

Vol 3 Issue 11 May 2014

ISSN No :2231-5063

International Multidisciplinary
Research Journal

Golden Research
Thoughts

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RNI MAHMUL/2011/38595

ISSN No.2231-5063

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LAW RELATED TO DISHONOUR OF CHEQUE IN INDIA:- AN OVERVIEW

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Abstract:-Advent of cheques in the market have given a new dimension to the commercial and corporate world, its time when people have preferred to carry and execute a small piece of paper called Cheque than carrying the currency worth the value of cheque. Dealings in cheques are vital and important not only for banking purposes but also for the commerce and industry and the economy of the country. The Cheque is the most important of the negotiable instruments and a difficulty is caused to a person if a cheque issued in his favour is dishonoured due to inefficiency of the funds or for that matter any other reason. As a confidence building measure the law has been enacted to ensure that all the transactions which take place through the cheques must be completed thoroughly. The present paper will analyse some statutory and judicial aspects of the law related to the dishonour of cheque in India.

Keywords:Law Related , Dishonour Of Cheque , commercial negotiable instruments .

INTRODUCTION :-

A cheque is a bill of exchange on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form. A great hardship is caused to the payee or holder in due course, if cheque is dishonoured either on account of insufficiency of funds in the account of drawer of the cheque or by some other acts or omissions on his part. To discourage the dishonour of certain cheques, a new chapter namely VIII consisting of Sections 138 to 142 was inserted in the Act of 1881. The said Act has again been amended in the year 2002 to resolve certain unsolved issues.

STATUTORY ASPECTS OF DISHONOUR OF CHEQUES

Section 138 of the Act of 1881:-

Section 138-Dishonour of cheque for insufficiency, etc of funds in the account.-Where any cheque drawn by any person with a banker for payment of any amount of money to another person, is returned back by the bank unpaid, either because of the amount of money standing to the credit of that 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 that bank, such person shall be punished with imprisonment which may be extended to two years, or with fine which may be extended to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

- (a) the cheque has been presented to the bank within a period of 3 month from the date on which it is drawn or within a period of its validity, whichever is earlier.
- (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of said amount by giving a notice, in writing, to the drawer of the, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid ;and
- © the drawer of such cheque fails to make payment of the said amount of money to the payee or, as the case may be, to the

holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation- For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability.

Judicial Interpretations

The courts from time to time have interpreted for widening the preview of the term "dishonour due to insufficient funds. Here are also some aspects which provided attention:-

Stop Payment:- The Hon'ble Supreme Court of India and various High Courts have repeatedly pronounced that "Stop payment" instructions fall within the ambit of dishonour due to insufficient funds.³

Account Closed: The cheque dishonoured with bank endorsement 'account closed', the offence u/s 138 of Act of 1881 is made out because it tantamount that as to cheque was returned due to insufficient funds to the credit of drawer.⁴

Post-dated Cheques:- In case of V.V.L.N. Chary V.N.A. Martin⁵, it was held that a post dated cheque is a representation of a present fact.

In Bank of Baroda Ltd. V. Panjab National Bank⁶, the Hon'ble Calcutta High Court observed that as far as the question of Post dated cheque is concerned this is just like the other cheques and has the some implications.

Liability to pay damages for the wrongful dishonour

The matter of wrongful dishonour of cheque is not a minor issue for a bank. The customer has authority to claim compensation from the bank not merely for the breach but its negative effect on him and his business including reputation, loss etc.⁷

Notice

In Tomy Jacob Kattaikaran V Thomas Manjaly⁸, the Hon'ble Supreme Court held that if complainant did not serve a notice on the drawer within the period prescribed u/s 138 of Act of 1881, no case can be made out against the drawer of such cheque.

The Apex Court in the case of Karnataka Public Service Commission V P.S. Rana Krishnan⁹ held that "it is settled law that a notice refused to be accepted by the addressee or notice returned as 'not claimed' by avoiding service can be deemed to have been served on him".

In a recent case the Hon'ble Andhra Pradesh High Court, in the case of Gorantia Venkateshawra Rao V Kolla Veera Ragha Rao¹⁰ radically held that failure of drawer of the cheque in giving reply to the legal notice issued by the cheque holder is one of the strong circumstances to draw an inference that the drawer borrowed the money from the cheque holder and the cheque was issue towards payment of the legally enforceable debt. The mode of sending notice can not be restricted to post or messenger as it can be sent by fax. 10A

Cause of action

In Maha Lakshmi Enterprises V Vishnu Trading Co.¹¹, the Hon'ble AP High Court held that the cause of action arises from the 16th day of receipt of notice by the drawer. The Payee or holder in due course has to wait for fifteen days anticipating payment of the amount by the drawer before becoming entitled to file a complaint.

A cheque can be presented any number of times during the period of its validity by payee as each presentation of the cheque and its dishonour, a fresh right and new cause of action accrues in his favour¹².

Jurisdiction of the Court

In K. Bhaskaran V. Sankaran Vaidhyan Balan and another¹³, the Hon'ble SC held that the offence under section 138 of Act of 1881, there are some jurisdictional aspects like drawing, presentation, returning of the cheque unpaid, Giving demand notice in writing to the drawer & Failure of the drawer to make payment within 15 days of the receipt of the notice.

(b) At the place where creditor's office is located¹⁴.

(c) At the place where the cheque was delivered¹⁵.

As the jurisdiction is so widened and expansive, regarding the offence u/s 138 of the NI Act, 1881¹⁶.

Punishment to the Bouncer of cheque

The amendment of 2001 has increased the punishment upto two years, or with fine which may extend to twice the amount of the cheque or with both¹⁷.

The Magistrate can award compensation to the payee or holder in due course aggrieved of dishonour of cheque by resorting to S.357(1) and 357 (3) of Code of Criminal Procedure Code,1973. The apex Court has emphasized the need for making liberal use of that provision to award compensation to the victim of crime¹⁸.

The amount of compensation sought to be imposed, thus, must be reasonable and not arbitrary. Before issuing a direction to pay compensation, the capacity of the accused to pay the same must be judged. A fortiori, an enquiry in this behalf even in a summary way may be necessary¹⁹.

Presumption in favour of holder²⁰

The element of presumption in the favour of payee or holder in due course as mentioned in section 139 of Act of 1881 makes it very woeful for bouncer of cheque.

Further 140 of said Act states that it shall not be a defence in a prosecution for an offence under section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section.

Offences by Companies²¹

In the case of Anil Handa V Indian Acrylic Ltd²², the Hon'ble SC held that the effect of reading section 141 is that when the company is the Principal offender under section 138 of the Act and the remaining persons are made offenders by virtue of the legal fiction created by the legislation as per the section. Hence, the actual offence should have been committed by company and then alone the other categories of person can also becomes liable for offence.

Cognizance of Offences²³

Section- 142. Cognizance of offences.- Notwithstanding anything contained in the Code of Criminal Procedure,1973[2 of 1974]-

(a) no court shall cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque.

(b)Such complaint is made within one month of the date on which the cause- of-action arises under clause (c) of the proviso to section 138:

Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

(c)no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.

The holder of power of attorney can be the competent person to file²⁴.

Condonation of delay in filing the complaint

In the light of proviso to section 142 (b) of Act of 1881 inserted by amending Act of 2002, the various High Courts are of view that delay in filing of the complaint could be condoned if an affidavit in support of the application for condonation is filed²⁵.

Summary Suits under Order 37 of the Code of Civil Procedure, 1908

There is a special provision made in Order 37 of the Code of Civil Procedure, 1908 for a summary procedure for trial of suits on bills of exchange, promissory notes or cheques. The advantage of suing under Order 37 is that the defendant is not allowed in such cases to defend the suit without leave obtained from Court and it is provided further that a decree passed under the said Order, may be executed forthwith. If no such leave is applied for or granted, the allegations in the plaint shall be deemed to be admitted, and the plaintiff is entitled to a decree for the principal sum and also interest thereon.

LIMITATION LAW AND DISHONOUR OF CHEQUE

The Hon'ble Delhi High Court in case of Rajesh Kumari V Prem Chand Jain²⁶ held that, although cheque is dishonoured but it serves as an acknowledgement of debt under section 19 of Limitation Act, 1963 and thereby, time of limitation get renewed for bringing an action against acknowledged debt. Both criminal and civil law remedy can be pursued simultaneously²⁷.

Power of Court to try case summarily²⁸

All offences under the Act are to be tried by Judicial Magistrate of First class or by a Metropolitan Magistrate. The provisions of sections 262 to 265 of Code of Criminal Procedure, 1973 shall, or as far as may be, apply to such trials. However, in certain circumstances, if Magistrate thinks that summary trial would be undesirable, he may order full trial on day to day basis. The Magistrate is under duty to make an endeavour to conclude the trial within 6 months from the date of filing of complaint.

Mode of service of summons²⁹

A magistrate issuing a summon to an accused or witness may direct a copy of summon to be served at the place where such accused or witness ordinarily resides or carries on business or personally works for gain, by speed post or by such courier services as approved by a Court of Session.

Evidence on affidavit³⁰

The complainant may give the evidence on affidavit. But on the application of the prosecution or the accused person, the court may order the examination of the person who has deposed on the affidavit.

The court shall presume bank's slip prima facie evidence of certain facts³¹ of dishonour of such cheque unless and until such fact is disproved.

Every offence punishable this Act of 1881, shall be of compoundable³² nature .

CONCLUSION

Sections 138 to 142 was introduced with the purpose of inculcating faith in the efficacy of Banking operations and giving credibility to negotiable instruments in business transactions. The said provisions were intended to discourage people from not honouring their commitment by way of payment through cheque. However, With the passage of time, these provisions proved to be inadequate to deal with scourge of dishonour of cheque. With aim to plug the loopholes in the said Act and to make it more effective & efficacious, it was again amended in the year 2002³³ and sections from 143 to 147 were inserted. Now, the procedure to deal with cases is simpler, punishment is more stringent and disposal of cases is more expeditious. Hence, the present law as enacted by legislature is less cumbersome and onerous but more formidable and deterrent.

In spite of prescription of time in the Act of 1881³⁴, disposal of cases expeditiously in a time bound manner, there is a black spot that trial of offences under the Act linger on for a very long time and hence, more often than not, very purpose is defeated. There is an urgent need to look into and address this grey area forthwith. The lower judiciary is also owes the duty to apply the various provisions of the Act of 1881 in such a fashion that it realize the object of the legislation in a true spirit.

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