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CRITICAL ANALYSIS OF SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT, 1881

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ABSTRACT

Promissory notes, promissory notes and checks have long been used as negotiable instruments for economic transactions as a way of transferring money. Over time, the development of the economic sector, specifically the banking sector check has become the most used negotiable instrument, but there is always a possibility that comes with it, the probability of insufficient amount in the account at the time of issuance of the check. Sections 138 to 142 have been inserted in the Negotiable Instruments Act to protect the interests of the payee and to ensure justice and this research paper focuses on the development of the objective, nature and current developments regarding the decriminalization of check dishonor sections in the Negotiable Instruments Act.¹

KEYWORDS: Dishonor of Cheque, Negotiable Instruments Act, S. 138, Jurisdiction, Decriminalization.

INTRODUCTION

The "Negotiable Instruments Act" was drafted in the year 1866 and came into existence in the year 1881. In 1988 which is more than a hundred years Chapter XVII in which Sections 138 to 142 were added to the Act. Section 138 of the Act basically lays down the penalty for the offense of dishonor of a cheque. A check can be described as "a negotiable instrument drawn on a specified banker and not otherwise shown to be payable on demand". Chapter 2 of Negotiable Instruments Act Section 6 defines check and the definition clearly states that it also includes "electronic image of cut check and check in electronic form". Criminal proceedings against the accused on punishment in case of dishonor of check was not present earlier, it is a recent addition but earlier

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only civil and alternative dispute resolution techniques where available to the check payee and now both civil and criminal remedies are available to the payee. In case of civil remedy, the payee can file a civil suit to recover damages and in the case of a criminal remedy, it is available under Section 138 of the Negotiable Instruments Act, which does not exclude the filing of a civil action.

I. OBJECTIVES OF SECTION 138

In *Modi Cement Limited v. Kuchil Kumar Nandi*², the Hon'ble Court stated that the main objective of "Section 138 of the Negotiable Instruments Act is to promote efficiency in banking operations and to ensure all credibility in dealing through cheques.

The law relating to negotiable instruments is the law of the commercial world, which is enacted especially to facilitate the operations of trade and commerce by providing for the sanctification of instruments of credit which would be considered convertible into money and easily passable from one to another."

In *Dalmia Cement Bharat Limited Vs M/S. Galaxy Traders and Agencies Limited and others*³, the Hon'ble Court observed the objective and rational background behind the enactment of Section 138. The Hon'ble Court also stated that "Negotiable instruments are in fact credit instruments which are exchangeable on account of the legality of negotiation and are easily transferable from one person to another. In order to achieve the objects of the Act, the Legislature in its wisdom has thought it proper to make such provisions in the Act for granting such privileges on commercial instruments covered by it and lays down specific penalties and procedure in the event that the obligations under the instruments are not fulfilled."

In the case of *D. Vinod Shivappa vs Nanda Valliappa*⁴ said that "Section 138 of the Negotiable Instruments Act is not meant to protect unscrupulous drawers who have no intention of honoring the checks drawn by them, as it is part of their modus operandi to punish the unscrupulous person".

² AIR 1998 SC 1057

³ AIR 2001 SC 676

⁴ (2006) 6 SCC 456

II. CONDITIONS TO COMMIT THE OFFENCE

UNDER SECTION 138 OF NIACT, 1881

Section 13 of the Negotiable Securities Act defines "negotiable security" which defines it as "a promissory note, promissory note or check payable to order or bearer". "Which basically means that 'it is a kind of document which guarantees to the bearer a sum of money which will be payable on demand or at any time in the future.'" Section 138 of this Act is essentially a penal provision which prescribes penalties for dishonor of a cheque. Section by itself it states certain circumstances which make contempt of control a crime and the ingredients are

1. "First, a person should issue a check as drawer, and a check that is issued for the payment of money to another person exempting himself from any liability"
2. The check should be presented to the drawee's bank and the check is returned unpaid by the bank due to insufficient or insufficient funds or the amount exceeds the "amount to be paid from this account by agreement with the bank" .
3. "The check should be presented to the bank within 6 months from the date of issue or its validity period, whichever is earlier."
4. If the check is dishonored by the bank, the bank will immediately issue a "Check Return Notice" to the payee
5. Then the owner of the check who is the payee sends a call for the check to be issued within 30 days of receiving the notice of return of the unpaid check.
6. The exhibitor must make payment within 15 days of receiving this notice, and if payment is not made within this period, the recipient may take legal action within 30 days after the 15 days have passed.

The main condition is that if the drawer is able to pay the money within 15 days, there will be no offence. According to Section 138 of the Act, he will be punished only if he is unable to pay the debt within 15 days,⁵ and he will be punished with a penalty under this section.

In the case of *Yogendra Pratap Singh vs Savitri Pandey*⁶ Hon'ble Supreme Court observed that

⁵ MANU/SC/0813/2014

⁶ (2008) 8 SCC 536

“there should be no cause of action till the lapse of 15 days, therefore the court is barred from taking cognizance of the complaint filed before the court. expiry In the case of Shankar Finance Investment Vs. State of Andhra Pradesh and another court held that "Section 142 of the Negotiable Instruments Act requires a complaint to be made by the payee or holder within the due date of inspection if the Payee is a natural person against whom the complaint can be made and if the payment is in person registered in the company, must be represented by a natural person."

III. LIABILITIES

In case of dishonor of check liabilities or penalties there are two types of liabilities one civil and other criminal. There is a remedy for offenses under both the Civil Procedure Code and Indian Penal Code. “Section 138 of the Negotiable Instruments Act imposes a penalty in case of civil liability which is twice the amount of the dishonored check and if the drawer files a suit under Code 37 of Civil Procedure 1908 for recovery of the amount and the judgment is in favor of the drawer then the drawer shall pay the amount ordered by the court.

In case of criminal liability Section 138 of the Act provides for imprisonment which may extend to 2 years or fine which may extend to double the check amount or both. The offense is bailable, compoundable and non-cognizable and the drawer of the check will be prosecuted under section 417 which is punishable for cheating and 420 of the Indian Penal Code.

A “Judicial Magistrate First Class” or “Metropolitan Magistrate” may take cognizance of the case. Section 29 of the Code of Criminal Procedure states that a Judicial Magistrate of the First Class cannot impose a fine exceeding 10,000 hence Section 143 (1) of the Negotiable Instruments Act was inserted by Amendment Act No.55 of the year 2002 which ultimately allowed Magistrates to exceed their prescribed limits under the Code. It provided freedom to impose a penalty which could be double the amount of the cheque.

IV. JURISDICTION

Regarding the appropriate jurisdiction to file a criminal complaint under the section 138 of the NI Act 1881 the act does not define the matter regarding the appropriate jurisdiction as the Criminal Court has the power to take cognizance the issue needed to be solved with the help of Criminal Procedure Code 1973 section 177 and 178(d).

In the case of K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Anr⁷ the Hon'ble court in paragraph 12 of the judgment observed that according to section 177 of the Criminal Procedure Code "every offence shall ordinarily be inquired into and tried in a court within whose jurisdiction it was committed."

Post K. Bhaskaran Judgement it was observed that the law allowed the complainant to abuse and misuse the law which can lead to hardship for the drawer.

This judgement conferred the payee with an unreasonable and arbitrary power to confer jurisdiction on places according to his convenience. "which can lead to harassment as the payee has no concern or relation with a distant place where the cheque was issued which had no link to the transaction or drawer."⁸

After this case in the year 2014 regarding the jurisdiction in the case of the Dashrath Rupsingh Rathod vs State of Maharashtra and Anr⁹ The Honorable Supreme Court held that "there is a discernible difference between the commission of an offence and cognizance of the 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 check is presented for encashment" and the judgement also stated that this will only be applicable in a retrospective effect, the Hon'ble Supreme Court also stated that "only those cases where after completing the summoning and the appearance of the alleged accused the recording of the evidence has commenced as respondent has not been properly served shall be returned to the complainant to file it in the mentioned under the section 145(2) of the Negotiable Instrument Act the proceeding will carry on at that place and other complaints which should also include those where the accused or the proper court."¹⁰

There has been amendment in the act and as per the Negotiable Instruments (Amendment) Act 2015 "a complaint can be filed under the section 138 of Negotiable Instrument Act for dishonour of cheque at a court within whose local jurisdiction the branch of the bank is located and the payee or the holder maintains an account."

⁷ (1999) 7 SCC 510

⁸ Agrima Sharma, Jasmine Malik and Sumit Roy, *Section 138 of Negotiable Instrument Act 1881- An In depth Analysis*, mondaq (Oct 9 2015), <https://www.mondaq.com/india/trials-appeals-compensation/433334/section138-negotiable-instruments-act-1881--an-in-depth-analysis>

⁹ (2014) 9 SCC 129

¹⁰ Dashrath Rupsingh Rathod vs State of Maharashtra and Anr (2014) 9 SCC 129

V. NATURE OF SECTION 138

In P mohanraj vs M/S. Shah Brothers Ispat Pvt. Ltd in 2021,¹¹ a recent judgment in which a bench comprising Rohinton Dali, Nariman and B.R. Gavai. In a case dealing with the issue of weather moratorium under Section 14 of the IBC blocks proceedings under Section 138 of the Negotiable Instruments Act against a corporate debtor, they said that the proceedings under Section 138 of the Negotiable Instruments Act can be termed as "Civil Sheep" in the "Criminal Wolf".

Clothing' and in this case learned 'Additional Attorney General' Shri Aman Lekhi, who presented for the Union of India, comprehensively went through the sections of the Negotiable Instruments Act and contended that "proceedings under section 138 can only be described as criminal proceedings and not as quasi-criminal proceedings', but here the court rejected that argument, calling it a misnomer.

The provision of Section 138 of the Act establishes the above-mentioned punishment for dishonoring a check and also follows the criminal code dealing with this type of cases, which describes the quasi-criminal nature of the section.

(A) FOLLOWING THE CRIMINAL PROCEDURE CODE

1. Compounding Of Offences

An offense committed under Section 138 can be made compoundable under Sec.147 of the Negotiable Instruments Act. It states that "notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offense punishable under this Act shall be compoundable".

2. Trying The Offences Summarily

Section 143 empowers a negotiable instrument magistrate to try cases briefly only if the Magistrate is of opinion that the alleged accused shall be liable to imprisonment for a term not exceeding one year and a fine not exceeding Rs.5000 and in all cases under this section efforts shall be made to complete the trial within 6 months of the filing of the complaint. That "the offense under Section 138 is person-specific and therefore cognizable against the person."¹²

¹¹ MANU/SC/0132/2021

¹² (2018) 13 SCC 663

3. Applicability Of Section 319 CrPC

Article 319(1) of the Criminal Code states that "If, during the investigation or trial of a crime, the evidence shows that a person who is not accused has committed a crime for which he could be tried together with the accused, the court may intervene for an offense which she appears to have committed." This rule also applies to an offense which is committed under Section 138. The case of N. Harihara Krishnan v. J. Thomas, which has so far been held to have been charged, is to be taken in the same manner as the previously accused was first taken cognizance of.'

When a person is convicted or sentenced in a criminal proceeding under Section 138 of the NI Act, he cannot take it as an alternative to a civil proceeding, the accused will be held liable for both civil and criminal liability, one cannot acquit the other.

VI. DECRIMINALIZATION OF SECTION 138 OF NI ACT, 1881

In 2020, the Minister of Finance published a decree on the "decriminalization of small offences to improve business sentiment and unblock court processes". For receiving suggestions and comments from interested parties regarding the decriminalization of a number of offences, which also include the offense under Section 138 of the Negotiable Instruments Act, 1881.

There are basically five reasons that made this proposal "instill confidence among investors; maintaining economic growth, national security and the public interest as paramount; evaluate non-compliance with respect to mens rea as opposed to negligence or inadvertent omission; and the habitual nature of non-compliance."¹³

The main objective of this government proposal is to facilitate the process of doing business and encourage investment, but in my opinion the decriminalization of Section 138 will not achieve this objective, the intention and main objective of this section was to create deterrence and discourage people from not honoring their commitment through check payment. Checks are now very much used in day to day economic and banking transactions and due to the penal provision in Section 138 the holder of the check feels relieved that he has a chance to recover payment in case of dishonor of that cheque, but by criminalizing this collateral, the certainty and security is lost

¹³ Rohan Tiwari, *Decriminalization of Dishonor of Cheques -A step Backwards*, BAR AND BENCH (July 1 2020, 8.59 AM), <https://www.barandbench.com/columns/decriminalization-of-dishonor-of-cheques-a-stepbackwards>

and the trust that people have in case of transactions through check, it will have an adverse effect which will eventually affect the economy.

Another objective of this proposal was to unblock the judicial system through the decriminalization process, but this objective will also not be met because there are already many pending cases in the magistrate courts and disposal of cases is also very late and with decriminalization the problem will increase as the burden and burden which faced by the criminal courts, he will move to the civil courts because as the holder of the check he will have no remedy in the criminal court, he will only be left with the option of a recovery suit.

CONCLUSION

In the case of P Mohanraj vs M/S. Shah Brothers Ispat Pvt. Ltd,¹⁴ the Hon'ble court observed that "the main object of the provisions of Section 138 of the NI Act is not to punish the culprit but to compensate the victim". There have been many landmark judgments over time which have brought about significant developments regarding the objective of the section and the jurisdiction over the offense committed under the section. The legislature has begun to propose decriminalizing the act, but it is still a crime.

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¹⁴ MANU/SC/0132/2021