MANIK LODH Vs STATE OF ASSAM AND ANOTHER, (2008)1 GLR 804- *A Critique*

By

Sri S.M. Deka
Director
North Eastern Judicial Officers' Training Institute (NEJOTI)

1. PREFACE

The Judgment of Criminal Revision Petition No. 40 of 2002 delivered on the 25th of September, 2006 and reported in February, 2008 issue of Gauhati Law Reports as MANIK LODH Vs STATE OF ASSAM AND ANOTHER, (2008)1 GLR 804 is being critically examined in this essay. The Judgment will be referred hereinafter as MANIK LODH.

MANIK LODH poses and answers a question rarely arising in a Criminal Prosecution under Section 138 of the Negotiable Instruments Act, 1881 (the N.I. Act hereinafter). The Judgment begins with six questions and it is the sixth question and the answer thereto that forms the theme of the essay. The sixth question suitably paraphrased reads thus : Whether, other requirements of Section 138 of the N.I. Act having been fulfilled if between the date of drawal of the cheque and the date of presentation of the same to the Bank a part payment of the amount of the cheque has been made to the payee, a criminal prosecution against the drawer is maintainable ? The answer rendered was in the negative. The novelty and rarity of the problem is the reason behind this writing.

2. THE FACTS

Sri Manik Lodh as proprietor of Dulal Store used to buy Akai Television sets from M/s Sangita a partnership firm of which the complainant is a partner. He on account of such dealings with M/s Sangita ran up a credit amount of Rs.75000/- and in discharge of that liability issued a cheque for an amount of Rs.75000/- dated 11.05.1996 in favour of M/s Sangita. The cheque on presentation was dishonoured on 30.05.1996. Thereafter on two other occasions on 20.08.1996 and 17.09.1996 also the cheque was returned by the Bank unpaid because of insufficiency of funds in the account of the drawer. Thereafter the requisite notice of demand was issued and upon failure to meet the demand a complaint case for an offence under Section 138 of the N.I. Act against Sri Manik Lodh was instituted. In the case on

the evidence the following facts were found (1) the cheque in question was drawn in discharge of the liability of Rs.75000/- (2) after the first presentation and dishonour of the said cheque on 30.05.1996 Sri Manik Lodh paid to M/s Sangita by another cheque of Rs.20,000/- (3) after encashing the second cheque for Rs.20,000/- the cheque for Rs.75000/- was presented again for encashment and was dishonoured (4) only after the third presentation and dishonour the requisite notice demanding payment of the amount of the cheque that is Rs.75000/- was issued and the complaint upon failure to meet the demand by Sri Manik Lodh was instituted in due time. On these findings, the trial Court convicted accused drawer for an offence under Section 138 of the N.I. Act and sentenced him to undergo rigorous imprisonment for six months and to pay a fine of Rs.5000/- with default sentence of imprisonment for further three months. The appellate Court concurred and dismissed the appeal by the convicted accused. Eventually the accused petitioner succeeded in the High Court. The High Court tested the facts found on the touchstone of law and held that since the accused after payment of Rs.20,000/- did not remain liable for Rs.75,000/- "the prosecution under Section 138 of the N.I. Act could not have been launched against the accused petitioner". A detailed look at the law stated in MANIK LODH may now be taken.

3. THE LAW STATED IN MANIK LODH

The submission of the Counsel for the accused petitioner before the High Court was that "the complainant having accepted a part of the entire cheque amount of Rs.75,000/- was not legally entitled to present the cheque for Rs.75,000/- on any date subsequent to his receiving the payment of the amount of Rs.20,000/- from the accused and, hence, the subsequent dishonour of the cheque, in question, by the Bank could not have legally exposed the accused to prosecution under Section 138 of the N.I. Act."

The High Court appears to have accepted the above submission in toto by responding respectively in para 11, 12, 30, 31 and 33 of MANIK LODH thus :-

In para 11 "*from the provisions of Section 138 ..... it clearly follows that if, on dishonour of a cheque ..... a notice is not given..... and/or if the drawee receives, after the cheque stands dishonoured, any amount in discharge of the liability, partial or complete, which the cheque carried, the drawee,..... shall not have the right to present to the bank such a cheque for payment ..... the drawee will not be entitled to prosecute the drawer.....*"

In para 12 "*the complainant's firm, having so received the sum of Rs.20,000/- would not be entitled to prosecute the accused petitioner, for, no cheque for Rs.55,000/- can be said to have been issued by the accused petitioner, and no notice, demanding payment of the remaining amount of Rs.55,000/- can be said to have been received by the accused petitioner***."**

In para 30 "…… *when the debt or liability of the accused had become less than Rs.75,000/- the complainant could not have presented the cheque for Rs.75,000/- to the bank and institute a proceeding under Section 138 of the N.I. Act,……***".**

In para 31 "…… *when, upon dishonour of a cheque of a certain amount of money, the holder of the cheque receives part payment towards the total amount for which the cheque stood issued, the holder of the cheque cannot, ……. launch prosecution against the drawer of the cheque,……"*

In para 33 "…… *the complainant was not entitled to receive the sum of Rs.75,000/- ……. and when the accused had not remained liable to pay Rs.75,000/-, the cheque, ……. Ought not to have been presented to the bank for encashment and upon its dishonour ……. the prosecution under Section 138 of the N.I. Act could not have been launched against the accused petitioner. Considered thus, it is abundantly clear that the prosecution launched against the accused petitioner was wholly impermissible in law……"*

To comprehend the law stated in the above extracts from MANIK LODH it will be necessary to have a close look at the relevant provisions of the N.I. Act. Such a look is attempted in the next paragraphs.

4. THE RELEVANT LAW IN THE N.I. ACT.

The offence under Section 138 of the N.I. Act has been in existence only since 01.04.1989 while the N.I. Act itself is in operation since 01.03.1882. Under Section 138 of the N.I. Act a statutory offence has been created in essentially a Civil Statute dealing with negotiable

instruments. Because of its origin concepts from Civil Law tend to infect criminal prosecution under Section 138 of N.I. Act.

Judgments tending to treat a complaint under Section 138 N.I. Act as if it were a plaint in a civil suit are not rare. The five extracts from MANIK LODH seem to have been the result of a failure to keep civil liability and criminal liability apart and the holdings therein do not appear to be deducible from the provisions of Section 138 of the N.I. Act. It is unfortunate that the learned counsel for the complainant could not place the entire law before the High Court. For example some of the statements in the extracts would not have been made had the provisions for presentment contained in chapter V of the N.I. Act been placed before the High Court. Of particular relevance is the provisions of Section 44 and 45 of the N.I. Act which deal with partial failure of money consideration or consideration ascertainable in money. A direct counter to what has been said in the extracts from MANIK LODH quoted above regarding the complainant not being entitled to present the cheque for Rs.75,000/- after receiving Rs.20,000/- is provided by the provisions of Section 44. The civil liability will no doubt be Rs.55,000/- after receipt of Rs. 20,000/- The complainant cannot realize Rs.75,000/- in a suit on the cheque but that would not prevent presentation of the cheque leading upto an eventual prosecution. Indeed if one looks at the provisions of proviso (C) to Section 138 of the N.I. Act it is crystal clear that unless within fifteen days of receipt of the notice demanding payment of " the said amount of money" that is the amount of the cheque is paid to the payee the offence is complete. On analyzing the provisions of Section 138 of the N.I. Act the following five ingredients of the offence emerge: (1) the drawing of the cheque for discharge wholly or partly of a legally enforceable debt or liability (2) Presentation of the cheque to the drawee bank within the period of validity, (3) Returning of the cheque unpaid by the drawee bank, (4)Giving notice by the payee in writing to the drawer of the cheque within thirty days of receipt of information by him from the bank regarding the return, (5) Failure of the drawer to pay the amount of the cheque within fifteen days of the receipt of the notice. The offence is completed on completion of the above chain of acts. Then within one month of failure to pay the entire amount within the fifteen day period as in (5) the prosecution may be launched. Section 138 mentions presentation only in proviso (a) thereof. It is trite to say that a cheque may be presented within the proviso any number of times within the period of its validity. But the cause of action for prosecution arises only once with regard to dishonour of a cheque. Any absence and/or infraction of, or infirmity in, the above ingredients are the defences to a prosecution under Section 138 of the N.I. Act. Part payment of the amount of the cheque is obviously not within the available defences in a criminal

prosecution Under Section 44/45 of the N.I. Act even in a civil suit part payment only proportionately reduces the eventual liability to be crystallized in the decree. It may be unethical on the part of the complainant having received part payment to launch prosecution. But in the criminal case the court is concerned not with any ethical problem but with a legal problem and law seems to be on the side of the complainant. In the criminal case the complainant is not seeking to enforce any liability crystallized in the cheque but only seeking to penalize the accused for committing an offence. Legally enforceable debt or liability mentioned in the provision predates the cheque. The presumption under Section 139 is not applicable to the existence and quantum of the debt but only to the discharge aspect of the debt or liability. Any diminution of that liability after drawal of the cheque does not, on the law under Section 138 of the N.I. Act other ingredients being satisfied, have any impact on the offence. Once the offence is complete even total discharge of the liability at a time beyond the fifteen days period indicated in proviso (C) to Section 138 of the N.I. Act will not wipe out the offence. To hold otherwise would be like holding that if a thief restores the stolen property the offence under Section 379 I.P.C. will be non existent and such a person can no longer be prosecuted.

Although no question of construction of Section 138 N.I. Act arose in the case in a way by holding as the High Court did in the five extracts from MANIK LODH quoted earlier the High Court has in effect put an interpretation on Section 138 of the N.I. Act. It may now be examined whether any known principle of interpretation would support the interpretation contained in the extracts quoted earlier in this essay.

It is trite to say that courts strongly lean against an interpretation making a statute or an enacting provision unworkable. This is on the principle expressed in the Latin maxim "Ut res magis valeat quam pereat". Translated into English (vide BLACK'S LAW DICTIONARY, Eight Edition page 1582) the maxim means, "to give effect to the matter rather than having it fail" In this regard passages from Craies on statute Law and Maxwell on the Interpretation of Statute have been quoted often in Judgments of the Supreme Court. Of such Judgments the following three decisions namely;

(1) Three Judge unanimous decision of the Supreme Court in Commissioner of Income Tax Vs Teja Singh AIR 1959 S.C. 352.
(2) Five Judge decision in M. Pentiah Vs Verramallapa, AIR 1961 S.C. 1107, and

(3) Another Five Judge unanimous decision in Tinsukhia Electric Supply Co. Ltd. Vs State of Assam , AIR 1990 S.C. 123 attained the status of locus classicus.

The object of enacting the penal provisions in the N.I. Act has been indicated by the High Court at para 10 of MANIK LODH. If the interpretation contained in the five extracts from MANIK LODH quoted in this essay is correct by a simple device of making a payment of a token amount of Rs.1/- even any time after issuing the cheque the offence may be wiped out and the object of the penal provision may be completely defeated.

An apt ending to this paragraph of the essay may be the following sentence borrowed, paraphrased and edited suitably from para 18 of the Three Judge decision of the Supreme Court in MODI CEMENTS LTD. –Vs- KUCHIL KUMAR NANDI, AIR 1998 S.C. 1057, a decision rendered in connection with a different aspect of Section 138 of the N.I. Act:

> **If the proposition enunciated in the five extracts from MANIK LODH is acceptable it will make Section 138 a dead letter, for, by making a part payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding that a deemed offence was committed.**

5. PRECEDENTS

It has been stated in para 9 of MANIK LODH that the learned counsel for the complainant in support of his contention "that payment of a part of the sum, for which the cheque is drawn, does not absolve the drawer from prosecution under Section 138 of the N.I. Act" relied on P.V. KOCHAYIPPA Vs P.N. SUPRASIDHAN, RAJANI BHAWAN AND ANOTHER, 2002 Cri.L.J. 4803 OF THE Kerala High Court. As held in MANIK LODH (para 32) the Judgment of the Kerala High Court lends no support to the contention. It has already been hinted that the problem seems to be res integra, MANIK LODH may be a case of first impression. However, the decision, closest on facts to MANIK LODH is M/s ANCON ENGG Co. (P) Ltd. Vs AMITAVA GOSWAMI, 1994 Cri.L.J. 351 from the Calcutta High Court. In that case on the 14th July, 1992 the complainant issued the notice demanding payment of the aggregate amount of four cheques amounting to Rs.36,842/- On the 28th July 1992 the drawer of the cheques forwarded a pay order for Rs.5000/- only to the payee. The payee as complainant filed the complaint under Section 138 read with 141 N.I. Act on the 12th of August 1992 and on the 20th of November, 1992 the

payee/complainant encashed the pay order earlier forwarded by the drawer/accused. On these facts with considerable similarity to that in MANIK LODH the contention before the Calcutta High Court was that since part payment of Rs.5000/- had been made the notice was no longer valid to sustain the cause of action and thus the prosecution is not maintainable.

The Calcutta High Court responded thus :-

(A) **"***If part payment could protect the drawer of the cheque from prosecution under S. 138 this would have been a very handy and convenient device for an unscrupulous person to frustrate the very purpose of S. 138 in that on tender of any paltry and insignificant amount say Rs.10/- or Rs.5/- even against demand for any huge amount mentioned in the cheque could frustrate the coercive remedy which the legislature has thought fit to make available under S.138 to a duped payee coming within the ambit of the said section***."**

(B) **"***It is immaterial whether the pay order which was issued towards part payment but not to cover the entire amount was encashed by the complainant after filing the complaint. Once the offence is complete any subsequent conduct either of the complainant or of the accused will not wash away the offence although in certain cases it may be permissible to compromise or compound the matter. In this connection it may be mentioned that where a person commits theft or criminal misappropriation the subsequent restoration of the subject matter of the theft or criminal misappropriation will not undo the offence which has already been committed……."*

The Calcutta High Court also held in the above case that part payment may have only a bearing on the quantum of sentence. In this connection some light can be drawn from three Supreme Court decisions. In SIVA SANKARAN Vs STATE OF KERALA, (2002)8 SCC 164 and K.L. KUNJAPPAN Vs RAFEEQUE, (2002)8 SCC 181 decided respectively on 05.08.2002 and 12.08.2002 a Three Judge Bench of the Supreme Court, money due under the cheque having been paid pursuant to a compromise, ordered reduction of the sentence only and not acquittal of the accused.

Another decision from the Supreme Court having some bearing on the question posed in MANIK LODH may also be noticed. In RAJNEESH AGGARWAL Vs AMIT BHALLA, AIR 2001 S.C. 518 the Supreme Court in para 7 of the Judgment spoke thus :-

> **"***So far as the criminal complaint is concerned, once the offence is committed, any payment made subsequent thereto will not absolve the accused of the liability of criminal offence, though in the matter of awarding of sentence, it may have some effect on the court trying the offence. But by no stretch of imagination a criminal proceeding could be quashed on account of deposit of money in the court……"*

It may be stated that in that case the entire amount of three cheques were deposited during the trial.

6. THE UPSHOT

To summarize, MANIK LODH has been the result primarily of a mix up between civil and criminal liability and derivatively of a misapprehension as to the concept contained in the word "liability" in Section 138 and 139 of the N.I. Act. Conclusion, then, has to be that MANIK LODH has not been correctly decided. However, MANIK LODH, apart from the answer to the sixth question critically examined in this essay, has also dealt with presumptions, standard of proof and discharge of burden of proof by the accused. That part of MANIK LODH is by and large in consonance with the holdings in the following five decisions of the Supreme Court by the same Presiding Judge of five Two Judge Benches, all cases under Section 138 of the N.I. Act. These decisions are :

1. *M.S NARAYAN MENON ALIAS MANI Vs STATE OF KERALA AND ANOTHER (2006) 6 SCC 39 dated 04.07.2006.*
2. *KAMALA S. Vs VIDYADHARAN M.J. AND ANOTHER, (2007)5 SCC 264, dated 20.02.2007.*
3. *K. PRAKASHAN Vs P.K. SUNDERAN, (2008) 1 SCC 258 dated 10.10.2007.*
4. *JOHN K. JOHN Vs TOM VERGHESE AND ANOTHER, 2007 AIR, SCW 6736 dated 12.10.2007.*
5. *KRISHNA JANARDHAN BHAT –Vs- DATTATRAYA G. HEGDE, 2008(1) SCALE 421 dated 11.01.2008.*