

Bench: V Kanade, R Sondurbaldota

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2523 OF 2010

ALONG WITH

CRIMINAL APPLICATION NO. 3478 OF 2010

CRIMINAL WRIT PETITION NO.2523 OF 2010

Mr. Rajesh Bhalchandra Chalke) Age : 37 years, Occupation : Business) Indaga House, 82, Dr. Annie Basent Road) Worli, Mumbai 400 018.). Petitioner

Versus

1) State of Maharashtra)

2) M/s Emco Dynatorq Pvt. Ltd.) (Formerly known as Emco Lenze Pvt. Ltd.)) having its office located at 1st Floor) Sita Mauli, Above Bank of Maharashtra) Madanlal Dhingra Road, Panch Pakhadi) Thane (W), 400 602.). Respondents

Mr. S.V. Marwadi i/b Mr. S.P. Narkar for the Petitioner. Mr. M.R. Tidke, Additional Public Prosecutor, for the State.

ALONG WITH

CRIMINAL APPLICATION NO. 3478 OF 2010

1) Nikhil Vasantlal Merchant, age 48 years)

a) 347-A, Pancharatna, Opera House, M.P. Marg)

Mumbai 400 004.)

b) H-2, Breach Candy Apts., Bhulabhai Desai) Road, Mumbai 400 026.) upa 2 fb-cri-wp2523-10

2) Manepanda Joyappa Subbaiah) a) 347-A, Pancharatna, Opera House, M.P. Marg)

Mumbai 400 004.)

b) 201, Skyline Apts., Langford Road,) Shanthinagar, Bangalore, Karnataka 560025)

3) Ashok Kumar Ram Gopal Doda)

a) 347-A, Pancharatna, Opera House, M.P. Marg)

Mumbai 400 004.)

b) A-203/204, Mt. Everest, Bhakti Park) Wadala (East), Mumbai 400031).. Applicants

Versus

1) The State of Maharashtra)

2) Global Trade Finance Ltd.) through its Registered Office situated at) Metropolitan Building, 6th Floor,
Bandra-Kurla) Complex, Bandra (East), Mumbai 400 051).. Respondents

Mr. Ashish Chavan for the Applicant.

Mr. Jatin Shah for the Respondent in other matter. Mr. Yashpal Thakur i/b M/s Paras Kuhad and Associates
for Respondent No.2.

Mr. M.R. Tidke, Additional Public Prosecutor, for the State.

CORAM : MOHIT S. SHAH, C.J.,

V.M. KANADE AND

SMT. R.P.SONDURBALDOTA, JJ.

JUDGMENT RESERVED ON : OCTOBER 12, 2010

JUDGMENT PRONOUNCED ON : DECEMBER 07, 2010

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JUDGMENT (Per Chief Justice)

This petition has been placed before the Full Bench for considering the question about interpretation of Section 145 of the Negotiable Instruments Act, 1881 read with Sections 118, 138, 139, 142, 143 and 146 of the Negotiable Instruments Act, 1881 (for short referred to as "NI Act") and its interplay with Section 200 of the Code of Criminal Procedure, 1973 (for short referred to as "CrPC").

2. Shortly put, the question is - "whether, in view of the provisions of Section 145 CrPC (added by Act No.55 of 2002), a Metropolitan Magistrate or Judicial Magistrate, First Class, taking up a complaint under Section 138 of the NI Act, along with documents in support thereof and a verification made in the affidavit in support of the complaint, is still obliged to examine on oath the complainant and his witnesses before issuing process on the complaint?

3. The reference has been made as the learned Single Judge expressed the prima facie view that the judgment of a learned Single Judge of this Court in Amarnath Baijnath Gupta and another vs Mohini Organics Pvt Ltd and another, 2009 ALL MR CRI 184 = 2009 CrI LJ 995 and the judgment of a Division Bench of this Court in Maharaja Developers and another vs Udaysing s/o Pratapsinghrao Bhonsale and another, 2007 ALL MR CRI 1339 = 2007 CrI LJ 2207 require reconsideration inasmuch as the said Benches have held that provisions of Section 145 of the NI Act would not have an over-riding effect over the provisions of Section 200 of Cr PC, and in so far as the said judgments have held that before issuing process under Section 200 CrPC, it is mandatory for the Magistrate to examine the complainant, upa 4 fb-cri-wp2523-10

who has filed the complaint under Section 138 of the NI Act, even though the complaint has been filed along with verification on solemn affirmation.

4. The learned Single Judge, while referring the matter to the Full Bench, also made the following observations in the order dated 20th September 2010 :-

"4. Large number of cases have been filed in this Court for quashing complaints on account of improper verification. There are 3,44,000 cases pending in the City of Mumbai alone and about 7,00,000 cases

pending in the State of Maharashtra. The judgment in the case of Amarnath Baijnath Gupta (supra) was

passed since it was brought to the notice of this Court that verification statements are not recorded in a proper manner and mechanically process is being issued by the learned Magistrates. Under these circumstances, various guidelines were laid down in the case of Amarnath Baijnath Gupta (supra). However, by that time, in almost, most of the matters which were filed at that time, the practice of accepting affidavits in lieu of examination of the complainant was followed in the State of Maharashtra. As a result of the judgment of Amarnath Baijnath Gupta (supra), large number of cases are being filed here for quashing all those cases."

FACTS

5. The short facts leading to filing of the writ petition are as under :-

Respondent No.2 M/s Emco Dynatorq Pvt Ltd (formerly known as Emco Lenze Pvt Ltd) filed a complaint against M/s Champagne Indage Ltd (now called Indage Vintners Ltd.), its Managing upa 5 fb-cri-wp2523-10

Director Mr. Ranjit S. Chougule and its Chief Financial Officer Mr. Rajesh Chalke in the Court of learned Judicial Magistrate, First Class at Thane (Case No.4743 of 2009) under Section 138 of the Negotiable Instruments Act, 1881 pointing out that it was formerly known as M/s Emco Lenze Pvt Ltd and is engaged in the business of manufacturing of various electro magnetic clutches, brakes, clutch-brakes, etc. for their different clients as per their requirement. Accused No.1 is a company with its registered office at Worli, Mumbai and that accused Nos.2 and 3 are Managing Director and Chief Financial Officer respectively and, therefore, they being in-charge, they are controlling the day to day affairs and management of accused company.

The complainant further stated that it had given Rs. 20,00,000/- (Rupees Twenty lakh only) as Inter Corporate Deposit to accused No.1 for the period from 19/09/2008 to 18/12/2008 (for 90 days) with a view to earn interest on it at 13.75% as promised, and that the said amount was paid by the complainant to accused No.1 company by cheque dated 19th September 2008; that upon receipt of payment accused No.2 had sent certified copy of the resolution of accused No.1 in respect of borrowing the funds and also copy of a board resolution dated 29th May 2008 in respect of the authorized person who was competent to sign the letter of undertaking for post-dated cheques, money receipts and undertaking under Section 293 of the Companies Act wherein, names of accused Nos.2 and 3 are shown, that the accused had also sent copy of the letter in respect of the signature verification of the authorised person vide letter dated 25th April 2006 and the letter dated 3rd June 2008, same having been verified by the bankers of the accused, wherein the name and specimen signatures of accused Nos.2 and 3 were shown. Copies of the above resolutions and letters were produced along with complaint. upa 6 fb-cri-wp2523-10

Upon receipt of the payment of Rs.20,00,000/- from the complainant, the accused issued two post-dated cheques dated 18th December, 2008, in favour of the complainant one for Rs.20,00,000/- towards the principal amount and the other for Rs.46,661/- towards interest for 90 days. However, in view of the letter dated 29th November 2008 sent by accused No.2, the complainant did not deposit the said cheques with their bankers and the accused issued two fresh cheques dated 28th March, 2009, in favour of the complainant - one

for principal amount of Rs. 20,00,000/- and the other of Rs.53,392/- towards interest. The complainant produced copies of the letters dated 29th November 2008 and 18th December 2008 with which the cheques dated 28th February 2009 were sent. In the said letter dated 18th December 2008, the accused had also agreed and undertaken that the cheques dated 28th February 2009 will not be dishonoured. In spite of such agreement and undertaking, the cheques were dishonoured on account of "Exceeds Arrangement". Thereupon, the accused informed the complainant vide letter dated 28th July 2009 to return the dis-honoured cheques so as to issue fresh cheques. Accused again issued fresh cheque to the complainant being cheque dated 29th August 2009 for Rs.20,00,000/- towards principal amount. The said cheque of Rs.20,00,000/- was again deposited by the complainant with its bankers. However, the cheque was dishonoured vide memo of dishonour dated 10th September 2009 for the reason "Funds Insufficient". As the complainant's bankers informed the complainant on 11th September 2009, in view of the memo of dishonour dated 10th September 2009 from the bankers of the accused, the complainant sent a statutory notice dated 19th September 2009 within the specified time to all the accused calling upon the accused to pay the amount of cheque within a period of 15 days from the date of receipt of the notice. The accused were also informed about the consequences of upa 7 fb-cri-wp2523-10

non-payment. The notices were sent to all the accused by registered post with acknowledgments due as well as under certificate of posting. The registered acknowledgments were received back by the complainant. The complainant accordingly produced copies of all the above documents and the acknowledgments. The complainant stated that the cheques were tendered to the complainant towards the legal and enforceable liability of the accused and that the accused had committed an offence punishable under Section 138 of the Negotiable Instruments Act, 1881. In all, 14 documents were produced along with the complaint, as per the details given in the body of the complaint itself. The complainant prayed that the Court may issue process, summon all the accused and try and punish them for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881. The complainant also gave the list of its witnesses. After the complaint was filed on 16th November 2009, the complainant also gave verification under affidavit dated 18th December 2009 of its Manager :-

"1. I say that, I am the Manager Legal &

Administration and POA Holder of the Complainant, I am well conversant with the facts of this complaint.

2. I say that the Accused have issued cheques, in favour of Complainant, towards the legal and

enforceable liability of the Complainant being the debt i.e. a cheque No. 939127 dated 29-08-2009 for Rs. 20,00,000/- (Rs. Twenty Lac Only) drawn on Punjab National Bank Large Corporate Branch, Cuffe Parade, Mumbai-400 005.

3. I say that, I have deposited the said cheque in our bank Axis Bank Ltd., Thane (W) Branch for

encashment, however, the same is returned dishonoured with memo dated 10-09-2009 with remarks "Funds Insufficient" and the same was intimated to the

Complainant by their banker vide letter of intimations dated 11-09-2009.

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4. The Complainant has issued legal notice on 19-09-2009 to all the Accused by R.P.A.D. & U.C.P. however the packet containing statutory demand notice forwarded by Reg Post with acknowledgment due as well as under the Certificate of Posting and same were duly received by all the Accused on or about

08-10-2009, as the registered acknowledgment have been duly received back by the Complainant.

I say that the Accused have failed to comply the requisitions of the notice within the time stipulated. Thus the Accuseds have committed an offence

punishable u/s 138 of N.I. Act.

I have filed the complaint on behalf of the Complainant against all the Accused U/S 138 of N.I. Act. All the Accused be tried and punished according to law.

Solemnly affirmed at Thane on this 18th day of

December 2009.

Filed in court on 18/12/09

Sd/-

Authorised signatory of complainant"

The complaint was numbered as Summary Criminal Case No.4743 of 2009 and the learned Judicial Magistrate, First Class, Court No.5, Thane, passed the following order on the said complaint on 18 th December, 2009 :-

"Issue summons against the accused under section 138 of negotiable instrument Act."

6. Accused No.3 Mr. Rajesh Balchandra Chalke filed Criminal Writ Petition No.2523 of 2010 before this Court under Article 227 of the Constitution of India and under Section 482 of the CrPC contending that upa 9 fb-cri-wp2523-10

the learned Magistrate was required to examine the authorised signatory of the complainant on oath and reduce into writing the substance of his examination as per Section 200 of CrPC; that such procedure is mandatory but instead of examining the complainant on oath and reducing into writing the substance of his examination in accordance with Section 200 of CrPC, learned Magistrate accepted the affidavit and on that basis passed the impugned order. Hence, the order is contrary to law. It is, therefore, submitted that the learned Magistrate erred in taking cognizance of the offence without following the procedure laid down by Section 200 of CrPC.

7. When the writ petition reached hearing before the learned Single Judge, reliance was placed on behalf of the petitioner upon the decisions of this Court in Amarnath Baijnath Gupta and another vs Mohini Organics Pvt Ltd and another, 2009 ALL MR CRI 184 and the judgment of a Division Bench of this Court in Maharaja Developers and another vs Udaysing s/o Pratapsinghrao Bhonsale and another, 2007 ALL MR CRI 1339 holding that it is mandatory for the learned Magistrate to examine the complainant on oath, when the complaint is filed under Section 138 of the NI Act, even though the complainant has filed verification on affirmation. While referring the matter to the larger Bench, the learned Single Judge also made the observations already quoted in paragraph 4 hereinabove.

RIVAL SUBMISSIONS

8. Mr. Marwadi, learned counsel for the petitioner accused, made the following submissions :

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8.1 Section 200 of CrPC mandates the learned Magistrate to examine upon oath the complainant and his witnesses present, if any, and to reduce the substance of such examination into writing, before the Magistrate can take cognizance of an offence on complaint. There is no other provision for taking cognizance of an offence except Sections 200 and 202 of CrPC. Section 200 uses the words "shall examine" and not "may examine". Hence, the procedure recording examination of the complainant on oath is mandatory and not optional. Reliance is placed on several decisions in support of the contention that examination of complainant on oath is mandatory before issuing process under Section 200 of CrPC.

8.2 Section 145 of NI Act, upon which reliance is placed by the complainant, provides that the evidence of the complainant may be given by him on affidavit, but what the Magistrate records under Section 200 CrPC is not evidence. The stage of recording evidence will be after commencement of trial and not at the stage when the Magistrate is yet to decide whether process should be issued or not. What the Magistrate is required to do under Section 200 CrPC is examination of the complainant on oath. This is the duty of the Court and, therefore, examination by the Magistrate under Section 200 CrPC is different from examination of the witness by prosecution/ complainant.

8.3 Section 145 of the NI Act is the same as Section 296 of Cr PC. Part I of each section deals with examination in chief as contemplated in Section 137 of the Evidence Act and, therefore, permits evidence in the form of examination in chief led by the affidavit. But neither of the said two Sections deal with any stage prior to issuance of process under Section 200 of Cr PC. (Section 137 of the Evidence Act). upa 11 fb-cri-wp2523-10

8.4 Section 145 gives right to the complainant to file an affidavit in lieu of evidence, but Section 200 of CrPC does not give any such right to complainant or discretion to the Court.

8.5 Section 142 of NI Act places restrictions on power of Court under Section 200 CrPC in respect of (i) complaint under Section 138 of NI Act has to be in writing; (ii) only the payee or the holder in due course of the cheque has a locus to file a complaint unlike the ordinary criminal law under which any person can set the law in motion and (iii) the complaint under Section 138 has to be filed within the time limit specified in Section 142, unlike complaint under the ordinary criminal law. Section 142 does not expand the powers of taking cognizance.

8.6 Sections 143 to 147 added by the amending Act of 2002 only deal with the stage of trial and none of them deals with the pre-trial stage.

9. The learned Counsel for the petitioner further submitted that Issuance of process by the Magistrate on the complaint is not so innocuous as is being contended on behalf of the complainant. Serious prejudice is caused to the accused as he is required to appear before the Magistrate at every hearing and during pendency of the complaint for years together and the accused is also required to give bond.

10. It is also vehemently contended on behalf of the accused that there may be cases where the complainant may have suppressed material documents. It is only by examining the complainant on oath that the Magistrate can get the complainant to produce such documents. If the complainant suppresses the documents and the Magistrate issues upa 12 fb-cri-wp2523-10

process on the complaint merely on the basis of his verification on affidavit and without examining the complainant on oath, thereafter the accused has no other option but to participate in the trial which will remain pending for a number of years. There is no provision enabling the accused to file an application for discharge. Once the plea of the accused is recorded under Section 252 of CrPC, the procedure laid down in Chapter XX for summary trial has to be followed and the entire trial is required to be taken to its logical conclusion. Our attention is also invited to the decision of the learned Single Judge of this Court in Peacock Industries Ltd. and others vs M/s Budhrani Finance Ltd. and another, 2006 ALL MR CRI 2233, decided on 14th July 2006.

Referring to the various guidelines laid down in the said decision, it is submitted that on account of non-observance of these guidelines, serious prejudice is being caused to the accused.

11. Mr. Chavan for accused in Criminal Writ Petition No.3478 of 2010 reiterated the above submissions and further submitted that the ingredients of the offence punishable under Section 138 of the NI Act can be brought out only by examination of the complainant on oath by the Magistrate and not by mere verification on affidavit which may be like examination-in-chief of the complainant. The learned counsel further submitted that the Directors of a company are very often harassed by filing complaints against all the accused without the Magistrate making proper inquiry before issuing process and that puts even those persons who have already resigned as Directors, to avoidable hardship and inconvenience and compels such Directors to invoke the powers of this Court under Article 227 of the Constitution of India and Section 482 of the Cr PC.

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12. On the other hand, Mr.Thakur and Mr. Jatin Shah, learned counsel for the complainants opposed the writ petitions and submitted that the very object for which the Legislature added Sections 143 to 147 and particularly Sections 143, 145 and 147 would be defeated if the petitioner's contentions were to be accepted.

Relying on the Statement of Objects and Reasons for the Amending Act 55 of 2002, it was submitted that the Legislature noticed the alarming state of affairs about huge pendency of complaints under Section 138 of NI Act and, therefore, the Legislature was keen to ensure that the complaints under Section 138 of the NI Act were taken up and tried and decided at the earliest. That is why the Legislature prescribed procedure for dispensing with the stage of preliminary evidence in the form of examination of complainant under Section 200 CrPC and achieved this object by providing at the commencement of Section 145(1) of NI Act, "Notwithstanding anything contained in the Code of Criminal Procedure, 1973", which would include Section 200 of the Criminal Procedure Code. The evidence of the complainant may be given by him on affidavit and may be read in evidence in any enquiry, trial or other proceeding under the CrPC. It was submitted that the stage prior to issuance of process under Section 200 of CrPC may not be trial but it would certainly be enquiry or other proceeding and even in such inquiry or other proceeding, the complainant is permitted to give his evidence on affidavit.

13. It is further submitted on behalf of the complainants that in order to expedite the decision on the complaint under Section 138 of NI Act, Section 143 thereof provides that notwithstanding anything contained in the Cr PC. the complaints under Section 138 of NI Act shall upa 14 fb-cri-wp2523-10

be tried by a Metropolitan Magistrate or by a Judicial Magistrate of the First Class as summary trial under Sections 262 to 265 of CrPC. The very fact that the Legislature specifically provided in sub-section (3) of Section 143 that every trial shall be conducted as expeditiously as possible and an endeavour shall be made to complete the trial within six months from the date of filing of the complaint clearly indicates the legislative intent that issuance of process was also intended to be expedited after filing of the complaint.

14. Sections 138 to 147 in Chapter XVII of the NI Act are a Code by itself and the very fact that the Legislature specifically provided for the non-obstante clause in Sections 143, 144 and 145 of NI Act that those provisions were "Notwithstanding anything contained in the Code of Criminal Procedure, 1973", the said provisions added on the statute book by Amending Act 55 of 2002 with effect from 6th February 2003 were obviously intended to give over-riding effect over Section 200 of CrPC which is on the statute book since the date of coming into force of the Code in 1974.

15. Strong reliance is placed on decisions of the Karnataka High Court in K. Srinivasa vs Kashinath, (2004) Cri LJ 4566, Kerala High Court in K. Vasudevan vs State of Kerala, 2005 BGLKS (Doc) 113 decided on 24th June 2004 and H.D.F.C. vs Anilesh, 2008 (2) Crimes 164 (Ker.), the Special Leave Petition against which was dismissed by the Apex Court on 13th September 2004.

16. The learned counsel for the complainants have submitted that the decisions relied upon by the learned counsel for the accused deal with cases which were filed prior to the addition of Section 145 on the upa 15 fb-cri-wp2523-10

statute book or such decisions relied on previous decisions of the Apex Court which were rendered prior to Section 145 of NI Act coming on the statute book.

17. The learned counsel for the respondent accused have also submitted that the decision of the learned Single Judge of this Court deprecating "pre-conceived format" of the complaint is not at all in consonance with the provisions of NI Act as amended in 2002 and that such approach has resulted into gross delay even in examination of the complainant on oath under Section 200 CrPC, resulting into pendency of almost three lakh complaints under NI Act in spite of as many as 32 Magistrates trying such complaints.

STATUTORY PROVISIONS

18. Before dealing with the rival submissions, we may briefly note the relevant statutory provisions.

Section 118 of the NI Act, which is on the statute book since 1881, provides as under :-

"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, indorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

(b) as to date that every negotiable instrument bearing a date was made or drawn on such date; " (emphasis supplied)

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Sections 138, 139 and 140 of the NI Act added by Amending Act No.66 of 1988 read as under:

"138. Dishonour of cheque for insufficiency, etc., of funds in the account Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount

arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may 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.

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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.

140. Defence which may not be allowed in any

prosecution under section 138 - It shall not be a defence in a prosecution for an offence under section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section. "

(emphasis supplied)

19. Section 142 of NI Act lays down that cognizance can be taken of an offence punishable under Section 138 of the NI Act only upon a complaint in writing made by a payee or the holder of due course of the cheque, that such complaint has to be made within one month of the date on which the cause of action arose under clause (c) or the proviso to Section 138, provided that the cognizance may be taken if the complainant satisfies the Court that he has sufficient cause for not making a complaint within such period.

20. Section 143(1) of NI Act, relevant for the purposes of the present controversy, reads as under :-

"143. Power of Court to try cases summarily. - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Chapter shall be tried by a Judicial

Magistrate of the first class or by a Metropolitan upa 18 fb-cri-wp2523-10

Magistrate and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials: "

As per the proviso to Section 143(1), a sentence of maximum one year and fine upto Rs.5,000/- can be imposed in a summary trial, but for imposing any higher sentence or if the Magistrate considers appropriate for any other reason, the Magistrate may hear the case otherwise than summarily. Sub-section (2) of Section 143 requires the Magistrate to conduct the trial from day to day except for reasons to be recorded in writing. Sub-section (3) of Section 143 further provides that the trial shall be conducted expeditiously and preferably within six months from the date of filing of the complaint. Sub-section (3) reads as under :-

(3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint."

(emphasis supplied)

Section 144 of NI Act provides for expeditious mode of service of summons by permitting such service to be made even by speed post or courier services. Even if the endorsement by the postal department or the courier services states that the accused refused to take delivery of summons, the Court may declare that the summons has been duly served.

21. Sections 145 and 146 of NI Act read as under :- upa 19 fb-cri-wp2523-10

"145. Evidence on affidavit - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

146. Bank's slip prima facie evidence of certain facts. - The Court shall, in respect of every proceeding under this Chapter, on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved."

(emphasis supplied)

22. Time and again the Apex Court has held that the object of bringing Section 138 on the statute book is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. (See Kusum Ingots & Alloys Ltd vs Pennar Peterson Securities Ltd, (2002) 2 SCC 745). It has also been held by the Apex Court that Section 138 of NI Act was enacted to punish those unscrupulous persons who purported to discharge their liability by issuing cheques without really intending to do so, which was demonstrated by the fact that there was no sufficient balance in the account to discharge the liability. At the same time, the proviso to Section 138 protects 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 upa 20 fb-cri-wp2523-10

failed to make necessary arrangements for the payment of the cheque, 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. (See Vinod Shivappa vs Nanda Belliappa, (2006) 6 SCC 456).

Again in Mosaraf Hossain Khan vs Bhagheeratha Engg. Ltd., (2006) 3 SCC 658, the Apex Court held that dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. Remedy available in a civil Court is a longdrawn process and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee.

23. Section 138 was thus introduced in the public interest to enhance the faith in the efficacy of banking operations of negotiable instruments. This object can be achieved by punishing the unscrupulous persons who issue cheques without really intending to discharge their liability. At the same time, Section 138 provides adequate safeguard by giving an opportunity to the honest drawer for his lapse induced by inadvertent or negligence by permitting him to pay the amount within the prescribed limit.

24. The Law Commission in its Report No. 213 sent on 24th November 2008, took note of the fact in paragraph 1.5 of the Report that over 38 lakh cheque bouncing cases were pending in various courts in the country as on 1st June 2008. The Law Commission specifically noted as under :-

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"... The number of complaints which are pending in Bombay Courts (5,91,818 cases pending in subordinate Courts of State of Maharashtra) seriously cast shadow on the credibility of our trade, commerce and business. Immediate steps have to be taken by all concerned to ensure restoration of the credibility of trade, commerce and business."

The Parliament, therefore, enacted Amending Act No.55 of 2002 adding Sections 143 to 147 in NI Act. The Statement of Objects and Reasons appended to the Bill leading to the enactment of the said Amending Act is set out in the decision dated 11th January 2010 of the Apex Court in M/s Mandvi Co-op Bank Ltd vs Nimesh B Thakore, 2010 ALL MR CRI 599 = (2010) 3 SCC 83. The relevant portions thereof read as under :-

"14. the procedure prescribed for the courts to deal with such matters has been found to be

cumbersome. The courts are unable to dispose of such cases expeditiously in a time bound manner in view of the procedure contained in the Act.

2. A large number of cases are reported to be pending under sections 138 to 142 of the Negotiable Instruments Act in various courts in the country. Keeping in view the large number of complaints under the said Act pending in various courts, a Working Group was constituted to review section 138 of the Negotiable Instruments Act, 1881 and make recommendations as to what changes were needed to effectively achieve the purpose of that section.

xxxxx xxxxx xxxxx

4. Keeping in view the recommendations of the Standing Committee on Finance and other

representations, it has been decided to bring out, inter alia, the following amendments in the Negotiable Instruments Act, 1881, namely :-

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.....

(iv) to prescribe procedure for dispensing with

preliminary evidence of the complainant;

xxxxx xxxxx xxxxx

(vi) to provide for summary trial of the cases under the Act with a view to speeding up disposal of cases;

(vii) to (xi) xxxxx xxxxx xxxxx .

5. The proposed amendments in the Act are aimed at early disposal of cases relating to dishonour of cheques, enhancing punishment for offenders, introducing

electronic image of a truncated cheque and a cheque in the electronic form as well as exempting an official nominee director from prosecution under the Negotiable Instruments Act, 1881.

6. The Bill seeks to achieve the above objects." (emphasis added)

25. The principal question for our consideration is whether affidavit referred to in sub-section (1) of Section 145 of NI Act would be sufficient for the Magistrate to issue process under Section 200 of CrPC, without orally examining the complainant on oath in each and every case.

26. The important point to be noted is that sub-section (1) of Section 145 begins with the non-obstante clause, "Notwithstanding anything contained in the Code of Criminal Procedure, 1973". It is, therefore, clear that interpretation of Section 145 cannot be controlled by Section 200 CrPC. On the contrary, the legislative intent is absolutely clear that in complaints under Section 138 of NI Act, interpretation of Section 200 CrPC has to be controlled by Section 145 of NI Act. Sub- upa 23 fb-cri-wp2523-10

section (1) of Section 145 specifically provides that the evidence of the complainant may be given by him on affidavit and, subject to all just exceptions, may be read in evidence in any enquiry, trial or other proceeding under the CrPC.

27. It is true that the trial has not yet commenced at the stage when the Magistrate is to decide whether or not to issue process on the complainant under Section 138 of NI Act, but sub-section (1) of Section 145 permits the complainant to give on affidavit not merely the evidence during trial, but also evidence in any enquiry or other proceeding under CrPC. Obviously, the stage at which the Magistrate considers whether or not to issue process on complaint under Section 138 of NI Act is either an enquiry or a proceeding under CrPC other than trial. Sub- section (1) of Section 145, therefore, is all comprehensive and permits the complainant to submit on affidavit what he would have otherwise been required to state before the Magistrate in the course of examination upon oath under Section 200 of CrPC.

28. The contention of the learned Counsel for the accused is that sub-section (2) of Section 145 contemplates that on the application of the accused, the Court shall summon and examine any person giving evidence on affidavit as to the facts contained therein and that, therefore, this stage can come only after issuance of process and not before issuance of process.

29. The argument is thoroughly misconceived. Sub-section (2) of Section 145 is as comprehensive as sub-section (1) thereof. While it is true that the question of the accused giving an application for summoning and examining the complainant would arise after issuance upa 24 fb-cri-wp2523-10

of the process and after service of summons on the accused, it is open to the Magistrate before whom affidavit is tendered by the complainant in support of his complaint, to summon and examine the complainant as to the facts contained in the affidavit filed by the complainant in support of the complaint, because such affidavit is permissible in the enquiry or other proceeding when the Magistrate is yet to decide whether or not to issue the process. The Magistrate certainly has the discretion to decide whether to rely on the affidavit given by the complainant in support of the complaint and on the documents and issue process on the basis thereof or to summon and examine the complainant on oath as to the facts contained in the affidavit. This, however, does not mean that in each and every case the Magistrate is bound to call the complainant and examine him on oath before issuing process. The very purpose of introducing Section 145 on the statute book would be defeated if the Court over-looks the non-obstante clause with which Section 145 begins - "Notwithstanding anything contained in the Code of Criminal Procedure, 1973...". The Statement of Objects and Reasons appended to the Bill clearly provides that it was decided to bring out, inter alia, the following amendments in the Negotiable Instruments Act, 1881, namely, "(iv) to prescribe procedure for dispensing with preliminary evidence of the complainant". The expression "preliminary evidence" obviously refers to examination of the complainant by the Magistrate before issuance of the process.

30. The learned counsel for the accused would submit that evidence would only mean examination in chief or cross-examination or re-examination as contemplated by Section 137 of the Indian Evidence Act, 1872. This argument is also misconceived. Section 3 of the Indian Evidence Act, 1872, defines "evidence" as under :-
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"Evidence - "Evidence means and includes -

(1) all statements which the Court permits or

requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence;

(2) all documents including electronic records

produced for the inspection of the Court,

such documents are called documentary evidence."

The words "Proved", "Disproved" and "Not proved" are defined as under :-

"Proved" - 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.

"Disproved" - A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non- existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved" - A fact is said not to be proved when it is neither proved nor disproved."

31. It is thus clear that "evidence" as defined by the Indian Evidence Act is not confined to examination in chief, cross-examination or re-examination of a witness under Section 137. Evidence means and includes all statements which the Court permits or requires to make before it in relation to matters of fact under enquiry. What would come up 26 fb-cri-wp2523-10

on record by way of examination upon oath of the complainant or witnesses under Section 200 of CrPC would as much be evidence as contemplated by Section 145 of NI Act, as examination in chief, cross- examination and re-examination of a witness under Section 137 of the Indian Evidence Act. There is nothing in the provisions of Section 145 or any other section of NI Act to adopt the narrow meaning of the word "evidence", as is canvassed by the learned Counsel for the accused.

32. It is, therefore, clear that as per the provisions of Section 145 of NI Act added by Amending Act 55 of 2002 with effect from 6th February 2003, the statement which the Court would require the complainant to make before it for the purpose of enabling the Court to decide whether or not to issue process under Section 200 of CrPC is also "evidence" as contemplated by sub-section (1) of Section 145 of NI Act.

33. It is even the case of the accused that, as held by the Apex Court in Nirmaljeet Singh Hoon vs The State of West Bengal and another, (1973) (3) SCC 753: (AIR 1972 SC 639) :-

". The object of such examination is to

ascertain whether there is a prima facie case against the person accused of the offence in the complaint and to prevent the issue of process on complaint which is either false or vexatious or intended only to harass such a person. Such examination is provided, therefore, to find out whether there is or not sufficient ground for proceeding."

If, on going through the complaint, the documents and the affidavit verifying the facts stated in the complaint, the learned upa 27 fb-cri-wp2523-10

Magistrate finds that a prima facie case against the accused is made out and that, prima facie, the complaint is neither false nor vexatious or intended only to harass the accused person, we see no reason why the learned Magistrate cannot issue process on the complaint and must insist upon personal examination of the complainant, particularly when sections 118, 139 and 146 raise presumptions in favour of the holder of the cheque (that the cheque was drawn for consideration; that the holder of the cheque received the cheque, for the discharge, in whole or in part, of any debt or other liability; that on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque) and Section 140 denies the accused the defence (that he had no reason to believe, when he issued the cheque, that the cheque may be dishonoured on the presentment for the reasons stated in section 138) and when Sections 143 to 147 are specifically added on the statute book to make the procedure less cumbersome and to expedite disposal of the case within six months from the date of filing the complaint.

34. As per the settled principle of interpretation of statute, a statutory provision is not to be interpreted in such a manner as to yield absurd results. All that the Magistrate is required to consider while considering whether or not to issue process on a complaint under Section 138 of the NI Act is to ascertain whether the complainant has made out a prima facie case. It would be absurd if, on the basis of the affidavit of complainant submitted after issuance of process, the accused can be convicted and sentenced to imprisonment upto one year in a summary trial, but on the basis of an affidavit in support of the complain, the Magistrate cannot even say that the complainant has made out a prima facie case for issuance of process.

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35. After addition of section 135 NI Act in the statute book, it is open to the Magistrate to issue process on the basis of the contents of the complaint, the documents in support thereof and the affidavit submitted by the complainant in support of the complaint. Once the complainant files an affidavit in support of the complaint before issuance of the process under Section 200 CrPC, it is thereafter open to the Magistrate, if he thinks it fit, to call upon the complainant to remain present and to examine him as to the facts contained in the affidavit submitted by the complainant in support of his complaint. But then it is a matter of discretion and the Magistrate is not bound to call upon the complainant to remain present before the Court and to examine him upon oath for taking decision whether or not to issue process on the complaint under Section 138 of NI Act.

CASE LAW

36. Having thus examined the matter on first principles, we proceed to refer to and rely upon the decision in M/s Mandvi Co-op Bank Ltd vs Nimesh B Thakore, 2010 ALL MR CRI 599 = (2010) 3 SCC 83 decided on 11th January 2010. The Apex Court considered the provisions of Section 145 of NI Act in a slightly different context but held in unmistakable terms as under:-

"16. It may be noted that the provisions of sections 143, 144, 145 and 147 expressly depart from and override the provisions of the Code of Criminal

Procedure, the main body of adjective law for criminal trials. The provisions of section 146 similarly depart from the principles of the Indian Evidence Act. Section 143 makes it possible for the complaints under section

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138 of the Act to be tried in the summary manner, except, of course, for the relatively small number of cases where the Magistrate feels that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily. It is, however, significant that the procedure of summary trials is adopted under section 143 subject to the qualification "as far as possible", thus, leaving sufficient flexibility so as not to affect the quick flow of the trial process."

"17. It is not difficult to see that sections 142 to 147 lay down a kind of a special code for the trial of offences under Chapter XVII of the Negotiable

Instruments Act and sections 143 to 147 were inserted in the Act by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 to do away with all the stages and processes in a regular criminal trial that normally cause inordinate delay in its conclusion and to make the trial procedure as

expeditious as possible without in any way

compromising on the right of the accused for a fair trial." (emphasis supplied)

37. The Apex Court also referred in paragraph 18 of the said judgment to 213th Report of the Law Commission submitted to the Union Minister for Law and Justice on November 24, 2008 and noted the alarming number of complaints under Section 138 of the NI Act in various Courts including in the subordinate Courts in the State of Maharashtra (5,91,818 complaints as on 1st June, 2008).

38. The Apex Court further made the following pertinent observations in paragraph 32 of the said judgment :-
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"..... the High Court was in error in drawing an analogy between the evidences of the complainant and the accused in a case of dishonoured cheque. The case of the complainant in a complaint under section 138 of the Act would be based largely on documentary evidence. The accused, on the other hand, in a large number of cases, may not lead any evidence at all and let the prosecution stand or fall on its own evidence. In case the defence does lead any evidence, the nature of its evidence may not be necessarily documentary; in all likelihood the defence would lead other kinds of evidences to rebut the presumption that the issuance of the cheque was not in the discharge of any debt or liability. This is the basic difference between the nature of the complainant's evidence and the evidence of the accused in a case of dishonoured cheque." (emphasis supplied)

39. The contention of the learned counsel for the accused that the Amending Act of 2002 only intended to expedite the stage of trial after issuance of process, without expediting the stage prior to issuance of process also, cannot be accepted. The very fact that when Parliament provided for time limit of six months for concluding the trial, it did not provide that the six months period would begin from the date of issuance of process. Parliament has specifically provided that endeavor shall be made to conclude the trial within six months from the filing of the complaint. Thus, having regard to the language of all the provisions added by the Amending Act of 2002 and the reasons in the Statement of Objects and Reasons, it is clear that Parliament had noted that Courts were unable to dispose of cases under Section 138 of NI Act expeditiously and in a time bound manner on account of the cumbersome procedure prescribed under CrPC for the Courts to deal with such matters. It is thus clear that Parliament added Sections 143 to 147 for making the procedure simpler and gave these provisions over-
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riding effect over CrPC by enacting the the non-obstante clause. The view that appeals to us makes the procedure simpler and the view which is being canvassed on behalf of the accused would mean that the

cumbersome procedure would still remain cumbersome.

40. We may now refer to decision of the Apex Court in National Small Industries Corporation Limited vs State (NCT of Delhi) and others. (2009) 1 SCC 407 strongly relied upon by the learned counsel for the accused and particularly paragraphs 15 and 16 of the judgment in support of the contention that Section 200 of the Code mandatorily requires examination of the complainant before issuance of process.

41. Reliance placed on the aforesaid decision is misconceived for the simple reason that in the above case before the Apex Court, the Magistrate took cognizance on 4th February 2002 without examining the complainant and its witnesses under Section 200 of CrPC. The Amending Act 55 of 2002, however, came into force from 6th February 2003 and, therefore, in National Small Industries Corporation Ltd. (supra), the Apex Court was not required to apply the provisions of Section 145 of NI Act inserted by the Amending Act 55 of 2002. In that case, the only question the Apex Court examined was, as indicated in paragraph 13 of the judgment, who should be examined as the complainant under Section 200 of CrPC, where the complainant is an incorporeal body. The Court held that when the complainant is a body corporate, it is the de jure complainant and it must necessarily associate a human being as de facto complainant to represent the de jure upa 32 fb-cri-wp2523-10

complainant in Court proceedings. Usually, where the complainant is an incorporeal body represented by one of its employees, the employee who is a public servant is a de facto the complainant and in presenting complaint, he acts in the discharge of his official duties. Therefore, in such cases, the exemption under clause (a) of provide to Section 200 of CrPC will be available. The following observations in paragraph 13 of the judgment highlight the scope of the controversy which was resolved by the Apex Court :-

"13. When an offence is committed in regard to a transaction of the government company, it will be illogical to say that a complaint regarding such offence, if made by an employee acting for and on behalf of the company will have the benefit of exemption under clause (a) of the proviso to Section 200 of the Code, but a complaint in regard to very same offence, if made in the name of the company represented by the said

employee, will not have the benefit of such exemption. The contention of the second respondent, if accepted, would mean that whereas a complaint by "the

Development Officer, NSIC" as the complainant can avail the benefit of exemption, the same complaint by "NSIC represented by its Development Officer" as the complainant will not have the benefit of exemption. Such an absurd distinction is clearly to be avoided."

42. The learned counsel for the accused also placed heavy reliance upon decision of the Apex Court in Sabitha Ramamurthy and another vs R.B.S. Channabasavaradhya. (2007) 1 SCC CRI 621. It is true that in the said decision Apex Court held that, in terms of Section 200 of the Code of Criminal Procedure, the complainant is bound to make statement on oath as to how the offence has been committed and how the accused persons are responsible therefore. However, this case upa 33 fb-cri-wp2523-10

also dealt with pre-amendment period i.e. prior to insertion of Section 145 in NI Act.

43. Similarly, reliance placed by learned counsel for the accused on decision of the Apex Court in Pankajbhai Nagjibhai Patel vs State of Gujarat and another, AIR 2001 SC 567=(2001) 2 SCC 595, would not carry the petitioner's case any further, because in the said decision also the Apex Court had no occasion to consider the provisions of Section 145 of NI Act which were added with effect from 6th February 2003 by the Amending Act 55 of 2002.

44. Reliance placed on the decision of the Apex Court in Associated Cement Co. Limited vs Keshvanand. (1998) 1 SCC 687, is also misconceived as in the said decision rendered on 16th December 1997 also the

Apex Court could have had no occasion to deal with Section 145 of the NI Act added with effect from 6th February 2003 by Amending Act 55 of 2002.

45. The learned counsel for the accused also relied on the decision of the Karnataka High Court in Smt. B.R. Premakumari vs Supraja Credit Co-op. Society Ltd., (2010) All MR CRI Journal 151. The learned Single Judge of the Karnataka High Court appears to have followed the view of the High Court in an earlier decision that recording of sworn statements means the statement of the complainant to be recorded by the Magistrate, not by way of an affidavit and that accepting the affidavit in the place of sworn statement is deprecated by the said Court. Since the reported decision does not make any reference to Section 145 of NI Act, we would be justified in proceeding on the basis that the earlier decisions of the Karnataka High Court did not deal with a
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case arising after 6th February 2003 when Section 145 of the NI Act came to be added. For the same reason, reliance placed on a decision of a Division Bench of the Kerala High Court in N. Harihara Iyer vs State of Kerala, rendered on 10th December 1999 and reported in 2000 CRI LJ 1251 would not take the case of the accused any further.

46. As regards the decision of the learned Single Judge of this Court in Peacock Industries Ltd. and others vs M/s Budhrani Finance Ltd. and another, 2006 All MR (CRI) 2233, learned counsel for the accused relied upon the guidelines laid down in the said decision. It is true that the judgment of the learned Single Judge was rendered after considering Section 145 of the NI Act. The learned Single Judge considered two questions. Question (a) was whether sub-section (2) of Section 145 of the NI Act confers an unfettered right on the complainant and the accused to apply to the Court seeking direction to give oral examination in chief of a person giving evidence on affidavit, even in spite of the facts stated therein and that if such a right is exercised, whether the Court is obliged to examine such a person inspite of a mandate of Section 145(1) of the Act. Question (b) was whether Section 145 of the NI Act was applicable to complaints under Section 138 of the Act pending on the date on which the amendment came into force i.e. 6th February 2003.

47. It is obvious that since question (b) does not arise in this case and question (a) has already been completely answered by the Apex Court in Mandvi Co-op. Bank Limited vs Nimesh B. Thakore, (2010) 3 SCC 83, it is not necessary to discuss the judgment of the learned Single Judge.

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48. We may also note that the Karnataka High Court in K. Srinivasa vs Kashinath, (2004) CRI LJ 4566, Kerala High Court in K. Vasudevan vs State of Kerala, 2005 BGLKS (Doc) 113 decided on 24th June 2004 and H.D.F.C. vs Anilesh, 2008 (2) Crimes 164 (Ker.) and Delhi High Court in Radhey Shyam Garg vs Naresh Kumar Gupta, 2008 Crimes 4 570, decided on 9th May 2008 and in Basab Ghosh vs M/s Outlook Publishing (India) Pvt. Ltd., CDJ 2010 DHC 693, have taken the same view which has appealed to us.

49. The learned counsel for the accused, however, submits that the Division Bench in Maharaja Developers and another vs Udaysing s/o Pratapsinghrao Bhonsle and another, 2007 ALL MR (CRI) 1339, vide paragraph 127 has held as under :-

"27. From the above discussion, we are of the

considered view that the non-obstante clause in Section 142 or 145 of the N.I. Act does not override the provisions of Section 200 of Cr.P.C. and it is mandatory for the Magistrate to examine the complainant who has filed the same under Section 138 of the N.I. Act though with an affirmation as regards truthfulness of the contents of the complainant. It, therefore, follows that the Magistrate is obliged and duty bound to examine upon oath the complainant and his witnesses before issuance of process under Section 204 of Cr.P.C. though there is a solemn affirmation at the foot of the complaint by the complainant."

50. With respect, we are unable to concur with the view of the Division Bench in Maharaja Developers case (supra). upa 36 fb-cri-wp2523-10

51. The Division Bench has not at all referred to the legislative object of the amendment particularly as set out in the Statement of Objects and Reasons. The Division Bench proceeded on the footing that Section 200 CrPC continues to control the inquiry or trial of an offence punishable under Section 138 of NI Act, without discussing the over-riding effect given by Parliament to Section 145 of the NI Act by providing the non-obstante clause "Notwithstanding anything contained in the Code of Criminal Procedure".

52. The Division Bench posed the following question, in paragraph 16 of the judgment :-

"16. In order to ascertain whether it is mandatory for the Magistrate to examine the complainant in a

complaint under Section 138 of the N.I. Act with affirmation as regards truthfulness of the facts mentioned in the complaint before issuance of process under Section 200 of Cr.P.C. it is necessary to examine whether the provisions of Sections 142 and 145 of the N.I. Act which is special enactment dispenses with the said requirement of Section 200 of Cr.P.C."

(emphasis supplied)

53. It is settled legal position that ordinarily the provisions of a subsequently enacted special legislation with a non-obstante clause would prevail over the provisions of a previously enacted general law. The Division Bench, however, relied upon reasoning of the Apex Court in Pankajbhai Nagjibhai Patel Vs. State of Gujarat and another (2001) 2 SCC 595, interpreting the scope of Section 142 of NI Act vis-a-vis Section 200 Cr PC. With respect to the Division Bench, the following important aspects were not noticed in the decision in Maharaja Developer's case:-

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(i) The controversy on Pankajbhai Nagjibhai Patel's case was about powers of the Judicial Magistrate, First Class, to impose a sentence of fine exceeding Rs.5,000/- the ceiling of fine having been fixed by Section 29 Cr PC. The Apex Court held that section 142 did not expand the powers of the Magistrate but imposed restrictions on his powers and therefore, notwithstanding the non-obstante clause with which Section 142 begins, the Magistrate did not have powers to impose a sentence of fine exceeding Rs.5,000/-.

Parliament, however, did not accept the above view (Section 138 added on the statute book alongwith section 142 in 1988 already empowered the Magistrate of the First Class to pass sentence of fine which may extend to twice the amount of the cheque, and/or with sentence of imprisonment upto one year) and by Amending Act No.55 of 2002, added Section 143 and expressly provided in the proviso to Section 143 that it will be lawful for the Magistrate to pass a sentence of fine for an amount exceeding five thousand rupees even in a summary trial under Sections 262 to 265 Cr PC. It is only in the matter of passing a sentence of imprisonment that Parliament provided a ceiling of one year in a summary trial, though empowering the Magistrate to pass sentence of imprisonment upto two years.

(ii) Even otherwise the Division Bench also did not appreciate that while Section 142 added in the NI Act in the year 1988 placed restrictions on powers of the Court to issue process under Section 200 Cr PC, it was by subsequent amendment made in 2002 (w.e.f. 6th February, 2003) that Parliament added Section 145 to enlarge the powers of the Court hearing complaints under Section 138 NI Act by making the upa 38 fb-cri-wp2523-10

procedure less cumbersome and particularly dispensing with the stage of preliminary evidence (i.e. examination of complainant under Section 200 CrPC) as expressly indicated in the Statement of Objects and

Reasons for the Amending Act 55 of 2002. With respect, the legislative object clearly evident in the non-obstante clause in Section 145 (to dispense with the stage of preliminary evidence i.e. requirement of personal examination of the complainant in Section 200 CrPC) has been frustrated by the view taken by the Division Bench that the said requirement in Section 200 CrPC continued notwithstanding the non- obstante clause in Section 145 of NI Act, which is a subsequently enacted special enactment.

54. The Division Bench referred to the decisions of the Apex Court and other Courts which were dealing with cases when Section 145 of the NI Act was not brought on the statute book. The Division Bench did not at all consider the celebrated "Mischief Rule" of interpretation, which we have applied in the foregoing discussion and which reads as under :

"1st - What was the law before making of the Act,

2nd - What was the mischief and defect for which the previous law did not provide.

3rd - What remedy the Parliament had resolved and appointed to cure the disease of the commonwealth, and

4th - The true reason of the remedy"

(Principles of Statutory Interpretation by Justice G.P. Singh, 11th Edition 2008).

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55. For the elaborate reasons given in paragraphs 19 onwards, therefore, we over-rule the decision of the Division Bench in Maharaja Developers case (supra).

56. When it was brought to notice of the Division Bench in Maharaja Developers case (supra) that the procedure of Magistrate personally examining the complainant on oath before issuing process will take considerable time, the Division Bench was of the view that this procedure would not take much time, if the verification statement of the complainant is recorded on the same day on which the complaint is filed or on the following day when the matter is fixed. No where did the judgment refer to the number of complaints being filed or to huge pendency of complaints under Section 138 of NI Act before the Magistrates in the State of Maharashtra and particularly in the Metropolitan city of Greater Mumbai. As per figures furnished by the learned Chief Metropolitan Magistrate, the inflow of complaints under Section 138 in Greater Mumbai is as under :-

Year Cases Instituted

2008 1,28,012

2009 1,29,985

2010 59,689

(Upto 30th November)

49,412 matters are still pending before 32 Metropolitan Magistrates Courts at the stage of examining the complainant before issuance of process, in view of the law laid down in the aforesaid decision of Division Bench. Pendency of Section 138 complaints in Greater Mumbai has come down to 2,97,487 as on 30th November 2010 partly on account of success of Lok Adalats and filing substantially going down. upa 40

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57. As regards decision of the learned Single Judge of this Court in K.K. Enterprises vs M/s Nirmal Udyog Office, 2010 of ALL MR (CRI) 825, rendered on 6th November 2009, the said decision merely follows the Division Bench judgment in Maharaja Developers vs Udaysing s/o Pratapsinghrao Bhonsle, 2007 of All MR (CRI) 1339 = 2007 CRI. LJ 2207. Since, we have over-ruled the above Division Bench decision, we have no hesitation in over-ruling the said decision of the learned Single Judge as well. We also disapprove of the observations of the learned Single Judge deprecating the practice of complainant filing affidavit in support of the complaint under Section 138 of NI Act in a pre-conceived format. We see no reason why the affidavit in a format based upon the ingredients of the offence under Section 138 of NI Act should be frowned upon, when the complaint read with the affidavit in support thereof and the documents produced with the complaint constitute sufficient material for the learned Magistrate to determine whether the complainant has made out a prima facie case.

58. As regards the submission of learned counsel for the accused about alleged harassment to accused who have resigned as directors of an accused company, we are of the view that ordinarily when such directors produce documentary evidence to show that the resignation was electronically communicated to the Registrar of Companies in the prescribed form before the date of the cheque in question, the Magistrate would grant such directors exemption for personal appearance and exemption for giving bond as a matter of course for the complaint in respect of the particular cheque. upa 41 fb-cri-wp2523-10

59. In view of the above discussion, our conclusions are as under :

(i) For the purpose of issuing process under Section 200 of the Code of Criminal Procedure, 1973, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the Negotiable Instruments Act, 1881 and the Magistrate is not obliged to call upon the complainant to remain present before the Court, nor to examine the complainant or his witnesses upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the Negotiable Instruments Act, 1881. It is only if and where the Magistrate, after considering the complaint under Section 138 of the Negotiable Instruments Act, 1881 and the documents produced in support thereof and the verification in the form of affidavit of the complainant, is of the view that examination of the complainant or his witness is required, that the Magistrate may call upon the complainant to remain present before the Court and examine the complainant and/or his witness upon oath for taking decision whether or not to issue process on the complaint under Section 138 of the Negotiable Instruments Act, 1881.

(ii) We are also of the view that there is nothing wrong in the complainant under Section 138 of the Negotiable Instruments Act, 1881 filing the affidavit in support of the complaint in a format indicating all the essential facts upa 42 fb-cri-wp2523-10

satisfying the ingredients of Section 138 of the Negotiable Instruments Act, 1881 for the purpose of enabling the Magistrate to decide whether or not to issue process on the complaint under Section 138 of the Negotiable Instruments Act, 1881.

(iii) The decision of a Division Bench of this Court in Maharaja Developers and another vs Udaysing P Bhonsale and another, 2007 ALLMR (CRI) 1339 = 2007 CrI LJ 2207 and the decision of a learned Single Judge of this Court in Amarnath Baijnath Gupta and another vs Mohini Organics Pvt. Ltd. and another, 2009 ALL MR (CRI) 184 = 2009 CrI LJ 995 are hereby over-ruled.

60. Criminal Writ Petition No.2523 of 2010 is dismissed.

61. A copy of this judgment shall be circulated amongst all the Metropolitan Magistrates in the city of Greater Mumbai and all the Judicial Magistrates in the States of Maharashtra and Goa and also in the Union

Territories of Daman, Diu, Dadra & Nagar Haveli.

CHIEF JUSTICE

V. K. KANADE, J.

SMT. R.P. SONDURBALDOTA, J.

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