

FIDC

Finance Industry Development Council

(A body incorporated as a Self Regulatory Organisation for Registered NBFCs – AFCs)
101/103, Sunflower, 1st Floor, Rajawadi Road No.2, Ghatkopar (East), Mumbai – 400 077
(India)

Tel: 022 21027324/9820035553 • E-mail: maheshthakkar45@yahoo.in website:
www.fidcindia.org

October 28, 2014

To

1. The Secretary,
Ministry of Finance,
Government of India,
North Block,
New Delhi-110 001.
2. The Secretary,
Ministry of Law and Justice,
4th Floor, A-Wing, Shastri Bhawan
Dr. Rajendra Prasad Road,
New Delhi – 110 001
3. The Governor,
Reserve Bank of India,
Government of India,
Central Office Building,
18th Floor, Shahid Bhagat Singh Road,
Mumbai – 400 001

SUB: SEEKING REVIEW OF THE JUDGMENT OF THE HON'BLE SUPREME COURT OF INDIA DELIVERED ON AUGUST 1, 2014 IN THE CASE OF DASHRATH RUPSINGH RATHOD – VS – STATE OF MAHARASHTRA & ORS. BEING CRIMINAL APPEAL NO. 2287 OF 2009

Sir,

Sir, as you are aware, the **Asset Financing NBFCs (NBFC-AFCs)** registered with Reserve Bank of India have joined hands and formed a Self Regulatory Organization (SRO) under the name of **Finance Industry Development Council (FIDC)**. The constitution of SRO emanated from deliberations with RBI in the past at various levels.

NBFC-AFCs have been recognized for their role in credit delivery in remote corners of India and have carved a niche for themselves in the semi-rural and rural segments

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of the country. NBFC-AFCs are also playing a vital role in furthering the cause of Financial Inclusion and in credit dispensation to the poor states/credit starved areas for over 6 decades.

A three judges bench of the Hon'ble Apex Court delivered a judgment on 1st August, 2014 in Criminal Appeal No. 2287 of 2009 (Dashrath Rupsingh Rathod-versus-State of Maharashtra) and other matters, the Hon'ble Apex Court holding amongst others, that the territorial jurisdiction to initiate a complaint for commission of offences under section 138 of the Negotiable Instruments Act, 1881 (as amended in 1988) is restricted to the Court within whose jurisdiction the cheque is dishonoured by the bank on which it is drawn i.e. the situs of the drawee bank.

It has also been held that said judgment of the Hon'ble Apex Court would be prospective in operation i.e. only those cases where recording of evidence has commenced as envisaged under section 145(2) of the Negotiable Instruments Act, 1881 would continue in the Court where the complaints have been filed and all other cases shall be deemed to have been transferred by the Hon'ble Apex Court to the Court having territorial jurisdiction over the branch of the drawee bank. This being a three judge bench judgment, all other previous decisions of the Hon'ble Apex Court of lesser strength and the decisions of the Hon'ble High Courts to the contrary stood overruled.

This decision has adversely affected all the members of our association. It goes without saying that the judgment is binding on all person throughout the country. We feel that the said judgment needs a re-look by the Hon'ble Apex Court for reasons stated herein below:-

1. Though Section 138 N. I. Act contemplates multi-fold territorial jurisdiction but the Hon'ble Apex Court has read it down to a solitary jurisdiction, i.e. where the cheque is dishonoured. According to our legal experts in an offence under section 138 of N. I. Act where Sec. 178(b) of Cr. P. C. applies then Section 177(b) of the Cr. P. C. does not apply.
2. Referring to civil law it has been held that the burden of proof in a civil suit is on the plaintiff whereas in case of criminal offence is on the State, so the complainant has little role to play in a criminal case. As per the legal experts this proposition may not apply in an offence under section 138 of N. I. Act where the Complainant is the prosecutor.

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3. In this decision it has been held that an offence U/s 138 N. I. Act is committed on the event of dishonour of the cheque. As per our legal experts, on a consideration of Section 138(c) of N. I. Act, which is an integral part of the section, the offence is complete when the drawer of the cheque fails to pay the cheque amount within fifteen days of receipt/tender of the demand notice. But if the drawer of the cheque pays the cheque amount then he is not answerable to an offence U/s 138 of N. I. Act.
4. Law is well settled that once an offence is committed, by subsequent paying off, cannot wipe off the offence. Our legal experts say that if the view that the offence U/s 138 of N. I. Act is complete with the dishonour of the cheque, then Section 138(c) of N. I. Act would become otiose.
5. The comparison of Section 138 N. I. Act and Section 420 Indian Penal Code in the decision also needs a relook since the element of mens rea is absent in a offence under Section 138 N. I. Act unlike in case of an offence under section 420 of the Indian Penal Code. Besides the other elements of Section 420 of Indian Penal Code are totally absent in Section 138 N. I. Act. The apparent contradiction in the judgment seems to be that in paragraph 17 of the decision it is observed that territorial jurisdiction of Section 138 N. I. Act is restricted to where the drawee bank is located whereas such restriction is not in case of an offence under section 420 of Indian Penal Code.
6. The suggestion at paragraph 17 of the decision that the payee or holder of the cheque may insist that the cheque be drawn at the place of creditor's convenience is commercially unworkable and impracticable.

The issue overlooked by the Hon'ble Apex Court:

The Hon'ble court has gone by the traditional method of banking and cheque clearance where the hard copy used to physically travel to cheque issuing branch for encashment of the instrument. Now with the introduction of Core Banking system and clearance of "Payable At Par Cheques", the cheque clearance under banking norms happens under CTS (Cheque Truncation System). Under this system the cheque clearance happens through scan image

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in electronic form and cheques are not physically presented with the issuing branch.

The Hon’ble court has overlooked the current system of clearing as introduced by RBI while delivering the order.”

Please also note in this regard that the Reserve Bank of India has introduced core banking system, a facility which permits encashment of cheque at any branch. This aspect of the matter has not been brought to the notice to the Hon’ble Apex Court or considered in the judgment. It has not been argued before the Hon’ble Apex Court that confining the jurisdiction within the territorial limits of the drawee bank would make the core banking system ineffective. The convenience of encashing a cheque at any place under the core banking system would be rendered ineffective in respect of cheques which get dishonoured

The outcome of the order

The Hon’ble Apex Court has held that for complaint u/s 138 of N.I. Act, 1881, complainant cannot choose the place of filing a case. As per the order the place of crime committed shall determine the jurisdiction of the court and as such the territorial jurisdiction is restricted to the court within whose jurisdiction the cheque is dishonoured. The case filing location will therefore depend on the cheque drawee bank branch. As a consequence, all pending/live cases which are at a stage lower than post summoning evidence shall be returned for refilling before the concerned location court.

Impact on the Banks & Financial Institution (NBFC):

Till now majority of financiers prefer to do centralised banking of PDC to one or few locations and in case of any bouncing, prefers to file cases in the local courts under whose jurisdiction where the cheques were banked. This is done with the objective to:

- a) Have a centralised control over the PDC banking operation which makes the system efficient and cost effective
- b) The legal infrastructure also is largely centralised and the legal cost are low.

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The 138 route to recover the dues from defaulter is quite common with financiers and they deal with thousands of the cases.

The outcome of the above order will definitely increase the legal cost as:-

- (i) Any NBFC / Financier operating at Pan India level will have hundreds of branches.
- (ii) Each branch will again have several local courts where the cheque issuing banking branches are located.
- (iii) To continue with the legal action u/s 138 all the financiers need to create legal infrastructure largely decentralised which will increase the cost many fold.
- (iv) Further currently there are thousands of cases already filed and are in different stages which need to be transferred to different courts which will delay the legal proceeding and justice moreover since the courts may start the proceedings from the beginning thus giving a go bye to all existing tools/instruments.

Costs:

Other than the legal cost the normal operation cost will also increase substantially as

- (i) Currently all the PDC are banked centrally because of CMS (Cash Management Services) available across the banks. This is cost effective method and makes transaction cost to be minimum and also for control and admin purpose this works efficiently.
- (ii) Normally the cheque bouncing in within the range of 10-15% of the PDC banked on which action under 138 may be initiated.
- (iii) For the cheque banking infrastructure need to be created in various branches which will increase the cost.

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- (iv) An officer who would represent as Authorised Representative will be required at each location since appearance of authorised representative is mandatory in a case U/s 138 NI Act.
- (v) Similarly local lawyer at different locations would be required to be engaged and a coordination with them would be a difficult job. Also finding of local lawyer having experience of cases of Banks and NBFCs at remote locations would be difficult.

Largely these cost ultimately will be passed on to the customer by charging higher interest rate at the time of the loan, resulting in higher lending rate and making loan more costly in the hand of the borrowers.

Other than the cost, the TAT (Turn Around Time) for the disposal of cases u/s 138 will also be delayed under the new process. If the cases need to be filed in the local courts all across the country, the coordination and also the TAT for courts across the country are different. The TAT of different courts are different thereby delaying the dates / orders.

In view of the above, considering important questions of law and its practical impact to the general business flow of the country, we feel that the matter requires your kind and urgent intervention for re-looking to the issue either by the Hon'ble Apex Court or by amending the Statutory Provisions contained in the Negotiable Instruments Act, 1881 (as amended upto date) pertaining to Dishonour of Cheques (Section 138 onwards).

Sir, we request, if key Managing Committee Members of FIDC can personally meet you and other concerned officers and executives from RBI and discuss these issues. We can further substantiate the above referred issues. It would help in wide acceptance and dissemination of the new norms whenever announced by RBI.

We look forward to an **immediate positive response** and are confident that we are in the process of a long and beneficial relationship.

Thanking you,

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Yours sincerely,

For **FINANCE INDUSTRY DEVELOPMENT COUNCIL**

MAHESH THAKKAR
Director General