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Critical Analysis of the Liability of Drawer and Drawee of Cheque with respect to The Negotiable Instruments Act, 1881

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ABSTRACT

Section Thirty of the Negotiable Instruments Act, 1881 defines the liability of the drawer wherein the drawer is required to compensate the holder of cheque in case of dishonour by the drawee. In this case, it is the drawer's but not the drawee's fault. Section Thirty-One of the Negotiable Instruments Act, 1881 defines the liability of the drawee wherein drawee is required to pay the obligated amount of money to the holder of cheque when there are sufficient funds in the drawer's account applicable to the payment of the cheque. If the drawee fails to pay the requisite amount without any lawful justification, in this case, it is the drawee's but not the drawer's fault.

The Supreme Court of India held that:

"[I]n construing a statutory provision the first and foremost rule of construction is the literal construction. All that the Court has to see at the very outset is what does the provision say...The other rules of interpretation, for example, the mischief rule, purposive interpretation etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute."

In other words, laws cannot be read literally because they are open to judicial interpretation due to the subjectivity of the cases that are brought before the Judiciary. Similarly, Section Thirty and Thirty-One of the Negotiable Instruments Act, 1881 is linked to various provisions majorly being Section Six, Seven, Eight, Thirty-Five, Eighty-Seven, Ninety-One, Ninety-Two, One Hundred Thirty-Eight and One Hundred Forty-One of the Negotiable Instruments Act, 1881. Liability of the drawer is subject to dishonor of cheque. Dishonor of cheques as mentioned in Section 138 of the Negotiable Instruments Act, 1881 is due to insufficient funds in the drawer's account or due to the amount mentioned in the cheque exceeds the amount that can be paid by the bank under an arrangement between the bank and the drawer of the cheque. However, there are also other reasons for dishonor of cheques - Account Closed, Stop Payment Instructions, Refer to Drawer and Not A

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Clearing Member - that are not explicitly mentioned. The need for the present study is the fact that these intricacies of the Negotiable Instruments Act, 1881 are not widely available in academia, and the author aims to consolidate such interpretations clubbed along with his interpretation and make it available to the wider mass.

I. CRITICAL ANALYSIS AND INTERPRETATION OF LIABILITY OF DRAWER OF CHEQUE

Transformation Section Thirty of the Negotiable Instruments Act, 1881 is read as follows:

“[T]he drawer of a bill of exchange or cheque is bound, in case of dishonor by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonor has been given to, or received by, the drawer as hereinafter provided.”²

For the purpose of this Section, Drawer is a person who makes the bill of exchange;³ Drawee is a person who is directed to pay a certain amount of money - to the payee or Holder of Bill of Exchange - to discharge a debt, and the drawee becomes the Acceptor of Bill of Exchange once he has signed the Bill of Exchange or communicated the same to the Holder or a person representing the holder;⁴ Payee or Holder of Bill of Exchange is the person who is in the possession of the Bill of Exchange (in his own name), and is entitled to recover the due amount from the other party;⁵ Dishonour of Cheque is defined in a two-fold manner in the Negotiable Instruments Act, 1881: Dishonour by Non-Acceptance⁶ refers to a situation wherein the Drawee is incompetent to contract⁷ or the acceptance is qualified⁸ defeating the provisions of the Indian Contract Act, 1872, and Dishonour by Non-Payment refers to a situation wherein the drawee of the cheque makes a default in payment, i.e. fails to pay the requisite amount to the payee or holder of cheque when duly required to do so.⁹ A debt is an amount owed to another person which is legally enforceable.

The primary liability is that of the drawee of the cheque to pay the holder of the cheque or the payee. In order for this to succeed, the cheque has to be presented to the drawee bank. In case the drawee bank fails to make the obligated payment, there is an implied assumption, promise

² The Negotiable Instrument Acts, 1881 s. 30, No. 26, Acts of Parliament, 1881 (India).

³ The Negotiable Instrument Acts, 1881 s. 7, No. 26, Acts of Parliament, 1881 (India).

⁴ *Ibid.*

⁵ The Negotiable Instrument Acts, 1881 s. 8, No. 26, Acts of Parliament, 1881 (India).

⁶ The Negotiable Instrument Acts, 1881 s. 91, No. 26, Acts of Parliament, 1881 (India).

⁷ The Indian Contract Act, 1872 s. 11, No. 09, Acts of Parliament, 1872 (India).

⁸ *supra* note 9.

⁹ The Negotiable Instrument Acts, 1881 s. 92, No. 26, Acts of Parliament, 1881 (India).

and liability of the drawer that he will compensate the drawee for the default in payment.¹⁰ This default in payment, as explicitly written in the Negotiable Instruments Act, 1881 may arise due to two facts: Firstly, it might be due to the insufficiency of funds in the drawer's account. Secondly, it might be due to the amount mentioned on the cheque that has exceeded the agreement made between the bank (drawee) and the drawer.¹¹ In this context, agreement refers to a situation wherein due to insufficiency of funds in the drawer's account, he has utilized the overdraft (credit) facility given by his bank called as "Exceeds Arrangement". However, this credit facility has a certain permissible limit. In an arrangement wherein the cheque amount has exceeded the permissible overdraft limit amount, the cheque is said to be dishonoured. Considering other side of the spectrum, in case where the overdraft facility has been completely utilized by the drawer after the agreement but before the cheque is honoured, the cheque is said to be dishonoured¹². The expressions "insufficiency of funds" and "exceeds arrangement" are technically different but essentially same: Bottomline being the funds in the drawer's account are incapable and insufficient to honour the cheque.¹³ However, there are other causes of dishonour of cheque - not explicitly mentioned in the Negotiable Instruments, 1881 - that are as follows -

- a. **"Stop Payment or Instructions for the Stoppage of Payment -"** The Supreme Court of India observed that in case of notice to the payee, before presentment for payment, to not to issue the cheque for payment, and after the aforesaid notice, the cheque is presented even after the drawer's instructions, the cheque is said to be dishonoured that attracts liability under Section 138 of the Negotiable Instruments Act, 1881.¹⁴
- b. **"Bank Account Closed -"** It refers to a situation wherein the drawer has closed his account even though it was operational while the cheque was issued. This situation is called as "Account Closed".¹⁵ It shows that the drawer has no intention to honour the cheque and it attracts liability under Section 183 of the Negotiable Instruments Act, 1881.¹⁶

¹⁰*Liabilities and Legal Trends*, SHODHGANGA (Mar. 27, 2020, 9:30 PM), https://shodhganga.inflibnet.ac.in/bitstream/10603/7935/14/14_chapter%206.pdf

¹¹ The Negotiable Instrument Acts, 1881 s.138, No. 26, Acts of Parliament, 1881 (India).

¹² J. Veeraraghavan v. Lalith Kumar, (1995) 83 CompCas 853 (India). See also, S.N. GUPTA, DISHONOUR OF CHEQUES: LIABILITY CIVIL & CRIMINAL (6th ed. 2010); *Dishonour of Negotiable Instruments*, SHODHGANGA (Mar. 26, 2020, 10:50 AM), https://shodhganga.inflibnet.ac.in/bitstream/10603/7935/11/11_chapter%203.pdf.

¹³ Bimal Kumar Nopani S/O Late Mohan v. State of Uttar Pradesh and Ajay, (2006) CriLJ 2611.

¹⁴ Modi cements Ltd. v. Kuchil Kumar Nandi, AIR 1998 SC 1057. See also, M/s M. M. T. C. Ltd. v. M/s Medchl Chemicals and Pharma (P) Ltd, AIR 2002 SC 182; M/s Electronic Trade & Technology Development Corporation Ltd. v. M/s Indian Technologist and Engineer (Electronic) Pvt. Ltd, AIR 1996 SC 2339.

¹⁵ Veerajhavan (J) v. Lalith Kumar, (1995) CriLJ 1882.

¹⁶ Npc Micon Limited and Others v. Magma Leasing Limited, (1999) CriLJ 1233.

- c. “Refer to the Drawer -”** It is a courteous way, adopted by the drawer’s bank, intimated to the holder of cheque or the payee, that the cheque cannot be honoured to insufficient funds in the drawer’s account. The payee or the holder of cheque is asked to approach the drawer for the same.¹⁷
- d. “Post Dated Cheques - ”** A “Post-Dated Cheque” is a bill of exchange which is drawn or made. This Bill of Exchange becomes a “Cheque” when it is payable on demand, i.e. a debt when demanded to be paid by the payee¹⁸. When such a bill of exchange becomes a cheque, only then the liability under Section 138 of the Negotiable Instruments Act, 1881 is attracted.¹⁹

Before all the aforesaid causes of dishonour of a cheque are taken into consideration, one needs to ensure the following -

- a.** The cheque was presented to the bank by the payee or the holder of the cheque at the payee’s bank or the drawer’s bank²⁰, within six months from the date on which it was drawn or its validity period, whichever is earlier;
- b.** The payee or the holder of the cheque sends a notice of dishonour to the drawer, within thirty days, after receipt of information from the bank regarding the cheque being dishonoured;
- c.** The drawer fails to make payment of the requisite amount within fifteen days after receipt of such notice.²¹

Therefore, cause of action arises when the offence is committed. And with respect to dishonour of cheque, the offence is committed when the drawer omits to pay the requisite amount within fifteen days after receipt of such notice.²²

A person can be held liable for issuing a cheque on behalf of another when the complainant is pressing for payment. A son can issue a cheque for a debt due to his father.²³ In the aforementioned scenario, the father was the maker of cheque that makes him the principal debtor and the son as his surety by way of Section Thirty-Seven of the Negotiable Instruments Act, 1881. If a cheque is given by a way of gift or present, the drawer cannot be held liable for

¹⁷ Voltas Ltd v. Hiralal Agarwalla, (1991) 71 CompCas 273 (Mad).

¹⁸ Anil Kumar Sawhney v. Gulshan Rai, (1993) 4 SCC 424. See also, Ashok Yashwant Badava v. Surendra Madhar Rao Nighojabar, AIR 2001 SC 1315.

¹⁹ Pushpanjali Sood, *Dishonour of Cheque: An Overview*, 2 INTERNATIONAL JOURNAL OF LAW, 8-11 (2016).

²⁰ ABK Publications Ltd. v. Tamil Nadu Newsprint & Papers Ltd, (1999) 1 BC 381.

²¹ *supra* note 17.

²² Amar Jothi Spinning Mills Ltd. v. B.R.B Garments, (2003) 117 CompCas 224 (Mad).

²³ Devendra Kumar Rai v. Ram Gopal Rai, (1999) 1 Bank CLR 298.

dishonour.²⁴ In case the Managing Director of a Company issued a cheque on his personal account to discharge the liability of the Company, the Company and the Managing Director can be made liable for dishonour of the cheque²⁵ because every person who is in-charge and responsible for the conduct of the Company shall be made liable and accused alongside the Company he is responsible for.²⁶ It is a requirement that the Company is also made liable for dishonour of cheque in order to hold the makers of cheque, i.e. person(s) who is in-charge and responsible for the conduct of the Company liable.²⁷ The person(s) who is in-charge and responsible for the conduct of the Company liable is not the drawer of cheque but the Company. It was also held that the notice served to the Company is sufficient and no notice is required to be served to the person(s) who is in-charge and responsible for the conduct of the Company.²⁸ The basic requirement to hold the person(s) who is in-charge and responsible for the conduct of the Company's business and affairs, there needs to be some evidence to indicate that the person(s) was is in-charge and responsible for the conduct of the Company.²⁹ Taking this into consideration, the person(s) who is in-charge and responsible for the conduct of the Company becomes the surety of the drawer of cheque, i.e. the Company by the provision of Section Thirty-Seven of the Negotiable Instruments Act, 1881³⁰ because the essential feature of the provision is that the Drawer of Cheque is the principal debtor and other parties are liable as sureties for the Drawer of Cheque.

By taking into consideration that the Drawer must receive a notice of dishonour from the Payee or the Holder of the Cheque, the scenario is variable in American Law. If the Payee or the Holder of Cheque is able to prove the fact that there was no prejudice caused to the Drawer for omitting the dispatch of the notice, an action upon the drawer is still maintainable.³¹ In English Law, notice to the drawer is not necessary in case of insufficient funds because the Drawer had no right to draw and could not be negatively affected upon non-receipt of the notice for dishonour³² which is defeated by Section 140 of the Negotiable Instruments Act, 1881.³³

The Drawer remains liable to the Payee or the Holder of the Cheque unless it is proved contrary to the presumption that the Drawer did not issue the cheque to pay a debt or discharge a

²⁴ Mohan Krishna (B) v. Union of India, (1996) CriLJ 636 (AP).

²⁵ Jagarlamundi Surya Prasad v. State of Andhra Pradesh, (1992) 1 BC 120.

²⁶ Oswal Ispat Udog v. Salem Steel Suppliers, (1991) 1 BC 559.

²⁷ K.Krishnamurthy, M.D., M/s. Surya Advertising (P) Ltd., Bangalore v. M/s Arti Press, Sivakasi, (1992) 1 BC 361.

²⁸ Dalip Kumar Jaiswal v. Debapriya Banerjee, (1992) 1 BC 403.

²⁹ R.Sekar v. S.P. Arjunaraja, (1994) 1 BC 648.

³⁰ The Negotiable Instrument Acts, 1881 s. 37, No. 26, Acts of Parliament, 1881 (India).

³¹ 2 MELVILLE MADISON BIGELOW, LAW OF BILLS, NOTES, AND CHECKS: ILLUSTRATED BY LEADING CASES (2nd ed. 1880).

³² *Ibid.*

³³ The Negotiable Instrument Acts, 1881 s. 140, No. 26, Acts of Parliament, 1881 (India).

liability.³⁴ The Drawer is liable for compensation that is twice the value of the Cheque value.³⁵ The principle of vicarious liability is not applicable for the liability of the drawers because one cannot be held criminally liable for the act of another. Both the Joint Account Holders can be prosecuted under Section 138 of the Negotiable Instruments Act, 1881 if both of them had signed the cheque. However, if only one of the Joint Account Holder had signed the cheque, only that person, considered as the Drawer, will be held liable.³⁶ There arises two types of remedies with the Payee: Civil and Criminal. The payee can file a Civil Suit against the Drawer for recovery of the money. Or, the payee can file a Criminal Suit against the Drawer for cheating.³⁷

II. CRITICAL ANALYSIS AND INTERPRETATION OF LIABILITY OF DRAWEE OF CHEQUE

Section Thirty-One of the Negotiable Instruments Act, 1881 is read as follows:

“[T]he drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default.”³⁸

The Drawee bank is bound to pay the payee's cheque provided there are sufficient funds in the account of the Drawer and the cheque is properly drawn. If it wrongfully dishonours the cheque, it would be liable to compensate the Drawer for any loss or damage to the credit or the reputation or the integrity of the Drawer. The Customer has a right to claim damages because the relationship between the Banker (Drawee) and the Customer (Drawer) is not a debtor-creditor relationship. The Banker has certain rights and duties one of it being paying the money from the customer's bank account as and when directed without any demur or protest as it is as an equitable relationship of trust.³⁹ In case of a non-trader, nominal damages shall be awarded when there is no proof of special loss or damages sustained. But in the case of a trader, substantial damages shall be awarded in the absence of such aforementioned proof for special loss or damage.⁴⁰ Mere expression of regret by the Drawee Bank is not a solution to discharge it of its liability. It is expected of the Drawee bank to honour the cheque when sufficient funds

³⁴ Bir Singh v. Mukesh Kumar, (2019) 4 SCC 197.

³⁵ Somnath Sarkar v. Utpal Basu, (2013) 10 CPSC 25.

³⁶ Mrs. Aparna A. Shah v. Sheth Developers Pvt. Ltd. and Anr, (2013) 8 SCC 71.

³⁷ *supra* note 18.

³⁸ The Negotiable Instrument Acts, 1881 section 31, No. 26, Acts of Parliament, 1881 (India).

³⁹ Shakuntala Devi v. Punjab National Bank, (1995) ISJ Banking 115 (MP).

⁴⁰ New Central Hall v. United Commercial Bank Ltd AIR 1959 Mad 153.

are available in the drawer's account. But if it fails to do so, the drawee bank will be liable to compensate the drawer.⁴¹ It is a fact and an established principle that the Drawee Bank will be brought under the tortious concept of "Strict Liability" for negligently honouring a forged cheque.⁴²

On the other hand, there can be certain situations wherein the Drawee bank may rightfully dishonour the cheque such when a Drawer closes his bank account immediately after the issue of cheque and before the presentment of cheque, dishonest intention on the part of the drawer can be inferred⁴³ wherein this dishonest intention secures the Drawee from any kind of liability under dishonour of cheque because the drawer is at fault;⁴⁴ If the amount standing credit to the account of the drawer is insufficient to meet the amount written in the cheque, the Drawee Bank is not held liable;⁴⁵ When there exists an overdraft arrangement between the Drawer and the Drawee Bank, the Drawee Bank is liable to pay the cheque to the Payee;⁴⁶ When there is a stale cheque, i.e. presented after the payment date, the cheque is returned and dishonoured;⁴⁷ Therefore, any act, that is lawfully and appropriately carried out by the Drawee Bank, causes dishonour of cheque, due to the Drawer's fault, will purge Drawee's Liability under Section 138 of the Negotiable Instruments Act, 1881, and is deemed as "rightful dishonour".

Section Eighty-Five sub-clause One and Two provides protection to the drawee against order cheque and bearer cheque by discharging his liability by payment in due course.⁴⁸ Section Eighty-Nine sub-clause One provides protection to the drawee - who has paid the amount for the materially altered cheque – by not allowing his payment to be in question and discharging his liability through such a payment.⁴⁹

In case of an electronic image of a truncated cheque, the clearing house is responsible to verify the same from the party that the image transmitted and received by the clearing house is the same that was approved by the other party.⁵⁰

⁴¹ Branch Manager, Madras v. I.V. Rajagopal, (1975) 1 MLJ 420.

⁴² *supra* note 18. See also, Ashit Roy v. Syndicate Bank, (2000) 100 CompCas 266 (Kant).

⁴³ Rajendra V. Khode v. L.S. Choudhari, (2000) CrLJ 1195.

⁴⁴ S.V. Rajendra Singh v. Lahiri Recording Co. Pvt. Ltd, (1999) 1 Bank LJ 352.

⁴⁵ NEPC MICON Ltd. v. Magma Leasing Ltd, AIR 1999 SC 1952.

⁴⁶ Brahma Shurn Sher-E-Jung Bahadur v. Chartered Bank of India, AIR 1956 Cal 399.

⁴⁷ Jogy David v. Babum, (1998) 3 Civil LJ 425.

⁴⁸ The Negotiable Instrument Acts, 1881 s. 85, No. 26, Acts of Parliament, 1881 (India).

⁴⁹ The Negotiable Instrument Acts, 1881 s. 89, No. 26, Acts of Parliament, 1881 (India).

⁵⁰ *Ibid.*

III. SUGGESTIONS

4.1 Suggestions

a. The definition of a “Company” in Section 141 of the Negotiable Instruments Act, 1881 is restricted to anybody corporate and includes a firm or other association of individuals.⁵¹ This definition can be further expanded to all Companies that are incorporated in India or abroad, other Foreign Bodies Corporate, Public and Private Financial Institutions, Nationalized Banks and Cooperative Societies. Furthermore, the term “Association of Individuals” should also include Clubs, Trusts, Hindu Joint Family, etc.

b. It was held that the sole proprietary concern is outside the purview of Section 141 of the Negotiable Instruments Act, 1881,⁵² i.e. it is not a company within the meaning of “Company” as defined in the explanation of the section.⁵³ However, Sole Proprietary concern forms a major business chain in India, and it should be separately and explicitly added in the Negotiable Instruments Act, 1881 for better transparency and uniformity by avoiding non-compliance with law.

c. Section Eighty-Nine allows the Drawee to escape his liability in cases of materially altered cheques.⁵⁴ This flexibility in terms of law needs to be restricted because if it is one of the duties of the Drawee Bank to know the Customer’s Signature,⁵⁵ then it casts upon a higher sense of duty on the Drawee Bank to avoid cases of material alteration through verification with the Drawer. This might widen the time gap and further perplex the situation, but it will help in avoidance of unwarranted escape of liability by the Drawee Bank. Or, the Drawee Bank can mandate an undertaking of Bona Fide from the Drawer every time he draws a cheque in order to ensure the fairness of the Negotiable Instrument.

⁵¹ The Negotiable Instrument Acts, 1881 s. 141, No. 26, Acts of Parliament, 1881 (India).

⁵² *Ibid.*

⁵³ P.M. Muthuraman v. M/s Shree Padmavathi Finance (Regd.), (1994) 8 CompCas 656.

⁵⁴ *supra* note 55.

⁵⁵ Bareilly Bank Ltd. v. Nawal Kishore, AIR 1964 AII 78.