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CRIMINAL LIABILITY UNDER NEGOTIABLE INSTRUMENTS ACT, 1881

AUTHORED BY: SANIL JOSE

Introduction:

The Negotiable Instruments Act, 1881 was basically introduced to define the law relating to the various aspects of the different negotiable instruments like Promissory Notes, Bills of Exchange and Cheques. But the increasing use of these negotiable instruments necessitated the introduction of a number of amendments in the Negotiable Instruments Act with the main aim of making the use of the negotiable instruments easy. Amongst all the amendments made in the Negotiable Instruments Act the amendment responsible for the insertion of the Chapter XVII into the Act can be considered to be the most important one as it helped in bringing about a revolutionary change with respect to the use of cheques. Prior to this amendment the scope of misuse of the power to issue cheques was on a rise in spite of the available civil remedy and the criminal remedy under Sec 420 of the Indian Penal Code, and the cheques being a part and parcel of the commercial transactions people started losing faith in the cheque system at large. So there was a need to curb down such misuse of the power to issue cheques and the insertion of the Chapter XVII by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (66 of 1988) was blessing in disguise for the payee, the people who were the worst affected in case of such misuse. Chapter XVII as a whole deals with Penalties in case of Dishonour of Certain Cheques for insufficiency of funds in the accounts of the drawer of the cheques. This chapter consists of a total of ten sections amongst which Section 138 is of utmost importance. Section 138 speaks of dishonour of cheques for insufficiency, etc. of funds in the account of the drawer. This section imposes criminal liability on the person who is responsible for issuing a cheque to another person for the fulfillment of his liability without having sufficient funds in his account. This section actually forces a person to think twice before issuing a cheque if he has minimal funds in his accounts as because such issuance of cheques may land the drawer of the cheque in jail even if he had no dishonest intention to cheat the payee.

Understanding the concept of Dishonour

When a cheque drawn by the drawer is presented for payment with the banker by the payee and the banker refuses to satisfy the claim of the payee then such a process is known as dishonour of cheques. The dishonour of cheque or refusal to satisfy the claim of the payee by the banker may be due to varied type of reasons like insufficiency of funds in the drawers account, closure of the account of the drawer due to any legal reasons etc. This process of dishonour of cheque gives a right to the person in whose name the cheque is issued to take the issuer of the cheque to the Court of Law for not being able to discharge his debt or liability either due to insufficiency of funds or due to closure of account.

Section 138 of the Negotiable Instruments Act, 1881 **and its significance**

Section 138 of the Negotiable Instruments Act is a pragmatic legislative step to reach justice to the aggrieved. This section was introduced by the legislature to fill in the void created by the denial of access to justice to the people who were victims of dishonour of cheques. This section basically provides for Dishonour of cheques for insufficiency etc., of funds in the account. As per Sec 138, if under any circumstance, the cheque issued by the drawer of the cheque is dishonored or it bounces back due to lack of funds in the account of the drawer or for the reason that it exceeds the arrangements made by the drawer with the bank, then the drawer of cheque is liable for such dishonour. The significance of Section 138 can be proved from the fact that it not only provides justice to the payee in case of dishonour of cheques but it also gives a chance to the honest drawers to rectify their actions in case of negligent behaviour so as to protect them from the clutches of law and to prevent their harassment at the hands of law. It can be said that Section 138 is a provision which clothes a civil dispute with the garment of criminality.

Necessary ingredients which attract Section 138

Section 138 of the NI Act, 1881 was mainly enacted by the Legislature to restore back the faith of the mercantile community with respect to the mechanism of the cheques as a whole. This section was mainly enacted to protect the payee from the dishonest attitude of the drawer of the cheque. But in order to attract liability

under Sec 138 certain provisions of the section are to be complied with as specified in case of Anchor Capital of India v. State of Gujarat¹. These provisions are as follows: The cheque must be issued in favour of a payee for the discharge either in full or in part of a legally enforceable debt. Then the same cheque must be presented for payment within six months from the date of issue of the cheque or the date of validity whichever is earlier and the cheque should be returned back by the banker as unpaid as because the funds available in the account of the drawer are insufficient for the debt to be paid. After receiving such an information from the banker with regards to the insufficiency of funds, the payee must send a notice intimating the same to the drawer within thirty days of receiving such notice. Then it is the duty of the drawer that within fifteen days of receiving such notice from the payee it has a duty of taking any action to make good the loss suffered by the payee. But if under any circumstances the drawer fails to take any action with regards to the dishonour of cheque then the drawer is considered to be responsible for the loss suffered by the payee without even he having an intention to cheat the payee. So under Sec 138 the concept of criminal liability begins from the point where the drawer even after receiving the notice from the payee fails to take any action in order to prevent such loss suffered by the payee. So a detailed analysis of the Section 138 helps us to understand that the section does not make the drawer criminally liable from the very starting point when the cheque is dishonoured. It gives a chance to the honest drawers to prevent any type of harassment at the hands of law by way of taking any action to make good the loss suffered by the payee after receiving a notice from the payee intimating him about the dishonour of the cheque. So this means that the cause of action with respect to the dishonour of a cheque necessary to make a person criminally liable arises only after the drawer fails to take any action within fifteen days of receipt of the notice from the payee informing him about the dishonour of the cheque to make good the loss suffered by him. In the case of Raman B v. Shasun Chemicals and Drugs Ltd.², it was held that the cause of action for prosecution under the Section 138 does not arise from mere presentment or dishonour of the cheque. It arises only when the drawer defaults in paying up the cheque amount due within fifteen days of receipt of the notice informing him about the dishonour of the cheque. The legislative mandate is that the Drawer should not be prosecuted immediately with the dishonour of cheque but rather he should be given a chance by the payee to rectify his mistake.

¹ (1998) 3 GLR 1973

² (2006) 4 CTC 529; (2006) 2 LW (Cri) 775(Mad).

Burden of Proof and Criminal Liability Under Section 138 of the Negotiable Instruments Act, 1881

In cases of criminal liability under dishonour of cheques the burden of proof lies on the accused who has to prove with the help of the required evidence that the cheque issued were not for the discharge of the existing debt or liability incurred by the drawer during the due course of time. No burden of proof lies on the complainant to prove with the help of evidence that the said cheque was issued with respect to the discharge of any existing debt or liability incurred by the accused. In complaints under Section 138, the Courts have to presume that the cheque or cheques issued were merely for discharging the liability of the drawer and such a presumption made by the Court under section 118 and 139 is rebuttable.

The drawer is considered to be criminally liable for dishonour of cheques when he fails to make payment of the amount which is due to the payee within fifteen days of receipt of notice from the payee intimating him regarding the dishonour of cheque and demanding payment of the said amount. In such a case it is considered that as the chance given to the drawer to pay up the amount due after the receipt of the notice was misused by the drawer and so this makes the Courts presume that even if there was no dishonest intention on part of the drawer then also he is considered to be criminally liable for the dishonour of the cheque. Under such circumstances the drawer may be subjected to imprisonment for a term of two years or with fine which may exceed twice the amount of the cheque or with both. But assumption of criminal liability varies from case to case. The option either to prosecute the accused or to lay a suit for recovery lies with the payee or the complainant. The payee is even entitled to pursue both the civil as well as the criminal remedies together. The initiation of criminal proceedings does not bar the payee from initiating the civil proceedings against the accused for recovery of the amount due. In *G.N. Raju v. B.S. Jaiprakash & Anr.*³, it was held that if the complainant was successful in getting the fruits of the decree in civil court, it would be helpful only as a mitigating circumstance while imposing sentence under Section 138 of NI Act.

But such a criminal liability will not be attached on the drawer if the cheque issued was not with respect to the discharge of the legally enforceable debt on the part of the drawer, if the cheque issued was a gift without any consideration, if the cheque was returned by due to some technical problems like signature being not clear, or date not mentioned properly, if the complaint made is

³ 2006 Cr LJ 820 (Karnt)

Conclusion

The spirit of the NI Act is that it is predominantly a civil law but to ensure that the drawer discharges his liability, a tint of criminal law has been added to it, which makes it quasi-criminal law. Failure on the part of the drawer to pay the cheque amount may expose him to penal provision provided under the Act. A provision relating to 'notice' has been added to protect the honest drawer and give him a chance to rectify his omission. This shows that the primary intent of the legislature was not to make it a criminal law. When the drawer fails to discharge his liability within fifteen days of 'receipt of the notice', it gives the cause of action to the complainant to file the complaint.

