lighted candle in a candlestick? Unless I am bound by authority to the contrary, or unless I can find a consensus of opinion to the contrary among textbook writers indicating a generally accepted interpretation of these words, I must give effect to the view I have formed.

Counsel for the defendant relies and it is his only prop upon *Austin v. Drewe* [(1816) 4 Camp. 360], not, indeed, upon the actual decision, which gives him no help, but upon two sentences to be found in the summing up to the jury by GIBBS, C.J. The facts of that case were very simple [p. 360]:

This was an action on a policy of insurance against fire. The premises insured were used as a manufactory for sugar baking. The building was divided into seven or eight storey's. On the ground floor were pans for boiling the sugar, and a stove to heat them. From the stove a chimney or flue went to the top of the building, and as it passed each floor, there was a register in it with an aperture into the rooms, whereby more or less heat might be introduced at pleasure. The upper floors were used for drying the baked sugars. One morning the fire being lighted as usual below, the servant whose duty it was to have opened the register in the highest storey forgot to do so. The consequence was that the smoke, sparks, and heat, were completely intercepted in their progress through the flue, and were forced into the room where the sugars were drying. The smoke being perceived below, the alarm was given. One or two men were suffocated in attempting to open the register; but at last it was opened, and the mischief remedied. Had it remained shut much longer, the premises would probably have been burnt down: but in point of fact there never was more fire than was necessary to carry on the manufacture, and the flame never got beyond the flue. The sugars, however, were very much damaged by the smoke, and still more by the heat. The loss amounted to several thousand pounds. The question was whether this was a loss for which the insurance office was liable.

The head note is as follows:

From the negligence of a servant of the assured in not opening a register, smoke and heat from a stove used in the manufactory are forced into a room and greatly damage goods, without actually burning any, the fire not being greater than it ought to have been had there been free vent for the smoke and heat. This held not to be a loss within the policy.

Judging from the head note, the grounds of the decision were the negligence of the plaintiff's servant and the absence of any burning of any of the insured property. Nowadays it is well-established that negligence is immaterial, and, in the case with which I have to deal,

there was burning of the insured property. In the direction to the jury, however, GIBBS, C.J., said, at p. 362:

If there is a fire, it is no answer that it was occasioned by the negligence or misconduct of servants; but in this case there was no fire except in the stove and the flue, as there ought to have been, and the loss was occasioned by the confinement of heat. Had the fire been brought out of the flue, and anything had been burnt, the company would have been liable. But can this be said, where the fire never was at all excessive, and was always confined within its proper limits? This is not a fire within the meaning of the policy.

There are several sources of damage from fire. There are the flames, the heat generated, and the smoke and sparks produced. Some might find it difficult to see how it could be said, when in fact smoke, sparks and excessive heat were forced into the room, that the fire was always confined within its proper limits. It could only be true of the actual flames. I asked counsel for the defendant what the position would be if the excessive heat had caused some of the bags to ignite, and the answer was that the loss would be within the policy – and yet it would have been just as true to say that the fire had not been brought out of the flue. I might put the question in a more awkward way. Suppose that some bags ignited and some were merely ruined by the heat. There would be liability for the former, but not for the latter, according to his view, yet the only distinction would be that in the one case there was ignition and in the other there was not.

The next report of this case to which I will refer is in Holt 126. There one can find little, if any, reference to this point about the fire escaping from its proper place. According to that report, I think that the ground upon which GIBBS, C.J., directed the jury was this [pp. 127, 128]:

As no substance, therefore, was taken possession of by the fire, which was not intended to be fuel for it, as the sparks and smoke caused no mischief, but as the damage arose from an excess of heat in the rooms, occasioned by the register being shut, I am of opinion that the plaintiffs are not entitled to recover.

The main point, and the point in the forefront there, is surely that no substance was taken possession of by the fire which was not intended to be fuel for it.

The editor's note about that case is as follows, at p. 128:

It is not to be concluded from this case that an insurer on a policy against fire is exempt from a loss occasioned thereby, on the ground that the servants of the assured have been careless or unskillful, and that the fire was occasioned by their negligence and misconduct. An insurer would unquestionably be answerable in such a case. The spirit of the decision of the present case is this: that there was no loss by fire, by whatever cause or misconduct produced. The injury arose from the misdirection of heat, occasioned by the unskillful management of the machinery in the sugar house. It was not, therefore, in any fair and reasonable construction of the policy, one of those accidents against which the defendant had engaged to indemnify the plaintiffs.

Therefore, the test of liability according to that report and according to that note is surely whether or not something has been consumed by fire which was not intended to be consumed.

There was a motion for a new trial in the Court of Common Pleas, and I turn to the report of that motion in 6 Taunt 436. It is interesting to read the arguments in that case and see how it was dealt with. The Solicitor-General, said this, among other things, at p. 438:

If actual flame was the cause of the damage, it matters not whether the fire was properly or improperly lighted, but the question is whether fire occasioned the damage. If any other criterion be taken, it would in many cases of policies against fire introduce nice and intricate questions. It cannot be necessary that the fire, to produce a loss within the policy, should be only such fire as is communicated to some substance not contained in the intended and proper receptacle of fire.

Then he goes on to give other illustrations. He has put the very point for which counsel for the defendant contends. GIBBS, C.J., is reported to have said this, at pp. 438, 439:

I think it is not necessary to determine any of those extreme questions. In the present case, I think no loss was sustained by any of the risks in the policy. The loss was occasioned by the extreme mismanagement by the plaintiffs of their register. I so directed the jury, and I have no reason to alter the opinion I then formed.

Then DALLAS, J., said, at p. 439:

I am of the same opinion. The only cause of the damage appears to me to have been the unskillful management of the machinery by the plaintiffs' own servants, and it is therefore not a loss within the meaning of the policy.

The rule was refused, apparently on the ground of negligence. Be that as it may, it is very difficult to argue that this case is an authority for the construction put upon it by counsel for the defendant, when it is said by GIBBS, C.J., in terms, "I think it is not necessary to determine any of those extreme questions", one of them being this very question whether or not it is necessary that the fire should have taken place in some place other than the place where the fire was intended to be.

There was fourth report of this same case. It is in 2 Marsh. 130, GIBBS, C.J., is reported, at p. 132, in the same language as I have just read, and DALLAS, J., said:

His Lordship's direction appears to me to have been perfectly right, and the jury have drawn a perfectly correct conclusion from it. There was nothing on fire which ought not to have been on fire; and the loss was occasioned by the carelessness of the plaintiffs' themselves.

Then PARK, J., concurred. The words "There was nothing on fire which ought not to have been on fire" suggests that the test of liability is that there must be the ignition of something which ought not to be ignited. In that case, there was no ignition of anything but the fuel, and, therefore, there was no liability, and no fire within the policy. The test is there laid down by DALLAS, J., and concurred in by PARK, J. That is exactly the case for which the plaintiff here contends - namely, that there was ignition here of something which ought not to have been ignited, newspaper, sticks of wood, banknotes, cotton, leather, jewellery, and so on.

The next case to which I was referred was *Everett v. London Assurance* (1865) 19 CBNS 126. That was a claim on a policy of insurance against fire. There had been an explosion about a quarter of a mile away which had damaged the plaintiff's premises, so that the windows had been blown in and other damage sustained, and a claim was made that this was damage caused by fire within the meaning of the policy. The argument as to the effect of *Austin v. Drewe* is not without interest. It took the form of a quotation from **MARSHALL ON INSURANCE**, Vol. 2, Book IV (a), p. 790, which is as follows:

In **MARSHALL ON INSURANCE**, Vol. 2, Book IV (a), p. 790 (Edn. 1823), it is said that

“by the terms of the usual policy, the insurers undertake to pay, make good, and satisfy to the insured all loss or damage which may happen by fire during the term specified in the policy... In order, therefore, to bring the loss within the risk insured against, it must appear to have been occasioned by actual ignition; and no damage occasioned by mere heat, however intense, will be within the policy.

In support of that proposition, *Austin v. Drewe* was relied upon. It ended up with a quotation with reference to *Austin v. Drewe* that the sugar was damaged “not by the smoke but by the excessive heat: but *nothing took fire*.” Those last words, “nothing took fire”, are in italics, showing that those were the words intended to be taken as the test. In that case, BYLES, J., said, at p. 134:

The expression in the policy which we have to construe is “loss or damage occasioned by fire.”

That is exactly the expression which I have to construe in this case, except that I have the word “caused” instead of the word “occasioned.” Then BYLES, J., continues as follows, at p. 134:

Those words are to be construed as ordinary people would construe them. They mean loss or damage either by ignition of the article consumed, or by ignition of part of the premises where the article is: in the one case, there is a loss, in the other damage, occasioned by fire. LORD BACON says: “It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contented itself with the immediate cause, and judged the acts by that, without looking to any further degree.”

It is a little too wide, because it is clear that there need not be ignition of part of the premises where the article is if the loss is, occasioned by the ignition of premises in the near neighbourhood, but the result is the same.

There is one other case to which I was referred, and that is *Upjohn v. Hitchens* [(1918) 2 K.B. 48]. During the argument in that case, SCRUTTON, L.J., said, at p. 61:

It has been held, however, that “fire” within the meaning of a fire policy means fire which has broken bounds, so that damage caused by excess of fire heat in an ordinary grate is not damage by fire within the policy.

I do not think that I can attach very much weight to an intervention of that kind with no argument about it, but there is something which I think is a little more relevant in the

judgment of PICKFORD, L.J., at p. 53. In that case, there was a covenant to insure premises against loss or damage by fire, and the question was whether such damage was within, a policy which did not cover the premises for damage caused by enemy aircraft. PICKFORD, L.J., said,

Nor am I impressed by the other case put where it has been held that the ordinary policy against fire does not cover damage caused by overheating from a fire in an ordinary grate. There the damage was held not to be damage by fire, but damage by heating, damage caused by an ordinary domestic fire not being covered unless it sets fire to the house.

He must have used the word “house” because he was dealing with a case of fire in a house.

Substituting the words “insured property”, again I find the same test laid down by HALLETT, J., in a similar case. The weight of authority seems to me to be strongly in favour of the test contended for by counsel for the plaintiff, and I think that the true test is whether or not there has been an ignition of the insured property which was not intended to be ignited. If there has been, the loss is one caused by fire. That is to say, has insured property been damaged otherwise than by burning as a direct consequence of the ignition of other property not intended to be ignited? In other words, I base my view in substance on what DALLAS, J., said in *Austin v. Drewe*.

I was referred to textbooks, including one very old one, MARSHALL ON INSURANCE, a quotation from which I read in *Everett's* case. The next, I think, was BUNYON ON INSURANCE. There is no suggestion in Bunyon's book of this limitation about the fire being restricted to places where fire is not intended to be. There is a paragraph describing his view of the risk insured against, at p. 161:

The “risk” must now be construed as applicable not only to loss by fire, but also to loss by the agency of the other perils insured against. In the case of loss by fire, there must, of course, be actual ignition, not necessarily of the property itself, but of some substance near to it.

He refers to *Austin v. Drewe* and continues as follows, at p. 162:

It is not, of course, necessary that the property must be itself on fire, since losses by smoke and water, when the fire has not touched the objects insured, are familiar to all managers of insurance offices. All that appears to be necessary is, that something should have caught fire, and damage have been thereby occasioned to the insured property.

The next was MACGILLIVRAY ON *INSURANCE*, which was the one textbook in which counsel for the defendant could find any support for his contention, because the author says, at p. 809:

Fire within the meaning of a fire policy means fire which has broken bounds. There must be actual ignition where no ignition ought to be. Damage caused by excess of fire-heat in its proper place, or by smoke from a fire in its proper place, is not damage by fire. Thus, where articles are destroyed in process of manufacture by

the excessive application of heat, whether by negligence or pure misadventure, the damage cannot be recovered as damage by fire, unless they have actually ignited.

I do not know exactly what that means, but at any rate there is some suggestion there on the lines of the argument of counsel for the defendant. In my view, however, a careful examination of the one authority on which that rests really negatives his argument that that case is an authority for his proposition.

Then, as a matter of interest, I was referred to **WELFORD AND OTTER BARRY ON FIRE INSURANCE**, 2nd Edn., p. 61:

Any loss, therefore, occasioned by such a fire, whether by the burning of any property in the fire itself, or by the scorching or cracking of any property adjacent to it owing to its intense heat, if unaccompanied by ignition, is not covered by the contract, since the cause of the loss cannot be regarded as a peril insured against.

That line in particular, “whether by the burning of any property in the fire itself”, was strongly relied upon by counsel for the defendant. However, the answer was to refer to **WELFORD AND OTTER BARRY ON FIRE INSURANCE**, 3rd Edn., p. 59. Before one refers to what is said there. I want to refer to the preface to the third edition:

Many questions in fire insurance are not covered by direct authority, and may still be regarded as open. In discussing such questions, an attempt has been made to answer them... Another example, which is discussed for the first time in this edition, is the question whether an article which accidentally falls into a domestic fire and is burned there is destroyed by fire within the meaning of a fire policy.

There is a statement by an author that whatever may have been said in the second edition was not the result of a discussion or consideration of this particular question, and then he says, at p. 59:

So long as the fire is burning in the grate or furnace, it is fulfilling the purpose for which it was lighted. If, therefore, property adjacent to the fire is merely damaged by scorching or cracking, owing to its proximity to the fire, the loss is not covered; though the element of accident may be present, there is no ignition of the property, and nothing is on fire which ought not to be on fire. If, however, the fire breaks its bounds and, by throwing out sparks or otherwise, causes ignition to take place outside the grate or furnace, there is at once a loss by fire within the meaning of the contract. The question then arises, what is the position where property is accidentally burned in an ordinary fire, such as a domestic fire: the fire never breaks its bounds, but something which was never intended to be burned falls or is thrown by accident into the grate and is burned. In this case, equally with the case where the fire breaks its bounds, there is an accident and something is burned which ought not to have been burned. The only distinction between them is that in the one case it is the fire which escapes out of its proper place and comes into contact with the property destroyed, whereas in the other case it is the property which gets out of its proper place and comes in contact with the fire. This distinction does not appear to be sufficient to make any difference in the result. The object of the contract is to indemnify the assured against accidental loss by fire, and so long as the property is accidentally

burnt, the precise nature of the accident seems to be immaterial. It may be therefore concluded that the loss in both cases falls equally within the contract.

In the textbooks, there is no clear consensus as to the meaning of these words which might force one to say that they have acquired an authorised meaning to which one can give effect. The most which counsel for the defendant can get out of the textbooks is perhaps a difference of opinion or an ambiguity. However, ambiguity is not his case, because the interpretation of those words which is most favourable to the insured must be adopted, and it seems to me that, if the underwriters wish to avoid liability, they must put words to that effect in their policy. In my judgment, the plaintiff is entitled to succeed. It is, of course, an unusual case. It has not been suggested that the loss was due to the negligence of the plaintiff. The underwriters have made it clear that they wish to stand or fall on the principle for which they have contended. I give judgment for the plaintiff for the agreed amount of £460.

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PART – B : BANKING

Sajjan Bank (Private) Ltd. v. Reserve Bank of India

AIR 1961 Mad. 8

RAMACHANDRA IYER, J. – The Sajjan Bank (Private) Ltd., which is carrying on business at Alandur, originated from Sajjan and Co. Ltd., which was incorporated in November 1944 with the main object of carrying on money-lending business. In May 1946, the company was converted into a banking company and in November of that year its name was changed into Sajjan Bank (Private) Ltd. All its shares are held by its three directors who are said to be closely related. The Banking Companies Act, 1949, referred to hereafter as the Act, came into force on 16.3.1949.

Section 22 of the Act provided amongst other things that every banking company in existence at the commencement of this Act should before the expiry of six months from such commencement and, every other company before commencing banking business in India, apply in writing to the Reserve Bank for a licence under the section to carry on banking business. The section further provided that the Banking Companies in existence at the commencement of the Act could continue to carry on their banking business till final orders were passed on their application for licence.

3. On 14.9.1949, the petitioner bank applied under S. 22 of the Act, to the respondent for a licence to carry on banking business. The Officers of the Reserve Bank inspected the petitioner bank under S. 22 of the Act in July 1952. A report of that inspection was prepared on 11.10.1952. The inspection appears to have revealed the existence of certain defects in the working of the bank. The Reserve Bank therefore decided to keep in abeyance the consideration of the question of issuing a licence evidently with a view to watch the progress of the bank in eradicating the defects pointed out by the inspection report.

The defects noticed were the subject matter of subsequent correspondence between the petitioner and the Reserve Bank. A fresh inspection of the petitioner Bank was carried out in September 1956 under S. 35 of the Act. That also revealed certain defects. The respondent was evidently not satisfied that the affairs of the petitioner Bank were being conducted in the interests of the depositors. The question of the grant of licence was taken up. The petitioner was directed to show cause against the refusal of the licence. The bank was also furnished with a copy of the inspection report.

After considering the representation of the petitioner, the respondent by its letter dated 18.3.1957, declined to grant the licence to the petitioner to carry on banking business in the terms of the first proviso to sub-section (2) of S. 22 of the Act. Aggrieved by that, the petitioner has moved this court for the issue of a writ of certiorari to quash the order of the respondent refusing to grant a licence to carry on business as a banking company.

5. Mr. Rajah Iyer, the learned advocate for the petitioner, raised before me three contentions: (1) That S. 22 of the Banking Companies Act was unconstitutional in so far as it proceeded to restrict the fundamental right of the petitioner to carry on its business, namely, the banking business; (2) even if the provisions of S. 22 of the Act be held to be in accordance with the Constitution, the action of the respondent was arbitrary; (3) In any event the procedure adopted by the respondent was illegal and in that after an inspection under S. 35, it could only proceed to act under S. 35(4) and not refuse the licence altogether.

7. The Reserve Bank of India came into existence on 1.4.1935. It is a central bank combining in its functions the regulation of both the credit and the currency of the country. Prior to its formation the responsibility for the currency was vested in the Central Government. The Imperial Bank of India performed the banking functions. This dichotomy between currency and credit was found to be a weakness in the Indian monetary system by the Royal Commission of Indian Currency and Finance in 1926. The Commission recommended the establishment of a Central Bank by charter on certain lines which experience had proved to be sound. It is said that the structure of the Bank was modelled very largely on the Bank of England.

It is a non-political statutory body, the general superintendence and management of the bank's affairs being vested in the Central Board of Directors. For each of the four regional areas, Bombay, Calcutta, Madras and New Delhi, there is a local Board functioning. The function of the local Boards is to advise the Central Board on such matters as may be referred to them or perform such duties as the Central Board may validly delegate to them. The preamble to the Reserve Bank Act states that the bank was constituted to regulate the issue of bank notes, to keep up reserves with a view to secure monetary stability in India and generally to operate currency and credit system of the country to its advantage.

The main function, therefore, of the Reserve Bank is to regulate the monetary system of the country so as to ensure the maintenance of economic stability and assist in its growth. The Bank has got the sole right to issue currency notes and it also acts as the Banker to the Government. It also acts as a banker to the various commercial Banks and other financial institutions and it has got various rights and duties prescribed in Chapter II of the Reserve Bank Act. For the performance of its duties in regard to the regulation of the credit of the country, the Reserve Bank is invested with powers of control of the bank rate, open market transactions etc.

The Reserve Bank's responsibilities include the development of an adequate and sound banking system not only for trade and commerce but also for the agricultural industry. The Reserve Bank is, therefore, occupying a position of considerable importance in the economic development of the country and its monetary system.

8. Originally, joint stock banks were governed in respect of their incorporation, organisation and management by the Indian Companies Act of 1913, which was common to banking as well as non-banking companies. In 1936, certain new provisions were introduced to the Indian Companies Act of 1913, in regard to the banking companies. In 1949, the Banking Companies Act was passed to consolidate and amend the law relating to the Banking Companies. The necessity for the legislation was for safeguarding the interests of the

depositors, shareholders and of the economic interests of the country in particular. Under S. 5(b) of the Act, the term “banking” has been defined as

“accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise.”

This definition follows the accepted legal concept of the word “banking.” The essence of a banking business is, therefore, receiving money on current account for deposit from the public repayable on demand and withdrawable by cheque, draft or otherwise.

9. An ordinary moneylender who does not accept moneys on terms enabling a depositor to draw cheques upon him would not, therefore, be a bank or banker properly so called. The provisions of the Act would, therefore, apply only to the limited class of cases where the bank or banker allows the withdrawal of money by the issue of cheques. A banking company has been defined to be a company that transacts the business of banking in India. Section 6 provides that in addition to banking business banking company may engage themselves in various allied businesses which are more or less incidental to or essential for the carrying on of the banking business.

Section 13 prescribes the minimum standards as to paid up capital and aggregate reserves. Sections 12 and 12(a) prevent the control of companies by a few persons to the detriment of a majority of shareholders and permits the Reserve Bank of India to require a banking company to call for a general meeting of the shareholders of the company, to elect fresh directors in accordance with the voting rights. Section 14 prohibits the creation of charges on unpaid capital. Sections 17 and 18 provide for minimum reserve funds and cash reserve. Section 20 prohibits loans on security of the company’s shares and unsecured loans to its directors to firms or private companies in which they are interested. Section 21 gives power to the Reserve Bank of India to control its advances. Section 22 prescribes a system of licensing of banks, the power of licensing being vested in the Reserve Bank of India. I shall advert to that section in greater detail presently.

Section 23 places restrictions on the opening of new places of business or change of existing place of business. Sections 24 and 25 require the maintenance of sufficient liquid assets. Section 26 obliges a bank to report to the Reserve Bank every year about unclaimed deposits. Sections 27 and 28 invest a power in the Reserve Bank to call for information and to punish them if it so decides. Sections 35 and 36 confer power in the Reserve Bank of India to call for periodical returns and inspection of books of accounts and empower the Central Government to take action against banks conducting business in a manner detrimental to the interests of the depositors. Section 35-A gives powers to the Reserve Bank of India to give directions to the banking companies in general, or to any banking company in particular, in the national interest or to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of the depositors or in a manner prejudicial to the interests of the banking company or to secure proper management thereof.

There are also other provisions relating to the management, restriction on the holding of shares and in regard to the winding up of banking companies. Thus the legislation is a comprehensive measure, covering the establishment, the working and the liquidation of the

banks. The Reserve Bank of India is substantially invested with the power of regulation of the banking companies. In this country there are various types of banks ranging from the village moneylender to a big commercial bank. It was found necessary in the interests of the public that there should be a regulation of the banking system. Section 22 introduces a complete system of licensing of banks by the Reserve Bank. Shortly stated the grant of a licence in the case of banks incorporated in India is dependent upon the maintenance of a satisfactory financial condition. In the case of foreign banks there is a further condition imposed that the country of their origin could not discriminate in any way against the banks registered in India. Sub-sections (1) and (2) provide for the necessity of obtaining a licence by a banking company and the time at which the licence is to be applied. The proviso to sub-section (2) authorises an existing banking company to continue to function until it is granted a licence or refused a licence. The conditions for granting the licence by the Reserve Bank are set out in sub-section (3). The section also provides for the cancellation by the Reserve Bank of a licence granted by it. In that case, the concerned bank is given a right of appeal. Similar enactments exist in the laws of certain foreign countries like America.

10. Mr. Rajah Aiyar contends that the provisions of S. 22(1) are unconstitutional as being in restraint of trade or business as in effect an arbitrary power is vested in the Reserve Bank of India to grant or refuse a licence, which according to him is really a permit for the doing of the business to be granted by the body. He, therefore, contended that the provisions of S. 22(1) of the Act are unconstitutional and invalid. In support of that contention he relied upon the principle stated in *Namazi v. Dy. Custodian of Evacuee Property, Madras* [AIR 1951 Mad 930]. That was a case where a disposition of property by an intending evacuee was made subject to permission by the Custodian of Evacuee Property. No rules were framed under the Act for his guidance. The nature of the enactment was that the custodian who was a mere officer of the Government could arbitrarily refuse to approve of a transfer by an intending evacuee. My Lord, the Chief Justice, observed:

“It may be said that the Custodian would not ordinarily refuse to approve any transfer unless for proper grounds. But surely that would be gambling on the reasonableness of the Custodian. As the section stands, there is nothing to prevent the Custodian from most unreasonably refusing to approve of any transfer by intending evacuee.”

It was held that while a permit system would be unconstitutional in so far as it related to the exercise of fundamental rights, it was well settled that a system of licensing, which had for its object the regulation of trades, would not be repugnant to Art. 19(1)(g) of the Constitution. That decision is also valuable for ascertaining whether in a particular case what was intended was only a licence for the regulation of trade or a permit as a condition precedent to the exercise of a business by an arbitrary power in the authority to grant or refuse a licence. The existence of rules for the guidance of the authority, the insistence of reasons for the refusal of a licence, provision for a right of appeal, the nature of the enquiry before the refusal of a licence being judicial in an enquiry were held to constitute that what was prescribed by a statute was only a regulation of trade by the issue of licence and not the insistence of a permit.

The question then is whether the provisions of S. 22(1) of the Banking Companies Act which require a licence for carrying on business by a banking company should be held a

system of enabling the doing of such a business by the issue of permits or whether only a licence intended to regulate the business of banking. There is no doubt that the Banking Companies Act was passed in the interests of the public after detailed enquiry by a Committee and after consideration of its reports. As I pointed out already the Committee itself recommended a system of licensing of all banking companies. Even the foreign banking experts were not averse to the proposal. The licensing itself is vested in a statutory authority, which is itself a Central Banking institution concerned both with the currency and credit operations in the country.

The Reserve Bank of India was established with a view to fostering the banking business and not for impeding the growth of such business. The powers vested in it under S. 22 are not one invested with a mere officer of the Bank. The standards for the exercise of the power have been laid down in S. 22 itself. The Reserve Bank is a non-political body concerned with the finances of the country. When a power is given to such a body under a statute which prescribes the regulations of a Banking Company, it can be assumed that such power would be exercised so that genuine banking concerns could be allowed to function as a bank, while institutions masquerading as banks or those run on unsound lines or which would affect the interests of the public could be weeded out.

The power given is regulated by the statute and being entrusted to a statutory body which is itself regulating the credit of the country the nature of the power, its exercise after the investigation prescribed by the statute invests it with a quasi-judicial character. Such a power cannot be said to be an arbitrary one. It is a mere licence granted as a matter of course to all genuine banking institutions run on sound lines as the judicial character of power would indicate. It cannot be held to be a permit.

14. It must also be noticed that the refusal of the licence under S. 22 of the Act does not mean a stoppage of business. I have already referred to the fact that the essence of banking is the opening of current account and the enabling of the constituent to draw by cheques. It follows that the refusal of a licence would only entail a loss of that type of business and it would be perfectly open to the petitioner to carry on business as moneylenders the only disability or restriction being that it cannot have transactions under which the constituents could draw cheques on him.

17. This leads us to the next question, namely, whether the respondent in this case has arbitrarily exercised the power, as is complained by the petitioner. There is no complaint in this case that sufficient opportunity was not given. But what is contended on behalf of the petitioner is that further opportunities should have been given to rectify the errors rather than refuse the licence. It is also contended that the petitioner had complied with all the directions, which the respondent gave from time to time and that there was really no default on its part. Mr. Rajah Iyer also contended that while the respondent was giving directions and the petitioner was complying with the same as and when given, the former had made up its mind not to issue the licence and that it did not bring to bear on the decision of the question of a judicial attitude.

The first inspection by the respondent of the petitioner was in 1952 under the provisions of S. 22. That revealed that the petitioner bank was not conducted on sound banking lines. The report dated 11.10.1952 pointed out fundamental errors in the accounts as also non-

compliance with the provisions of the Act. The Reserve Bank very properly kept in abeyance the decision of the question of the grant of licence. But the Bank being one that came into existence before the Act, it could continue its banking business till the licence was granted or refused. It was, therefore, necessary that some kind of control should be exercised over the bank pending decision on the issue of the licence. They, therefore, proceeded to give periodical instructions in regard to the conduct of the bank. I have said that the first inspection revealed defects in the method of keeping accounts and contravention of certain provisions of the Act.

Correspondence that ensued was in regard to both the matters. It was not till 1955 that the defects pointed out were sought to be explained away or remedied. This, therefore, entailed a further inspection, undertaken by the Reserve Bank under S. 35 of the Banking Companies Act. A report was duly submitted to the local board of the Bank, who were satisfied that the proposal to refuse the licence was proper in the circumstances. As pointed out in the report of the Reserve Bank on more than one occasion, the bank was not able to effectuate any material improvement in the pattern of its working. It was not able to attract sufficient deposits from the public. As a private limited company to start with it was converted into a banking company evidently to circumvent the provisions of the Madras Pawn Brokers Act of 1943.

The paid up capital was only Rs. 50,000. Its reserves were found to be poor and the establishment charges had absorbed more than 50 per cent of the gross income. The Reserve Bank gave more than one opportunity to the petitioner to show cause against the refusal of licence. In the report placed before the Central Committee we find a comparative statement of the undesirable features noticed in the inspection reports with the corresponding representation of the bank and the comments of the bank. It was only after a careful consideration of all the matters that the Reserve Bank came to the conclusion that the continuance of the bank would be likely to prove detrimental to the interests of prospective depositors and that the petitioner was not entitled to a licence.

The respondent did not take any hasty action. The progress and working of the bank was closely watched for more than 4 years and every opportunity was given to the bank to justify its claim as a sound banking concern. The learned Advocate General explained that the delay in the disposal of the application by the respondent was due to their anxiety not to precipitate a crisis which a quick decision to refuse licence might occasion and which might further lead to undesirable results. Far from the action of the Reserve Bank being arbitrary, I am satisfied that it has given the utmost consideration to the petitioner's case.

19. I am, therefore, of the opinion that the action of the Reserve Bank in refusing to grant the licence to the petitioner is within its jurisdiction, and such jurisdiction has been properly exercised in the case, and that there is no case for the issue of a writ under Art. 226 of the Constitution. This petition is dismissed with costs.

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PART – C : NEGOTIABLE INSTRUMENTS

Ponnuswami Chettiar v. P. Vellaimuthu Chettiar

AIR 1957 Mad. 355

PANCHAPAKESA AYYAR J. - This petition raises an interesting question of law not exactly covered by any ruling. The main point of law is *whether the absence of the name of the payee in a promissory note will make the note invalid, though the payee was known with certainty even at execution.* The facts are briefly these: It was a suit brought against the petitioner by one Vallaimuthu Chettiar for the recovery of Rs. 1177-8-0, the principal and the interest due on a promissory note, dated 16-11-1950, for Rs. 1000.

Two defences were raised by the petitioner in the lower courts. One was that the promissory note was not supported by consideration. The lower courts found that the promissory note was fully supported by consideration, and Mr. B. V. Viswanatha Aiyar, learned counsel for the petitioner, was not able to shake that finding which is in my opinion quite correct.

2. The next plea was that the promissory note was not executed in favour of a known and certain person and, so, would be invalid. Mr. B.V. Viswanatha Aiyar urged vehemently before me that a promissory note in favour of a person without his name being mentioned in it should be held to be totally invalid and inoperative, even though full consideration might have passed, and the person lending was known with precision even at the time of execution by the person borrowing, and though the description in the context, could refer only to him.

The description of the payee in the suit promissory note was “son of Palaniandi Chettiar.” He was certainly that. But there are also three other sons of Palaniandi Chettiar, according to the plaintiff, though they never lent a pie to the petitioner and had not come into the picture at all. I think the law is not so wooden as to allow this kind of quibbling by a debtor in a desperate attempt somehow to escape his just liability.

If really the lender was not known, and if Rs. 1000 had been brought by a maid-servant or other servant from the house of Palaniandi Chettiar and handed over to the petitioner with the statement that a son of Palaniandi Chettiar had lend him this Rs. 1000, and the petitioner had honestly been ignorant as to who the lender was, and had executed a promissory note in favour of a son of Palaniandi then the case might be at least arguable that Palaniandi had four sons and that the petitioner had executed the suit note without knowing or seeing the particular son who lend him the Rs. 1000, and so the promissory note would fail as the payee was not certain.

But here “the son of Palaniandi” who lent the money was the plaintiff Vallamuthu Chettiar, who swore to it, and it was not alleged by the borrower, the defendant, that any of the other three sons of Palaniandi had lent him a pie out of the amount in that pronote. The other three sons were far away, and had nothing to do with the petitioner or this promissory note.

Though the name of the plaintiff was not mentioned (perhaps by sheer slip or accident), the lender and borrower knew it, and there was the description. To say that the name must

always be mentioned to make a promissory note valid is, in my opinion, not sustainable in any modern court of justice, equity and good conscience, though such a plea might have been allowed in a court, like the old Anglo-saxon Courts, deciding on outworn formulae without reference to living facts.

Many a Hindu woman will not name her husband, but to say from that that she has no husband will be absurd. Many a man is known by his caste or village or official name, or surname, like Mudaliar, Ayyar or Rao, Ambedkar, Gandhi, Nehru, Kirloskar, Prime Minister, Rajah of Sandur, etc., and not by his personal name.

To say that hundreds of Raos Mudaliars Ayyars, Gandhis, Nehrus etc., might have been the persons who lent the money, when the particular man who has lent the money is known, even at that time beyond all doubt to the lender and the borrower is in my opinion, disingenious and meaningless. The Hindu law givers and Mimamsakas have said, 2000 years ago, that "I" cannot be made into "O" or "O" into "I", by any amount of quibbling, and that arguments will not avail to show that there is no gooseberry on the palm when it is there.

So too, no amount of quibbling can change the fact that this particular promissory note was executed by the petitioner in favour of the plaintiff, that particular son of Palaniandi. This defence had been raised only because the defence of "no consideration" collapsed. The plaintiff swore that he was the man who lent, and the defendant would not swear that the plaintiff was not the man who was mentioned in the promissory note as the lender.

The description in the promissory note is, no doubt, a little defective because because of the failure to mention the rank of the plaintiff among Palaniandi's sons like "first son of Palaniandi" etc. But the evidence (which can be let in in such cases to clear the pretended, but not real, ambiguity) shows that the parties knew even then with certainty that the lender was the plaintiff, and no other son of Palaniandi.

Section 96 of the Indian Evidence Act will apply, as held by the learned Judges at the new trial and evidence regarding the name could be let in in such cases. The ruling in *Abdul Hakim Ear Mahomed v. Ebrahim Solaiman Salehjee and Co.* [AIR 1921 Cal 480], shows this. In this view, the civil revision petition has no merits, and is dismissed.

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Ashok Yeshwant Badeve v. Surendra Madhavrao Nighojakar

(2001) 3 SCC 726 : AIR 2001 SC 1315

B.N. AGRAWAL, J. - 9. The concept of post-dated cheque was well known even in common law and it was in effect a bill of exchange payable on demand with a post-date upon which the demand was to be made. As far back as in 1776 and while the Law of Merchant was then in the process of formation, it was held in *Da Silva v. Fuller* [Sel Ca 238 MS] referred to in *Chitty on Bills of Exchange*, 11th Edn., (188) that a banker was not justified in paying a post-dated cheque before its actual date. In 1868 nearly a hundred years later, the Court of Queen's Bench in *Emanuel v. Robarts* [(1868) 9 B & S 121] observed that a banker was justified in refusing payment of a post-dated cheque before its due date and that the custom of banker to do so was a part of the contract between the banker and the customer. In *Bull v. O'Sullivan* [LR 6 QB 209], the Court laid down that a post-dated cheque payable to order was an instrument payable to order on demand on its date. Later, in 1877 in *Gatty v. Fry* [(1877) 2 Ex D 265] the Court held that a post-dated cheque is not payable on the day it is issued but on the day of its date. All these cases were decided before the law was codified in England by the Bills of Exchange Act, 1882. After passing of the aforesaid Act, in *Palme 6 Palmer, Re, ex p Richdale* [(1882) 19 Ch.D. 409], it has been decided by the Court of Appeal that a post-dated cheque was equivalent to a bill of exchange payable on a future date, namely, the date of the cheque. In *Hinchcliffe v. Ballarat Banking Co.* [1870 1 VR (L) 229] the Court determined the exact point in question in the present case against the bank, holding that a post-dated cheque is a bill of exchange payable at a future date and that the banker may be liable to an action by the customer for negligence if he pays such cheque before the day it bears date.

10. In the high authority of *Royal Bank of Scotland v. Tottenham* [(1894) 71 LT 168], similar question was the subject-matter of consideration before the Court of Appeal in which Lord Esher, M.R., after due consideration observed thus:

“A cheque is a contract between the parties, and it is for a Judge at the trial to construe that contract by reading what is written upon it. Reading this cheque, upon its face it is dated the 10th of August, and is payable to order. What is the true construction of that contract upon reading it? It is simply an order to pay £ 250 upon demand. It is said that this is not the proper construction under the circumstances, because the cheque was signed on the 3rd of August, and handed over to the payee on the 8th of August, being dated the 10th of August. It is said that the cheque was, therefore, a post-dated cheque. Upon those facts being proved before the Judge, what ought he to do? Must he say that, in construing this written document, because it was handed over before the day of the date written upon it, he must put a different construction upon it and say that it is not a bill payable upon demand, but a bill payable two days after the day of its issue or negotiation? I have never heard of a cheque being so construed, and the argument of the appellant is entirely fallacious.... It is not denied that, by the Bills of Exchange Act, 1882, a post-dated cheque is not made invalid;.... The objection as to post-dating a cheque is therefore now an

obsolete and useless objection. If a cheque is dealt with as a bill of exchange before the date which it bears, then it becomes a bill of exchange in the ordinary sense; but it is not in any way an escrow. All the defences and objections are futile and must fail.”

14. In **Halsbury’s Laws of England**, 4th Edn. (Reissue) Vol. 3(1), at p. 143, procedure to be adopted by the bank in relation to post-dated cheque has been enumerated which reads thus:

“Post-dated cheques are not invalid, but the banker should not pay such a cheque if presented before the date it bears. If, therefore, a cheque dated on a Sunday is presented on the previous business day, it should be returned with the answer ‘post-dated’. A post-dated cheque, however, if presented at or after its ostensible date, should be paid though the banker knows it to be post-dated, and even if it has been presented before the date and refused payment.”

15. In **Chalmers & Guest on Bills of Exchange, Cheques and Promissory Notes**, 15th Edn., at p. 74, the concept of “post-dated cheques” has been explained as under:

“Post-dated cheques. - Cheques are often issued post-dated, that is to say, bearing a date later than that on which they are in fact issued. The purpose of issuing a post-dated cheque is to prevent the drawee banker from paying the cheque to the payee or a holder before the date written on the cheque. It is clear that the instrument is a cheque once the date written on it arrives. But its status is unclear prior to that date. It is arguable that, between the date of its issue and the date written on the cheque, it is not payable on demand and so cannot be a cheque but an instrument of a different kind. The view has been expressed that: ‘so far as regards its practical effect, a post-dated cheque is the same thing as a bill of exchange at so many days’ date as intervene between the day of delivering the cheque and the date marked upon the cheque’. It has also been stated that the effect of issuing a post-dated cheque is equivalent to giving a promissory note not payable until the date written on the cheque.”

16. In **Thomson’s Dictionary of Banking**, 12th Edn., p. 463 “post-dated” has been defined as follows:

“Post-dated.- A cheque which is dated subsequent to the actual date on which it is drawn, and which is issued before the date it bears, is called a post-dated cheque.

A post-dated cheque should not be paid before the date appearing thereon....

A cheque presented for payment before the date has arrived should be returned marked ‘post-dated’ ”

17. F.E. Perry in **The Law and Practice Relating to Banking : I**, at pp. 137 and 138 has dealt with “post-dated cheque” as under:

“A cheque must not be post-dated, that is, dated after the day on which it is presented for payment to the drawee branch. Post-dated cheques present far more difficulties to the banker than antedated cheques: There are practical difficulties rather than legal ones..... But a cheque is generally post-dated because the drawer

does not expect to have the funds to meet it until that date arrives. It is a mandate to the banker to the effect that it should not be paid before that date arrives.”

18. In *Jiwanlal Achariya v. Rameshwarlal Agarwalla* [AIR 1967 SC 1118] a cheque dated 25-2-1954 was delivered on 4-2-1954 and encashed soon after 25-2-1954. This Court was considering the question of payment envisaged within the meaning of Section 20 of the Indian Limitation Act, 1908 and delivering the majority judgment, Wanchoo, J. observed thus:

“Where, therefore, the payment is by cheque and is conditional, the mere delivery of the cheque on a particular date does not mean that the payment was made on that date unless the cheque was accepted as unconditional payment. Where the cheque is not accepted as an unconditional payment, it can only be treated as a conditional payment. In such a case the payment for purposes of Section 20 would be the date on which the cheque would be actually payable at the earliest, assuming that it will be honoured..... As the payment was conditional it would only be good when the cheque is presented on the date it bears, namely, 25-2-1954 and is honoured. The earliest date, therefore, on which the respondent could have realised the cheque which he had received as conditional payment on 4-2-1954 was 25-2-1954 if he had presented it on that date and it had been honoured.”

19. From a bare perusal of Sections 5 and 6 of the Act it would appear that a bill of exchange is a negotiable instrument in writing containing an instruction to a third party to pay a stated sum of money at a designated future date or on demand. On the other hand, a “cheque” is a bill of exchange drawn on a bank by the holder of an account payable on demand. Under Section 6 of the Act a “cheque” is also a bill of exchange but it is drawn on a banker and payable on demand. A bill of exchange even though drawn on a banker, if it is not payable on demand, it is not a cheque. A “post-dated cheque” is not payable till the date which is shown thereon arrives and will become cheque on the said date and prior to that date the same remains bill of exchange.

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Lachmi Chand v. Madanlal Khemka

AIR 1947 All. 52

WALI ULLAH, J. – This is an appeal by the defendants against the decree passed by the learned Civil Judge decreeing the claim due on the basis of a promissory note dated 25-8-1928. The suit was instituted by B. Madan Lal Khemka as Secretary of Baba Kali Kamliwala Panchaiti Kshetra, Rishikesh, a registered society under Act 21 of 1860. The two defendants impleaded were Lala Lachmi Chand and his son, Onkar Prasad. As mentioned above, the suit was decreed against the defendants, both of whom filed an appeal in this Court. Lala Lachhmi Chand died during the pendency of the appeal leaving his son Onkar Prasad, appellant 2, as his sole legal representative. The position, therefore, is that Onkar Prasad is the sole appellant in this case.

2. The case set out in the plaint was to this effect. A pro-note was executed by Lala Lachhmi Chand, defedant 1, on 25-3-1928 for a sum of Rs. 10,000. The rate of interest stipulated was 12 annas per cent per mensem. It was in favour of Shri 108 Baba Kali Kamliwala Ramnath Maniramji of Rishikesh. On 28-7-1930 a sum of Rs. 4800 was paid by defendant 1 through one Mt. Draupadi. On 25-8-1932 a fresh pro-note was executed in renewal of the previous pro-note by both Lala Lachhmi Chand and Onkar Prasad for a sum of Rs. 8363 the total amount then found due. On 5-11-1934 another pro-note by way of renewal was executed for Rs. 9887-43. It was executed by Lala Lachhmi Chand alone. In November 1937 another pro-note is said to have been executed in respect of the amount found due on the previous pro-note and handed over to the creditor. Along with this pro-note a letter (Ex. 5) dated 3-11-1937 acknowledging the liability for payment of Rs. 12,024-1-6 then due was sent over the signatures of both Lala Lachhmi Chand and Onkar Prasad. Lastly, on 14-11-1939 a pro-note was executed by both Lachhmi Chand and Onkar Prasad for a sum of Rs. 13,302-11-9. This purported to be by way of renewal of the pre-existing liability under the former pro-note. The plaint was filed on 4-11-1942 with the allegations set out above and it was specifically stated in para. 7 of the plaint that the cause of action for the suit arose on 25-8-1928, the date of the original transaction, and it was stated that limitation was saved by reason of the subsequent acknowledgment in the form of pro-notes executed from time to time by the defendants in favour of the plaintiff.

3. The defendants resisted the suit on various grounds. Of them the most material pleas were these: (i) The suit was misconceived inasmuch as the plaintiff was not a payee under the pro-note of 1928 and consequently was not entitled to sue under the provisions of the Negotiable Instruments Act; (ii) that the cause of action on the basis of the pro-note of 1928, as set out in the plaint, did not exist; and (iii) that in any event, the defendants were “agriculturists” and as such entitled to the benefit of the Agriculturists’ Relief Act in the matter of reduction of interest and the grant of instalments. It may be mentioned here in passing that the plaintiff admitted that the defendants were agriculturists. It is also a matter of admission that both the defendants were members of a joint Hindu family and Lachhmi Chand was the Karta of that family.

4. The facts, as set out in the plaint, were substantially admitted. The defendants led no oral evidence while the plaintiff contented himself with the production of one single witness

Bishambhar Sahai, the Karinda of the plaintiff. Bishambhar Sahai produced the plaintiff's Bahi Khata from Sambat 1995 to Sambat 1998. His evidence was to the effect that the plaintiff's accounts were kept regularly and defendants, accounts were sent to them regularly. His evidence was also intended to prove that all the loans advanced by Baba Ramnath Maniramji were actually advanced by the Kshetra Kali Kamliwala which was the real creditor. The documentary evidence in the case consists of various pro-notes executed from time to time and the correspondence exchanged between the parties as well as the statement of the defendants' accounts as they stood in the Bahi Khatas of the plaintiff.

5. The learned Civil Judge, on a consideration of the materials on the record, came to the conclusion that the defendants were "agriculturists" but that the plaintiff was not a "creditor" within the meaning of S. 32, Agriculturists' Relief Act. On the main question, whether the plaintiff was debarred from suing on the pro-note dated 25-8-1928, the learned Civil Judge seems to have missed the real point which had to be decided. He came to the conclusion, to quote his own words, that "there was no legal defect in the plaint" and in view of the renewals of the original loan he held that the suit was within limitation. In view of the findings recorded by him, he decreed the claim with costs and *pendente lite* and future interest at 3 per cent per annum payable by monthly instalments of Rs. 500 each, first instalment falling due on 1-9-1943. On failure to pay any of those instalments the whole amount due was directed to be recoverable at once.

6. Learned counsel for the appellant has strongly contended that the plaintiff not being the "payee" of the pro-note could not, by reason of S. 78 read with S. 8, Negotiable Instruments Act, successfully enforce the liability of the defendants under the pro-note. We have heard learned counsel for the parties at great length on this question. Our attention has been invited to a large number of rulings both of this Court as well as of other High Courts. The relevant provisions of the Negotiable Instruments Act are contained in Ss. 8 and 78 of the Act.

7. Reading the two sections together it is clear that the person to whom the payment should be made in order to discharge the maker or the acceptor from all liability under the instrument is the "holder" of the instrument or his accredited agent, such as a banker acting as an agent for collection. The "holder" of a promissory note is essentially the person who "*entitled in his own name.*" The words "*entitled in his own name*" are obviously most significant. The legislature appears to have clearly intended to prevent any one from claiming the rights of a "holder" under the Act on the grounds that the ostensible holder is a mere name-lender. The term "*holder*", therefore, does not include a person who, though in possession of the instrument, has not the right to recover the amount due thereon from the parties thereto. The principle enshrined in S. 78 of the Act is clearly in accordance with the basic principle underlying the law relating to negotiable instruments, viz., that the doctrine of *benami* will introduce an element of uncertainty greatly hampering the free circulation of negotiable instruments. The Negotiable Instruments Act has been enacted for encouraging trade and commerce and the underlying principle undoubtedly is that promissory notes, bills of exchange, and cheques should be negotiated *as apparent on their face* without reference to the secret title to them. It is for this reason that the provisions of S. 78 provide that in order to discharge the maker or acceptor from liability payment must be made to the "payee" or the "holder" of the instrument. Section 48 of the Act provides for the negotiation of a promissory

note by the holder by means of an endorsement and delivery. The effect of such endorsement and delivery is to transfer to the endorsee the property in the note with a right to negotiate it still further. It would appear, therefore, that the property, or ownership, in a promissory note including the right to recover the amount due thereon is vested by statute in the holder of the note. The express words of s. 78 no doubt do not negative a right of suit but the effect of allowing a suit by any one except the payee or the holder of the note would necessarily be to put the maker or the acceptor of the instrument in a most difficult situation. As has been said, a person so circumstanced is liable to be shot at twice: once by the person who is the “real” holder and then again by the person who is the “holder” within the meaning of the Negotiable Instruments Act.

8. Under the general law, a principal can institute a suit to enforce a contract entered into by his agent though his name is not disclosed but S. 78, Negotiable Instruments Act, clearly implies that there is an exception to the general rule so far as negotiable instruments are concerned. There are numerous cases in the reports and quite a number of them have been brought to our notice in the course of arguments by the learned counsel in which S. 78 of the Act has been strictly construed, and it has been held that a valid discharge can be given to the maker or acceptor of the instrument only by the payee of the note or the holder thereof. It has further been clearly laid down that there is no such thing for this purpose as a benami promissory note taken in the name of one person but really meant for the benefit of another. Where a hand-note is executed in favour of a benamidar it is not open to the promisor to assert that the holder of the note is not the beneficial owner. Conversely, if a suit is to be based upon the hand-note it must be instituted by the holder whose name appears on the note and not by any person who alleges that the original holder is his benamidar and that he is the beneficial owner. It was observed by their Lordships of the Privy Council in *Sadasukh Janki Das* [AIR 1918 PC 146] that:

“It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or *on the back of the document*, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand ...It is not sufficient that the principal’s name should be “in some way” disclosed, it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bills.”

With reference to the contention based on Ss. 26, 27 and 28 of the Negotiable Instruments Act, their Lordships observed:

“These sections contain nothing inconsistent with the principles already enunciated, and nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or promissory note against a person whose name properly appear as party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal.”

9. As a corollary to the general rule above indicated, it has been held that the “real” creditor, as distinguished from the payee or the holder of the instrument, cannot be allowed to

fall back upon the original consideration and to sue for the money advanced by him independently of the promissory note by proving the actual loan. On the contrary, obviously with a view to moderate the rigour of the general rule above indicated, it has been held in a number of cases that section 78 does not in reality deal with a right of suit and looking to the language of section 78 that is obviously correct. It has accordingly been held that the real owner is entitled to sue *provided* he is in a position to obtain a good discharge from liability from the maker or acceptor of the instrument. The fact that a person who is not the holder of the instrument cannot claim the privileges of a “holder”, so it has been held, does not disentitle him from suing. Thus, in a suit brought by the “real” creditor to which the maker and the holder of the promissory note were parties a decree was passed against the maker with a proviso that payment shall be made to the real creditor only on his securing a valid discharge of the maker from the holder of the note. The contention that the real creditor, the holder of the promissory note being his benamidar, is precluded from maintaining a suit for enforcement of the liability incurred by the maker under the pro-note was repelled. With the utmost respect to the two learned Judges, we must say we find ourselves in full agreement with their views.

10. As must have been noticed from the discussion and the decisions in the cases above referred to judicial opinion on the question whether a suit lies at the instance of the real holder as distinguished from the payee or the endorsee of a promissory note is far from unanimous. The broader view, however, which has been accepted in some of the cases appeals to us as the one more in consonance with the dictates of justice and fairplay. It must, however, be carefully noted that in all these cases, with the exception of the Nagpur case, the “holder” of the note was himself a party to the suit. In the Nagpur case, however, the promissory notes in question were in favour of Khudai Dad Khan and not in favour of the firm of partnership that had instituted the suit. In that case Khudai Dad Khan does not appear to have been impleaded as a party but he had entered the witness box and was evidently agreeable to the decree being passed in favour of the plaintiff (the partnership). Under those circumstances the decree in favour of the firm was maintained provided the firm obtained within one month from the date of the decision a proper discharge from Khudai Dad Khan exonerating the defendant from all liability to him under the pro-note.

11. Reverting to the facts of the present case we find that the pro-note dated 25-8-1928 as also the pro-notes executed subsequently by the defendants were all in favour of Shri 108 Baba Kali Kamliwala Ramnath Maniramji or Rishikesh, that is to say, in favour of an individual person, namely, Ramnath Maniramji of Rishikesh. It is true that in the pro-note dated 5-11-1934 Baba Ramnath Maniramji is described as “the owner and manager of the Kshetra Baba Kali Kamliwala” but that cannot be of any help to the plaintiff-respondent in this case. It is beyond dispute therefore that the original pro-note as well as the pro-notes executed subsequently were in favour of Ramnath Maniramji Maharaj, may be that he was the owner and manager of what became a registered society as Baba Kali Kamliwal Panchaiti Kshetra, Rishikesh, in the year 1932 – we are informed that the society was registered on 4-1-1932 – but that fact, in our judgment, cannot make any real difference. The position, therefore, is that the suit has been instituted in the name of a registered body and the payee of the promissory note in question is not a party to the suit. During the course of the hearing of

this appeal we were informed by the learned counsel that Ramnath Maniramji Maharaj was dead. Beyond this statement of the learned counsel for the respondent, however, there is no other indication in the record as to whether he is dead or alive and also, if he died when he died and whether he left any heir and who that heir is. From the unrebutted evidence of Bishambhar Sahai, the *Karinda* of the plaintiff respondent, it appears that the consideration of the pro-note in question may very possibly have come out of the funds of the Kshetra Baba Kali Kamliwala, the registered society, but in the present case we find it impossible to hold that the plaintiff (the registered society) was (while the suit was pending in the Court below) or is even now in a position to secure a discharge of the defendant from all liability under the pro-note in suit. We are, therefore, constrained to hold that the present case does not fall even within the scope of the "*broader principle*" referred to above, this view of the matter, the contention of the learned counsel for the appellant must be accepted. It follows, therefore, that the suit be instituted by the plaintiff-respondent could not succeed.

12. In the result, therefore, this appeal may be allowed, the decree of the Court below set aside and the suit filed by the plaintiff-respondent dismissed.

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Singheshwar Mandal v. Smt. Gita Devi

AIR 1975 Pat. 81

H.L. AGRAWAL, J. – A money suit was filed against him by the plaintiff-respondent for recovery of a sum of Rs. 1541/15/- annas on the basis of a handnote admittedly executed by him on 4.7.1959 for a sum of Rs. 1133/11/- annas in favour of Dhir Narain Chand, the father of the plaintiff. It has been stated in the plaint, inter alia, that the plaintiff's father had expressed his desire in presence of the defendant second party that the amount in respect of this loan would go to the plaintiff alone to which the defendant second party expressly consented. The defendant second party are the two widows of Dhir Narain Chand aforesaid.

2. Defendant No. 1 filed a written statement and contested the suit on various grounds, inter alia, that the plaintiff being not the holder of the handnote in question, she had no right to institute the suit in question. As it is only this question that is falling for my consideration, it is not necessary to advert to any other defence put forward on behalf of the defendant. The trial court; accepted the defence and dismissed the suit but on appeal, however, the learned Additional Subordinate Judge has decreed the same and, therefore, this second appeal has been filed by defendant No. 1. The learned Additional Subordinate Judge has overcome this plea of the appellant on the ground that the plaintiff was an heir of Dhir Narain Chand who had every right to make arrangement and partition the assets among his heirs. On referring to the evidence and the circumstances on record, he has held that the plaintiff's father did make such an arrangement according to which this debt was made realisable by the plaintiff alone.

3. In my opinion, the court of appeal below has committed an apparent error of law in decreeing the suit. Under the provisions of Section 78 of the Negotiable Instruments Act, payment of the amount due on a promissory note etc. in order to discharge the maker or acceptor thereof must be made to the holder of the instrument or if the same is endorsed then to the endorsee as provided under Section 82(c) of the Act which is not the case here. The provisions of the Negotiable Instruments Act are very specific.

4. Admittedly in this case the handnote in question is not indorsed in favour of the plaintiff nor does the recital in any way indicate the intention of the creditor for the payment of the ultimate dues by the debtor to the plaintiff. The term "Holder" has been defined in Section 8 of the Negotiable Instruments Act, according to which the holder of a promissory note, inter alia, means a person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. Admittedly, therefore, the plaintiff does not answer any of the descriptions mentioned above and the defendant was not bound to make the payment to her of the dues in question and as such the plaintiff has no right to institute the suit. It is not a case either of any transfer of this debt or claim which under the provisions of the Transfer of Property Act would be an "actionable claim" by the father to the plaintiff. In view of the provisions of Section 130 of the Transfer of Property Act the transfer of an actionable claim has to be effected; only by the execution of an instrument in writing signed by the transferor or his duly authorised agent and only thereafter the rights and remedies of the transferor is to vest in the transferee. The learned Additional Subordinate Judge, therefore, was not right in referring to any other mode of supposed arrangement by the father of the plaintiff and the different members of the family which did not answer this

requirement of law. Reference may be made to a decision of the Calcutta High Court in *Harkishore Barua v. Guru Mia Chowdhry* [AIR 1931 Cal 387]. As the provisions of the enactments referred to above themselves are clear, it is not necessary to cite any further authority in support of my views.

5. I would accordingly allow this appeal, set aside the judgment and decree of the court of appeal below and restore the order of dismissal of the suit passed by the trial court.

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Nunna Gopalan v. Vuppuluri Lakshminarasamma

AIR 1940 Mad. 631

LEACH, C. J. – On 10th December 1933 the respondent executed a promissory note in favour of one Maddipati Tattabayi, alias Tata, defendant 2 in the suit out of which this petition arises. The respondent says that she paid the amount due on the promissory note two days later, but the instrument was left in the hands of the payee, who the next day endorsed it to the petitioner. The petitioner instituted a suit on the promissory note in the Court of the District Munsif of Kovvur. The District Munsif passed a decree against the respondent and the payee. The respondent then appealed to the Subordinate Judge of Ellore, who confirmed the decree so far as it affected the payee, but dismissed the suit so far as it concerned the respondent. The Subordinate Judge held that the petitioner was a holder in due course, but inasmuch as the respondent had paid the amount due on the promissory note to the payee he was not entitled to recover from the respondent. The petitioner filed a second appeal, but as the amount involved was less than Rs. 500 the appeal did not lie. My learned brother Krishnaswami Ayyangar, however, allowed the appeal to be treated as an application for revision under S. 115, Civil P. C., and the case has been placed before this Bench for decision.

The opinion of the Subordinate Judge that the petitioner was not entitled to recover is contrary to the provisions of the Negotiable Instruments Act. S. 9 of the Act states that the term “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 endorsee, if 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. S. 22 says that the maturity of a promissory note or bill of exchange is the date at which it falls due. It is to be observed that in the case of a promissory note which is payable on demand, (as in this case) it does not become payable until demand is made. On demand being made it falls due immediately. S. 60 provides that a negotiable instrument may be negotiated (except by the maker, drawee or acceptor after maturity) until payment or satisfaction by the maker, drawee or acceptor at or after maturity, but not “after such payment or satisfaction.” “Such payment” means at or after maturity. S. 118 says that until the contrary is proved it shall be presumed that every transfer of a negotiable instrument was made before its maturity, and that the holder of a negotiable instrument is a holder in due course. In this case, there is no evidence of any demand having been made on the respondent before she paid the amount to the payee of the instrument and it must therefore be taken that the endorsement to the petitioner took place before maturity. According to the sections of the Act to which reference has been made the petitioner is clearly entitled to recover from the maker.

In *Glasscock v. Balls* [(1890) 24 QBD 13], the Court of appeal had to consider the position of a person who was a holder of a promissory note in these circumstances. The payee of the instrument had taken from the maker a further security for the same amount in the shape of a mortgage. The payee transferred the mortgage to another person, receiving on the transfer the amount of the debt. Subsequently the payee endorsed the promissory note which remained in his hands to the plaintiff for value, the plaintiff having no knowledge of the circumstances. It was held that the note, not having been paid or returned to the maker, was

still current at the time of the endorsement, and the plaintiff as a bonafide endorsee for value was entitled to recover upon it. Lord Esher said:

In this case the plaintiff sues the maker of a promissory note payable on demand as endorsee. It was admitted that the plaintiff was endorsee of the note for value without notice of anything that had occurred. The plaintiff cannot be said to have taken the note when overdue, because it was not shown that payment was ever applied for, and the cases show that such a note is not to be treated as overdue merely because it is payable on demand and bears date some time back. If a negotiable instrument remains current, even though it has been paid, there is nothing to prevent a person to whom it has been endorsed for value without knowledge that it has been paid from suing.

That is the position here. The principle laid down in *Lickbarrow v. Mason* (1787) 2 TR 63, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled the third person to occasion the loss must sustain it, has also direct application. The respondent had discharged the promissory note on 12th December 1933, but it was endorsed to the petitioner without knowledge of this fact the next day and the respondent as the maker of the note should have insisted on its return to her when she paid the amount. She did not do so and as she left the instrument in the hands of the payee and thus gave him an opportunity to commit a fraud she must suffer in preference to the petitioner. In this connexion I may point out that S. 81, Negotiable Instruments Act, provides that any person liable to pay, and called upon by the holder thereof to pay, the amount due on a promissory note, is before payment entitled to have it shown, and is on payment entitled to have it delivered up to him, or, if the instrument is lost or cannot be produced, to be indemnified against any further claim thereon against him. The respondent, having paid the promissory note without insisting on its return to her or without obtaining from the payee a guarantee, acted at her own risk.

In *Muthureddi v. Velu Asari* [AIR 1917 Mad 886], Seshagiri Ayyar J., held that the maker of a promissory note could not plead against a holder in due course that he had paid the money to the payee before the indorsement, and relied on the decision in *Nash v. De Freville* [(1900) 2 QB 72]. The only dissentient note is that struck by Pandalai J., in *Venkanna v. Subbayya* [AIR 1933 Mad 300], on which the respondent relies. There the facts were these. A promissory note was executed by A in favour of B, but the note came into the possession of his wife and her nephew who refused to give it up to B. As the result B asked A to give him a fresh promissory note, which A did. The new promissory note was subsequently negotiated by B. Eventually A paid the amount due on the promissory note to the endorsee. After B's death his wife negotiated the original promissory note and the endorsee called upon A for payment. Liability was denied by A and Pandalai J. accepted his defence. This decision is clearly wrong. Apart from the provisions of the Negotiable Instruments Act the principle in *Lickbarrow v. Mason* [(1787) 2 TR 63], applied. The maker of the promissory note gave of his own free will a new promissory note without insisting on the return of the original instrument or obtaining an indemnity. Had he obtained an indemnity it would not of course have precluded the plaintiff from recovering from him, but if he had taken a proper indemnity would have safeguarded his position. *Venkanna v. Subbayya* [AIR 1933 Mad 300], was wrongly decided and cannot be allowed to stand.

It follows that the petition must be allowed and the decision of the Subordinate Judge so far as it exonerated the respondent must be set aside. The decree of the District Munsif will therefore be restored in its entirety.

* * * * *

Canara Bank Ltd. v. I. V. Rajagopal

(1975) 1 MLJ 420

RAMAPRASADA RAO, J. - The plaintiff had a personal account with the Canara Bank Limited, at its Madras Branch hereinafter referred to as the Bank on 6th April, 1964. The plaintiff was the representative of a reputed group of concerns in Coimbatore, popularly known as M/s. Lakshmi Mills Company Limited, Coimbatore, and its sister concerns at Madras. The group companies had a liaison office at Madras. There was a telephone in the Madras office of the group companies, which was apparently intended for the advantage and benefit of the sister concerns and which was in the sole administrative custody of the plaintiff. In the course of his official duties, the plaintiff gave a cheque for Rs. 294-40 towards the telephone bill for the aforesaid telephone admittedly standing in the name of the said M/s. Lakshmi Mills Company Limited. This cheque was drawn on the personal account kept by the plaintiff with the defendant-bank. On 8th April, 1964 when the cheque came for clearance, the defendant did not honour the cheque, though the plaintiff had a sum of Rs. 653-83 to his credit in his account with the banks. On 24th April, 1964, the telephone department advised the plaintiff of the dishonour of the cheque. The plaintiff met the officials of the Bank on 28th April, 1964 and according to the defendant, the manager of the Madras Office of the Bank expressed regret for what all happened. It is said that the manager of the department approached the telephone department and requested them to re-present the cheque for payment. Apparently, the telephone department was not interested in such representation. But on prompt steps taken by the plaintiff it was resorted on 7th May 1964. As the telephone bill remained unpaid, the telephone was disconnected on 6th May, 1964. The plaintiff tried to explain to his employers the circumstances under which the cheque was dishonoured and how the telephone was disconnected and later restored. The plaintiff's employers, however, did not, accept the explanation and on 15th June, 1964 the plaintiff's services were terminated. According to the plaintiff, he lost the job, which was fetching him a sum of Rs. 600 per mensem besides free boarding and lodging and a car for his conveyance, on the sole ground that the plaintiff did not pay the telephone bill in time as a result of which the telephone was disconnected. The plaintiff says that the defendant was mainly responsible for not having honoured the cheque, when there was sufficient money to his credit and such negligence on the part of the defendant bank which was wilful resulted in himself being dismissed from the reputed group concerns of M/s. Lakshmi Mills Company Limited, Coimbatore. He would allege that but for this happening, he would have continued in the mill for a period, of 10 years with better prospects and advantages and might have earned about Rs. 75,000 which had been lost once and for all. The plaintiff however, limited his claim for compensation or damages against the defendant-bank for loss of earnings for a period of five years, which he estimated at Rs. 36,000 and also claimed a sum of Rs. 14,000 for loss of prestige and status and for mental agony caused to him by losing his covetable job. As the plaintiff's notice of demand was not respected, he filed the present action *in forma pauperis* for recovery of Rs. 50,000 being the damages suffered by him because of the wrongful dishonour of the cheque by the Bank.

2. In the written statement the defendant admits that the plaintiff had a current account with its branch office at Thambu Chetty Street, Madras, and that the plaintiff was working as the representative of Messrs. Lakshmi Mills Company Limited. They would concede that by mistake and oversight the cheque for Rs. 294-40 presented by the Telephone Department was dishonoured and that they expressed regret in person for the same and that they assured the plaintiff that they would inform the Telephone Department at Madras about the mistake and arrange for payment on representation of the said cheque. They followed up the interview with the plaintiff, by phoning up the cash Department of the Madras Telephones and requested them that the cheque may be represented once again. They were informed that the Telephone Department would do so and hence they did not take any further steps. They also expected the plaintiff to forward another cheque to the Telephone Department with a request for the representation of the same. They would allege that they have taken all possible and reasonable steps to arrange for payment of the cheque on representation. According to the defendant, if the facts relating to the dishonour of the cheque was conveyed to the Managing Agents of M/s. Lakshmi Mills Company Limited, Coimbatore, and if, after all this, the Mills terminated the service without reference to the Bank, it was an arbitrary act on the part of the employers and would allege that the said termination of service and the damages claimed and said to have been suffered by the plaintiff cannot, in law and in fact, be said to flow naturally from the dishonouring of the cheque. They would deny that the plaintiff was entitled to the damages as claimed by him and would refer to certain incidents in 1963 and 1964 which would reflect upon the status of the plaintiff. In any event, they would say that the plaintiff did not take immediate steps to avert the consequence, which would flow from the dishonour of the cheque and mitigate the damages. The claim for Rs. 50,000 is excessive and unreasonable. The defendant would specifically plead that the plaintiff ought to have issued a fresh cheque on his account or utilised the other funds of his employer for paying the telephone bill and he, not having taken such steps, cannot claim the exaggerated amount of Rs. 50,000. The plaintiff filed replication and answered that the reference made by the Bank to his dealings in 1963-64 were irrelevant besides being incorrect. He would add that when the cheque issued towards the telephone bill of a reputed company was not honoured, it did react on the reputation of the company and it is only on account of the dishonour and the supervening disconnection of the telephone, that his services were terminated. The correspondence that ensued between the plaintiff and his employers will disclose how the principals were greatly upset by the dishonour of the cheque and the later disconnection of the telephone and would assert that the immediate and proximate cause for his termination of service is the wilful and negligent act of the dishonour of the cheque by the defendant-bank.

3. A supplemental written statement was also filed wherein again the defendant would reiterate their stand. On the above pleadings, the following issues were framed:

1. What is the total compensation or salary which the plaintiff was entitled to as employee by the Lakshmi Mills Limited, and sister concerns as alleged by him?
2. Whether the defendant is not liable to compensate the plaintiff for the damage or loss caused to him by the default in honouring the plaintiff's cheque?
3. Was the dishonouring of the plaintiff's cheque wilful and negligent?

4. Was the damage claimed by the plaintiff, the natural and reasonable consequence of dishonouring the cheque by the defendant bank?

5. Was the service of the plaintiff terminated by the Lakshmi Mills Limited, and sister concerns as a result of the dishonouring of the cheque?

6. To what damages, if any, general and special is the plaintiff entitled to? and

7. To what relief?

4. On issues 2 and 3, the trial Court found against the defendant. It held that the dishonouring of a cheque by a Bank if it is due to mistake cannot affect the liability of the Bank to pay damages, which would reasonably flow from their wrongful act. It also observed that the conduct of the Bank throughout reflects that they were negligent in handling the transaction and hence, would find that the dishonouring of the cheque issued by the plaintiff, in the circumstances, should be viewed to be due to indifference and wilful negligence. On issues 4 and 5, the trial Judge found that the action of Lakshmi Mills Company Limited, against the plaintiff was because of the disconnection of the telephone and such disconnection was because of the dishonour of the plaintiff's cheque Exhibit A-1 by the defendant Bank. On issues 1 and 6, the trial Court estimated the damages in all at Rs. 14,000 and decreed the suit accordingly and directed the defendant to pay Court-fee on the amount allowed and directed the plaintiff to pay the Court-fee on the sum disallowed. It is as against this, the present appeal has been filed.

5. The learned Counsel for the appellant would say that the termination of the plaintiff's services by M/s. Lakshmi Mills Company Limited, cannot solely be attributed to the dishonouring of the cheque and the later disconnection of the telephone but according to him it is due to other causes. In any event, he would say that the special damages of Rs. 10,000 granted by the Court-below and general damages of Rs. 4,000 under the head of mental agony and loss of reputation are on the high side and exaggerated. On the other hand, Mr. Challapathy Rao, learned Counsel for the respondent-plaintiff would urge that the damages were correctly reckoned by the Court below and that such damages flow from the wilful and negligent act of the officers of the appellant Bank and that the defendant is liable to suffer the decree.

6. Before we consider the respective broad contentions, it is necessary to summarise the relevant correspondence, which led to the catastrophe in this case. It is common ground that Exhibit A-1, which is the cheque drawn by the plaintiff was issued by the plaintiff at a time when he had enough money in the Bank in his account for the same being honoured. The Bank having so indifferently dealt with its customer's account, did not even make a second verification regarding their act, but kept silent over it until the plaintiff called upon them and apprised of the position. In fact, the plaintiff was advised about the dishonour of the cheque by the Telephone Department on or about 24th April, 1964 and he met the officers of the Bank on the same day besides writing them a letter. Even then, the Bank would take the incidents very lightly and under Exhibit A-4 they would write a formal and a casual letter to the District Manager, Telephones, Madras, stating that they had telephonic conversation with their cash department in respect of the cheque and requested the Madras Telephones to represent the cheque for payment. This is the least that could be expected of a Banker, who has realised his mistake in dishonouring the cheque. One should have expected the Bank to

have taken more concrete steps in averting further untoward consequences in the matter of the dishonoured cheque when, as Bankers they ought not to have done it. Besides writing Exhibit A-4, no further steps were taken by the Bank. It is no doubt true that one of the assistants of the Bank expressed personally regret. But between 24th April, 1964 and 6th May, 1964 when the cheque was dishonoured, the silence and the inaction of the Bank remains unexplained. When, therefore the telephone was disconnected, the plaintiff wrote Exhibit B-1, dated 6th May, 1964 wherein the plaintiff intimated to the Bank that the Telephone Department has taken further steps to disconnect the telephone. No doubt, the plaintiff took emergent steps to restore the phone on the 7th of May, 1964, which step was taken on his own and not for and on behalf of the Bank either. When the Bank was informed about the phone disconnection and about the mental agony, which by then the plaintiff was suffering since he was being taken to task by his employers for such gross dereliction of duty, the defendant-Bank would still in a light-hearted manner reply to Exhibit B-1 under Exhibit A-7 stating that they took up the matter with the Telephone Department and that the Department agreed to represent the cheque and concluded "in spite of this, we do not understand why this misunderstanding has been created". Here again, there is no contrite expression of regret on the part of the Bank excepting to formally express it to the plaintiff.

7. Thereafter the concerned exhibits revolve round the correspondence which passed between the plaintiff and his employers, which resulted in his service being terminated. The plaintiff apprised his employers under Exhibit A-5, dated 7th May, 1964 in writing as to the circumstances under which the telephone was disconnected. It appears to be fairly clear that the employers by then were very much dissatisfied about the way in which the matter was handled by the plaintiff and his Bankers and Exhibit A-5 was in the nature of a letter of apology written by the plaintiff to his employers and was one in which he requested them to pardon him for the unhappy incident. Under Exhibit A-8 he was asked to go over to meet the managing agents at Coimbatore. The plaintiff could not meet the managing agents at Coimbatore and wanted time till 22nd May, 1964, as he was ill by then. This is seen from Exhibit A-9. Again he was asked by a telephonic message as is seen from Exhibit A-6 to render accounts for the matters, which he was dealing with by them and also go over to Coimbatore to meet Mr. G. K. Devarajulu Naidu, who was the Managing Director of the Mills. In reply thereto, the plaintiff gave a statement of account in respect of the moneys of the group companies which he maintained as their representative of the Madras branch. This statement of account was not fully accepted by their employers as is seen from Exhibit A-27. The employers had to pursue the matter under Exhibit A-12 and call for further accounts. It is no one's case that the employers were so tight and corrective as against the plaintiff prior to the dishonouring of the cheque and disconnection of the telephone. Exhibit A-13 and A-14 are further letters, which were exchanged between the plaintiff and his employers. In the meantime the plaintiff wanted to make a frantic but a last effort with the Bankers so that he could avert a catastrophe so far as his connections with Messrs. Lakshmi Mills Company Limited, was concerned, and wrote exhibit A-15 to the Bank. In Exhibit A-15 the plaintiff requested the Bank to write to him that there was enough money in the account in the Bank on the date when the cheque was dishonoured and that it was by oversight on the part of the Bank that the amount under the cheque was not paid and that it was because of it, the telephone was disconnected. He would also make it clear that such a letter giving the facts

could convince his employers. He made it candid that if the Bank kept silent in spite of his requests, his services would be terminated for which the Bank would be held responsible. To this there was no reply and ultimately the expected event happened and under Exhibit A-16 the plaintiff's services were terminated. The plaintiff thereafter followed up the events by issuing Exhibit B-2, the Counsel's notice before suit claiming a sum of Rs. 50,000 as damages and has come to Court thereafter.

8. The plaintiff examined himself besides letting in other evidence, oral and documentary. The defendant examined the Manager of its branch office when the incident happened. The plaintiff reiterated what all he said earlier in the correspondence. He referred to the fact that he was the liaison officer of four companies, which were very reputed establishments; they were Lakshmi Mills Company Limited; Lakshmi Machine Works Limited; Lakshmi Card clothing Manufacturing Company Private Limited, and G. Kuppuswamy Naidu and Company. His business was to attend as a liaison officer to the purchase and despatch of goods required by the concerns, to take the delivery of imported machinery from Harbour and despatching them to Coimbatore and selling motors and pumps manufactured by them. In that context he brought out before the Court that the telephone was the essential link between himself and his employers. He reiterated what all he had stated in the correspondence, but accepted that he got a part-time job under Sri Rama Vilas Mills Limited, Coimbatore at Rs. 285 per month and that job was from 1st September, 1964 to 31st December, 1966 and from 1st January, 1967 he was without any employment. In cross-examination it was brought out that the telephone connection was in the name of Lakshmi Mills Company Limited, and that the four other concerns, which were appointed with it, were sharing the expenses towards that phone. The Bank would refer to some personal discussions it had with one Rudrappa Naidu, who was undoubtedly connected with Lakshmi Mills etc. Ultimately, what is brought about in the cross-examination has merely a bearing on the letters and the correspondence which ensued between the plaintiff and the bank.

9. Mr. Nayak, appearing for the Bank was unable to dislodge the finding of fact by the Court below that the disconnection of the telephone was due to the dishonour of the cheque and that the dishonour of the cheque was due to the negligence of the Bank. The Counsel's attempt was to sustain the attitude of the bank and urge that they have taken all steps to avoid an injury to the plaintiff. His further contention was that all necessary steps were taken by the bank so as to make out absence of negligence on their part. We are unable to agree with the learned Counsel for the appellant that the bank was *bona fide* in its attempts to avert negligence on its part. We have already traced briefly the correspondence which touch upon the presence or absence of negligence on the part of the bank. When the bank was apprised of the dishonour, one would expect the officials of the bank, instead of being light-hearted and chimerical in their attitude, should promptly act so as to satisfy their customer whose cheque they negligently dishonoured. Exhibit A-4 which the bank wrote does not appear to be a *bona fide* step taken by them in the situation. When the cheque was dishonoured, they ought to have issued a credit note or paid off cash to the Telephone Department and advised them to treat the return of the cheque as to of no consequence. But, on the other hand, a casual letter was written asking the District Manager, Telephones to represent the cheque. Mere expression of regret is not the answer to the situation. It is expected of a bank to honour its customer's

cheque if it has sufficient funds in his hands. If it fails to do so, it will be liable to damages. The reason is obvious. It injuriously affects the reputation, credit and integrity of its customer. Even section 31 of the Negotiable Instruments Act provides that the drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and in default of such payment, must compensate the drawer for any loss or damage caused by such default. The bank aggravated the situation by its inaction between 24th April, 1964 and 6th May, 1964. Even when the bank was put on notice about the disconnection of the telephone, the attitude of the bank did not change. The plaintiff in an agonising mood complained under Exhibit B-1 about the gravity of the situation. The bank would reply in a very matter of fact fashion stating that it took up the matter with the Telephone Department and has concluded by saying “in spite of this we do not understand why this misunderstanding has been created”. Of course, they followed it up by an expression of regret. As pointed out by a Division Bench of this Court in *New Central Hall v. United Commercial Bank* [AIR 1959 Mad. 153], the fact that such dishonouring took place due to a mistake of the Bank is no excuse nor can the offer of the Bank to write and apologise to the payees of such dishonoured cheques affect the liability of the bank to pay damages for their wrongful act”. The bank would plead that they had a frank discussion with Sri Rudrappan who was one of the principal representatives of the employers. Nothing prevented the Bank from taking out a sub-poena to Sri Rudrappan to prove their effort at reconciliation. Here again the bank miserably failed to take any such steps.

10. On the other hand it is clear in the instant case that the dismissal of the plaintiff from the service of his employer was due to the disconnection of the telephone of the group companies which action had a definite impact on the dishonour of the cheque. It has not been brought out that the employers ever had any serious complaint against the plaintiff prior to the dishonour of the cheque. As a matter of fact, the letters exchanged between the plaintiff and his employers as summarised above by us is a pointer to the effect that it was the dishonour of the cheque and the consequential serious inconvenience caused to the employer in the matter of disconnection of the telephone, which appears to be a commercial necessity for the well-known group companies at all times, that was mainly responsible for the ultimate dismissal of the plaintiff from service. A last minute effort was made by the plaintiff asking the bank to write to him about the real state of affairs. In Exhibit A-15 he made such a specific request and made it clear that such a letter is likely to convince his employers and such a conviction if gained is likely to avoid the catastrophe of his dismissal from service. The bank never cared to reply. We are satisfied that beyond reasonable doubt, there is sufficient nexus between the dishonour of the cheque and the consequential disconnection of the telephone with the final act of dismissal of the plaintiff from service by his employers. It is not in dispute in the instant case that the group companies in which the plaintiff was employed was a commercial group having a recognised business status and mercantile integrity. It was not also urged before us that the absence of a telephone with the liaison officer of such group companies at Madras would not matter. On the other hand, the appellant insisted that he was not negligent and that all possible efforts were made by him to ease the situation. As we said, the methodology adopted by the bank in a serious situation like this is not a satisfactory one and in a case like this we should characterise such a slow and haphazard movement of a responsible bank as

negligence on its part. The *causa causans* of the dismissal of the plaintiff's service is therefore attributable to the conduct of the bank which we find is far from reasonable and indeed abounding in negligence.

11. The word 'compensate' used in section 31 has special signification in the context in which it is used. The well-understood proposition in law is that damages are awardable if a sufficient nexus is established between the wrongful act and the resultant loss to the injured. This principle laid down in section 73 of the Contract Act is a well-known one. Under this section, the measure of compensation for any loss or damage caused in case of breach of contract is fixed as that which naturally arose in the usual course of things from such breach or which the parties knew, when they made the contract, to be likely to result from the breach of it and such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Adopting this as the standard or yard-stick by which damages have to be awarded in case where a party suffers an injury by reason of the negligence or negligent conduct of another, it is essential that the party complaining of such an injury or claiming such compensation should be in a position to connect the injury with the act of malfeasance or misfeasance or negligence on the part of the other party. Besides creating such a nexus, he should also prove that the resultant damage has flown from the event of negligence. As between a banker and a customer, statute law itself makes it mandatory that the injured customer should be compensated for the wrongful act of the banker. We have seen this in section 31 of the Negotiable Instruments Act. But in all such cases a distinction has been made between compensation which has to be paid to a trader and that which has to be paid to a non-trader in cases of proved injury caused at the instance of the banker. The banker's failure to honour his customer's cheques and drafts when he has moneys of the customer to meet them, is a peculiar type of breach of contract which has certain significations attached to it. As pointed out by McGregor on Damages, Thirteenth Edition, at page 917:

"The important characteristic of such cases is that the plaintiff, where a trader, can recover substantial damages for injury to his credit without proof of actual damage".

The reason has been explained by the learned author with reference to decided cases thus:

"The *ratio decidendi* in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, without allegation of specific damage, reasonable compensation for the injury done to his credit: but this rule does not apply where the customer is not a trader: in such cases substantial damages cannot be awarded without proof of actual injury to credit".

This distinction has been well brought out by many decided cases in Courts in our country.

In *Mohammed Hussain v. Chartered Bank* [AIR 1965 Mad. 266], which was later approved by a Bench of our Court in O.S.A. No. 52 of 1964, Sadasivam, J., after reviewing the English authority said that "a negligent act may be the effective cause of an injury though it may not be proximate in time, if it is the particular incident, in a chain of events which has

in fact led to the injury, that is, if it is the real cause of subsequent accident. To determine responsibility the law will consider the proximate and not the remote cause of an injury.”

The learned Judge referred to the observations of Tindal, C.J., in *Davis v. Carret* [130 ER 1456, 1459, 1030] in the following terms:

“(N)o wrongdoer can be allowed to apportion or qualify his own wrong and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done.”

The learned Judge also approved of the distinction which is invariably made between traders and non-traders in the matter of recovery of damages from a negligent banker. The line thus drawn between a trader and a non-trader in the matter of recovery of compensation from a defaulting banker is traceable to the well-known principle that the credit of a trader if marred and injured without reasonable cause is likely to totally mar his reputation and credit in the market and it is this that prompted courts of law to award substantial damages to a trader in case of wrongful dishonour of cheques as against the banker without proof of actual loss to the customer. As against this, in so far as a non-trader is concerned, it is but reasonable to expect proof of such special damage claimed by him so as to entitle him to recover the same. As secrecy is maintained as between a non-trader-customer and his banker, the fact that a particular cheque, big or small, has been dishonoured would only affect the particular customer and the prestige of that customer but it would not have a deleterious effect in the eye of the community at large. On account of this concept which is found in the ratio of such decisions that courts call for proof of special damage in case the subject-matter relates to the dishonour of cheque of a non-trader.

12. Bearing these principles in mind, it is for us to assess the quantum of damages to which the plaintiff is legitimately entitled to in the instant case as found by the trial Court and as accepted by us and consider whether there has been proof of such special damage in the instant case by the plaintiff-respondent. So long as the damages claimed is not remote and purely speculative, Courts are bound to consider the reasonable requests of injured parties and grant them proper relief. The plaintiff was earning a sum of Rs. 600 per month with his employers. He got an employment between 1964 and 1966. This was taken into account by the learned trial Judge in assessing the special damages to which the plaintiff would be entitled to by reason of the consequential dismissal of the plaintiff from the employer's service. We have no hesitation in finding that the dismissal was due to the dishonour of the cheque which resulted in the telephone being cut off. He claimed special damages of Rs. 36,000 it being the probable salary which he would have got for a period of five years from the date of termination of his service, since on the date of termination he was 50 years of age. The trial court did take every aspect into consideration and estimated the special damages at Rs. 10,000 to the plaintiff and we agree with the Court below that the quantum of damages granted is a reasonable assessment of the same having regard to the situation in which the plaintiff was placed. We may add that in the appeal before us there was no serious argument against the quantum of damages awarded by the Court below. In addition to a sum of Rs. 10,000 awarded as special damages, a sum of Rs. 4,000 as general damages towards loss of prestige, status and mental agony was also granted. The claim of the plaintiff was that he was

entitled to a sum of Rs. 14,000 under this head. But the learned Judge awarded Rs. 4,000 as general damages. This again was not attacked by the learned Counsel for the plaintiff. We, therefore, confirm the decree of the trial Court in the sum of Rs. 14,000 as against the defendant as special and general damages together with interest at 6 per cent per annum from the date of judgment of the court below till date of payment. The respondent shall carry out the special directions issued by the trial Court in paragraph 32 of its judgment in the matter of the payment of Court-fee due to Government. The appeal is therefore dismissed with costs.

* * * * *

London Joint Stock Bank Ltd. v. Macmillan

(1918-19) All ER Rep 30

LORD SHAW - The facts of this case are very simple, and they have been told by your Lordships who preceded me. The case is one between banker and customer. It is almost as important, in view of the large citation of authority which has been made in the courts below and at the Bar of this House, to keep in mind some things which are not part of this case as those things which are. In the first place, not only is this not a case between the drawer and the acceptor of a bill or between the acceptor and a holder of the bill in due course, but it is not the analogue of such a case. The reason that I state this in the forefront of my opinion is that it disposes at once of a considerable body of authority which was cited as relevant to the consideration of the present suit. The distinction between a case of the latter sort and of the present was very clearly brought out in *Scholfield v. Earl of Londesborough* [(1894) 2 Q.B. 660] by LORD WATSON and by LORD DAVEY. In the words of the former, which are directly applicable to the present case:

“(T)he duty of the customer raises directly out of the contractual relation existing at the time between him and the banker, who is his mandatory. There is no such connection between the drawer or acceptor and possible future endorsees of a bill of exchange.”

In the next place, on the facts before us themselves the elements are of the simplest. It is the case of a customer drawing a cheque in his own favour from his banker. There is no complication as to the cheque having passed to a payee, third party, nor is there any question accordingly as to any conduct or misconduct on the part of such payee. The case is direct in that sense. Nor is there any question of the genuineness of the signature; it is admitted to be genuine. I state this elementary point because it disposes again of a considerable portion of the authorities cited to us in regard to forged cheques. A cheque with the signature of a customer forged is not the customer's mandate or order to pay. With regard to that cheque, it does not fall within the relation of banker and customer. If the bank honours such a document not proceeding from its customer, it cannot make the customer answerable for the signature and issue of a document which he did not sign or issue; the banker paying accordingly has paid without authority, and cannot charge the payment against a person who was a stranger to the transaction.

The case, then, must be taken as the simplest one namely, of a cheque duly signed, forwarded on behalf of the customer to the banker, and honoured. There are in these circumstances reciprocal obligations. If the cheque does not contain on its face any reasonable occasion for suspicion as to the wording and figuring of its contents, the banker, under the contract of mandate which exists between him and his customer, is bound to pay. He dare not, without liability at law, fail in this obligation, and the consequences to both parties of the dishonour of a duly signed and ex facie valid cheque are serious and obvious. In the second place, if there be on the face of the cheque any reasonable ground for suspecting that it has been tampered with, then that, in the usual case, is met by the marking “refer to drawer”, and by a delay in payment, until that reference clears away the doubt. Always granted that the doubt was reasonable, the refusal to pay is warranted. These obligations on the banker do not,

of course, exist until after the cheque has been presented. Upon the other part there are obligations resting upon the customer. In the first place, his cheque must be unambiguous and must be *ex facie* in such a condition as not to arouse any reasonable suspicion. But it follows from that, that it is the duty of the customer, should his own business or other requirements prevent him from personally presenting it, to take care to frame and fill up his cheque in such a manner that when it passes out of his (the customer's) hands it will not be so left that before presentation, alterations, interpolations, etc., can be readily made upon it without giving reasonable ground for suspicion to the banker that they did not form part of the original body of the cheque when signed. To neglect this duty of carefulness is a negligence cognizable by law. The consequences of such negligence fall alone upon the party guilty of it namely, the customer.

It appears to me that a crucial consideration in a case such as the present is this: What is the point of time at which these respective obligations meet. The point of time is the presentation of the cheque. Not until that moment is the banker confronted with any mandate or order, and, in my opinion, the responsibility for the cheque and all that has happened to it between its signature and its presentation is not and ought not to be laid upon the banker. If at that moment three things are satisfied namely, (i) that the cheque is duly signed, (ii) that its appearance and statement of contents present no reasonable ground for suspicion, and (iii) there are customer's funds available then the banker is bound to pay. But if a banker were bound to inquire, in regard to every cheque with quite genuine signatures, what had been their history from the time that the customer lifted his pen from the cheque until the time when it was presented at the bank, banking business would be greatly impeded or impossible, and, in my humble view, it would be subjected to risks for which there is no foundation in legal principle. It is entirely different, however, on the matter of this intervening period, with regard to the obligations of the customer. When a customer makes a cheque payable to himself or bearer it is entirely at his option when to present it. The responsibility for what occurs between signature and presentation, a period in his control, lies entirely with him. If, as in the present case, he gives it to a clerk, who tampers with it in such a way that no man of ordinary skill can find the roguery out, there does not seem to me to be any foundation in law for discharging the customer from the responsibility for these events or for laying them upon the banker, who was in no sort of position either of control over or participation therein. It may be true it is true in this case that what happened in the meantime to increase the nominal value of the cheque and to deceive all parties was a crime. But it was a crime brought about during this period of the customer's responsibility, and, as frequently happens in such cases, the crime of the customer's own servant. Accordingly, the condition of the cheque has been altered, not only during the period of the customer's responsibility, but by the act of some person with whom he had left the document in charge. If it is suggested that this is a hardship upon the customer (abating for the moment the obvious consideration that it is still harder for the banker) the answer of the general case is obvious namely, that it is part of the customer's duty to fill up his cheque in such a way as to prevent roguery being made easy.

I do not here pronounce any judgment upon another type of case which may be figured. I refer to a case in which there has been no negligence on the part of the customer in the respect last alluded to, but in which erasures of great skill or deletions, say accomplished by chemical aid,

have been made upon a cheque so as to undo all the case properly exercised by the customer in regard to its contents. Yet I cannot conceal from your Lordships that I should have the greatest doubt whether this kind of roguery having been practised during that period of responsibility on the part of the customer to which I have referred the customer would not also be liable. But the present is not a case of that kind. It is a case of negligence, and it is necessary to state again that in which the negligence consists. The negligence consists in the breach of a duty owing by the customer to the banker. That duty is so to fill up his cheque as that when it leaves his hands a signed document it shall be properly and fully filled up, so that tampering with its contents or filling in a sum different from what the customer meant it to cover shall be prevented. This is the sole ratio of the blank cheque decisions. The customer in such cases is bound to accept the responsibility for whatever the contents of the cheque may be, if he has allowed a cheque to pass out of his hands blank. The present case was upon its facts a very near approach to that of a blank cheque; a figure "2" was upon it with space before and behind it which easily permitted the "2" being turned into "120". As for the words of the cheque, these were wholly blank and the clerk to whom it was entrusted filled in the words "one hundred and twenty pounds." In that condition it was presented to the bank and honoured. I ask myself: so far as the banker was concerned, what difference did it make to his obligation to pay, that between the time when his customer signed it, and his customer's servant presented it, the servant had filled up that cheque from being a blank to what it was, or from being a cheque with a figure "2" to what it was?, and I ask myself with regard to the customer, what difference does it make in principle that the cheque is left by him entirely blank or is left so blank that the contents finally appearing on it may so appear without arousing the slightest suspicion? There is a suggestion in some of the judgements below that the limitation of the authority to the clerk was a limitation to £2 because of the isolated figure "2." That was a limitation of authority only indicated to the clerk, and no care was taken that such a limitation of authority should reach the knowledge of the banker. So that in truth, my Lords, for all practical purposes and so far as the banker was concerned the same limitation of authority could have been pleaded, although the figure "2" had not been inserted, and that by simply establishing that the clerk knew perfectly well that it was to be a £2 and nothing more. The roguery would have been little more and little different than it was whether the cheque had been entirely blank or with the figure "2" placed where it stood. It does not appear to me that on principle the duty of properly and fully filling up the cheque is met by what was done in the present case. It is no doubt true that, had the cheque been presented as signed, it might have been honoured without impropriety, but when a cheque is not presented as signed and has been tampered with before presentation, the question whether the customer has been negligent in a duty that lay upon him of so filling up his cheque as to prevent such tampering, if answered in the affirmative, absolves the banker if the latter has paid on an ex facie unsuspecting document.

I had intended to go over in detail the authorities from *Young v. Grote* [(1827) 4 Bing. 253] downwards; but this is unnecessary, and I think it would be presumptuous in me to do so after the full treatment thereof by my noble and learned friend on the Woolsack. I express my entire agreement with his Lordship's narrative and conclusions upon that subject. In particular I desire to say that *Young v. Grote* was rightly decided. I may further indicate my view that many subsequent decisions which have referred to it have introduced a certain embarrassment into this portion of our law, not because of what is said in *Young v. Grote* itself, but of what later judges, even while approving the decision, thought must have underlain it. Not a word is said, for instance, in *Young v. Grote*, about estoppel. It may be that some such doctrine was in the judges' minds in deciding it. I am not enough of a psychological expert to say. It is enough for me,

agreeing as I do entirely with the result of the decision, to observe that I think it safest to place the case upon the grounds which the judges themselves put it. It was treated by them as a case of negligence. As BEST, C.J., said: ‘We decide here on the ground that the bank has been misled by want of proper caution on the part of his customer.’ PARK, J., concurred with the arbitrator on the fact of negligence. “Great negligence” was the reason assigned by GASELLEE, J. And, said BARROW, J., “the blame is all one side.” That was the ground of his judgment. I do not think it expedient to speculate upon anything deeper than or different from that, and, as I say, I think the course of the law has been disturbed by speculations of that order. It is true that BEST, C.J., founded upon certain sentences of POTHIER, but these sentences seem, like *Young v. Grote* itself, to be perfectly apposite to the present case and to be entirely sound. I think this sentence of POTHIER’S may be held as a plain statement of the law of England and Scotland on the subject in the present day. *Young v. Grote* has been approved, by a preponderating body of decisions and in the highest quarters, since its date. I beg to say, however, that I express no surprise that great difficulty was felt upon this topic in the courts below. That difficulty is caused for two reasons. The first I have already alluded to namely, the speculations made in subsequent cases as to what underlay or was supposed to underlie that judgment. Alongside of these explorations des arrières pensées, it is consoling to be able to place the few simple sentences in which the judges in *Young v. Grote* pronounced their own opinions. There was also a certain note of invitation to review in the language used by LORD HALSBURY in *Scholfield* case, although it has to be borne in mind that the learned Lord’s doubts and queries were answered in the case itself by the other four learned Lords who sat with him.

A very substantial difficulty, however, has been caused by *Colonial Bank of Australasia, Ltd. v. Marshall* [(1906) A.C. 559], to which great respect has to be paid. In that case, as the judgment of SIR AUTHUR WILSON undoubtedly shows, the crux of the decision was the opinion expressed in these words – namely, that the duty which

“subsists between customer and bank is substantially the same as that contended for in *Scholfield v. Earl of Londesborough* as existing between the acceptor and the holder of the bill.”

In my opinion, this was erroneous, and I illustrate the error not only by the passage from LORD WATSON already quoted, but by the following citation from LORD MACNAGHTEN. Referring to the report in BINGHAM he says:

“the court went very much on the authority of the doctrine laid down by POTHIER that in cases of mandate generally, and particularly in the case of banker and customer, if the person who received the mandate is misled through the fault of the person who gives it, the loss must fall exclusively on the giver. That is not unreasonable; but the doctrine has no application to the present case. There is no mandate as between the acceptor of a bill and a subsequent holder.”

I humbly think *Colonial Bank of Australasia, Ltd. v. Marshall* to be in conflict with the great and binding authority of *Scholfield* and I do not see my way to follow it.

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Shivalingappa v. P.B. Puttappa

AIR 1971 Mys. 273

V.S. MALIMATH, J. – The respondent plaintiff brought the suit to recover a sum of Rs. 2,635/-, which includes principal amount of Rs. 2,000/- and interest thereon. The suit is based on the pronote dated 9-2-1961 executed by the defendant in favour of the plaintiff. He, however, pleaded discharge to the extent of Rs. 2,000/-. The defendant did not deny the execution and consideration of the pronote. He, however, pleaded discharge to the extent of Rs. 2,000/-. The defendant further took a specific stand that the pronote in question has been materially altered by the plaintiff. The defendant's case is that at the time of Navarathri in the year 1961, he paid a sum of Rs. 2,000/- to the plaintiff and made an endorsement on the back side of the pronote about the payment of the said sum of Rs. 2,000/- to the plaintiff. The defendant's case is that the said endorsement was made in pencil and not in ink, as no pen was available at that time. The defendant has further stated that the plaintiff has erased the endorsement made by him and that is the material alteration of the pronote. Relying on the provisions of Section 87 of the Negotiable Instruments Act, the defendant contended that the pronote has become void and unenforceable. The plaintiff denied the discharge pleaded by defendant to the extent of Rs. 2,000/-. He further asserted that no endorsement, whatsoever, was made on the back of the pronote by the defendant. He also asserted that no erasure was made, as alleged by the defendant.

2. The learned Munsiff dismissed the plaintiff's suit. He came to the conclusion that the pronote has been materially altered, as contended by the defendant. He appears to have come to the conclusion that the discharge pleaded by the defendant to the extent of Rs. 2,000/- was established.

3. The lower appellate court reversed the decree of the trial court and decreed the plaintiff's suit. The learned Civil Judge came to the conclusion that the pronote has not been materially altered. He held that the discharge pleaded to the extent of Rs. 2,000/- has not been satisfactorily established.

4. It is the legality of the decree passed by the learned Civil Judge in appeal that is challenged in this second appeal under Section 100 of the Code of Civil Procedure.

5. Shri Swamy, the learned counsel for the appellant contended that the finding of the learned Civil Judge that the pronote has not been materially altered, is not in accordance with law. In order to satisfy myself, I perused the pronote. The pronote is on a printed form. The alleged alteration of the pronote is on the back side of the pronote. The back side of the pronote is blank and nothing whatsoever is found written there at present. Shri Swamy pointed out that the texture of the paper on the side somewhere near the middle on the top side indicates that some erasure of some writing has been made. He relied upon the evidence of the hand-writing expert to whom the document was sent who has given an opinion that there is some erasure of some writing on the back side of the pronote. In order to prove that an endorsement was made by the defendant on the back side of the pronote, which has subsequently been erased by the plaintiff, the defendant has not only examined himself but also examined one Shankarappa. The learned Civil Judge has assessed the evidence of the defendant and his witness, Shankarappa. He has observed that Shakarappa, is a chance witness

whose evidence is not worthy of acceptance. I do not find any good reasons to disagree with the conclusion of the learned Civil Judge. As the defendant has not established that an endorsement was made on the back side of the pronote in pencil, the question of erasing the alleged endorsement does not arise.

Shri Swami contended that the evidence or opinion of the hand-writing expert to the effect that something was written on the back side of the pronote which has been erased has been accepted by both the courts below. He, therefore, contended that his client has established that there is an alteration in the pronote. As the pronote was in the custody of the plaintiff all along, Shri Swamy urged that it is for the plaintiff to explain satisfactorily the erasure that is found on the back side of the pronote. The plaintiff has asserted that there was no writing on the back side of the pronote and that he has not erased any such writing on the back side of the pronote. Merely on the basis of the vague type of evidence of the hand-writing expert it is difficult to hold that there was some writing on the back side of the pronote which has been erased by the plaintiff when the document was in his custody. Even otherwise, I find it difficult to accede to the contention of Shri Swamy that Section 87 of the Negotiable Instruments Act can be invoked in the facts and circumstances of this case. It is not disputed that no part of the promissory note as such has been altered in any manner whatsoever. Even if the entire contention of the defendant is accepted, it would only mean that an endorsement made by the defendant on the back side of the pronote has been materially altered by the plaintiff.

As already noticed no part of the pronote is written on the back side of the document. The entire pronote has been completed only on one side of the paper. Section 87 of the Negotiable Instruments Act contemplates material alteration of a negotiable instrument. If there is a material alteration of a negotiable instrument, the same renders the document void against any one who is a party thereto at the time of making such an alteration and does not consent thereto unless it was made in order to carry out the common intention of the original parties. The endorsement which is alleged to have been made on the back side of the pronote does not form part of the negotiable instrument. It is an independent transaction, unconnected with the negotiable instrument in question. The alleged endorsement could as well have been made on an independent piece of paper and not on the back side of the pronote. Merely because an endorsement has been made on the back side of the pronote, it does not become part of the pronote. As the endorsement in question is not a part of the negotiable instrument, any alteration in the said endorsement does not attract the penal provisions of Section 87 of the Indian Negotiable Instrument Act. Hence, even if the entire case of the defendant about the endorsement of the pronote is true, the same does not, in any way, render the pronote (Ex. D-1) void under Section 87 of the Negotiable Instruments Act. There is, therefore, no substance in the contention of Shri Swamy that the plaintiff's suit is liable to be dismissed on account of the alleged material alteration of the endorsement on the back side of the pronote Ex. D-1.

6. The learned Civil Judge, after assessing the evidence on record, has recorded a finding of fact to the effect that the defendant has failed to prove the discharge pleaded by him to the extent of Rs. 2,000/-. That finding is not liable for interference in this second appeal.

7. For the reasons stated above, this appeal fails and the same is dismissed.

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C.C. Alavi Haji v. Palapetty Muhammed

2007 (7) SCALE 380

2. The matter has been placed before the three Judge Bench in view of a Reference made by a two-Judge Bench of this Court, pertaining to the question of service of notice in terms of Clause (b) of proviso to Section 138 of the Negotiable Instruments Act, 1881 ('the Act'). Observing that while rendering the decision in ***D. Vinod Shivappa v. Nanda Belliappa***, this Court has not taken into consideration the presumption in respect of an official act as provided under Section 114 of the Indian Evidence Act, 1872, the following question has been referred for consideration of the larger Bench:

“Whether in absence of any averments in the complaint to the effect that the accused had a role to play in the matter of non-receipt of legal notice; or that the accused deliberately avoided service of notice, the same could have been entertained keeping in view the decision of this Court in ***Vinod Shivappa*** case?”

3. As it hardly needs emphasis that necessary averments in regard to the mode and the manner of compliance with the mandatory requirements of Section 138 of the Act are required to be made in the complaint, from the format of the question, the scope of controversy appears to lie in a narrow compass but bearing in mind the fact that the issue raised has wider implication with regard to the very maintainability of the complaint itself, we deem it necessary to deal with the issue in little more detail.

4. Chapter XVII of the Act originally containing Sections 138 to 142 was inserted in the Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 with the object of promoting and inculcating faith in the efficacy of banking system and its operations and giving credibility to negotiable instruments in business transaction. The introduction of the said Chapter was intended to create an atmosphere of faith and reliance on banking system by discouraging people from not honouring their commitments by way of payment through cheques. Section 138 of the Act was enacted to punish those unscrupulous persons who purported to discharge their liability by issuing cheques without really intending to do so. To make the provisions contained in the said Chapter more effective, some more Sections were inserted in the Chapter and some amendments in the existing provisions were made. Though, in this reference, we are not directly concerned with these amendments but they do indicate the anxiety of the Legislature to make the provisions more result oriented. Therefore, while construing the provision, the object of the legislation has to be borne in mind.

5. As noted above, the controversy arises in the context of service of notice in terms of Section 138 of the Act. The conditions pertaining to the notice to be given to the drawer, have been formulated and incorporated in Clauses (b) and (c) of the proviso to Section 138 of the Act, which read as follows:

“Provided that nothing contained in this section shall apply unless - x x x x x

(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, 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.”

6. As noted hereinbefore, Section 138 of the Act was enacted to punish unscrupulous drawers of cheques who, though purport to discharge their liability by issuing cheque, have no intention of really doing so. Apart from civil liability, criminal liability is sought to be imposed by the said provision on such unscrupulous drawers of cheques. However, with a view to avert unnecessary prosecution of an honest drawer of the cheque and with a view to give an opportunity to him to make amends, the prosecution under Section 138 of the Act has been made subject to certain conditions. These conditions are stipulated in the proviso to Section 138 of the Act, extracted above. Under Clause (b) of the proviso, the payee or the holder of the cheque in due course is required to give a written notice to the drawer of the cheque within a period of thirty days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. Under Clause (c), the drawer is given fifteen days time from the date of receipt of the notice to make the payment and only if he fails to make the payment, a complaint may be filed against him. As noted above, the object of the proviso is to avoid unnecessary hardship to an honest drawer. Therefore, the observance of stipulations in quoted Clause (b) and its aftermath in Clause (c) being a pre-condition for invoking Section 138 of the Act, giving a notice to the drawer before filing complaint under Section 138 of the Act is a mandatory requirement.

7. The issue with regard to interpretation of the expression ‘giving of notice’ used in Clause (b) of the proviso is no more res integra. In **K. Bhaskaran v. Sankaran Vaidhyan Balan**, the said expression came up for interpretation. Considering the question with particular reference to scheme of Section 138 of the Act, it was held that failure on the part of the drawer to pay the amount should be within fifteen days ‘of the receipt’ of the said notice. ‘Giving notice’ in the context is not the same as ‘receipt of notice’. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address and for the drawer to comply with Clause (c) of the proviso. Emphasizing that the provisions contained in Section 138 of the Act required to be construed liberally, it was observed thus:

“If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that Court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure. In **Maxwell’s Interpretation of Statutes** the learned author has emphasized that “provisions relating to giving of notice often receive liberal interpretation.” The context envisaged in Section 138 of the Act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his

interest the very provision is made by the legislature. The words in Clause (b) of the proviso to Section 138 of the Act show that payee has the statutory obligation to 'make a demand' by giving notice. The thrust in the clause is on the need to 'make a demand'. It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is dispatched his part is over and the next depends on what the sendee does."

8. Since in *Bhaskaran*, the notice issued in terms of Clause (b) had been returned unclaimed and not as refused, the Court posed the question: "Will there be any significant difference between the two so far as the presumption of service is concerned?" It was observed that though Section 138 of the Act does not require that the notice should be given only by 'post', yet in a case where the sender has dispatched the notice by post with correct address written on it, the principle incorporated in Section 27 of the General Clauses Act, 1897 ('G.C. Act') could profitably be imported in such a case. It was held that in this situation service of notice is deemed to have been effected on the sendee unless he proves that it was not really served and that he was not responsible for such non-service.

9. All these aspects have been highlighted and reiterated by this Court recently in *Vinod Shivappa* case. Elaborately dealing with the situation where the notice could not be served on the addressee for one or the other reason, such as his non availability at the time of delivery, or premises remaining locked on account of his having gone elsewhere etc; it was observed that if in each such case, the law is understood to mean that there has been no service of notice, it would completely defeat the very purpose of the Act. It would then be very easy for an unscrupulous and dishonest drawer of a cheque to make himself scarce for sometime after issuing the cheque so that the requisite statutory notice can never be served upon him and consequently he can never be prosecuted. It was further observed that once the payee of the cheque issues notice to the drawer of the cheque, the cause of action to file a complaint arises on the expiry of the period prescribed for payment by the drawer of the cheque. If he does not file a complaint within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138 of the Act, his complaint gets barred by time. Thus, a person who can dodge the postman for about a month or two, or a person who can get a fake endorsement made regarding his non availability, can successfully avoid his prosecution because the payee is bound to issue notice to him within a period of 30 days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. He is, therefore, bound to issue the notice, which may be returned with an endorsement that the addressee is not available on the given address. This Court held:

"We cannot also lose sight of the fact that the drawer may by dubious means manage to get an incorrect endorsement made on the envelope that the premises has been found locked or that the addressee was not available at the time when postman went for delivery of the letter. It may be that the address is correct and even the addressee is available but a wrong endorsement is manipulated by the addressee. In such a case, if the facts are proved, it may amount to refusal of the notice. If the complainant is able to prove that the drawer of the cheque knew about the notice and deliberately evaded service and got a false endorsement made only to defeat the process of law, the Court shall presume service of notice. This, however, is a matter

of evidence and proof. Thus even in a case where the notice is returned with the endorsement that the premises has always been found locked or the addressee was not available at the time of postal delivery, it will be open to the complainant to prove at the trial by evidence that the endorsement is not correct and that the addressee, namely the drawer of the cheque, with knowledge of the notice had deliberately avoided to receive notice. Therefore, it would be premature at the stage of issuance of process, to move the High Court for quashing of the proceeding under Section 482 of the Code of Criminal Procedure. The question as to whether the service of notice has been fraudulently refused by unscrupulous means is a question of fact to be decided on the basis of evidence. In such a case the High Court ought not to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure”

10. It is, thus, trite to say that where the payee dispatches the notice by registered post with correct address of the drawer of the cheque, the principle incorporated in Section 27 of the G.C. Act would be attracted; the requirement of Clause (b) of proviso to Section 138 of the Act stands complied with and cause of action to file a complaint arises on the expiry of the period prescribed in Clause (c) of the said proviso for payment by the drawer of the cheque. Nevertheless, it would be without prejudice to the right of the drawer to show that he had no knowledge that the notice was brought to his address.

11. However, the Referring Bench was of the view that this Court in *Vinod Shivappa* case did not take note of Section 114 of Evidence Act in its proper perspective. It felt that the presumption under Section 114 of the Evidence Act being a rebuttable presumption, the complaint should contain necessary averments to raise the presumption of service of notice; that it was not sufficient for a complainant to state that a notice was sent by registered post and that the notice was returned with the endorsement ‘out of station’; and that there should be a further averment that the addressee-drawer had deliberately avoided receiving the notice or that the addressee had knowledge of the notice, for raising a presumption under Section 114 of Evidence Act.

12. Therefore, the moot question requiring consideration is in regard to the implication of Section 114 of the Indian Evidence Act, 1872 insofar as the service of notice under the said proviso is concerned. Section 114 of the Indian Evidence Act, 1872 reads as follows:

“Section 114 - Court may presume existence of certain facts.- The Court may presume the existence of any fact which it thinks likely to have happened. regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume -

(f) That the common course of business has been followed in particular cases;”

13. According to Section 114 of the Act, read with illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was

not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

“27. Meaning of service by post. - Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression ‘serve’ or either of the expressions ‘give’ or ‘send’ or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post”.

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement ‘refused’ or ‘not available in the house’ or ‘house locked’ or ‘shop closed’ or ‘addressee not in station’, due service has to be presumed. It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

15. Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act, in order to enable the Court to draw presumption or inference either under Section 27 of the G.C. Act or Section 114 of the Evidence Act, is concerned, there is no material difference between the two provisions. In our opinion, therefore, when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasise that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the Court is required to be prima facie satisfied that a case under the said Section is made out and the aforementioned mandatory statutory procedural

requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. In our opinion, this interpretation of the provision would effectuate the object and purpose for which proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to provide him an opportunity to make amends.

16. As noticed above, the entire purpose of requiring a notice is to give an opportunity to the drawer to pay the cheque amount within 15 days of service of notice and thereby free himself from the penal consequences of Section 138. In *Vinod Shivappa*, this Court observed:

“One can also conceive of cases where a well intentioned drawer may have inadvertently missed to make necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within the prescribed period. It is for this reason that Clause (c) of proviso to Section 138 provides that the section shall not apply unless the drawer of the cheque fails to make the payment within 15 days of the receipt of the said notice. To repeat, the proviso is meant to protect honest drawers whose cheques may have been dishonoured for the fault of others, or who may have genuinely wanted to fulfil their promise but on account of inadvertence or negligence failed to make necessary arrangements for the payment of the cheque. The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their modus operandi to cheat unsuspecting persons.”

17. It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran’s case (supra), if the ‘giving of notice’ in the context of Clause (b) of the proviso was the same as the ‘receipt of notice’ a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act.

18. In the instant case, the averment made in the complaint in this regard is: “Though the complainant issued lawyer’s notice intimating the dishonour of cheque and demanded

payment on 4.8.2001, the same was returned on 10.8.2001 saying that the accused was ‘out of station’.” True, there was no averment to the effect that the notice was sent at the correct address of the drawer of the cheque by ‘registered post acknowledgement due’. But the returned envelope was annexed to the complaint and it thus, formed a part of the complaint which showed that the notice was sent by registered post acknowledgement due to the correct address and was returned with an endorsement that ‘the addressee was abroad.’ We are of the view that on facts in hand the requirements of Section 138 of the Act had been sufficiently complied with and the decision of the High Court does not call for interference.

19. In the final analysis, with the clarification indicated hereinabove, we reiterate the view expressed by this Court in *K. Bhaskaran* and *Vinod Shivappa* cases.

20. For the reasons aforementioned, we do not find any merit in this appeal. It is dismissed accordingly but with no order as to costs in the circumstances of the case.

* * * * *

Rangappa v. Sri. Mohan

(2010)11SCC441

K.G. BALAKRISHNAN, C.J. 2. In the present case, the trial court had acquitted the appellant-accused in a case related to the dishonour of a cheque under Section. 138 of the Negotiable Instruments Act, 1881 [Hereinafter `Act']. This finding of acquittal had been made by the Addl. JMFC at Ranebennur, Karnataka in Criminal Case No. 993/2001, by way of a judgment dated 30-5-2005. On appeal by the respondent-complainant, the High Court had reversed the trial court's decision and recorded a finding of conviction while directing that the appellant-accused should pay a fine of Rs. 75,000, failing which he would have to undergo three months simple imprisonment (S.I.). Aggrieved by this final order passed by the High Court of Karnataka [in Criminal Appeal No. 1367/2005] dated 26-10-2005, the appellant-accused has approached this Court by way of a petition seeking special leave to appeal. The legal question before us pertains to the proper interpretation of Section 139 of the Act which shifts the burden of proof on to the accused in respect of cheque bouncing cases. More specifically, we have been asked to clarify the manner in which this statutory presumption can be rebutted.

3. Before addressing the legal question, it would be apt to survey the facts leading up to the present litigation. Admittedly, both the appellant-accused and the respondent- claimant are residents of Ranebennur, Karnataka. The appellant-accused is a mechanic who had engaged the services of the respondent-complainant who is a Civil Engineer, for the purpose of supervising the construction of his house in Ranebennur. The said construction was completed on 20-10- 1998 and this indicates that the parties were well acquainted with each other.

4. As per the respondent-complainant, the chain of facts unfolded in the following manner. In October 1998, the accused had requested him for a hand loan of Rs. 45,000 in order to meet the construction expenses. In view of their acquaintance, the complainant had paid Rs. 45,000 by way of cash. On receiving this amount, the appellant-accused had initially assured repayment by October 1999 but on the failure to do so, he sought more time till December 2000. The accused had then issued a cheque bearing No. 0886322, post-dated for 8-2-2001 for Rs. 45,000 drawn on Syndicate Bank, Kudremukh Branch. Consequently, on 8-2-2001, the complainant had presented this cheque through Karnataka Bank, Ranebennur for encashment. However, on 16-2-2001 the said Bank issued a return memo stating that the `Payment has been stopped by the drawer' and this memo was handed over to the complainant on 21-2-2001. The complainant had then issued notice to the accused in this regard on 26-2-2001. On receiving the same, the accused failed to honour the cheque within the statutorily prescribed period and also did not reply to the notice sent in the manner contemplated under Section 138 of the Act. Following these developments, the complainant had filed a complaint (under Section 200 of the Code of Criminal Procedure) against the accused for the offence punishable under Section 138 of the Act.

5. The appellant-accused had raised the defence that the cheque in question was a blank cheque bearing his signature which had been lost and that it had come into the hands of the

complainant who had then tried to misuse it. The accused's case was that there was no legally enforceable debt or liability between the parties since he had not asked for a hand loan as alleged by the complainant.

6. The trial judge found in favour of the accused by taking note of some discrepancies in the complainant's version. As per the trial judge, in the course of the cross-examination the complainant was not certain as to when the accused had actually issued the cheque. It was noted that while the complaint stated that the cheque had been issued in December 2000, at a later point it was conceded that the cheque had been handed over when the accused had met the complainant to obtain the work completion certificate for his house in March 2001. Later, it was stated that the cheque had been with the complainant about 15-20 days prior to the presentation of the same for encashment, which would place the date of handing over of the cheque in January 2001. Furthermore, the trial judge noted that in the complaint it had been submitted that the complainant had paid Rs. 45,000 in cash as a hand loan to the accused, whereas during the cross-examination it appeared that the complainant had spent this amount during the construction of the accused's house from time to time and that the complainant had realized the extent of the liability after auditing the costs on completion of the construction. Apart from these discrepancies on part of the complainant, the trial judge also noted that the accused used to pay the complainant a monthly salary in lieu of his services as a building supervisor apart from periodically handing over money which was used for the construction of the house. In light of these regular payments, the trial judge found it unlikely that the complainant would have spent his own money on the construction work. With regard to these observations, the trial judge held that there was no material to substantiate that the accused had issued the cheque in relation to a legally enforceable debt. It was observed that the accused's failure to reply to the notice sent by the complainant did not attract the presumption under Section 139 of the Act since the complainant had failed to prove that he had given a hand loan to the accused and that the accused had issued a cheque as alleged. Furthermore, the trial judge erroneously decided that the offence made punishable by Section 138 of the Act had not been committed in this case since the alleged dishonor of cheque was not on account of insufficiency of funds since the accused had instructed his bank to stop payment. Accordingly, the trial judge had recorded a finding of acquittal.

7. However, on appeal against acquittal, the High Court reversed the findings and convicted the appellant-accused. The High Court in its order noted that in the course of the trial proceedings, the accused had admitted that the signature on the impugned cheque (No. 886322, dated 8-2-2001) was indeed his own. Once this fact has been acknowledged, Section 139 of the Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. This presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. With regard to the present facts, the High Court found that the defence raised by the accused was not probable. In respect of the accused's stand that he had lost a blank cheque bearing his signature, the High Court noted that in the instructions sent by the accused to his Bank for stopping payment, there is a reference to cheque No. 0886322, dated 20-7-1999. This is in conflict with the complainant's version

wherein the accused had given instructions for stopping payment in respect of the same cheque, albeit one which was dated 8-2-2001. The High Court also noted that if the accused had indeed lost a blank cheque bearing his signature, the question of his mentioning the date of the cheque as 20-7-1999 could not arise. At a later point in the order, it has been noted that the instructions sent by the accused to his bank for stopping payment on the cheque do not mention that the same had been lost. However, the correspondence does refer to the cheque being dated 20-7-1999. Furthermore, during the cross-examination of the complainant, it was suggested on behalf of the accused that the complainant had the custody of the cheque since 1998. This suggestion indicates that the accused was aware of the fact that the complainant had the cheque, thereby weakening his claim of having lost a blank cheque. Furthermore, a perusal of the record shows that the accused had belatedly taken up the defence of having lost a blank cheque at the time of his examination during trial. Prior to the filing of the complaint, the accused had not even replied to the notice sent by the complainant since that would have afforded an opportunity to raise the defence at an earlier stage. All of these circumstances led the High Court to conclude that the accused had not raised a probable defence to rebut the statutory presumption. It was held that:

6. Once the cheque relates to the account of the accused and he accepts and admits the signatures on the said cheque, then initial presumption as contemplated under Section 139 of the Negotiable Instruments Act has to be raised by the Court in favour of the complainant. The presumption referred to in Section 139 of the N.I. Act is a mandatory presumption and not a general presumption, but the accused is entitled to rebut the said presumption. What is required to be established by the accused in order to rebut the presumption is different from each case under given circumstances. But the fact remains that a mere plausible explanation is not expected from the accused and it must be more than a plausible explanation by way of rebuttal evidence. In other words, the defence raised by way of rebuttal evidence must be probable and capable of being accepted by the Court. The defence raised by the accused was that a blank cheque was lost by him, which was made use of by the complainant. Unless this barrier is crossed by the accused, the other defence raised by him whether the cheque was issued towards the hand loan or towards the amount spent by the complainant need not be considered....

Hence, the High Court concluded that the alleged discrepancies on part of the complainant which had been noted by the trial court were not material since the accused had failed to raise a probable defence to rebut the presumption placed on him by Section 139 of the Act. Accordingly, the High Court recorded a finding of conviction.

8. In the course of the proceedings before this Court, the contentions related to the proper interpretation of Sections 118(a), 138 and 139 of the Act. Before addressing them, it would be useful to quote the language of the relevant provisions:

118. Presumptions as to negotiable instruments. - Until the contrary is proved, the following presumptions shall be made:

(a) of consideration: that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

138. Dishonor 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 two years, 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 thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

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

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

139. Presumption in favour 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.

9. Ordinarily in cheque bouncing cases, what the courts have to consider is whether the ingredients of the offence enumerated in Section 138 of the Act have been met and if so, whether the accused was able to rebut the statutory presumption contemplated by Section 139 of the Act. With respect to the facts of the present case, it must be clarified that contrary to the trial court's finding, Section 138 of the Act can indeed be attracted when a cheque is dishonoured on account of 'stop payment' instructions sent by the accused to his bank in respect of a post-dated cheque, irrespective of insufficiency of funds in the account. This position was clarified by this Court in **Goa Plast (Pvt.) Ltd. v. Chico Ursula D'Souza** : (2003) 3 SCC 232, wherein it was held:

Chapter XVII containing Sections 138 to 142 was introduced in the Act by Act 66 of 1988 with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. These provisions were intended to discourage people from not honouring their commitments by way of payment through cheques. The court should lean in favour of an interpretation which serves the object of the statute. A post-dated cheque will lose its credibility and acceptability if its payment can be stopped routinely. The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of a post-dated cheque. In view of Section 139, it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of a post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong....

10. It has been contended on behalf of the appellant-accused that the presumption mandated by Section 139 of the Act does not extend to the existence of a legally enforceable debt or liability and that the same stood rebutted in this case, keeping in mind the discrepancies in the complainant's version. It was reasoned that it is open to the accused to rely on the materials produced by the complainant for disproving the existence of a legally enforceable debt or liability. It has been contended that since the complainant did not conclusively show whether a debt was owed to him in respect of a hand loan or in relation to expenditure incurred during the construction of the accused's house, the existence of a legally enforceable debt or liability had not been shown, thereby creating a probable defence for the accused. Counsel appearing for the appellant-accused has relied on a decision given by a division bench of this Court in **Krishna Janardhan Bhatv. Dattatraya G. Hegde** (2008) 4 SCC 54, the operative observations from which are reproduced below (S.B. Sinha, J. at Paras. 29-32, 34 and 45):

29. Section 138 of the Act has three ingredients viz.:

(i) that there is a legally enforceable debt

(ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and

(iii) that the cheque so issued had been returned due to insufficiency of funds.

30. The proviso appended to the said section provides for compliance with legal requirements before a complaint petition can be acted upon by a court of law.

Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

31. The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct.

32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of the accused and that of the prosecution in a criminal case is different.

34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of the accused is 'preponderance of probabilities'. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies.
(emphasis supplied)

Specifically in relation to the nature of the presumption contemplated by Section 139 of the Act, it was observed;

45. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have been rebutted. Other important principles of legal jurisprudence, namely, presumption of innocence as a human right and the doctrine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same.
(emphasis supplied)

11. With respect to the decision cited above, counsel appearing for the respondent-claimant has submitted that the observations to the effect that the 'existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act' and that 'it merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability' [See Para. 30 in **Krishna Janardhan Bhat** (supra)] are in conflict with the statutory provisions as well as an established line of precedents of this

Court. It will thus be necessary to examine some of the extracts cited by the respondent-claimant. For instance, in **Hiten P. Dalal v. Bratindranath Banerjee** (2001) 6 SCC 16, it was held (Ruma Pal, J. at Paras. 22-23):

22. Because both Sections 138 and 139 require that the Court 'shall presume' the liability of the drawer of the cheques for the amounts for which the cheques are drawn, ..., it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption has been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused (...). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court may presume a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable probability of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exists, the discretion is left with the Court to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man. (emphasis supplied)

12. The respondent-claimant has also referred to the decision reported as **Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm and Ors.** 2008 (8) SCALE 680, wherein it was observed:

Under Section 118(a) of the Negotiable Instruments Act, the court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the Court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal....

This decision then proceeded to cite an extract from the earlier decision in **Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pyarelal** : (1993) 3 SCC 35(Para. 12):

Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbably or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that it did not exist.

(emphasis supplied)

Interestingly, the very same extract has also been approvingly cited in **Krishna Janardhan Bhat** (supra).

13. With regard to the facts in the present case, we can also refer to the following observations in **M.M.T.C. Ltd. and Anr. v. Medchl Chemicals & Pharma (P) Ltd.** : (2002) 1 SCC 234 (Para. 19):

...The authority shows that even when the cheque is dishonored by reason of stop payment instruction, by virtue of Section 139 the Court has to presume that the cheque was received by the holder for the discharge in whole or in part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus show that the 'stop payment' instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there was sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation

of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused....
(emphasis supplied)

14. In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in **Krishna Janardhan Bhat** (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonor of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.

15. Coming back to the facts in the present case, we are in agreement with the High Court's view that the accused did not raise a probable defence. As noted earlier, the defence of the loss of a blank cheque was taken up belatedly and the accused had mentioned a different date in the 'stop payment' instructions to his bank. Furthermore, the instructions to 'stop payment' had not even mentioned that the cheque had been lost. A perusal of the trial record also shows that the accused appeared to be aware of the fact that the cheque was with the complainant. Furthermore, the very fact that the accused had failed to reply to the statutory notice under Section 138 of the Act leads to the inference that there was merit in the complainant's version. Apart from not raising a probable defence, the appellant-accused was not able to contest the existence of a legally enforceable debt or liability. The fact that the accused had made regular payments to the complainant in relation to the construction of

his house does not preclude the possibility of the complainant having spent his own money for the same purpose. As per the record of the case, there was a slight discrepancy in the complainant's version, in so far as it was not clear whether the accused had asked for a hand loan to meet the construction-related expenses or whether the complainant had incurred the said expenditure over a period of time. Either way, the complaint discloses the prima facie existence of a legally enforceable debt or liability since the complainant has maintained that his money was used for the construction-expenses. Since the accused did admit that the signature on the cheque was his, the statutory presumption comes into play and the same has not been rebutted even with regard to the materials submitted by the complainant.

16. In conclusion, we find no reason to interfere with the final order of the High Court, dated 26-10-2005, which recorded a finding of conviction against the appellant. The present appeal is disposed of accordingly.

Laxmi Dyechem v. State of Gujarat and Ors.

(2012)13SCC375

T.S. THAKUR, J. 2. These appeals are directed against orders dated 19th April, 2010 and 27th August, 2010 passed by the High Court of Gujarat at Ahmedabad whereby the High Court has quashed 40 different complaints under Section 138 of the Negotiable Instruments Act, 1881 filed by the Appellant against the Respondents. Relying upon the decision of this Court in **Vinod Tanna and Anr. v. Zaher Siddiqui and Ors.** : (2002) 7 SCC 541, the High Court has taken the view that dishonor of a cheque on the ground that the signatures of the drawer of the cheque do not match the specimen signatures available with the bank, would not attract the penal provisions of Section 138 of the Negotiable Instruments Act. According to the High Court, the provisions of Section 138 are attracted only in cases where a cheque is dishonored either because the amount of money standing to the credit to the account maintained by the drawer is insufficient to pay the cheque amount or the cheque amount exceeds the amount arranged to be paid from account maintained by the drawer by an agreement made with the bank. Dishonor of a cheque on the ground that the signatures of the drawer do not match the specimen signatures available with the bank does not, according to the High Court, fall in either of these two contingencies, thereby rendering the prosecution of the Respondents legally impermissible. Before we advert to the merits of the contentions urged at the Bar by the learned Counsels for the parties, we may briefly set out the factual backdrop in which the controversy arises.

3. The Appellant is a proprietorship firm engaged in the sale of chemicals. It has over the past few years supplied Naphthalene Chemicals to the Respondent-company against various invoices and bills issued in that regard. The Appellant's case is that a running account was opened in the books of account of the Appellant in the name of the Respondent-company in which the value of the goods supplied was debited from time to time as per the standard accounting practice. A sum of Rs. 4,91,91,035/- (Rupees Four Crore Ninety One Lac Ninety One Thousand Thirty Five only) was according to the Appellant outstanding against the Respondent-company in the former's books of accounts towards the supplies made to the latter. The Appellant's further case is that the Respondent-company issued under the signatures of its authorized signatories several post dated cheques towards the payment of the amount aforementioned. Several of these cheques (one hundred and seventeen to be precise) when presented were dishonored by the bank on which the same were drawn, on the ground that the drawers' signatures were incomplete or that no image was found or that the signatures did not match. The Appellant informed the Respondents about the dishonor in terms of a statutory notice sent under Section 138 and called upon them to pay the amount covered by the cheques. It is common ground that the amount covered by the cheques was not paid by the Respondents although according to the Respondents the company had by a letter dated 30.12.2008, informed the Appellant about the change of the mandate and requested the Appellant to return the cheques in exchange of fresh cheques. It is also not in dispute that fresh cheques signed by the authorized

signatories, according to the new mandate to the Bank, were never issued to the Appellant ostensibly because the offer to issue such cheques was subject to settlement of accounts, which had according to the Respondent been bungled by the outgoing authorized signatories. The long and short of the matter is that the cheques remained unpaid despite notice served upon the Respondents that culminated in the filing of forty different complaints against the Respondents under Section 138 of the Negotiable Instruments Act before the learned trial court who took cognizance of the offence and directed issue of summons to the Respondents for their appearance. It was at this stage that Special Criminal Applications No. 2118 to 2143 of 2009 were filed by Shri Mustafa Surka accused No. 5 who happened to be one of the signatories to the cheques in question. The principal contention urged before the High Court in support of the prayer for quashing of the proceedings against the signatory to the cheques was that the dishonor of cheques on account of the signatures 'not being complete' or 'no image found' was not a dishonor that could constitute an offence under Section 138 of the Negotiable Instrument Act.

4. By a common order dated 19th April, 2010, the High Court allowed the said petitions, relying upon the decision of this Court in **Vinod Tanna's** case (supra) and a decision delivered by a Single Judge Bench of the High Court of Judicature at Bombay in Criminal Application No. 4434 of 2009 and connected matters. The Court observed:

In the instant case, there is no dispute about the endorsement that "drawers signature differs from the specimen supplied" and/or "no image found-signature" and/or "incomplete signature/illegible" and for return/dishonor of cheque on the above endorsement will not attract ingredients of Section 138 of the Act and insufficient fund as a ground for dishonoring cheque cannot be extended so as to cover the endorsement "signature differed from the specimen supplied" or likewise. If the cheque is returned/bounced/dishonored on the endorsement of "drawers signature differs from the specimen supplied" and/or "no image found-signature" and/or "incomplete signature / illegible", the complaint filed under Section 138 of the Act is not maintainable. Hence, a case is made out to exercise powers under Section 482 of the Code of Criminal Procedure, 1973 in favour of the Petitioner.

5. Special Criminal Applications No. 896 to 935 of 2010 were then filed by the remaining accused persons challenging the proceedings initiated against them in the complaints filed by the Petitioner on the very same ground as was taken by Mustafa Surka. Reliance was placed by the Petitioners in the said petitions also upon the decision of this Court in Vinod Tanna's case (supra) and the decision of the Single Judge Bench of High Court of Bombay in Mustafa Surka v. Jay Ambe Enterprise and Anr. (2010 (1) Bom. (Cr.) 758). The High Court has, on the analogy of its order dated 19th April, 2010 passed in the earlier batch of cases which order is the subject matter of SLP Nos. 1780-1819 of 2011, quashed the proceedings and the complaints even qua the remaining accused persons, Respondents herein. The present appeals, as noticed above, assail the correctness of both the orders passed by the High Court in the two batch of cases referred to above.

6. Chapter XVII comprising Sections 138 to 142 of the Negotiable Instruments Act was introduced in the statute by Act 66 of 1988. The object underlying the provision contained

in the said Chapter was aimed at inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business and day to day transactions by making dishonor of such instruments an offence. A negotiable instrument whether the same is in the form of a promissory note or a cheque is by its very nature a solemn document that carries with it not only a representation to the holder in due course of any such instrument but also a promise that the same shall be honored for payment. To that end Section 139 of the Act raises a statutory presumption that the cheque is issued in discharge of a lawfully recoverable debt or other liability. This presumption is no doubt rebuttable at trial but there is no gainsaying that the same favors the complainant and shifts the burden to the drawer of the instrument (in case the same is dishonored) to prove that the instrument was without any lawful consideration. It is also noteworthy that Section 138 while making dishonor of a cheque an offence punishable with imprisonment and fine also provides for safeguards to protect drawers of such instruments where dishonor may take place for reasons other than those arising out of dishonest intentions. It envisages service of a notice upon the drawer of the instrument calling upon him to make the payment covered by the cheque and permits prosecution only after the expiry of the statutory period and upon failure of the drawer to make the payment within the said period.

7. The question that falls for our determination is whether dishonor of a cheque would constitute an offence only in one of the two contingencies envisaged under Section 138 of the Act, which to the extent the same is relevant for our purposes reads as under:

138. Dishonor 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 honor 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 of a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both.

8. From the above, it is manifest that a dishonor would constitute an offence only if the cheque is returned by the bank 'unpaid' either because the amount of money standing to the credit of the drawer's account is insufficient to honor the cheque or that the amount exceeds the amount arranged to be paid from that account by an agreement with that bank. The High Court was of the view and so was the submission made on behalf of the Respondent before us that the dishonor would constitute an offence only in the two contingencies referred to in Section 138 and none else. The contention was that Section 138 being a penal provision has to be construed strictly. When so construed, the dishonor must necessarily be for one of the two reasons stipulated under Section 138 & none else. The argument no doubt sounds attractive on the first blush but does not survive closer scrutiny. At any rate, there is nothing new or ingenious about the submission, for the same has been noticed in several cases and

repelled in numerous decisions delivered by this Court over the past more than a decade. We need not burden this judgment by referring to all those pronouncements. Reference to only some of the said decisions should, in our opinion, suffice.

9. In NEPC Micon Ltd. v. Magma Leasing Ltd. : (1999) 4 SCC 253, the cheques issued by the Appellant-company in discharge of its liability were returned by the company with the comments 'account closed'. The question was whether a dishonor on that ground for that reason was culpable under Section 138 of the Negotiable Instruments Act. The contention of the company that issued the cheque was that Section 138 being a penal provision ought to be strictly construed and when so interpreted, dishonor of a cheque on ground that the account was closed was not punishable as the same did not fall in any of the two contingencies referred to in Section 138. This Court noticed the prevalent cleavage in the judicial opinion, expressed by different High Courts in the country and rejected the contention that Section 138 must be interpreted strictly or in disregard of the object sought to be achieved by the statute. Relying upon the decision of this Court in **Kanwar Singh v. Delhi Administration**: AIR 1965 SC 871, and **Swantraj v. State of Maharashtra** (1975) 3 SCC 322 this Court held that a narrow interpretation of Section 138 as suggested by the drawer of the cheque would defeat the legislative intent underlying the provision. Relying upon the decision in **State of Tamil Nadu v. M.K. Kandaswami** : (1975) 4 SCC 745, this Court declared that while interpreting a penal provision which is also remedial in nature a construction that would defeat its purpose or have the effect of obliterating it from the statute book should be eschewed and that if more than one constructions are possible the Court ought to choose a construction that would preserve the workability and efficacy of the statute rather than an interpretation that would render the law otiose or sterile. The Court relied upon the much quoted passage from the *Seaford Court Estates Ltd. v. Asher* (1949 2 All E.R. 155) wherein Lord Denning, L.J. observed:

The English language is not an instrument of mathematical precision. Our literature would be much poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.... A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do so as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases.

10. Relying upon a three-Judge Bench decision of this Court in **Modi Cements Ltd. v. Kuchil Kumar Nandi** : (1998) 3 SCC 249, this Court held that the expression "the amount of money is insufficient to honour the cheque" is a genus of which the expression 'account being closed' is a specie.

11. In *Modi Cements Ltd.* (supra) a similar question had arisen for the consideration of this Court. The question was whether dishonour of a cheque on the ground that the drawer had stopped payment was a dishonour punishable under Section 138 of the Act. Relying upon two earlier decisions of this Court in **Electronics Trade & Technology Development Corporation Ltd. v. Indian Technologists and Engineers (Electronics) (P) Ltd.** : (1996) 2 SCC 739 and **K.K Sidharthan v. T.P. Praveena Chandran** : (1996) 6 SCC 369, it was contended by the drawer of the cheque that if the payment was stopped by the drawer, the dishonor of the cheque could not constitute an offence under Section 138 of the Act. That contention was specifically rejected by this Court. Not only that, the decision in *Electronics Trade & Technology Development Corporation Ltd.* (supra) to the extent the same held that dishonor of the cheque by the bank after the drawer had issued a notice to the holder not to present the same would not constitute an offence, was overruled. This Court observed:

18. The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of Sections 138 and 139 of the Act. If we are to accept this proposition it will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Further the following observations in para 6 in *Electronics Trade & Technology Development Corp'n. Ltd.* "Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induce the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly" (emphasis supplied) in our opinion, do not also lay down the law correctly.

20. On a careful reading of Section 138 of the Act, we are unable to subscribe to the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honor the cheque issues the same and, therefore, this amounts to an offence under Section 138 of the Act. For the reasons stated hereinabove, we are unable to share the views expressed by this Court in the above two cases and we respectfully differ with the same regarding interpretation of Section 138 of the Act to the limited extent as indicated above.

12. We may also at this stage refer to the decisions of this Court in **M.M.T.C. Ltd. and Anr. v. Medchl Chemicals and Pharma (P) Ltd. and Anr.** : (2002) 1 SCC 234, where too this Court considering an analogous question held that even in cases where the dishonor was on account of "stop payment" instructions of the drawer, a presumption regarding the

cheque being for consideration would arise under Section 139 of the Act. The Court observed:

19. Just such a contention has been negated by this Court in the case of *Modi Cements Ltd. v. Kuchil Kumar Nandi*. It has been held that even though the cheque is dishonoured by reason of "stop-payment" instruction an offence under Section 138 could still be made out. It is held that the presumption under Section 139 is attracted in such a case also. The authority shows that even when the cheque is dishonoured by reason of stop-payment instructions by virtue of Section 139 the court has to presume that the cheque was received by the holder for the discharge, in whole or in part, of any debt or liability of course this is a rebuttable presumption. The accused can thus show that the "stop-payment" instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there were sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop-payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused. Thus a court cannot quash a complaint on this ground.

13. To the same effect is the decision of this Court in *Goaplast (P) Ltd. v. Chico Ursula D'souza and Anr.* : (2003) 3 SCC 232, where this Court held that 'stop payment instructions' and consequent dishonor of the cheque of a post-dated cheque attracts provision of Section 138. This Court observed:

Chapter XVII containing Sections 138 to 142 was introduced in the Act by Act 66 of 1988 with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. The said provisions were intended to discourage people from not honouring their commitments by way of payment through cheques. The court should lean in favour of an interpretation which serves the object of the statute. A post-dated cheque will lose its credibility and acceptability if its payment can be stopped routinely. The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of a post-dated cheque.

In view of Section 139, it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. (Emphasis supplied)

14. A three-Judge Bench of this Court in **Rangappa v. Sri Mohan**: (2010) 11 SCC 441 has approved the above decision and held that failure of the drawer of the cheque to put up a probable defence for rebutting the presumption that arises under Section 139 would justify conviction even when the Appellant drawer may have alleged that the cheque in question had been lost and was being misused by the complainant.

15. The above line of decisions leaves no room for holding that the two contingencies envisaged under Section 138 of the Act must be interpreted strictly or literally. We find ourselves in respectful agreement with the decision in *NEPC Micon Ltd. (supra)* that the expression "amount of money is insufficient" appearing in Section 138 of the Act is a genus and dishonor for reasons such "as account closed", "payment stopped", "referred to the drawer" are only species of that genus. Just as dishonor of a cheque on the ground that the account has been closed is a dishonor falling in the first contingency referred to in Section 138, so also dishonor on the ground that the "signatures do not match" or that the "image is not found", which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonor within the meaning of Section 138 of the Act. This Court has in the decisions referred to above taken note of situations and contingencies arising out of deliberate acts of omission or commission on the part of the drawers of the cheques which would inevitably result in the dishonor of the cheque issued by them. For instance this Court has held that if after issue of the cheque the drawer closes the account it must be presumed that the amount in the account was nil hence insufficient to meet the demand of the cheque. A similar result can be brought about by the drawer changing his specimen signature given to the bank or in the case of a company by the company changing the mandate of those authorized to sign the cheques on its behalf. Such changes or alteration in the mandate may be dishonest or fraudulent and that would inevitably result in dishonor of all cheques signed by the previously authorized signatories. There is in our view no qualitative difference between a situation where the dishonor takes place on account of the substitution by a new set of authorized signatories resulting in the dishonor of the cheques already issued and another situation in which the drawer of the cheque changes his own signatures or closes the account or issues instructions to the bank not to make the payment. So long as the change is brought about with a view to preventing the cheque being honored the dishonor would become an offence under Section 138 subject to other conditions prescribed being satisfied. There may indeed be situations where a mismatch between the signatories on the cheque drawn by the drawer and the specimen available with the bank may result in dishonor of the cheque even when the drawer never intended to invite such a dishonor. We are also conscious of the fact that an authorized signatory may in the ordinary course of business be replaced by a new signatory ending the earlier mandate to the bank. Dishonor on account of such changes that may occur in the course of ordinary business of a company, partnership or an individual may not constitute an offence by itself because such a dishonor in order to qualify for prosecution under Section 138 shall have to be preceded by a statutory notice where the drawer is called upon and has the opportunity to arrange the payment of the amount covered by the cheque. It is only when the drawer despite receipt of such a notice and despite the opportunity to make

the payment within the time stipulated under the statute does not pay the amount that the dishonor would be considered a dishonor constituting an offence, hence punishable. Even in such cases, the question whether or not there was a lawfully recoverable debt or liability for discharge whereof the cheque was issued would be a matter that the trial Court will examine having regard to the evidence adduced before it and keeping in view the statutory presumption that unless rebutted the cheque is presumed to have been issued for a valid consideration.

16. In the case at hand, the High Court relied upon a decision of this Court in Vinod Tanna's case (*supra*) in support of its view. We have carefully gone through the said decision which relies upon the decision of this Court in Electronics Trade & Technology Development Corporation Ltd. (*supra*). The view expressed by this Court in Electronics Trade & Technology Development Corporation Ltd. (*supra*) that a dishonor of the cheque by the drawer after issue of a notice to the holder asking him not to present a cheque would not attract Section 138 has been specifically overruled in Modi Cements Ltd. case (*supra*). The net effect is that dishonor on the ground that the payment has been stopped, regardless whether such stoppage is with or without notice to the drawer, and regardless whether the stoppage of payment is on the ground that the amount lying in the account was not sufficient to meet the requirement of the cheque, would attract the provisions of Section 138.

17. It was contended by learned Counsel for the Respondent that the Respondent-company had offered to issue new cheques to the Appellant upon settlement of the accounts and that a substantial payment has been made towards the outstanding amount. We do not think that such an offer would render illegal a prosecution that is otherwise lawful. The offer made by the Respondent-company was in any case conditional and subject to the settlement of accounts. So also whether the cheques were issued fraudulently by the authorized signatory for amounts in excess of what was actually payable to the Appellant is a matter for examination at the trial. That the cheques were issued under the signature of the persons who were authorized to do so on behalf of the Respondent-company being admitted would give rise to a presumption that they were meant to discharge a lawful debt or liability. Allegations of fraud and the like are matters that cannot be investigated by a Court under Section 482 Code of Criminal Procedure and shall have to be left to be determined at the trial after the evidence is adduced by the parties.

18. On behalf of the signatories of the cheques dishonored it was argued that the dishonor had taken place after they had resigned from their positions and that the failure of the company to honor the commitment implicit in the cheques cannot be construed an act of dishonesty on the part of the signatories of the cheques. We do not think so. Just because the authorized signatories of the cheques have taken a different line of defence than the one taken by the company does not in our view justify quashing of the proceedings against them. The decisions of this Court in **National Small Industries Corporation Limited v. Harmeet Singh Paintal and Anr.** : (2010) 3 SCC 330 and **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr.** : (2005) 8 SCC 89 render the authorized signatory liable to be prosecuted

along with the company. In the National Small Industries Corporation Limited's case (supra) this Court observed:

19. (c) The answer to Question (c) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under Sub-section (2) of Section 141.

19. In the result, we allow these appeals, set aside the judgment and orders passed by the High Court and dismiss the special criminal applications filed by the Respondents. The trial Court shall now proceed with the trial of the complaints filed by the Appellants expeditiously. We make it clear that nothing said in this judgment shall be taken as an expression of any final opinion on the merits of the case which the trial Court shall be free to examine on its own. No costs.

Gyan Sudha Misra, J. 20. I endorse and substantially agree with the views expressed in the judgment and order of learned Brother Justice Thakur. However, I propose to highlight a specific aspect relating to dishonor of cheques which constitute an offence under Section 138 as introduced by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 by adding that in so far as the category of 'stop payment of cheques' is concerned as to whether they constitute an offence within the meaning of Section 138 of the 'NI Act', due to the return of a cheque by the bank to the drawee/holder of the cheque on the ground of 'stop payment' although has been held to constitute an offence within the meaning of Sections 118 and 138 of the NI Act, and the same is now no longer res integra, the said presumption is a 'rebuttable presumption' under Section 139 of the NI Act itself since the accused issuing the cheque is at liberty to prove to the contrary. This is already reflected under Section 139 of the NI Act when it lays down as follows:

139. Presumption in favour 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.

21. We have to bear in mind that the Legislature while incorporating the provisions of Chapter XVII, Sections 138 to 142 inserted in the NI Act (Amendment Act 1988) intends to punish only those who know fully well that they have no amount in the bank and yet issue a cheque in discharge of debt or liability already borrowed/incurred -which amounts to cheating, and not to punish those who refused to discharge the debt for bona fide and sustainable reason. It is in this context that this Hon'ble Court in the matter of M.M.T.C. case was pleased to hold that cheque dishonor on account of drawer's stop payment instruction constitutes an offence under Section 138 of the NI Act but it is subject to the

rebuttable presumption under Section 139 of the NI Act as the same can be rebutted by the drawer even at the first instance. It was held therein that in order to escape liability under Section 139, the accused has to show that dishonour was not due to insufficiency of funds but there was valid cause, including absence of any debt or liability for the stop payment instruction to the bank. The specific observations of the Court in this regard may be quoted for ready reference which is as follows:

The authority shows that even when the cheque is dishonoured by reason of stop-payment instructions by virtue of Section 139 the court has to presume that the cheque was received by the holder for the discharge, in whole or in part, of any debt or liability. of course this is a rebuttable presumption. The accused can thus show that the "stop-payment" instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there were sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop-payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused. Thus a court cannot quash a complaint on this ground.

Therefore, complaint filed in such a case although might not be quashed at the threshold before trial, heavy onus lies on the court issuing summons in such cases as the trial is summary in nature.

22. In the matter of Goaplast case also this Court had held that ordinarily the stop payment instruction is issued to the bank by the account holder when there is no sufficient amount in the account. But, it was also observed therein that the reasons for stopping the payment can be manifold which cannot be overlooked. Hence, in view of Section 139, it has to be presumed that a cheque is issued in discharge of any debt or other liability. But the presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. However, this presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. Therefore, in order to hold that the stop payment instruction to the bank would not constitute an offence, it is essential that there must have been sufficient funds in the accounts in the first place on the date of signing of the cheque, the date of presentation of the cheque, the date on which stop payment instructions were issued to the bank. Hence, in Goaplast matter (supra), when the magistrate had disallowed the application in a case of 'stop payment' to the bank without hearing the matter merely on the ground that there was no dispute about the dishonor of the cheque issued by the accused, since the signature was admitted and therefore held that no purpose would be served in examining the bank manager since the dishonor was not in issue, this Court held that examination of the bank manager would have enabled the Court to know on what date stop payment order was sent by the drawer to the bank clearly leading to the obvious inference

that stop payment although by itself would be an offence, the same is subject to rebuttal provided there was sufficient funds in the account of the drawer of the cheque.

23. Further, a three judge Bench of this Court in the matter of Rangappa case held that Section 139 is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies the strong criminal remedy in relation to the dishonor of the cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. The Court however, further observed that it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose money is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the Defendant accused cannot be expected to discharge an unduly high standard of proof". The Court further observed that it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is all preponderance of probabilities.

24. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. If however, the accused/drawer of a cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant.

25. It is no doubt true that the dishonor of cheques in order to qualify for prosecution under Section 138 of the NI Act precedes a statutory notice where the drawer is called upon by allowing him to avail the opportunity to arrange the payment of the amount covered by the cheque and it is only when the drawer despite the receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount, that the said default would be considered a dishonor constituting an offence, hence punishable. But even in such cases, the question whether or not there was lawfully recoverable debt or liability for discharge whereof the cheque was issued, would be a matter that the trial court will have to examine having regard to the evidence adduced before it keeping in view the statutory presumption that unless rebutted, the cheque is presumed to have been issued for a valid consideration. In view of this the responsibility of the trial judge while issuing summons to conduct the trial in matters where there has been instruction to stop payment despite sufficiency of funds and whether the same would be a sufficient ground to proceed in the matter, would be extremely heavy.

26. As already noted, the Legislature intends to punish only those who are well aware that they have no amount in the bank and yet issue a cheque in discharge of debt or liability

which amounts to cheating and not to punish those who bona fide issues the cheque and in return gets cheated giving rise to disputes emerging from breach of agreement and hence contractual violation. To illustrate this, there may be a situation where the cheque is issued in favour of a supplier who delivers the goods which is found defective by the consignee before the cheque is encashed or a postdated cheque towards full and final payment to a builder after which the apartment owner might notice breach of agreement for several reasons. It is not uncommon that in that event the payment might be stopped bona fide by the drawer of the cheque which becomes the contentious issue relating to breach of contract and hence the question whether that would constitute an offence under the NI Act. There may be yet another example where a cheque is issued in favour of a hospital which undertakes to treat the patient by operating the patient or any other method of treatment and the doctor fails to turn up and operate and in the process the patient expires even before the treatment is administered. Thereafter, if the payment is stopped by the drawer of the cheque, the obvious question would arise as to whether that would amount to an offence under Section 138 of the NI Act by stopping the payment ignoring Section 139 which makes it mandatory by incorporating that the offence under Section 138 of the NI Act is rebuttable. Similarly, there may be innumerable situations where the drawer of the cheque for bonafide reasons might issue instruction of 'stop payment' to the bank in spite of sufficiency of funds in his account.

27. What is wished to be emphasized is that matters arising out of 'stop payment' instruction to the bank although would constitute an offence under Section 138 of the NI Act since this is no longer *res-integra*, the same is an offence subject to the provision of Section 139 of the Act and hence, where the accused fails to discharge his burden of rebuttal by proving that the cheque could be held to be a cheque only for discharge of a lawful debt, the offence would be made out. Therefore, the cases arising out of stop payment situation where the drawer of cheques has sufficient funds in his account and yet stops payment for bona fide reasons, the same cannot be put on par with other variety of cases where the cheque has bounced on account of insufficiency of funds or where it exceeds the amount arranged to be paid from that account, since Section 138 cannot be applied in isolation ignoring Section 139 which envisages a right of rebuttal before an offence could be made out under Section 138 of the Act as the Legislature already incorporates the expression "unless the contrary is proved" which means that the presumption of law shall stand and unless it is rebutted or disproved, the holder of a cheque shall be presumed to have received the cheque of the nature referred to in Section 138 of the NI Act, for the discharge of a debt or other liability. Hence, unless the contrary is proved, the presumption shall be made that the holder of a negotiable instrument is holder in due course.

28. Thus although a petition under Section 482 of the Code of Criminal Procedure may not be entertained by the High Court for quashing such proceedings, yet the judicious use of discretion by the trial judge whether to proceed in the matter or not would be enormous in view of Section 139 of the NI Act and if the drawer of the cheque discharges the burden even at the stage of enquiry that he had bona fide reasons to stop the payment and not make the said payment even within the statutory time of 15 days provided under the NI Act, the

trial court might be justified in refusing to issue summons to the drawer of the cheque by holding that ingredients to constitute offence under Section 138 of the NI Act is missing where the account holder has sufficient funds to discharge the debt. Thus the category of 'stop payment cheques' would be a category which is subject to rebuttal and hence would be an offence only if the drawer of the cheque fails to discharge the burden of rebuttal.

29. Thus, dishonor of cheques simpliciter for the reasons stated in Section 138 of the NI Act although is sufficient for commission of offence since the presumption of law on this point is no longer *res integra*, the category of 'stop payment' instruction to the bank where the account holder has sufficient funds in his account to discharge the debt for which the cheque was issued, the said category of cases would be subject to rebuttal as this question being rebuttable, the accused can show that the stop payment instructions were not issued because of insufficiency or paucity of funds, but stop payment instruction had been issued to the bank for other valid causes including the reason that there was no existing debt or liability in view of bonafide dispute between the drawer and drawee of the cheque. If that be so, then offence under Section 138 although would be made out, the same will attract Section 139 leaving the burden of proof of rebuttal by the drawer of the cheque. Thus, in cases arising out of 'stop payment' situation, Sections 138 and 139 will have to be given a harmonious construction as in that event Section 139 would be rendered nugatory.

30. The instant matter however do not relate to a case of 'stop payment' instruction to the bank as the cheque in question had been returned due to mismatching of the signatures but more than that the Petitioner having neither raised nor proved to the contrary as envisaged under Section 139 of the NI Act that the cheques were not for the discharge of a lawful debt nor making the payment within fifteen days of the notice assigning any reason as to why the cheques had at all been issued if the amount had not been settled, obviously the plea of rebuttal envisaged under Section 139 does not come to his rescue so as to hold that the same would fall within the realm of rebuttable presumption envisaged under Section 139 of the Act. I, therefore, concur with the judgment and order of learned Brother Justice Thakur subject to my views on the dishonor of cheques arising out of cases of 'stop payment' instruction to the bank in spite of sufficiency of funds on account of bonafide dispute between the drawer and drawee of the cheque. This is in view of the legal position that presumption in favour of the holder of a cheque under Section 139 of the NI Act has been held by the NI Act as also by this Court to be a rebuttable presumption to be discharged by the accused/drawee of the cheque which may be discharged even at the threshold where the magistrate examines a case at the stage of taking cognizance as to whether a *prima facie* case has been made out or not against the drawer of the cheque.

MSR Leathers v. S. Palaniappan

2012 ALL SCR 3025

PINAKI CHANDRA GHOSE, J.

1. This matter was referred before the larger Bench by order dated 25th March, 2009. The question referred to the larger Bench was : “whether the action of the appellant was time-barred under Section 138(b) of the Negotiable Instruments Act or not ?”

2. The facts of the case, briefly stated, are that the respondent issued four cheques to the appellant on 14th August, 1996. The appellant presented those four cheques on 21st November, 1996 and on presentation, those cheques were returned by the Bank with an endorsement “not arranged funds for”. At the request of the respondent, the appellant did not present the said cheques since the respondent agreed to settle the dispute. However, the respondent failed to settle the dispute subsequently. In these circumstances, on 8th January, 1997, the appellant sent a notice (to the respondent) under section 138(b) of the Negotiable Instruments Act, 1881 (hereinafter referred to as ‘the Act’). The respondent duly received the said notice. Subsequent thereto, those cheques were again presented before the Bank on 21st January, 1997 by the appellant. On presentation, the said cheques were dishonoured for want of sufficient funds.

3. On 28th January, 1997 the appellant sent a notice under Section 138(b) of the Act and called upon the respondent to pay the said amount with interest within 15 days. The respondent duly received the said notice on 3rd February, 1997.

4. From the said facts, it appears that while the first notice dated 8th January, 1997 was beyond the limitation period, as required under Section 138(b) of the Act, the second notice sent by the appellant under the Act was within the limitation period from the date the Bank informed the appellant on the second occasion, i.e., on 28th January, 1997. Thereafter, the appellant filed a complaint before the Trial Court on 4th March, 1997. In the circumstances, the question arises whether the action of the appellant was time-barred under Section 138(b) of the Act or not.

5. The Division Bench since expressed their Lordships’ reservation about the correctness of the law laid down in **Sadanandan Bhadran vs. Madhavan Sunil Kumar** [1998 (6) SCC 514] and felt that it requires to be considered by a larger Bench and the matter was placed before the Hon’ble Chief Justice for consideration.

6. Accordingly, the matter was placed before a larger Bench. Their Lordships, while deciding the said question, noticed that proviso to Section 138 stipulates following three distinct

conditions precedent, which must be satisfied before dishonour of the cheque can constitute an offence and becomes punishable.

“...The first condition is that the cheque ought to have 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. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. The third condition is that the drawer of such a cheque should have failed to make 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...” Fulfilment of those three conditions constitutes an offence under Section 138 and it can then be said that an offence under the said section has been committed by the person issuing the cheque.

7. Their Lordships further noticed that no court shall take cognizance of any offence punishable under Section 138 except when a complaint in writing is made by the payee or by the holder in due course and such complaint has to be made within one month from the date on which the cause of action arises under clause (b) of the proviso to Section 138. It is also noticed by their Lordships that neither Section 138 nor Section 142 of the Act or any other provision contained in the said Act prevents the holder or the payee of the cheque from presenting the cheque for encashment for any number of occasions within a period of six months from the date of its issuance or within a period of its validity, whichever is earlier. Therefore, it appears that the payee or the holder has a right to present the same as many number of times for encashment within a period of six months or within its validity period, whichever is earlier.

8. After analysing Sections 138 and 142 of the Act, their Lordships held that “... we find it difficult to hold that the payee would lose his right to institute such proceedings on a subsequent default that satisfies all the three requirements of Section 138.” Accordingly, their Lordships held as follows :

“23. Coming then to the question whether there is anything in Section 142(b) to suggest that prosecution based on subsequent or successive dishonour is impermissible, we need only mention that the limitation which *Sadanandan Bhadran’s* case (*supra*) reads into that provision does not appear to us to arise. We say so because while a complaint based on a default and notice to pay must be filed within a period of one month from the date the cause of action accrues, which implies the date on which the period of 15 days granted to the drawer to arrange the payment expires, there is nothing in Section 142 to suggest that expiry of any such limitation would absolve him of his criminal liability should the cheque continue to get dishonoured by the bank on subsequent presentations. So long as the cheque is valid and so long as it is dishonoured upon presentation to the bank, the holder’s right to prosecute the drawer for the default committed by him remains valid and exercisable. The argument that the

holder takes advantage by not filing a prosecution against the drawer has not impressed us. By reason of a fresh presentation of a cheque followed by a fresh notice in terms of Section 138, proviso (b), the drawer gets an extended period to make the payment and thereby benefits in terms of further opportunity to pay to avoid prosecution. Such fresh opportunity cannot held the defaulter on any juristic principle, to get a complete absolution from prosecution.”

9. It was further held as follows :

“31. Applying the above rule of interpretation and the provisions of Section 138, we have no hesitation in holding that a prosecution based on a second or successive default in payment of the cheque amount should not be impermissible simply because no prosecution based on the first default which was followed by a statutory notice and a failure to pay had not been launched. If the entire purpose underlying Section 138 of the Negotiable Instruments Act is to compel the drawers to honour their commitments made in the course of their business or other affairs, there is no reason why a person who has issued a cheque which is dishonoured and who fails to make payment despite statutory notice served upon him should be immune to prosecution simply because the holder of the cheque has not rushed to the court with a complaint based on such default or simply because the drawer has made the holder defer prosecution promising to make arrangements for funds or for any other similar reason. There is in our opinion no real or qualitative difference between a case where default is committed and prosecution immediately launched and another where the prosecution is deferred till the cheque presented again gets dishonoured for the second or successive time.

32. The controversy, in our opinion, can be seen from another angle also. If the decision in *Sadanandan Bhadran's case* (supra) is correct, there is no option for the holder to defer institution of judicial proceedings even when he may like to do so for so simple and innocuous a reason as to extend certain accommodation to the drawer to arrange the payment of the amount. Apart from the fact that an interpretation which curtails the right of the parties to negotiate a possible settlement without prejudice to the right of holder to institute proceedings within the outer period of limitation stipulated by law should be avoided we see no reason why parties should, by a process of interpretation, be forced to launch complaints where they can or may like to defer such action for good and valid reasons. After all, neither the courts nor the parties stand to gain by institution of proceedings which may become unnecessary if cheque amount is paid by the drawer. The magistracy in this country is overburdened by an avalanche of cases under Section 138 of Negotiable Instruments Act. If the first default itself must in terms of the decision in *Sadanandan Bhadran's case* (supra) result in filing of prosecution, avoidable litigation would become an inevitable bane of the legislation that was intended only to bring solemnity to cheques without forcing parties to resort to proceedings in the courts of law. While there is no empirical data to suggest that the problems of overburdened magistracy and judicial system at the district level is entirely because of the compulsions arising out of the decisions in *Sadanandan Bhadran's case* (supra), it is difficult to say that the law declared in that decision has not added to court congestion.”

10. In the result, their Lordships overruled the decision in *Sadanandan Bhadran's case* (supra) and held that the prosecution based on second or successive dishonour of the cheque is also

permissible so long as it satisfies the requirements stipulated under the proviso to Section 138 of the Act.

11. In the light of the said decision, we set aside the order passed by the High Court and allow these appeals.

* * * * *

G. J. Raja v. Tejraj Surana

AIR 2019 SC 3817

1. Leave granted.

2. This Appeal challenges the Final Order dated 08.02.2019 passed by the High Court of Judicature at Madras in Criminal O.P.No.3406 of 2019 preferred by the Appellant herein.

3. Complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as ‘the Act’) being C.C.No.7171 of 2018 is presently pending against the Appellant before the IInd Fast Track Court -Metropolitan Magistrate, Egmore, Chennai. According to the complaint, two cheques issued by the Appellant in the sums of Rs.20,00,000/- and Rs.15,00,000/- in favour of the Respondent-Complainant were dishonoured on account of insufficiency of funds. The Complaint was lodged on 04.11.2016.

4. With effect from 01.09.2018, Section 143A was inserted in the Act by Amendment Act 20 of 2018. Said Section is to the following effect:-

“143A. **Power to direct interim compensation.** – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Court trying an offence under section 138 may order the drawer of the cheque to pay interim compensation to the complainant –

(a) in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and

(b) in any other case, upon framing of charge.

(2) The interim compensation under sub-section (1) shall not exceed twenty per cent of the amount of the cheque.

(3) The interim compensation shall be paid within sixty days from the date of the order under subsection (1), or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.

(4) If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial years, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

(5) The interim compensation payable under this section may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973 (2 of 1974). (6) The amount of fine imposed under section 138 or the amount of compensation awarded under section 357 of the Code of Criminal Procedure, 1973 (2 of 1974), shall be reduced by the amount paid or recovered as interim compensation under this section.”

5. Soon thereafter, the Trial Court ordered that 20% of the cheque amount be made over by the Appellant to the Respondent as interim compensation in accordance with the provisions of Section 143A of the Act. Thus, the Appellant was directed to pay to the Respondent a sum of Rs.7,00,000/-.

6. The Appellant being aggrieved, filed Criminal O.P.No.3406 of 2019 in the High Court. By its order dated 08.02.2019, the High Court found no illegality or infirmity in the order awarding interim compensation under Section 143A of the Act but reduced the percentage from 20% of the cheque amount to 15% of the cheque amount.

7. The order of the High Court is presently under challenge. While issuing notice the Appellant was directed to deposit the sum so ordered by the High Court in the Trial Court. It was further directed that upon deposit, the Trial Court should invest the money in Fixed Deposit and that the money would not be made over to the Respondent till further orders. Since the Respondent, despite having been served with the notice, had not entered appearance, this Court by its Order dated 01.07.2019 requested Mr. Vinay Navare, learned Senior Advocate to assist this Court as Amicus Curiae.

8. We heard Mr. G. Ananda Selvam, learned Advocate for the Appellant and the learned Amicus Curiae.

9. A reading of Section 143A shows (i) interim compensation must not exceed 20% of the amount of the cheque; (ii) it must be paid within the time stipulated under Sub-Section (3); (iii) if the accused is acquitted, the complainant shall be directed to pay to the accused the amount of interim compensation with interest at the bank rate; (iv) the interim compensation payable under said Section can be recovered as if it were a fine under Section 421 of the Code of Criminal Procedure, 1973 ('the Code', for short); and (v) if the accused were to be convicted, the amount of fine to be imposed under Section 138 of the Act or the amount of compensation to be awarded under Section 357 of the Code would stand reduced by the amount paid or recovered as interim compensation.

10. Since Sub-Section (5) of Section 143A stipulates that the interim compensation could be recovered as if it were a fine under Section 421 of the Code, said Section 421 also needs to be considered at this stage. Section 421 appears in Chapter XXXII of the

Code which Chapter deals with ‘Execution, Suspension, Remission and Commutation of Sentences’. By very context and the language of the provisions contained in the Chapter, they apply in cases where the guilt of an accused is determined and he is convicted of an offence punishable with sentence and/or fine. Part-C of the Chapter deals with ‘Levy of Fine’ and Section 421 appearing in said Part-C is to the following effect:-

“421. Warrant for levy of fine.- (1) When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may –

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter.

Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under section 357.

(2) The State Government may make rules regulating the manner in which warrants under clause (a) of subsection (1) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Court issues a warrant to the Collector under clause (b) of sub-section (1), the Collector shall realise the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law: Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.”

11. According to Section 421 of the Code, fine could be recovered either by warrant of attachment or sale of movable property belonging to the offender or by issuance of warrant to the Collector authorising him to realise the amount as arrears of land revenue from the movable or immovable property or both of the defaulter.

12. It is thus clear that in case an accused, against whom an order to pay interim compensation under Section 143A of the Act is passed, fails or is unable to pay the amount of interim compensation, the process under Section 421 can be taken resort to which may inter

alia result in coercive action of procedure prescribed for such recovery may vary from State to State but invariably, such procedure may visit the person concerned with coercive methods.

13. For instance, by virtue of Section 183 of the Maharashtra Land Revenue Code, 1966, in case there be a default in payment of land revenue, the person concerned could be arrested and detained in custody for 10 days in the office of the Collector or of a Tehsildar unless the arrears of revenue which were due, were paid along with the penalty or interest and the cost of arrest and of the notice of demand as also the cost of his subsistence during detention.

14. In the present case, the Complaint was lodged in the year 2016 that is to say, the act constituting an offence had occurred by 2016 whereas, the concerned provision viz. Section 143A of the Act was inserted in the statute book with effect from 01.09.2018. The question that arises therefore is whether Section 143A of the Act is retrospective in operation and can be invoked in cases where the offences punishable under Section 138 of the Act were committed much prior to the introduction of Section 143A. We are concerned in the present case only with the issue regarding recovery of the amount of interim compensation as if the amount represented the arrears of land revenue. The extent and rigor of the applicability of said Section 143A to offences under Section 138 of the Act, committed before the insertion of said Section 143A.

15. While considering general principles concerning ‘retrospectivity of legislation’ in the context of Section 158-BE inserted in the Income Tax Act, 1961, it was observed by this Court in Commissioner of Income Tax (Central)-I, New Delhi vs. Vatika Township Private Limited (2015) 1 SCC 1, as under:-

“28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow’s backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit*: law looks forward not backward. As was observed in *Phillips v. Eyre* (1870) LR 6 QB 1, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.”

16. Similarly, while considering the effect of modified application of the provisions of the Code, as a result of Section 20(4)(bb) of the Terrorist and Disruptive Activities (Prevention) Act, 1987, whereunder the period for filing challan or charge-sheet could get extended, this Court considered the issue about the retrospective operation of the concerned provisions in *Hitendra Vishnu Thakur and others vs. State of Maharashtra and others*, (1994) 4 SCC 602 as under:

“26. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the court. From the law settled by this Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:

- (i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.
- (ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.
- (iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.
- (iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.
- (v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.”

17. The fourth and the fifth principle as culled out by this Court in *Hitendra Vishnu Thakur* are apposite to the present fact situation.

18. The provisions contained in Section 143A have two dimensions. First, the Section creates a liability in that an accused can be ordered to pay over upto 20% of the cheque amount to the complainant. Such an order can be passed while the complaint is not yet adjudicated upon and the guilt of the accused has not yet been determined. Secondly, it makes available the machinery for recovery, as if the interim compensation were arrears of land revenue. Thus, it not only creates a new disability or an obligation but also exposes the accused to coercive methods of recovery of such interim compensation through the machinery of the State as if the interim compensation represented arrears of land revenue. The coercive methods could also, as is evident from provision like Section 183 of the Maharashtra Land Revenue Code, in some cases result in arrest and detention of the accused.

19. We must at this stage, refer to a decision of this Court in *Employees' State Insurance Corporation vs. Dwarka Nath Bhargwa*, (1997) 7 SCC 131, where provisions of Section 45B, which was inserted in Employees State Insurance Act, 1948 with effect from 28.01.1968 was held to be procedural and that it could have retrospective application. Said Section 45B is as under:-

“45B. Recovery of contributions. - Any contribution payable under this Act may be recovered as an arrear of land revenue.”

The issue was whether the modality of recovery so prescribed in said Section 45B could be invoked in respect of amounts which had become payable on 27.01.1967 and 24.01.1968, i.e. before said Section 45B was inserted in the statute book. While holding that the arrears could be recovered as arrears of land revenue, it was observed, “It is not in dispute and cannot be disputed that the contributions in question had remained payable all throughout and were not paid by the respondent.”

20. It must be stated that prior to the insertion of Section 143A in the Act there was no provision on the statute book whereunder even before the pronouncement of the guilt of an accused, or even before his conviction for the offence in question, he could be made to pay or deposit interim compensation. The imposition and consequential recovery of fine or compensation either through the modality of Section 421 of the Code or Section 357 of the code could also arise only after the person was found guilty of an offence. That was the status of law which was sought to be changed by the introduction of Section 143A in the Act. It now imposes a liability that even before the pronouncement of his guilt or order of conviction, the accused may, with the aid of State machinery for recovery of the money as arrears of land revenue, be forced to pay interim compensation. The person would, therefore, be subjected to a new disability or obligation. The situation is thus completely different from the one which arose for consideration in *Employees' State Insurance Corporation* case.

21. Though arising in somewhat different context, proviso to Section 142(b) which was inserted in the Act by Amendment Act 55 of 2002, under which cognizance could

now be taken even in respect of a complaint filed beyond the period prescribed under Section 142(b) of the Act, was held to be prospective by this Court in *Anil Kumar Goel v. Kishan Chand Kaura* (2007) 13 SCC 492 . It was observed:-

“10. There is nothing in the amendment made to Section 142(b) by Act 55 of 2002 that the same was intended to operate retrospectively. In fact that was not even the stand of the respondent. Obviously, when the complaint was filed on 28-11-1998, the respondent could not have foreseen that in future any amendment providing for extending the period of limitation on sufficient cause being shown would be enacted.”

22. In our view, the applicability of Section 143A of the Act must, therefore, be held to be prospective in nature and confined to cases where offences were committed after the introduction of Section 143A, in order to force an accused to pay such interim compensation.

23. We must, however, advert to a decision of this Court in *Surinder Singh Deswal and Ors. vs. Virender Gandhi*, (2019) 8 SCALE 445, where Section 148 of the Act which was also introduced by the same Amendment Act 20 of 2018 from 01.09.2018 was held by this Court to be retrospective in operation. As against Section 143A of the Act which applies at the trial stage that is even before the pronouncement of guilt or order of conviction, Section 148 of the Act applies at the appellate stage where the accused is already found guilty of the offence under Section 138 of the Act. It may be stated that there is no provision in Section 148 of the Act which is similar to Sub-Section (5) of Section 143A of the Act. However, as a matter of fact, no such provision akin to sub-section (5) of Section 143A was required as Sections 421 and 357 of the Code, which apply post-conviction, are adequate to take care of such requirements. In that sense said Section 148 depends upon the existing machinery and principles already in existence and does not create any fresh disability of the nature similar to that created by Section 143A of the Act. Therefore, the decision of this Court in *Surinder Singh Deswal* stands on a different footing.

24. In the ultimate analysis, we hold Section 143A to be prospective in operation and that the provisions of said Section 143A can be applied or invoked only in cases where the offence under Section 138 of the Act was committed after the introduction of said Section 143A in the statute book. Consequently, the orders passed by the Trial Court as well as the High Court are required to be set aside. The money deposited by the Appellant, pursuant to the interim direction passed by this Court, shall be returned to the Appellant along with interest accrued thereon within two weeks from the date of this order.

25. The Appeal is allowed in aforesaid terms.

26. In the end, we express our sincere gratitude for the assistance rendered by Mr. Vinay Navare, learned Amicus Curiae.

Surinder Singh Deswal and Ors. v. Virender Gandhi
(2019) 8 SCALE 445

ASHOK BHUSHAN, J.

These appeals have been filed against a common judgment of the Punjab and Haryana High Court dated 10.09.2019 dismissing 28 petitions filed by the appellants under Section 482 of Cr.P.C.

2. Brief facts of the case giving rise to these appeals are:

Appellant Nos. 1 and 2 are partners of appellant No.3, M/s. Bhoomi Infrastructure Co., now known as GLM Infratech Private Limited. Respondent No.1, Virender Gandhi, who was also a partner of the Firm Signature Not Verified Digitally signed by ARJUN BISHT retired Date: 2020.01.08 14:57:40 IST Reason:

with respect of which Memorandum of Understanding dated 30.11.2013 was entered into. A cheque No.665643 dated 31.03.2014 drawn on Canara Bank amounting to Rs.45,84,915/- was issued by the appellant to respondent No.1 against the part payment of the retirement dues. Similarly, 63 other cheques were issued by the appellants in favour of respondent arising out of the same transaction. On 06.04.2015, respondent No.1 deposited cheque No.665643 in his Bank that is Karnataka Bank Ltd., Sector-11, Panchkula. The cheque was dishonoured and returned vide memo dated 07.04.2015 with the remarks “funds insufficient”. Other 63 cheques were also dishonoured.

3. Respondent No.1 sent the statutory demand notice under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as “NI Act”) on 06.05.2015. Complaints were filed by respondent No.1 against the appellants under Section 138 of the NI Act before the Judicial Magistrate, Ist Class, Panchkula. In all 28 complaints were filed. The complaints were decided by Judicial Magistrate vide his judgment dated 30.10.2018 holding the appellant Nos.1 and 2 guilty for the offence punishable under Section 138 of the NI Act, who were accordingly convicted. By order dated 13.11.2018 the appellants were sentenced to undergo imprisonment for a period of two years and to pay jointly and severally an amount equal to the amount involved in the present case i.e. cheque amount plus 1% of this amount as interest as well as litigation expenses.

4. The appeal was filed by the appellants against the judgment dated 30.10.2018 and sentence dated 30.11.2018 in the Court of Sessions Judge, Panchkula. In the appeal the appellants had filed an application under Section 389 of Cr.P.C. for suspension of sentence. The learned trial court has suspended the sentence of the appellants by order dated 13.11.2018 for 30 days. The Appellate Court vide order dated 01.12.2018 entertained the appeal and suspended the sentence during the pendency of the appeal, subject to furnishing of bail bond and surety bond

in the sum of Rs.50,000/- with one surety in the like amount and also subject to deposit of 25% of the amount of compensation awarded by the learned trial court in favour of the complainant. The appellants were directed to deposit the amount within four weeks by way of demand draft in the name of the Court.

5. The appellants were convicted in all 28 cases and the total amount to be deposited under the order of the Appellate Court was, in all cases, Rs.9,40,24,999/-. The appellants preferred an application seeking extension of time to deposit the amount of 25% of the compensation amount. The learned Sessions Judge allowed the application on 19.12.2018 granting time to deposit the amount till 28.01.2019. The appellants filed an application under Section 482 Cr.P.C. seeking quashing of the part of the order dated 01.12.2018 passed by the learned Additional Sessions Judge, Panchkula, whereby the said Court has imposed a condition to deposit 25% of the amount of compensation while suspending the sentence.

6. The High Court vide its judgment dated 24.04.2019 dismissed the petition of the appellants under Section 482 Cr.P.C. and other connected petitions. The appellants preferred Special Leave Petition(Criminal) Nos.4948-4975/2019 before this Court against the judgment dated 24.04.2019 of the High Court of Punjab and Haryana at Chandigarh.

7. This Court vide its judgment dated 29.05.2019 dismissed the criminal appeals arising out of the SLPs(Criminal). Learned Additional Sessions Judge, Panchkula in view of the non-compliance of the order dated 20.07.2019 directed the appellants to surrender in the trial court within four days. The appellants were also not present when the case was taken by the Additional Sessions Judge on 20.07.2019. Another petition under Section 482 Cr.P.C. was filed by the appellants challenging the order dated 20.07.2019 passed by the Additional Sessions Judge. The 28 petitions under Section 482 Cr.P.C. filed by the appellants have been dismissed by the impugned judgment of the Punjab and Haryana High Court dated 10.09.2019. Aggrieved by which judgment these appeals have been filed by the appellants.

8. Shri Balbir Singh, learned senior counsel appearing for the appellants questioning the order of the Additional Sessions Judge dated 20.07.2019 and judgment of the High Court submits that by mere non- deposit of 25% of the amount of compensation as directed on 01.12.2018 cannot result in vacation of suspension of sentence. Learned counsel submits that the direction to deposit 25% of the compensation as directed by the trial court could not have been made under Section 148 of the NI Act. Section 148 of the NI Act having come into force on 01.09.2018 could not have been relied by the Courts below. Since, the complaint was filed in the year 2015 alleging offence under Section 138 of the NI Act which was much before the enforcement of Section 148 of the NI Act. He further submits that non-deposit of 25% of the amount of compensation could not lead to vacation of the order suspending the sentence rather it was open to the respondents to recover the said amount as per the procedures prescribed under Section 421 Cr. P.C.

9. Learned counsel for the appellants submits that this Court in Criminal Appeal No.1160 of 2019 (G.J. Raja vs. Tejraj Surana) decided on 30.07.2019 has held the provisions of Section 143A of NI Act to be prospective only that is to apply with respect to offence committed after insertion of Section 143A w.e.f. 01.09.2018. He submits that both Sections 143A and Section 148 inserted in NI Act by amendment Act 20 of 2018, hence Section 148 was not attracted in the present case which was only prospective and could have been utilised in offences which were committed after 01.09.2018. He has also placed reliance on the judgment of Bombay High Court in Ajay Vinodchandra Shah vs. State of Maharashtra, (2019) 4 Mah LJ 705 and another judgment of Punjab and Haryana High Court at Chandigarh dated 18.07.2019 in CRM-M-29187 of 2019(O&M)(Vivek Sahni and another vs. Kotak Mahindra Bank Ltd.).

10. We have considered the submissions of learned counsel for the parties and have perused the records.

11. The appellants had challenged the order dated 01.12.2018 passed by the Additional Sessions Judge, Panchkula by which while entertaining the criminal appeal of the appellants, Appellate Court has suspended the substantive sentence of the appellants subject to deposit 25% of the compensation awarded by the trial court in favour of the complainant. The petitions under Section 482 Cr.P.C. filed by the appellants questioning the order dated 01.12.2019 were dismissed by the High Court vide its judgment dated 24.04.2019 against which judgment the appellants have also filed SLP(Criminal)Nos.4948-4975 of 2019) which were dismissed by this Court on 29.05.2019. All arguments raised by the appellants questioning the order dated 01.12.2018 have been elaborately dealt with by this Court and rejected. The submissions regarding challenge to the order dated 01.12.2018 of the learned Additional Sessions Judge which have been addressed before us have been considered by this Court and rejected. It is useful to refer paragraph 8., 8.1 and 9 of the judgment of this Court which are to the following effect:

“8. It is the case on behalf of the Appellants that as the criminal complaints against the Appellants Under Section 138 of the N.I. Act were lodged/filed before the amendment Act No. 20/2018 by which Section 148 of the N.I. Act came to be amended and therefore amended Section 148 of the N.I. Act shall not be made applicable. However, it is required to be noted that at the time when the appeals against the conviction of the Appellants for the offence Under Section 138 of the N.I. Act were preferred, Amendment Act No. 20/2018 amending Section 148 of the N.I. Act came into force w.e.f.

1.9.2018. Even, at the time when the Appellants submitted application/s Under Section 389 of the Code of Criminal Procedure to suspend the sentence pending appeals challenging the conviction and sentence, amended Section 148 of the N.I. Act came into force and was brought on statute w.e.f. 1.9.2018. Therefore, considering the object and purpose of amendment in Section 148 of the N.I. Act and while suspending the sentence in exercise of powers Under Section 389 of the Code of Criminal Procedure, when the first appellate court directed the Appellants to deposit 25% of the amount of fine/compensation as imposed by the

learned trial Court, the same can be said to be absolutely in consonance with the Statement of Objects and Reasons of amendment in Section 148 of the N.I. Act.

8.1. Having observed and found that because of the delay tactics of unscrupulous drawers of dishonoured cheques due to easy filing of appeals and obtaining stay on proceedings, the object and purpose of the enactment of Section 138 of the N.I. Act was being frustrated, the Parliament has thought it fit to amend Section 148 of the N.I. Act, by which the first appellate Court, in an appeal challenging the order of conviction Under Section 138 of the N.I. Act, is conferred with the power to direct the convicted Accused - Appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court. By the amendment in Section 148 of the N.I. Act, it cannot be said that any vested right of appeal of the Accused - Appellant has been taken away and/or affected. Therefore, submission on behalf of the Appellants that amendment in Section 148 of the N.I. Act shall not be made applicable retrospectively and more particularly with respect to cases/complaints filed prior to 1.9.2018 shall not be applicable has no substance and cannot be accepted, as by amendment in Section 148 of the N.I. Act, no substantive right of appeal has been taken away and/or affected. Therefore the decisions of this Court in the cases of Garikapatti Veeraya (supra) and Videocon International Limited (supra), relied upon by the learned senior Counsel appearing on behalf of the Appellants shall not be applicable to the facts of the case on hand. Therefore, considering the Statement of Objects and Reasons of the amendment in Section 148 of the N.I. Act stated hereinabove, on purposive interpretation of Section 148 of the N.I. Act as amended, we are of the opinion that Section 148 of the N.I. Act as amended, shall be applicable in respect of the appeals against the order of conviction and sentence for the offence Under Section 138 of the N.I. Act, even in a case where the criminal complaints for the offence Under Section 138 of the N.I. Act were filed prior to amendment Act No. 20/2018 i.e., prior to 01.09.2018. If such a purposive interpretation is not adopted, in that case, the object and purpose of amendment in Section 148 of the N.I. Act would be frustrated. Therefore, as such, no error has been committed by the learned first appellate court directing the Appellants to deposit 25% of the amount of fine/compensation as imposed by the learned trial Court considering Section 148 of the N.I. Act, as amended.

9. Now so far as the submission on behalf of the Appellants that even considering the language used in Section 148 of the N.I. Act as amended, the appellate Court "may" order the Appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court and the word used is not "shall" and therefore the discretion is vested with the first appellate court to direct the Appellant - Accused to deposit such sum and the appellate court has construed it as mandatory, which according to the learned Senior Advocate for the Appellants would be contrary to the provisions of Section 148 of the N.I. Act as amended is concerned, considering the amended Section 148 of the N.I. Act as a whole to be read with the Statement of Objects and Reasons of the amending Section 148 of the N.I. Act, though it is true that in amended Section 148 of the N.I. Act, the word used is "may", it is generally to be construed as a "rule" or "shall" and not to direct to deposit by the appellate court is an exception for which special reasons are to be assigned. Therefore amended Section 148 of the N.I. Act confers power upon the Appellate Court to pass an order pending appeal

to direct the Appellant-Accused to deposit the sum which shall not be less than 20% of the fine or compensation either on an application filed by the original complainant or even on the application filed by the Appellant-Accused Under Section 389 of the Code of Criminal Procedure to suspend the sentence. The aforesaid is required to be construed considering the fact that as per the amended Section 148 of the N.I. Act, a minimum of 20% of the fine or compensation awarded by the trial court is directed to be deposited and that such amount is to be deposited within a period of 60 days from the date of the order, or within such further period not exceeding 30 days as may be directed by the appellate court for sufficient cause shown by the Appellant. Therefore, if amended Section 148 of the N.I. Act is purposively interpreted in such a manner it would serve the Objects and Reasons of not only amendment in Section 148 of the N.I. Act, but also Section 138 of the N.I. Act. Negotiable Instruments Act has been amended from time to time so as to provide, inter alia, speedy disposal of cases relating to the offence of the dishonoured of cheques. So as to see that due to delay tactics by the unscrupulous drawers of the dishonoured cheques due to easy filing of the appeals and obtaining stay in the proceedings, an injustice was caused to the payee of a dishonoured cheque who has to spend considerable time and resources in the court proceedings to realise the value of the cheque and having observed that such delay has compromised the sanctity of the cheque transactions, the Parliament has thought it fit to amend Section 148 of the N.I. Act. Therefore, such a purposive interpretation would be in furtherance of the Objects and Reasons of the amendment in Section 148 of the N.I. Act and also Section 138 of the N.I. Act.”

12. This Court having already upheld the order of the Appellate Court dated 01.12.2018 suspending the sentence subject to deposit 25% of the amount of compensation any submission questioning the order of the Appellate Court directing the suspension of sentence subject to deposit of 25% of the compensation amount needs no further consideration. By dismissal of the criminal appeals of the appellants on 29.05.2019 by this Court the challenge stands repelled and cannot be allowed to be reopened.

13. The second round of litigation which was initiated by the appellant by filing application under Section 482 Cr.P.C. was against the order dated 20.07.2019 passed by the Additional Sessions Judge, Panchkula by which Additional Sessions Judge held that the appellant having not complied with the direction dated 01.12.2018 to deposit 25% of the amount of compensation, the order of suspension of sentence shall be deemed to have been vacated. The order dated 20.07.2019 was an order passed by the Additional Sessions Judge on account of failure of the appellant to deposit 25% of the amount of compensation. The suspension of sentence on 01.12.2018 was subject to the condition of deposit of 25% of the amount of compensation, when the condition for suspension of sentence was not complied with, learned Additional Sessions Judge was right in taking the view that order of suspension of sentence shall be deemed to have been vacated. Challenge to order dated 20.07.2019 has rightly been repelled by the High Court by its elaborate and well considered judgment dated 10.09.2019.

14. Learned counsel for the appellant has placed reliance on the judgment of this Court dated 30.07.2019 in Criminal Appeal No.1160 of 2019 (G.J. Raja vs. Tejraj Surana). This Court in the above case was considering provisions of Section 143A of the N.I. Act which was inserted

by the same Amendment Act 20 of 2018 by which Section 148 of the N.I. Act has been inserted. This Court took the view that Section 143A is prospective in nature and confined to cases where offences were committed after the introduction of Section 143A i.e. after 01.09.2018. In paragraph 22 of the judgment following has been held:

“22. In our view, the applicability of Section 143A of the Act must, therefore, be held to be prospective in nature and confined to cases where offences were committed after the introduction of Section 143A, in order to force an accused to pay such interim compensation.”

15. The judgment of this Court which was delivered in the case of the present appellants i.e. Criminal Appeal Nos.917-944 of 2019 (Surinder Singh Deswal @ Col. S.S. Deswal and others vs. Virender Gandhi) (in which one of us M.R.Shah, J was also a member) was also cited before the Bench deciding the case of G.J. Raja. This Court in its judgment dated 29.05.2019 has rejected the submission of the appellants that Section 148 of N.I. Act shall not be made applicable retrospectively. This Court held that considering the Statement of Objects and Reasons of the amendment in Section 148 of the N.I. Act, on purposive interpretation of Section 148 of the N.I. Act as amended, shall be applicable in respect of the appeals against the order of conviction and sentence for the offence under Section 138 of the N.I. Act, even in a case where the criminal complaints for the offence under Section 138 of the N.I. Act were filed prior to amendment Act No.20/2018 i.e. prior to 01.09.2018.

16. The Bench deciding G.J. Raja’s case has noticed the judgment of this Court in the appellants’ case i.e. Surinder Singh Deswal’s case and has opined that the decision of this Court in Surinder Singh Deswal’s case was on Section 148 of the N.I. Act which is a stage after conviction of the accused and distinguishable from the stage in which the interim compensation was awarded under Section 143A of the N.I.Act. When the Bench deciding G.J. Raja’s case(supra) itself has considered and distinguished the judgment of this Court in appellants’ own case i.e. Surinder Singh Deswal’s, reliance by the learned counsel for the appellants on the judgment of this Court in G.J. Raja’s case is misplaced. It is useful to refer to paragraph 23 of the judgment in G.J. Raja’s case which is to the following effect:

“23. We must, however, advert to a decision of this Court in Surinder Singh Deswal and Ors. v. Virender Gandhi (2019) 8 SCALE 445 where Section 148 of the Act which was also introduced by the same Amendment Act 20 of 2018 from 01.09.2018 was held by this Court to be retrospective in operation. As against Section 143A of the Act which applies at the trial stage that is even before the pronouncement of guilt or order of conviction, Section 148 of the Act applies at the appellate stage where the Accused is already found guilty of the offence Under Section 138 of the Act. It may be stated that there is no provision in Section 148 of the Act which is similar to Sub-Section (5) of Section 143A of the Act. However, as a matter of fact, no such provision akin to Sub-section (5) of Section 143A was required as Sections 421 and 357 of the Code, which apply post-conviction, are adequate to take care of such requirements. In that sense said Section 148 depends upon the existing machinery and

principles already in existence and does not create any fresh disability of the nature similar to that created by Section 143A of the Act.

Therefore, the decision of this Court in *Surinder Singh Deswal* (2007) 13 SCC 492 stands on a different footing.” In view of the above, the judgment of this Court in the case of *G.J. Raja* does not help the appellants.

17. The judgment of Punjab and Haryana High Court in *Vivek Sahni* and another (supra) which has been relied by the learned counsel for the appellants has been noted and elaborately considered by the High Court in the impugned judgment. In paragraph 14 and 15 of the impugned judgment of the High Court reasons have been given for distinguishing the *Vivek Sahni*’ case.

18. The High Court is right in its opinion that question No.2 as framed in *Vivek Sahni*’s case was not correctly considered. When suspension of sentence by the trial court is granted on a condition, non-compliance of the condition has adverse effect on the continuance of suspension of sentence. The Court which has suspended the sentence on a condition, after noticing non-compliance of the condition can very well hold that the suspension of sentence stands vacated due to non-compliance. The order of the Additional Sessions Judge declaring that due to non-compliance of condition of deposit of 25% of the amount of compensation, suspension of sentence stands vacated is well within the jurisdiction of the Sessions Court and no error has been committed by the Additional Sessions Judge in passing the order dated 20.07.2019.

19. It is for the Appellate Court who has granted suspension of sentence to take call on non-compliance and take appropriate decision. What order is to be passed by the Appellate Court in such circumstances is for the Appellate Court to consider and decide. However, non-compliance of the condition of suspension of sentence is sufficient to declare suspension of sentence as having been vacated.

20. Insofar as the judgment of the Bombay High Court in *Ajay Vinodchandra Shah* (supra) which has been relied by the learned counsel for the appellant, it is sufficient to observe that the High Court did not have benefit of judgment of this Court dated 29.05.2019 in *Surinder Singh Deswal*’s case. The judgment of the Bombay High Court was delivered on 14.03.2019 whereas judgment of this Court in appellants’ case is dated 29.05.2019. In view of the law laid down by this Court in *Surinder Singh Deswal*’s case decided on 29.05.2019, the judgment of Bombay High Court in *Ajay Vinodchandra Shah*’s case cannot be said to be a good law insofar as consequences of non-compliance of condition of suspension of sentence is concerned.

21. It is further to note that even Bombay High Court while modifying the direction to deposit 25% of the amount of total compensation directed the accused to deposit 20% of the amount of compensation within 90 days.

22. In view of the foregoing discussion, we do not find any merit in the submission of the appellants. The appeals are dismissed.

T H E E N D