EFFECT OF PAYMENTS ON COMPLAINTS FOR DISHONOUR OF CHEQUE

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By

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1. INTRODUCTION

On the 19th February, 2009 a printout of a Division Bench Judgment of the Kerala High Court was downloaded from www.airwebworld.com. By the Judgment the Kerala High Court has overruled two Single Bench Judgments of the same High Court. All these three Judgments and a few others from other High Courts make interesting but discordant and at times confusing reading. All these Judgments speak of various aspects of payments after issue of the cheque leading upto the trial in a criminal case on dishonour of the cheque. This essay is an attempt to stitch together a coherent legal view on the problem.

2. THE JUDGMENTS

The Judgment of the Division Bench of the Kerala High Court so retrieved delivered on 29.10.2008 in Cri. Appeal No. 1432 of 2003 is JOSEPH SARTHO Vs- G. GOPINATHAN & Anr. The said Judgment hereinafter will be referred to as JOSEPH SARTHO. The Single Bench Judgments overruled are R. GOPIKUTTAN PILLAI –Vs- SANKARN NARYNAN NAIR, (2004) 1 DCR 222 dated 19.03.2003 (GOPIKUTTAN hereinafter) and M/s THEKKAN & Company –vs- Smt. M. ANITHA, 2004 Cri.L.J 58 (THEKKAN hereinafter) dated 05.06.2003.

2.1 Unfortunately the Full Judgment of GOPIKUTTAN could not be perused by the Writer but the portion excerpted in JOSEPH SARTHO sets out the point discussed. According to the Judgment if a part payment of the amount covered by the cheque had been made and the funds in the Bank are sufficient to honour the balance outstanding but not the entire amount covered by the cheque the dishonour of the cheque would be for insufficiency of funds and the prosecution, other conditions being fulfilled, would be competent. Part payment as such has no effect but the accused can avoid culpability by paying the entire amount including the part-payment made before dishonour of the cheque, within the proviso (C) of Section 138 of Negotiable Instruments Act, 1881 (N.I. Act hereinafter).

2.2. **In THEKKAN facts found were these. A cheque for Rs.1,25,000/- was issued but before any complaint came to be filed regarding the cheque by three other cheques a sum of Rs.37500/- was paid. The cheque for Rs.1,25,000/- when presented for encashment was dishonoured on the ground of insufficiency of funds in the account. Due notice of demand under proviso (C) of Section 138 of the N.I. Act was served. Even after the expiry of the 15 days period as indicated in the said provision the amount covered by the cheque was not paid. On these facts the High Court in effect held (1) that the part payment had no effect on the prosecution and if the cheque for Rs.1,25,000/- had been honoured a civil suit for the overpayment is the remedy (2) that if the accused had paid the balance amount within the 15 days notice period together with the part-payment earlier made that would have enabled him to get away from the clutches of the penal provision under the N.I. Act. Thus the law laid down in both the Single Bench Judgments is the same.**

2.3. **In JOSEPH SARTHO, the Division Bench dealt with these facts :- On 04.06.1999 accused issued a cheque for Rs.4,61,400/- in discharge of a full debt due to the complainant. On 09.06.1999 the accused paid a sum of Rs.2,26,400/- as part payment of the same debt. The cheque for Rs.4,61,400/- was presented for encashment on 30.11.1999 but was returned unpaid for insufficiency of funds. A Notice demanding payment of the balance amount of Rs.2,35,000/- was served. The trial Court took the view that since the cheque presented was not for the amount due from the accused, no offence was made out under Section 138 of the N.I. Act and acquitted the accused. Initially the appeal against the acquittal was heard by a Single Judge but finding an apparent conflict between GOPIKUTTAN and another Single Bench decision SUPPLY HOUSE –Vs- ULLAS, 2006 Cri.L.J 430 the appeal was placed before the Division Bench.**

Three stark features of the Judgment of the Division Bench, two of them the foundation of the judgment and the third which would have provided the firmest foundation for the conclusion in the judgment but not at all noticed by the Division Bench and all others concerned, are

(1) That the drawee is obliged to make an indorsement of the part payment in the cheque under Section 56 of the N.I. Act.

(2) That it is an essential ingredient of the offence that the cheque should represent the amount due to the payee or part of it, on the date of presentation

of it for collection/encashment and lastly the one unnoticed is

(3) That the notice of demand was for the balance only.

Before going into the details of the reasons in JOSEPH SARTHO, one may deal with the third feature as a sidewind of the judgment.

3. THE SIDE WIND

It is undisputed that notice of demand indicated in proviso (b) and (c) of Section 138 of N.I. Act issued in the case was only for the balance amount of Rs.2,35,400/- and not for the cheque amount which was Rs.4,61,400/- Nothing can be clearer than the language of the said two provisos that the requirement of law is to make a demand for payment of the "said amount of money" meaning the amount covered by the cheque. There are atleast four Supreme Court decisions starting from CENTRAL BANK OF INDIA –Vs- M/S SAXONS FARMS, AIR 1999 S.C. 3607, SUMAN SETHI –Vs- AJAY K. CHURIWAL, AIR 2000 S.C. 828, K.R. INDIRA –Vs- DR.R. ADINARAYANA, (2003) 8 SCC 300 and RAHUL BUILDERS –Vs- ARIHANT FERTILIZERS & CHEMICALS, (2008)2 SCC 321 speaking in one voice that unless the notice makes a demand for the "said amount" meaning the amount mentioned in the cheque the notice is incapable of sustaining a prosecution under Section 138 of the N.I. Act. Even the Magistrate in such a circumstance need not issue process. Incidentally (2008)2 SCC 321 was placed before the Division Bench but in another connection. It is surprising that none concerned raised the point. It is, in these circumstances, when the prosecution could have been nipped in the bud as early as in January/February 2000, the case dragged on to 29.10.2008 when the Division Bench eventually affirmed the acquittal rendered by the Magistrate on grounds which require close scrutiny. But before that a conspectus of the law would be in order.

4. A CONSPECTUS OF THE LAW

In Bhashyam and Adiga's classic work "The Negotiable Instruments Act" eighteenth edition, 2008, at page 741 the offence of dishonour of cheque has been described thus :

> *"The offence under Section 138 is not a natural crime like hurt and murder. It is an offence created by a legal fiction in the statute. It is a civil liability transformed into a criminal liability, under restricted conditions by way of an amendment to the Act, which is brought into force only in 1989. Till then the offending acts referred to in Section 138 constituted a pure civil liability."*

The objects and reasons for the new provisions have been stated thus :

> ***"These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the creditability of the instrument".***

Any book on principles of Interpretation like Maxwell's G.P. Singh's tells anyone interested that a legal fiction has to be kept within the bounds of the purpose for which it was created by the Legislature. They also tell us that when the language is clear literal or plain meaning is the rule of interpretation of a statute, that interpretation should aim at upholding the object of the statute and the intent of the legislature and also that by interpretation when necessary a statute should be made workable and should not be reduced to a deed letter. It is also well established that a penal statute should be strictly construed. Indeed in relation to the last principle as regards the offence under Section 138 of the N.I. Act RAHUL BUILDERS, (2008)2 SCC 321 cited in JOSEPH SARTHO says as much.

Though no direct decision from the Supreme Court on the problem at hand could be discovered there are indication from several Supreme Court Judgments as to proper construction of the provisions of Section 138 of the N.I. Act so as to uphold the object of the provision and the intent of the legislature. Two such decisions may be noticed. In I.C.D.S. Ltd. –Vs- BEENA SHABER, 2002 Cri.L.J. 3935 the Supreme Court regarding Section 138 of the N.I. Act observed thus :-

> ***"The commencement of the Section stands with the words "where any cheque". The above noted three words are of extreme significance, in particular, by reason of the user of the word "any" the first three words suggest that infact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words at the commencement of the section leave no manner of doubt that for whatever reason it may be the liability under the provision cannot be avoided....."***

In N.A. ISSAC –Vs- JEEMON P. ABRAHAM, 2005(TLS) 41059, 2005(1) CIVIL COURT CASES 690 the Supreme Court proceeded thus :-

> ***"The interpretation of the High Court of Section 138 of Negotiable Instruments Act, 1881 to the effect that the said provision will not be applicable when the cheque is issued from an already closed account cannot be upheld on the wordings of Section 138.***

> ***The word "maintained" in Section 138 of the said Act has been narrowly construed by the High Court for coming to the aforesaid conclusion. Such an interpretation would defeat the object of insertion of the provision in Act. Section 138 does not call for such a narrow construction."***

The Judgment also referred to GOA PLAST (P) –Vs- CHICO URSULA D'SOUZA, AIR 2004 S.C. 408 as laying down the correct approach in construing Section 138 of the N.I. Act.

In the above background of object an reasons of the law, of the principles of interpretation, of the indication from precedents and keeping in focus the distinction between the civil and the criminal liability in the N.I. Act if one approaches the provisions of Section 138 of the N.I. Act it becomes clear that the opening sentence of the section provides that the drawal of the cheque has to be in discharge of a pre existing debt or liability. The section does not say anything about the quantum of the debt or liability. Once this initial primary ingredient of the offence is fulfilled the same cannot be tinkered with by addition or deletion of words into the provision. Any diminution of the liability as a factor effecting the offence cannot be read into the provisions of Section 138 of the N.I. Act.

5. ANALYSIS OF THE REASONS IN JOSEPH SARTHO

Understanding the law and principles as narrated above one may now have a closer look at the reasons in JOSEPH SARTHO, which says :

(1) "In this case once, part payment is received, the cheque no longer was one for payment of money for discharging in whole or in part of any debt or other liability. In fact, the amount covered by the cheque was larger than the amount of debt or liability. The whole amount of debt or liability was lesser than the amount represented by the cheque. So, if the cheque for such an amount was dishonoured, the same will not be an offence under Section 138 of the Act".

(2) " Going by the plain words of the Section, the cheque presented for encashment should be one for payment in full or part of the debt due. In this case, admittedly the cheque was for an amount higher than the amount due on the date it was presented for encashment. The law contemplates making of an indorsement by the drawee on the back of the cheque regarding the part payment received."

(3) **"..... the essential ingredient of the offence that the cheque should represent the amount due to payee or part of it, on the date of presentation of it for collection/encashment is absent."**

(4) **"In this case, admittedly, a portion of the amount covered by the cheque was repaid. The same was not indorsed by the drawee on the cheque. In view of the above position, the appellant could not have negotiated that cheque for the full amount. For the very same reason he also could not have presented it for collection of the full amount. He was entitled to get only the balance amount. Therefore, he must have made an indorsement of the amount received and presented the cheque, to collect the balance amount due."**

Most of the above extracts from JOSEPH SARTHO reads like the reasonings in a Judgment deciding a civil action for realization of the liability covered by the cheque. The provisions like those of Section 30, 44, 45 and 64 of the N.I. Act have gone unnoticed in the Judgment whereas those of Section 56 of the N.I. Act became the keystone. Most surprisingly the submission, strangely, of the learned counsel for the accused that Section 138 is not a substitute for a suit for money as recorded in paragraph 6 of the printout of the judgment has not at all been adverted to by the Division Bench. Though the end product of a successful criminal prosecution under section 138 of the N.I. Act may be realization of the cheque amount through fine or compensation it is not the means to achieve such a result. It is a mistake to obliterate the distinction and treat a criminal case virtually as a civil suit forgetting the real purpose of the penal provision. JOSEPH SARTHO lays down that the liability existing at the date of the presentation of the cheque at the Bank is the crux. No such thing is there in Section 138 in terms and nothing like this can be deduced by interpretation from the Section. This central assumption in JOSEPH SARTHO, if correct, would reduce the penal provision of the 138 N.I. Act into a dead letter. Such an interpretation would be in breach of the cardinal rule of interpretation that interpretation should aim at making a statute workable and uphold its purpose.

The central assumption in JOSEPH SARTHO which is its foundation is appropriately answered by the Calcutta High Court in the following words :-

> ***"If part payment could protect the drawer of the cheque from prosecution under S.138 this would have been a very handy and convenient device for an unscrupulous person to frustrate the very purpose of S.138 in that on tender of any paltry and insignificant amount say Rs.10/- or Rs.5/- even against demand for any huge amount mentioned in the cheque could frustrate the coercive remedy which the legislature has thought fit to make available under S.138 to a duped payee coming within the ambit of the said section."***

The above extract is from 1994 Cr.L.J. 351. The consequences of the extracts from JOSEPH SARTHO having thus been adequately dealt with if one turns to the language of the provision of Section 138 the assumption about changeability of the original liability by the action of the drawer and eventual fixing of the same on the date of presentation cannot be founded on the words of the provision.

The second reason for the conclusion in JOSEPH SARTHO is entirely based on Section 56 of the N.I. Act. Chapter III of the N.I. Act comprising Section 26 to 47 A deals with PARTIES TO NOTES, BILLS AND CHEQUES, Chapter IV comprising Section 46 to 60 has the title "OF NEGOTIATION" and lastly Chapter V comprising Sections 61 to 77 starts with the title "OF PRESENTATION." How any question of negotiation is relevant in the facts and circumstances of the case is not understandable. Section 56 does not oblige the payee presenting the cheque for encashment to make any indorsement. Indorsement which is a right of the payee or the holder in due course under the provision of the N.I. Act has been read as an obligation on the part of the payee. In JOSEPH SARTHO the matter is only among the drawer/accused, the payee/complainant and the drawee Bank. Incidentally in JOSEPH SARTHO at a few places payee has been described as the drawee which has been defined in Section 7 of the N.I. Act. Section 56 prohibits indorsement for part of the sum due but when a part of the sum due has been paid if the payee/holder in due course wants to negotiate for the balance an indorsement of the part payment enables negotiation for the balance. No question of the payee wanting to negotiate the instrument for the balance arises in the case. Thus the provisions of Section 56 can have no role to play in the matter of a prosecution under Section 138 of the N.I. Act dealt with in JOSEPH SARTHO.

GOPI KUTTAN and THEKKAN also had made a secondary point as regards the defence of the accused under the proviso (c) of Section 138 of the N.I. Act. It was uniformly held, though the holding is obiter, that any part payment after issue of the cheque upto the fifteen day limit of the notice period provided in the proviso (C) to Section 138 of the N.I. Act may be added to cover the amount of the cheque within the proviso (c) in order to avoid the penal liability. JOSEPH SARTHO did not comment on this aspect of the Judgments overruled by it. Though on a bird's eye view of the provision one is tempted to find fault with such a holding deeper reflexion and closer scrutiny makes the soundness of the enunciation of the law under the proviso (c) clear. In P. Ramanatha Aiyar's Advanced Law Lexicon meaning of the preposition "within" used in the proviso (c) has been explained referring to A.I.R. 1953 Nagpur 81, AIR 1957 A.P. 30 and AIR 1972 Mysore 50. The most favoured meaning has been stated thus :-

> ***"The word "within" in relation to a period of time does not usually mean "during" or throughout the whole of; it is***

more frequently used to delimit a period "inside which" certain events may happen".

Part payments made after the issue of the cheque cannot thwart a criminal prosecution but can be added to make up the whole of the cheque amount paid upto the outer limit of fifteen days notice period under proviso (c) to Section 138 N.I. Act.

JOSEPH SARTHO also has not commented on a holding, again obiter, in SUPPLY HOUSE –Vs- ULLAS (Supra) but has indirectly upheld the holding there that if the cheque is in excess of the liability to be discharged section 138 of the N.I. Act will not apply. What has been said by the Calcutta High Court with regard to part payment in 1994 Cri.L.J. 351 in the extracts quoted earlier may be applied here as well with a bit of paraphrasing. On this interpretation a cheque in excess of the liability to be discharged by even one rupee or a few paise would then be sufficient to frustrate the cheque culture facilitating which is the prime object of the penal provision. The upshot is that the law laid down in GOPI KUTTAN and THEKKAN two overruled Single Judge decision is correct.

JOSEPH SARTHO has been wrongly decided.

6. OTHER HIGH COURTS

Many of the decisions from other High Courts on the problem considered in this writing appear to have failed to keep in mind the distinction between civil and criminal liability relating to cheques and its dishonor as also to keep in focus the object and purpose of the penal provision and the legal fiction creating the offence. The mixup of civil and criminal liability that occurred in JOSEPH SARTHO is considerable. Some sample from other High Courts may be indicated.

1998 Cri.L.J. 881 from the Andhra Pradesh High Court and 2002(2) KLT 652 from the Kerala High Court, amongst others, also exhibit the same mixup of civil and criminal liability. (2008)1 GLR 804 from the Gauhati High Court also is a similar Judgment. Even without going into details of the decisions and without noticing more of the kind one may reach the conclusion that JOSEPH SARTHO is not without company and in future may attract more unless the Supreme Court intervenes and settles the law in this regard.

7. CONCLUSION

The essay argues for the following statement of law regarding payments after issue of a cheque upto and during trial of criminal case under Section 138 of the N.I. Act following its dishonor.

(1) Payment of any amount in discharge of a part of the amount covered by the cheque after its issue will not affect the prosecution.

(2) **Any such amount paid upto the outer limit of fifteen day period of the notice can however be counted to make up the whole of the amount of the cheque upto end of that period. If such additions make up the whole of the amount covered by the cheque the accused will successfully avoid the penal liability.**

(3) **No amount paid after the fifteen day period provided in the proviso (c) to Section 138 of the N.I. Act that is after the commission of the crime can wipe out the crime itself.**

(4) **Any amount paid as in (3) above may however be taken into consideration in awarding sentence and may in appropriate cases result in compounding of the offence if the parties agree.**

[For (3) and (4) above AIR 2001 S.C. 518, (2002)8 SCC 164 and (2002) 8 SCC 181 are the sources*.]*

This is ended with a hope that the Supreme Court would on an appropriate occasion settle once for all the points made in JOSEPH SARTHO but argued against in this essay.