

**A PERSPECTIVE ON TWO RECENT DECISIONS OF
THE SUPREME COURT.**

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1. PREFACE

In the month of May 2009 the Supreme Court delivered two judgments dealing with two questions of Law arising in two criminal cases under Section 138 of Negotiable Instruments Act 1881 (N.I. Act hereinafter). In the first judgment no previous decisions of the Supreme Court or of the High Courts on the exact question involved have been cited and considered and as a result the judgment came to be rendered per incuriam. In the second judgment a point seemingly well settled has been unsettled. The writer has not been able to accept this unsettlement of the law in one case and the error of law in the other case. Hence this perspective penned in June 2009.

2. RAJ KUMAR KHURANA -VS- STATE OF (NCT OF DELHI) AND ANR, 2009 (7) SCALE 55 DATED THE 5TH OF MAY, 2009.

The Judgment noted above will hereinafter be referred to as **RAJ KUMAR KHURANA**. A cheque was returned unpaid by the bank with the endorsement "said cheque reported lost by the drawer". On receipt of the information of dishonour from the bank the complainant issued the requisite notice demanding payment of the amount of the cheque. In reply the story of loss of the cheque on being stolen by the complainant had been stated to be false. In due course a complaint under Section 138 N.I. Act was filed. On being summoned to face the trial the drawer reached the High Court pleading that on the facts stated in the complaint no offence had been disclosed and the complaint should be quashed. The High Court did not accede to the prayer. However in **RAJ KUMAR KHURANA** a Two Judge Bench of the Supreme Court opining "that the complaint petition does not disclose an offence punishable under Section 138 of the Act" quashed the proceedings in the complaint case.

Reasons that can be gathered from the judgment for such a holding are these. The provisions of Section 138 N.I. Act create a crime through a legal fiction and as such must receive strict construction. Either of the grounds of dishonour of the cheque mentioned in the section are thus legal requirements of the offence. The complaint being devoid of either of the grounds does not disclose the offence under Section 138 N.I. Act. In the case at hand the complaint petition did not contain any allegation that the

accused did not have sufficient funds in his bank account. Para 11, 12, 13 and 14 of the judgment contain the details of the reasons. It will be convenient to test the validity of these reasons on the touchstone of principles and precedents.

2.1. THE PRINCIPLE OF STRICT CONSTRUCTION OF PENAL LAWS.

As regards the origin of the principle of strict construction of penal laws in Maxwell on the Interpretation of Statutes, 12th Edition at page 238 one can read the following :-

“ The rule that statutes imposing criminal and other penalties should be construed narrowly in favour of the person proceeded against was more rigorously applied in former times when the number of capital offences was still very large, when it was still punishable with death to cut down a cherry tree in an orchard or to be seen for a month in the company of gipsies.”

In the same work the author also has noticed the gradual development of the principle of wider construction depending on the purpose of the statute. A very detailed analysis of the principle inclusive of its origin and the modern day development can, however, be read in Justice G.P. Singh's celebrated work PRINCIPLES OF STATUTORY INTERPRETATION, 11TH Edition, 2008 from page 845 to 874 under Synopsis 3. A large number of cases from the English Courts and the Supreme Court dealing with modern penal statutes in England as well as in India have been digested in the aforesaid synopsis. Among the decisions digested are decisions relating to Prevention of Corruption Act 1947, Section 135 of the Customs Act 1962, Section 489A of the Indian Penal Code. Penal provision in Foreign Exchange Regulation Act 1947 and 1973 and Section 138 of N.I. Act 1881. A perusal of the Synopsis 3 of the Justice G.P. Singh's Book described above leaves no doubt that the principle of strict construction of penal statutes has largely yielded place to the modern doctrine of purposive interpretation of all statutes. Viewed in the light of the principle in its modern avatar, as indicated above, the statement in para 11 of RAJ KUMAR KHURANA implying that the two grounds of dishonour mentioned in Section 138 N.I. Act as legal requirement of the Section would have to be alleged in the complaint on the principle of strict construction of a penal provision is far wide of the mark. In other words modern variant of the principle would not support the statement. Such a requirement would certainly defeat the object and purpose of the penal provision. One may now look at the reasonings in RAJ KUMAR KHURANA in the light of the precedents.

2.2. PRECEDENTS

Introductory to this part of the essay it has to be stated that the remark returning the cheque unpaid that is "SAID CHEQUE REPORTED LOST BY THE DRAWER" is nothing but an instruction to the bank to stop payment. From the date of birth of the offence under Section 138 N.I. Act, on the 18th April 1989 till today the High Courts and the Supreme Court has dealt with a large number of cases of cheques affected by "stop payment" instructions. The decisions are also not far to seek dealing with various other kinds of endorsements by the bank returning a cheque unpaid.

2.2.1. THE VOICES FROM THE HIGH COURTS

The High Courts have spoken on the matter under examination in two distinct voices. One group of cases spoke for strict or literal construction of the provisions contained in Section 138 of N.I. Act as regards the reasons for dishonour. The reasoning runs like this. Section 138 creates an offence and a penal provision as is well known should be construed strictly. The Legislature has consciously chosen two reasons out of several possible reasons for dishonour. Therefore the intention is to punish other ingredients being fulfilled, only if the cheque is returned because of one or the other of the two reasons pointedly mentioned in the Section. Above all the language of the provision in as much as it used the decisive expression "either or" clinches the matter in favour of strict construction.

A few of the decisions advocating strict construction may be noticed at this stage. Perhaps one of the earliest cases is the one from the Karnataka High Court. Reference is G.F. Hunasikathimath -Vs- State of Karnataka (1991) 1 Crimes 226 rendered by a Single Judge where the cheque was returned with the Bank's endorsement "Account closed". The Magistrate refused to issue process as according to him closure of account is not within the grounds indicated in Section 138 N.I. Act. The High Court moved under 482 Cr.P.C upheld the Magistrate's conclusion. As usual in the precedent bound judicial system of ours a few other High Courts followed the easy way of holding likewise because the Karnataka High Court held as above. Some of these decisions do not contain any other reason except the reason that the Karnataka High Court has held thus therefore I hold likewise. For the sake of brevity such Judgments may be described as heldhold judgments. These "held hold" judgments variously dealt with endorsements such as "Account closed", "refer to drawer" and "stopped payment" in the Bank's slip. A common feature of these Judgments is that all are Single Bench Judgments rendered under Section 482 Cr.P.C. These judgments are -Prasanna -Vs- R. Vijaya Laxmi, 1992 Cr.L.J. 1233, from the Madras High Court; Bhageerathy -Vs- Beena 1992 Cr. L.J. 3946 from the Kerala High Court; Omprakash -Vs- Smti. Swati Girish Bhide (1992) 3 Crimes 306 from the Bombay High Court; M/s Union Roadways (P) Ltd. -Vs- M/s Shah Ramanlal Satesh Kumar (1992) 2 Crimes 215 from the Andhra

Pradesh High Court and Abdul Samad –Vs- Satya Narayan Mahawar (1993) 76 Com Cas 241 from the Punjab and Haryana High Court.

Opposed to the above is the other group of decisions advocating purposive construction of the provision containing reasons for dishonour of a cheque. This view based on Mischief Rule has been expounded brilliantly by four Division Bench decisions of four different High Courts.

In THOMAS VARGHESE –VS- P. JEROME, 1992 Cr. L.J.3080 dated 05.06.1992 one can read the following :

“ The rule of strict interpretation of penal statutes in favour of an accused is not of rigid or universal application. It must be considered alongwith other well established rules of interpretation. When it is seen that the scheme and object of the statute are likely to be defeated by the strict interpretation, Courts must endeavour to resort to that interpretation which furthers the object of the legislation

In this circumstance, we are not in a position to hold that a complaint under S.138 of the Act should be thrown out at the threshold if the banker’s endorsement while returning the cheque is anything other than that the amount of money standing to the credit of the account of the drawer 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.

Next on 29.07.1992 a Division Bench of Bombay High Court decided RAKESH NEMKUMAR PORWAL –VS- NARAYAN DHONDU JOGLEKAR, 1993 CR.L.J. 680. Of importance for the present purpose is the following statement of law in the Judgment :-

“18. A clear reading of the S. 138 leaves no doubt in our mind that the circumstances under which such dishonour takes place are required to be totally ignored. In this case, the law only takes note of the fact that the payment has not been forthcoming and it matters little that any of the manifold reasons may have caused that situation.....

*.....
25 The wording and the endorsement from the bank or the circumstances under which a cheque is returned are not the guiding criterion but the fact that on presentation of the cheque, the payment was not made*”

The Division Bench Judgment of Andhra Pradesh High Court dated 30.09.1992, namely; M/S SYED RASOOL & SONS -VS- M/S AILDAS & COMPANY, 1992 CR.L.J 4048 dealt with a case of dishonour of cheques returned with the endorsement “refer to drawer”. The Division Bench refused to quash the complaints mainly on the ground that in banking parlance “refer to drawer” signifies insufficiency of funds. However, in reaching such a conclusion the Division Bench stressed the point that “words used by the bank in dishonour of cheque” are not important.

Perhaps the clearest statement of the law that the bank’s endorsement in returning the cheque is immaterial can be read in the Division Bench Judgment of the Madras High Court dated 19.10.1994 namely VEERARAGHAVAN -VS- LALITH KUMAR 1995 Cr.L.J 1882. The Judgment considered both the strict and liberal interpretation doctrines, drew largely on Rakesh Porwal (Supra) and Thomas Verghese (Supra) and then answered the point relating to grounds of dishonour thus :

“ 22..... We are, therefore, of the firm view that the reasons, as given by the bank for the return of the cheque may not at all reflect the reality of the situation relatable to the sufficiency or otherwise of the funds in the accounts of the drawer or whether it exceeds the amount arranged to be paid by the drawer by agreement with the bank.”

With regard to “what is necessary and requisite for a complaint to be taken cognizance of, in respect of an alleged offence under Section 138 of the Act”, the Division Bench listed the dishonour of the cheque whatever be the reason, the presentation within the period of validity, the non compliance with the notice demanding payment and institution of the complaint within one month of such non-compliance as the essentials. It further held thus:

“ Such being the case the non mentioning in the complaint by way of a specific averment made therein as to the insufficiency of funds in the account of the drawer, is of no consequence and the question whether there was sufficiency of funds or not in the account of the drawer on the date when the cheque had been drawn, will be relevant during the stage of trial and such question is capable of being decided, with ease and grace, by the Court on the adduction of evidence”

Finally, the Division Bench answered the questions centering round the reason for dishonour of cheques in these words :

“(i) It shall be competent for a Magistrate to take cognizance of a private complaint, when the return

by the bank of the cheque bears endorsement of any of the contingencies or eventualities other than the one mentioned in Section 138 of the Negotiable Instruments Act.

(ii) Invoking the inherent power Under Section 482, Code of Criminal Procedure is not permissible to put an end to the prosecution, merely because the averments in the complaint as relatable to insufficiency of funds, not being specifically mentioned, especially when the details as to the factum of dishonour of a cheque, whatever be it reasons Presentation within the period of validity or six months coupled with the non-compliance by the drawer of the demand made on him and institution of the prosecution within one month from such non-compliance are all specifically mentioned in the complaint.....”

Indeed a direct decision dealing with a complaint where the cheque was returned unpaid with the endorsement “cheque reported stolen” is available from Kerala High Court. The High Court refused to quash the complaint in T.P. CHANDRAN -VS- M.K. SATHYANANDAN AND ANOTHER, 2000 Cri. L.J. 3728 relying on a Three Judge decision of the Supreme Court.

It may now be seen what view the Supreme Court has chosen out of the two views exposed so far from the High Courts.

2.2.2. THE VOICES FROM THE SUPREME COURT.

One may straight away begin with MODI CEMENTS LTD -VS- KUCHIL KUMAR NANDI, AIR 1998 S.C. 1057 decided on the 2nd March 1998, the Three Judge decision of the Supreme Court binding on the Two Judge Bench in RAJ KUMAR KHURANA. There the Magistrate took cognizance of three complaints relating to three cheques returned unpaid by the Bank with an endorsement “payment stopped by the drawer”. Unlike in RAJ KUMAR KHURANA the High Court quashed the complaints allowing applications under Section 482 of the Code of Criminal Procedure 1973 on the grounds (1) that neither insufficiency of funds in the account nor exceeding of arrangement, which are necessary ingredient of Section 138 of the N.I. Act having been pleaded cognizance could not have been taken (2) that the endorsement “payment stopped” being not an ingredient of the offence under Section 138 of the N.I. Act cognizance could not have been taken on its basis. The three Judge Bench while setting aside the quashing of the complaints by the High Court clearly and firmly held that the endorsement “stop payment” is covered by Section 138 of the N.I. Act. It was firmly and clearly further held that irrespective of the fact that “stop payment” instructions to the Bank or “do not present now” notice to the holder is issued before presentation of the cheque, the instruction or information would be within Section 138. Certain observations to the

contrary in AIR 1996 S.C. 2339 and (1996)6 SCC 369, two Two Judge decisions on Section 138 of the N.I. Act were held to be incorrect in these words.

“The aforesaid propositions in both these reported Judgments , in our considered view, with great respect are contrary to the spirit and object of Section 138 and 139 of the Act. If we are to accept this proposition it will make Section 138 a dead letter, for, by giving instructions to the bank to stop 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”.

There can be no doubt that the Three Judge Bench lays down that the principle of purposive interpretation as the correct principle to adopt and not the old principle of strict construction of penal statute. In NEPC MICON LTD. -VS- MAGMA LEASING LTD., AIR 1999 S.C. 1952 the Supreme Court considered the two competing views emanating from the High Courts indicated earlier. The Two Judge Bench impliedly approved the Division Bench Judgments of the Madras and Bombay High Courts mentioned earlier. The Judgment relying on the Mischief Rule expounded in Heydon’s case 76 ER 637 held that “even with regard to penal provision any interpretation, which withdraws the life and blood of the provision and makes it ineffective and a dead letter should be averted.”

In M/S M.M.T.C. Ltd. -VS- M/S MEDCHL CHEMICALS, AIR 2002 S.C. 182 the Supreme Court again dealt with a case of dishonour of cheques with the endorsement “payment stopped by the drawer”. The High Court quashed the complaints because of such endorsement as also on two other grounds. Rejecting all the three grounds and relying on MODI CEMENTS (Supra) rather further explaining the said Three Judge decision the Supreme Court held thus :-

“It has been held that even though the cheque is dishonoured by reason of “stop payment” instruction an offence under Section 138 could still be made out. It is held that presumption under Section 139 is attracted in such a case also. The authority shows that even when the cheque is dishonoured by reason of stop payment instructions by virtue of Section 139 the Court has to presume that the cheque was received by the holder for the discharge in whole or in part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus show that the stop payment instruction were not issued because of insufficiency or paucity of funds. If the accused shown that in his account there was sufficient funds to clear the amount of the cheque at

the time of presentation of the cheque for encashment at the drawer bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of the cheque for encashment, then offence under Section 138 would not be made out. (Underlining supplied).

The same law has been laid down in **GOA PLAST PVT. LTD. – VS- CHICO URSULA D/SOUZA, AIR 2003 S.C. 2035. In N.A. ISSAC –VS- JEEMON P. ABRAHAM, 2005 –BCR (Cri) -1-771** to uphold the object of the penal provision in Section 138 of the N.I. Act, the Supreme Court set aside the quashing of a complaint under the section relating to a cheque issued “from an already closed account” holding that the High Court had erred in narrowly construing the word “maintained” in Section 138 which construction would defeat the object of the penal provisions. Unfortunately none of these decisions of the Supreme Court nor the Division Bench decisions of the four High Courts were noticed in **RAJ KUMAR KHURANA**. The two Supreme Court decisions namely (2009)1 SCC 516 and (2008)8 SCC 1 mentioned in para 11 of **RAJ KUMAR KHURANA** do not at all deal with the question falling for determination in the case.

Lastly the implication in para 13 of **RAJ KUMAR KHURANA** that insufficiency of funds in the account has to be alleged in the complaint or in other words such an allegation is an ingredient of the offence apart from being on the wrongside of many previous decisions of the Supreme Court is in conflict with three other Three Judge decisions of the Supreme Court namely **S.M.S. PHARMACEUTICALS LTD. –VS- NEETA BHALLA (2005) 8 SCC 89** and **C.C. ALAVI HAZI –VS- PALAPETTY MUHAMMAD & ANR (2007)6 SCC 555** and **RAMRAJ SINGH –VS- STATE OF M.P. AND ANR., 2009(5) SCALE 670** where the ingredients of the offence under Section 138 of the N.I. Act have been clearly pinpointed respectively in paragraph 2, paragraph 6 and paragraph 10 of the Reports.

2.2.3. CONCLUSION ON **RAJ KUMAR KHURANA**

In view of what has been stated above there can be no question that **RAJ KUMAR KHURANA** being on the wrong-side of principle and binding precedent has been decided per incuriam. The Judgment may not be read as a precedent that no process need be issued in a complaint under Section 138 N.I. Act if the cheque is returned unpaid with the bank’s remark that the cheque has been reported by the drawer as lost or stolen which is nothing but a variant of “stop payment instruction”.

3. **SIVA KUMAR –VS- NATARAJAN, 2009(8) SCALE 431 DATED THE 15TH OF MAY, 2009**

The above noted judgment will be referred in this essay as **SIVAKUMAR**. Sivakumar was convicted and sentenced for an offence under Section 138 of the N.I. Act. His appeal and revision respectively before the Sessions Judge and the High Court proving unsuccessful Sivakumar

eventually succeeded in getting an acquittal by the Supreme Court on a pure question of Law. The question of law centres round the following short facts. The complainant Natarajan received the information returning the cheque unpaid from the Bank on 03.12.2003. The notice demanding payment of the amount of the dishonoured cheque was issued on 02.01.2004. Does the notice fulfil the requirements of being “within thirty days of receipt of information by him” as laid down in proviso (b) to Section 138 of the N.I. Act ? The Judicial Magistrate III Tiruchirapalli, the Principal Sessions Judge, Tiruchirapalli and the Madras High Court thought that the notice does. But the Supreme Court thought that the notice is bad by one day. The core question of law is whether the date of receipt of information from the bank that is 03.12.2003 is to be included in or excluded from the thirty days available under proviso (b) to Section 138 of the N.I. Act for the giving of the notice. Unlike RAJ KUMAR KHURANA in so far as the Supreme Court is concerned SIVAKUMAR seems to be a decision of the first impression and as such the decision is on virgin ground. Fed on a diet of the principle behind section 9 of the General Clauses Act 1897, of Section 12(1) of the Limitation Act, 1963, it is small wonder that the three courts below excluded the first day that is 03.12.2003 from the thirty days period for giving the notice. What then are the reasons for the reversal at the hands of the Supreme Court ?

3.1. THE REASONS

As in RAJ KUMAR KHURANA the requirement of strict construction of the provisions of Section 138 N.I. Act has been emphasised. Following up on that the main reason stated in para 11 of the Judgment centres round the fact that the parliament used the words “within thirty days of the receipt of information” and not “within thirty days of the date of receipt of information”. This difference in phraseology and departure from the provisions Section 9 of the General Clauses Act 1897 are significant and deserve serious consideration. So proceeding the Supreme Court held that including the first day that is 03.12.2003 the notice dated 02.01.2004 was issued on the 31st day and not within a period of thirty days from the date of receipt of information from the Bank. The proviso (b) to Section 138, thus having been breached, the concurrent conviction by the three courts below had been set aside. The two prepositions “of” and “from” seem to have clinched the matter one way or the other.

These reasons may now be tested in the light of principle and precedents.

3.2. THE PRINCIPLES AND PRECEDENTS

SIVAKUMAR appears as far as the writer is concerned to be the only judgment from the Supreme Court reading a difference between “of” and “from” in the language of Section 138 of the N.I. Act. MUNOTH INVESTMENTS LTD. -VS- PUTTKOLA PROPERTIES LTD. AND ANOTHER, (2001)6 SCC 588 has been referred with approval in

SIVAKUMAR but MUNOTH (Supra) does not read any difference between “of” and “from”. This is evident from the fact that after quoting the proviso (b) with the “of” the Supreme Court paraphrased the provision thus :

“ So fifteen days are to be counted from the receipt of information

.....” (underlining supplied).

MUNOTH (Supra), thus, does not support the interpretation of the proviso (b) in SIVAKUMAR.

Turning to the High Courts one finds a few cases dealing with the matter containing similar phraseology as in proviso (b) to the Section 138 of the N.I. Act.

VASANTLAL RANCHHODDAS PATEL AND OTHERS -VS- UNION OF INDIA AND OTHERS, AIR 1967 BOMBAY 138, a Division Bench judgment of the Bombay High Court interpreted the phrase “within six months of the seizure of the goods” in sub-section (2) of Section 110 of the Customs Act, 1962 Para 10, 11 and 12 of the Judgment contain the detailed reasons for the conclusion that “of” and “from” in the context of Section 9 of the General Clauses Act 1897 mean the same thing. The main planks of the reasoning are :- (1) the principles behind Section 9 of the General Clauses Act 1897 are applicable even though in terms the section may not be applicable. (2) There is a plethora of English decisions holding that “of” “from” and “after” really mean the same thing. (3) In STROUD’S JUDICIAL DICTIONARY VOL.3 1953 Edition in Note (5) under the word “of” it has been observed that “of” is sometimes the equivalent of “after” e.g. in the expression “within 21 days of the execution”. The principle underlying Section 9 of the General Clauses Act cannot therefore be held inapplicable merely because the word used in sub-section (2) of Section 110 of the Customs Act 1962 is “of” and not “from”. (4) The argument that relevant words being “within six months of the seizure of the goods” and not “within six months of the day of the seizure of the goods” Section 9 of the General Clauses Act cannot be applied has been answered by Halsbury thus (see Halsbury’s Laws of England, Third Edition Vol.37, page 95) :-

“ The general rule in cases in which a period is fixed within which a person must act or take the consequences is that the day of the act or event from which the period runs should not be counted against him.”

It may be stated at this stage that the principle narrated in the English cases and in Halsbury’s Laws of England have been accepted by the Supreme Court in HARU DASGUPTA -VS- THE STATE OF WEST BENGAL, (1972)1 SCC 639 excerpts wherefrom were quoted in SAKETH INDIA LTD. AND ANOTHER -VS- INDIA SECURITIES LTD., (1999)3 SCC 1, though the contexts were not quite the same.

In **Re V.S. METHE AND OTHERS, AIR 1970 ANDHRA PRADESH 234**, a Division Bench judgment considered the meaning of the phrase “within three months of the date” in section 106 of the Factories Act 1948. The Division Bench using **STROUD’S** judicial Dictionary applied Section 9(1) of the General Clauses Act, among other reasons, and excluded the first day.

In **KASHI NATH PANDEY -VS- SHIBBAN LAL SAXENA, AIR 1959 Allahabad 54**, a Division Bench of the Allahabad High Court interpreting the phrase “within fourteen days of such publication” excluded the first day that is the date of publication in counting the period of fourteen days.

Lastly, in **SMT E.P. JANUAMMA -VS- THE REVENUE DIVISIONAL OFFICER, KOZHIKODE, AIR 1980 Kerala 175**, a Single Bench of the Kerala High Court found no difficulty in reading the phrase “within six weeks of the receipt of the notice” as within six weeks from the date of receipt of the notice”.

Unfortunately no argument on the basis of the principles discussed in the above judgments had been made in **SIVAKUMAR**. Indeed in **SIVAKUMAR** itself while pinpointing the “core question” in para 9 of the judgment the Supreme Court used the phrase “thirty days from the date of receipt” and not “thirty days of the date of receipt”. Talking of intention of Legislature the very fact that the period has been increased from fifteen days to thirty days with effect from 06.02.2003 is indicative of the intention that period available to the complainant should not be curtailed by including the first day but full thirty days should be made available to him by excluding the first day so that primary object of the statute that is to enhance the credibility of cheque culture is upheld.

A direct decision holding that while computing the period of the notice under the proviso (b) to Section 138 of the N.I. Act the day on which the information of dishonour is received has to be excluded is available from the Gujrat High Court. The decision is **HARSUKHLAL LAKMANBHAI VAGODIA -VS- STATE OF GUJRAT, 2000(2) A.I. Cri.L.R. 463 (Guj)**. Since the journal is not available to the writer the judgment could not be perused.

4. THE UPSHOT

On the precedents primarily from the High Courts and the principles discussed above there can be no doubt that **SIVAKUMAR** eminently deserves reconsideration by a larger Bench of the Supreme Court.