

# Dispute Resolution Hotline

January 07, 2014

## SUPREME COURT INFUSES PRAGMATISM IN RULINGS ON DISHONOUR OF CHEQUE

- Supreme Court holds that fine under Section 138 of the Negotiable Instruments Act cannot exceed twice the value of the cheque. Any compensation to be awarded to the complainant has to be within this limit specified under Section 138 of the Negotiable Instruments Act.
- Supreme Court holds that, for the purpose of computing period of limitation for initiating action under the Negotiable Instruments Act, the day the cause of action arises is to be excluded. Therefore, limitation commences one day after the day notice of dishonour is received.
- Supreme Court holds that criminal liability cannot be attributed to a person based on the principles of vicarious liability. Therefore, one joint account holder will not be liable if the second joint account holder alone has signed and issued a cheque which was subsequently dishonoured.
- Supreme Court holds that a power of attorney holder may initiate action and also depose on behalf of the complainant where he has personal knowledge of the transaction and has been duly authorized by the complainant.

Recently, the Supreme Court of India ("**Supreme Court**") decided certain important cases relating to the offence of dishonour of a cheque under the Negotiable Instruments Act, 1881 ("**NI Act**"). Issues relating to prosecution and defence of cases relating to cheques are extremely important as very often companies have to consider expeditious measures to recover monies from various parties including payments received by way of cheques. Further, dishonour of a cheque could also have serious consequences for directors.

### SUPREME COURT CAPS LIABILITY FOR COMPENSATION TO TWICE CHEQUE VALUE<sup>1</sup>

In the case of *Somnath Sarkar v. Utpal Basu*, the Appellant issued a cheque in favour of the Respondent for a sum of Rs. 69,500/- which was dishonoured due to insufficient funds. The Appellant was directed to pay Rs. 80,000 towards the cheque amount (i.e., principal of Rs. 69,500 and Rs. 10,500 towards compensation) and also undergo six months imprisonment. The Appellant made the payment of Rs. 80,000 and preferred an appeal to the Additional District and Sessions Judge, Calcutta to set aside the imprisonment. The appeal was dismissed and he was asked to surrender within 15 days. The Appellant filed a further appeal to the Calcutta High Court and the court imposed an additional payment of Rs. 69,500/- in lieu of the six months imprisonment. Thus, as against the original cheque amount of Rs. 69,500/- the Appellant was liable to the extent of Rs. 1,49,500/- (original amount of Rs. 80,000 and the additional amount of Rs. 69,500). The Appellant challenged this additional imposition of Rs. 69,500/- in the Supreme Court.

The Supreme Court held that there was nothing wrong in a compensation of Rs. 80,000 in view of Section 357 (3) of Criminal Procedure Code, 1973 (power to award compensation). However, the payment of a further sum of Rs. 69,500/-, since it exceeded the limit of double the cheque amount (i.e., twice Rs. 69,500) imposed under Section 138<sup>2</sup> of the NI Act, was held to be contrary to Section 138 of the NI Act. The judgment clearly sets out the monetary limit by holding that even in cases where a court takes a lenient view it cannot impose a fine of more than twice the cheque amount. Since the power to award compensation does not independently exist under the NI Act, any amount sought to be imposed as compensation, can only be out of the fine imposed and such fine, in any event, cannot exceed twice the value of the cheque amount as stated above. The Supreme Court upheld the setting aside of the prison sentence. It recognized and accepted the principle that the object of Section 138 of the NI Act was to expeditiously recover money and not seek retributive justice.

### LIMITATION FOR COMPLAINT ON CHEQUE DISHONOUR CLARIFIED – DAY OF EVENT TO BE EXCLUDED<sup>3</sup>

Due to an apparent conflict of opinion, the Supreme Court in *Econ Antri Ltd v. Rom Industries Ltd.* reconsidered<sup>4</sup> the principle of limitation explained in *Saketh India Ltd. and Ors. v. India Securities Ltd*<sup>5</sup> ("**Saketh**"). This issue came before the Supreme Court in light of the difference of opinion with respect to the commencement of the period of limitation under Section 142 (b) of the NI Act<sup>6</sup> and the calculation of one month period prescribed therein. The issue was whether, in a case where a period is fixed within which a person must act, the day on which the cause of action arises (i.e., receipt of notice under Section 138 (b) of the NI Act intimating the drawer of the fact of dishonour of the cheque) should also be counted while computing the limit of 30 days.

After considering *Saketh* and *SIL Import, USA v. Exim Aides Silk Exporters*<sup>7</sup> which had conflicting methods of computation, the Supreme Court held that for the purposes of calculating the period of one month, the period had to be reckoned by excluding the date on which the cause of action arose. Relying on precedents under the NI Act, the General Clauses Act, 1897 and Halsbury's Laws of England, the Supreme Court concluded that where a particular time was to be computed from the happening of a certain event, the day of the event was to be excluded.

Companies should be aware of when their right to initiate action against a party commences or lapses under Indian

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law and this judgment provides clarity on the principles to be followed in computing the period of limitation.

### JOINT ACCOUNT HOLDER NOT LIABLE FOR CHEQUE BOUNCING<sup>8</sup>

The Supreme Court in *Mrs. Apama A. Shah v. Sheth Developers Pvt. Ltd. and Anr.*, held that only the drawer of a cheque could be made liable for an offence under Section 138 of the NI Act and a strict interpretation was required to be given to penal provisions of the NI Act. The Supreme Court clarified that no one could be held criminally liable for the act of another. In this case, a cheque of Rs. 25 Crores was issued solely by the husband of the Appellant from the joint account of the husband and wife. The Respondent deposited the cheque in its account and the cheque was dishonoured due to insufficient funds. The Respondent issued a notice under Section 138 of the NI Act to the Appellant and her husband asking them to repay the sum of Rs. 25 Crores. The Respondent alleged that the Appellant and her husband were both guilty of the offence under Section 138 of the NI Act. The Respondent also filed a complaint before the Metropolitan Magistrate. The Appellant and her husband challenged the initiation of the complaint in a writ petition before the Bombay High Court. The Bombay High Court did not quash the complaint and hence, the Appellant filed an appeal to the Supreme Court.

The Supreme Court referred to *Jugesh Sehgal v. Shamsher Singh Gogi*<sup>9</sup> where the court had set out the essential ingredients for an offence under Section 138 of the NI Act<sup>10</sup> and on the basis of those principles held that it was legally impermissible to attribute criminal liability to a person because of the actions of a third person. The court held that unless a law makes an exception, the principle of vicarious liability would not apply in the context of criminal liability.

The principles laid down in the judgment ensure that the NI Act is not abused and innocent employees are not harassed.

### POWER OF ATTORNEY HOLDER'S COMPETENCE TO FILE COMPLAINT UPHELD

Conflicting judgments on the legality of a power of attorney holder ("**Attorney holder**") to initiate action on behalf of the principal under Section 138 of the NI Act was settled by a three-judge bench of the Supreme Court in *A.C. Narayan v. State of Maharashtra & Anr.* ("**Narayan's case**") and *G. Kamalakar v. Ms Surana Securities Ltd. & Anr.*<sup>11</sup> ("**Kamalakar's case**"). In this judgment the Supreme Court held that subject to certain essential pre-conditions, an Attorney holder had the power and authority to file a complaint under Section 138 of the NI Act.

In two different cases the maintainability of an Attorney holder initiating a complaint under Section 138 of the NI Act came up for consideration before the Supreme Court. In Narayan's case the drawee of the cheque had authorized the Attorney holder to initiate proceedings under Section 138 of the NI Act and this was upheld by the Bombay High Court. However, in Kamalakar's case, the drawer of the cheque challenged the order of the Andhra Pradesh High Court upholding the maintainability of a complaint initiated by an Attorney holder. The Supreme Court had to examine whether a complaint was maintainable when initiated by an Attorney holder and whether an Attorney holder could depose on behalf of the drawee / complainant.<sup>12</sup>

The Supreme Court held that an Attorney holder could initiate a complaint on behalf of a principal and also depose on behalf of the principal provided he had personal knowledge of the complaint. For the prosecution of an offence under Section 138 of the NI Act, the principal would not have to be present in person and the Attorney holder could testify on his behalf. Further, the principal should specifically empower the Attorney holder where the power is to be sub-delegated for initiating action under Section 138 of the NI Act.

This ruling will be of immense assistance to both companies and individuals who require action to be taken through an Attorney holder to help manage their affairs.

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You can direct your queries or comments to the authors

<sup>1</sup> *Somnath Sarkar v. Utpal Basu*, 2013 (12) Scale 484.

<sup>2</sup> Section 138 of the Act: Dishonour of cheque for insufficiency, etc., of funds in the account: 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 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 year, 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.

<sup>3</sup> 2013 (10) Scale 555.

<sup>4</sup> In view of the conflicting opinion, the issue of limitation was referred to a larger bench of the Supreme Court. Therefore in *Econ Antri Ltd v. Rom Industries Ltd.*, the Supreme Court only gave its views on the issue of limitation based on Section 142 (b) and did not examine the facts specific to this particular case.

<sup>5</sup> (1999) 3 SCC 1.

<sup>6</sup> Section 142(b) prescribes that the complaint, is to be filed within 30 days of the date on which the cause of action under Section 138 (c) of the NI Act arises.

<sup>7</sup> (1999) 4 SCC 567.

<sup>8</sup> 2013 (8) Scale 140.

<sup>9</sup> (2009) 14 SCC 683.

<sup>10</sup> The conditions set out in *Jugesh Sehgal v. Shamsher Singh Gogi* are:

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;

ii. the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;

iii. that 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;

iv. 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;

v. 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;  
vi. 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. Being cumulative, it is only when all the aforementioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence Under Section 138 of the Act.

<sup>11</sup> 2013 (11) Scale 360.

<sup>12</sup> The Supreme Court in this case was not concerned with the individual facts of the case but was only concerned with the issue of law regarding maintainability of complaints initiated by an Attorney holder.

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