Section 138 Proceedings: Completely Misunderstood

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Abstract

Realizing the need to curb the growing tendencies among citizenry, in particularly in commercial transactions, issuing cheques and thereafter causing it to be dishonoured, the Parliament of India, introduced a law whereby the causing of the dishonour of a Cheque, which was issued in discharge of any debt or liability, was made a punishable offence. The new law (Sections 138 to 147) was armed with presumption that it would be deemed that the dishonoured Cheque was issued for consideration; and the burden to prove otherwise was laid upon the Accused.

Nonetheless, the legal fraternity failed to appreciate the crux of the remedy; and the consequence is – the criminal trial under the regime goes on for years, notwithstanding the summary remedy provided under the law.

In this context, the Hon'ble Kerala High Court in Johnson Scaria Versus State of Kerala enlightens the path; and aptly lays down the nature of 138 proceedings. It says, among other things, the crux of the liability under Section 138 is the issuance or delivery of the Cheque by the drawer, to or in the hands of the Payee Complainant; and the Complainant is not obliged to prove the original transaction of debt or liability.

Therefore, in Complaints filed under Section 138, in so far ingredients of the offence are concerned only one thing is to be proved by the Complainant, that is – delivery or issuance of Cheque by the Accused in the hands of the Complainant. The Complainant may prove the issuance of the Cheque, with the aid of Section 114 of the Evidence Act.

Once this is prima facie proved, the burden shifts upon the Accused to prove that either (a) the said Cheque was never issued to Complainant, and / or (b) the said Cheque was not issued in discharge of any liability.

KEYWORDS: Section 138, dishonour of cheque, negotiable instrument, criminal liability

INTRODUCTION

The Parliament of India, in the year 1988, with a view to deal with the menace of unabated dishonouring of Cheques; and thus to fasten criminal liability upon dishonest drawers of the Cheques, amended the Negotiable Instruments Act, 1881, and by virtue of these Amendments, the causing of dishonour of a Cheque was made a criminal offence, wherein Sections 138 to 142 were inserted. In the said Amendments, the Section 139 of Negotiable Instruments Act raised a presumption of law that the

cheque so delivered / issued, was delivered / issued for valuable consideration / in discharge of whole or in part, of any debt or other liability; and the burden to prove the contrary would lie upon the drawer of the Cheque. Section 143 inter alia mandates that every trial under this law shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint. Whereas the aforesaid Amendments failed to produce the desired results, further Amendments were made so as to fill the gaps found in the earlier Amendments, whereby Sections 143 to 147 were added.

Nevertheless, the reality today is gross and miserable. There could be many reasons contributing for delays in disposal of 138 cases, but the primary reason, in our view is, that legal fraternity, comprising lawyers and judges, have miserably failed to truly appreciate the import of remedy contemplated under this law.

In this context, Hon'ble Kerala High Court in *Johnson Scaria Versus State of Kerala*[1] judgment has beautifully laid down the nature of 138 proceedings. It says, among other things, that the complainant is not obliged to prove the original transaction or original consideration as he is expected in a suit for recovery of money. The crux of the liability u/s 138 of the N.I. Act is the issuance / delivery of the Cheque by the drawer, to / in the hands of the Payee Complainant.

Therefore, in a Complaint to be filed u/s 138, the body of the Complaint may contain the details as to original transaction, in discharge of which, the relevant Cheque was issued; but the Affidavit of Evidence may be confined to (a) dishonour of Cheque, (b) Bank Memo, evidencing the dishonour of the Cheque, and (c) the factum of issuance / delivery of relevant Cheque to / in the hands of the Payee.

Once this is prima facie proved to the satisfaction of the trial Court, the presumption of law contained in Section 139 of the said Act raises its head in favour of the Complainant; and the burden shifts upon the Accused to prove that either (a) the said Cheque was never issued / delivered to the Complainant, and / or (b) the said Cheque was not issued in discharge of any liability.

If the Accused, during the cross examination of the Complainant, or by himself leading evidence to that effect, is able to raise a reasonable suspicion / doubt as to any of the above facts, the burden again shifts upon the Payee Complainant to prove that the relevant Cheque was in fact issued / delivered to the Payee Complainant. Therefore, so as to dispel the presumption of law operating against the Accused, it is not sufficient for the Accused to throw up many possibilities in his favour. The Accused must prove the contrary, to the satisfaction of a prudent mind. Of course, the higher standard of proof beyond reasonable doubt will not be insisted from him. His discharge of burden u/s 139 is akin to that of a litigant in a civil case. Not any fanciful possibility but a practical probability which the court is able to accept as true adopting the standards of a prudent man.

The Complainant then by taking aid to Section 311 of the Code of Criminal Procedure, 1973, may lead additional evidence, to prove the limited fact that (a) the relevant Cheque was in fact issued to the Payee, and / or (b) in the discharge of a legally enforceable debt. However, to our mind, the Original transaction is never required to be proved under this regime.

However, in our view, no evidence is required to be led by Payee Complainant to prove the original transaction, in discharge of which the relevant Cheque was issued / delivered; and to prove the original transaction, the Payee Complainant has to file a Civil Suit, and prove the debt. In every prosecution u/s 138 of the N.I. Act, the criminal court shall not have engaged itself to adjudicate on the original liability; and the limited mandate of trial Court is to record a finding as to whether the relevant Cheque was issued / delivered by the drawer Accused, to / in the hands of the Payee Complainant, in discharge of any liability.

It may further be noted that mere signing of Cheque by the drawer is not sufficient, and the delivery of the Cheque, is essential to complete the drawing of the Cheque for the benefit of the Payee (Section 46 of the N. I. Act). It may further be noted that, to qualify for a valid Cheque, it is sufficient, if the said Cheque bears the Signature of the drawer, and contains the amount to be paid therein, and the said Cheque is duly issued / delivered / handed-over, to the Payee. Under the law, the drawer of the Cheque gives an implied authority to the Payee to fill up the rest of the details. In this respect, although Section 20 of the Negotiable Instruments Act, 1881, talks about implied authority to fill up the details in respect of inchoate stamped Instruments only, there are consistent rulings of our High Courts and Apex Court that the Cheques are duly covered, more particularly, having regard to definition of Bill of Exchange and Cheque contained in Sections 5 and 6 of the said Act.

The crux of the aforesaid Kerala High Court ruling may said to be that – The complainant is not obliged to plead and prove the original transaction or original consideration as he is expected in a suit for recovery of money. The foundation of liability under Section 138 of the N.I. Act is the issuance of the cheque for consideration.

However, Section 67 of Evidence Act mandates that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. And therefore, the burden lies upon the Payee Complainant to prove that the relevant Cheque was signed by the Accused; and presumption of law available u/s 139 would be of no help, as the said presumption of law is not available as to the execution and delivery of the concerned negotiable instrument / Cheque. Nevertheless, the said burden may be discharged with the aid of Section 114 of the Evidence Act, 1872; and of course with classic Apex Court rulings.

Section 114 of Evidence Act, 1872:

This burden the Payee Complainant can well discharge with the aid of section 114 of the Evidence Act. The said Section inter alia states that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. By aid of this Section appropriate inferences can be drawn in each case on the question of execution and issue of the Cheque.

1. **Possession of the Cheque:** Possession of the Cheque in the hands of the Complainant goes a long way to prove issuance of the Cheque. The said Section 114 by way of illustration further states that the Court may presume that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged, with the rider that the Court may not presume in the circumstances where although the bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it. The necessary corollary of the aforesaid proposition is that where the instrument is in the hands of payee, it may be presumed that the obligation has not been discharged, with the rider that the Court may not presume, in the circumstances that he may have stolen it.

2. **Endorsement on the Bank Memo:** The execution of the Cheque by the accused may be inferred when the Cheque was not dishonoured for the reason "Signature mismatch". The Apex Court in the case of *L.C.Goyal Versus Suresh Joshi*[2] has dealt with the case wherein the accused raised the contention that he had not signed the cheque. The Hon'ble Court rejected the said contention. The Court held that the said cheque was dishonoured due to insufficient funds. The appellant (Accused) denied his signature on the relevant Cheque and contended that his signature was forged by the complainant. It is in this context that it was urged before the Bar Council of India that some hand-writing expert be examined in order to find out the genuineness of the signature on the relevant Cheque. As stated above, the Cheque bounced not on account of the fact that the signature on Cheque was not tallying with the specimen signature of the appellant kept with the Bank, but on account of insufficient funds. Had the signature on Cheque been different, the bank would have returned the same with the remark that the signature on Cheque was not tallying with the Accused's specimen signature kept with the bank. The Bank Memos issued by the bank clearly show that signature of the Accused over the relevant Cheque was not objected to by the bank, but the same was returned with the remark "insufficient fund". This circumstance shows that the signature on relevant Cheque was that of the Accused.

3. **Registration of FIR for theft of Cheque:** Whenever the accused takes the stand that he has not signed the Cheque, he invariably suggests that the concerned Cheque has been stolen from his custody and his Signature has been forged by the Payee Complainant. And therefore, in the eyes of law, being a prudent person he is expected to take suitable steps, act diligently to safeguard his interest. The Apex Court in the case of *L.C.Goyal Versus Suresh Joshi***,** said No FIR lodged with regard to theft of the cheque book. The case set up by the Accused before the Bar Council was that, in fact, the complainant somehow managed to get his cheque book and she after forging his signature on one of the leaf presented the same to the bank for payment. If it was true, why did the appellant not lodge any FIR with the Tilak Marg Police Station regarding theft of the cheque book?

   The further submission is – The accused cannot merely say that he has not signed the Cheque and would ask for opinion of handwriting expert, so as to ascertain the authenticity of the signature appearing in the Cheque. In case he

claims he has not signed the Cheque, he has to first lead evidence to show that the concerned Cheque was stolen from his custody, the date when he came to know of such theft, the steps he took to avoid possible misuse of stolen Cheque, for, any man of ordinary prudence would take requisite steps in case he comes to know that his valuable security is stolen, and it may be misused.

There is yet another serious fallacy in merely allowing the Applications of Accused u/s 243(2) of CrPC, 1973, and to send Cheque to handwriting expert, inter alia, to determine the signature on the Cheque. Assumingly, the hand writing expert gives the opinion that signature on the Cheque does not match with the signature occurring in Bank records. Then the accused would claim acquittal on the basis of this finding, although he might have played mischief by deliberately signing incorrectly.

Assume a case wherein the Cheque was returned due to mismatch of signature. Whereas the complainant / payee are not aware of the signature of the drawer / accused, the drawer of the Cheque may play mischief by giving such Cheque to the payee bearing their false or deliberately made distorted signature, causing the return of the Cheque by the drawee Bank, and then would cry "theft" having not delivered / signed the Cheque.

It may be appreciated that the fact which the accused agitating is "my said Cheque was stolen"; and the evidence which is to be led by accused in these situations is to demonstrate the "factum of actual theft" of concerned Cheque and not the mere matching or mismatching of signature, for, the mismatching of signature does not establish the theft of Cheque; and only inference which can be drawn from the proved mismatch of signature is that "Cheque issued by drawer bears different signature when compared to bank records.

Therefore, in 138 proceedings, the accused should be barred from merely contending that he has not delivered or signed the Cheque; and before he makes an Application, asking for opinion of handwriting expert, it is imperative that he must say in his evidence – (a) that the concerned Cheque was stolen from his custody; (b) the date when he came to know of such theft, and if it is claimed that he came to know of such theft on receipt of statutory Notice, then, (c) the steps he took to avoid possible misuse of stolen Cheque; for, any man of ordinary prudence would take requisite steps in case he comes to know that his valuable security is stolen and may be misused; and (d) he must also establish that despite due diligence and attending circumstances of his day to day affairs, he could not have known such theft; If the trial court is reasonably satisfied that the Cheque under consideration might have stolen from the custody of accused, he may then send the Cheque for opinion of handwriting expert.

4. **The failure of accused to reply the statutory Notice**: The failure of accused to reply the statutory Notice would also go a long way in safely invoking the presumption u/s 114 of the Evidence Act. The Apex Court in the case of *L.C.Goyal Versus Suresh Joshi* [3]**,** observed to say that *The complainant sent two notices* to the Accused, wherein she inter alia alleged, that a sum of Rs.25,102.00 was misappropriated by the appellant under the pretext of

payment of the Court-fee. These notices admittedly received, but were not replied to by the Accused, which is a material circumstances against the Accused.

Observations made in Kerala High Court judgment **Johnson Scaria Versus State Of Kerala**[4] worth mentioning here. The version of the complainant gets further support and assurance from the fact that the notice of demand issued under Section 138 threatening criminal prosecution though duly received and acknowledged, did not evoke any response. It of course is not the law that the mere omission to send a reply to a notice of demand shall ipso facto entail a verdict of guilty and conviction. But a prudent man whose standards the court is bound to adopt and import in the adjudication of a criminal case also, must always consider all the relevant inputs. Section 114 of the Evidence Act mandates that a Court must be cognizant of the common course of natural things, human conduct and public and private business in their relationship to the facts of the particular case. So reckoned it is only an unreasonable and puerile mind which will not attribute to the unexplained conduct of not sending a reply to the notice, the importance and significance which it deserves.

Para 16: "*Any ordinarily prudent human mind placed in such circumstances which the petitioner says he was, is certainly unlikely to remain inactive, silent dumb and mute. If as a matter of fact, Ext.P1 cheque was one which was misutilised by the complainant having obtained the same from the said Jose Paul, the accused as an ordinary prudent person was unlikely to have not responded. Nay it was impossible that he could have remained idle ordinarily unless he had any compelling reason. No such reason is revealed. Conduct offers indications about the truth or otherwise of the contentions and existence or otherwise of facts. I am unable to accept the argument that the courts should have accepted the very convenient excuse advanced by the accused that he had gone to the complainant, met him and discussed the claim in the notice after it was received and that is why he did not issue any reply to the notice*."

It may further be observed that the Accused gets the "Notice" of dishonour of the Cheque from his Banker about the return of the Cheque, well before the receipt of Statutory Notice sent by the Complainant. So there are in fact two Notices, on which the Accused has remained silent.

5. **The defense of Accused that he had issued blank cheque to the Complainant and the Complainant misused those cheques:** In this respect, we would again take the assistance of observations made in Kerala High Court judgment *Johnson Scaria Versus State Of Kerala*[5] The convenient and specious plea that a blank signed cheque was handed over as security in a loan transaction cannot readily and naively be accepted and swallowed by courts. In doing so, the indictee is attributing to himself an improbable, artificial and indifferent conduct to claim exculpation from liability. The laudable commercial morality which the legislature seeks to usher in by introduction of Section 138 into the statute book will be frustrated and stultified if courts were to readily and meekly accept and swallow such an explanation. If such a laudable commercial morality were to prevail, account holders will also have

to deal with their Cheques carefully, cautiously and reasonably and not without diligence, indifferently unreasonably and irrationally. Even today such a defence may not be impossible or impermissible in a prosecution under Section 138 of the NI Act. But the burden must rest squarely and heavily on the person who wants to attribute to himself such an irresponsible and indifferent conduct - that he handed over a signed blank cheque, to claim exculpation from liability. In this aforesaid discussion it is equally important to know the attributes of a prudent and reasonable man, for, it would have a huge bearing on raising a presumption and placing a burden of proof.

Who is a Prudent Man: A prudent man is a wise man, may not be a genius. A prudent man is not in a hurry. He is not influenced by his emotions and acts after weighing the occasion. He deliberates. He pauses. He rethinks and is willing to learn. He agonizes. He is willing to see the point of view, which was never in his mind. He may not be learned but has robust common sense and has basic instincts that move man and woman; are those who think and reason intelligently; is a person having the power of self control to be expected of an ordinary person of the age; a person exercising those qualities of attention, knowledge and intelligence and judgment, which requires of its members for the protection of their own interests and the interests of others.

CONCLUSION

The law would fail to serve the purposes and suppress the mischief for which they were invented if the presumption of law is not correctly applied; and moreover, the whole body of law is thrown into the ocean by an unscrupulous accused so easily; and the victim complainant would be left further wounded and bleeding.

REFERENCES

[1] (2006) 134 Comp Case 370.
[2] AIR 1999 SC 2222.
[3] AIR 1999 SC 2222.
[4] (2006) 134 Comp Case 370.
[5] (2006) 134 Comp Case 370.