

**IN THE HIGH COURT OF JUDICATURE AT MUMBAI
APPELLATE CRIMINAL JURISDICTION
CRIMINAL WRIT PETITION NO.2072 OF 2009**

Shri Prabhu Dayal Modi

Age: 73 years,

An adult Indian Inhabitant of Jaipur,

Residing at 8/403, Vidhyadhar Nagar,

Jaipur- 302013, Rajasthan.

...Petitioner(Org.Accd.).

v.

1 M/s. Euro Developers Pvt. Ltd.

a Private Limited Company registered
under the provisions of Companies

Act 1956 having its office at W-8, 1st floor,

Park Street, Upon Hero Honda Showroom,

Infront of Centurion Bank of Punjab

M.I.Road, Jaipur,

And registered office at, A/4-6, Durion Estate,

Goregaon Mulund Link Road,

Goregaon (East), Mumbai 400 063,

Through its Director Shri Mahesh Doshi

2 The State of Maharashtra

(Through Commissioner of Police, Gr.Mumbai
Bombay High Court)

...Respondents(Resp.No.
1/Org. Complainant).

Mr. A.Y.Amare, adv. For the Petitioner.

Mr. Rishi Bhuta, adv. For the Respondent No.1.

Smt. V.R.Bhosale, APP for the Respondent No.2.

CORAM : J.H. BHATIA, J.

DATED : JULY 9, 2010

ORAL JUDGMENT:

1

Rule. Rule made returnable forthwith. Heard the learned

counsel for the parties.

2 Petitioner and his wife are the owners of the plot of land situated at Jaipur. On 24.4.06 an agreement was entered into between the respondent no.1/complainant on one hand and the petitioner and his wife on the other. As per that agreement, the petitioner had given development rights over the said land to the respondent/complainant for a consideration of Rs.2.5 crs. Out of the consideration amount, respondent had made a payment of Rs.35,01,000/-. The certain terms of the contract could not be fulfilled and the agreement was cancelled. As to who was responsible for the noncompliance of the terms of the contract is not relevant for the purpose of deciding this matter. As the agreement was cancelled, accused/petitioner issued a cheque of Rs.35,01,000/- in favour of the respondent/complainant. Cheque was deposited with the complainant's banker at Juhu Branch, Mumbai. The cheque was dishonoured and thereafter notice was issued by the respondent to the petitioner from Mumbai. In spite of service of notice, payment was not made within the stipulated period, therefore, the respondent filed a complaint under Section 138 of the Negotiable Instruments Act against the present petitioner and his wife before the Metropolitan Magistrate 44th Court, Andheri, Mumbai where it was registered as Criminal Case

No.1045/SS/2007. The learned Magistrate issued process under Section 138 of the Negotiable Instruments Act against the accused no.1, who is the present petitioner. Process was not issued against the wife.

3 Petitioner challenged the issuance of process by filing Criminal Revision Application No.286/08. According to him, he is resident of Jaipur. Respondent has also a branch office at Jaipur. Development agreement dated 24.4.06 was entered into and executed at Jaipur. Payment of Rs.35,01,000/- was made by the respondent no.1 to the petitioner at Jaipur. The land to be developed is situated at Jaipur. But as the certain terms of the contract could not be fulfilled for one or the other reasons, the agreement was cancelled at Jaipur and the cheque in dispute was drawn and issued by the present petitioner at Jaipur. Cheque was drawn against the Bombay Mercantile Co-op. Bank, Jaipur branch, where the petitioner has account. Cheque was presented at the Jaipur branch of Bombay Mercantile Co-operative Bank and was dishonoured there. Thus, the whole of the transaction had taken place at Jaipur and no part of the transaction had taken place at Mumbai. It is contended that merely because the respondent no.1, who has head office at Mumbai and Branch office at Jaipur, deposited the cheque with its banker, i.e., HDFC Bank, Juhu branch, Mumbai for presentation to the

drawee bank and because notice was issued by the respondent no.1 from Mumbai, the Magistrate at Mumbai does not get jurisdiction to entertain the complaint under Section 138 of the Negotiable Instruments Act, therefore, it was prayed that process issued by the Metropolitan Magistrate Mumbai be quashed and the complaint be directed to be returned to the complainant/respondent no.1 for the presentation before the Court having jurisdiction. Application was naturally opposed. The learned Additional Sessions Judge rejected the revision application observing that since the cheque was presented at Mumbai and notice demanding payment was also issued at Mumbai, the learned Magistrate at Mumbai has jurisdiction to try the case. That order is challenged in the present petition.

4 Facts leading to the filing of the complaint are not much in dispute. Question before this Court is only whether the Metropolitan Magistrate at Mumbai has jurisdiction to entertain the complaint under Section 138 of the Negotiable Instruments Act, 1881.

Section 138 of the Negotiable Instruments Act reads as follows:

“138. Dishonour of cheque for insufficiency, etc., of funds in the account-

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole

or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for [a term which may be extended 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.

5 Question of jurisdiction in the complaint under Section 138 of the Negotiable Instruments Act was the subject matter for consideration in **K.Bhaskaran v. Sankaran V. Balan and Another**

(1999) 7 Supreme Court Cases 510. The Supreme Court considered provisions of Section 138 in the light of Sections 177, 178 and 179 of the Cr.P.C. and observed as follows in paragraph 14 to 16 of the judgment:

“14. The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence: (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice.

15. it is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at five different localities. But a concatenation of all the above five is a sine qua non for the completion of the offence under Section 138 of the Code. In this context a reference to Section 178(d) of the Code is useful. It is extracted below:

“178.(a)-(c) * * *

(d) where the offence consists of several acts done in different local areas,

it may be enquired into or tried by a court having jurisdiction over any of such local areas.”

16. Thus it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act. In

other words, the complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done. As the amplitude stands so widened and so expansive it is an idle exercise to raise jurisdictional question regarding the offence under Section 138 of the Act.”

6 These observations have been quoted in number of cases decided by this Court. As rightly observed by the learned Single Judge of this Court in **Criminal Application No.2674/08, Hemlata Raghunath Pendharkar v. Jaswantsingh Rajaram Sonawane & Anr.** Supreme Court in the case of **K.Bhaskaran (Supra)** has held that following acts are components of the offence under Section 138.

- “ (i) drawing of the cheque;
 (ii) presentation of the cheque to the Bank;
 (iii) returning the cheque unpaid by the drawee Bank;
 (iv) giving a notice in writing to the drawer of the cheque demanding payment of the cheque amount; and
 (v) failure of the drawer to make payment within 15 days of the receipt of the notice.”

As held by the Supreme Court in **K.Bhaskaran (Supra)**, if the aforesaid five different acts were done in five different localities, any of the Courts within the jurisdiction of which any such act was done would have the

jurisdiction to entertain the complaint under Section 138 of the Negotiable Instruments Act.

7 In the present case admittedly, the original agreement had taken place at Jaipur and it was also cancelled at Jaipur. Petitioner had drawn the cheque in favour of the respondent against the Bombay Mercantile Co-operative Bank , Jaipur branch where the petitioner was maintaining his account. As far as presentation of cheque is concerned, admittedly, the cheque was deposited by the respondent no.1 with its banker, i.e., HDFC Bank, Juhu Branch at Mumbai for presentation to the Bombay Mercantile Co-operative Bank, Jaipur Branch, i.e., the drawee bank for encashment and admittedly, the cheque was dishonored by the drawee bank at Jaipur. Of-course, the respondent no.1 got the communication of its being dishonoured at Bombay, through its banker and then notice was issued from Bombay demanding the amounts. Presentation of cheque was itself the subject matter for consideration, in **Ahuja N. Dongre v. State of Maharashtra 2007(1) Bombay C.R. (Criminal) 1031** wherein the learned Single Judge of this Court, Nagpur Bench, considered the provisions of Section 138 of the Negotiable Instruments Act in the light of Supreme Court judgment in **K.Bhaskaran (Supra)** and observed as follows in paragraphs 14 and 15:

“14. In Bhaskaran’s case, as a matter of fact, it was held as proved that cheques in question have been issued at the shop of P.W.3 within territorial limits of trial Courts’ jurisdiction. The five ingredients enumerated by the Court in paragraph 14 of the judgment would undisputedly attract the provisions of Clause (d) of section 178 of the Code of Criminal Procedure, since it can be said that the offence punishable under section 138 of the Negotiable Instruments Act consists of the five acts, enumerated in paragraph 14 of the judgment. It may be seen that clauses (2) and (3) in paragraph 14 of the judgment refer to presentation of “**the** cheque” to “**the** bank” and returning the cheque unpaid by “**the** drawee Bank”. A reference to section 138 of the Negotiable Instruments Act, would also show that the section begins, with reference to “a banker” and then goes on to refer to “**the** banker”,.....”is returned by **the** bank”,.....”by an agreement made with **that** bank”,.....”the cheque has been presented to the bank within thirty days from information by him to “**the** bank” etc. Thus, the reference to presentation of the cheque or return of the cheque dishonoured is in relation to the bank on which the cheque is drawn. Considering the usage of indefinite articles ‘a’ and ‘an’ and definite article “the” it would not be permissible to hold that reference to the bank extends to any bank where the cheque is presented, or any bank from which holder in due course eventually gets information of dishonour. This is amply made clear by the Apex Court by prefixing the words “bank” and “drawee bank” in Items (1) and (2) in paragraph 14 of the Judgment with definite article “the”.

15. The Apex Court must have chosen to prefix the word “bank” by definite article “the” in order to avoid the confusion and problems that would be

created by using indefinite article 'a'. A cheque is negotiable instrument and by appropriate endorsement and delivery it can be negotiated. If instead of the courts at the place where the bank on which the cheque was drawn, the courts at the place where the cheque was presented were to have jurisdiction, drawers of the cheque would be exposed to an unforeseen risk."

The learned Judge also referred to the provisions of Section 72 of the Negotiable Instruments Act, 1881, which provides that a cheque must, in order to charge the drawer, be presented at the bank upon which it is drawn before the relation between the drawer and his banker has been altered to the prejudice of the drawer. The learned Judge further observed in paragraph 18 thus,

"18. Practice of presenting a cheque to payee's or holder's own banker does not make such banker "the drawee". Such a banker merely undertakes to present the cheque on behalf of the holder to the drawee bank for clearance. Such a banker acts as agent of holder and not agent of the drawee bank. This can be clear from the fact that it is the holder who has to bear the expenses in clearing the cheque and not the drawee bank. Even between different branches of the same bank, branch at which holder has an account does not become agent of the drawee branch for accepting the cheque unless the cheque is one marked as payable "at par" at all branches of the bank."

8 Division Bench of this Court in **Mrs. Preetha S. Babu v. Voltas Ltd & Anr.** 2010 All M.R. Criminal 1025 considered observations made in **Ahuja N. Dongre (Supra)** and observed as follows in paragraph 28.

“28. We agree with learned Single Judge’s view in Ahuja Dongre to the extent that “the bank” referred to in clause (a) to proviso to Section 138 of the N.I. Act would mean the drawee-bank on which the cheque was drawn. But with great respect, we feel that the view taken by learned Single Judge in that case in the context of jurisdiction of the court to entertain complaint under Section 138, that the cheque has to be presented to the drawee-bank at the place mentioned in the cheque and only the court within whose jurisdiction, the drawee bank is situated will have jurisdiction to entertain the complaint and not the court at another place where it is presented for realization needs to be reconsidered by a larger bench in an appropriate case.”

In support of the view that the presentation of the cheque has to be before the drawee bank and not before any other bank, the Division Bench also placed reliance upon **Shri Ishar Alloys Steel Ltd. vs. Jayaswals NECO Ltd.** AIR 2001 SC 1161. From the above observations of the Division Bench, it is clear that Division Bench agreed with the observations in **Ahuja N. Dongre (Supra)** that the bank referred to in Clause (a) to proviso to Section 138 of the Negotiable

Instruments Act would mean the drawee bank on which the cheque was drawn and the cheque has to be presented for encashment to that drawee bank and none else. However, whether the Court within whose jurisdiction payee's banker is situated with whom the cheque was deposited for onward presentation to the drawee bank, will also have jurisdiction or not, the Division Bench appears to have some reservation in accepting the propositions made in **Ahuja N. Dongre (Supra)**. However, the Division Bench did not express any final view on that point and only observed that the matter needs to be re-considered by the larger bench. Incidentally, that question was not referred to the larger bench either by the Division Bench nor it was decided by the Division Bench itself. Nothing has been brought to my notice that this question was ever referred to the larger bench of this Court. I am in respectful agreement with the observations made in **Ahuja N. Dongre (Supra)** in this respect and I hold that presentation of the cheque to the bank means presentation of the cheque to the drawee bank and none else. The payee may deposit the cheque with its banker situated anywhere for presentation to the drawee bank. Deposit of the cheque by the payee with its banker does not amount to presentation within the meaning of section 138 of the Negotiable Instruments Act, 1881. The payee's banker with

whom the cheque is deposited only acts as an agent of the payee for the purpose of presentation of the cheque to the drawer bank and as rightly observed in **Ahuja N. Dongre (Supra)**, the bank with whom cheque is deposited by the payee does not become the agent of the drawee bank. It only acts as an agent of the payee and presents the cheque to the drawee bank, which is expected to clear the cheque and make the payment; If the funds are insufficient or arrangement is not made with the drawee bank, the cheque will be dishonoured by the drawee bank and then, the cheque is returned as unpaid by the drawee bank. The act of returning the cheque unpaid is completed at the place where the drawee bank is situated. Only the intimation of cheque being dishonoured is received by the banker of the payee with whom the cheque is deposited and that banker conveys the information received from the drawee bank to the payee.

9 It has been consistently held by this Court in **Ahuja N. Dongre (Supra)**, **Mrs. Preetha S. Babu (Supra)** and several other cases that if the payee is an individual, he can issue notice from the place where he ordinarily resides or carries on business and in case payee is a company, it can issue notice from the place where it is carrying on business and or where its head office is situated. In **M/s. Harman**

Electronics (P) Ltd. and Anr. v. M/s. National Panasonic India Ltd.

2009 All M.R. Criminal 280 (S.C.), question was, if the company has head office at one place and branches at different places and whole of the transaction had taken place within the area where its branch is situated and not where the head office is situated, whether the notice could be issued from the place where its head office is situated. In that case, accused/appellant was resident at Chandigarh and was carrying on business at Chandigarh. Complainant had its head office at Delhi but also had branch office at Chandigarh. Transaction between the parties had taken place at Chandigarh and the accused had issued cheque in favour of the complainant at Chandigarh against its banker situated at Chandigarh and thus, the bank at Chandigarh was drawee bank. However, the complainant deposited the cheque with its banker at Delhi, which in turn presented the same to the drawee bank at Chandigarh. Cheque was dishonoured and the complainant issued a notice for payment from Delhi. As the payment was not made, the complainant filed a complaint under Section 138 of the Negotiable Instruments Act before the Magistrate at Delhi. The Supreme Court held that a company or financial institution having several branches has to file the complaint at the place where the transaction had taken place, cheque was drawn,

presented and dishonoured. Merely because company issued a notice from the place where its head office is situated and where no part of the transaction had taken place, it could not file the complaint before the Magistrate having jurisdiction over the area where the head office is situated. After having considered different provisions of law and the judgment in **K.Bhaskaran (Supra)** as well as in **M/s. Dalmia Cement (Bharat) Ltd. v. M/s. Galaxy Traders & Agencies Ltd., AIR 2001 SC 676**, the Supreme Court observed as follows in paragraph 14.

“14, It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence under Section 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended hereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in the provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act are intended to be applied in favour of the accused, there cannot be any doubt that the receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. **Issuance of notice would not by**

itself give rise to a cause of action but communication of the notice would.” (emphasis supplied)

Thus, even though issuance of notice is necessary ingredient, as observed by the Supreme Court issuance of notice would not itself give rise to the cause of action but communication of notice would. After considering the several other authorities, the Supreme Court in **M/s. Harman Electronics (P) Ltd. (Supra)** observed further thus, in paragraph 25:

“We cannot, as things stand today, be oblivious of the fact that a banking institution holding several cheques signed by the same borrower can not only present the cheque for its encashment at four different places but also may serve notices from four different places so as to enable it to file four complaint cases at four different places. This only causes grave harassment to the accused. It is, therefore, necessary in a case of this nature to strike a balance between the right of the complainant and the right of an accused vis-a-vis the provisions of the Code of Criminal Procedure.”

This view of the Supreme Court in Herman was infact tried to be elaborated in **Ahuja N. Dongre (Supra)**.

10 Coming to the facts of the case, complainant has its head office at Mumbai and admittedly, it has branch office at Jaipur since

prior to the agreement took place between the complainant and the accused. In the agreement also its local address of Jaipur was given, besides the address of its head office . The accused in the revision application as well as the petition before this Court has specifically contended that the complainant has branch office at Jaipur even now and this fact is admitted in the affidavit-in-reply filed on behalf of the complainant. From this it is clear that the complainant is regularly having branch office for carrying on business at Jaipur besides its head office at Mumbai. It is not that branch office at Jaipur was opened merely because of the development agreement with the accused. If it would be so, that office would have been closed by the complainant as soon as agreement with the accused was terminated for one or the other reasons. Even though that agreement had come to an end in the year 2006 itself, the complainant continues its branch office at Jaipur even now and it could not be without any purpose or without any business, therefore, it is clear that the complainant has, besides its head office, a regular branch office at Jaipur, where whole of the transaction had taken place. From the facts stated above, it is clear that cheque was drawn at Jaipur; the drawee bank is situated at Jaipur; the cheque was presented to the drawee bank at Jaipur though it was deposited with the payee's

banker at Mumbai for presentation at Jaipur, and the cheque was dishonoured at Jaipur by the drawee bank. The complainant having branch office at Jaipur where whole of the transaction had taken place, could have issued notice from Jaipur but it chose to issue notice from Mumbai where its head office is situated but as held in **Herman's case (Supra)** though giving of the notice is an important ingredient, it does not give cause of action but the communication of that notice gives cause of action and that cause of action arose at Jaipur. In view of these circumstances, it must be held that payment was to be made at Jaipur and not at Mumbai. From paragraph 26 in **Herman Electronics (Supra)**, it appears that the learned counsel for the complainant had contended that the principle that debtor may seek the creditor should be applied in such cases. However, that argument was rejected by the Supreme Court by following observations in paragraph 27.

“27. We regret that such a principle cannot be applied in a criminal case. Jurisdiction of the Court to try a criminal case is governed by the provisions of the Criminal Procedure Code and not on common law principle.”

In view of this legal position and the facts of the present case, there remains no doubt that the payment was to be made at Jaipur as such no part of the transaction had taken place at Mumbai, none of the

ingredients of the offence under Section 138 of the Negotiable Instruments Act had taken place at Mumbai and, therefore, Magistrate at Mumbai could have no territorial jurisdiction to entertain the complaint. The territorial jurisdiction would be with the Magistrate exercising jurisdiction at Jaipur.

11 For the aforesaid reasons, writ petition is allowed. Impugned orders are hereby set aside. Process issued by the learned Metropolitan Magistrate, 44th Court Anhderi is hereby quashed. The learned Magistrate shall return the complaint to the complainant for presentation before the competent Court having jurisdiction within two weeks from this date and the complainant may file complaint before the Magistrate having jurisdiction within two weeks thereafter. If the complaint is taken back and presented within the stipulated period, the accused shall not take any objection on the ground of limitation. No order as to costs. Rule made absolute accordingly.

12 Parties to act on an authenticated copy of this judgment.

(J.H. BHATIA,J.)