DISHOHOUR OF A CHEQUE FOR A TIME BARRED DEBT

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1. THE PREFACE

In the cover-page of the April 2007 issue of the Criminal Law Journal under the heading "IMPORTANT DECISIONS" two digests of such decisions have been prominently displayed. The first of these decisions says that a "cheque issued for discharge of time barred debt would still fall within purview of S.138 of N.I. Act......". This apparently surprising statement of law prompted the writer to read up the law on this point as closely as the limited resources permit. This essay is the result of the effort.

The Negotiable Instruments Act, 1881 is referred in this essay as N.I. Act.

2. THE STATUTORY PROVISIONS

The heading of the Chapter XVII of the N.I. Act renacted since 01.04.1989 reads thus :

> ***"OF PENALTIES IN CASE OF DISHOHOUR OF CERTAIN CHEQUES FOR INSUFFICIENCY OF FUNDS IN THE ACCOUNTS"***

One of the vital requirements of Section 138 creating the offence is that the cheque in question must be drawn "for the discharge, in whole or in part, of any debt or other liability". The Explanation appended to the Section 138 says thus – For the purposes of this Section, "debt or other liability" means a legally enforceable debt or other liability. In the face of these statutory provisions describing the words "certain cheques" in the heading it is difficult not to be surprised by the statement in the cover-page of CRIMINAL LAW JOURNAL, APRIL 2007. This is not all. The section just following Section 138 that is Section 139 contains the words "the cheque of the nature referred to in Section 138 for the discharge in whole or in part, of any debt or other liability".

In contrast significantly the Legislature has not described a cheque in this manner anywhere else in the N.I. Act. It is trite to say that any exercise in interpretation to find the intention of the Legislature, which is the goal of such an exercise, without keeping in mind the statutory provisions as above in Chapter XVII of the N.I. Act and the significant omission from other Chapters such description of a cheque will remain incomplete and erroneous. The fitting end to this paragraph of the essay seems to be the following extract from SHRI ISHAR ALLOY STEELS LTD. V. JAYASWALS NECO LTD. (2001) 3 SCC 609 :-

> ***"It has always to be kept in mind that section 138 of the Act creates an offence and the law relating to the penal provisions has to be interpreted strictly so that no-one can ingeniously or insidiously or guilefully or strategically be prosecuted."***

3. RAMAKRISHNAN –VS- GANGADHARAN NAIR & ANOTHER 2007 Cri.L.J. 1486.

The statement in the cover-page is a digest from the above decision of a Single Judge of the Kerala High Court. That was a case where the cheque was issued in discharge of a time barred debt. The Judgment simply followed a Division Bench decision of the same High Court reported in RAMAKRISHNAN –VS- PARTHASARADHY, 2003(2) Ker L.T 613. The submission made before the Single Judge that the Division Bench decision being based on an erroneous view of the concept of acknowledgement under Section 18 of the Limitation Act deserves reconsideration by a Larger Bench did not prevail. The Single Judge in para 8 of the Judgment in effect held that the Judgment of the Division Bench "does not rest on any acknowledgement under Section 18 of the Limitation Act but is based on Section 25(3) of the Contract Act and Section 46 of the N.I. Act. Following the Division Bench it was held that the cheque itself constitutes a valid promise in writing required under Section 25(3) of the Contract Act. Several case law cited and noted at para 6 of the Judgment were not at all considered thinking all of them to be dealing with acknowledgement. So overwhelming was the influence of the Division Bench Judgment that the Single Judge even failed to notice that the Full Bench decision of the same High Court that is AIR 1958 Ker 31(FB) dealt with Section 25(3) of the Contract Act and the law stated by the Division Bench on Section 25(3) of the Contract Act is in direct conflict with the law laid down by the Full Bench. Incidentally the Full Bench decision was not noticed by the Division Bench. Before analyzing the Division Bench decision which is the basis of 2007 Cri.L.J. 1486 it will be appropriate to look at what the other High Courts say on the matter of dishonour of a cheque for a time barred debt.

4. THE ANDHRA PRADESH HIGH COURT –GIRDHARI LAL RATHI –Vs- P.T.V. RAMANUJACHARI, 1997(2) CRIMES 658.

This seems to be the earliest case where the matter fell for decision. The High Court clearly held that if a cheque is issued for a time barred debt and it is dishonoured the accused cannot be convicted under Section 138 of the N.I. Act. simply, on the ground that the debt is not legally recoverable. Indeed the Kerala High Court itself followed this decision in SASSERIYIL JOSEPH –Vs- DEVASSIA, 2001 Cri.L.J 24 a Single Judge decision dated 22.09.2000. These two Judgments are based on the statutory provisions as indicated in paragraph 2 of this essay. In SASSERIYIL JOSEPH (Supra) the loan was of January, 1988 and the cheque was issued in August 1991. There was no valid acknowledgement of liability within the three year period of Limitation. To Counsels argument based on Section 25(3) of the Contract Act, the High Court responded thus :

> ***"No doubt, the promise to pay a time barred cheque (debt) is valid and enforceable, if it is made in writing and signed by the person to be charged therewith. But, it is clear from Section 138 of the Negotiable Instruments Act that in order to attract the penal provisions in the bouncing of a cheque in Chapter XVII, it is essential that the dishonoured cheque should have been issued in discharge, wholly or in part of any debt or other liability of the drawer to the payee."***

Incidentally, SASSERIYIL JOSEPH (Supra) reached the Supreme Court, more of which will follow latter in this writing.

5. THE KARNATAKA HIGH COURT – H. NARASIMHA RAO –VS- VEBKATARAM R., 2007 CRI.L.J. 583.

In the case the trial court accepted the evidence of the complainant that in the year 1994 he gave a loan of Rs.60,000/- to the accused but only on the ground that the cheques were issued in May 1999 that is when the debt has become barred by limitation the accused was acquitted. But in the appeal against acquittal relying on 2003(2) Ker L.T. 613, the Division Bench Judgment of the Kerala High Court the acquittal was overturned. A.V. MURTHY –VS- B.S.NAGABSAVNNA (2002)2 SCC 642 was also pressed into service. It will be necessary to analyze minutely and understand clearly this Judgment of the Supreme Court which seems to have influenced the Division Bench of the Kerala High Court.

6. THE BOMBAY HIGH COURT – NARENDRA V. KANEKAR –Vs- BARDEZ TALUKA CO-OP HOUSING MORTGAGE SOCIERY, 2006 Cri.L.J. 3111.

The loan in this case was of 05.11.1996 and the four cheques came to be issued on the 30th of September, October, November and December, 2003. Thus all the cheques were issued much beyond the three year period of limitation of recovery of the loan. The High Court relied on its earlier Judgment on the point ASHWINI SATISH BHAT –VS- SHRIJEEVAN DIVAKAR LOLIENKAR (1999)1 Goa L.T. 408, GIRDHARI LAL RATHI (Supra) and SASSERIYIL JOSEPH (Supra) did not follow the Kerala Division Bench Judgment which held that the cheque given for the discharge of a time barred debt itself becomes a contract under Section 25(3) and can lead to a conviction under Section 138 N.I. Act if the other conditions necessary for such conviction are established. In this case alongwith the cheques an affidavit/undertaking admitting the time barred loan was given and because of that the debt was held to be enforceable. The High Court specifically considered SASSERIYIL JOSEPH (Supra) as having the imprimatur of the Supreme Court and as the law declared on the matter. This will be considered in detail latter in this writing.

7. APPRAISAL OF DIVISION BENCH JUDGMENT OF THE KERALA HIGH COURT –RAMAKRISHNAN –VS- PARTHASARDHY, 2003(2) Ker. L.T. 613, 2003(3) INDIAN CIVIL CASES 662.

The view of the Division Bench of the High Court that a cheque given in discharge of a time barred debt on its dishonour and on proof of other requisites under Section 138 N.I. Act may sound in a criminal prosecution rests on the holding that a cheque of such nature drawn and delivered constitutes a promise to pay a time barred debt within Section 25(3) of the Contract Act. Added to the above holding is the failure to distinguish civil Liability from criminal liability.

Section 4, 5, 6 and 13 of the N.I. Act make it clear that of the three kinds of negotiable instruments only a promissory note contains an unconditional undertaking that is promise to pay whereas a bill of exchange and a cheque contain an unconditional order as distinguished from a promise. Thus the holding that the cheque itself constitutes a promise in writing signed by the person to be charged therewith within Section 25(3) of the Contract Act has been reached without considering this vital legal character of a cheque statutorily provided and as such is per incuriam. CHACKO VARKEY –VS- THOMMEN THOMAS, AIR 1958 Ker 31 a Full Bench decision of the Kerala High Court had an occasion to lay down the law under Section 26 of the Tranvancore Contract Act which corresponds to Section 25 of the Indian Contract Act and in that

context quoted with the approval Pollock and Mulla on Contract the following :

> ***"After the period of limitation expires, nothing short of an express promise will provide a fresh period of limitation; an implied promise is not sufficient."***

The Division Bench failed to notice this binding precedent and on that count also the holding as to the cheque being a promise in writing within Section 25(3) of the contract Act is per incuriam. It has to be stated however that the Full Bench decision was not placed before the Division Bench but when the same was placed before the later Single Judge on a plea for reconsideration of the Division Bench Judgment the High Court brushed it aside by simply thinking this to be not dealing with Section 25(3) of the Contract Act.

The Statutory provision clearly indicate that penal provision of Section 138 of the N.I. Act is applicable only to "certain cheques" for "the discharge in whole or in part, of any debt or other liability", which according to the Explanation must be "a legally enforceable debt or other liability". The same nature and purpose of the cheque have again been emphasized in Section 139 of the N.I. Act. A close perusal of these provision yields the result that the debt or liability and the cheque in discharge thereof are two distinct matters and cannot be merged into one by the cheque itself for the purpose of the penal provision in Section 138. This was hinted but not exposed in so many words in SASSERIYIL JOSEPH (Supra) which was overruled by the Division Bench. A cheque given in discharge of a time barred debt will not constitute a promise in writing not even an implied promise but will under Section 30 of the N.I. Act on dishonour give rise to a civil liability and not a criminal liability under Section 138 of N.I. Act. The Division Bench failed to distinguish between civil liability and criminal liability.

The Division Bench was unable to concur with the views in GIRDHARI LAL (Supra) and ASHWINI SATISH BHAT (Supra) and rejected SASSERIYIL JOSEPH (Supra) on the ground that "relevant provisions like S.25(3) of the Contract Act and S.46 of the Negotiable Instruments Act, were not brought to the notice of the learned Single Judge." The factual error in the above observation is explicit on the extract from SASSERIYIL JOSEPH (Supra) in para 4 of this writing. The Single Judge did consider at length Section 25(3) of the Contract Act. The relevance of Section 46 of the N.I. Act dealing with negotiation would have arisen only if the cheque can in law be accommodated within Section 25(3) of the Contract Act, which the Single Judge could not do.

In dismissing the special leave petition arising out of the Judgment in SASSERIYIL JOSEPH (Supra) on 10.09.2001 the Supreme Court spoke thus :-

> ***"We have heard the learned counsel for the petitioner. We have perused the Judgment of the high Court of Kerala in Criminal Appeal No.161 of 1994 confirming the judgment/order of acquittal passed by the Addl. Sessions Judge, Thalassery in Criminal Appeal No.212 of 1992 holding inter alia that the cheque in question having been issued by the accused for due which was barred by limitation the penal provision under S.138 of the Negotiable Instruments Act is not attracted in the case.***
>
> ***On the facts of the case as available on the records and the clear and unambiguous provision in the Explanation to S.138 of the Negotiable Instruments Act the Judgment of the lower appellate Court as confirmed by the High Court is unassailed.***
>
> ***Therefore, the Special Leave Petition is dismissed."***

The above was placed before the Division Bench. To counter the above the opposing counsel placed A.V. MURTHY –Vs- B.S. NAGABASVNNA (2002)2 SCC 642 dated the 8th of February, 2002. That was a case where the Trial Court issued process on a complaint where the loan was stated to have been advanced "about four years back". The Addl. Sessions Judge quashed the complaint relying on the Explanation to Section 138 N.I. Act that loan was barred by limitation on the date of the cheque in question. Karnataka High Court concurred but eventually the Supreme Court reversed the Judgment of the High Court and restored order of the Trial Court issuing process. The Division Bench of the Kerala high Court seems to have been greatly impressed by these facts and concluded thus :-

> ***"This is indicative of the fact that the accused was not entitled to escape liability to suffer penalty merely on account of the fact that the limitation for recovery of the amount had expired before the date of issue of the cheque."***

A close perusal of the entire judgment of the Supreme Court does not seems to yield any such indication. The Supreme Court was only bringing home the point that merely because of the words that the loan was advanced "about four years back" it may not be barred by limitation. It may still be legally recoverable if there is a acknowledgement in law or by way of a written promise within Section 25(3) of the Contract Act. Indeed balance-sheets tending to prove acknowledgement was produced before the Supreme Court. The Supreme

Court only did not foreclose a finding by the Magistrate on the question of the loan being barred by limitation which may be raised by way of defence at the trial. The Division Bench did not notice that while SASSERIYIL JOSEPH (Supra) reached Supreme Court after a full trial AV. MURTHY (Supra) reached Supreme Court before any trial could be held by the Magistrate. AV. MURTHY (Supra) cannot be read even as implying that a bar of limitation is outside the Explanation to Section 138 and that the Explanation would "only mean that the liability or debt should not arise out of a transaction which is illegal. It should be not a cheque to meet a liability under a wagering contract which shall not be legally enforceable." The quote extracted from the Division Bench Judgment perhaps has been inspired by para 6 of A.V. MURTHY (Supra) which in the light of the entire judgment does not appear to restrict the scope of the Explanation as above. The Supreme Court was giving only an illustration to bring home the point that the quashing was erroneous limitation unlike an admitted wagering contract being a mixed question of law and fact.

The Division Bench examining dismissal of the SLP in SASSERIYIL JOSEPH (Supra) in the light of A.V. MURTHY (Supra) concluded that the dismissal order cannot be said to be the enunciation of law which my be binding under Article 141. There is a judicially recognised distinction between an order of dismissal of a Special Leave Petition in limine without a speaking order and that of a Special Leave Petition by a speaking order as regards its value as a precedent. The order in SASSERIYIL JOSEPH (Supra) quoted in full earlier falls in the later variety and lays down law within Article 141. The error of the Division Bench in not following a binding precedent and following what is at best an implication demonstrably erroneous can best be exposed by the following words of the Supreme Court in para 6 of UNION OF INDIA – VS- ALL INDIA SERVICES PENSIONERS' AND ANOTHER, (1988) 2 SCC 580 thus :-

> ***"This is wholly untenable ground. The Special Leave Petition were not dismissed without reasons. This Court has given reasons for dismissing the Special Leave petition. When such reasons are given the decision becomes one which attracts Article 141 of the Constitution which provides that the law declared by the Supreme Court shall be binding on all the Courts within the territory of India."***

It appears that the Division Bench failed to appreciate the true ratio of both the judgments of the Supreme Court bearing on the matter. The Division Bench could not have overruled SESSARIYIL JOSEPH (Supra) after the Supreme Court has affirmed it on the specific question that limitation is within the Explanation to Section 138 of the N.I. Act. Thus there can be no question that the Division Bench

Judgment of the Kerala High Court did not lay down correct law when it held that a cheque for a time barred debt on being dishonoured can embroil a drawer in a criminal prosecution. The important decision No.1 in the cover-page of April, 2007 issue of the CRIMINAL LAW JOURNAL thus is important only negatively because of the errors indicated in this essay.

8. THE CONCLUSION

The Andhra Pradesh High Court in GIRDHARI LAL RATHI (Supra), The Bombay High Court in ASHWINI SATISH BHAT (Supra) and NARENDRA V. KANEKAR (Supra) and the Kerala High Court in SASSERIYIL JOSEPH (Supra) being in consonance with the law laid down by the Supreme Court in the speaking order dismissing the petition for special leave to Appeal (criminal) No. 1785 of 2001 dated 10th of September 2001 have correctly decided the law by holding that a cheque for a time barred debt on dishonour cannot form the foundation of a criminal prosecution under Section 138 of the N.I. Act. The Judgment of the Kerala High Court in Division Bench RAMAKRISHNAN (Supra), in Single Bench RAMAKRISHNAN (Supra) and of the Karnataka High Court in H. NARASIMHA RAO (Supra) being in the teeth of the Supreme Court order quoted earlier in this essay do not lay down the correct law in the matter of a criminal prosecution on dishonour of a cheque for a time-barred debt.