Dispute Resolution Hotline

October 09, 2017

SUPREME COURT: SECTION 138 OF THE NI ACT IS SELF-CONTAINED; CRPC IS NOT APPLICABLE TO DISHONOUR OF CHEQUES

Supreme Court has held that:

- The concept of *"taking cognizance of the offence but not the offender"* in the context of the Code of Criminal Procedure, 1973 **("CrPC")**, is not applicable to proceedings under Section 138 of the Negotiable Instruments Act 1881 **("NI Act").** Section 138 is self-contained in so far as it creates an offence and prescribes the punishment;
- To establish the commission of an offence of dishonor of cheques - each of the ingredients under Section 138 of the NI Act has to be proven;
- The identity of the drawer of the cheque, being the first ingredient under Section 138 of the NI Act, is a mandatory requirement for establishing the cause of action for prosecution
- Mandatory to array the company itself in case the offence is committed by the company;

INTRODUCTION:

Recently, in *N. Harihara Krishnan* **("Appellant")** *v. J. Thomas* **("Respondent")**,[1] the Supreme Court **("SC")** has held that Section 138[2] of the NI Act is self-contained, in so far as it creates an offence and prescribes necessary punishment. It does not contemplate a procedure for investigation of the offence. Hence, the concept of *"taking cognizance of the offence and not the offender"* is inappropriate in cases of dishonour of cheques.

BACKGROUND FACTS:

M/s Norton Granites **("Norton")** and M/s Srivari Exports **("Srivari")** executed three sale deeds for sale of three parcels of land to Srivari. The Appellant was the managing partner of Srivari besides being a director of a company M/s Dakshin Granites Pvt. Ltd. **("Dakshin")**, while the Respondent was the power of attorney holder for the managing director of Norton. A cheque amounting to INR 39 lakhs (allegedly towards the balance of the sale consideration) was drawn by the Appellant in favour of the Respondent. When the cheque was presented for collection, the same was dishonoured as the account on which the cheque was drawn had been closed.

Subsequently, the Respondent issued a notice calling upon the Appellant to pay INR 39 lakhs within 15 days from the receipt of the notice.[3] This notice was served on the Appellant on 14 September 2012. On the Appellant's failure to respond or make any payment, a complaint was filed by the Respondent on 8 October 2012.

Subsequently, on 19 August 2015, an application was moved by the Respondent **("Application")** under Section 319 of the CrPC to implead Dakshin. In the Application, the Respondent contended that it was only during the cross-examination of the Appellant that the Respondent discovered that the impugned cheque was drawn on behalf of Dakshin, and by the Appellant as its signatory. The trial court allowed the Application on the basis that court is not required to take cognizance of each accused persons if cognizance has been taken against the offence. The Appellant filed an appeal aggrieved by the decision of the trial court. However, the High Court upheld the decision of the trial court. The decision of the High Court was subsequently appealed before the Supreme Court.

ARGUMENTS ON BEHALF OF THE PARTIES:

Arguments advanced on behalf of the Appellant

a. Since the cheque was drawn on behalf of Dakshin, the primary liability would be on Dakshin and the Appellant could only be vicariously liable (if at all) in his capacity as the director of Dakshin.
b. Since, the Respondent had not impleaded Dakshin in the original complaint *(the impleadment application was filed only after the lapse of three years), the* application was, in substance, a complaint against Dakshin, filed three years after the expiry of the period of 15 days stipulated under proviso (c) to Section 138 of the NI Act.[4]
c. In the absence of any valid explanation for condonation of such delay, the courts below have erred in allowing impleadment of Dakshin, especially since the timelines prescribed in the NI Act are mandatory, and in holding that once the offence is taken cognizance of, the question of delay does not arise.

Arguments advanced on behalf of the Respondent

It was the case of the Respondent that the cheque was signed by the Appellant. It was further contended that sufficient cause had been established for condonation of delay since the Respondent became aware that the cheque in question was drawn on the account of Dakshin only during the course of trial.

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DECISION OF THE SC:

On the liability of the Respondent vis-à-vis Dakshin

Applying the doctrine laid down in *Aneeta Hada v. Godfather Travels & Tours Private Limited*[5] in cases of dishonour of cheques issued by a company if the company is not arrayed as an accused in the complaint, the court cannot take cognizance of the offence. The SC further held that:

"*...for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh (supra) which is a three-Judge Bench decision.*"

Thus, other categories of offenders in this regard, such as authorized signatories of the company who may have signed the cheque would only be vicariously liable.

On the scheme under the Section 138 of NI Act: cognizance of each accused v. cognizance of the offence:

The SC held that Section 138 creates an offence and prescribes punishment on establishment of the ingredients stipulated therein, that are:

i. that a person drew a cheque on an account maintained by him with the banker;
ii. that such a cheque when presented to the bank is returned by the bank unpaid;
iii. that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier;
iv. that the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee;
v. such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid; and
vi. that in spite of the demand notice referred to above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand – this would essentially have to be proven by the drawer of the cheque.

A failure to comply with any of these ingredients would not provide a "*cause of action for prosecution*." Thus, in the context of Section 138 of the NI Act, the concept of "*taking cognizance of the offence but not the offender*" would be inappropriate. Non-fulfillment of the first ingredient, i.e. person drawing the cheque would result in prosecution without accused – an impossibility in itself. In such a scenario, the court cannot take cognizance of the offence.

ANALYSIS OF THE DECISION:

In the foregoing judgment, the SC has distinguished between the schemes and procedures under the NI Act and CrPC, with sufficient clarity. In doing so, it has exempted applicability of the principle of "*taking cognizance of the offence but not the offender*" derived in in the background of the scheme of CrPC, to prosecution for dishonour of cheques under Section 138 of the NI Act.

Such a finding has several practical implications especially when a cheque is drawn by a company wherein cognizance would have to be taken against the company. Since an authorized signatory signing on behalf of the company would only be vicariously liable, it would be mandatory to array the company in the prosecution.

– Shweta Sahu, Alipak Banerjee & Moazzam Khan
You can direct your queries or comments to the authors

[1] 2017 SCC OnLine SC 1017 [Criminal Appeal No. 1534 of 2017 (Arising out of SLP (Crl.) No. 1439 of 2017), decided on 30 August 2017]

[2] NI Act, section 138: "*Dishonour of cheque for insufficiency, etc., of funds in the account. —Where any cheque drawn by a person on an account maintained by himwith a banker for payment of any amount of money to another person fromout 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 to honour the cheque or that it exceeds the amount arranged to be paid fromthat 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 provisions of this Act, be punished with imprisonment for 19 [a termwhich may be extended to two years], 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 fromthe 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, 20 [within thirty days] of the receipt of information by himfromthe 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.]

[3] See Section 138(b) of the NI Act.

[4] See, NI Act, section 142(1)(a)

[5] (2012) 5 SCC 661

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