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# Section 138 of Negotiable Instrument Act, 1881

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## ABSTRACT

*Section 138 of the Negotiable Instrument Act, 1881 deals with the Dishonor of cheques in India. There are a large number of cases filed under this section, and these cases are clogging the court. These chapter outlines the Object, liability, scope, procedure of Sec 138 of Negotiable Instrument Act, 1881.*

*This chapter also outlines the Limitation Period, where India continued to be in lockdown due to Covid 19 SC held that Limitation period not to be applicable during lockdown in view of the difficulties faced by lawyers and litigations during the lockdown the SC extended the period of limitation prescribed under laws for initial arbitral proceedings and the cheque bounce with effect from March 15.*

**Keywords:** *Negotiable Instrument Act, Object, Scope, Covid 19, Section 138,*

## I. INTRODUCTION

The term "Negotiation" is a does not necessarily imply anything more than the assertion that the paper possesses the negotiable quality. Generally speaking, it applies to any written statement given as security, usually for the payment of money, which may be transferred by endorsement or delivery, vesting in the party to whom it is transferred a legal title on which he can support a suit in his name. The term signifies that the note or paper writing to which it is applied, possesses the requisites of negotiability.

*A negotiable instrument is one, therefore, which when transferred by delivery or by endorsement and delivery, passes to the transferee a good title to payment according to its tenor and irrespective of the title of the transferor, provided he is bona fide holder for value without notice of any defect attaching to the instrument or in the title of the transferor; in other words, the principle nemo dat quod non habit does not apply, It is the element of negotiability that make a contract founded upon paper thus adopted for circulation different in many particulars from other contracts known to law*

According to section 6 of the NEGOTIABLE INSTRUMENT ACT, 1881 (therein after called as NI Act) cheque is a bill of exchange drawn on a specified banker and not expressed to be

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payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in an electronic form. DISHONOR OF CHEQUE means it is condition in which bank refuses to pay the amount of cheque to the payee due to insufficiency of funds etc.

Whenever the cheque is dishonored, the drawee bank instantly issues a **Cheque Return Memo** to the payee banker specifying the reason of dishonor. The marginal note of section 138 of the NI ACT explicitly defines the offence as being the dishonor of cheque for insufficiency, etc. of funds in the account.

*138 - Dishonor 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 honor 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 provisions of this Act, be punished with imprisonment for <sup>19</sup> [a term which may be extended to two years], 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, <sup>20</sup> [within thirty 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.]*

According to this section clearly point to the contrary, the offence is concerned with the dishonor of a cheque; and in the confusion before us, the body of this provision speaks in the same character since it refers to a cheque being returned by the bank unpaid. None of the provision of the Indian Penal Code have given significance to dishonor of cheque, so Section 138 of the NI act operate on their own. It is trite that mens rea is the essential thing of every

crime.

When there is a default on the part of the drawer of a cheque in discharge of its legally enforceable debt or other liability to the payee of the cheque as a result of which the cheque is dishonored due to insufficiency of funds or if the amount exceeds the amount in the bank of the drawer, the legal remedy, available to the Payee of the cheque is to proceed under Section 138 of the Negotiable Instruments Act. Bouncing of a cheque invites criminal prosecution under the Act and is a punishable offence and the drawer/signatory of the cheque can be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both. It is to be noted that Proceedings under Section 138 N.I. Act is an alternate remedy. An aggrieved party can also simultaneously initiate proceedings before the Civil Court for Recovery.

If the drawer is an individual, the proceedings would happen under Section 138 of the NI Act. If the drawer is a Company, its managing director, Whole Time Director and other officers/Directors of the Company who are actively involved in the transaction, pursuant to which cheque is issued, can be personally prosecuted under Section 141 of the Act also. In the event of Insolvency Proceedings being initiated against the Accused Company, Cheque Bounce Complaint can be continued and there is no automatic stay of the proceedings.

### **Object**

The object of this amendment Act is:

- To regulate the growing business, trade, commerce and Industrial activities. To promote greater vigilance in financial matters.
- To safeguard the faith of creditors in drawer of cheque. (*Krishna vs. Dattatraya 2008(4) Mh.L.J.354 (Supreme Court)*)

However, it was found that punishment provided was inadequate, the procedure prescribed cumbersome and the courts were unable to dispose of the cases expeditiously and in time bound manner. Hence, the Negotiable Instruments (Amendment and Miscellaneous provisions Act 2002) was passed. The provisions of sec.143 to 147 were newly inserted and provisions of section 148, 141, 142 were amended.

## **II. ESSENTIAL INGREDIENTS**

Essential Ingredients of Section 138 before one is to proceed for Criminal Complaint:

To constitute an offence under Section 138 of the Act, the following ingredients are required to be fulfilled:

1. A person must have drawn a cheque on a bank account maintained by him.
2. The cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;
3. That cheque has been presented to bank within a period of three months from the date on which it is drawn
4. 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 honor the cheque or issuance of stop payment instructions by the Drawer to the Drawee Bank or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank or when there is deliberate mismatch of signature of cheque;
5. 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 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;
6. 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;
7. The complaint is to be filed before the Court of Chief Judicial Magistrate/Chief Metropolitan Magistrate within one month of the date of expiry of the 15 days' time period of receipt of the notice.

### **III. SCOPE OF SECTION 138 OF NEGOTIABLE INSTRUMENT ACT, 1881**

Section 138 creates statutory offence in the matter of dishonor of cheque on the ground of insufficiency of funds in the accounts maintained by a person with the Banker and exceeds the amount arranged to be paid from that account by an agreement made with that bank as mentioned in the Act.

But there are many reason for dishonor of cheque i.e. signature doesn't match, payment stopped by the drawer, Account closed by the drawer etc., whenever any cheque for discharge of any legally enforceable debt or other liability is dishonored by the bank for wants of fund and the payment is not made by the drawer in spite of legal notice of demand, it shall considered to be a criminal offence. Act considers the dishonor of cheque as a criminal offence but it is in a summary mode of enforcing civil right.

Generally in criminal Law Mens Rea is an essential component of a crime but dishonor of

cheque is criminal offence but here no need of proving a mens rea and it is not essential thing. Construction of the strict liability in this section if an effective measure to prevent casual careless or change of attitude of the drawers in discharge of debts.

#### HISTORY AND EVOLUTION OF THE ACT IN PURSUANCE WITH SECTION 138, NEGOTIABLE INSTRUMENTS ACT, 1881

Negotiable Instruments have been used in commercial world for a long period of time as one of the convenient modes of transferring money. Development in banking sector and with the opening of new branches, cheque became one of the favorite Negotiable Instrument.

In the case of *Dalmia Cement (Bharat) Ltd. V Galaxy Traders and Agencies Ltd.*, the Apex Court referred to the object of Section 138 of the Act. The court observed that the Act was enacted and section 138 thereof incorporated with a specified object of making a special provision by incorporating a strict liability so far as the cheque, a negotiable instrument, is concerned. The law relating to the negotiable instruments is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another.

The offence under section 138 is not a natural crime like hurt or 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 only a pure civil liability. Legitimately, the legislature thought it fit to provide for adequate safeguards in the Act to protect honest drawers from unnecessary harassment.

However, the sections 138 to 142 of the said Act were found deficient in dealing with dishonor of cheque. Thereby, the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002, inter alia, amended sections 138, 141 and 142 and inserted new sections 143 to 147 in the said Act. These sections aimed at speedy disposal of cases relating to dishonor of cheque through their summary trial as well as making them compoundable. Punishment provided under section 138 too was enhanced from one year to two years. These legislative reforms aimed at encouraging the usage of cheque and enhancing the credibility of the instrument so that the normal business transactions and settlement of liabilities could be ensured

#### IV. LIABILITIES ON DISHONOR OF CHEQUE

**Civil liability:** As per section 138 of the NI ACT provides the civil liability by imposing a fine twice the amount of dishonored of cheque. But if the payee files a suit under Order 37 Civil Procedure Code, 1908, then the judgment is in the favor of the payee, then the drawer should pay the amount mentioned in the court order.

**Criminal Liability:** Section 138 provides the punishment of imprisonment of two years or fine or both and the drawer of the cheque will be prosecuted under sections of 417 and 420 of the Indian Penal Code (IPC), 1860.

In case of *K. Shrikant Singh vs. North East Security Ltd. And others J.T. 2007 (9) SC 449.* The Hon'ble apex court observed that vicarious liability on the part of a person must be pleaded and proved and not inferred.

In case of *Aparna A Shaha vs. Sheth Developers Pvt. Ltd. 2014 (1) Mh L.J.* The apex court took a view that Joint Account holder cannot be prosecuted unless cheque is signed by signed each and every person who is Joint Account holder. In this case the cheque was signed by husband of the appellant. The Apex court quashed the proceeding against the appellant. Court observed that as a natural corollary each and every joint account holder must sign the cheque before they are considered for criminal action under sec. 138 of the N.I. Act.

#### WHERE CAN BE A COMPLAINT FILED?

The Complaint can be filed only in a Court within whose local jurisdiction the bank branch of the payee, where the payee deposits the cheque for payment through his account, is situated, except in case of bearer cheque, which are presented to the branch of the drawee bank and in that case the local court of that branch would get jurisdiction.

#### V. WHO CAN FILE COMPLAINT?

Payee or holder in due course is a competent person to file complaint. Complaint must be by corporal person capable of making physical appearance in the court. In case of company and firm natural person should represent it. Complaint can be filed by Power of Attorney Holder. It is not requirement that the person whose statement was taken on oath at the first instance should only represent the company till the proceeding have ended. Even if the person sent earlier had no authority, the company can at subsequent stage send a person competent to represent the company. (*Associated Cement Company Ltd. vs. Keshavanand (1998) 91 company cases 3619 SC.*)

It is further observed in the above case that a complaint which is made in the name and behalf of company can be made by any office of that company and that the section does not require that complaint must be signed and presented only by authorized agent or a person empowered under the Articles of Association or by any resolution of the Board of Directors.

#### **LIST OF DOCUMENTS TO BE SUBMITTED IN COURT:**

In case the Complaint is to be filed:

1. Any agreement / contract between complainant & accused including order(s) placed (if any)
2. Invoice / Bill against which dishonored cheque was issued
3. Any other document that is evidence of creation of debt or liability
4. Correspondence Exchanged between the parties.
5. Original Dishonored Cheque
6. Bank Memo stating reason for dishonor of cheque
7. Copy of the legal notice sent to the accused
8. Proof of dispatch of the above legal notice
9. Postal Acknowledgment received from the accused

In case of accused:

1. Communication exchanged between the parties
2. Documents evidencing that the accused has no liability.
3. Reply to Demand Notice.

The proceedings under the cheque bounce matter are summary in nature, meaning, thereby that the Courts would not go for normal criminal trials, which are very lengthy and more complex.

For contesting the matter, the accused person has to take bail from the Court. In cheque bounce cases, the parties also have the option of settling the matter amicably outside the court, as it is a compoundable offence.

#### **VI. JURISDICTION**

Considering the ingredients of sec.138 referred above the Hon'ble Apex Court in case of **K. Bhaskaran vs. Shankaran AIR 1999, SC 3762**, had given jurisdiction to initiate the prosecution at any of the following places:

- 1- Where cheque is drawn
- 2- Where payment had to be made.
- 3- Where cheque is presented for payment
- 4- Where cheque is dishonored.
- 5- Where notice is served up to drawer.

However, recently in case of **Dashrath Rupsingh Rathod vs. State of Maharashtra, reported in MANU /SC/ 0655/ 2014** interpreted various provisions of Sec.138 of Negotiable Instruments Act and held,

- i. An offence under Section 138 of the Negotiable Instruments Act, 1881 is committed no sooner a cheque drawn by the accused on an account being maintained by him in a bank for discharge of debt/liability is returned unpaid for insufficiency of funds or for the reason that the amount exceeds the arrangement made with the bank.
- ii. Cognizance of any such offence is however forbidden under Section 142 of the Act except upon a complaint in writing made by the payee or holder of the cheque in due course within a period of one month from the date the cause of action accrues to such payee or holder under clause (c) of proviso to Section 138.
- iii. The cause of action to file a complaint accrues to a complainant /payee/ holder of a cheque in due course if,
  - a) The dishonored cheque is presented to the drawee bank within a period of six months from the date of its issue.
  - b) If the complainant has demanded payment of cheque amount within thirty days of receipt of information by him from the bank regarding the dishonor of the cheque and
  - c) If the drawer has failed to pay the cheque amount within fifteen days of receipt of such notice
- iv. The facts constituting the cause of action does not constitute the ingredients of the offence under section 138 of the Act
- v. The proviso to section 138 simply postpones/ defers institutions of criminal proceedings and taking of cognizance by the court till such time cause of action in terms of clause (c) of proviso accrues to the complainant.

- vi. Once the cause of action accrues to the complainant, the jurisdiction of the court to try the case will be determined by reference to the place where the cheque is dishonored.
- vii. The general rule stipulated under Section 177 of Cr.P.C. Applies to cases under section 138 of the Negotiable Instrument Act. Prosecution in such cases can therefore, be launched against the drawer of the cheque only before the court within whose jurisdiction the dishonor takes place except in situation where the offence of dishonor of the cheque punishable under section 138 is committed along with other offence in a single transaction within the meaning of section 200(1) read with section 184 of the Code Of Criminal Procedure is covered by the provision of Section 182(1) read with Sections 184 and 220 thereof.

## VII. PUNISHMENT

After the amendment of 2002 the imprisonment that may be imposed may extend two years, while fine may extend to twice the amount of cheque. However, the trial is conducted in summary way, then Magistrate can pass sentence of imprisonment not exceeding one year and amount of fine exceeding Rs.5,000/-. There is no limitation for awarding compensation.

The sentence should be such that it gives proper effect to the object of legislation. No drawer can be allowed to take advantage of cheque issued by him lightly. Apex court has cautioned against imposing flee bite sentences. In case of *Sujanti Suresh Kumar vs Jagdeeshan 2002 Cr.L.J. 1003* Prior to the amendment of 2002 a sentence of fine in excess of Rs.5, 000/by Judicial Magistrate, First Class or Metropolitan Magistrate was held to be illegal. However the amendment the Magistrate are empowered to impose fine exceeding Rs.5, 000/.

In case of *Dilip vs. Kotak Mahindra Company Ltd. 2008 (1) Mh L.J. 22* it was enunciated that the amount of compensation sought to be imposed must be reasonable and not arbitrary. Before issuing a direction to pay compensation the capacity of the accused to pay the same must be judged. An inquiry in this behalf even in summary way may be necessary. Sub section 3 of sec. 357 does not impose any limitation but the powers thereunder should be exercised only in appropriate cases. Ordinarily it should be lesser than the amount which can be granted by civil court upon appreciation of evidence. A criminal case is not a substitution for civil suit.

## VIII. PROCEDURE

Section 142 of the N. I. Act creates bar against taking cognizance of the offence u/s. 138 of the N.I Act except upon complaint in writing by payee or holder in due course. Complaint

may be instituted by Power of Attorney Holder. However, if the holder of the Power of Attorney has merely lodged the complaint without being aware of the facts, then recording the statements of the payee becomes imperative.

Once Magistrate is satisfied that there is proper compliance of the proviso to Sec.138 N.I Act and jurisdictional conditions are fulfilled, Magistrate shall issue the process. Service of summons by speed post or approved courier is recognized by Sec. 144 of N. I. Act. If the accused does not appear in response to the summons or remain absent subsequent, a coercive process needs to be taken by the court. In case of **Bhaskar Industries Ltd. vs. M/s Bhiwani – Denim and Apparens Ltd. and Apparens Ltd. 2001 All M.R. ( Criminal) 1961** ). The advocate who appeared in absence of accused was allowed to plea on behalf of accused.

Section 145 (1) of the Act permits the recording of complainant on affidavit. Even evidence of accused and witnesses can be recorded on affidavit. This was for expedite disposal of the cases. The bank slips are held as a primary evidence and admissible directly.

The accused are given effective opportunity to defend the case. Considering presumptions under section 118 and 139 of the N.I. Act effective opportunity is to be given to the accused to cross-examine the witness.

It is common experience that in cases u/s 138 of N.I. Act evidence is recorded by one judicial officer and before delivery of Judgment he is transferred, in such situation the successor has to proceed with de-novo trial. However, in case of **Mehsana Nagarik Sahakari Bank Ltd. Vs Shreeji CAB company ltd. and others 2014 Cr.L.J. 1953.** The apex court held that if evidence is recorded in full and not in summary manner, then evidence recorded by predecessor can be acted upon.

Though the provision contained in Sec.143 of the N. I. Act provides that cases u/s 138 are tried in summary way, they should be tried as a regular summons cases. If it appears to the magistrate that nature of case is such that sentence of imprisonment for a term exceeding one year may have to be passed, or that it is for any other reasons undesirable to try the case summarily, Magistrate shall after hearing the parties record and order to that effect and try the case as a regular summon case.

Recently in case of **Indian Bank Association and others vs. Union of India & others reported in AIR 2014 Supreme Court 2528, general** directions have been given by the court.

The directions are worth quoting and they are as under:

- 1- Metropolitan Magistrate/ Judicial Magistrate (MM/JM), on the day when the complaint under sec. 138 of the Act is presented, shall scrutinize the complaint and, if

the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.

- 2- MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must to be properly addressed and sent by post as well as by e-mail address got from the complainant. Court in appropriate cases, may take the assistance of the police or the nearby court to serve notice to the accused. For notice of appearance, a short date be fixed. If the summons is received back unserved, immediate follow up action be taken
- 3- Court may indicate in the summons that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, Court may pass appropriate orders at the earliest.
- 4- Court should direct the accused, when he appears to furnish a bail bond, the ensure his appearance during trial and ask him to take notice under Section 251, Cr.P.C. to enable him to enter his plea of defence and fix the case for defence evidence, unless an application made by the accused under Section 145(2) for recalling a witness for cross – examination
- 5- The court concerned must ensure that examination in chief, cross-examination and re-examination of the complainant must be conducted within three months of assigning the case. The court has option of accepting affidavits of the witnesses, instead of examining them in Court. Witnesses to the complainant and accused must be available for cross-examination as and when there is direction to this effect by the Court.

## **IX. CONCLUSION**

As we trace the history and establishment of the Negotiable Instruments Act,1881 and focus on the jurisdictional debate under Section 138, which deals with dishonor of cheque, we analyse the necessities which forced the Courts and the Government to adopt landmark changes in the law. The latest change and the present prevalent law being the 2015 Ordinance, has the effect of nullifying the law as laid down by the Supreme Court in 2014, DasratRathod case. The legal effect of the Ordinance is that, so as to institute a complaint under Section 138, the same must be instituted as per: If the cheque is delivered for collection through an account, the branch of the bank where the payee or holder, maintains the account, is situated; or If the cheque is presented for payment by the payee or holder otherwise through his account, the branch of the drawee bank where the drawer maintains the account,

is situated. This law comes with a promise to solve and aid in not only the speedy disposal of the pending cases pertaining to complaints under 138, but also to bring a sanctity to the system by seeking to clamp down on defaults in payments. It clarifies the legal position as to jurisdiction and also seeks to keep up with the modern banking system.

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