CASE NO.:
Appeal (crl.) of 2003

PETITIONER:
Goaplast Pvt. Ltd.

RESPONDENT:
Shri Chico Ursula D'Souza & Anr.

DATE OF JUDGMENT: 07/03/2003

BENCH:
M.B. SHAH & ARUN KUMAR

JUDGMENT:

JUDGMENT

(Arising out of SLP (Crl.) 2742/02)

With Criminal Appeals No._____of 2003
(Arising out of SLP(Crl.) No.3844/2002, SLP(Crl.) No.3907/2002, SLP(Crl.) No.3937/2002, SLP(Crl.) 3940/2002, SLP(Crl.) No.3944/2002 and SLP(Crl.)No.3950/2002)_____

ARUN KUMAR, J.

Leave granted in all the appeals.

These appeals involve a pure question of law as to applicability of Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "Act") to a case in which a person issuing a post dated cheque stops its payment by issuing instructions to the drawee bank before the due date of payment. The facts involved in all the appeals are almost similar except variations in dates and amounts of cheques involved in each case. For purpose of this judgment we have taken the facts in Criminal Appeal No._____/2003(arising out of SLP(Crl.)2742/2002. The facts are in a very narrow compass. Respondent No.1 addressed a letter to the appellant on 20th July, 1992 enclosing therewith ten post-dated cheques, each for an amount of Rs.40,000/- by way of refund of amount due from him to the appellant. The two cheques subject matter of the present appeal were dated 10.12.1994 and 10.4.1995. On 12th February, 1993 respondent No.1 again wrote to the appellant denying his liability to pay the amount under the aforesaid cheques on the ground that they were issued under a mistaken belief of liability and asked the appellant to treat the cheques as invalid. Respondent No.1 also wrote to the drawee Bank on 15th March, 1993 to stop payment of the aforesaid post-dated cheques issued by him. On 10th May, 1995, the appellant presented the two cheques dated 10.12.1994 and 10.4.1995 for payment but the said cheques were returned unpaid with the endorsement "present again" on 12.5.1995. On 24th May, 1995 the appellant issued notice under Section 138B of the Act demanding payment of the amount of Rs.80,000/- i.e. the total amount of the two cheques. On failure of the respondent No.1 to make the payment in pursuance to the notice, the appellant filed a complaint under Section 138 of the Act on 7th July, 1995. The concerned Magistrate dismissed the complaint vide

order dated 18th October, 1999, taking the view that Section 138 of the Act was not attracted in these facts. The appellant filed an appeal against the said order of the Magistrate. The Goa Bench of the Bombay High Court dismissed the appeal on 16th March, 2002 upholding the view of the learned Judicial Magistrate. Both the courts primarily based their decision on a misreading of the judgment of this Court in Anil Kumar Sawhney vs. Gulshan Rai [1993 (4) SCC 424]. They took the view that the accused had only countermanded a bill of exchange on the date the accused wrote the letter about stopping payment of the cheques. Before the due date the instruments were merely bills of exchange and not cheques. Therefore, no offence could be said to have been made out under Section 138 of the Act. According to the courts below the payment had been stopped before the cheques became payable.

The learned counsel for the appellant has submitted that mere writing of letter to the Bank stopping payment of the post-dated cheques does not take the case out of the purview of the Act. He has invited our attention to the object behind the provision contained in Chapter XVII of the Act. For appreciating the issue involved in the present case, it is necessary to refer to the object behind introduction of Chapter XVII containing Sections 138 to 142. This Chapter was introduced in the Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (Acts 66 of 1998) with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions and in order to promote efficacy of banking operations. With the policy of liberalisation adopted by the country which brought about increase in international trade and commerce, it became necessary to inculcate faith in banking. World trade is carried through banking operations rather than cash transactions. The amendment was intended to create an atmosphere of faith and reliance on banking system. Therefore, while considering the question of applicability of Section 138 of the Act to a situation presented by the facts of the present case, it is necessary to keep the objects of the legislation in mind. If a party is allowed to use a cheque as a mode of deferred payment and the payee of the cheque on the faith that he will get his payment on the due date accepts such deferred payment by way of cheque, he should not normally suffer on account of non payment. The faith, which the legislature has desired that such instruments should inspire in commercial transactions would be completely lost if parties are as a matter of routine allowed to interdict payment by issuing instruction to banks to stop payment of cheques. In today’s world where use of cash in day to day life is almost getting extinct and people are using negotiable instruments in commercial transactions and plastic money for their daily needs as consumers, it is all the more necessary that people’s faith in such instruments should be strengthened rather than weakened. Provisions contained in Sections 138 to 142 of the Act are intended to discourage people from not honouring their commitments by way of payment through cheques. It is desirable that the court should ban in favour of an interpretation which serves the object of the statute. The penal provisions contained in Sections 138 to 142 of the Act are intended to ensure that obligations undertaken by issuing cheques as a mode of payment are honoured. A post-dated cheque will lose its credibility and accepatibility if its payment can be stopped routinely. A cheque is a well recognized mode of payment and post-dated cheques are often used in various

transactions in daily life. The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of post-dated cheque. If stoppage of payment of a post-dated cheque is permitted to take the case out of the purview of Seciton 138 of the Act, it will amount to allowing the party to take advantage of his own wrong.

The present case was decided by courts below mainly on the basis of the judgment of this Court in Sawhney's case (supra). In that case this court noted that a cheque under Section 6 of the Act is a bill of exchange drawn on a banker and is payable on demand. From this it follows that a bill of exchange though drawn on a banker, if not payable on demand is not a cheque. A post-dated cheque is only a bill of exchange when it is written or drawn. It becomes a cheque when it is payble on demand. It is not payable till the date which is shown on the face of the document. It will become a cheque only on the date shown on it, prior to that it remains a bill of exchange. In Sawhney's case this Court was concerned with the question of limitation as provided in proviso (a) to Section 138 of the Act. This proviso requires that a cheque should be 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. The cheques in question in Sawhney's case (supra) were dated 15.12.1991 and 15.5.1991 totalling an amount of Rs.5,00,000/-. These cheques were returned by the Banker with the endorsement "not arranged for no fund". The payee thereafter issued notice as contemplated under Section 138 of the Act followed by complaint under Section 138 being filed in the Court of the Chief Judicial Magistrate at Karnal. It appears from the judgment that these cheques were handed over to the payee in a settlement arrived at in a court case on 5th March, 1990. The question for consideration was as to the date on which the cheques in question could be taken as drawn, in other words, what is the starting point of limitation of six months provided in proviso (a) to Section 138 of the Act. According to the drawer the cheques were drawn in March, 1990 when they were written and handed over to the payee. The cheques were post-dated and bore the dates mentioned hereinbefore. Proviso (a) to Section 138 uses the words "the date on which it is drawn". The cheques were drawn in March, 1990 and were presented for encashment in the year 1991 which was beyond the period of six months provided in proviso (a) to Section 138 and therefore, no offence was said to be made out under Section 138. Keeping in view the object of Section 138 i.e. to enhance the acceptability of cheques by making the drawer liable for penalty in case the cheque is dishonoured, it was felt that drawer of a post-dated cheque could defeat Section 138 of the Act by showing a date beyond six months of its delivery. An interpretation which supports the object of the provision had to be adopted. Therefore, it was held that a post dated cheque for purpose of clause (a) of the provision to section 138 has to be considered to have been drawn on the date it bears. On the basis of Sections 5 and 6 of the Act, it was observed that "post-dated cheque is only a bill of exchange when it is written or drawn, it becomes a cheque when it is payable on demand. The post-dated cheque is not payable till the date which is shown on the face of the document. It will only become cheque on the date shown on it and prior to that it remains a bill of exchange under Section 5 of the Act. As a

bill of exchange a post-dated cheque remains negotiable but it will not become a cheque till the date when it becomes payable on demand." The ratio of the decision in Sawhney's case is found in the following words:

"One of the main ingredients of the offence under Section 138 of the Act is, the return of the cheque by the bank unpaid. Till the time the cheque is returned by the bank unpaid, no offence under Section 138 is made out. A postdated cheque cannot be presented before the bank and as such the question of its return would not arise. It is only when the postdated cheque becomes a "cheque", with effect from the date shown on the face of the said cheque, the provisions of Section 138 come into play. The net result is that a postdated cheque remains a bill of exchange till the date written on it. With effect from the date shown on the face of the said cheque it becomes a "cheque" under the Act and the provisions of Section 138(a) would squarely be attracted. In the present case the postdated cheques were drwn in March 1990 but they became "cheques" in the year 1991 on the dates shown therein. The period of six months, therefore, has to be reckoned from the dates mentioned on the face of the cheques."

From the above it will be seen that in Sawhney's case the point for consideration was the date from which the period of six months provided in proviso (a) to Section 138 should be counted. The Court clearly held that a post-dated cheque becomes a cheque only on the date it bears when it becomes payable on demand, and therefore, limitation will start from that date.

In the present case the issue is very different. The issue is regarding payment of a post-dated cheque being countermanded before the date mentioned on the face of the cheque. For purpose of considering the issue, it is relevant to see Section 139 of the Act which creates a presumption in favour of the holder of a cheque. The said Section provides that "it shall be presumed that, 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, or any debt or other liability". Thus it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of

one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. This was the view taken by this Court in Modi Cements Ltd. vs. Kuchil Kumar Nandi [1998 (3) SCC 249]. On same facts is the decision of this Court in Ashok Yeshwant Badave vs. Surendra Madhavrao Nighojakar and another [2001 (3) SCC 726]. The decision in Modi's case overruled an earlier decision of this Court in Electronics Trade & Technology Development Corpon. Ltd. vs. Indian Technologists & Engineers [AIR 1996 SC 2339] which had taken a contrary view. We are in respectful agreement with the view taken in Modi's case. The said view is in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138 of the Act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date.

NEPC Micon Ltd. & Ors. Vs. Magma Leasing Ltd. [(1999) 4 SCC 253] was a case in which the drawer of the cheque closed the account in the Bank before presentation of the cheque and the cheque when presented was returned by the Bank with the remark "account closed". The question arose whether in this situation Section 138 of the Act would be attracted. It was contended on behalf of the appellant that Section 138 being a penal provision it should be strictly interpreted. Section 138 according to the appellant applied only in two situations i.e. either because the money standing to the credit of the account of the drawer is insufficient to honour the cheque or it exceeds the amount arranged to be paid from that account by an agreement made with the bank. Rejecting the contentions raised on behalf of the accused this Court held that return of a cheque on account of account being closed would be similar to a situation where the cheque is returned on account of insufficiency of funds in the account of the drawer of the cheque. Before one closes his account in the Bank he withdraws the entire amount standing to credit in the account. Withdrawal of the entire amount would therefore mean that there were no funds in the account to honour the cheque which squarely brings the case within Section 138 of the Act. On the question of strict interpretation of penal provisions raised on behalf of the accused it was observed: "If the interpretation, which is sought for, were given, then it would only encourage, dishonest persons to issue cheques and before presentation of the cheques, close the account and thereby escape from the penal consequences of Section 138." Any interpretation which withdraws the life and blood of the provision and makes it ineffective and a dead letter, should be averted. It is the duty of the court to interpret the provision consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. The legislative purpose is to permit the efficacy of banking and of ensuring that in commercial or contractual transactions, cheques are not dishonoured and credibility in transacting business through banks is maintained. The Court relied upon its earlier

judgment in Modi Cement Ltd.(supra). We would like to quote the following observations t contained in NEPC Micon Ltd. & Ors. Vs. Magma Leasing Ltd. (supra).

"15. " In view of the aforesaid discussion we are of the opinion that even though section 138 is a penal statute, it is the duty of the court to interpret it consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. As stated above, Section 138 of the Act has created a contractual breach as an offence and the legislative purpose is to promote efficacy of banking and of ensuring that in commercial or contractual transactions cheques are not dishonoured and credibility in transacting business through cheques is maintained. The above interpretation would be in accordance with the principle of interpretation quoted above "brush away the cobweb varnish, and shew the transactions in their true light" (Wilmot, C.J.) or, (by Maxwell) "to carry out effectively the breach of the statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited." Hence, when the cheque is returned by a bank with an endorsement "account closed", it would amount to returning the cheque unpaid because "the amount of money standing to the credit of that account is insufficient to honour the cheque" as envisaged in Section 138 of the Act."

We are unable to agree with the reasoning adopted by the courts below. The impugned judgments of the High Court and the Judicial Magistrate, Ist Class, Panaji, Goa are set aside. We hold that Section 138 of the Negotiable Instruments Act will be attracted in the facts of the case. However, whether a case for punishment under that provision is made out, will depend on outcome of the trial. The cases are remanded to the concerned Judicial Magistrate for deciding the complaints filed by the appellant herein on merits in accordance with law. All the appeals are allowed. Nothing contained in this judgment be taken as expression of opinion on merits.