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## **ABOUT US**

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# **Critical Analysis Of Sec.138 Of** **Negotiable Instruments Act**

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## ***Abstract -***

*The Negotiable Instruments Act, 1881 provides for three kinds of instruments, namely, promissory notes, bills-of-exchange and cheques; it excludes from its periphery instruments in oriental language, such as, Hundies. With the advent of technology, two other modes of payments came to be recognised, that is, NEFT (National Electronic Fund Transfer) and RTGS (Real Time Gross Settlement). Promissory notes, bills of exchange and cheques are being used as Negotiable Instruments for economic transaction since long time as a mode of transferring money. With time the development of economic sector specifically the banking probability king sector cheque become the most used negotiable instrument but there is always a possibility which comes with this, during the time of issuing the cheque the of insufficiency of amount in the account. To protect the interest of the payee and to provide him justice Section 138 to 142 were inserted in Negotiable Instrument Act and this research paper focuses on the development the objective, nature and the current it development regarding decriminalization of sections relating to dishonoring of cheque in the Negotiable Instrument Act.*

## **Introduction -**

In the year of 1866 the “Negotiable Instruments Act” was drafted and the act came into existence in the year of 1881. A negotiable Instrument was required to avoid high cash transactions and give legal effect to such an instrument; to provide this legal effect, in India Negotiable Instrument Act,1881 was enacted. After a century, Chapter XVII, Section 138 to 142 were inserted in the Act vide Section 4 of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988, (Act 66 of 1988). Section 138 of the Act deals with the punishment for the dishonour of the cheque. Negotiable Instrument Act,1881 does not provide a proper definition of the Negotiable instrument. Still, Section 13 of the NI

act defines Negotiable Instrument as “a promissory note, bill of exchange, or cheque payable either to order or the bearer.”

## Meaning of Negotiable Instrument -

The word “negotiable” means transferable from one person to another in return for consideration; however, the word “instrument” means, a written document by virtue of which a right is created in favour of some person. Thus, every document which entitles a person to a sum of money and which is transferable (like cash) by delivery, is permitted to be called a “negotiable instrument”. Thus, negotiable instrument means, a document transferable by delivery.

## Kinds of Negotiable Instruments -

Negotiable Instruments are of following kinds :-

1. Promissory notes
2. Bill of Exchange
3. Cheque

## Section 138 Of Negotiable Instrument Act,1881-

A Cheque is an instrument that is used regularly for business transactions and to make payments. Certainly, cheques get dishonoured due to various reasons like stale cheques, insufficiency of funds, alteration, irregular signature, etc., and such dishonour of cheques gets dealt with under Section 138 of the Negotiable Instrument Act,1881. This Sec. has no concern with dishonour of other negotiable instruments.

## Cheque (Sec. 6 of the Act) -

According to section 6 of the NEGOTIABLE INSTRUMENT ACT,1881(herein after called as NI ACT), Cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

There are **three parties** involved in a cheque: the drawer, the drawee bank and the payee;

It must be in writing and it must be signed by the drawer;

The payee is always certain;

It is always payable on demand;

It must bear a date, otherwise it is invalid, and shall not be honoured by the bank;

The amount must be specified clearly- both in figures and in words. According to Section 18 of the Negotiable Instruments Act, 1881, if the amount undertaken or ordered to be paid is stated differently in figures and in words, the amount stated in words shall be the amount undertaken or ordered to be paid.

## Types of Cheques:

**a. Open Cheque:** In such a cheque, it is possible to get the cash, over the counter of the bank;

**b. Bearer Cheque:** It is somewhat similar to an open cheque; in case of a bearer cheque, any person holding or bearing the cheque, can be made payment of the amount mentioned in the cheque;

**c. Crossed Cheque:** Generally speaking, open cheques are open to risk and it is dangerous to issue an open cheque, however, this risk can be avoided by using a crossed cheque which would only be credited into the bank account of the payee. A cheque can be crossed by drawing two parallel lines across the cheque on the left-hand side top corner of the cheque and with/without writing "Account Payee" or "Not Negotiable";

**d. Order Cheque:** It is a cheque which is payable to a particular person and in such a cheque the word bearer may be cut or cancelled;

**e. Electronic Cheque:** It is a cheque which contains the exact mirror image of the cheque and it is generated in a secured system, ensuring safety standards with the use of digital signatures.

## Dishonour of Cheque -

Dishonour of cheque means it is a condition in which bank refuses to pay the amount of cheque to the payee due to insufficiency of funds etc.

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



## Objectives of Section-138 of Negotiable Instrument Act,1881:

The objective of sec 138 of NI Act is -

**To promote the efficiency of banking operations and to ensure credibility in transacting business through cheques** is mentioned in the case law **Modi Cements Ltd. v. Kuchil Kumar Nandi**<sup>1</sup>. And this Act was enacted and Section 138 of NI Act 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 negotiable instrument is the law of commercial world legislated to simplify 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.

In **Dalmia Cement Bharat Limited vs M/S. Galaxy traders and Agencies Limited and others**<sup>2</sup> the Hon'ble court has observed the objective and rational behind the enactment of the the section 138. The Hon'ble court also stated that "The negotiable instruments are in fact the instruments of credit being convertible on account of legality of being negotiated and are easily transferable from one person to another. To attain the objectives of the Act, the legislature has, in its wisdom thought it proper to make such provisions in the Act for conferring such privileges to the mercantile instruments considered under it and provide special penalties and procedure in case the obligations under the instruments are not discharged."

In the case of **D.Vinod Shivappa Vs Nanda Valliappa**<sup>3</sup> the court stated that "section 138 of the Negotiable Instrument Act is not to protect unscrupulous drawers who does not have the intention to honour the cheques issued by them it being a part of their modus operandi to punish the unscrupulous person."

## Conditions to commit an offence under S.138 of Negotiable Instruments Act -

1. A person (will be drawer of the cheque) should have a legally enforceable debt or other liability towards another person (will be payee or holder of the cheque, as the case may be) and a cheque is drawn to discharge the debt or liability.

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1. <sup>1</sup> (1998) 3 SCC 249

<sup>2</sup> AIR 2001 SC 676

<sup>3</sup> (2006) 6 SCC 456

2. Cheque is returned due to insufficient funds or exceeds the amount agreed upon to be paid by the bank.
3. Cheque is to be presented within six months from date of its drawn or till its validity, whichever being earlier<sup>4</sup>.
4. A written notice within 30 days is sent to the drawer along with the receipt of information from bank about failure of payment of cheque.
5. The payee or holder doesn't receive the payment within 15 days of the receipt of send written notice to the drawer.

These ingredients mentioned in the case law **Kusum Ignots and Alloys Ltd. V. Pennar Peterson Securities Ltd**<sup>5</sup>.

The main condition is that if the drawer within that 15 days of time frame able to pay the money then there will be no offence. It will only be punished under section 138 of the Act if he is unable to pay the debt within that 15 days and such person shall be punished with punishment provided under this section.

In the case of **Yogendra Pratap Singh vs Savitri Pandey**<sup>6</sup> The Hon'ble Supreme Court observed that "there should be no cause of action to have arisen until the period of 15 days elapsed therefore the court is barred from taking cognizance of a complaint made before the expiry of 15 days."

In the case of **Shankar Finance Investment vs State of Andhra Pradesh**<sup>7</sup> and others the court held that "section 142 of the Negotiable Instrument Act makes it compulsory that the complaint must be filed by the payee or holder in due course of the check where a Payee is a natural person he can file a complaint and when the pay is a form of a company registered person it must be represented by a natural person."

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<sup>4</sup> As per RBI Notification No. RBI/2011-12/251, DBOD.AML BC. No. 47/14.01.001/2011-12, dated 4th November 2011 (with effect from 01-04-2012) the validity period of Cheques, Demand Drafts, Pay Orders and Banker's Cheques will be reduced from six (6) months to three (3) months, from the date of mentioned in the instrument.

<sup>5</sup> (2000) 2 SCC 745

<sup>6</sup> MANU/SC/0813/2014

<sup>7</sup> (2008) 8 SCC 536

## Procedure -

### *Procedure that is followed in matters regarding Section 138 of the Act is as follows:*

- i. A legal notice is to be issued to the drawer within 15 days of dishonor of cheque by registered post with all relevant facts. The drawer is given a time of 15 days to make the payment, if the payment is made then the matter is served and the issue is settled. On the other hand if the payment is not made then the complainant is to file a criminal case process under Section 138 of the Act, against the drawer within 30 days from the date of expiry of 15 days specified the notice, with the concerned magistrate court within the jurisdiction.
- ii. The complainant or his authorized agent should appear in the witness box and provide relevant details for filing the case. If the court is satisfied and finds substance in the complainant, then summons will be issued to the accused to appear before the Court.
- iii. If after being served with the summons the accused abstains himself from appearing then the court may issue a bailable warrant. Even after this if the drawer does not appear a non-bailable warrant may be issued.
- iv. On appearance of the drawer/accused, he may furnish a bail bond to ensure his appearance during trial. After which the plea of accused is recorded. In case he pleads guilty, the court will post the matter for punishment. If the accused, denies the charges then he will be served with the copy of complaint.
- v. The Complainant may present his evidence by way of affidavit and produce all documents including the original in support of his complaint. The complainant will be cross examined by the accused or his counsel.
- vi. The accused will be given an opportunity to lead his evidence. The accused will also be afforded an opportunity to submit his documents in support of his case, as well as witnesses in his support. Accused and his witnesses will be cross examined by the complainant.
- vii. The last stage of the proceeding is that of the arguments after which the court will pass a judgment. If the accused is acquitted then the matter ends, but the complainant can go on further appeal in the High Court, similarly if the accused is convicted he can file an appeal in the Sessions Court.

## Liabilities on Dishonor of Cheques:

In the case of liabilities or penalties on dishonor of cheque there are two types of liabilities one is civil and other is criminal. The offence have remedies under both civil procedure code and Indian Penal Code .

### Civil Liability -

“In the case of civil liability as per section 138 of the Negotiable Instrument Act it imposes a fine which is double the amount of dishonored cheque and if the payee files a suit under the order 37 of code of civil procedure 1908 to recover the amount and the judgement comes in the favour of the payee then a drawer have to pay the amount ordered by the court.”

### Criminal Liability -

In the case of criminal liability section 138 of the Act states the punishment of imprisonment which can be extended upto 2 years or fine which can be extend up to the twice of the amount of the cheque or both. the offence is isailable compoundable and non cognizable and the drawer of the cheque will be prosecuted under section 417 which is punishment for cheating and 420 of Indian penal code.

### Cognizance -

The cognizance of the case can be take by “Judicial magistrate First Class” or “Metropolitan Magistrate”. Section 29 of The Criminal Procedure Code States that is judicial magistrate of first class cannot impose a fine more than 10,000 so by the Amendment Act Number 55 of the Year 2002 inserted the section 143 (1 )of the Negotiable Instrument Act which eventually provided the liberty to the Magistrates to impose the fine exceeding their prescribed limits under the code which can be double the amount of cheque.

### Penalty -

There are two remedies as penalty for dishonor of a cheque as follows :

**In civil-** Payee/Drawee may initiate recovery procedure under Order 37 of the Code of Civil Procedure,1908 in a jurisdictional court apart from criminal proceedings. The payee/drawer recovers the amount by the court order.

**In criminal-** Dishonor of Cheque attracts section 138 of Negotiable Instruments Act,1881 which provides imprisonment which may extend up to two (2) years or fine which may extend

up to twice of the cheque amount or both. This offence is bailable, compoundable and non-cognizable offence (a case in which a police officer cannot arrest the accused without an arrest warrant).

### **Limitation**

According to sec 138 and 142 of NI act, the drawee has to send a legal notice within 30 days from the date of return (dishonor) of cheque and asking the amount mentioned in the cheque to pay within the 15 days. On expiry of fifteen days from the service of notice, you have to file a complaint before the First Class Judicial Magistrate within 1 month of the said expiry. Once a cause of action has arisen, the limitation will begin to run and it could not be stopped by presenting the cheque again so as to have a fresh cause of action and fresh limitation.

## **Jurisdictional Development Under Section 138 of Negotiable Instruments Act:**

The Act is silent on the matter relating to the appropriate jurisdiction with respect to filing of criminal complaint under Section 138. Since the Criminal courts are approached, the issue needs to be examined from the point of view of the Criminal Procedure Code, 1973, Section 177 and 178(d) of Code of Criminal Procedure (herein after called as Cr.P.C).

In **Gautham T. V. Centre vs Apex Agencies**<sup>8</sup> held in the year 1993, the High Court of Andhra Pradesh held that the Court within whose jurisdiction the cheque is given, or where the information of dishonor is received or where the office of the payee is situated, will have jurisdiction to try the offence.

After that, **K.Bhaskaran v. Sankaran Vaidhyan Balan and Another**<sup>9</sup> held in the year 1999, the apex court was held that in the paragraph no. 12, 13, 14, 15, 16 of the judgement explains where to file a criminal complaint in case the offence of Dishonor of the Cheque is committed under Section 138. The rule that every offence shall be tried by a Court within whose jurisdiction it was committed is not an unexceptional or unchangeable principle. Section 177 itself has been framed by the legislature thoughtfully by using the precautionary word

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<sup>8</sup> (1993) 1 Crimes 723 (Andhra Pradesh)

<sup>9</sup> (1999) 7 SCC 510

ordinarily to indicate that the rule is not invariable in all cases.

Section 178 of the Code suggests that if there is uncertainty as to where, among different localities, the offence would have been committed the trial can be had in a Court having jurisdiction over any of those localities. The provision has further widened the scope by stating that in case where the offence was committed partly in one local area and partly in another local area the Court in either of the localities can exercise jurisdiction to try the case. Further again, Section 179 of the Code stretches its scope to a still wider horizon.

It reads thus Offence triable where act is done or consequence ensues.- When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.

The locality where the bank (which dishonored the cheque) is situated cannot be regarded as the sole criteria to determine the place of offence. Considering the constituents of section 138 of NI Act and section 178(d) of the Code, held:

1. Drawing of the cheque,
2. Presentation of the cheque to the bank,
3. Returning the cheque unpaid by the drawee bank,
4. Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount,
5. failure of the drawer to make payment within 15 days of the receipt of the notice.

It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at 5 different localities. But concatenation (series) of all the above five is a sine qua non (an essential condition) for the completion of the offence under Section 138 of the Code. In this context a reference to Section 178(d) of the Code is useful. Where the offence consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

Thus, it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act. In other words, the complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial

limits of which any one of those five acts was done. In this case, court considers the sec 177, sec 178(d), sec 179 of Cr.P.C and it has a wide range of jurisdiction.

After the **Baskaran's case**, slight changes in **Harman Electronics Pvt. Ltd. v. National Panasonic India Pvt. Ltd.**<sup>10</sup> held in the year 2009, decreases the scope of the jurisdiction. The Hon'ble Supreme Court held that: A cause of action will not be triggered by issue of statutory notice but only receipt/acceptance of notice does. Solely, the specific provisions of Section 138 will make or build an offence and the proviso is merely a condition required for taking cognizance. A sole issue of notice or presentation of cheque can't give or provide the court with territorial jurisdiction to try offences under section 138 or it will unreasonably harass the drawer.

In **Harman electronics case** the scope of the jurisdiction is narrow as compare with **Baskaran's case**.

After this in 2014, various changes were made in the territorial jurisdiction by the **Dashrath Roopsingh Rathod Vs. State of Maharashtra & Another**<sup>11</sup>. The SC held that there is a discernibly defined difference between the commission of an offence and cognizance of offence. Cognizance leads to cause of action. For section 138 complaints, the cause of action arises only when the drawer fails to pay the defaulted payment. The complaints can be filed only in the courts within whose jurisdiction the cheque is presented for encashment.

But the courts can take cognizance of the offence only when:

- I. The cheque is presented to the bank within 3 months from the date on which it is drawn;
- II. Notice has been issued to the drawer demanding the defaulted payment within 30 days from the date of dishonour by the bank;
- III. The drawer fails to pay the defaulted payment within 15 days from the receipt of the notice.

Judgement would apply retrospective effect. The Supreme Court had directed that only in those cases where post the summoning and appearance of the alleged accused, the recording of evidence has commenced as envisaged in section 145(2) of the Negotiable Instruments Act, 1881, proceeding will continue at that place. All other complaints (including those where the accused / respondent has not been properly served) shall be returned to the complainant for filing in the proper court, in consonance with exposition of the law, as determined by the

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<sup>10</sup> (2009) 1 SCC 720

<sup>11</sup> (2014) 9 SCC 129

Supreme

Court.

After the amendment in 2015, The Gujarat High Court in its judgment in **Brijendra Enterprise v. State of Gujarat and Another**<sup>12</sup> has explained the law relating to territorial jurisdiction for filing a complaint for dishonor of cheques.

As per the Negotiable Instruments (Amendment) Act, 2015 a complaint can be filed under Section 138 for dishonor of cheque at a court within whose local jurisdiction:

- The branch of the bank is located.
- The payee or the holder maintains an account.

## Nature Of Section 138 -

In **P Mohanraj vs M/S. Shah Brothers Ispat Pvt. Ltd**<sup>13</sup> in the year 2021 which is the recent judgement a bench comprising of J. Rohinton Nariman and J. B.R. Gavai. In the case when dealing with the issue of whether moratorium under section 14 of IBC bars the proceedings under the section 138 of Negotiable Instrument Act against corporate debtor they commented that proceedings which are under the section 138 of the Negotiable Instrument act can be called as a “Civil sheep” in a “criminal wolf’s Clothing” and in this case Shri Aman Lekhi learned “Additional Solicitor General” who presented the Union of India comprehensively went through the sections of negotiable instrument act and argued that “the proceedings mentioned in the section 138 can only be described as criminal proceedings not as a quasi criminal proceedings” but here the court rejected this argument and called it a misnomer. Section 138 of the Act provides the punishment for dishonoring of cheque which is mentioned above and also follows the Criminal procedure Code dealing with these type of cases this describes the quasi criminal nature of the section.

## Criminal Procedure Code and Sec.138 -

1. **Compounding of Offences** - The offence committed under the section 138 can be made compoundable under the section 147 of the Negotiable Instrument Act. It states that “Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable”.

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<sup>12</sup> Criminal Misc. Application No. 13062 of 2011

<sup>13</sup> MANU/SC/0132/2021



2. **Trying the offences Summarily** - Section 143 the Negotiable Instrument gives the power to Magistrates to try the cases summarily only if the Magistrate thinks that the alleged accused is not going to be sentenced more than one year and amount more than 5000 rupees and efforts should be made in all the cases under this section to conclude the trial within 6 months from filing the complaint.

3. **Applicability of Section 319 CrPC** - Section 319 (1) of Criminal Procedure Code states that “Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.” This rule is also applicable in the case of offence which is committed under section 138.

The Hon’ble Supreme Court In the case of **N. Harihara Krishnan v. J. Thomas**<sup>14</sup> opined that “the offence under Section 138 is person-specific hence cognizance against the person not being accused till now has to be taken in the same manner in which cognizance was first taken against the earlier accused.”

When a person is sentenced or convicted under the criminal proceeding under section 138 of NI Act he cannot take this as an alternative to civil proceedings the accused will be convicted under both civil and criminal liability, one cannot absolve the other.

## **Decriminalization Of Section 138 Of NI Act 1881-**

In the year 2020 Minister of Finance published public notice of “decriminalization of minor offences for improving business sentiment and unclogging the court processes” . For taking the suggestions and comments from the stakeholders regarding the decriminalization of number of offences which also includes the offence under the section 138 of the Negotiable Instrument Act 1881.

There are basically five reasons which caused this proposal -

- I. inspiring confidence among investors;
- II. keeping economic growth, national security and public interest as paramount;
- III. evaluate non-compliance;
- IV. keeping mens rea in mind as opposed to negligence or inadvertent omissions; and

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<sup>14</sup> (2018) 13 SCC 663

V. the habitual nature of non-compliance.<sup>15</sup>

The main objective behind this proposal by the government is to ease the process of business and to encourage investment but the decriminalization of Section 138 will not fulfill this objective. The intent and the main objective behind this section was to create a deterrent effects and discourage people from not honoring their commitment by way of making payment through cheque. Now cheques are used very much in everyday economic and banking transactions and the holder of the cheque because of the penal provisions in the section 138 feels relieved that he has a chance to enforce the payment in the case of dishonour of that cheque but by criminalizing this provision the assurance and the safety will be lost and the confidence which people have in the case of transactions through cheque will adversely effect which will eventually affect the economy.

Another objective behind this proposal was to unlock the judicial system through the process of decriminalization but this objective also will not be fulfilled as there are already many pending cases in the magistrate courts and the disposal of the cases are also very late and by decriminalization the problem will be increased as the strain and burden which was faced by the criminal courts will shift to the Civil courts because as the holder of the cheque will not be have any remedy in the criminal court then he will only be only left with the option of recovery suit.

## **Judicial Pronouncements under Section 138 of the Negotiable Instruments Act, 1881 -**

1. **Harman Electronics (P) Ltd. v. National Panasonic India (P) Ltd**<sup>16</sup>: In this case, the appellant and the respondent-complainant entered a business transaction. The appellant was a resident of Chandigarh and was carrying on business at Chandigarh. The appellant issued a cheque from its office at Chandigarh in favour of the respondent-complainant which eventually got dishonoured at Chandigarh; it is to be noted that the respondent-complainant had a branch office at Chandigarh although its head-office was at Delhi. Post the dishonour of the cheque, the respondent-complainant issued a notice upon the appellant from New Delhi asking it to make the payment of the sum due; the notice was served upon the appellant at Chandigarh. On failure on the part of the

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<sup>15</sup> Rohan Tiwari, Decriminalization of Dishonor of Cheques -A step Backwards, BAR AND BENCH (<https://www.barandbench.com/columns/decriminalization-of-dishonor-of-cheques-a-step-backwards>)

<sup>16</sup> (2009) 1 SCC 720

appellant to make the payment of the sum due within a period of 15 days from the date of the communication of the notice, a complaint petition was filed by the respondent-complainant at Delhi; cognizance of the offence was taken against the appellant. Questioning the jurisdiction of the Court of the Additional Session Judge, New Delhi, an application was filed by the appellant, which was dismissed holding that the court at Delhi had the jurisdiction to entertain the complaint as notice was sent by the respondent-complainant to the appellant (accused person) from Delhi, and the respondent-complainant had its registered office at Delhi, and the respondent-complainant was carrying out its business from Delhi.

A criminal miscellaneous petition was filed against the order of the Additional Session Judge by the appellant in the High Court, the same was also dismissed. Thereafter, an appeal was preferred to the Supreme Court of India by the appellant. The Supreme Court of India observed that, the only question that arises for consideration is whether sending of notice from Delhi itself would give rise to a cause of action for taking cognizance under the Negotiable Instruments Act, 1881. The Supreme Court held that, it is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act, 1881 are intended to be applied as regards the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on the receipt of the notice, that, the accused at his own peril may refuse to pay the amount. Clause (b) and clause (c) of the proviso to Section 138 of the Negotiable Instruments Act, 1881 therefore must be read together. The issuance of notice would not by itself give rise to a cause of action but communication of the notice would. It was further observed that, a court derives jurisdiction only when the cause of action arises within its jurisdiction. A distinction must be borne in mind between the ingredient of an offence and commission of a part of the offence. While issuance of a notice by the holder of a negotiable instrument is necessary, service thereof is also imperative. Only on a service of such notice and failure on the part of the accused to pay the demanded amount within a period of 15 days thereafter, the commission of an offence completes.

Giving of notice, therefore, cannot have any precedence over the service. Section 177 of the Code of Criminal Procedure, 1973 determines the jurisdiction of a court trying the matter. The court ordinarily will have the jurisdiction only where the offence has been committed. The provisions of Section 178 and Section 179 of the Code of Criminal Procedure, 1973 are exceptions to Section 177 of the Code of Criminal Procedure, 1973. The place where the offence has been committed plays an important role. Offence under Section 138 of the Negotiable Instruments Act, 1881 is governed by Section 177 of the Code of Criminal Procedure, 1973, so far as the territorial aspect is concerned. Principle that the debtor must seek the creditor cannot be applied in a criminal case. Jurisdiction of the court to try a criminal case is governed by the provisions of the Code of Criminal Procedure and not on common law principle. Thus, the Supreme Court held that, the Delhi High Court had no jurisdiction to try the case; and consequently, under Article 142 of the Constitution of India, 1950, the complaint case in the Court of the Additional Session Judge, New Delhi, is to be transferred to the Court of the District and Sessions Judge, Chandigarh, who was to assign the same to a court of competent jurisdiction.

This case over-ruled the case of, *K. Bhaskaran v. Sankaran Vaidhyan Balan*<sup>17</sup>.

2. In **Krishan Lal More and another vs. M/s Bibby Financial Services India Pvt. Ltd. And another**<sup>18</sup>, it was held by the Hon'ble High Court that the provision of Section 202 Criminal Procedure Code are not applicable to the complaints filed under Section 138 of the Negotiable Instrument Act.
3. In **Ashok Kumar vs. Jagdish Ram alias Jagdish Rai**<sup>19</sup>, it was held by the Hon'ble High Court that in case of acquittal of accused in cheque dishonour case by trial Magistrate, appeal against acquittal is not maintainable before Sessions Court. Complainant can approach High Court seeking leave to appeal.
4. In **Rajan Singhal vs. State of U.T. Chandigarh and Ors.**<sup>20</sup>, it was held by the Hon'ble High Court that when accused issues a cheque drawn on an account which is already

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<sup>17</sup> (1999) 7 SCC 510

<sup>18</sup> 2016(2) RCR (Criminal) 603 (P&H)

<sup>19</sup> 2016(2) RCR (Criminal) 281 (P&H)

<sup>20</sup> 2015(4) RCR (Criminal) 809 (P&H)

closed, mala fide intention was clear in the case. Both offences of cheating under Section 420 IPC and Section 138 of NIT Act are made out and accused can be prosecuted for both the offences.

5. In **Vishal Sharma vs. Balkaran Singh**<sup>21</sup>, and **Yogender Pratap Singh vs. Savitri Devi 2014 (4) CCC 305 (SC)** it was held by the Hon'ble Court that the Complaint filed before expiry of 15 days from the date of receipt of notice by the accused is not maintainable.
6. In **Damodar S. Prabhu Vs. Sayed Babalal H.**<sup>22</sup>, it was held by Hon'ble Supreme Court that if parties compound the offence in trial court accused will have to pay 10% of cheque amount as cost of compounding. Cost of compounding will be 15% in High Court and 20% in Supreme Court.

However, in **Madhya Pradesh State Legal Services Authority vs. Prateek Jain and another, 2014(4) RCR (Criminal) 178 (SC)** it was held by the Hon'ble Supreme Court that where settlement is made in Lok Adalat, the Lok Adalat can waive the same for reasons to be recorded.

7. **Bhushan Kumar & Anr v. State (NCT of Delhi)**<sup>23</sup>: In this case it was held that, it is inherent in Section 251 of the Code of Criminal Procedure, 1973 that when an accused appears before the trial court pursuant to summons issued under Section 204 of the Code of Criminal Procedure, 1973 in a summons trial case, it is the bounden duty of the trial court to carefully go through the allegations in the charge-sheet/complaint and consider the evidence to come to a conclusion whether or not, commission of any offence is disclosed and if the answer is in the affirmative, the Magistrate shall explain the substance of the accusation to the accused and ask him whether he pleads guilty or not; otherwise, he is bound to discharge the accused as per Section 239 of the Code of Criminal Procedure, 1973.
8. dure, 1973.

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<sup>21</sup> 2015(4) RCR (Criminal) 916 (P&H)

<sup>22</sup> 2010(2) RCR (Criminal) 851 (SC)

<sup>23</sup> AIR 2012 SC 1747

## ***Recent Supreme Court rulings for speedy disposal of cases under Section 138 of the Act:***

In 2017, Delhi High Court in **Dayawati v. Yogesh Kumar Gosain** considered the question whether an offence under Section 138, which is a criminally compoundable case, could be settled by mediation.<sup>24</sup> The Court held that even though an express statutory provision enabling the criminal court to refer the complainant and accused persons to alternate dispute redressal mechanisms has not been specifically provided by the Legislature. The Code of Criminal Procedure ("Cr.P.C.") does permit and recognize settlement without stipulating or restricting the process by which it may be reached. Thus, there is no bar to utilizing the alternate dispute mechanisms including arbitration, mediation, conciliation (recognized under Section 89 of Civil Procedure Code, 1908<sup>25</sup>) for the purposes of settling disputes which are the subject matter of offences covered under Section 320 of the Cr.P.C. It also stated the proceedings under Section 138 of the Act is distinct from other criminal cases and are in the nature of a civil wrong which has been given criminal overtones.

In **Meters and Instruments (P) Ltd. v. Kanchan Mehta**, the Honourable Supreme Court after taking into consideration the object of introducing Section 138 and other provisions of Chapter XVII of the Act, observed as under<sup>26</sup>:

"18. From the above discussion following aspects emerge:

**18.1.** Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on

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<sup>24</sup> Dayawati v. Yogesh Kumar Gosain 2017 SCC Online Del 11032.

<sup>25</sup> **Settlement of disputes outside the Court:** (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for-

a) arbitration;  
b) Conciliation  
c) judicial settlement including settlement through Lok Adalat; or  
d) mediation.

Where a dispute had been referred-

a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.

b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

d) for mediation, the court shall affect a compromise between the parties and shall follow such procedure as may be prescribed.

<sup>26</sup> Meters and Instruments (P) Ltd. v. Kanchan Mehta (2018) 1 SCC 560.

accused in view presumption under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C.<sup>27</sup> will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

**18.2.** The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

**18.3.** Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C.<sup>28</sup> to award suitable

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<sup>27</sup> **Power to stop proceedings in certain cases:** In any summons- case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge.

<sup>28</sup> **Order to pay compensation:** (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-

- a) in defraying the expenses properly incurred in the prosecution;
  - b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;
  - c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855 ), entitled to recover damages from the person sentenced for the loss resulting to them from such death;
  - d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto,
- (2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal,
  - (3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced,
  - (4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session

compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C.<sup>29</sup> With this approach, prison sentence of more than one year may not be required in all cases.

**18.4.** Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonour of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C.<sup>30</sup> The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances."

### **Recent amendment:**

The **Negotiable Instruments (Amendment) Act, 2018** which came into effect from September 1, 2018 allows the Court trying an offence related to cheque bouncing, to direct the drawer to pay interim compensation not exceeding 20% of the cheque amount to the complainant within 60 days of the trial court's order to pay such compensation. This interim compensation may be paid either in a summary trial or a summons case where the drawer pleads not guilty to the accusation made in the complaint; or upon framing of charge in any other case. Furthermore, the Amendment also empowers the Appellate Court, hearing appeals against conviction under s. 138, to direct the appellant to deposit a minimum 20 % of the fine/compensation awarded, in addition to interim compensation.

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when exercising its powers of revision,

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

<sup>29</sup> **Money ordered to be paid recoverable as a fine:** Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine:

**Provided** that Section 421 shall, in its application to an order under Section 359, by virtue of this section, be construed as if in the proviso to sub-section (1) of Section 421, after the words and figures 'under Section 357', the words and figures 'or an order for payment of costs under Section 359' had been inserted.

<sup>30</sup> **Judgment in cases tried summarily:** In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding.



## Observations and Conclusion -

The recent steps undertaken by the judiciary and the changes brought by the legislature are steps in the right direction. But there is a need to realise the commercial realities in India and further speed up recovery to discourage delays caused by the accused, unnecessary adjournments and frivolous appeals. Courts in India are overburdened and lack basic infrastructure to deal with dishonoured cheque cases. It is vital that people have faith in the integrity and honesty of the system. However, reliability of cheques in commercial dealings has been eroded to a great extent. Dishonour of cheque causes financial loss, inconvenience and injury to the payee.

1. The number of Magistrates exclusively meant for cheque bounce cases should be doubled. Special Courts can be set up to deal with such cases. The Government must provide for funds needed to meet the costs involved in increasing the number of Magistrates, their supporting staff and other infrastructure.
2. There should be no more than fifty matters before a judge on a particular day. Twenty-five in the morning session and twenty-five in the afternoon session.
3. To address the time concern, the following suggestions can be investigated:
  - a. Before the Court's time i.e., before 11 AM. the Court's Judicial clerk should sit for one hour, take roll call and entertain applications for adjournment by consent, adjourn the cases which appear to him require adjournment. In case where the Magistrate's judicial attention/time is required, can be put up with remark by the Judicial clerk and those cases should be kept at 11 AM for judicial scrutiny.
  - b. Judicial time from 11 AM should be exclusively devoted to taking down the evidence.
  - c. The above will save Court's time of almost 1 to 2 hours a day.
4. No court fees for victims of cheque-bounce cases as he is not making a fresh monetary claim.
5. Further, Section 139 of the Act<sup>31</sup> mandates that unless the contrary is proved, it is to be presumed that the holder of a cheque received the cheque of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability. This

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<sup>31</sup> **Presumption in favour of holder:** It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

presumption is rebuttable by the accused by leading cogent evidence that there was no debt or liability. Once such rebuttal evidence is adduced and accepted by the court the evidential burden shifts back to the complainant. In this regard, it has to be noted by the Courts that the accused is given an opportunity twice to prove his innocence, first when the bank informs him about insufficiency of funds, and the second time he can raise his defence at the time of notice served under Section 138 of the Act. If he fails to do so, then the Court should presume that he is guilty and start process forthwith. In case of false cases, heavy costs should be imposed on the complainant.

6. Since it is a quasi-judicial proceeding, the intent is that the Court should take innovative approach and not succumb to technicalities. Technicalities should be found and turned down with firm hand.
7. Magistrates must take *suo moto* action and a four-hearing procedure should be followed. If the accused does not show up at the first hearing, a non-bailable warrant must be issued. At the second hearing the accused must show cause and file a defence. At the third hearing cross examination should be conducted. At the fourth hearing arguments should take place after which a judgment must follow.

Credit is given on trust and good faith. It is in the interest of the justice system that these reforms are brought as expeditiously as possible to further ease the process of doing business in India. Section 138 of the Act should not be used by person who borrows money on credit to delay his commitment to pay and it is the duty of the Court to ensure that it is not made a party to such dilatory tactics.

Through Section 138 Payee is protected against illegal activity of the drawer. It not solely aims to shield the interest of the payee but additionally to bring a holiness to the drawers who issues the cheques.

At last, I need to conclude that the importance of speedy and timely disposal of cheque bounce cases are one amongst the most concern before the judiciary because of the aim of timely payment of monetary to payee and enacting the remedy for him would fail if accused accomplish prolonging these cases.