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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 27.04.2015

% Judgment delivered on: 14.05.2015

\+ **CRL.L.P. 706/2014**

SURESH CHANDRA GOYAL ..... Petitioner
Through: Mr. Kshitij Sharda, Advocate.

versus

AMIT SINGHAL ..... Respondent
Through: Mr. Aman Bhalla, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. After hearing learned counsel, leave granted.

2. Let the appeal be registered and numbered.

Crl.A. No. /2015 (to be registered and numbered)

3. I heard learned counsel finally at the admission stage with their consent and reserved judgment. Accordingly, I now proceed to dispose of the appeal.

4. The present appeal is directed against the judgment dated 15.09.2014 passed in complaint No. 96/2012, whereby the learned Metropolitan

Magistrate, Karkardooma Courts, Delhi, has acquitted the respondent-accused of the offence under Section 138 of the Negotiable Instruments Act, 1881 (NI Act).

5. The case of the complainant, as emerging from the complaint and the evidence led by the complainant, was that the complainant had invested monies, from time to time, in the business of the accused. A sum of Rs.3 Lakhs was outstanding after accounting for the monies returned by the accused to the complainant. The accused – acting as the first party, entered into a Memorandum of Understanding (MOU) dated 26.06.2011 with the appellant – acting as the second party, for return of the said remaining investment of Rs.3 lakhs to the complainant. The relevant extract of the MOU (Ex.CW-1/4), *inter alia*, reads as follows:

> *".....*
>
> *and whereas the second party Sh. Suresh Chandra Goyal has invested a sum of Rs. 3,00,000.00 (Rs. Three Lakhs only) in the month of June, 2010 and onwards by cash & various cheques by way of partnership on 50-50% basis. The Partnership was broken by way of mutual consent in first week of December, 2010.*
>
> *and whereas both the parties agreed that First party will return full amount of Rs. 3,00,000/- (Rs. Three Lakhs only) to Second Party Sh. Suresh Chandra Goyal in six instalment of Rs. 50,000.00 (Rs. Fifty thousand only) by way of six monthly cheque starting from December, 2011 and Second Party Suresh Chandra Goyal will return all security cheque drawn in favour of second party, if any. It is also agreed upon by all the parties that interest @ 1.5% per month will be charged if there is any delay in getting the cheques cleared by the first party."*

6. Thus, the complainant held six cheques of Rs. 50,000/ each, given by the accused in terms of the MoU (Ex.PW1/4). The appellant/complainant admitted the receipt of Rs.1.50 lakhs out of the aforesaid amount. Three cheques in respect thereof were returned to the accused when the said amount of Rs. 1.50 lakhs was returned in installments of Rs. 50,000/- each. The appellant/complainant claimed that the accused, in order to repay the remaining amount of Rs. 1.50 Lakhs issued three cheques of Rs. 50,000/- each, bearing Nos. 864160, 864161 & 864162 dated 15.01.2012, 15.02.2012 & 15.03.2012 respectively, drawn on Axis Bank, Preet Vihar Branch, Delhi, in favour of the appellant, which were exhibited as Ex.CW1/1, CW1/2 and CW1/3. The said cheques were presented and were dishonoured upon presentation on account of insufficient funds. After issuance of the statutory notice dated 04.08.2012 under Section 138 NI Act, since the accused did not make payment, the complaint was preferred. The accused admitted, while making his statement under Section 251 Cr.P.C., that he was liable to make payment to the appellant/ complainant of Rs.60,000/-, but denied that the liability was Rs.1,50,000/-.

7. The submission of learned counsel for the appellant is that the learned Magistrate, while acquitting the accused, has given two reasons in the impugned judgment. The first is that the petitioner has not been able to establish that a debt was owed by the accused towards the appellant-thus, it could not be said that the cheques Exs.CW1/1, CW1/2 and CW1/3 were issued in discharge of a debt; secondly, the learned Magistrate had held that the cheques in question were given as security cheques and, therefore, could not form the basis of a complaint under Section 138 of the NI Act.

8. In respect of the first reason, the submission of learned counsel for the appellant is that MOU (Ex.CW-1/4) itself reflects the debt owed by the accused, and the undertaking given by him that the same shall be returned in six monthly installments from December, 2011, onwards of Rs. 50,000/- each. Learned counsel submits that in the face of the acknowledgement of debt contained in the MOU (Ex.CW-1/4), and the statement of the accused that he was indebted to the appellant/complainant – though to the extent of Rs.60,000/- and not Rs.1.50 lakhs, the exercise undertaken by the learned Magistrate to ascertain whether the accused was indebted to the appellant, and the doubt entertained by the learned Magistrate with regard to the said debt, itself was misdirected, and it was not open to Magistrate to go behind the MOU (Ex.CW-1/4) to make an inquiry as to whether, or not, the debt existed.

9. The further submission of learned counsel for the appellant is that the MOU (Ex.CW-1/4) itself recorded that the repayment had to be made in six monthly installments. He submits that the learned Magistrate has placed reliance on the cross-examination of the appellant, who was examined as CW-1, as also the language used in MOU (Ex.CW-1/4) – to the effect that the complainant/ appellant shall return the security cheques drawn in his favour, upon the installments being paid- to hold that the cheques in question were "security cheques;" and were not meant for payment of a legally recoverable debt. Learned counsel has referred to the cross-examination of the appellant's/ complainant's witness to submit that the accused never challenged the genuineness, or authenticity of the MOU (Ex.CW-1/4). In fact, the suggestion was that the complainant had received

a sum of Rs. 1.50 Lakhs in respect of the outstanding liability/ debt of Rs. 3 Lakhs. The further submission of the appellant is that the statement of the accused that the outstanding liability was only to the tune of Rs.60,000/- and not Rs.1.50 lakhs, was his mere *ipse dixit*, which was not shown to be even probably true. The same did not dislodge the presumption under Section 118 and 139 of the NI Act, which arose on account of the indisputed position that the cheques Ex.CW1/1, CW1/2 and CW1/3 had been issued/signed by the accused drawn from the bank account maintained by him.

10. On the other hand, the submission of learned counsel for the accused supports the impugned judgment. He submits that the appellant could not establish the availability of monetary liquidity with him, to show that he had advanced any loan, and that Rs. 3 Lakhs was outstanding. The claim made by the appellant/ complainant, that he had earlier too advanced a loan of Rs. 3 Lakhs, out of which only Rs. 2 Lakhs had been returned was not believable, as there was no reason for the petitioner to invest a further amount in the business of the accused – when the initially invested amount had not been fully returned. He further submits that the petitioner had admitted during his cross-examination that the cheques in question had been given as security cheques. He has placed reliance on the decisions taken note of in the impugned judgment as well as on the decision of Supreme Court in ***Vijay Vs. Laxman & Anr.,*** (2013) 3 SCC 86. Learned counsel has also referred to the statement of the accused recorded before the learned Magistrate on 02.07.2014, wherein he admitted his liability to the extent of Rs.60,000/- only.

11. The scope of interference with a judgment of acquittal, in appeal, by the Appellate Court, has been noticed by the Supreme Court in ***Ghurey Lal Vs. State of Uttar Pradesh***, (2008) 10 SCC 450, wherein the Supreme Court held:

> *"70. In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:*
>
> *1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.*
>
> *A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:*
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> *i) The trial court's conclusion with regard to the facts is palpably wrong;*
>
> *ii) The trial court's decision was based on an erroneous view of law;*
>
> *iii) The trial court's judgment is likely to result in "grave miscarriage of justice";*
>
> *iv) The entire approach of the trial court in dealing with the evidence was patently illegal;*
>
> *v) The trial court's judgment was manifestly unjust and unreasonable;*
>
> *vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic expert, etc.*
>
> *vii) This list is intended to be illustrative, not exhaustive."*

12. Therefore, the impugned judgment has to be tested in the aforesaid light.

13. The MOU (Ex. CW-1/4) has been duly proved by the appellant/ complainant. The accused has not challenged the genuineness and authenticity of the MOU (Ex. CW-1/4) executed between him (as the first party), and the appellant/ complainant (as the second party). This MOU acknowledges the debt owed by the accused in favour of the appellant/ complainant of Rs.3 Lakhs. The MOU, inter alia, records *"and whereas both the parties agreed that First party will return full amount of Rs.3,00,000/- (Rs. Three Lakhs only) to Second Party Sh. Suresh Chandra Goyal in six instalment of Rs. 50,000.00 (Rs. Fifty thousand only) by way of six monthly cheque starting from December, 2011 ... ..."*. Thus, the factum of the debt of Rs.3 Lakhs being owed by the accused to the appellant/ complainant stands duly proved and established by the MOU (Ex. CW-1/4).

14. The approach of the learned Magistrate in doubting the existence of the debt, and in going behind MOU (Ex. CW-1/4) is clearly misdirected. No further inquiry was called for on the said aspect since the MOU (Ex. CW-1/4) was not even challenged by the accused, and the exercise undertaken by the learned Magistrate was even barred by law.

15. The endeavour of the learned Magistrate to go behind the MOU (Ex. CW-1/4) was not permissible, in view of Sections 91 & 92 of the Evidence Act. When the terms of a contract have been reduced to the form of a document, no evidence could be given in proof of terms of such contract,

except the document itself. The two exceptions and three explanations to Section 91 of the Evidence Act do not come into play in the facts of the present case.

16. The accused admitted as correct the suggestion that to discharge the legal liability towards the complainant, he had issued three post-dated cheques in question, namely Ex.CW-1/1, CW-1/2 & CW-1/3. However, he qualified his admission by stating that the cheques were given as security. He did not dispute the legal liability owed to the appellant. But he admitted his liability to the extent of Rs.60,000/- only, and not of the amount of Rs.1,50,000/-.

17. Section 92 of the Evidence Act provides that when the terms of any such contract have been proved according to Section 91, no evidence of any oral agreement, or statement shall be admitted as between the parties to any such instrument, or their representatives in interest for the purpose of contradicting, varying, adding to and subtracting from its terms. Thus, the accused could not have sought to contradict the MOU (Ex. CW-1/4) by claiming that an amount of Rs.3 Lakhs was not owed by the accused, or refundable in terms of the MOU (Ex. CW-1/4) to the appellant/ complainant. Pertinently, the accused did not set up a defence in terms of provisos 1 to 6 to Section 92 of the Evidence Act.

18. Thus, in my view, the approach of the learned Magistrate was completely misdirected in law, in proceeding to examine the issue whether the debt in question was owed by the accused to the appellant/ complainant. The finding returned by the learned Magistrate on the said issue is clearly

contrary to the terms of the MOU (Ex. CW-1/4), and certainly cannot be sustained. It is even contrary to the statement/stand of the accused that he was indebted to the complainant, though to the extent of Rs. 60,000/- and not to the extent of Rs. 1.50 lakhs. The finding returned by the learned Magistrate on the aforesaid aspect cannot even be termed as one of the plausible views. It is a finding, which the learned Magistrate could not have returned in the face of the terms contained in the MOU (Ex. CW-1/4), and the stand of the accused.

19. The defence set up by the accused that his outstanding liability was Rs.60,000/-, and not Rs.1.5 lakhs is merely an *ipsi dixit* of the accused. Neither on a reading of the complaint, nor from the evidence led by the complainant and the cross examination of the complainants witness, the accused has been able to create a reasonable doubt with regard to the quantum of the outstanding debt. The accused has also not led any evidence to show that the outstanding liability was Rs.60,000/-, and not Rs.1.5 lakhs. The accused, to rebut the presumption under Section 139 read with Section 118 of the NI Act, has to set up at least a probable defence. The defence cannot be frivolous or moonshine. It cannot be merely a "possible" defence.

20. This Court in ***V.S. Yadav v. Reena***, 172 (2010) DLT 561, commented on the obligation of the accused while setting up a defence to repulse the presumption created by virtue of Section 118 and 139 of the NI Act as follows:

> "*5. It must be borne in mind that the statement of accused under Section 281 Cr.P.C. or under Section 313 Cr.P.C. is not the evidence of the accused and it cannot be read as part of*

evidence. The accused has an option to examine himself as a witness. Where the accused does not examine himself as a witness, his statement under Section 281 Cr.P.C. or 313 Cr.P.C. cannot be read as evidence of the accused and it has to be looked into only as an explanation of the incriminating circumstance and not as evidence. There is no presumption of law that explanation given by the accused was truthful. In the present case, the accused in his statement stated that he had given cheques as security. If the accused wanted to prove this, he was supposed to appear in the witness box and testify and get himself subjected to cross examination. His explanation that he had the cheques as security for taking loan from the complainant but no loan was given should not have been considered by the Trial Court as his evidence and this was liable to be rejected since the accused did not appear in the witness box to dispel the presumption that the cheques were issued as security. Mere suggestion to the witness that cheques were issued as security or mere explanation given in the statement of accused under Section 281 Cr.P.C., that the cheques were issued as security, does not amount to proof. Moreover, the Trial Court seemed to be obsessed with idea of proof beyond reasonable doubt forgetting that offence under Section 138 of N.I. Act was a technical offence and the complainant is only supposed to prove that the cheques issued by the respondent were dishonoured, his statement that cheques were issued against liability or debt is sufficient proof of the debt or liability and the onus shifts to the respondent/ accused to show the circumstances under which the cheques came to be issued and this could be proved by the respondent only by way of evidence and not by leading no evidence."

21. The Court further observed:

"*7. ... ... Mere pleading not guilty and stating that the cheques were issued as security, would not give amount to rebutting the presumption raised under Section 139 of N.I. Act. If mere statement under Section 313 Cr.P.C. or under Section 281 Cr.P.C. of accused of pleading not guilty was sufficient to*

rebut the entire evidence produced by the complainant/ prosecution, then every accused has to be acquitted. But, it is not the law. In order to rebut the presumption under Section 139 of N.I. Act, the accused, by cogent evidence, has to prove the circumstance under which cheques were issued. It was for the accused to prove if no loan was taken why he did not write a letter to the complainant for return of the cheque. Unless the accused had proved that he acted like a normal businessman/prudent person entering into a contract he could not have rebutted the presumption under Section 139 N.I. Act. If no loan was given, but cheques were retained, he immediately would have protested and asked the cheques to be returned and if still cheques were not returned, he would have served a notice as complainant. Nothing was proved in this case".

22. The accused did not lead any evidence to show that apart from the amount of Rs.1.5 lakhs, admittedly returned to the appellant/complainant after the execution of the MOU (Ex. CW-1/4), a further sum of Rs.90,000/- was returned by the accused to the complainant. The accused did not step into the witness box to stand by his defence in this respect. He did not produce any documentary evidence in the form of an acknowledgment or receipt nor claimed that one had been, issued by the complainant, to show that the said amount, i.e. Rs.90,000/- had been paid to the complainant over and above the amount of Rs.1.5 lakhs admitted and acknowledged by the complainant. He did not produce any other person as a witness in whose presence the amount may have been returned.

23. The parties, admittedly, recorded the outstanding liability of the accused, existing on the date of the execution of the MOU (Ex. CW-1/4). In this light, it does not stand to reason as to why they would not record the repayment of the amount of Rs.90,000/- in some form, if the money had

actually been so returned by the accused to the complainant. Pertinently, CW-1 in his deposition stated that at the time of repayment of Rs.1.5 lakhs in three instalments of Rs.50,000/- each, not only three security cheques were returned by the complainant to the accused, but the accused also got the vouchers signed from the complainant. On this aspect, there was no challenge raised by the accused during the course of the complainants cross examination. Thus, if the amount of Rs.90,000/- had been returned, over and above the amount of Rs.1.5 lakhs, the accused would have been holding not only a receipt/acknowledgment given by the complainant, but the complainant would not have been in possession of all the three remaining security cheques (Ex. CW-1/1, CW-1/2 & CW-1/3) of Rs. 50,000/- each. At least, one of them would have been returned to the accused. Thus, it stands established beyond all reasonable doubt that the debt of Rs.1.50 lakhs was outstanding and payable by the accused to the complainant when the three cheques in question were presented for payment.

24. The next issue that needs examination is whether the complaint of the appellant was maintainable under Section 138 of the NI Act since the cheques in question were "security cheques". The MOU (Ex. CW-1/4) itself provides that the first party/ accused will return the amount of Rs.3 Lakhs to the second party/ appellant in six installments of Rs.50,000/- each **by way of six monthly cheques** starting from December, 2011 and second party/ Suresh Chandra Goyal **will return all security cheques** drawn in favour of the second party, if any. Thus, the MOU (Ex. CW-1/4) provided that the amount of Rs.3 Lakhs shall be returned by way of six monthly cheques. The complainant (CW-1) in his cross-examination accepted that he had in his

possession some security cheques issued by the accused. He further stated that he had received Rs.1.50 Lakhs in cash from the accused. He volunteered that the same was received by him in three monthly installments of Rs.50,000/- each and that whenever the accused had given a sum of Rs.50,000/- to him, he had taken back a cheque, and had also got the voucher signed from the complainant. He stated that he did not have the said security cheques with him anymore. He accepted that the security cheques have been filed by him with his complaint before the Court. It is, therefore, evident that the transaction between the parties was that at the time of execution of the MOU (Ex. CW-1/4) six post-dated monthly cheques of Rs.50,000/- each towards security were delivered by the accused to the complainant/ accused. These cheques were issued in respect of a crystallized and admitted debt of Rs.3 Lakhs. The accused returned Rs.1.50 Lakhs to the complainant in cash, in three installments of Rs.50,000/- each and on each such occasion, the complainant returned one cheque of Rs.50,000/-. According to the complainant, the remaining amount of Rs.1.50 Lakhs was not returned and, thus, the appellant proceeded to enforce the security by presenting the three security cheques (Ex. CW-1/1, CW-1/2 & CW-1/3), which were dishonoured.

25. It has come in evidence that the cheques (Ex. CW-1/1, CW-1/2 & CW-1/3) were all filled up in all respects by the accused at the time of their being delivered to the complainant, simultaneously with the execution of the MOU (Ex. CW-1/4). The said original cheques are placed on the Trial Court Record which has been summoned and perused, and it is clear to the naked eye that they had been filled by the same person, and in the same ink.

It is not even the case of the accused that these cheques were blank when given to the complainant, or that the appellant/ complainant had filled them up subsequently. Even otherwise, merely because the cheque may be blank in some or all respects (except that it bears the signatures of the drawer), and the blanks may have been filled in by the drawee subsequently, that by itself does not invalidate the cheque. It cannot be said that a complaint under Section 138 NI Act would not lie in respect of such a cheque, consequent upon its dishonor for reason of insufficient funds [see ***Sandeep Khanna & Anr. v. State & Ors.***, MANU/DE/2364/2010; ***Ravi Chopra v. State &Anr.***, 2008 (102) DRJ 147).

26. The submission of learned counsel for the accused is, and the finding returned by the learned Magistrate is, that the said three cheques Ex. CW-1/1, CW-1/2 & CW-1/3 being security cheques, could not form the basis of a complaint under Section 138 of the NI Act.

27. Reliance had been placed by the accused on the judgment of the Supreme Court in ***M.S. Narayana Menon @ Mani Vs. State of Kerala & Another***, (2006) 6 SCC 39; of this Court in ***Ravi Kumar D. Vs. State of Delhi & Another,*** MANU/DE/1538/2011, and; of the Supreme Court in ***Vijay*** (supra).

28. There is no magic in the word "security cheque", such that, the moment the accused claims that the dishonoured cheque (in respect whereof a complaint under Section 138 of the Act is preferred) was given as a "security cheque", the Magistrate would acquit the accused. The expression "security cheque" is not a statutorily defined expression in the NI Act. The

NI Act does not *per se* carve out an exception in respect of a 'security cheque' to say that a complaint in respect of such a cheque would not be maintainable. There can be mirade situations in which the cheque issued by the accused may be called as security cheque, or may have been issued by way of a security, i.e. to provide an assurance or comfort to the drawee, that in case of failure of the primary consideration on the due date, or on the happening (or not happening) of a contingency, the security may be enforced. While in some situations, the dishonor of such a cheque may attract the penal provisions contained in Section 138 of the Act, in others it may not.

29. To elaborate on the aforesaid aspect, I may consider the different kinds of situations that the Courts have dealt with from time to time, and the manner in which the defence of "security cheque", or that the cheque was given as a security, set up by the accused, has been dealt with.

30. In ***ICDS Ltd. Vs. Beena Shabeer &Anr.*** (2002) 6 SCC 426, the cheque in question had been issued by the guarantor (wife) of the principal debtor (husband) in respect of a hire purchase agreement entered into by the principal debtor with the complainant for purchase of a car. The cheque in question was issued by the guarantor towards part payment to the appellant/complainant. The same was returned unpaid on account of insufficient funds. The issue raised before the Supreme Court was whether a complaint under Section 138 of the NI Act was maintainable in respect of the said cheque. The High Court had come to the conclusion that when a cheque was issued as security, no complaint would lie under Section 138 of the NI Act, since the cheque issued could not be said to be for the purpose of

discharging any debt or liability. The High Court held that the cheque must be for payment of money from out of the drawer's account. In the case of a cheque issued by a guarantor or surety, it could not be said to be for immediate payment of money. The High Court placed reliance on the decision of the Kerala High Court in ***Sreenivasan Vs. State of Kerala*** (1999) 3 K.L.T. 849 wherein the Kerala High Court had observed:

> *"A comparative reading of the principle laid down by the Andhra Pradesh High Court and the mandatory provisions laid down in Section 138 of the Negotiable Instruments Act is crystal clear that when a cheque has been issued as a security, no complaint will lie under Section 138 of the Negotiable Instruments Act."*

31. The Supreme Court reversed the decision of the High Court by placing reliance on the language of Section 138 of the NI Act. Section 138 begins with the word, *'where any cheque……'*. These three words were held to be significant. In particular, emphasis was laid on the use of the word, '*any'*-which suggests that, if, for whatever reason a cheque drawn on an account maintained by the drawer with the banker in favour of another person for the discharge of any debt or other liability is dishonoured, the liability under Section 138 NI Act cannot be avoided. The Supreme Court also emphasized that the legislature had been careful enough to use not only the expression "*discharge, in whole or in part, of any debt*", but has also included the expression '*other liability*' in the language of Section 138 NI Act. The Supreme Court held that the issue regarding the liability of a guarantor and the principal debtor being co-extensive, was out of purview of Section 138 of the NI Act and did not call for any discussion. The Supreme Court held:

> "11. ……*The language of the Statute depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act. 'Any cheque' and 'other liability' are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the Statute. Any contra interpretation would defeat the intent of the legislature. The High Court, it seems, got carried away by the issue of grantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act."*

Thus, the view taken by the Kerala High Court in ***Sreenivasan*** *(supra)* was clearly not approved by the Supreme Court. The Supreme Court rejected the wide proposition that the dishonour of a security cheque issued by a guarantor from his account would not attract Section 138 of the NI Act.

32. The accused has placed reliance on ***M.S.Narayana Menon (supra)***. In this case, the cheque had been issued by the appellant – who was transacting shares with the share broker/second respondent/complainant. The appellant/accused disputed the statement of account relied upon by the complainant, on the basis whereof it was claimed that the cheque amount was due and outstanding. The Supreme Court examined the nature of the transactions undertaken between the parties in the light of the evidence before it. The Supreme Court held that the complainant had not been able to explain the discrepancies in his books of accounts. The complainant did not bring on record any material to show that the parties had transactions, other than those which had been entered into through the Cochin Stock Exchange.

The Supreme Court held that the so called acknowledgement, as correct, of some of the statements of account was not enough since, admittedly, there was no acknowledgement in respect of five statements of accounts. After examining the evidence, the Supreme Court observed as follows:

> *"26. In view of the said error of record, the findings of the High Court to the effect that the appellant had not been able to substantiate his contention as regards the correctness of the accounts of Ex.P10 series must be rejected."*

33. The Supreme Court then proceeded to delve into Sections 118(1) and 139 of the NI Act which raise a presumption against the drawer of a cheque. In para 52 of the judgment, the Supreme Court, inter alia, observed;

> *".....The appellant clearly said that nothing is due and the cheque was issued by way of security. The said defence has been accepted as probable.* ***If the defence is acceptable as probable the cheque therefore cannot be held to have been issued in discharge of the debt as, for example, if a cheque is issued for security or for any other purpose the same would not come within the purview of Section 138 of the Act****."* (emphasis supplied)

34. The aforesaid observations made by the Supreme Court in ***Narayana Menon (supra)*** have been relied to urge that in respect of a cheque issued by way of security, a complaint under Section 138 NI Act is not maintainable.

35. The aforesaid observations have to be read in the context in which they were made. It is well settled that a judgment cannot be read like a Statute. Construction of a judgment should be made in the light of the factual matrix involved therein. What is more important is to see the issues involved in a given case, and the context wherein the observations were

made by the Court while deciding the case. Observation made in a judgment, it is trite, should not be read in isolation and out of context. [See ***Goan Real Estate & Construction Ltd. v. Union of India***, (2010) 5 SCC 388]. It is the ratio of the judgment, and not every observation made in the context of the facts of a particular case under consideration of the court, which constitutes a binding precedent. The Supreme Court in ***P.S. Sathappan v. Andhra Bank Ltd.***, AIR 2004 SC 5152 has held as follows:

> "*138. While analyzing different decisions rendered by this Court, an attempt has been made to read the judgments as should be read under the rule of precedents. A decision, it is trite, should not be read as a statute.*
>
> *139. A decision is an authority for the questions of law determined by it. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment as is well-known, must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it. (See Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr., [2002]1SCR621 , Union of India and Ors. v. Dhanwanti Devi and Ors. , (1996) 6 SCC 44 , Dr. Nalini Mahajan v. Director of Income Tax (Investigation) and Ors., [2002] 257 ITR 123(Delhi) , State of UP and Anr. v. Synthetics and Chemicals Ltd. and Anr. , 1991 (4) SCC 139 , A-One Granites v. State of U.P. and Ors., AIR 2001 SCW 848 and Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and Ors., (2003) 2 SCC 111.*
>
> *140. Although, decisions are galore on this point, we may refer to a recent one in State of Gujarat and Ors. v. Akhil Gujarat Pravasi V.S. Mahamandal and Ors., AIR2004SC3894 wherein this Court held:*

"... It is trite that any observation made during the course of reasoning in a judgment should not be read divorced from the context in which they were used.""

36. The Supreme Court in ***Narayana Menon*** (supra) was not particularly dealing with the issue as to whether, or not, a cheque issued for security or for any other purpose would come within the purview of Section 138 of the NI Act. The observation of the Supreme Court as extracted above cannot, therefore, be understood as laying down a general proposition that a cheque issued as security would not come within the purview of Section 138 of the NI Act in all cases. Such reading of the judgment would go contrary to the express language used in Section 138 of the NI Act, which uses the expression, *'where any cheque…… for payment of any amount of money……of any debt or other liability……'.*

37. The Karnataka High Court in M***/s Shree Ganesh Steel Rolling Mills Ltd. v. M/s STCL Limited***, Criminal Petition No.4104/2009 decided on 21.05.2013, 2013 SCC OnLine Kar 9939 : (2013) 4 AIR Kant R 70, inter alia, observed in relation to ***Narayana Menon*** (supra):

> "*It is to be noticed that the observation made by the apex court in Narayana Menon's case that "…….. if a cheque is issued for security or for any other purpose the same would not come within the purview of Section 138 of the Act……". This was a passing observation in that case with reference to the facts found therein. It cannot be construed as an axiomatic statement of law to be mechanically applied, in all circumstances*".

38. I may also observe that in ***Narayana Menon*** (supra), the earlier decision of the Supreme Court in ***Beena Shabeer*** (supra) was not cited or

brought to the notice of the Court, and has not been considered by the Court. In fact, on a reading of ***Narayana Menon*** (supra), it is clear that the said decision was rendered in the specific facts of that case, and upon examination of the evidence led before the Court by holding that the accused had been able to discharge his initial burden of raising a probable defence, and that the complainant had failed to establish that the cheques in question have been issued in discharge of a legal debt or other liability.

39. Thus, the decision in ***Narayana Menon*** (supra) is of no avail, as it cannot be said to have laid down any general proposition that a complaint under Section 138 NI Act would not be maintainable in respect of a security cheque or a cheque given as a security to assure the performance of another obligation.

40. I may take note of a decision of the Karnataka High Court in ***M/s. Klen & Marshalls Manufacturers & Fertilisers Ltd. v. M/s Shri Ishar Alloy Steels Ltd.***, Crl A No.1610/2001 decided on 26.07.2006. The accused A-6 issued a hundi in favour of the accused A-1 towards supply of certain materials. Under an agreement between A-1 and the complainant, the complainant discounted the hundi and paid an amount of Rs.50 lacs to A-1. In addition to the discounted hundi, A-1 also issued a cheque as security to bind himself, in case A-6 does not pay the hundi amount on the due date. Eventually, the hundi was not paid by A-6 and the cheque issued by A-1 was presented for encashment, but was dishonoured. Consequently, after issuance of statutory notice under Section 138 of NI Act, the complainant preferred the complaint. The accused raised several defences, including the defence that the cheque in question was a security cheque. In this regard,

the accused relied on the judgment in ***Sreenivasan*** (supra). By referring to an earlier decision in the case of ***Smt. Umaswamy v. K.N. Ramanath***, 2006 (5) AIR Kar R 171, wherein a contrary view had been taken, reliance on ***Sreenivasan*** (supra) was rejected. In ***Umaswamy*** (supra), the Karnataka High Court had taken the view that the cheque issued either for discharge of debt or as a security makes little distinction in law. Dishonour of cheque in both the situations attracts valid prosecution under Section 138 of N.I. Act. Criminal Appeal No.1842/2008 from the judgment of the Karnataka High Court in ***M/s Klen & Marshalls*** (supra) was dismissed by the Supreme Court on 17.08.2010 by observing that "*Having heard learned counsel for the parties and perused the record, we find no infirmity in the impugned order*". Thus, the view of the Karnataka High Court in ***M/s. Klen & Marshalls*** (supra) was affirmed.

41. In ***K.S. Bakshi v. State***, 146 (2008) DLT 125, the issue that arose for consideration before this Court was the scope and ambit of the expression, 'other liability' occurring in Section 138 of the NI Act. A collaboration agreement was entered into between the complainant, Ansal Buildwell Co. (referred to as ABC) – whose directors were the petitioners before the Court (in a petition under Section 482 Cr.P.C. seeking quashing of the summoning order issued by the Magistrate), and another company who was termed as the confirming party. Clause 5 of the agreement stipulated that, as a security for due performance of the agreement (whereunder the immovable property of the complainant had to be developed by ABC), a defined sum was to be deposited by ABC with the complainant and other owners. ABC issued 30 cheques in favour of the complainant. Six of these cheques were

dishonoured upon presentation with the remarks, 'exceeds arrangement'. After issuance of the statutory notice of demand, a complaint was preferred wherein, apart from a company ABC, its directors-which included the petitioner before the High Court, were named as accused. The submission of the petitioners before the High Court was that the *sine qua non* for an action under Section 138 of the NI Act is that the dishonored cheque has been issued towards discharge of *"a debt or other liability"*. The expression, '*other liability'* envisaged under Section 138 of the NI Act was akin to a debt or money owed. It was argued that the cheques in question could not be said to have been issued towards payment of a debt or other liability, for the reason that the amount covered by the cheques, in terms of clause (v) of the collaboration agreement, was liable to be returned by the complainant to the accused company on the due performance of the agreement.

42. The petitioner had placed reliance on the decision of the Supreme Court in ***Narayana Menon (supra)***. This Court held that the expression, *'other liability'* could not be construed as akin to '*debt'*. It was held that the expression, '*other liability*' could take its meaning and colour from the preceding word, '*debt'*, only if the rule of *ejusdem generis* is held to be applicable. The learned Judge held that the said rule could not be invoked because the expression, '*other liability*' follows only one single expression i.e. 'debt' which is not a distinct genus. The learned Judge placed reliance on the judgment of the Supreme Court in ***Beena Shabeer*** (supra) to hold that the expression, '*other liability*' must be given its ordinary and grammatical meaning. The learned Judge held that provisions and phrases used in

Section 138 of the NI Act must be construed in the same sense, as people in the commercial world would understand the same. Thus, the expression, '*other liability*' would take within its broad sweep any '*liability'* to pay. The Court also held that the term stipulating creation of a security deposit in favour of the complainant was a fundamental term, breach whereof went to the root of the contract, entitling the complainant to rescind the contract. The Court, inter alia, observed:

> *"31. A distinction has to be drawn between a cheque issued as security and a cheque issued towards discharge of a liability to pay notwithstanding that the money is by way of security for due performance of the contract. A cheque given as security is not to be encashed in presenti. It becomes enforceable if an obligation is future is not enforced. It is not tendered in discharge of a liability which has accrued.*
>
> *32. Thus where a cheque forms part of a consideration under a contract it is paid towards a liability."*

43. The Court also held that the expression, '*consideration'* used in the Contract Act is a very wide term, and it is not restricted to monetary benefit. Consideration does not necessarily mean money in return of money, or money in lieu of goods, or services. Any benefit or detriment of some value can be a consideration. The Court held that the complainant and the other owners of the property blocked their asset till the period of completion of the construction as per the collaboration agreement. The same was the consideration within the meaning of Section 2(d) of the Indian Contract Act. Thus, the reciprocal obligations of the builder, namely to create a security deposit was also a consideration for the contract. Consequently, the court dismissed the quashing petition.

44. In ***Sai Auto Agencies through its partner Dnyandeo Ramdas Rane v. Sheikh Yusuf Sheikh Umar***, 2011 (1) Crimes 180, the defence of the respondent/accused was that, in relation to purchase of a tractor and equipments from the appellant, five blank cheques were given only as security. The respondent claimed that the complainant had already received the entire purchase consideration, and that the cheque in question was without consideration. The Court rejected the defence of the accused that the entire consideration stood paid to the appellant supplier. Relying upon ***Beena Shabeer*** (supra), the High Court observed:

> "*7. ... ... Necessarily, the cheque given as a security, if bounced, shall be the subject-matter of a prosecution under Section 138 of the Act.* ***So, the contention of the accused that cheque (exhibit 28) was given only as a security will not enable him to escape from the clutches of law***".
>
> (emphasis supplied)

45. The High Court further held as follows:

> "*9. Even if blank cheque has been given towards liability or even as security, when the liability is assessed and quantified, if the cheque is filled up and presented to the bank, the person who had drawn the cheque cannot avoid the criminal liability arising out of Section 138 of the Negotiable Instruments Act*".

Thus, the myth that the dishonour of a cheque given as a security, cannot be the subject matter of a compliant under Section 138 NI Act was busted in this decision as well.

46. I may now deal with the decision in ***Ravi Kumar D*** (supra) relied upon by the respondent. In this case the petitioner preferred a petition under Section 482 Cr PC to seek the quashing of the complaint filed against him

under Section 138 of NI Act by respondent no.2, on account of dishonour of three cheques of Rs.25 lacs each. Respondent no.2 placed an order for supply of machinery and spare parts on the company of the petitioner, and gave a cheque for Rs.90 lacs towards advance payment. The said cheque was encashed by the company of the petitioner. The company of the petitioner failed to deliver the machinery/spare parts. When approached, the petitioner expressed his inability to supply the machinery/spare parts and requested the respondent no.2 to treat the amount of Rs.90 lacs, given as advance payment, as a loan. The petitioner issued a post dated cheque for Rs.70 lacs in favour of respondent no.2. The said cheque, upon presentation, was repeatedly dishonoured by the drawee bank. Then the petitioner issued the three cheques in question of Rs.25 lacs each in favour of respondent no.2 as security, and stated that in the event of the cheque of Rs.70 lacs being again dishonoured, respondent no.2 may encash the said three cheques given as security. However, the cheque of Rs.70 lacs was once again dishonoured on presentation. Respondent no.2 issued a legal notice upon the petitioner and his company under Section 138 of NI Act. However, no payment was made. Consequently, respondent no.2 filed a complaint under Section 138 read with Section 141 NI Act. Respondent no.2 also presented the three cheques of Rs.25 lacs each for encashment, which too were dishonoured with the remarks "account closed". Another notice under Section 138 of the NI Act was issued in respect of the said three cheques upon the petitioner and his company. Since the payment was not made, three separate complaints were filed in respect of the said three dishonoured cheques of Rs.25 lacs each.

47. The submission of the petitioner before the High Court was that the said 3 cheques in question were issued from his personal account only as a security with the assurance that the cheque of Rs.70 lacs issued by the petitioner's company would be encashed upon presentation. Therefore, it was claimed that the three cheques of Rs.25 lacs each could not be stated to have been issued in discharge of an existing liability and, therefore, it was contended that Section 138 of the NI Act was not attracted. It was also argued that the complainant had preferred multiple complaints – both in respect of the cheque of Rs.70 lacs and also three different complaints in respect of three cheques of Rs.25 lacs each.

48. The Court, by placing reliance on ***Narayana Menon*** (supra) and in particular the extract of the said decision as quoted above in para 33, held that Section 138 of the NI Act is attracted only if the dishonoured cheque was issued in whole or in part payment of an existing debt or liability, and that the said section does not apply to a cheque issued to meet the future liability, which may arise on the happening of some contingency. It was held that a post dated cheque, if issued for discharge of a due debt, in event of dishonour, would attract Section 138 of NI Act, but a cheque issued not for an existing debt/liability, but issued by way of a security for meeting some future contingency, would not attract Section 138 of NI Act.

49. Firstly, I may observe that the present is a case where the post dated cheques in question were issued for discharge of a due debt, since the debt was existing at the time of execution of the MOU (Ex. PW-C1/4) between the parties. Secondly, what appears to have influenced the decision of the Court in ***Ravi Kumar D*** (supra) is the above quoted extract from ***Narayana***

Menon (supra), which does not appear to be the ratio of the said decision. The Court while deciding ***Ravi Kumar D*** (supra) has neither considered the earlier decision in ***Beena Shabeer*** (supra), nor the decision in ***K.S. Bakshi*** (supra). Since ***Beena Shabeer*** (supra) is an earlier decision of the Supreme Court, which has not been dealt with in ***Ravi Kumar D*** (supra), the view taken in ***Ravi Kumar D*** (supra) would not bind this Court and this Court is bound by the ratio of the decisions in ***Beena Shabeer*** (supra).

50. In ***Indus Airways Pvt. Ltd. & Ors. v. Magnum Aviation Pvt. Ltd.***, IV (2014) SLT 321, the question that arose for consideration before the Supreme Court was, whether the post dated cheques issued by the appellants (purchasers) as an advance payment in respect of purchase orders could be considered in discharge of a legally enforceable debt or other liability and, if so, whether the dishonour of such cheques amount to an offence under Section 138 of NI Act. The appellants before the Supreme Court were the purchasers who had placed purchase orders and issued post dated cheques in favour of the respondent towards advance payment. One of the terms and conditions of the contract was that the entire payment would be made to the supplier in advance. The supplier claimed that the advance payment had to be made, as it had to procure the parts from abroad. The cheques were dishonoured upon presentation on the ground that the purchasers had stopped payment. Thereafter, the purchasers cancelled the purchase orders and requested for return of the cheques. The respondent/seller insisted on collecting payment and initiated a complaint under Section 138 of NI Act after sending a demand notice.

51. This Court, following its decision in ***Moji Engineering Systems Ltd. & Ors. v. A.B. Sugars Ltd.***, 154 (2008) DLT 579, held that the issuance of a cheque at the time of signing such a contract has to be considered against a liability, as the amount written in the cheque is payable by the person on the date mentioned in the cheque.

52. The Supreme Court did not agree, and held that to attract an offence under Section 138, there should be a legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of existing or past adjudicated liability is a *sine qua non* for bringing an offence under Section 138 of the NI Act. It was held that if the cheque is issued as an advance payment for purchase of goods and, for any reason, purchase order is not carried to its logical conclusion either because of its cancellation or otherwise, and the material or goods for which the purchase order was placed is not supplied, the cheque could not be held to have been drawn for an existing debt or liability. It was held that the payment made by a cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability. While disagreeing with the view of this Court, the Supreme Court held as follows:

> *"…. …. …. If at the time of entering into a contract, it is one of the conditions of the contract that the purchaser has to pay the amount in advance and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Section 138.* ***For a criminal liability to be made out under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the***

cheque. *We are unable to accept the view of the Delhi High Court that the issuance of cheque towards advance payment at the time of signing such contract has to be considered as subsisting liability and dishonour of such cheque amounts to an offence under Section 138 of the N.I. Act.*

…. … …

In what we have discussed above, ***if a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise and material or goods for which purchase order was placed is not supplied by the supplier, in our considered view, the cheque cannot be said to have been drawn for an existing debt or liability***.

(emphasis supplied)

53. The Supreme Court referred to the decisions of the Andhra Pradesh High Court and Gujarat High Court as follows:

"*14. In Swastik Coaters Pvt. Ltd v. Deepak Brothers and Ors., 1997 Cri.L.J. 1942 (AP), the single Judge of the Andhra Pradesh High Court while considering the explanation to Section 138 held:*

> *"... Explanation to Section 138 of the Negotiable Instruments Act clearly makes it clear that* ***the cheque shall be relateable to an enforceable liability or debt and as on the date of the issuing of the cheque*** *there was no existing liability in the sense that the title in the property had not passed on to the accused since the goods were not delivered....*

15. The Gujarat High Court in Shanku Concretes Pvt. Ltd. and Ors. v. State of Gujarat and Anr., 2000 Cri.L.J. 1988 (Guj.) dealing with Section 138 of the N.I. Act held that ***to attract Section 138 of the N.I. Act, there must be subsisting liability or debt on the date when the cheque was delivered. The very***

> ***fact that the payment was agreed to some future date and there was no debt or liability on the date of delivery of the cheques would take the case out of the purview of Section 138 of the N.I. Act****. While holding so, Gujarat High Court followed a decision of the Madras High Court in Balaji Seafoods Exports (India) Ltd. and Anr. v. Mac Industries Ltd. 1999 (1) CTC 6*".
>
> (emphasis supplied)

54. Reference was also made to the decision of the Kerala High Court in ***Supply House, represented by Managing Partner v. Ullas, Propreitor Bright Agencies & Anr.***, 2006 Cri. LJ 4330 (Kerala). In this case, the post dated cheque had been issued by the accused while placing the order for supply of goods. However, the supply of goods was not made by the complainant. Consequently, the accused first instructed the bank to stop payment of the cheque, and then requested the complainant not to present the cheque as the goods had not been supplied. The Kerala High Court held that the said cheque could not be said to be one issued in discharge of a liability.

55. I may refer to another decision of this Court in ***Haryana Petrochemicals Ltd. & Anr. v. Indian Petrochemicals Ltd. & Anr.***, 2015 (1) JCC (NI) 11. The petitioner, Haryana Petrochemicals had issued cheques in lieu of supply of chemicals by the respondent Indian Petrochemicals, which had been dishonoured upon presentation. The learned Magistrate had convicted the petitioners under Section 138 of NI Act. The said judgment was endorsed by the learned Sessions Judge. Consequently, a revision has been preferred before the High Court. The primary submission of the petitioner was that the cheques in question were

security cheques, as it was a regular trade practice that after the goods had been received by the petitioner company, fresh cheques in lieu of the security cheques were issued by the petitioners. It was argued that the security cheques, by themselves, would not constitute a legal debt or liability of the petitioner towards the complainant. The Court observed that the manner in which the parties transacted their business was, that the complainant company would send the goods along with the invoices as per the value of the goods. The petitioner/purchaser enjoyed a credit facility, i.e. the payment was not to be made immediately upon receipt of goods. For this reason, the security cheques were issued by the petitioner at the time of taking delivery of the goods. However, they were to be returned upon receipt of payment by the respondent/seller. In case payment was not forthcoming, the security cheques were considered as consideration towards supply of goods, and the respondent would bank the cheques. The cheques in question had similarly been banked since payment was not otherwise made by the petitioner/accused on the expiry of the credit period.

56. This Court, by placing reliance on ***Beena Shabeer*** (supra), rejected the petitioner's submission that the cheques in question being security cheques could not be the foundation of a complaint under Section 138 of NI Act. In the present case as well, the transaction clearly stipulated that the cheques in question were issued as security cheques, which were to be returned upon receiving payment in installments of Rs.50,000/- each from the respondent/accused by cheque. The only difference is that in ***Haryana Petrochemicals Ltd.*** (supra), the Court found that as a matter of the *inter se* dealings between the parties, whenever the payment was not made at the end

of the credit period, the security cheques were banked for realization of the amount due. However, in the present case, there is no express agreement of the parties to this effect, and there is no established practice of this nature between the parties. Pertinently, the MOU (Ex. CW-1/4) does not expressly prohibit the appellant/ complainant from banking the security cheques, in case the installments are not paid on the due dates.

57. At this stage, I consider it appropriate to analyse as to what is the meaning of the word "security". What does the issuance of a security cheque entail, and if there is no specific agreement touching upon this aspect, what would be the rights and obligations of the parties qua a security cheque, in case the primary obligation – to secure which the security cheque was given, is not discharged. The Black's Law Dictionary (6th edition), *inter alia*, defines "security" to mean:

> *"Protection; assurance; Indemnification.* ***The term is usually applied to an obligation****, pledge, mortgage,* ***deposit,*** *lien, etc.,* ***given by a debtor in order to assure the payment or performance of his debt,*** *by furnishing the creditor with a resource* ***to be used in case of failure in the principal obligation.*** *Collateral given by debtor to secure loan. Document that indicates evidence of indebtedness. The name is also sometimes given to one who becomes surety or guarantor for another".*
>
> (Emphasis supplied)

58. Similarly, the word "security" is defined in the Shorter Oxford English Dictionary (5th edition), *inter alia*, to mean:

> "***Property etc. deposited or pledged by or on behalf of a person as a guarantee of the fulfillment of an obligation*** *(as an*

appearance in court or the payment of a debt) ***and liable to forfeit in the event of default***".

(Emphasis supplied)

59. Thus, when one party gives a security to the other, implicit in the said transaction is the understanding that in case of failure of the principal obligation, the security may be enforced.

60. In ***V.K. Ashokan v. CCE***, (2009) 14 SCC 85, the Supreme Court observed that:

> "*The term "security" signifies that which makes secure or certain. It makes the money more assured in its payment or more readily recoverable as distinguished from, as for example, a mere IOU, which is only evidence of a debt, and the word is not confined to a document which gives a charge on specific property, but includes personal securities for money. (See Chetumal Bulchand v. Noorbhoy Jafeerji, AIR 1928 Sind 89). It is a word of general import signifying an assurance*".

61. Thus, in my view, it makes no difference whether, or not, there is an express understanding between the parties that the security may be enforced in the event of failure of the debtor to pay the debt or discharge other liability on the due date. Even if there is no such express agreement, the mere fact that the debtor has given a security in the form of a post dated cheque or a current cheque with the agreement that it is a security for fulfillment of an obligation to be discharged on a future date itself, is sufficient to read into the arrangement, an agreement that in case of failure of the debtor to make payment on the due date, the security cheque may be presented for payment, i.e. for recovery of the due debt. If that were not so, there would be no purpose of obtaining a security cheque from the debtor. A

security cheque is issued by the debtor so that the same may be presented for payment. Otherwise, it would not be a security cheque. As observed above, the MOU (Ex.CW-1/4) does not expressly, or even impliedly states that the security cheques are not to be used to recover the installments, even in case of failure to pay the same by the respondent/ debtor.

62. Section 138 of NI Act does not distinguish between a cheque issued by the debtor in discharge of an existing debt or other liability, or a cheque issued as a security cheque on the premise that on the due future date the debt which shall have crystallized by then, shall be paid. So long as there is a debt existing, in respect whereof the cheque in question is issued, in my view, the same would attract Section 138 of NI Act in case of its dishonour.

63. Thus, the defence that the cheques in question Ex. CW-1/1, CW-1/2 and CW-1/3 were issued as "security" cheques has no force in the facts and circumstances of this case, as, on the date when the said cheques were issued simultaneously with the execution of the MOU (Ex. CW-1/4), the debt of Rs.1.5 lacs was outstanding. The appellant was well within his rights to enforce the security in respect whereof the cheques in question were issued and to seek to recover the outstanding debt by encashment of the said cheques. Since the cheques in question were dishonoured upon presentation, the accused suffered all consequences as provided for in law and the appellant became entitled to invoke all his rights as created by law. Thus, the appellant was entitled to invoke Section 138 of the NI Act; issue the statutory notice of demand, and; upon failure of the accused to make payment in terms of notice of demand – to initiate the complaint under Section 138 of the NI Act.

64. The learned Magistrate has returned findings of fact which are palpably wrong; its approach in dealing with evidence is patently illegal; its decision is based on an erroneous view of the law, and; the impugned judgment, if sustained, would lead to grave miscarriage of justice. For the aforesaid reasons, the impugned judgment is set aside. The accused is convicted of the offence under Section 138 of the NI Act.

(VIPIN SANGHI)
JUDGE

MAY 14, 2015