understand. In that context, the Division Bench held that the peculiar facts warranted it to be held that there was no impropriety committed by the Magistrate.

9. To put it simply, the requirement of law is that the Magistrate has to form an opinion in writing contemplated by Section 111 of the Cr.P.C. and thereafter proceed to issue a show cause notice as contemplated by Section 107 and along with the show cause notice annex the opinion. But, in a given case, it may happen that the language in which the order/opinion contemplated under Section 111 is not comprehensible to the noticee, then the notice may integrate the order/opinion and convey to the noticee in the language which the noticee comprehends.

10. The purpose of the law is that the noticee is to be made known the factual matrix comprising either the complaint or the information received by the Magistrate and the reasons for the opinion formed by the Magistrate.

11. Since we find no contra opinion in ***Suleman Adam's case (supra)*** vis-a-vis the opinion taken by the learned Single Judges or by the Division Bench of this Court in the 8 decisions referred to in paragraph 3 of the order dated 23rd December, 2014, we return the reference unanswered for the reason the law is well settled and captured in the eight decisions noted in paragraph 3 of the order of reference dated 23rd December, 2014.

***Result*:-** Ordered accordingly.

ABC 2019 (III) 310 BOM
ACQUITTAL & BAIL CASES

HIGH COURT OF BOMBAY

(Bharati Dangre, J.)
Criminal Application No 1316 of 2017
Decided on 26 September 2019

MR. SHEHZAD VALIMOHAMMAD MERCHANT - Applicant(s).

Versus

MR. SAIYED GHULAM ABBAS ZAIDI & ANR. - Respondent(s).

Law Covered*:-** ***(A) Negotiable Instruments Act, 1881— Sections 138 & 141 — Notice — issuing of — notice not issued to drawer company —Absence of statutory compliance of Sec. 138(b)—

the invocation of proceedings u/s 138 of the NI Act must necessarily fail — In the absence of the drawer i.e. the Company being issued with a notice before initiation of complaint — order of issuance of process set aside. (Para 13)

(B) Negotiable Instruments Act, 1881— Sections 138 & 141 — Appellant was not a Director — therefore, not in control of the affairs of the Company on the date when the cheque was presented — he had already ceased to be the Director of the Drawer Company — entitled to avail the benefit u/s 141. (Para 13)

(C) Negotiable Instruments Act, 1881— Sections 138(b)(c) & 141 — Vicarious liability of the Director of a Company — requirement under — Held, Section 138 & sub-Sections (b) &(c) do not admit of a situation where it is a requirement of drawee issuing a notice to every Director of the Company who was in charge & responsible to the Company for conduct of its business. (Para 13)

(D) Negotiable Instruments Act, 1881— Sections 138 & 141 — Merely on an assumption that when a notice is issued to the Director & then the Director would necessarily inform the Company — do not make it imperative for a drawer to issue a notice to any other person other than the drawer of the cheque. (Para 13)

(E) Jurisprudence — Requirement of a Statute — Held, when a statute requires a particular thing to be done in a particular manner— that must be performed in the same manner & not in any other manner. (Para 13)

(F) Negotiable Instruments Act, 1881— Section 138 vis-à-vis MoU — liability under — Held, the liability flowing from the Memorandum of Understanding is a different from the institution of proceedings u/s 138. (Para 13)

(G) Negotiable Instruments Act, 1881— Section 138 clause (b) — Scope — the proviso makes it imperative on the part of the payee or the holder in due course of the cheque — to make a demand for payment of said amount of the cheque by giving notice in writing — the said demand has to be raised on the drawer of the cheque. (Para 9)

(H) Negotiable Instruments Act, 1881— Section 138 Clause (c) — Scope — provides that if there is a failure on the part of the drawer of a cheque, to whom Notice has been issued, to make payment as demanded, to the payee or to the holder in due course of the cheque, within fifteen days of receipt of the notice, then the liability can be fastened u/s 138. (Para 9)

(I) Negotiable Instruments Act, 1881— Section 138(b) & (c) — Joint perusal — Object of issuing notice — is to give a chance to the drawer of the cheque to rectify his omissions and also to protect a honest drawer. (Para 9)

(J) Negotiable Instruments Act, 1881— Section 141 — Scope — the section postulates the constructive liability of the Directors of the Company — or other persons responsible for the conduct of the business of the Company — when offence is committed by the Company— every person who at the time when the offence was committed by the Company is in charge of & was responsible to the Company for conduct of business of the Company — as well as the Company shall be deemed to be guilty of the offence — shall be liable to be proceeded against and punished accordingly.

(K) Negotiable Instruments Act, 1881— Section 141 — Prosecution of person responsible — Exception under — if a person liable for punishment proves that the offence was committed without his knowledge — or that he has exercised all diligence to prevent commission of such offence — or where a person is a nominated Director. (Para 10)

(L) Negotiable Instruments Act, 1881— Section 138 & 141 — Distinct & conjunctive reading — Where a Company is liable for commission of offence — apart from the said company every person who was responsible for the affairs of the Company shall also be deemed to be guilty of commission of the said offence. (Para 11)

(M) Negotiable Instruments Act, 1881— Section 138 & 141 — Issue of notice — Section 138 does not admit of any necessity or scope that the Directors of the Company in question must also be issued individual notices — Such Directors who are in charge of affairs of the Company and responsible for the affairs of the Company would be aware of the receipt of the notice by the Company. (Para 12)

Facts:- *The company in question entered into a Memorandum of Understanding for Full and Final Settlement of Accounts with the respondents. The Complainant, being aggrieved by the dishonour of the cheque, addressed a notice to three Directors of the Company. Since there was no compliance of the said notice, complaint u/s 138, NI Act, came to be instituted which resulted into issuance of process by the Metropolitan Magistrate and the process was issued against the Applicant. The Applicant being aggrieved by the issuance of the process it was submitted on his behalf that he had tendered his resignation from the post of Director of the Company through a communication addressed to the Board of Directors*

which was accepted. Another aspect which was pressed into service was that the notice which was addressed by the Complainant was not addressed to the Company which was the drawer of the cheque. The honourable High Court accepted both the submission made on behalf of the appellant and set aside the order of the issue of process.

Law of relief:- ***When a statute requires a particular thing to be done in a particular manner that must be performed in the same manner & not in any other manner.***

Held:- To attract the offence and penalty under Section 138 of the NI Act, clause (b) of Section 138 of the NI Act makes it imperative on the part of the payee or the holder in due course of the cheque to make a demand for payment of said amount of the cheque by giving notice in writing and it is pertinent to note that the said demand has to be raised on the drawer of the cheque. Clause (c) of Section 138 of the NI Act then provides that if there is a failure on the part of the drawer of a cheque, to whom Notice has been issued, to make payment as demanded, to the payee or to the holder in due course of the cheque, within fifteen days of receipt of the notice, then the liability can be fastened under Section 138.

The perusal of Section 138(b) and (c) would make it amply clear that the object of issuing of notice is to give a chance to the drawer of the cheque to rectify his omissions and also to protect a honest drawer. Service of notice of demand as contemplated in Clause (b) of the proviso to Section 138 of the NI Act is a condition precedent for filing of a complaint under Section 138. By sending a notice to the Company as well as the persons in charge of and responsible for the conduct of business of the Company, the Complainant can make a demand asking him to pay the amount. The said notice can then be responded by denying that the addressee of the noticee is in no way responsible for the conduct of the business of the Company or another possibility is that efforts can be made by the Directors of the Company to make the payment and, in that event, the complainant may drop the action of filing of the complaint or on receipt of the response he may decide to file complaint only against the persons who are responsible for making the payment of the amount contained in the cheque. (Para-9)

Section 141 postulates the constructive liability of the Directors of the Company or other persons responsible for the conduct of the business of the Company and when offence is committed by the

Company, the question as to who would be responsible for the commission of offence, the answer is Section 141 and, by virtue of it, every person who at the time when the offence was committed by the Company is in charge of and was responsible to the Company for conduct of business of the Company as well as the Company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The only exception being that if a person liable for punishment proves that the offence was committed without his knowledge or that he has exercised all diligence to prevent commission of such offence or where a person is a nominated Director as contemplated in the second proviso to the said section. (Para-10)

Section 138 is to be distinctly and conjunctively read with Section 141 of the NI Act. Where a Company is liable for commission of offence, apart from the said company every person who was responsible for the affairs of the Company shall also be deemed to be guilty of commission of the said offence. (Para-11)

The said judgment also deals with Section 141 of the NI Act and authoritatively lays down that Section 138 of the NI Act does not admit of any necessity or scope for reading into it the requirement that the Directors of the Company in question must also be issued individual notices under Section 138 of the NI Act. Such Directors who are in charge of affairs of the Company and responsible for the affairs of the Company would be aware of the receipt of the notice by the Company under Section 138 of the NI Act and, therefore, on the purposive interpretation such a requirement of issuance of individual notices cannot be read into Section 138. (Para-12)

The NI Act draw a succinct distinction between the provisions of Section 138 and Section 141. Merely because a Director of a Company can be vicariously held liable for the offence committed by the Company by relying on Section 141 of the Act, the plain reading of Section 138 and sub-Sections (b) and (c) appended to the proviso do not admit of a situation where it is a requirement of drawee issuing a notice to every Director of the Company who was in charge and responsible to the Company for conduct of its business. This requirement of issuance of notice to an individual Director in terms of sub-clause (b) of proviso to Section 138 cannot be read into the said provision. Merely on an assumption that when a notice is issued to the Director and then the Director would necessarily inform the Company of such a notice being received, do not make it imperative

for a drawer to issue a notice to any other person other than the drawer of the cheque.

It is settled position of law that when a statute requires a particular thing to be done in a particular manner, then that must be performed in the same manner and not in any other manner. In such circumstances, in the absence of the notice being issued to the Company, which is the drawer of the cheque in question, the invocation of proceedings under Section 138 of the NI Act must necessarily fail in the absence of the statutory compliance of subclause (b) of the proviso appended to Section 138. In any contingency, the Applicant is also entitled to avail the benefit under Section 141 of the NI Act since it is an admitted position that he was not a Director, and, therefore, not in control of the affairs of the Company on the date when the cheque was presented i.e. on 31/01/2017 and on the said date, he had already ceased to be the Director of the Drawer Company. In the absence of the drawer i.e. the Company being issued with a notice as contemplated in Clause (b) of proviso to Section 138 before initiation of complaint under Section 138, the impugned order cannot be sustained. This aspect of the matter has been completely ignored by the Metropolitan Magistrate and the Additional Sessions Judge while passing the order. The liability flowing from the Memorandum of Understanding is a different from the institution of proceedings under Section 138 of the NI Act for the fact that one of the cheques which formed part of the Memorandum of Understanding is not honoured.(Para-13)

Counsel:- ***For Applicant(s):*** *Subodh Desai, Bhavesh Thakur, Advs.*

For Respondent(s): *Vijendra Kumar Rai, Priti S. Jaiswal, Iram Sayed, H.J. Dedhia, Advs.*

Cases Referred:-

1. Kirshna Texport and Capital Markets Limited v. ILA A. Agrawal & Others, (2015) 8 SCC 28, (Para-11)

JUDGMENT

BHARATI DANGRE, J.: - 1. The Applicant, who was a Director of Landmark Real Estate Developers Limited, a Company incorporated under the provisions of the Companies Act is before this Court assailing the action of issuance of process against him and subsequent order passed by the Appellate Court which upholds the order passed by Metropolitan Magistrate.

December 2019

2. The Landmark Real Estate Developers Limited entered into a Memorandum of Understanding for Full and Final Settlement of Accounts with one Mr. Sayed Ghulam Abbas Rizvi and two others wherein, it was agreed that the amount would be paid to the Fourth, Fifth and Sixth Parts of the Memorandum of Understanding in pursuance of the quashing proceedings that they have filed before the High Court seeking quashment of C.R.No.20 of 2016. A schedule of payment was set out and the Memorandum of Understanding also makes a mention to four post dated cheques and the issue in the present Criminal Application revolves around the third cheque bearing No.034405 dated 31/01/2017 issued for an amount of Rs.2,94,805/-.

3. The Complainant, being aggrieved by the dishonour of the cheque, on 13/02/2017 addressed a notice on three addressees viz. one Mr. Vali Mohamed Ismail Merchant, Director of Landmark Real Estate Developers Limited at his residence at 401, Khaiber Apartments, 83, Prof. Almeidia Road, Bandra (West), Mumbai. The second noticee is again Mr. Vali Mohamed Ismail Merchant, Director of Landmark Real Estate Developers Limited and the address is given as Digital Planet, 181, Hill Road, Bandra (West), Mumbai - 400 050. The third noticee is the Applicant Mr. Shehzad Vali Mohamed Ismail Merchant, Director of the Landmark Real Estate Developers Limited and the notice is addressed at his residence located at Andheri, Mumbai. Since there was no compliance of the said notice, complaint under Section 138 of the Negotiable Instruments Act, 1881 ("**NI Act**") came to be instituted which resulted into issuance of process by the 70th Court of Metropolitan Magistrate, Mazgaon, Mumbai and the process was issued against the Applicant who was arraigned as Accused No.3 in the said complaint for the offence punishable under Sections 138 and 142 of the NI Act.

4. The Applicant is aggrieved by the issuance of the process and the learned counsel Mr. Desai would submit that the unembellished and elemental facts have not been taken into consideration by learned Magistrate while issuing the process. He would submit that on 28/12/2016, the Applicant has tendered his resignation from the post of Director of the Company through a communication addressed to the Board of Directors of Landmark Real Estate Developers Limited. Pursuant to this, a Resolution was passed by the Board on the same day i.e. on 28/12/2016, thereby resolving that the resignation of the Applicant from the Directorship of the Company is accepted from 28/12/2016. The factum of resignation is

also depicted in Form DIR-12 maintained by the Ministry of Corporate Affairs and the said document confirms that the Applicant, with effect from 28/12/2016, is not associated with Landmark Real Estate Developers Limited.

5. Another aspect which the learned counsel for the Applicant has pressed into service is that the notice which was addressed by the Complainant was not addressed to the Company which is the drawer of the cheque dated 31/01/2017 issued to the Complainant for discharge of the liability of an amount of Rs.2,94,805/-. He would submit that the drawer of the said cheque is the 'Landmark Real Estate Developers Limited'. Relying upon clause (b) of Section 138 of the NI Act, Mr. Desai would submit that since the notice was not addressed to the drawer, the procedure contemplated under Section 138 of the NI Act is not complied with and resultantly, no liability under the said section can be foisted on its Directors as it is non compliant of clause (b) of Section 138 of the NI Act.

6. Learned counsel for the Respondent No.1 would invite my attention to the Memorandum of Understanding and he would submit that the cheque came to be issued towards discharge of liability as admitted and committed to in the Memorandum of Understanding executed between the parties towards Full and Final Settlement of Accounts. He would submit that the Memorandum of Understanding describe the present Applicant along with Landmark Real Estate Developers Limited as "Developers" and he would rely upon the terms contained in the Memorandum of Understanding to advance his submission that the liability was accepted not only by the Company but also by the Directors of the Company and, since, it is the joint liability which was shared by the signatories of the Memorandum of Understanding, the Applicant cannot now be absolved from his responsibility and specifically by virtue of Section 141 of the NI Act. He would emphasize that the Additional Sessions Court has clearly appreciated the said stand and has held that since the Applicant was aware of the liability and was signatory to the Memorandum of Understanding, he is bound by the Memorandum of Understanding and the consequence prescribed under Section 141 of the NI Act must necessarily follow.

7. It is not in dispute that the Applicant was a Director of Landmark Real Estate Developers Limited, which is a Company incorporated under the provisions of the Companies Act. The

documents placed on record clearly reflect that on 28/12/2016 the Applicant tendered his resignation to the Board of Directors of the Company and it came to be accepted with effect from the same date. The legal effect to the said resignation letter was given by removing the name of the Applicant from the Directorship of the Company in the necessary documents maintained under the Companies Act, 2013 and the Rules prescribed thereunder. Once this fact has surfaced on record that the Applicant is no longer the Director of the Company when the cheque was dishonoured on 31/01/2017, in the context of Section 141 of the NI Act, the Applicant cannot be held liable. Section 141 of the NI Act which is based on the principle of vicarious liability to be devolved upon when an offence is committed by the Company, every person who at the time when the offence was committed, was in charge of and was responsible to the Company for the conduct of its business is to be held liable. What emerges from plain reading of Section 141 of the NI Act is that not only the person who at the time when the offence was committed was in charge of the affairs of the Company but also the Company itself shall be deemed to be guilty of the offence and liable to be proceeded against and punished accordingly.

8. What has been not looked into by the learned Sessions Judge is the provisions of Section 138 and in specific clause (b) thereof, which clearly stipulate that the provisions of Section 138 cannot be invoked unless the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the cheque amount by giving a notice in writing, to the drawer of the cheque within 30 days of information by him from the bank regarding the return of the cheque as unpaid.

9. To attract the offence and penalty under Section 138 of the NI Act, clause (b) of Section 138 of the NI Act makes it imperative on the part of the payee or the holder in due course of the cheque to make a demand for payment of said amount of the cheque by giving notice in writing and it is pertinent to note that the said demand has to be raised on the drawer of the cheque. Clause (c) of Section 138 of the NI Act then provides that if there is a failure on the part of the drawer of a cheque, to whom Notice has been issued, to make payment as demanded, to the payee or to the holder in due course of the cheque, within fifteen days of receipt of the notice, then the liability can be fastened under Section 138.

The perusal of Section 138(b) and (c) would make it amply clear that the object of issuing of notice is to give a chance to the drawer of the cheque to rectify his omissions and also to protect a honest drawer. Service of notice of demand as contemplated in Clause (b) of the proviso to Section 138 of the NI Act is a condition precedent for filing of a complaint under Section 138. By sending a notice to the Company as well as the persons in charge of and responsible for the conduct of business of the Company, the Complainant can make a demand asking him to pay the amount. The said notice can then be responded by denying that the addressee of the noticee is in no way responsible for the conduct of the business of the Company or another possibility is that efforts can be made by the Directors of the Company to make the payment and, in that event, the complainant may drop the action of filing of the complaint or on receipt of the response he may decide to file complaint only against the persons who are responsible for making the payment of the amount contained in the cheque.

10. Section 141 postulates the constructive liability of the Directors of the Company or other persons responsible for the conduct of the business of the Company and when offence is committed by the Company, the question as to who would be responsible for the commission of offence, the answer is Section 141 and, by virtue of it, every person who at the time when the offence was committed by the Company is in charge of and was responsible to the Company for conduct of business of the Company as well as the Company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The only exception being that if a person liable for punishment proves that the offence was committed without his knowledge or that he has exercised all diligence to prevent commission of such offence or where a person is a nominated Director as contemplated in the second proviso to the said section.

11. Section 138 is to be distinctly and conjunctively read with Section 141 of the NI Act. Where a Company is liable for commission of offence, apart from the said company every person who was responsible for the affairs of the Company shall also be deemed to be guilty of commission of the said offence. The notice issued and placed on record at page 53 of the paper-book reveals that the notice has been issued to the two Directors of the Company and it is not at all addressed to the Company, which incidentally is the drawer of the

cheque dated 31/01/2017. The Apex Court in the case of ***Kirshna Texport and Capital Markets Limited v. ILA A. Agrawal & Others*** reported in ***(2015) 8 SCC 28,*** while dealing with the similar aspect of a matter in paragraph 15 has observed thus:

> *"15. With these principles in mind, we now consider the provisions in question. According to Section 138, where any cheque drawn by a person on an account maintained by him is returned by the Bank unpaid for reasons mentioned in said Section such person shall be deemed to have committed an offence. The proviso to the Section stipulates three conditions on the satisfaction of which the offence is said to be completed. The proviso inter alia obliges the payee to make a demand for the payment of said amount of money by giving a notice in writing to "the drawer of the cheque" and if "the drawer of the cheque" fails to make the payment of the said amount within 15 days of the receipt of said notice, the stages stipulated in the proviso stand fulfilled. The notice under Section 138 is required to be given to "the drawer" of the cheque so as to give the drawer an opportunity to make the payment and escape the penal consequences. No other person is contemplated by Section 138 as being entitled to be issued such notice. The plain language of Section 138 is very clear and leaves no room for any doubt or ambiguity. There is nothing in Section 138 which may even remotely suggest issuance of notice to anyone other than the drawer."*

12. The said judgment also deals with Section 141 of the NI Act and authoritatively lays down that Section 138 of the NI Act does not admit of any necessity or scope for reading into it the requirement that the Directors of the Company in question must also be issued individual notices under Section 138 of the NI Act. Such Directors who are in charge of affairs of the Company and responsible for the affairs of the Company would be aware of the receipt of the notice by the Company under Section 138 of the NI Act and, therefore, on the purposive interpretation such a requirement of issuance of individual notices cannot be read into Section 138.

13. The NI Act draw a succinct distinction between the provisions of Section 138 and Section 141. Merely because a Director of a Company can be vicariously held liable for the offence committed by the Company by relying on Section 141 of the Act, the plain reading of Section 138 and sub-Sections (b) and (c) appended to the proviso do not admit of a situation where it is a requirement of drawee issuing a notice to every Director of the Company who was in

charge and responsible to the Company for conduct of its business. This requirement of issuance of notice to an individual Director in terms of sub-clause (b) of proviso to Section 138 cannot be read into the said provision. Merely on an assumption that when a notice is issued to the Director and then the Director would necessarily inform the Company of such a notice being received, do not make it imperative for a drawer to issue a notice to any other person other than the drawer of the cheque.

It is settled position of law that when a statute requires a particular thing to be done in a particular manner, then that must be performed in the same manner and not in any other manner. In such circumstances, in the absence of the notice being issued to the Company, which is the drawer of the cheque in question, the invocation of proceedings under Section 138 of the NI Act must necessarily fail in the absence of the statutory compliance of subclause (b) of the proviso appended to Section 138. In any contingency, the Applicant is also entitled to avail the benefit under Section 141 of the NI Act since it is an admitted position that he was not a Director, and, therefore, not in control of the affairs of the Company on the date when the cheque was presented i.e. on 31/01/2017 and on the said date, he had already ceased to be the Director of the Drawer Company. In the absence of the drawer i.e. the Company being issued with a notice as contemplated in Clause (b) of proviso to Section 138 before initiation of complaint under Section 138, the impugned order cannot be sustained. This aspect of the matter has been completely ignored by the Metropolitan Magistrate and the Additional Sessions Judge while passing the order. The liability flowing from the Memorandum of Understanding is a different from the institution of proceedings under Section 138 of the NI Act for the fact that one of the cheques which formed part of the Memorandum of Understanding is not honoured.

14. In such circumstances, the present Application is allowed. The impugned order is quashed and set aside. The Application is allowed in terms of prayer clause (c).

***Result*:-** Application allowed.