A Case Study under section 138 of Negotiable Instrument Act

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The Section 138 of the Negotiable Instrument Act 1881 (herein after referred as "Act") was brought on statute by Central Act 66 of 1988 w.e.f. April 1, 1989 with a view to penalise the accused in cases of dishonour of certain cheques for insufficiency of funds in the accounts of the Drawer. The object of bringing Section 138 on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Despite civil remedy, Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account mainly maintained by him in a bank and induce the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly. It is seen that once the cheque has been drawn and issued to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the Bank for non-payment and the cheque is returned to the payee with such an endorsement, it also amounts to dishonour of cheque and it comes within the meaning of Section *138 (M/S. Electronics Trade & vs M/S. Indian Technologists, AIR 1996 SC 2339).*

Therefore, How far it is correct to say that once cheque is issued by drawer , need to be honoured at any cost to avoid consequences of imprisonment under section 138 of Act. It is necessary to bring to notice that section 139 of Act provides opportunity for rebuttal of allegations on Drawer. In view of this , the discussion of section 138 is essential. Section 138 is reproduced as under:

"*138. Dishonour of cheque for insufficiency, etc., of funds in the accounts. Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient 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 deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one, or with fine which may extend 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 six months from the date on which it is drawn or within the 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 the said amount of money by giving a notice in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid ; and

(c) the drawer of such cheque fails to make the 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 purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

The perusal of section gives emergence to following five *ingredients (Kusum Ingots & Alloys Ltd., Etc. vs Pennar Peterson Securities Ltd , 2000 (1) ALD Cri 770)* for compliance of section 138.

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any **debt or other liability**;

(ii) that cheque has been presented to the bank within a period of **six months** from the dale on which it is drawn of within the period of **its validity** whichever is earlier;

(iii) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the 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 the bank;

(iv) the **payee** or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, **within 15 days** of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the **drawer** of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque **within 15 days** of the receipt of the said notice.

NEXUS OF CHEQUE AND LIBILITY TO PAY:

If the aforementioned ingredients are satisfied then the person who has drawn the cheque shall be deemed to have committed an offence. In the explanation to the section clarification is made that the phrase **"debt or other liability" means a legally enforceable** debt or other liability. In other words if cheques are given for some transactions ,which cannot be used by payee for another transaction without confirmation . The nexus of cheque issuance and legally enforceable liability must be established by payee apart from compliance of all aforesaid ingredients. Without sufficient reason ,if “STOP PAYMENT” instruction issued to banker by Drawer is frustrated ground of arguments. Merely obtaining cheques in security form, shall not serve the purpose of payee. It is equally important for the drawer to issue cheques with forwarding letter that for what business ,the post dated cheques are issued . Once drawer of cheque rebut the liability under section 139 and establish the facts that dues are not legally enforceable , the onus is shifted to payee to prove the nexus of liability and payment due.

PUNISHABLE OFFENCE FOR WHOM:

Section 141 of Act is a provision specifically dealing with the offences by companies. Therein it is laid down, inter alia, that if the person committing an offence under Section 138 of Act is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduce of the 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. Under the proviso to Sub-section (1) it is laid down that nothing contained in this sub-section shall rendered any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

Sub-section (2) of the Section 141 , makes any director/manager/secretary or other officer of the company in connivance or any neglect on the part of whom, an offence under the Act has been committed by the Company, such director/manager/secretary or other officer is deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. The signatory to the cheque is an employee may also held guilty for this punishable offence.

JURISTICTINAL ISSUE FOR TRIAL(CASE FILING):

Under Section 177 of the Criminal proceeding Code *"every offence shall **ordinarily** be inquired into and tried in a court within whose jurisdiction it was committed*." The locality where the bank (which dishonoured the cheque) is situated cannot be regarded as the sole criteria to determine the place of offence. It must be remembered that offence under Section 138 would not be completed with the dishonour of the cheque. It attains completion only with the failure of the drawer of the cheque to pay the cheque amount within the expiry of 15 days mentioned in Clause (c) of the proviso to Section 138 of the Act. It is normally difficult to fix up a particular locality as the place of failure to pay the amount covered by the cheque. A place, for that purpose, would depend upon a variety of factors. It can either be at the place where the drawer resides or at the place where the payee resides or at the place where either of them carries on business. Hence,

the difficulty to fix up any particular locality as the place of occurrence for the offence under Section 138 of the Act*(K. Bhaskaran vs Sankaran Vaidhyan Balan , AIR 1999 SC 3762)*.

Even otherwise the rule that every offence shall be tried by a court within whose jurisdiction it was committed is not an unexceptional or unchangeable principle. Section 177 of Cr P.C. itself has been framed by the legislature thoughtfully by using the precautionary word **'ordinarily'** to indicate that the rule is not invariable in all cases. Section 178 of the Code suggests that if there is uncertainty as to where, among different localities, the offence would have been committed the trial can be had in a Court having jurisdiction over any of those localities. The provision has further widened the scope by stating that in case where the offence was committed partly in one local area and partly in another local area ,the Court in either of the localities can exercise jurisdiction to try the case. Further again, Section 179 of the Code stretches its scope to a still wider horizon. It reads thus:

179. Offence triable where act is done or consequence ensues. -When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.

The above provisions in the Code should have been borne in mind when the question regarding territorial jurisdiction of the Courts to try the offence was sought to be determined.

The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. Following are the acts which are components of the said offence : (1) Drawing of the cheque, (2) Presentation of the cheque to the bank, (3) Returning the cheque unpaid by the drawee bank, (4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice.

It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at 5 different localities. But concatenation of all the above five is a sine qua non for the completion of the offence under Section 138 of the Code.

In this context a reference to Section 178(d) of the Code is useful. It is extracted below:

Where the offence consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

Thus it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act. In other words**, the complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done.**

TIME LINE COMPLIANCE:

On the part of the payee , he has to make a demand by 'giving a notice' in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such 'giving' the travails of the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days 'of the receipt' of the said notice. It is, therefore, clear that 'giving notice' in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer in the correct address.

If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a cheque drawer would get the premium to avoid receiving the

notice by different strategies and he could escape from the legal consequences of Section 138 of the Act.

The context envisaged in Section 138 of the Act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in Clause (b) of the proviso to Section 138 of the Act show that payee has the statutory obligation to 'make a demand' by giving notice. The thrust in the clause is on the need to 'make a demand'. It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is despatched his part is over and the next depends on what the sender does.

It is well settled that a notice refused to be accepted by the addressee can be presumed to have been served on him, *(Harcharan Singh v. Smt. Shivrani and Ors. , and Jagdish Singh v. Natthu Singh, 1988 AIR 2127)*

If the notice is returned as unclaimed and not as refused. Will there be any significant different between the two so far as the presumption of service is concerned? In this connection a reference to Section 27 of the General Clauses Act will be useful. The Section reads thus:

27. Meaning of service by post. - Where any central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

No doubt Section 138 of the Act does not require that the notice should be given only by 'post'. Nonetheless the principle incorporated in Section 27 (quoted above) can

profitably be imported in a case where the sender has dispatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sender unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very weak position as the drawer of the cheque who is liable to pay the amount would resort to the deceit strategy by successfully avoiding the notice.

Thus, when a notice is returned by the sender as unclaimed such date would be the commencing date in reckoning the period of 15 days contemplated in Clause (c) to the proviso of Section 138 of the Act. Of course such reckoning would be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address.

CONCLUSION:

It is clear from various court pronouncements that even proceedings pending before respective appellate body, courts or board for winding up under section 536 of Companies Act ,1956 or section 22 of SICA , offence under section 138 deemed to be committed once cheque is dishounoured and all five ingredients of requirements of section 138 of Act are complied with. *(Orkay Industries Limited & Others vs The State Of Maharashtra & Others 2000 (5) BomCR 14)* Thus it is essential to keep in mind while issuing and signing post dated or blank cheques the consequential punishment under section 138 of Negotiable Instrument Act 1881.