

**M.L. Gupta and anr. Vs. Ceat Financial Services Ltd.**

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**Court :** Delhi

**Decided On :** Nov-23-2006

**Reported in :** [2008]145CompCas837(Delhi); 136(2007)DLT308;  
[2007]77SCL73(Delhi)

**Judge :** A.K. Sikri, J.

**Acts :** Negotiable Instrument Act - Sections 136, 138, 139, 141 and 141(1); Companies Act - Sections 441(2), 529A, 530, 536 and 536(2); Sick Industrial Companies (Special Provisions) Act, 1985 - Sections 18, 19, 20, 20(1), 22 and 22A; Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992; Special Court Act - Sections 3 and 3(2); Indian Penal Code (IPC) - Sections 120B and 420

**Appeal No. :** Crl. M.C. No. 2595 of 2004 and Crl. M. 8849/2004

**Appellant :** M.L. Gupta and anr.

**Respondent :** Ceat Financial Services Ltd.

**Advocate for Def. :** U.L. Watwani, Adv.

**Advocate for Pet/Ap. :** R.K. Bharti, Adv

**Judgement :**

**A.K. Sikri, J.**

1. The question, which falls for consideration, is as to whether a complaint under Section 138 of the Negotiable Instrument Act can be filed against the company and/or its Managing Director/Director after the winding up of the said company.

2. Petitioner No. 1 was the Managing Director and petitioner No. 2 is the Director of a public limited company called Sakura Seimitsu India Ltd. It entered into Lease Agreement dated 12.1.1995 with Ceat Financial Services Ltd. (hereinafter called 'complainant') and issued post-dated cheques on 12.1.1995 for future lease rentals. There were certain defaults in making payment of lease rentals as a result of which complainant filed winding up petition being CP. No. 23 of 1998 against the company in the High Court of judicature at Allahabad. Vide order dated 24.7.1998 the said petition was admitted and thereafter this company was finally wound up by the orders of the High Court passed on 23.11.1998 and Official Liquidator (OL) was appointed to take charge of all the assets and properties of the company. The necessary legal consequence was discharge of all the employees and officers from the services of the company including the Board of Directors. It is not in dispute that complainant presented cheque dated 19.10.1999 for payment much after the winding up of the company. This cheque which was issued by the company and returned with the remarks 'No Account/Account Closed'. Notice of dishonour of the cheque was issued to the company in liquidation at the registered office of the company in liquidation and thereafter complaint filed under Section 138 of the Negotiable Instruments Act. In this complaint the company is made accused No. 1 whereas petitioners are arraigned as accused Nos. 2 and 3. The cause title of the complaint reads as under:

IN THE COURT OF CHIEF METROPOLITAN MAGISTRATE

KARKARDOOMA, DELHI

COMPLAINT NO. \_\_\_\_\_ OF 2000

IN THE MATTER OF:

Ceat Financial Services Ltd.

601, Adishwar Apartment,

34, Ferozshah Road,

New Delhi through itself

authorised representative

Shri Vijay Pal Singh Complainant

Versus

1. Sakura Seimitsu India Ltd.

E-115, Site B, UPSIDC Indl. Area,

Surajpur, Distt. Ghaziabad

also at :

A-36, Sector VII

Noida

2. Shri M.L.Gupta

Director

Sakura Seimitsu India Ltd

E-115, Site - B, UPSIDC Indl. Area,

Surajpur, Distt. Ghaziabad (U.P.)

also at :

S-626, Mohan Park,

Shakarpur, Delhi

3. Shri Rajeev Gupta

Director

Sakura Seimitsu India Ltd.

E-115, Site-B, UPSIDC Indl. Area,

Surajpur, Distt. Ghaziabad (U.P.) Accused

Police Station: Shakarpur

3. When the complaint is filed against a company prior to the winding up of the company and during the pendency of such a complaint under Section 138 of the Negotiable Instruments Act and the company is ordered to be wound up, the complaint against the company cannot proceed without the permission of the Company Judge of the High Court which ordered winding up. Reason is simple. A fortiori, the complaint under Section 138 cannot be filed against the company which is already wound up on the date when the cheque was dishonoured and notice of dishonour of the cheque was given.

4. As on date of presentation of the cheque and filing of complaint, the company was in liquidation. In fact, as noted above, the company was ordered to be wound up at the instance of the complainant who had filed company petition for winding up. thereforee, after winding up and appointment of Official Liquidator, it is the Official Liquidator only who could represent the company. Proceedings were clearly not maintainable against the company as the money payable to the complainant after the winding up of the company was a `debt' which could be recovered by the complainant only in accordance with the provisions of Companies Act.

5. The question for consideration is as to whether the complaint is maintainable against the Directors. If the complaint was filed prior to the winding up orders passed against the company, even if the company is to be dropped from the proceedings after the winding up orders are passed, such criminal proceedings can continue against the Directors. That is the legal position settled by the Supreme Court in the case of Anil Hada v. Indian Acrylic Ltd. : 2000 CriLJ373 . In this case the Court held that offender under Section 138 of the Negotiable

Instruments Act is the drawer of the cheque which alone would have been the offender there under, if the Act did not contain other provisions. thereforee, normally, in the case of a company incorporated under the Companies Act it is the company which would be the offender. However, by virtue of Section 141 of the Act, penal liability under Section 138 is cast upon other persons connected with the company. thereforee, those persons also become liable for penal action in addition to the company. It further held that if the offence is committed by a company it can be punished only if the company is prosecuted. However, if, instead of prosecuting the company, a payee opts to prosecute other persons falling within the description of Section 141, it is permissible for him to do so. It would be of interest to reproduce the discussion as contained in this judgment on the aforesaid aspect.

10. Three categories of persons can be discerned from the said provision who are brought within the purview of the penal liability through the legal fiction envisaged in the section. They are: (1) The company which committed the offence. (2) Everyone who was in-charge of and was responsible for the business of the company, (3) Any other person who is a director or a manager or a secretary or officer of the company, with whose connivance or due to whose neglect the company has committed the offence.

11. Normally an offence can be committed by human beings who are natural persons. Such offence can be tried according to the procedure established by law. But there are offences which could be attributed to juristic persons also. If the drawer of a cheque happens to be a juristic person like a body corporate it can be prosecuted for the offence under Section 138 of the Act. Now there is no scope for doubt regarding that aspect in view of the clear language employed in Section 141 of the Act. In the expanded ambit of the word 'company' even firms or any other associations of persons are included and as a necessary adjunct thereof a partner of the firm is treated as director of that company.

12. Thus when the drawer of the cheque who falls within the ambit of Section 138 of the Act is a human being or a body corporate or even firm, prosecution proceedings can be initiated against such drawer. In this context the phrase 'as

well as' used in Sub-section (1) of Section 141 of the Act has some importance. The said phrase would embroil the persons mentioned in the first category within the tentacles of the offence on a par with the offending company. Similarly the words 'shall also' in Sub-section (2) are capable of bringing the third category of persons additionally within the dragnet of the offence on an equal part. The effect of reading Section 141 is that when the company is the drawer of the cheque such company is the principal offender under Section 138 of the Act and the remaining persons are made offenders by virtue of the legal fiction created by the Legislatures as per the section. Hence, the actual offence should have been committed by the company and then alone the other two categories of persons can also become liable for the offence.

13. If the offence was committed by a Company it can be punished only if the company is prosecuted. But instead of prosecuting the company if a payee opts to prosecute only the persons falling within the second or third category the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the Company. In such a prosecution the accused can show that the company has not committed the offence, though such company is not made an accused, and hence the prosecuted accused is not liable to be punished. The provisions do not contain a condition that prosecution of the company is sine qua non for prosecution of the other persons who fall within the second and the third categories mentioned above. No doubt the Company is sine qua non for convicting those other persons. But if a company is not prosecuted due to any legal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged in Section 141 of the Act.

6. The Court also noted the provisions of Section 139 of the Act which draws a legal presumption in favor of holder, namely, to the effect that the holder of a cheque received the cheque of the nature referred under Section 138 of the Act in discharge, in whole or in part, of any debt or any other liability and held that such a presumption mentioned in this Section would operate not only against the drawer but against other persons who can be roped in by virtue of Section 141 of the Act. The liability of the company as well as Directors under Sections 138 and 141 of

the Negotiable Instruments Act would remain if the cheque is presented after the winding up petition is filed and is pending but the orders of winding up have not been passed. This proposition stands concluded by the judgment of the Supreme Court in the case of Pankaj Mehra and Anr. v. State of Maharashtra and Ors. : 2000 CriLJ1781 . The question which was posed for determination in the said case was 'can a company escape from penal liability under Section 138 of the Negotiable Instruments Act (for short 'the NI Act') on the premise that a petition for winding up of the company has been presented and was pending during the relevant time'? The cases decided in the said judgment were those where winding up petition was filed some time in the year 1996. Cheques presented were dishonoured and in the year 1997 complaint was filed and in the year 1998 winding up orders were passed and official liquidator was appointed. Submission on behalf of company and the Directors who were made accused in complaint under Section 138 of the Negotiable Instruments Act was that once the winding up orders are passed though after the complaint was filed but in a winding up petition filed earlier, the winding up orders would relate back to the date of filing of the petition by virtue of Section 441(2) of the Companies Act. thereforee, on this premise it was submitted that effect of winding up orders would be from 1996 i.e. the date when winding up petition was presented. The necessary consequence, according to them was that after the filing of the winding up petition there could not have been any disposition of the property of the company as Section 536(2) of the Companies Act stipulates that any disposition of the property of the company shall be void if it was made after the commencement of the winding up proceedings. This contention was negated by the Supreme Court holding that mere filing of the winding up petition would not attract the provisions of Section 536(2) of the Companies Act. It was held that after the filing of the winding up petition, a Company Court could still refuse to wind up the company and, thereforee, mere presenting of the winding up petition was not necessary concomitant that the winding up would follow. It was further held that Section 536(2) of the Companies Act had to be given purposive interpretation. If Section 536(2) is to be interpreted by holding that all payments made from the date of filing of the petition till the date of passing of winding up orders, are to be treated as void, then it would lead to disastrous consequence and it may become difficult for the company to do its

business merely because winding up petition is filed. This position is succinctly stated in para-20 of the judgment which reads as under:

20. It is difficult to lay down that all dispositions of property made by a company during the interregnum between the presentation of a petition for winding up and the passing of the order for winding up would be null and void. If such a view is taken the business of the company would be paralysed, for, the company may have to deal with very many day-to-day transactions, made payments of salary to the staff and other employees and meet urgent contingencies. An interpretation which could lead to such a catastrophic situation should be averted. That apart, if any such view is adopted, a fraudulent company can deceive any bona fide person transacting business with the company by stage-managing a petition to be presented for winding up in order to defeat such bona fide customers. This consequence has been correctly voiced by the Division Bench in the impugned judgment.

7. thereforee, even up to this stage there is no problem. From the aforesaid discussion, the two propositions, which can be culled out are as under:

A. When the complaint under Section 138 of the Negotiable Instruments Act is filed against the company and its Directors and during the pendency of this complaint, orders of winding up of the company are passed, even if the complaint cannot continue against the company, the proceedings can still continue against the Directors.

B. If there is a winding up petition pending against a company in which no winding up order is passed, complaint under Section 138 would be maintainable against the company as well as its Directors as mere filing of the winding up petition would not be of any consequence. In such winding up petition even if winding up order is passed on a later point of time, namely, after the filing of the complaint under Section 138 of the Act, such a complaint can still continue.

8. We are, however, concerned with the position where cheque presented is dishonoured and complaint is filed under Section 138 of the Negotiable Instruments Act against the company and the Directors after the company has



already been ordered to be wound up. Whether such a complaint would be maintainable is the question and the legal position on this aspect is what needs to be determined.

9. To answer this question, we may have first to take note of the necessary legal consequences of the winding up of a company and orders of appointment of Official Liquidator/Liquidator. By operation of law, i.e. by virtue of the Companies Act, it would result in discharge of all the employees and the Officers from the service of the company including Board of Directors. Affairs of such a company are taken over by the Official Liquidator and the Official Liquidator has to disburse the payment in accordance with the Companies Act. Section 536 of the Companies Act now comes into play fully and disbursement of any amount would be void. If the cheque is presented at this stage, payment thereof is legally barred. Bank, on which cheque is issued is precluded from honouring the cheque. In the instant case itself, account was closed by the Official Liquidator and that was the reason for dishonour of cheque. It is also to be borne in mind that after the winding up orders and the taking over of the affairs of the company by the Official Liquidator since erstwhile Directors cease to be the Directors as on the date of presentation of the cheque, they are not in charge of day to day affairs of the company. Offence is committed under Section 138 of the Act only on the dishonour of the cheque and issuance of notice for demand to pay the amount. As on that date, no such notice could be issued to the company which was in liquidation and the creditors are now to be paid as per the scheme of the Companies Act. therefore, liability on them also cannot be fastened under Section 141 of the Negotiable Instrument Act.

10. However, some of the observations made by the Supreme Court in the case of Pankaj Mehra and Anr. etc. v. State of Maharashtra and Ors. (supra) were referred to by the Learned Counsel for the respondent to contend that complaint can be maintainable against the Directors even after the company has been wound up. It was submitted that the Court has hinted in this judgment that even if a company goes into the liquidation, enforcement of debt due from the company is only made subject to conditions prescribed therein. It would not mean that the debt has become enforceable altogether. Para 26 of the judgment deals with this aspect. It

would be apposite to reproduce the same at this stage to understand its implication:

26. There is no provision in the Companies Act, which prohibits enforcement of the debt due from a company. When a company goes into liquidation, enforcement of debt due from the company is only made subject to the conditions prescribed therein. But that does not mean that the debt has become unenforceable altogether. Perhaps due to want of sufficient assets for the company the realization of a debt would be difficult. But that is no premise to hold that the debt is legally unenforceable. Enforceability of a debt is not to be tested on the touchstone of the modality or the procedure provided for its realization or recovery. Hence the contention that the special provision incorporated in the Companies Act regarding the debts and liabilities due from the company will render the debt unenforceable, cannot be accepted.

11. The Learned Counsel also pointed out that the Court has interpreted the expression 'fails to make payment' occurring in proviso to Clause-(c) of Section 138 and the manner in which it is interpreted would clearly be indicative of the effect that the liability of the Directors would still remain. To comprehend this argument, we need to notice the discussions contained in paras 29 to 31 of the judgment:

29. The words 'the drawer of such cheque fails to make the payment' are ostensibly different from saying 'the drawer refuses to make payment'. Failure to make payment can be due to the reasons beyond the control of the drawer. An illustrative case is, if the drawer is not a company but individual who has become so pauper or so sick as he cannot raise the money to pay the demand sum. Can he contend that since failure to make payment was on account of such conditions he is entitled to be acquitted? The answer cannot be in the affirmative though the aforesaid conditions can be put forth while considering the question of sentence.

30. We, therefore, feel that Legislature has thoughtfully used the words 'fails' instead of other expressions as failure can be due to variety of reasons including his disability to pay. But the offence would be complete when the drawer 'fails' to make payment within the stipulated time, whatever be the cause for such failure.

31. The drawer of the cheque can have different Explanationns for the failure to pay the amount covered by the cheque. But no such Explanationn would be sufficient to extricate him from the tentacles of the offence contemplated in the section. Perhaps some kind of Explanationn would be sufficient to alleviate the rigor of the offence which may be useful to mitigate the quantum of sentence to be imposed. But that is no ground for consideration at this stage.'

12. As noted above, the question in that case was in a different fact situation, namely, filing of complaint under Section 138 of the N.I. Act during the pendency of winding up petition where no orders for winding up of the company had been passed, as on the date when the complaint was filed. The manner in which this question was answered has already been noticed above. It is thus clear that the question involved was totally different as is clear from the very first para of the said judgment formulating the judgment in the following manner:

Can a company escape from penal liability under Section 136 of the Negotiable Instruments Act (for short 'the NI Act') on the premise that a petition for winding up of the company has been presented and was pending during the relevant time?

13. The observation made in paras referred to above are with a view to answer the aforesaid question formulated by the Court. The entire judgment has to be read in that context. It is a trite law that the ratio of a judgment is what it decides and not what logically follows from it. Judgments are not to be interpreted as statutes. In the case of *The Divisional Controller, K.S.R.T.C. v. Mahadeva Shetty and Anr.* : AIR 2003 SC4172 the Supreme Court clarified this aspect in a succinct and erudite manner by observing as under:

23. xxxxx The decision ordinarily is a decision on the case before the Court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. thereforee, while applying the decision to a later case, the Court dealing with it should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is

the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made as measure of social justice. Precedents sub silentio and without argument are of no moment. Mere casual expression carry no weight at all. Nor every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement having the weight of authority.

14. That apart, the reading of the aforesaid paras of the judgments would not lead to the conclusion which the Learned Counsel for the respondent wants. In para 26, what is stated is that there is no provision in the Companies Act. It is simply stated that when the Company goes into liquidation, there is no prohibition from the enforcement of debt due from the company. However, it is also clarified that enforcement of a debt is subject to the conditions prescribed under the companies Act. The Companies Act, particularly Chapter V, clearly lays down the manner in which debts of the company are to be discharged by the Official Liquidator from the funds/corpus available. There is a category of preferential creditors as mentioned in Sections 529A and 530 which are to be given preference over the other creditors. After payment of preferential creditors, if there is any money due, it is to be utilized for payment of statutory dues and governmental dues and only thereafter the turn of unsecured creditors comes. thereforee, obviously the debt does not become enforceable as rightly pointed out in para-26 of the judgment, but at the same time it is payable only in accordance with Scheme of the Act. The observation in this para if at all would go against the respondent herein.

15. Insofar as interpretation of the expression 'fails to make payment' is concerned, no doubt what is clarified is that 'failure to pay' is different from 'disability to pay'. However, in para-29 while giving an example, the Court has specifically excluded a company, and has given the illustration of an individual. What is to be noted is that the discussion is qua the drawer who 'fails' to make payment. Drawer in the case before us would be a company which has gone into liquidation and case of a company is on different footing and is governed by the statute, namely, the Companies Act. It would also be interest to note that in the

case of Anil Hada v. Indian Acrylic Ltd. (supra) (which is also incidentally a judgment by Hon'ble Mr. Justice K.T. Thomas who is the author of the judgment in the case of Pankaj Mehra (supra) as well). It is remarked that '

12. xxxxxxxx The effect of reading Section 141 is that when the company is the drawer of the cheque such company is the principal offender under Section 138 of the Act and the remaining persons are made offenders by virtue of the legal fiction created by the legislature as per the section. Hence the actual offence should have been committed by the company, and then alone the other two categories of persons can also become liable for the offence.

16. Thus, what is emphasized is that actual offence has to be committed by the company and then alone the Directors can become liable for the offence. When the company goes into liquidation and the cheque is presented thereafter, it cannot be said that the company has committed the offence as it is because of legal bar that it is precluded from making the payment. Once dishonour of the cheque by the Bank and failure to make payment of amount by the company is beyond its control, the Directors (who are in fact ex-Directors) can also not be held liable. Sustenance for this proposition can be drawn from another judgment of the Supreme Court in the case of Kusum Ingots and Alloys Ltd. etc. v. Pennar Peterson Securities Ltd. and Ors. . That was a case where reference in respect of the company was pending before the Board of Industrial and Financial Reconstruction (for short 'BIFR') under the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). The Court held that mere registering the reference would not be sufficient to bar the proceedings under Section 138 of the N.I. Act even by virtue of Section 22 of SICA as Section 22 which provided that no proceedings would be instituted against the company related to only to civil proceedings and does not include criminal proceedings. However, the Court further held that position would be different if order is passed by the BIFR under Section 22A of SICA restraining the company or its Directors from disposing of the assets of the company. Following observations would be relevant for our purposes:

19. The question that remains to be considered is whether Section 22-A of SICA affects a criminal case for an offence under Section 138 NI Act. In the said Section provision is made enabling the Board to make an order in writing to direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets-(a) during the period of preparation or consideration of the scheme under Section 18; and (b) during the period beginning with the recording of opinion by the Board for winding up of the company under Sub-section (1) of Section 20 and up to commencement of the proceedings relating to the winding up before the concerned High Court. This exercise of the power by the Board is conditioned by the prescription that the Board is of the opinion that such a direction is necessary in the interest of the sick industrial company or its creditors or shareholders or in the public interest. In a case in which the BIFR has submitted its report declaring a company as 'sick' and has also issued a direction under Section 22-A restraining the company or its directors not to dispose of any of its assets except with consent of the Board then the contention raised on behalf of the appellants that a criminal case for the alleged offence under Section 138 NI Act cannot be instituted during the period in which the restraint order passed by the BIFR remains operative cannot be rejected outright. Whether the contention can be accepted or not will depend on the facts and circumstances of the case. Take for instance, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of the BIFR under Section 22-A was passed against the company then it cannot be said that the offence under Section 138 NI Act was completed. In such a case it may reasonably be said that the dishonouring of the cheque by the bank and failure to make payment of the amount by the company and/or its Directors is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the company in view of the ban order passed by the BIFR. In such circumstances it would be unjust and unfair and against the intent and purpose of the statute to hold that the Directors should be compelled to face trial in a criminal case.

17. thereforee, such a complaint would not be maintainable when the cheque is presented after the company has already been ordered to be wound up.

18. I may mention that Learned Counsel for the respondent also relied upon the judgment of Apex Court in the case of Hiten P.Dalal v. Bratindranath Banerjee : 2001 CriLJ4647 to contend that since the cheques in question were issued prior to the date of winding up and the transaction related to pre-winding up period, the complainant had right to file a complaint on that basis, this judgment, however, shall not be of any assistance to the petitioner. A perusal of the judgment would show that complaint under Section 138 of the Negotiable Instrument Act was tried by the Special Court constituted under Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992. Under this Act offences relating to transaction in securities after the first date of 1991 and on or before 6.6.1992 could be tried by the Special Court. Four cheques which were given by the accused were dated 24.12.91, 26.6.91, 17.2.92 and 27.3.92 which were presented for payments were returned dishonoured on 21.5.92. Notices under Section 138 of the Negotiable Instrument Act were sent by the Bank on 31.5.92 and 1.6.92 calling upon the appellant to make payment in respect of these cheques within 15 days. 15 days period expired after 6.6.92. In view of this, contention of the accused persons was that since the alleged offence was committed after 6.6.92, Special Court had no jurisdiction to entertain the same. On the other hand the case of the bank/complainant was that Special Court had jurisdiction to entertain the complaint in view of provisions of Section 3(2) of the Special Court Act which mentioned that all those transactions which took place between 1.4.91 and 6.6.92 could be entertained by the Special Court. thereforee, it was interpretation of Section 3 of the Special Court Act which was involved and the relevant portion which reads as under:

3. (2)...any offence relating to transactions in securities after the 1st day of April,1991 and on and before 6th June,1992....

19. The question which was posed for consideration is mentioned in para-7 of the judgment in the following words:

7. The question is - does the period specified qualify the word 'offence' or the word 'transactions'? If it is the former, the jurisdiction of the Special Court would be, as contended by the appellant, limited to offences committed within the period

specified whenever the transactions may have taken place. The respondent has however contended that the period qualifies the word 'transactions' and that this was not only clear from the language of the statutory provisions but also supported by authority.

20. The Court held that Section 3(2) related to the transaction 'and, therefore, Special Court was competent to decide'. In the present case, we are not concerned with the provisions of any such enactment. Here is a complaint under Section 138 of the Negotiable Instrument Act filed before an ordinary Criminal Court/Magistrate. therefore, the governing section would be Section 138 of the Negotiable Instrument Act which deals with 'offence' and not 'transaction' . It is held in number of cases that the cause of action for filing of the complaint arise only after the notice of dishonour of the cheque is given and payment is not made within 15 days of the receipt of the said notice. therefore, date on which cheques were handed over would have no bearing and it is only when the cheque is presented for payment and is dishonoured and even after notice of dishonour is given and payment is not made by the drawer of the cheque within 15 days of the receipt of this notice, cause of action for filing of complaint would arise. In the instant case when the cheque was presented and the notice of dishonour was given the company had already been wound up. In para-13 of the complaint, the complainant alleges as under:

13. That the complainant submits that the accused company being the drawer of the cheques in question has committed an offence in law as defined by Section 138 of the Negotiable Instrument Act. The second and third accused are the persons in charge of the day to day affairs and conduct of the business of the company. The cheques in question were issued at their instance even though they knew that they did not have sufficient funds in their account to honour their commitments and were aware of the fact that the cheques under reference shall not be honoured. The accused with the mala fide intention of cheating the complainant out of its money and property, deliberately and intentionally issued the cheques and gave mandate to the complainant company to present and represent the same for encashment and thus played fraud upon the complainant company. The intention of the accused has at all times been to cause harmful loss



to the complainant company and wrongful gain for themselves.

21. On the aforesaid averments, complaint under Section 138 of the Negotiable Instrument Act cannot be filed as on the date of presentation of the cheque the company was in liquidation and cannot be stated to have committed any offence. Even second and third accused (petitioners herein) were not the in charge of the day to day affairs and conduct of the business of the company on that date. No doubt there are allegations of cheating as well and the complaint is under Section 420 read with Section 120B of the IPC as well. It would have reference to the date when the cheques were issued with intent to cheat and complaint to that extent may be maintainable if prima facie case under these provisions is made out. However, the summoning orders dated 29.7.2000 would show that the cognizance of the alleged offence is taken only after Section 138 of the Negotiable Instrument Act and not under Section 420 read with Section 120-B of the IPC. Since complaint under Section 138 of the Negotiable Instrument Act is not maintainable if filed after the winding up of the company, summoning order issued is bad in law.

22. The petition is accordingly allowed and the summoning order is set-aside. The complaint would, thus, warrant dismissal and it is ordered to be dismissed.

No costs.

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