Sita Ram Singhania Vs State of Gujarat

Court: Gujarat High Court

Date of Decision: July 13, 2004

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 18, 20, 80
Companies Act, 1956 â€" Section 442, 446, 446(1), 446(2)
Contract Act, 1872 â€" Section 42, 49
Criminal Procedure Code, 1973 (CrPC) â€" Section 177, 178(D), 18, 181(4), 20
Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 â€" Section 7
Negotiable Instruments Act, 1881 (NI) â€" Section 138, 141, 141, 142, 30
Penal Code, 1860 (IPC) â€" Section 420
Sick Industrial Companies (Special Provisions) Act, 1985 â€" Section 15, 20, 20(1), 22(1)

Citation: (2005) 3 CivCC 282 : (2005) 2 GLR 1298 : (2005) 3 RCR(Criminal) 546

Hon'ble Judges: C.K. Buch, J

Bench: Single Bench

Advocate: A.D. Shah, for the Appellant; K.T. Dave, LD APP for Respondent No. 1, K.S. Nanavati, LD and Prabhav A. Mehta, for Nanavati Associates, for the Respondent

Judgement

C.K. Buch, J.
The petitioners of both these Revision Applications are the accused of Criminal Case Nos.1947/95 and 1949/95, pending

in the Court of learned Judicial Magistrate First Class (4th Court) at Vadodara. The respondent no.2-Gujarat State Fertilizers Company Ltd.,

Vadodara (hereinafter referred to as "the GSFC") is the orig.complainant of the aforesaid criminal cases instituted for the offence punishable u/s

138 of the Negotiable Instruments Act, 1938 (hereinafter referred to as "the NI Act"). A criminal complaint came to be filed against four accused

persons. However, as the accused no.3 could not be served by the orig. complainant, he has been deleted from the complaint vide order dated

14th October, 2003, passed by the Court below Exh.49 submitted by the orig.complainant. The accused no.4 is Esslon Synthetics Ltd. and as per

the say of the complainant-GSFC, the accused no.1 was the Managing Director of the said company and the accused no.2 was the whole time

Director. After service of summons, the petitioners-accused nos.1 and 2 (hereinafter referred to as "the accused nos.1 and 2) submitted one

application on 12th February, 1996 at Exh.19 to drop the proceedings alleging that the Court of learned Judicial Magistrate First Class at

Vadodara, had no territorial jurisdiction to try the alleged offence. Hearing of the said application was fixed initially on 31st January, 1997. The

accused nos.1 and 2 had also submitted one more application referring Section 446(1) of the Companies Act, 1956 and prayed that the

proceedings before the Court in respect of criminal cases may not be proceeded with in view of the order of winding up dated 27th March, 1996

passed by the High Court of Allahabad and the appointment of Official Liquidator of the accused no.4-Company.

2. To appreciate the rival contentions and submissions placed before this Court, it is necessary to state facts in brief that has brought the

controversy before this Court. The accused no.4-Esslon Synthetics Ltd. is situated at New Delhi and the registered office of the said Company is

at Kanpur. The accused no.2 was the whole time Director and the accused no.1 was the Managing Director of the accused no.4-Company. The

accused no.4-Company was the customer of the GSFC and it was purchasing caprolactam, which is used for manufacturing synthetics. According

to the complainant-GSFC, normally the credit facility was being given to the accused no.4-Company and accordingly, the complainant had

supplied caprolactam to the accused no.4-Company during the period from March, 1995 to June, 1995 as per the lifting schedule decided and

order placed with the complainant. The complainant was despatching the material to the accused no.4-Company against the Post Date Cheques

(for short "PDCs") of specific amount on various dates. It is contended by the complainant that during the initial period of transaction with the

accused no.4-Company, the PDCs given by the accused nos.1 and 2 on behalf of the accused no.4-Company were honoured on presentation.

According to the complainant, the accused no.4-Company had issued four PDCs for purchase of caprolactam to the tune of Rs.92,82,172/-. The

said cheques on supply of material were deposited by the complainant-GSFC in its bank account with the ANZ Grindlays Bank at Connote Circle

Branch, New Delhi for clearing but the said PDCs were returned unpaid by the State Bank of India at Kasturba Gandhi Road Branch, New Delhi,

for the reason, ""Insufficient Fund"". The complainant received these cheques with the memo of the Bank on 10th July, 1995 and, therefore, the

complainant served a notice to the accused no.4-Company at Kanpur and Director at New Delhi, through their advocate on 24th July, 1995,

calling upon them to pay the entire sum with interest till that date. This notice has been posed as a statutory notice contemplated u/s 138 of the NI

Act. This notice was responded vide reply dated 5th August, 1995, indicating that the accused no.4-Company being a sick company has

approached BIFR and it was also indicated that the accused no.4-Company was going through a severe financial crunch. It was also mentioned in

the reply that there was no understanding between the accused no.4-Company and the complainant-GSFC as to presentation of the cheques on

3rd July, 4th July and 6th July, 1995 for realization and these cheques were not to be presented without the consent and it is alleged that the

complainant was fully aware that the cheques on presentation would never be honoured because of insufficiency of funds. The allegation of the

accused no.4-Company in its reply to the notice is that significant changes in the credit policy of the complainant had disturbed the day to day

functioning of the Company and consequently the same had affected the cash flaw and none of these situations was anticipated by the accused

no.4-Company. On the contrary, discontinuance in supply of raw material has severely distressed the operation of the accused no.4-Company and

presentation of cheques for realization was contrary to the understanding and was inappropriate. It is averred further by the advocate for the

accused no.4-Company in the said reply to the notice that, ""I have instructions to say that active dialogue is still going on between the Companies

on the question of supplies and the payment. The agreed arrangement of payment of 110% for every supply is just and fair. In fact, about 100 MT

of Caprolactam has been lifted under the above arrangement and the payment made for 110 MT. The excess has been adjusted by your clients,

but it seems no instructions have been given to you to the said effect."" It is not a matter of dispute that the transaction with the complainant has

occurred at New Delhi and the complainant-GSFC was having a bank account with the ANZ Grindlays Bank, Connote Circle Branch, New

Delhi. The accused no.4-Company was also having a bank account with State Bank of India, Kasturba Gandhi Road Branch, New Delhi.

3. After receipt of the reply to the notice, the complainant-GSFC filed a complaint in the Court of learned Judicial Magistrate First Class at

Vadodara on 7th September, 1995 and the learned Magistrate, ultimately, issued summons against the accused named in the complaint. As

mentioned earlier, the accused nos.1 and 2 submitted an application on 12th February, 1996 to drop the proceedings. The concerned learned

Magistrate after hearing the parties rejected the application u/s 446(1) of the Companies Act on 19th February, 2004 and similarly, the learned

Magistrate rejected the application for dropping the proceedings on account of want of jurisdiction on 19th February, 2004. The present Revision

Applications are moved against the orders passed below Exhs.19 and 20 on various grounds mentioned in para :2 of the memo of the both the

Revision Applications.

4. When both these Revision Applications were listed for admission hearing, the Court ordered for issuance of notice for final disposal and the

same was made returnable on 4th April, 2004 and as the learned counsel appearing for the parties have agreed to hear both these Revision

Applications finally, the Court issued Rule and the same has been waived by the otherside; and as the learned counsel appearing for the parties

have agreed to make their submissions in both these Revision Applications simultaneously, having similar set of facts and the law points involved,

these Revision Applications on consent are heard simultaneously and they are being disposed of by this common judgment.

5. Mr. A.D. Shah, learned counsel appearing for the petitioners, has firstly submitted that rejection of the application preferred u/s 446(1) of the

Companies Act is absolutely illegal and unwarranted in the facts and circumstances of the case because the provisions of Section 446(1) of the

Companies Act clearly provides that :

No suit or other legal proceedings shall be commenced or if pending on the date of winding up order shall be proceeded with against the

Company except by leave of the Court and subject to such terms as the Court may impose.

6. It is argued that the other legal proceedings are interpreted as including the criminal proceedings. It was clearly pointed out to the learned

Magistrate that the Company Court at Allahabad has passed the winding up order on 27th March, 1996 and it was also pointed out that the

accused no.4-Company had filed Reference u/s 15 of the SICA (Sick Industrial Companies Act) before the BIFR. Therefore, the learned

Magistrate ought to have stayed the proceedings; especially in view of the ratio of the decision in the case of Saurabh Soparkar v. Official

Liquidator, reported in 1998 (5) CLJ 100, wherein this Court through Justice S.D. Pandit, as he then was, has observed that :

Looking at the legislative history and the Scheme of the Indian Companies Act, particularly, the language of Section 446 read as a whole, it

appears to us that the expression ""other legal proceedings"" in sub-section (1) and the expression ""legal proceedings"" in sub-section (2) conveyed

the same sense in the proceedings and both the sub-sections must be such as can appropriately be dealt with by the Winding-up Court"".

7. Placing reliance on the very decision, it has been argued by Mr. Shah that the learned Magistrate has committed a serious error in coming to the

conclusion that the provision in Section 446(1) of the Companies Act is made for the Company only and its benefit cannot be availed by the

Directors of the Company.

8. One of the arguments of Mr. Nanavati is that the complainant has not instituted a criminal complaint making grievance only against the accused-

Company. Considering the scheme of Section 138 r/w. Sections 141 and 142 of the NI Act, the Directors concerned with day to day

management/affairs of the business of the accused-Company also can be joined as accused-persons and the Court can convict those Directors and

the Directors against whom the criminal case has been instituted whether can take advantage of filing of proceedings by the Company u/s 50 of the

SICA is also a question. it is further argued that it was open for the complainant to prosecute only Directors, especially when from the day of filing

of the complaint there was neither even prima facie opinion framed by the BIFR nor there was any order of winding up whatsoever, even accused-

Company cannot take advantage of the language of Section 446(1) of the Companies Act or Section 42 of the SICA. In support of this argument,

Mr. Nanavati has placed reliance on the decision in the case of BSI Ltd. and Another, etc. Vs. Gift Holdings Pvt. Ltd. and Another, etc.,

9. One of the main submissions of Mr. Shah is that the learned Magistrate has committed a grave error in not properly appreciating the question of

jurisdiction of the Court at Vadodara to try the accused for the offence punishable u/s 138 r/w. 141 of the NI Act. Though the learned Magistrate

was assisted by the learned counsel appearing for the petitioner-accused abling and the decision of the Apex Court in the case of M/s. Dalmia

Cement (Bharat) Ltd. Vs. M/s. Galaxy Traders and Agencies Ltd., , wherein the Apex Court has laid down necessary criteria for determining the

commission of offence. The ratio of the decision in the case of K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, has been considered by

this Court in the case of Chemox Laboratories Ltd. v. Gujarat Narmada Valley Fertilizers Ltd., reported in 44 (1) GLR 424, for deciding the

question of jurisdiction while interpreting Section 178(D) of the Code of Criminal Procedure (hereinafter referred to as "the Code"). But according

to Mr. Shah, the decision of the Apex Court in the case of K.Bhaskaran (Supra) is distinguishable in light of the findings recorded in the case of

M/s. Dalmia Cement Ltd.(Supra). In view of the observations of the Apex Court, it can be said that the following are the acts, which are

components of the offence punishable u/s 138 of the NI Act :

(1) Drawing of the cheque,

(2) Presentation of the cheque to the Bank,

(3) Returning the cheque unpaid by the drawee Bank,

(4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, and

(5) Failure of the drawer to make payment within 15 days of the receipt of the notice.

10. As per the facts in the present case, it is disclosed in the complaint that all the transactions have taken place at New Delhi and it is relevant to

note that the following facts are undisputed :

(a) The cheque was delivered at Delhi;

(b) The cheque was presented for clearing at Delhi;

(c) The cheque was dishonoured at Delhi;

(d) The notice was served at Delhi; and

(e) The accused no.4 failed to make payment in response to the notice received at Delhi.

11. It is argued by Mr.Shah that Section 138 r/w. 141 of the NI Act, is itself a code and the provision of Section 178(D) of the Code is not

attracted at all. Section 178(D) of the Code reads as under :

178(D). Where the offence consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over

any of such local areas.

12. The word ''offence'' has been defined in Section 2(N) of the Code of Criminal Procedure and the offence means ""any act or omission made

punishable by any law for the time being in force."" In the case of K.Bhaskaran (Supra), the Apex Court has clearly observed that :

However, the entire scheme of Section 178 clearly contemplates that the same is applicable when there is uncertainty as to whether particular

spot/place when an offence has been committed is situated within one district or another. Section 178 clearly contemplates that it is the offence

which consists of several acts done in different local areas.

13. It is further argued by Mr. Shah that giving of the notice cannot be said to be act or omission make punishable by law but act of non-payment

of amount even after receipt of notice is made punishable u/s 138 of the NI Act. As per the ratio of the decision in the case of M/s. Dalmia Cement

Ltd.(Supra), the cause of action within the meaning of Section 138 of the NI Act is interpreted thus :

To constitute an offence u/s 138 of the Act, the complainant is obliged to prove its ingredients which include the receipt of the notice by the

accused under clause (b). It is not the ""giving of the notice"" which makes the offence but it is the ""receipt"" of the notice by the drawer which gives

the cause of action to the complainant to file the complaint within the statutory period.

14. While elaborating the arguments and citing various decisions, it is submitted by Mr.Shah that the lower Court has erred in accepting the

observation of the Apex Court in the case of K. Bhaskaran (Supra). In view of the subsequent decision in the case of M/s. Dalmia Cement Ltd.

(Supra), the learned Magistrate ought to have recorded findings against the complainant-GSFC and the complaint ought to have been returned to

the complainant for presentation in the appropriate Court.

15. It is also argued by Mr. A.D. Shah that the learned Magistrate ought to have seen that merely because this being a summons case, the

proceedings cannot be dropped without recording plea and the evidence is absolutely unwarranted. The question of jurisdiction to try an accused

goes to the root of the case and when such preliminary point is raised, the same ought to have been decided at the earliest. Even when a process is

issued by a Court in respect of an offence outside the jurisdiction of the Court, the accused has right to point out such an important infirmity and the

point of jurisdiction requires to be dealt with first and if the Court is satisfied that the cognizance is taken in respect of all the offence with the Court,

has no jurisdiction to try, then the alternative remedy is to return the complaint to the complainant for presenting the same before the Court having

jurisdiction. Failure to appreciate this aspect makes the order under challenge bad.

16. One of the arguments of Mr. A.D. Shah is that irrespective of the fact that the case where the Court has taken cognizance is a summons case,

the proceedings can be dropped without recording plea of evidence. There is ample evidence on record to show that no cause of action has taken

place within the jurisdiction of Court of Vadodara, then merely giving of notice by itself would not confer jurisdiction to the Court to try the offence

which has been committed at Delhi. The error has been cropped up because the learned Magistrate has not properly appreciated the authorities

relating to provisions of Sections 18 and 20 of the Code in their proper perspective. The NI Act being a special law, provisions of general law

would not apply. The facts emerging from complaint, notice and reply sent clearly establish that all acts constituting offence have taken place at

Delhi, more particularly, when the office of the complainant at New Delhi has carried on transactions at New Delhi and, therefore, Section 178(D)

of the Code also would not apply.

17. Mr. K.S. Nanavati, learned senior counsel appearing for the respondent no.2, submitted that the order under challenge is absolutely legal and

in accordance with law. There is no element of error or perversity and the learned Magistrate has rightly recorded the findings on set of fact that

the Court at Vadodara has jurisdiction to try the case u/s 138 of the NI Act and the learned Magistrate has rightly appreciated the ratio of the

jurisdiction in the case of K. Bhaskaran (Supra). It is argued by Mr. Nanavati that even as per the observations of the Apex Court in the case of

M/s. Dalmia Cement Ltd. (Supra), the Court at Vadodara would not loose the jurisdiction merely because several events of transactions have

taken place at New Delhi. When this is not a case of implied or express bar of jurisdiction, the learned trial Court is supposed to consider the

bundle of facts which was placed for appreciation and the principle that debtor must seek creditor would apply even in the case where demand as

to the payment against cheque, a negotiable instrument is raised by virtue of a notice and it would be wrong to say that this principle would not

apply. Giving of a notice is an important event in the entire scheme of Section 138 r/w. Section 141 of the NI Act and in the present case the

negative response, made by the accused i.e. by sending the reply at Vadodara, has been received at Vadodara. So this is the case, according to

Mr. Nanavati, where two important events have occurred at Vadodara i.e. giving of notice and receipt of negative reply. These two aspects should

be considered in the background of one important fact i.e. ordinary place of business of the complainant. The complainant is a registered public

limited company having its registered office at Vadodara. Merely because the company is also operating through its various offices in big cities like,

Delhi, Bombay or Calcutta; it would not be either proper or legal for the petitioner to say that the petitioner-accused could have avoided

prosecution by making payment at Delhi because it was obligatory duty on the part of the petitioner-accused either to pay money to the creditor on

receipt of the statutory notice or to respond whereby he can explain as to the allegation in the notice or can refuse payment on legitimate grounds, if

he is able to do so.

18. Mr. Nanavati has pointed out certain undisputed facts and it reveals that because of bouncing of cheques, the complainant-GSFC was

constrained to issue notice contemplated u/s 138 of the NI Act. It is true that as per the allegations made in the complaint, the offence of cheating

was also committed punishable u/s 420 of the Indian Penal Code. However, the Court has not issued process for the offence punishable u/s 420 of

the Indian Penal Code. This statutory notice was given on 24th July, 1995 and the reply by the otherside to the notice was given on 5th August,

1995. The complaint was filed on 7th September, 1995. It is true that the proceedings before the BIFR (Board for Industrial and Financial

Reconstruction) initiated u/s 15 of the SICA (Sick Industrial Companies Act) were initiated by the accused no.1-Company on 11th March, 1994

and prima facie opinion was recorded that the company be wound up and decided to issue a notice to show cause u/s 20 of the SICA on 4th

October, 1995. The say of Mr. Nanavati is much prior to issuance of show cause notice and formation of prima facie opinion on 4th October,

1995, the complaint was filed on 7th September, 1995. The order of winding up ultimately came to be passed by the Allahabad High Court on

27th March, 1996. It is rightly argued that the pendency of application/Reference u/s 15 of the SICA has no relevant in view of the scheme of

language of Section 446(1) of the Companies Act. Refusal to pay the amount under any pretext or excuse itself has constituted offence on the day

on which the notice was responded on 5th August, 1995 and the complainant was intimated about the stand taken by the accused because that

event had constituted the offence. Giving of notice even for the sake of argument by itself may not give rise to cause to file a criminal complaint,

even then the response to the notice given from Vadodara, the place where registered office of the complainant is situated, also undisputedly has

been received at Vadodara as the same was sent to Vadodara by the accused persons from New Delhi.

19. The contents of para :30 of the reply to the statutory notice issued u/s 138 of the NI Act by the complainant say, ""active dialogue is still going

on between the companies on the question of supply and payment. The agreed payment of 110 for every supply is just and fair. The sequence of

events including either refusal or omission to pay the amount of cheque, a negotiable instrument, all put together constitute an offence and,

therefore, the decision in the case of M/s. Dalmia Cement Ltd. (supra) would not go against the complainant on the point of jurisdiction. Issuance

and receipt of such notice are important ingredients and in that light the observations in the case of K. Bhaskaran (supra) become important to

resolve the present dispute. The notice of demand was sent from principal place of business of the complainant-GSFC and at that place refusal has

been conveyed. Even the notice in the present case would not have been responded, even then, according to Mr. Nanavati, the Court at

Vadodara was competent to try the case and the case of the complainant-GSFC was obviously on a better footing as the complainant was

conveyed at its principal place of business about refusal of the amount demanded under the statutory notice. Placing reliance on the decision

reported in 1968 Guj 276, in the case of M/s. H.S. Shobasingh and Sons v. Saurashtra Iron Foundary and Steel Works (Pvt.) Ltd., it is argued

that debtor must seek creditor, is an accepted principle of law and that also would apply in criminal proceedings initiated by the aggrieved party-

Complainant u/s 138 of the NI Act. He has also placed reliance on the decision reported in 1956 Bombay 111, in the case of Bharumal Udhomal

and ors. v. Shakhawatmal Veshomal and ors.

20. One of the arguments of Mr. Nanavati is that mere Court at New Delhi also could have jurisdiction by itself cannot oust the territorial

jurisdiction of the Court at Vadodara. In support of this submission, Mr. Nanavati has taken me through the provisions of Section 49 of the

Contract Act. In support of this submission, he has also referred to a decision reported in 1974 Mad 345 in the case of Azizuddin and Co., by

Managing partner, P.M.Azizuddin v. Union of India. In view of the language of the notice sent by the complainant, the place of performance was

impliedly conveyed to the accused and the payment had to come to Vadodara. The accused could have avoided prosecution paying the amount at

Delhi would not be a matter of much relevance when competency to try the cases instituted by the complainant is under scrutiny. Placing reliance

on a judgment reported in 1991 Cr.L.J. 2594 in the case of M.M. Malik, Managing Director, Dany Dairy and Food Engineers Ltd. and ors. v.

Prem Kumar Goyal, Advisor, Haryana Milk Foods Ltd., Pehowa and anr., of the Punjab and Hariyana High Court, it is argued that the principle

of ''the debtor must seek the creditor'' is applicable even in the cases where demand is made in notice issued u/s 138 of the NI Act has not been

complied with. Mr. Nanavati has taken me through the relevant paragraph nos.5 to 8 of the said decision. Similarly, he has also taken me through

one more decision of the same High Court, reported in 1992 Cr.L.J. 739, in the case of M/s. Ess Bee Food Specialities and ors. v. M/s. Kapoor

Brothers (re :paras 4, 5 and 6). Mr. Nanavati has also referred Section 30 of the NI Act, which talks about civil liabilities, and the decision

reported in 1993 Cr.L.J. 680, in the case of Rakesh Nemkumar Porwal v. Narayan Dhondu Joglekar and anr. of Bombay High Court, Mr.

Nanavati has placed much reliance on the facts of K. Bhaskaran''s case and has taken me through relevant paragraph nos.4,5 and 11 and has

explained that ""consequence ensuing has been given appropriate weightage (paras : 12 and 16 of K.Bhaskaran''s case) and it is submitted that this

Court should take a broader/moral view to secure legislative intent. It is submitted that giving of notice includes receipt and if two places are

different then a criminal complaint can be filed at both the places, if the ratio of decision in the case of K. Bhaskaran is considered. The case of

Chemox Laboratories Ltd. (supra) squarely helps the complainant and in the same way para :10.1 of the decision dated 17th January, 2004, in the

case of Rohit Chunubhai Mehta v. Gujarat State Fertilizers Corporation Ltd. and ors., should be considered important and binding to this Court,

wherein this Court (Coram : D.H. Waghela, J), referring to the cases of K. Bhaskaran and Chemox Laboratories (supra) has reiterated that ""it is

settled that complainant can choose any one of those Courts within whose jurisdiction any of the five acts constituting the offence had taken place,

which acts include failure to pay within 15 days of the receipt of the notice u/s 138 of the NI Act."" According to Mr. Nanavati, the decision in the

case of M/s. Dalmia Cement Ltd. (supra) does not give a different view. On the contrary, it endorses the decision of K.Bhaskaran''s case.

Referring to paras : 3 and 8 of the decision in the case of M/s. Dalmia Cement Ltd. (supra), it is submitted that while dealing with the cases

instituted u/s 138 of the NI Act, the Court should look to the complexity and then of trade and business in the commercial work and commercial

morality should be focused. According to Mr. Nanavati, the case of K.Bhaskaran is not distinguished by the Apex Court by its subsequent

decision in the case of M/s. Dalmia Cement Ltd. (supra) and while developing this point of argument Mr.Nanavati has taken this Court through the

provisions and decisions with reference to Section 20 and Section 18 of the CPC and also the scheme of Section 30 and 64 of the NI Act.

21. One of the arguments of Mr.Nanavati for the complainant is that the learned Magistrate had no power to recall the process issued against the

accused persons or to drop the proceedings. In support of this submission, Mr. Nanavati has placed two decisions to the notice of this Court; (i)

K.M. Mathew Vs. State of Kerala and another, and (ii) Nilmani Rotary v. Bennet Coleman & Co. ltd., reported in 1998 (2) SCC 1551, whereby

the Apex Court has observed that the case of K.M. Mathew (supra) requires reconsideration.

22. In reply to the arguments advanced by Mr. Nanavati, Mr. A.D. Shah has pointed out the provisions of Chapter V of the NI Act, which deals

with presentation of negotiable instrument for payment and also Section 61 representing payment and has submitted that though the decision

reported in Bharumal Udhomal and Others Vs. Sakhawatmal Veshomal and Others, in the case of Bharumal Udhomal and ors. v. Sakhavatmal

Veshomal and ors., relied upon by Mr. Nanavati can be said to have a binding force but the decision in the case of Jivatlal Purtapshi Vs. Lalbhai

Fulchand Shah, was not brought to the notice to the Benches dealing with similar type of disputes in the year 1953 or 1956. Because in the case of

Jivatlal (supra), the Bombay High Court has held that Section 49 of the Contract Act does not apply to negotiable instrument. Of course, the case

before the Bombay High Court was a Civil Suit based on a promissory note and while propounding this principle, the Bombay High Court had

considered the ratio of the decision of Full Bench of the Madras High Court, reported in Koka Audinarayana Rao Naidu Vs. Bhavaraju

Lakshminarayana Rao, Notice of demand to pay against the promissory notice was the rely in the case of Jivatlal (supra), whereas in the present

case, giving of notice is a statutory obligation similar to Section 18 of the Civil Procedure Code. But that giving of notice itself does not give rise to

any cause to institute a criminal proceeding. Issuance of notice is a condition precedent and so the act of giving notice cannot be said to be a fact

relevant for determining the jurisdiction. Referring to Section 94 of the NI Act and the mode of service of notice adopted by the complainant had

compelled the accused to send reply at Vadodara. The advocate from Vadodara had sent a statutory notice and, therefore, it was responded at

Vadodara. If the logic placed by the complainant is accepted, one would select the advocate from any part of the country and reply to such notice

if is sent to the advocate at his office or response, then many complainants may institute different cases at different places and in reality reply is not

of refusal. Referring to para :13 of the reply, Mr. A.D. Shah has submitted that actually the accused had pointed out agreement made earlier as to

the reschedulement of payment and pointed out reschedulement agreed is to be referred to as explained and not refusal. It is submitted that on

earlier occasion, the payments have been made oat Delhi office of the complainant and this would be an additional feature of the case.

Distinguishing the decision in the case of Bharumal (supra), it is submitted that a common rule would not apply when there is a special statute.

Placing reliance on the decision reported in 1965 Calcutta Weekly Note 113, in the case of Jagdish Chandra Sikdar v. S. Choudhury, it is

submitted that it is not safe to import the English common law doctrine. The ratio of the decision in the case of Anil Hada Vs. Indian Acrylic

Limited, would not be applicable.

23. Mr. K.T. Dave, ld. APP appearing for the State as the State of Gujarat is also an important party in a revisional proceedings initiated under

Code of Criminal Procedure, when asked to place point of view of the State in the matter, he has submitted that the provisions of Section 258 of

the Code of Criminal Procedure would not be applicable in the present case in view of the decision reported in (10) GLR 84, in the case of L.N.

Bhagwati and anr. v. Prabhakar Madhavrav Jambekar and ors., and this Court normally should not drop the proceedings unless it is found that the

same have been initiated before a wrong forum or the institution itself is not proper. After all, all the accused persons are facing summons case. The

Vadodara Court may not have jurisdiction to try the case on similar set of facts for the offence punishable u/s 420 of the Indian Penal Code. In the

case of K.M. Mathew (supra), the question of dropping the proceedings or recalling of process whether permissible has been replied in affirmative

in the case of K.M. Mathew (supra). But this very decision thereafter has been referred to the Larger Bench as discussed earlier in the case of

Nilmani Rotary (supra). Mr. K.T. Dave, ld. APP, has pointed out that the decision in the case of John Thomas v. K. Jagdeesan, reported in 2001

(5) JT 398 . In the case of B.K. Dudani Vs. State of Gujarat and Others, this Court has held that the order of learned Magistrate issuing process

cannot be interfered with in revision unless the same is arbitrary or capricious. According to Mr. Dave, the present case does not fall in any of

these two categories. In the same way, the decision in the case of Show Wallace and Co. Ltd. and ors. v. State of Gujarat passed in Criminal

Revision Application No.457/1997 by this Court (Coram :H.R.Shelat, J), would not help the complainant because the same stands overruled by

the decision in the case of M/s. Dalmia Cement Ltd. (supra). The decision in the case of Rameshchandra Ranjikant Kothari v. Gunvantlal Shivlal

Shah and anr., reported in 1998 (1) GLR 9 (equi. GLR) would help the petitioner-accused, wherein this Court has held that dishonour of cheque

by bank only, would not amount to an offence within the purview of Section 138 of the NI Act. According to Mr. Dave, if the Court accepts that

non-payment is nothing but the non-payment at Delhi and the same was to be made at Delhi, then this Court can positively look into the matter and

if this aspect needs some consideration then it would not be proper to say that jurisdictional error has been committed by the learned Magistrate.

On the other hand, Mr. A.D. Shah''s proposition is that the ratio of decision in the case of Show Wallace Company Ltd. (supra) has been

overruled in the decision in the case of M/s. Dalmia Cement Ltd.(supra).

24. To appreciate the rival contentions, certain facts are required to be mentioned which are found relevant. Some of the facts pointed out by the

learned counsel appearing for the parties have been mentioned in foregoing paragraphs while referring to the oral submissions made but it is not

necessary to mention the some of the facts brought to the notice of the Court which are not referred to in the foregoing paragraphs while referring

to the oral submissions made before the Court. The office of the accused-Company is at Kanpur (Uttar Pradesh) and it was engaged in

manufacturing of synthetic yarn and for the same, raw material-caprolactam was being purchased from the complainant-GSFC since 1980.

Initially, the material was purchased on credit basis. Thereafter, in the year 1992 payment system was changed to PDCs and most of the

transactions have been entered into at Delhi. Of course, the parties are silent as to where the first negotiation had taken place or the understanding

as to commercial transactions between them was made. The complainant-GSFC is having its bank account with the ANZ Grindlays Bank at New

Delhi and thus, the PDCs in advance have been given to the complainant-GSFC for supply of ''Caprolactam'' bearing dates on the basis of credit

period and the Criminal Case No.1947/1995 is filed on account of bouncing of two cheques of Rs.23,20,543/- each dated 7th February, 1995,

against the delivery of the material in the month of February, 1995, which was deposited on 6th July, 1995 and second criminal complaint being

Criminal Case No.1949/1995 is because of bouncing of cheque of some amount issued against delivery of 3rd February, 1995, which was

deposited on 3rd July, 1995 and 4th July, 1995. Both these cheques are of 4th June, 1995 and 6th June, 1995. Before issuance of statutory notice

u/s 138 of the NI Act on 27th April, 1995, the accused no.1-Company had filed Reference u/s 15 of the SICA before the BIFR on 11th March,

1994. So it can be said that even prior to taking of the delivery of the material, the proceedings were initiated u/s 15 of the SICA by the accused-

Company itself. It is not clear from record that the complainant was informed about the proceedings initiated by the accused-Company when

PDCs referred to in the complaint were issued to the complainant and no prima facie opinion on Reference made u/s 15 of the SICA was

recorded by the BIFR till October, 1995. Notice for the first time came to be published as to the opinion framed by the BIFR on 17th October,

1995. So it can legitimately infer that till the statutory notice was responded by the accused in the month of August, 1995, the BIFR had not even

expressed its prima facie opinion as to the state of sickness and need to order winding up the accused-company. So legally and logically it would

not be proper to conclude that the provisions of Section 446(1) of the Companies Act can any way help the accused persons in a criminal

proceedings initiated u/s 138 of the NI Act. It is also relevant that the proceedings initiated u/s 138 of the NI Act cannot be said to be an action

against the assets of the Company as held by the Kerala High Court in the case of K.P. Devasee v. Official Liquidator, reported in (90) 1997

Company Cases 438. While dealing with the Company Application No.228/1998, in the case of GLS (India) Ltd. v. Bayer ABS Ltd., in respect

of word ""proceedings"" used in Section 442 of the Companies Act, this Court has observed that the proceedings include criminal proceedings

pending in the Court. However, it has been held in the very case that on facts criminal proceedings against the company in exercise of judicial

discretion are not required to be stayed. In the background of the facts of the present case, any adverse order dropping the proceedings on

account of proceedings initiated before the BIFR u/s 15 of the SICA that had not taken any shape of formation of prima facie opinion by the BIFR

would affect adversely to the commercial morality and the need to nurture and protect the value based commercial transactions. Merely on plain

reading of Sections 442 and 446 of the Companies Act, 1956. Both these Sections cannot be put at par by considering their respective

construction. Of course, the accused have pressed into service the provisions of Section 446 of the Companies Act. Section 446(1) of the

Companies Act applies to such proceedings or against Company whether pending and operates as stay against commencement of new

proceedings or progress in pending proceedings except with the leave of the Court. u/s 446(2), the Company Court by a non-obstante clause gets

jurisdiction to entertain or dispose of any suit or proceeding or claim made by or against the Company but I am afraid that the Company Court can

try and dispose of a complaint filed u/s 138 of the NI Act, or can get such proceedings transferred to itself and dispose of the same. It is true that

reading of Section 442 of the Companies Act makes one thing clear that the term ''proceedings'' in both these provisions embraces within it both

Civil and Criminal proceedings. This Court while dealing with the case of Saurabh Soparkar (supra) has observed that :

If the provisions of section 141 of the Negotiable Instruments Act, 1881, are considered, then it would be quite clear that under the said section,

directors are to be made accused for the offence committed by the company. Admittedly, in the prosecution in question, the cheques were given

by the company towards company''s debts to the complainant and cheques were dishonoured and hence, the prosecution u/s 138 is launched.

Therefore, the directors of the company are made accused u/s 141 and for the continuation of the said prosecution which is principally against the

company''s debts, the leave of the court, will be required and the provisions of section 446(1) would be applicable.

6. Thus, in my opinion, in case prosecution of the company u/s 138 of the Negotiable Instruments Act is pending, at the time of passing of the

order of liquidation, in order to continue the said prosecution, leave of the court which has passed the order of winding up is necessary and the

provisions of section 446 would be applicable to such criminal prosecution against the company.

25. In the decision of Saurabh Soparkar (supra), in view of the facts and circumstances placed before the Court, the Court had not granted any

stay as to the proceedings initiated against the Company or the Directors. So the question of dropping of proceedings against the present

petitioners in this background does not arise.

26. But the argument advanced by Mr. Nanavati that neither the Company nor any of the Directors get immunity against the prosecution instituted

u/s 138 of the NI Act, has logic and reasoning. In the background of the fact that raw material ''caprolactam'' has been purchased and the cheques

against the amount of consideration were given to the complainant-Company, the Reference u/s 15 of the SICA was made to the BIFR and,

therefore, it would not be proper or justified to say that institution or pendency of the proceedings is bad or the same cannot sustain. The

prosecution against the Director can positively continue and in light of the observations made by this Court in the case of Saurabh Soparkar

(supra), this Court could have observed as to criminal proceedings instituted u/s 138 of the NI Act qua accused-Company. But as the Company

has not prayed for any relief, no further observation or finding is called for.

27. So far as the State territorial jurisdiction to try the case at Vadodara is concerned, the arguments advanced by Mr.Nanavati are required to be

accepted. the ratio of the decision in the case of K.Bhaskaran (supra) clearly lays down that the fact of giving of notice in writing to the drawer of

the cheque demanding the payment of cheque amount is one of the important components and that would be a track to the jurisdiction of the

Court. The Apex Court while dealing with the facts of the case of K.Bhaskaran (supra) has made use of Section 178(D) of the Code, which

provides that where the offence consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction

over any of such local areas. But the complainant can choose the Court having jurisdiction over any one of the local areas within the territorial limits

of which any one of those five acts mentioned in para :14 of the decision was done. The Apex Court has observed that, ""as the amplitude has been

so widened and so expansive, it is an idle exercise to raise jurisdictional question regarding offence punishable u/s 138 of the NI Act."" Of course,

this Court in the case of Chemox Laboratories Ltd. (supra) is mainly based on the decision in the case of K. Bhaskaran (supra), so far as the issue

raised on the point of territorial jurisdiction is concerned and has observed that, ""suffice it to state that no conflict of opinion on the point of the

territorial jurisdiction was found to be traceable in earlier or later judgments referred by the learned counsel."" Here in the present case, Mr. A.D.

Shah has admitted to distinguish the ratio of the decision in the case of K.Bhaskaran (supra) and has submitted that Section 178(D) of the Code is

not attracted. Because the scheme of Section 138 of the NI Act, a special act, provides a particular scheme and, therefore, general law of the

Code has no role to play. The Court to some extent is in agreement with the say of Mr. Shah that the decision in the case of M/s. Dalmia Cement

(supra) shows different shed of scheme of Section 138 of the NI Act. ""Giving of notice"" by itself would not constitute an offence punishable u/s

138 of the NI Act. The complainant is under obligation to prove its other ingredients which include receipt of the statutory notice by the accused

under clause ''B'' and it is the receipt of the receipt by the drawer gives the cause of action to the complainant. He is also supposed to say that the

demand (amount mentioned in the cheque/negotiable instrument) has not been complied with. But the decision in the case of M/s. Dalmia Cement

Ltd. (supra) does not distinguish the ratio of the decision in the case of K.Bhaskaran (supra) but only adds one more ingredient in the list of

important components described in para :14 of the decision in the case of K.Bhaskaran (supra). In the case of K.Bhaskaran (supra), the following

five ingredients are mentioned :

14. The offence u/s 138 of the Act can be completed only with the con-catenation of a number of acts. Following are the acts which are

components of the said offence : (1) Drawing of the cheque, (2) Presentation of the cheque to the bank, (3) Returning the cheque unpaid by the

drawee bank, (4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make

payment within 15 days of the receipt of the notice.

28. Now it can be said that the complainant can prosecute the accused at the place also where he has received the notice. It is true that in the

present case, the accused have received the statutory notice at Delhi. But the failure to make payment within 15 days on the receipt of the statutory

notice against has taken place at Vadodara. It is true that failure on the part of the drawer to make payment within 15 days from the date of receipt

of statutory notice has no element in stricto senso of the criminal breach of trust and, therefore, sub-section 4 of Section 181 of the Code shall

have no application. But the later part of sub-section 4 of Section 181 provides that in the case of criminal misappropriation or breach of trust may

be inquired or tried by the Court within whose local jurisdiction any part of the property, which is subject of the offence, was required to be

returned or accounted for. In this background, it would be proper to mention statement of objects and reasons of Banking, Public Financial

Institutions and Negotiable Instruments Laws Amendment Act, 1988, more particularly, the objectives mentioned there in Chapter 17 of the

penalties in the case of dishonour of certain cheques for insufficiency of fund in the account is inserted by the amendment Act of 1988 and out of

12 objectives, one of the objectives is that, ""to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for

penalties in the case of bouncing of cheques due to insufficiency of fund in accounts or for the reasons i.e. it exceeds the arrangements made by the

drawer, with adequate safeguards to prevent all honest drawer."" Section 138 of the NI Act, 1988, has been amended by Section 7 of the NI Act,

2002. The amendment has been made keeping in view the recommendation of the Standing Committee on finance and other representations, it

was felt that the Courts were unable to dispose of Criminal Cases instituted u/s 138 of the NI Act expeditiously in the time bound manner and in

view of the procedure contained in the NI Act. In this background, the observations of the Apex Court in the case of K.Bhaskaran made in

para:14 should be read. Undisputedly, the cheques were to be honoured on presentation and as per Section 30 of the NI Act, the drawer of the

cheques is bound in the case of dishonour by the drawee or acceptor thereof to compensate the holder. In the present case, it is not contended

that the statutory notice of dishonour of cheque has not been given or received by the drawer. The question posed before the Court is where

normal place of business is and the complainant-Company would determine the forum and how far the English common law doctrine that ""the

debtor must seek the creditor and pay him"" would be applicable to determine the forum. One decision cited by Mr. A.D. Shah in the case of

Jagdish Chandra Sikdar (supra), wherein it has been held that it may not be safe to import English common law doctrine and Section 49 of the

Indian Contract Act has no application on negotiable instrument. But in the cited decision, the Calcutta High Court was dealing with a Civil

Revision Application in a suit based on a promissory note. The reading of the decision and the defence clearly reveals that the allegations and the

defence taken by the orig. defendants are totally of different nature. For the sake of convenience, it would be appropriate to reproduce the

provisions of Section 30 of the NI Act and Section 42 of the Indian Contract Act, which are as under :

Section 30 of the Negotiable Instruments Act : Liability of drawer :- The drawer of a bill of exchange or cheque is bound in case of dishonour by

the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given, to or received by, the drawer as

hereinafter provided.

Section 42 of the Contract Act :- Devolution of joint liabilities :- When two or more persons have made a joint promise, then, unless a contrary

intention appears by the contract all such persons, during their lives, and after the death of any of them, his representative jointly with the survivor

or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

29. The ordinary rule that "the debtor must seek the creditor" was brought before the Bombay High Court in the case of Jivatlal (supra). The

Bombay High Court after referring to the decisions reported in 1927 PC 156 , in the case of Chunilal Mayachand Vs. E.E. Millard, in the case of

Chunilal Mayachand v. Millard, has held that :

The money due under the pronote being payable on demand the natural inference was that the moneys were payable at the place where the

demand was communicated to and received by the debtor and since the demand for payment was made from Bombay by notice addressed to the

debtor at Ahmedabad, the moneys were payable at Ahmedabad. The fact that no reply was sent to that notice by the debtor was not enough to

show that the demand made from Bombay gave jurisdiction to the Court at Bombay.

30. It is true that in the very decisions, the Bombay High Court has negatived the arguments advanced by the plaintiffs that if the promissory note

does not specify the place of payment, the presumption was that money were to be payable at usual place of business of the creditor and has

further observed that there is no such presumption. But on the set of facts, the Bombay High Court has reached to the conclusion that no part of

cause of action had arisen in Bombay. The case of Jivatlal (supra) being a case based on promissory note where there was no place of payment

mentioned in the promissory note in question, expressly or by implication, would not help the present petitioners in light of the subsequent

amendments in the NI Act and especially the legislative intent reflected in the scheme of Sections 138, 141 and 142 of the NI Act. The subsequent

decisions in the case of K.Bhaskaran (supra) and two other decisions of this Court in the cases of Gujarat State Financial Corporation Ltd. v.

ATV Projects India Ltd., reported in 2001 (1) GLH UJ (5), Chemox Laboratories Ltd. (supra) and Rohit Chunubhai Mehta (supra), clearly help

the present complainant as the part cause of action can be said to have arisen at Vadodara. A statutory notice provided u/s 138 was sent from

Vadodara and this is not a case wherein the statutory notice was not responded but a contesting reply conveying the resistance of refusal has been

received at Vadodara. When there is a presumption of law in the case of acceptance of cheque by which principal existing debt is sought to be

paid is that the cheque is taken only as a conditional payment. Subject to condition subsequent that if it is dishonoured, the creditor could fall back

on the original cause of action. When, as per the settled legal proposition, even in the case of contemporaneous debts the presumption applies then

it can be legitimately inferred that there is hidden element of old English rule that debtor must seek creditor in Section 30 of the NI Act. The

discussion in the case of Jivatlal (supra) with reference to Sections 64, 65 and other relevant sections referred to by the Bombay High Court, if

considered in the background of changing socio, economical and financial scenario of our country then it is required to be held that the debtor must

discharge his liability in a given period of time i.e. period provided u/s 138 of the NI Act seeking, drawee, holder or creditor to avoid prosecution.

It would be illogical to say that the liability as is made criminal punishable in the event of dishonour of cheque, the general rule would disappear.

This logic gets strength from the finding recorded in the case of P.K. Murleedharan v. C.K.Parid, reported in 1992 Cr.L.J. 1965, wherein in para

:21 of the decision, the Kerala High Court has held that :

21. From the discussions in the foregoing paragraphs the position that emerges is that the venue of enquiry or trial has primarily to be determined

by the averments contained in the complaint. If on the basis of such averments the court has jurisdiction, it has to proceed with the complaint. The

place where the creditor resides or the place where the debtor resides cannot be said to be the place of payment unless there is any indication to

that effect either expressly or impliedly. The cause of action as contemplated in S.142 of the Act arises at the place where the drawer of the

cheque fails to make payment of the money. That can be the place where the bank to which the cheque was issued is located. It can also be the

place where the cheque was issued or delivered. The court within whose jurisdiction any of the above mentioned places falls has therefore got

jurisdiction to try the offence u/s.138 of the Act.

31. Irrespective of Section 178(D) of the Code, the Punjab and Haryana High Court in the case of M.M.Malik, Managing Director, Dany Dairy

and Food Engineers Ltd. and ors. v. Premkumar Goyal, Advisor, Haryana Milk Foods Ltd., Pehowa and anr., reported in 1991 Cr.L.J. 2594,

has held that dishonour of cheque was only a part of cause of action and the offence was completed only when the petitioner-company failed to

discharge its liability to the creditor i.e. complainant-GSFC. For discharging the debt, the petitioner has to find out its creditor and seek the creditor

at his office at Pehova, the offence was completed at the place and in this situation, the Court at Kurukshetra had territorial jurisdiction to try the

matter. The Punjab and Haryana High Court while considering the quashing petition filed u/s 482 has made this observation. This finding has

positive relevance for the purpose. In the same way, the Division Bench of the Bombay High Court in the case of Rakesh Nemkumar Porwal v.

Narayan Dhondu Joglekar and anr., reported in 1993 Cr.L.J. 680, has observed that :

It is obvious that having regard to the wide spread practice of issuing cheques which are dishonoured and the many ingenious methods of avoiding

payment that are practised, that the Legislature has opted for a no nonsense situation. The possibility has not been overlooked whereby an account

may inadvertently be overdrawn or a dishonour may be for technical reasons or where a genuine mistake has occurred and the grace period

provided for by the Legislature after service of notice on the drawer is in order to afford an opportunity to the drawer to rectify these.

Undoubtedly, even when the dishonour has taken place due to the dishonesty of the depositor, the drawer is still given a last chance to act

otherwise. Consequently, the reasons for dishonour even if they be very valid should not and cannot be taken into account by a Magistrate when

such a complaint is presented.

32. It is relevant to note that the Bombay High Court while dealing with the petition preferred u/s 482 of the Code of Criminal Procedure has

considered the case of M.M.Malik (supra) and also the judgment of Kerala High Court referred to hereinabove. The law developed by the other

High Courts and lastly by the Apex Court while dealing with the case of K. Bhaskaran (supra) clearly indicates that the prosecution can be initiated

in the case of dishonour of cheque at places mentioned in the above referred cases including the case of K.Bhaskaran (supra) and also at the place

where the holder of the cheque who had issued statutory notice under the scheme of Section 138 of the NI Act is responded with a negative reply.

In the present case, the registered office of the accused no.1 is at Kanpur (U.P.). I am afraid the accused could have raised the grievance as to the

territorial jurisdiction of the Court at Kanpur. Merely because certain relevant and important transactions had taken place at Delhi, some of the

Directors stationed at Delhi, if works and operates from Delhi, the liability of the company of having registered office at Kanpur would remain also

at Kanpur. The Court is not in agreement with the say of Mr. A.D. Shah that the observations of the Apex Court in the case of K.Bhaskaran

(supra) have been dissented in the subsequent case of M/s. Dalmia Cement Ltd. (supra), on the contrary to some extent, the say in the case of K.

Bhaskaran (supra) has been endorsed or was well brushed by the subsequent decision. In a decision in the case of Soniram Jeetmull (supra), the

Privy Council has observed that when the contract is silent as to the place of payment of liability, the payment should be made where the creditor

is. While dealing with Section 49 of the Contract Act, the Privy Council has focused on the intention of the party to the contract. In the present

case, the Court is of the view that the intention of the legislature, if seen in respect of the hidden element that the liability is to be discharged by the

person who has issued the cheques and he should seek the holder of the cheque, then a prosecution instituted at the place where the complainant-

Company is ordinarily carrying on business having its registered office at Vadodara cannot be said to be either bad or at a wrong place.

33. The Court is in agreement with the submission substantially that mere issuance of notice does not constitute an offence. The statutory notice, if

is required to be given under any provision, it may be of the Railways Act or may be u/s 80 of the Civil Procedure Code, then it is only an essential

or preliminary step for the valid institution and that by itself may not make an independent cause of action. In view of the scheme of Sections 138

and 142 of the NI Act in the background of the legislative intent, the institution of the proceedings when the holder of the cheques receives

resistance or is intimated that the payment is refused, then he can institute prosecution u/s 138 of the NI Act stating that he has instituted the case

where he ordinarily resides or his ordinary place of business is at that particular place. Of course, Mr.A.D. Shah has tried to submit that when the

Bombay High Court was dealing with the case of Bharumal (supra), the Division Bench was not apprised of the earlier decision in the case of

Jivatlal (supra), otherwise according to Mr.A.D.Shah, the Bombay High Court might have followed that binding decision because the decision in

the case of Jivatlal (supra) is also a decision of the Division Bench. Both these decisions are having some force in view of the accepted principle of

jurisprudence. The judgment debtor in point of time needs to be considered. The gap of year between such decisions also becomes relevant on

certain occasions, because the decisions are nothing but the reflection of the society and the changes that might have occurred during the years.

The Bombay High Court in the case of Bharumal (supra) has in terms held that as there is no consistency between the parties, there is no reason to

hold that in the case like this where there is a loan advanced by the creditor to the debtor, the contract makes no mention as to where the amount

should be repaid and the debtor has made no application to the creditor seeking him to fix the place of performance why the common law rule that

the debtor must seek the creditor should not apply. Ultimately, the common law rule when has been found reasonable, and the same is in

conformity with the justice and equity, then it would be highly unjustified to ask the company to go to the place to institute the proceedings which is

not its ordinary place of business or the place from where he might have agreed to sell the raw material, caprolactam. It is true that certain

payments were earlier made at Delhi and that can be said to be a feature but such payments made by the accused and accepted by the

complainant at Delhi by itself would not ousted the jurisdiction of the Vadodara Court. It is true that the view taken by the Kerala High Court,

Punjab and Hariyana High Court and Bombay High Court in the above cited decisions have only persuasive value. But one thing is certain that all

these High Courts are of the same view and they refuse to quash the proceedings on the ground that they were initiated at a wrong place, on the

point of lack of territorial jurisdiction. The Apex Court always insists that a decision of the Court and that too of a particular High Court normally

should be consistent. Consistency in the judicial pronouncement makes the vital dispensation of justice system stronger and if this Court accepts the

ratio propounded by the aforesaid three High Courts, it can be said that there is consistent view now in more number of High Courts. This is

relevant because the network of business and the applicability of the commercial transactions are increasing day by day and frequency of

transactions by cheques has gone very high. Electronic clearance and at par payments have become a rule of convenience; then at that time the

common rule that the creditor or the holder of the cheque at least should not be asked to launch the prosecution at a place where he might have

entered into some understanding for business or for sale of material manufactured by him. It is true that statutory obligation has to be discharged

and, therefore, a company may send a statutory notice from the place where it has its registered office, so if such company attempts to institute a

prosecution at a place where no event had occurred except issuance of notice, then the arguments advanced by Mr. Shah, can be made use of on

the ground that the institution is not bona fide but the complaint is filed at altogether different place and there is an element of harassment. This can

be decided only on appreciation of facts, whereby he has submitted that issuance of notice by itself does not give cause but non-payment within 15

days from the date of receipt of statutory notice, gives cause. In the case on hand, three factors are found relevant that it is not a matter of dispute

that the complainant-GSFC has sold raw material to the accused no.4-Company and the complainant is having its registered office at Vadodara,

the accused-Company was bound to reply at the said place. The statutory notice was served from Vadodara and the voice of resistance sent by

the accused has been received by complainant-Company at Vadodara. Merely because it was possible for the complainant to institute prosecution

at Delhi also would not be relevant in view of the above discussion. The complainant could have selected any of the three places, in view of the

facts available on record i.e. (i) at Kanpur, where the accused-Company is having its registered office; (ii) Delhi, where material transactions have

taken place and (iii) at Vadodara, in view of the scheme of the NI Act and the interpretations of various Sections and their applicability in such or

similar type of cases by other High Courts and this Court while dealing with the case of Chemox Laboratories Ltd. (supra), Rohit Mehta (supra)

and GSFSL (supra). The argument of Mr. Shah now after the decision of K.Bhaskaran (supra) and in the background of the observations made

by the Apex Court in the subsequent decision in the case of M/s. Dalmia Cement Ltd. (supra) would not help the accused. The decision in the case

of GSFSL (supra) and the judgment referred to in the said decision of Show Wallace and Co. Ltd. (supra) have no legal force.

34. It is an accepted principle of jurisprudence that where there is a statute, the common rule of law would not apply. But now when the provisions

of Sections 138 and 142 of the NI Act have been interpreted in a particular manner by the Apex Court and more number of High Courts, then it

would be wrong to say that this Court, if applies the rule that debtor must seek the creditor, would be the application of common law rule. On the

contrary, it should be interpreted that the law interpreted by the Apex Court requires to be applied in present set of facts.

35. The local area where the bank is situated cannot be regarded as sole criteria to determine the place of offence. u/s 177 of the Code of Criminal

Procedure, every offence shall have to be tried ordinarily or inquire into a Court within whose jurisdiction it was committed. The scheme of Section

138 denotes various components of the offence but it would not be correct to say that the offence has been committed at the place where the

cheque has been drawn or where it was presented for clearance or at the place where the same has been returned unpaid by the drawee bank or

the place from where the statutory notice has been given to the drawer of cheque demanding the payment of the cheque amount or the place where

such notice has been received or at the place where notice has been responded or at the place where insufficient amount against the amount

demanded has been paid or at the place where the failure of drawer to make payment accrues within 15 days from the date of receipt of statutory

notice. It is possible that any or each of these events i.e. components of Section 138 of the NI Act may occur in different local areas and, therefore

only, the Apex Court in the case of K.Bhaskaran (supra) has observed that it is not necessary that all the five components enumerated in para :14

should have been perpetuated at the same locality and it is possible that each of these five acts could be done at five different localities. The

connotation of all the five components mentioned, according to the Apex Court, is sine qua non for completion of offence u/s 138 of the NI Act.

As the amplitude stand was widened and was expansive, the Apex Court has observed that, ""it is an idle exercise to raise jurisdictional question

regarding offence u/s 138 of the Act. So if the say of Mr. Shah is accepted that giving of notice itself does not constitute offence, would not help

the present petitioners.

36. It is true that when the point of jurisdiction; especially the lack of territorial jurisdiction of the matter is specifically contended, the same should

be dealt with as first preliminary point and issuance of process by earlier order cannot become an embargo in dealing with such resistance and it

would not be a good argument in such or similar cases that the issuance of process is an inter locutory order and no Revision Application either

would lie or the case being a summons case, the accused must have been tried till its logical conclusion because it may seriously prejudice the

accused especially in light of the scheme of Section 462 of the Code. In the present case, when the trial Court has not issued process u/s 420 of

the Indian Penal Code, it is not necessary to comment upon at this stage the allegations made in this regard in the complaint. In the case of Anil

Handa (supra), the drawer Company was not made accused but the office bearers of the Company alone were made accused while dealing with

the contentions raised before the Apex Court, the Apex Court held that the prosecution is maintainable against the Directors. In the present case,

both the petitioners are Directors. Though I have dealt with the factual scenario hereinabove emerging in the present case, the more relevant aspect

in the present case is that both the Directors have prayed for dropping or termination of proceedings. So unless the presumption is raised by the

present petitioners or any of them, it would not be either legal or proper to drop them from the proceedings, merely on the ground that one

Reference Application u/s 15 was preferred in the year 1994 under the SICA or there is an order of winding up the Company passed by the

Competent Court i.e. Allahabad High Court, qua the accused no.4-Company. So if the say of Mr. Shah is accepted that Section 258 would not

apply in light of the nature of the point raised before the trial Court, even in substantia it would not help the petitioners on merit for succeeding in

the present Revision Application because it is not possible for the Court to say at this stage that the prosecution against both the petitioners has

been improperly instituted or the same has been instituted at a wrong place. Though it is submitted that the Court should observe that the complaint

against the accused no.4-Company cannot sustain without formal leave or permission granted by the court, who has passed the winding up order

and where the liquidation proceedings qua the accused no.4-Company are pending because the accused no.4-company has not prayed for this

relief. But the in the larger interest and when this Court is called upon to observe accordingly as to the finding recorded on the point may go to the

root of the sustainability of the prosecution against the petitioners and, therefore, now it would be proper to have a look on the scheme of Section

305 of the Code. It would be beneficial to reproduce Section 305 of the Code, which is as under :

305. Procedure when corporation or registered society is an accused:- (1) in this section, ""corporation"" means an incorporated company or other

body corporate, and includes a society registered under the Societies Registration Act, 18060 (21 of 1860).

(2) Where a corporation is the accused person or one of the accused person in an inquiry or trial, it may appoint a representative for the purpose

of the inquiry or trial and such appointment need not be under the seal of the corporation.

(3) Where the representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or

shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the

representative or read or stated or explained to the representative, and very requirement that the accused shall be examined shall be construed as a

requirement that the representative shall be examined.

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply.

(5) Where a statement in writing purporting to be signed by the managing director of the corporation or by any person (by whatever name called)

having, or being one of the persons having the management of the affairs of the corporation to the effect that a person named in the statement has

been appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall, unless the contrary is proved,

presumed that such person has been so appointed.

(6) If a question arises as to whether any person, appearing as the representative of corporation in an inquiry or trial before a Court is or is not

such representative the question shall be determined by the Court.

The scheme of Section 305 deals with the procedure that the Corporation and society is an accused as interpreted appropriate corporation and

used in the Section includes company in liquidation under the Companies Act, 1956. In the present case, it was obligatory even on the part the

prosecutor to have an order and service of process as provided u/s 305 of the Code and the accused no.4-Company could have been served with

the process under the procedure prescribed in Section 305 and in such case the Court can direct the Company to nominate any Director or officer

to face the prosecution on behalf of the company. The jurisdiction of the Company Court to regulate each civil as well as criminal proceedings that

may have certain financial or administrative implications is purposeful and such purpose has been reflected in "n" number of judgments and the

legislative intent with regard to the relevant provision of Section 446 of the Companies Act. I am told by Mr.Shah that one of the Directors was

appearing on behalf of the Company and he has intimated to the Court that because of the order passed by the Allahabad High Court for winding

up the accused no.4-Company, the Official Liquidator appointed by the Allahabad High Court may be intimated about pendency of the Criminal

Proceedings against the Company and on instructions Mr. Shah submitted that probably the Official Liquidator has intimated the concerned

learned Magistrate that unless the permission is sought by the complainant, the prosecution against the Company for the very offence should not

proceed any further. The Court is also informed that no formal order in this regard has been passed yet. So the Director nominated who was facing

prosecution on behalf of the company cannot be held liable to pay any amount of fine and also the amount of compensation, if awarded at the

conclusion of the trial. But the very Director is also held guilty or responsible for the criminal wrong alleged in the complaint, then absence of formal

permission would not come in the way of the complainant in view of the ratio of the decision in the case of Anil Handa (supra), this Court (Coram :

B.K. Mehta, J) has observed that pendency of the winding up proceedings or the appointment of the Official Liquidator after the orders of winding

up would not relieve the Director when they are individually responsible. As observed earlier, the cheques in question were given to the holder

even after filing Reference u/s 15 of the SICA. So it would not be proper to comment upon this factual aspect because it may cause serious

prejudice either to the accused or the prosecution. The decisions in the case of K.Bhaskaran (supra) and the decision of the Apex Court in the

case of M/s. Dalmia Cement Ltd. (supra), if are read together, it emerges that the Apex Court has taken moral view and other consequences

ensuing in such or similar transactions.

38. The decision in the case of BSI Ltd. (supra) substantially helps the respondent-complainant wherein the Apex Court has held that, ""in reference

to a prosecution instituted under Sections 138, 141 and 142 of the NI Act against the sick company and its Directors that once offence is

committed by the company u/s 138 of the NI Act is completed by reason of non-payment of amount covered by the cheque by it within a period

of 15 days contemplated in Clause "C" of proviso thereto, the order passed by the BIFR under Sick Industrial Companies" (Special Provisions)

Act, would not become a bar in instituting criminal complaint against the company or its Directors under the Act. The Apex Court has further

observed that punishment of fine imposed on the company for the offence punishable u/s 138 of the NI Act would not attract payment envisaged

u/s 20(1) of the SICA, if it is with consent of BIFR. Therefore, in the present case, the trial Court reaches to a conclusion that the amount of fine, if

imposed in the event of company being convicted then such imposition of fine should be with the consent of BIFR. So by consent of BIFR, the

Courts dealing with winding up proceedings or the Official Liquidator having sufficient fund then in accordance with relevant law and the rules

framed under the Companies Act, the amount of compensation can also be awarded and paid to the holder of the cheque. In conclusive part of the

decision in the case of BSI Ltd. (supra), the Apex Court has held that :

22. The conclusion that we have to draw is that if commission of the offence u/s 138 of the NI Act was completed before the commencement of

proceedings u/s 22(1) of SICA there is no hurdle in any of the provisions of SICA against the maintainability and prosecution of a criminal

complaint duly instituted u/s 142 of the NI Act. The decisions rendered by the High Courts, which are assailed before us in this batch of appeals,

are therefore not liable to be interfered with. Appeals are accordingly dismissed. Special leave petitions heard along with the above appeals are

also hence dismissed.

39. In the case of Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, by referring the decision of BSI Ltd.

(supra), the Apex Court has held that :

10. On a reading of provisions of Section 138 of the NI Act it is clear that the ingredients which are to be satisfied for making out a case under

the provision are :

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person

from out of that account for the discharge of any debt or other liability;

(ii) that 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;

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the 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 the bank;

(iv) the payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15

days of the receipt of the said notice.

40. For short, the Court is of the view that there is substance in the submissions made by Mr.K.S.Nanavati, learned senior counsel appearing for

the respondent no.2-Company. In the say of Mr. A.D. Shah, learned senior counsel appearing for the petitioners, has sufficient strength as the

facts of the present case are materially different than those decisions brought to the notice of this Court by him. So the Court is inclined to dismiss

both these Revision Applications.

41. For the reasons above recorded, both the Revision Applications are hereby dismissed. The request to drop or terminate the proceedings

initiated at Vadodara is also hereby rejected. Both the Revision Applications fail on all the material counts. Rule is discharged in each Revision

Application.

The learned counsel appearing for the petitioners submits that he has instructions to approach the Apex Court, if the result of both these Revision

Applications is against the petitioners and, therefore, he has requested that the order passed by this Court today be placed under suspension at

least for a period of eight weeks.

It is not the practice of this Court to suspend such or similar orders normally. However, considering the totality of facts and circumstances that are

brought to the notice of the Court during the oral submissions, the Court is inclined to suspend this judgment for a period of eight weeks. However,

it is clarified that there shall not be any extension. The learned counsel appearing for the complainant-Company has resisted this suspension but in

the interest of justice, the suspension is accorded for eight weeks as prayed for.