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

+ CRL.M.C. 1648/2011 & Crl.M.A.No.6036/2011(Stay)

% *Judgment reserved on: 26th March, 2012*
Judgment delivered on: 03rd July, 2012.

FOUR SEASONS ENERGY VENTURES
PVT LTD & ORS ..... Petitioners
Through: Mr. Kailash Vasudev, Sr. Adv. with Mr. Girish Ananthamurthy, Mr. Sanjay K. Shandilya and Mr. Chandrase Karan, Advs.

versus

STATE OF NCT OF DELHI & ANR …….Respondents
Through: Ms.Rajdipa Behura, APP for State/R1.
Mr.Tanveer Ahmed Mir, Mr.Manish Kaushik and Mr.Vivek Singh, Advs. for R-2.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Vide the present petition, the petitioner is seeking quashing of the complaint filed by the respondent No. 2 for the offence punishable under Section 138 of the Negotiable Instruments Act, for the reasons that the said compliant is not maintainable as the cheque in question, presented and was dishonoured, was issued towards Security and not towards any lawful outstanding debt or dues.

2. The brief facts of the case are that the petitioner No.1 and

respondent No. 2 entered into an agreement dated 19.02.2010, in respect of supply of Iron-ore to one M/s Glencore International A.G., a company in Switzerland. As per the agreed terms, the petitioners with a covering letter, contemporaneously executed three documents in favour of respondent No. 2, wherein, it was specifically mentioned that the three documents were being executed by the petitioners as Security for Mobilisation Advance. The details of the three documents executed by the petitioners are as under:-

A	**Promissory Note dated 19.02.2010 for Rs.2.50Crores;**
B	**Cheque bearing No. 909722, dated 19.02.2010 for Rs.2.50Crores; and**
C	**Bank Guarantee dated 19.02.2010 for Rs.1.25Crores.**

3. The respondent No. 3 on receipt of Security Documents i.e. Cheque, Promissory Note and Bank Guarantee from the petitioners and got released Rs.2.50Crores from its banker in favour of the petitioner on 22.03.2010. The respondent No. 2 presented the Cheque bearing 909722 dated 19.02.2010 for a sum of Rs.2.50Crores.

4. The respondent No. 2 received a Memo dated 08.08.2010 from its Bankers with the endorsement "Exceed Arrangements". The respondent No. 2, allegedly got issued Notice dated 26.08.2010 to the petitioners, which was dispatched on 27.08.2010.

5. Mr. Kailash Vasudev, learned Sr. Advocate appearing for the petitioners submitted that the aforementioned legal notice was duly

served upon the petitioners on 31.08.2010, thereafter, the respondent filed a complaint under Section 138 Negotiable Instruments Act in the court of learned CMM, Tis Hazari Courts, Delhi, vide CCNo. 648/RN/10. The trial court took cognizance on 16.11.2010, after considering the Pre-summoning-evidence of the complainant/ respondent No. 2 and issued summons to the petitioners.

6. On 09.02.2011, the petitioners appeared before the trial court through counsel, when the matter was adjourned to 06.07.2011 for appearance of the petitioners, framing of notice and recording of plea of defence, if any.

7. Ld. Sr. counsel submitted that the petitioners are aggrieved by the aforesaid complaint, hence, filed the instant petition on the ground that the aforesaid cheque was issued as a Security only and not towards any lawful debts or dues. To strengthen his arguments, learned counsel has relied upon a case of ***M.S. Narayana Menon @ Mani v. State of Kerala and Anr. AIR 2006 SCC 3366***, wherein, the Apex court has observed as under :-

> *"57. We in the facts and circumstances of this case need not go into the question as to whether even if the prosecution fails to prove that a large portion of the amount claimed to be a part of debt was not owing and due to the complainant by the accused and only because he has issued a cheque for a higher amount, he would be convicted if it is held that existence of debt in respect of large part of the said amount has not been proved. The Appellant clearly said that*

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

8. In another case of ***Sudhir Kumar Bhalla v. Jagdish Chand and Ors (2008) 7 SCC 137***, the Apex court has observed as under :-

"22. On examination of the above-stated findings of the learned Single Judge in the judgment impugned before us, we find that the learned Single Judge has not addressed himself on the legal question raised before him by the appellant that the criminal liability of the appellant under the provisions of Section 138 of the Act are attracted only on account of the dishonour of the cheques issued in discharge of liability or debt, but not on account of issuance of security cheques. The learned Single Judge has also not given cogent, satisfactory and convincing reasons for disbelieving and discarding the pre-charge evidence of the appellant corroborated by the evidence of the expert opinion in regard to the interpolation in and fabrication of the cheques by adding one more figure '0' to make Rs. 30,000/- to Rs. 3,00,000/- and similarly adding one more figure '0' to make Rs. 40,000/- to Rs. 4,00,000/-."

9. Learned counsel for the petitioner further refers to a judgment passed by Bombay High Court in ***Joseph Vilangadan V. Phenomenal***

Health Care Services Ltd. & Anr. in Criminal Writ Petition No. 2243 of 2009, wherein it was recorded as under :-

> *"11 The issue as regards the coextensive liability of the guarantor and the principal debtor, in our view, is totally out of the purview of Section 138 of the Act, neither the same calls for any discussion therein. The language of the statute depicts the intent of the lawmakers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matte of application of the provisions of Section 138 of the or embargo in the matter of application of the provisions of Section 138 of the Act. "Any cheque" and "other liability" are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the statute. Any contra interpretation would defeat the intent of the legislature. The High Court, it seems, got carried away by the issue of guarantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act. The judgments recorded in the order of the High Court do not have any relevant in the contextual facts and the same thus do not lend any assistance to the contentions raised by the respondents."*

10. To sum up his arguments, Ld. Sr. counsel submitted that the law has been settled by judgments referred above that if a cheque has been issued just for security, and on presentation, if bounced, in that

eventuality, the drawer of the cheque can be held liable under Section 138 read with Section 141 of Negotiable Instruments Act. Therefore, the instant petition deserves to be allowed.

11. On the other hand, learned counsel for the respondent has submitted that the relief sought by the petitioners is not maintainable as the petitioners has not challenged the summoning order dated 16.11.2010.

12. The learned counsel further submitted that the cheque in question was initially issued for a Security, since the petitioner did not pay the enforceable debt, in that eventuality it did not remain as Security and it became the cheque for the enforceable debt due to the petitioners.

13. It is further submitted that as per Section 4 of the Evidence Act, the petitioner has to dis-approve the evidence led by the respondent No. 2, and in the absence of that, the present case is an abuse of power.

14. The petitioner issued the cheque in question because of the fact that, if the petitioner would not be able to pay his dues, the said cheque can be used for the enforceable debt, therefore, the respondent rightly presented the said Cheque in the bank. On being dishounoured, he issued legal notice and the petitioners were duty bound to settle the amount, failing which, they are responsible for the offence punishable under Section 138 of Negotiable Instruments Act.

15. It is further submitted that the petitioners have to prove in the trial, that he did not owe any dues towards respondent No. 2, therefore,

at this stage, the instant petition is pre-matured.

16. To strengthen his arguments, learned counsel for respondent has relied upon a case of ***M.S. Narayana Menon(supra)***, wherein, it has been held as under :-

> *"28. In view the aforementioned backdrop of events, the questions of law which had been raised before us will have to be considered. Before, we advert to the said questions, we may notice the provisions of Sections 118(a) and 139 of the Act which read 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, indorsed, negotiated or transferred for consideration.*
>
> *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".*

17. In another case of ***I.C.D.S. Ltd. V. Beena Shabeer and Anr. AIR 2002 SC 3014***, it has been held as under:-

> *"3. It is on the basis of the provision as above, the High Court came to a conclusion when a cheque was issued as security, no*

complaint will lie under Section 138 of the Act since the cheque issued cannot be said to be for the purpose of discharging any debt or liability: In justification of the said conclusion the High Court records the following reasons:
"Reading of the above Section would make it clear that issuance of a cheque must be for payment of amount of money from out of the account. In the case of a guarantor or surety, even if a cheque is issued, that cannot be said to be for immediate payment of money: Section 138 of the Act further says that issuance of cheque to another persons is towards discharge, in whole or in part of any debt or other liability."

5. Having, however, the support of Andhra Pradesh High Court judgment, the Kerala High Court in Sreenivasan (supra) observed:

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

8. The High Court, as noticed above, did allow the Petition upon a categorical finding that being a cheque from the guarantor it could not be said to have been issued for the purpose of discharging any debt or liability and the complaint under Section 138 of the Negotiable Instruments Act, 1881, thus cannot be maintained.

9. As noticed hereinbefore the principal reason for quashing of the proceeding as also the complaint by the High Court was by reason of the fact that Section 138 of the Act provides for issuance of a cheque to another person towards the discharge in whole or in part of any or liability and on the factual context, the High Court came to a conclusion that issuance of the cheque cannot be co-related for the purpose of discharging any debt or liability and as such complaint under Section 138 cannot be maintainable.

10. The language, however, has been rather specific as regards the intent of the legislature. The commencement of the Section stands with the words "Where any cheque" The above noted three words are of excrement significance, in particular, by reason of the user of the word "any"--the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment."

18. Learned counsel for respondent further refers to a case of ***MMTC Ltd. and Anr. V. Medchi Chemicals & Pharma (P) Ltd. and Anr.***, wherein, it was held as under :-

> *8. In this case the respondents have taken identical contentions in their petitions to quash the complaints viz. that the complaints filed by Mr. Lakshman Goel were not maintainable and that the cheques were not given for any debt or liability. It was pointed out to the learned Judge that between the same parties and on identical facts, it had already been held that as case for discharge was made our. Yet the learned Judge chose to ignore those findings and proceeded to hold to the contrary.*
>
> *13. The learned Judge has next gone into facts and arrived at a conclusion that the cheques were issued as security and not for any debt or liability existing on the date they were issued. In so doing the learned Judge has ignored well settled law that the power of quashing criminal proceedings should be exercised very stringently and with circumspection. It is settled law that at this stage the Court is not justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. The inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice. At this stage the court could not have gone into .merits and or come to conclusion that there was no existing debt or liability.*
>
> *17. There is therefore no requirement that the Complainant must specifically allege in*

the complaint that there was a subsisting liability. The burden of proving that there was no existing debtor liability was on the respondents. This they have to discharge in the trial. At this stage, merely on basis of averments in the Petitions filed by them the High Court could not have concluded that there was no existing debt or liability.

19. Learned counsel further relies upon a case of Lok Housing & Constructions Ltd. V. Raghupati Leasing & Finance Ltd., wherein, it was observed as under :-

"10. Learned counsel for the petitioners also argued that the cheque in question was not given for discharge, in the whole or in part of any debt or other liability. It was given as collateral security, and on the basis of such a dishonoured cheque, proceedings under Section 138 of N.I. Act are not maintainable. In support of his submission, reliance was placed on the decision of the Gujarat High Court in Om Prakash v. Gurucharan Singh 1997 (3) Crimes 433. The answer to my mind is simple. Section 139 of N.I. Act states that it shall be presumed unless contrary is proved that the holder of a cheque received the cheque of the nature referred to in the Section 138 of the discharge in whole or in part of any debt or other liability. The Section raises presumption that cheque was drawn for consideration. This issue was also settled by several authoritative pronouncements of the Supreme Court in Maruti Udyog Ltd. v. Narender and Ors. MANU/SC/0803/1999 : (1999)1SCC113 , and M.M.T.C. Ltd. v. Medchl Chemicals & Pharma (P) Ltd.,

MANU/SC/0728/2001 : 2002CriLJ266 , wherein it was held:

"15. A similar view has been taken by this Court in the case of K.N. Beena v. Muniyappan reported in 2001(7) Scale 331, wherein again it has been held that under Section 139 of the Negotiable Instruments Act the Court has to presume, in complaint under Section 138, that the cheque had been issued for a debt or liability.

16. There is Therefore no requirement that the Complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on basis of averments in the Petitions filed by them the High Court could not have concluded that there was no existing debt or liability."

The Apex Court rejected the similar contention in recent case in A.V. Murthy v. B.S. Nagabasayanna, MANU/SC/0089/2002 : 2002CriLJ1479 and it was held:

"This is not a case where the cheque was drawn in respect of a debt or liability, which was completely barred from being enforced under law. If for example, the cheque was drawn in respect of a debt or liability payable under a wagering contract, it could have been said that that debt or liability is not legally enforceable as it is a claim, which is prohibited under law. This case is not a case of that type. But we are certain that at this stage of the proceedings, to say that the cheque drawn by the respondent

was in respect of a debt or liability, which was not legally enforceable, was clearly illegal and erroneous."

20. In another case of ***Rajesh Kumar Gulati V. National Agricultural Co-operative Marketing Federation of India Ltd.***, it was held as under:-

"20. So, according to this reply sent by the petitioner, execution of the cheques in question has nowhere been disputed and as per the reply of the petitioner, the cheques in question were issued being a collateral security. This question as to whether the cheques in question were only a collateral security or not, is a matter of evidence to be decided later on during the course of the trial. Moreover, petitioner has no where taken up this plea in his reply that he was neither in charge of or responsible to the company for the conduct of the business of accused company."

21. In another case of ***K.S. Bakshi and Another V. State 2008 (2) JCC (NI) 267*** and Another, decided by this court, it has been observed as under:-

"5. On 10.6.1989, a MOU was entered into between the respondent No. 2, Rakesh Bedi and Ansal Properties and Industries Ltd. (hereinafter referred to as confirming party). As per the said MOU the confirming party was to construct a group housing building on the said property. In pursuance of said MOU a sum of Rs. 11.5 lacs was received by the owners from the confirming party. However, the aforesaid MOU was

cancelled by mutual agreement between the parties to the MOU.

6. Thereafter, on 17.1.2001, a collaboration agreement was entered into between the respondent No. 2, Rakesh Bedi, the confirming party and Ansal Buildwell Co. As per the agreement, the Ansal Buildwell Co. had to construct the multi-storeyed residential building on the said property.

7. Clause V of the aforesaid agreement around which controversy in the present petition revolves stipulated that as a security for due performance of agreement, a sum of Rs. 138 lacs was to be deposited by the Ansal Buildwell Co. with the respondent No. 2 and other owner of the said property.

8. Clause V reads as under:

V. Security Deposit

(a) The Builder shall deposit with the owners a total sum of Rs. 138 lakhs towards security for due compliance of the terms of this Agreement by the Builder. A sum of Rs. 11.5 lakhs has already been received by the owners from the Confirming Party, receipt whereof the owners hereby acknowledges. The Builder shall return the said sum of Rs. 11.5 lakhs on behalf of the owners, and the balance sum of Rs. 126.5 lakhs shall be paid by the Builder to the owners in 30 equal monthly Installments as per Annexure-II hereto.

(b) Payment of the said cheques on the due dates is the essence of the contract. In the event any cheque is dishonoured for any

reason, the Builder shall replace the cheque with a demand draft within 7 days of the receipt of an intimation from the owners failing which the owners shall be entitled to take recourse to any right or remedy available to or accruing to the owners by such dishonour.

(c) The said deposit shall not carry any interest and shall be refunded by the owners to the Builder upon the Builder delivering to the owners the possession of their areas in the Building.

(d) That upon failure of the owners to refund the Security deposit the Builder shall have full authority and power to adjust the same by reduction of the allocation of the area of the owners calculated on price prevalent and mutually acceptable as on the date of such default.

(e) That till the refund/adjustment of the entire security deposit in the manner stated above the Builder shall have a lien over 50% out of the owners' areas in the Building and the owners shall not sell/transfer/lease or deal with the same till the deposit is refunded to the Builder or recovered by the Builder by making adjustment out of the owners' share. Delay in such refund will attract compound interest @ 18% per annum from the date the refund is due.

13. During hearing of the instant petition, the learned Counsel for the petitioners submitted that the sine qua non for an action under Section 138 of the N.I. Act is that the dishonoured cheque has been issued towards discharge of a "debt or other

liability". That the expression "other liability" envisaged under Section 138 is akin to a debt or money owed. Learned Counsel elaborated that the Section 118(a) and 139 of the N.I. Act raise a statutory presumption that the dishonoured cheque must have been drawn/made for a consideration, meaning thereby, that there must be some money due to the drawee from the drawer in lieu of which cheque was drawn. That the cheques in question cannot be taken to be issued in lieu of any money due to the complainant for the reason amount covered by the cheques was to be returned by the complainant to the accused company on the due performance of the agreement.

14. That the Clause V of the agreement evidences that the cheques in question were issued as security for the due performance of the agreement. That from the fact that the amount covered by cheques in question was to be returned by the complainant/respondent No. 2 to the accused company on the due performance of the agreement, it is clear that cheques in question were neither issued towards discharge of a debt nor because accused company owed any money to the complainant. Counsel further relied upon judgment of the Supreme Court in the decision reported as Narayana Menon v. State of Kerala MANU/SC/2881/2006 : 2006CriLJ4607 in support of his contention that where a cheque is given only as a security, the provisions of Section 138 of the N.I. Act are not at all attracted.

17. At the outset, I note that the expression "other liability" cannot be construed as akin to the preceding word "debt". The expression "other liability" can take its meaning and colour from the preceding word "debt" only if the rule of ejusdem generis is held to be applicable.

18. The rule of ejusdem generis is applicable when words pertaining to a class, category or genus are followed by general words. In such a case, the general words take their meaning from the preceding particular words because the legislature by using the particular words of a distinct genus has shown its intention to that effect. Thus, before the rule of ejusdem generis is applied it is a pre-requisite that there must be a distinct genus, which must comprise of more than one species. Consequently, if a general word follows only one particular word, that single particular word does not constitute a distinct genus and Therefore rule of ejusdem generis cannot be applied in such a case.

*20. The Supreme Court had the occasion to consider the ambit of the expression "other liability" in the decision reported as I.C.D.S. Ltd. v. Beemna Shabeer and **Anr**. MANU/SC/0669/2002 : 2002CriLJ3935 . In the said case, the issue under consideration was as to the maintainability of the proceeding under Section 138 of the N.I. Act vis-a-vis a guarantor. In para 10 and 11 of the said judgment, it was observed as under:*

10. The language, however, has been rather specific as regards the intent of the

legislature. The commencement of the Section stands with the words "Where any cheque" The above noted three words are of excrement significance, in particular, by reason of the user of the word "any"--the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favor of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment.

11. The issue as regards the co-extensive liability of the guarantor and the principle debtor, in our view, is totally out of the purview of Section 138 of the Act, neither the same calls for any discussion therein. The language of the Statute depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favor of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act: 'Any cheque' and 'other liability' are the two key expressions which stands as

clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the Statute. Any contra interpretation would defeat the intent of the legislature. The High Court, it seems, got carried away by the issue of grantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act. The judgments recorded in the order of the High Court do not have any relevance in the contextual facts and the same thus does not lend any assistance to the contentions raised by the respondents.

23. Thus, if given its full meaning, the expression "other liability" within its broad sweep would include any "liability to pay".

25. The doctrine of fundamental terms of a contract as enunciated in the decision reported as Suisse Atlantique Societe D'Armement Maritime S.A. v. N.V. Rotterdamche Kolen Centrale (1967) 1 AC 361 is as under:

A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract so that any breach of that term may at once and without reference to the facts and circumstances be regarded by the innocent party as a fundamental breach and thus is conferred on him the alternative remedies at his option.

29. Under the agreement, the accused company had a liability to pay Rs. 138 lakhs

to the complainant and other owner of the said property and discharge of this liability was treated fundamental to the agreement, non-performance thereof would entitle the complainant and the other owner to rescind the contract.

30. In the instant case, money in sum of Rs. 126.5 lakhs was to be paid by the accused company to the complainant and other owner. It is irrelevant whether such money was to be retained and returned in future on due performance of the agreement. What is relevant for purposes of Section 138 of the NI Act is the fact that at the time of issuance of cheques the accused company had a liability to pay money to the complainant and other owner of the said property.

31. A distinction has to be drawn between a cheque issued as security and a cheque issued towards discharge of a liability to pay notwithstanding that the money is by way of security for due performance of the contract. A cheque given as security is not to be encased in presenti. It becomes enforceable if an obligation is future is not enforced. It is not tendered in discharge of a liability which has accrued.

32. Thus where a cheque forms part of a consideration under a contract it is paid towards a liability.

33. Section 2(d) of the Indian Contract Act, 1972 defines consideration as under:

When at the desire of the promisor, the promise or any other person has done or abstained from doing, or does or abstains

from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

34. Jural concept of consideration is as:

A valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.

35. The jural concept of the consideration requires that something of value must be given, and that this can either be a benefit to the promisor or some detriment to the promisee. In the decisions reported as Chidambara Iyer v. Renga Iyer MANU/SC/0279/1965 : [1966]1SCR168 and Sonia Bhatia v. State of U.P. AIR 1981 SC 1271, the Supreme Court compared the jural concept of the consideration and Section 2(d) of the Contract Act and held the two as being practically the same. It was held that the word 'valuable' in civil law could be negative or positive.

36. Thus, "consideration" is a very wide term and is not restricted to monetary benefit. Consideration does not necessarily means money in return of money or money in lieu of goods or service. Any benefit or detriment of some value can be a consideration.

37. In the instant case, the complainant and the other owner of the said property blocked their asset (property) till the period of

completion of construction as provided in the agreement. The promise/act of the complainant and other owner of the said property of blocking their asset for a considerable period can very well be held to be a consideration within the meaning of Section 2(d) of the Indian Contract Act. Thus all reciprocal obligations of the builder would also be a consideration for the contract.

38. In the decision reported as Narayana Menon v. State of Kerala MANU/SC/2881/2006 : 2006CriLJ4607 relied upon by the counsel for the petitioners, the Supreme Court was considering the nature and extent of statutory presumption provided under Section 118(a) and 139 of the N.I. Act. The observations relied upon the counsel reads as under:

57. We in the facts and circumstances of this case need not go into the question as to whether even if the prosecution fails to prove that a large portion of the amount claimed to be part of debt was not owing and due to the complainant by the accused and only because he has issued a cheque for a higher amount, he would be convicted if it is held that existence of debt in respect of large part of the said amount has not been proved. The Appellant clearly said that nothing is due and the cheque was issued by way of security. The said defense has been accepted as probable. If the defense is acceptable as probable the cheque Therefore cannot be held to have been issued on discharge of the debt as, for example, if a cheque is issued for security or

any other purpose the same would not come within the purview of Section 138 of the Act.

39. The afore-noted observations are emphasised are clarificatory in nature."

22. I have heard learned counsels for the parties.

23. On perusal of Section 118(a) and Section 139 of the Act provides 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, indorsed, negotiated or transferred for consideration 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.

24. On reading of the Section 138 of the Act, it would make it clear that issuance of a cheque must be for payment of amount of money from out of the account. In the case of a guarantor or surety, even if a cheque is issued, that cannot be said to be for immediate payment of money: Section 138 of the Act further says that issuance of cheque to another persons is towards discharge, in whole or in part of any debt or other liability."

25. The language, however, has been rather specific as regards the intent of the legislature. The commencement of the Section stands with the words "Where any cheque," the above noted three words are of excrement significance, in particular, by reason of the user of the word "any"--the first three words suggest that in fact for whatever reason if a

cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of **any debt or other liability**, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid.

26. It is settled law that at this stage the Court is not justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. The inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice. At this stage the court should not go into merits and or come to conclusion that there was no existing debt or liability.

27. In view of the above discussion, my opinion matched with the law as has been settled in a judgment delivered by Gujarat High Court in the case of ***Om Prakash v. Gurucharan Singh (supra)*** wherein, it has been held that 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.

28. The case of the petitioner is not that they have no debts against the respondent and the cheque in question was issued only for security; the case is otherwise, they failed to discharge their enforceable debt.

The respondent presented the same and on dishonor of the said cheque, he filed the complaint under Section 138 of NI Act,

29. Therefore, in view of the legal position discussed above and on consideration of the submissions of the learned counsels for the parties, I do not find any merits in the instant petition.

30. Accordingly, the instant petition is dismissed with no orders as to costs.

31. Consequently interim order passed vide Crl. M.A. 6036/2011 is vacated and dismissed accordingly.

SURESH KAIT, J

03rd JULY, 2012
j