

Technicality at its Height in Cheque Bounce cases

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We know that cheque bounce offence (popularly so called) under Section-138 of the Negotiable Instruments Act is a very technical offence and though very limited number of provisions are there, the system and litigating public have been struggling with the concept for quite a long time. In the present paper also, we will have a look at a very technical situation arising in such cheque bounce case.

2. Normally, a transaction of cheque happens between two persons, one issues the cheque and the other receives the same. What if three persons are involved in this transaction? How the liability for criminal prosecution will be fixed and on whom? Be it noted that we are presently not talking about the concept of civil liability. Even if we say it thousand times that cheque bounce cases are quasi-civil quasi-criminal, the fact remains that this creates an offence as defined in the General Clauses Act as it is a punishable thing. Therefore, we are clearly talking about a criminal prosecution.

3. We may consider some situations involving three persons in transactions related to one single cheque. These three persons are A, B, C. One cheque is in existence and upon presentation to the bank, the same has been returned unpaid for insufficiency of funds.

3.1. **First situation:** A had given a loan to B. When the time came to discharge the loan liability, one C (say father of B) issued his own cheque to discharge the liability and given the same to A. Since, the cheque remained unpaid upon presentation, A issued a legal demand notice to C and after waiting for prescribed time, he filed a criminal complaint against C. Upon being summoned, the said C took a defence that he had never taken any loan from A and was not having any liability towards him.

3.2. **Second situation:** A had given a loan to C. When the time came to discharge the loan liability, the said C returned the loan through a cheque but for xyz reason, A asked C to give cheque in the name of his relative B. Upon usual formalities, the case came before the court in a complaint filed jointly by A & B against C. The said C took a defence that he had never taken any loan from B and was not having any liability towards him, so the cheque cannot be treated as having been issued in discharge of a liability. He further claims that A since is not the payee of the cheque has no concern with the present case.

3.3. **Third situation:** C issues a cheque to A to repay the amount he had taken from A. When A was in some other transaction with B and was required to pay some money to B, he endorsed the concerned cheque to B. Upon usual formalities being completed, B filed a complaint against the said C in the court and the said C took a defence that he does not owe any liability towards B and that he had issued the cheque to some A. He claims that since he is not liable towards B, he cannot be prosecuted under Section-138.

4. All the aforesaid three situations have been dealt with by the Courts. Prime emphasis appears to have been on the expression “any” used in Section-138. In the first situation, C has been found liable for prosecution. In the second situation, C has not been found liable for prosecution. Again in the third situation, C has been found liable. First case, **ICDS vs Beena Shabeer** decided by a two judges bench of Supreme Court on 12.08.2002. The second case, **Rajendra Mishra vs Pramod Nischal** decided by Delhi High Court on 07.08.2018. The third case, **Pressy Pinto vs Shashikala Kotian** decided by a three judges bench of Supreme Court on 23.01.2018.

5. In **ICDS case**, the Supreme Court was dealing with the facts suggesting “*The appellant herein is a Company incorporated under the provisions of the Companies Act, 1956, having its registered and administrative office at Syndicate House, P.B. No.46, Upendra Nagar, Manipal-576119 and branches among other places at Palayam, Trivandrum. The husband of respondent No.1 entered into a hire purchase agreement with the appellant for the purposes of the purchase of a Maruti car on hire purchase basis. The respondent No.1, his wife stood as a guarantor in respect of the hire purchase facilities being made available to her husband. The facts further reveal that the respondent No.1, on account of the aforesaid transaction and towards part payment issued a cheque bearing No.672501 dated 29.8.1998 for Rs.80,490/- drawn on Catholic Syrian Bank Limited, St. Mary’s School, Pattom, Trivandrum to the Appellant*”.

5.1. Ground for acquittal was found as “*the principal reason for quashing of the proceeding as also the complaint by the High Court was by reason of the fact that Section 138 of the Act provides for issuance of a cheque to another person towards the discharge in whole or in part of any debt or liability and on the factual context, the High Court came to a conclusion that issuance of the cheque cannot be co-related for the purpose of discharging any debt or liability and as such complaint under Section 138 cannot be maintainable*”.

5.2. Supreme Court however taken note of specific language used in Section 138 and commented *“The language, however, has been rather specific as regards the intent of the legislature. The commencement of the Section stands with the words "Where any cheque". The above noted three words are of extreme significance, in particular, by reason of the user of the word "any" the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment”*.

5.3. One may say that since in ICDS, the drawer of the cheque was guarantor, she was held liable as principal debtor and guarantor do have co-extensive liability. However, this is not the case. The language explained by the Supreme Court in respect of “any” is sufficient enough to hold that the same will cover a person who discharges the liability of another. On principal and guarantor, the Supreme Court observed *“The issue as regards the co-extensive liability of the guarantor and the principal debtor, in our view, is totally out of the purview of Section 138 of the Act, neither the same calls for any discussion therein. The language of the Statute depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act: 'Any cheque' and 'other liability' are the two key expressions which stands as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the Statute. Any contra interpretation would defeat the intent of the legislature. The High Court, it seems, got carried away by the issue of guarantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act”*.

5.4. Any doubt whatsoever was latteron cleared by the Supreme Court in **P.J. Agro Tech Limited vs Water Base Limited** decided on 28.07.2010 and **Mainuddin Abdul Sattar vs Vijay Salvi** decided on 06.07.2015 where director/managing director had given cheque from their own bank account to discharge the liability of the company. Supreme Court found that only the drawer of the cheque could

have been held liable even if the cheque was issued to discharge the liability of the company. It is clear then that if anyone issues a cheque to discharge the liability of another, he himself being the drawer of the cheque will be liable for a prosecution under Section-138.

6. In **Rajendra Mishra case**, Delhi High Court was facing the fact as *“Going by the averments in the criminal complaint, it appears that sons of the complainant, namely, Ashish Nischal and Arun Nischal (the second said son being the attorney, present before the court) are advocates practicing in the Courts and Tribunals in Delhi. It appears that the petitioner had engaged the said sons of the complainant for representing him in some litigation before Central Administrative Tribunal (Principal Bench) at New Delhi and, in that context, professional fees of Rs.50,000/- was settled to be paid by him to the said sons (his advocates). Against the said arrangement, Rs.20,000/- stood paid on 25.04.2015, the balance Rs.30,000/- having been agreed to be paid before the date of hearing next fixed before the tribunal”*.

6.1. How the cheque was issued in someone's else name is present in the further factual depiction by the High Court as *“It is alleged in the complaint that on 10.02.2015, the petitioner handed over afore mentioned cheque (post dated cheque) and upon the “son of the complainant” asking him to fill it in the name of his mother, i.e., the complainant, the cheque was accordingly issued in the name of the mother, i.e., the complainant. The cheque, on being presented at the bank, was returned unpaid with reasons “payment stopped by drawer”. A legal notice demanding the payment of money followed, but no payment having been made, the criminal complaint was filed”*.

6.2. High Court commented on the concept of presumptions and *“Undoubtedly, the statutory provision contained in Section 139 of the Negotiable Instruments Act, 1881 gives rise to a presumption, “unless contrary is proved” that the holder of the cheque had received the cheque of the nature mentioned in Section 138 “for the discharge, in whole or in part, of any debt or other liability”. It has to be borne in mind that in order to maintain and bring home a case for offence under Section 138 of the Negotiable Instruments Act, 1881, aside from proving other facts like failure of the cheque upon presentation and default in payment despite demand notice, it is the onus of the complainant to also prove that the cheque was issued “for the discharge, in whole or in part, of any debt or other liability”*.

6.3. High Court also observed on the principle of rebuttal of presumption as *“Ordinarily, the opportunity to rebut the presumption raised by Section 139 of the N.I. Act would be exercised and availed*

of by the accused at the trial by attempting to discredit the evidence of the complainant or by leading some positive evidence in rebuttal”.

6.4. However, the High Court observed that even on averments, there cannot be any liability. It observed as *“In the present case, however, even going by the averments in the criminal complaint, it is clear from the word go that there was no liability due to the complainant from the petitioner, i.e., the person who has been summoned as an accused. The complainant had no arrangement with the petitioner. She had not rendered any service to him. It is her sons who were engaged by him and the payment was due on account of professional services rendered by them to the petitioner”.*

6.5. Clearly, therefore, if the payee of the cheque was not entitled for the amount of cheque from the drawer though someone else was so entitled, the drawer cannot be held liable for a prosecution under Section-138.

7. In **Pressy Pinto case**, the Supreme Court observed and held as *“From the materials on record it does not appear that the accused had disputed issuing the cheque(s) to one-Janaki Balakrishna. The payee of the cheque(s) Janaki Balakrishna had endorsed the same in favour of the complainant in respect of some other transaction. Whether the aforesaid second/other transaction has been established or not is not germane to the issue in view of the absence of any denial on the part of the accused that he had indeed issued the cheque(s) in favour of Janaki Balakrishna”.*

7.1. It is clear that even if the drawer does not have liability towards the last person having the cheque upon endorsement, the drawer will still be liable for a prosecution initiated by him. What is further interesting to note is that even the said third party transaction need not be establish to implicate the drawer. Meaning thereby that in such cases, the accused drawer cannot question the complainant/third party about the transaction taken place with the original payee.

8. From the aforesaid analysis, we can say that:

8.1. **First situation:** A had given a loan to B. When the time came to discharge the loan liability, one C (say father of B) issued his own cheque to discharge the liability and given the same to A. Since, the cheque remained unpaid upon presentation, A issued a legal demand notice to C and after waiting for prescribed time, he filed a criminal complaint against C. Upon being summoned, the said C took a

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