



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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LIABILITIES OF PARTIES – DISHONOR OF CHEQUES

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Abstract

The Negotiable Instruments Act, 1881, provides a legal framework for regulating various negotiable instruments, including cheques. Dishonor of a cheque is a serious matter that can have significant legal consequences for all parties involved. This abstract aims to explore the liabilities of parties under the Act when a cheque is dishonored. Firstly, it delineates the obligations of the drawer, drawee, and payee concerning the issuance, presentation, and payment of cheques. The Act imposes a duty on the drawer to ensure that there are sufficient funds in the account to honor the cheque upon presentation. Failure to fulfill this obligation results in legal repercussions. Secondly, it discusses the consequences of dishonor, which may include civil and criminal liabilities. Upon dishonor, the payee has the right to initiate legal proceedings against the drawer for recovery of the amount due. Additionally, the drawer may be subjected to criminal prosecution under Section 138 of the Act if the dishonored cheque was issued for discharge of a debt or liability and the drawer fails to make payment within the stipulated period after receiving a notice of demand. Furthermore, the abstract examines the liabilities of the drawee bank in cases of dishonor. The drawee bank is obligated to honor a valid cheque drawn upon it, provided the necessary conditions are met. Failure to do so may render the bank liable for damages to the payee or holder in due course. Moreover, it highlights the importance of procedural compliance in enforcing liabilities under the Act. Strict adherence to statutory requirements regarding notice periods, service of demand notices, and legal remedies is essential for safeguarding the rights of the aggrieved parties.

Keywords: Negotiable Instruments Act 1881, Dishonor of Cheque, Liability of Parties, Civil Liability, Criminal Liability, Section 138

Introduction

Over the years there have been many important changes in the way cheques are issued/bounced/dealt with. Commercial globalisation has resulted in giving a big boost to our country. With the rapid increase in commerce and trade, use of cheque also increased and so did the cheque bouncing disputes. The object of Sections 138-142 of the Negotiable Instruments Act, 1881 is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. Section 138 casts a criminal liability punishable with imprisonment or fine or with both on a person who issues a cheque towards discharge of a debt or liability as a whole or in part and the cheque is dishonoured by the bank on presentation.¹

Section 138 was enacted to punish unscrupulous drawers of cheques who, though purport to discharge their liability by issuing cheque, have no intention of really doing so. Apart from civil liability, criminal liability is sought to be imposed by the said provision on such unscrupulous drawers of cheques. However, with a view to avert unnecessary prosecution of an honest drawer of the cheque and with a view to give an opportunity to him to make amends, the prosecution under Section 138 of the Act has been made subject to certain conditions. These conditions are stipulated in the proviso to Section 138. In criminal law, commission of offence is one thing and prosecution is quite another. Commission of offence is governed by Section 138 of the Act. Prosecution is governed by Section 142 of the Act. It is also noteworthy that Section 138 while making dishonour of a cheque an offence punishable with imprisonment and fine, also provides for safeguards to protect drawers of such instruments where dishonour may take place for reasons other than those arising out of dishonest intentions.²

Meaning of the Cheque

A cheque is a negotiable instrument and bill of exchange which acts as a written instruction to the bank to pay a certain amount of money from the drawer's bank account to the payee to whom the cheque is issued. It is an unconditional and definite order to the bank, payable on demand and it can be transferred by mere hand delivery. As per the Section 6 of the Negotiable Instruments

¹ <https://company360.in/blog/what-is-the-dishonour-of-cheque/>

² <https://blog.ipleaders.in/dishonour-of-cheque/>

Act 1881, “A cheque is a bill of exchange drawn on specific banker and not expressed to be payable otherwise than on demand and it includes electronic image of truncated cheque and a cheque in electronic form.” Truncated cheque is a cheque which is converted into an electronic image by bank or clearing house for the purpose of easier transmission substituting physical cheque. An electronic cheque is a cheque that is drawn in electronic form Making payment through cheque is safe and convenient. However, cheques are not legal tender and a person can refuse to accept them.³

Following are the Parties to a Cheque

- 1.Drawer-** Drawer is the person who draws the cheque and promises to pay a certain amount to another person. Drawer signs the cheque and orders the bank to pay the amount to another person
- 2.Drawee-** Drawee is the bank on which a cheque is drawn by the drawer. The Drawee is directed by the drawer to pay the amount mentioned in the cheque.
- 3.Payee-** Payee is the beneficiary receiving payment.
- 4.Endorser-** Endorser is the party who transfers their right to receive payment to some other party.
- 5.Endorsee-** Endorsee is the party in the favour of whom the right to receive payment is transferred by the endorser.⁴

Types of Cheques

1.Bearer Cheque- Bearer Cheque is the cheque that can be encashed by the person to whom the cheque is issued or by anyone who presents the cheque in the bank. Bearer cheques are negotiable in nature and transferable by mere delivery. Bank does not require any authorisation from the drawer in these cheques.

³ <https://cleartax.in/glossary/cheque>

⁴ <https://www.toppr.com/guides/business-laws-cs/negotiable-instruments-act/parties-of-a-cheque-and-essentials>

2. Order Cheque- Order Cheque is the cheque that is payable only to the person or entity whose name is written on the cheque. No other has the authority to encash these cheques. In the Order cheque, the word 'Or Bearer' is cancelled. Authentication of the payee is required in these cheques. The payee can transfer such cheques to a third party by signing his/her name at the back of it.

3. Crossed Cheque- In crossed cheque amount can only be transferred into the account of the payee. Any third party can submit this cheque to the bank on the behalf of the payee. In Crossed cheque, two parallel sloping lines along with words 'A/C Payee' is written in the top left corner. These cheques can be routed only through an account and cannot be paid in cash. These are non-negotiable in nature.

4. Uncrossed/Open Cheque- In Open cheque amount can be payable in cash at the bank counter or can be transferred to the account of the person whose name is written on the cheque. These cheques can be transferred from the payee to any third party. It can be both order or bearer cheque.⁵

5. Anti-dated Cheque- Anti-dated cheque is a cheque on which a date prior to the current date is mentioned. Such cheques can be cleared in the bank until three months to the date mentioned in the cheque.

6. Post-dated Cheque- Post-dated cheque is a cheque in which a future date is mentioned. These cheques can be submitted any time after their issuance but will process these cheques according to the date mentioned in the cheque.

7. Stale Cheque- Stale cheque is a cheque that is not presented in the bank within its validity period. In India, a cheque is valid up to three months of the date mentioned in the cheque.

8. Mutilated Cheque- The mutilated cheque is a cheque that is torn, spoiled, or damaged, banks often reject these cheques. The banks make payment against such cheques only after getting confirmation and verification from the drawer.⁶

⁵ <https://byjus.com/govt-exams/types-of-cheques>

⁶ <https://www.iifl.com/blogs/other/different-types-of-cheque>

9. Blank Cheque- In a blank cheque the amount, name of the payee, and date are not mentioned. It only has the signature of the drawer. The maximum withdrawal limit can be mentioned in these cheques.

10. Self-Cheque- Self cheque is used by the drawer to withdraw money from his/her own account. In self cheque word 'Self' is written in place of the name of the payee.

11. Pay Yourself Cheque- Pay yourself cheques are used when the drawer wants his bank to deduct some amount from his account. These cheques are issued at the time of buying bank drafts, pay orders, or FDs.⁷

12. Traveller's Cheque- Traveller's cheque is a cheque of a fixed amount issued by the bank for making payment or to withdraw money in a foreign country. The bank charges a fee to issue such cheques.

13. Banker's Cheque- Banker's cheque is issued by the bank on behalf of the customer of the bank for making the payment within the same city. It is also known as pay-order. It is non-negotiable in nature and cannot be dishonoured.

14. Cancelled Cheque- Cancelled cheque acts as a proof that person holds an account with the given bank. In cancelled cheque, two parallel lines are drawn across the cheque and the word 'cancelled' is written between them. It is used in various bank processes like withdrawal of EPF funds, the opening of another bank account, KYC process, etc.⁸

⁷ <https://groww.in/banking/what-is-cheque>

⁸ <https://navi.com/blog/types-of-cheques>

Liability of a Drawer of a Dishonoured Cheque

1. Civil Liability –Where a cheque is dishonoured, the legal position of the drawer of the cheque becomes that of a principal debtor to the holder. The holder can bring civil suit just like any creditor to recover the amount from the drawer making him liable as principal debtor.⁹

2. Criminal Liability -

A drawer of a cheque is deemed to have committed a criminal offence when the cheque drawn by him is dishonoured by the drawee on account of insufficiency of funds.

The criminal liability of a drawer in case of dishonour of cheque is dealt in section 138 to Section 142 of Negotiable Instrument Act 1881.¹⁰

Notice

Before taking any action, a legal notice for check dishonour is required. This Act stipulates that, if a cheque has been dishonoured, the drawer must be notified (by registered A.D.) within 30 days of receipt of the memo from the drawee bank that the cheque has been dishonoured.

The following points should be included in the legal notice for cheque dishonour:

1. The issued check was presented to the bank for payment;
2. The check was then dishonoured for the reason stated by the drawee bank.
3. Requesting payment of a sum written on a cheque within 15 days of receipt of notice.
4. The next action should be conducted after sending the legal notice for cheque dishonour.¹¹

⁹ <https://www.jstor.org/stable/4395178>

¹⁰ <https://abbasilegal.com/dishonour-of-cheques-under-section-138-of-the-n-i-act-1881>

¹¹ <https://districts.ecourts.gov.in/sites/default/files/study%20circles.pdf>

Filing of complaint

When the drawer of the cheque fails to make the payment within fifteen days after receiving the notification, the cause of action for beginning proceedings is complete, according to Section 138 of the Act and its proviso.

Only from the moment the notice period expired would the offence be considered committed. A section 138 complaint must be filed within one month of the occurrence of the cause of action. The day on which the cause of action arises is excluded from the calculation of the limitation period for filing a complaint under Section 138 of the Act.¹²

Maximum Punishment

The maximum punishment for such an offence is imprisonment upto 2 years or fine upto twice the amount of cheque or both.

Where the cheque is drawn by a company, a firm, or association of individuals, the punishment can be awarded to every person who was in-charge of and was responsible for its conduct of business and also to the company.¹³

Liability of Parties – Cheque

The provisions relating to the liability of parties to negotiable instruments are under section 30 to 32 and 35 to 42 of the Negotiable Instrument Act, 1881.

The Liability of parties is as follows:

1. Liability of Drawer (Section 30) -

Drawer means a person who signs a cheque or a bill of exchange ordering his or her bank to pay the amount to the payee.

¹² <https://www.lawjire.com/complaint-under-section-138-of-negotiable-instruments-act/>

¹³ <https://blog.ipleaders.in/section-138-ni-act-punishment/>

In case of dishonour of cheque or bill of exchange by the drawee or the acceptor, the drawer of such cheque or bill of exchange needs to compensate the holder such amount. But, the drawer needs to receive due notice of dishonour.

So, the nature of the drawer's liability on drawing a bill is:

- (i) On due presentation:- It should be accepted and paid accordingly.
- (ii) In the case of dishonour:- Drawer needs to compensate the holder such amount, only when he receives a notice of dishonour by the drawee.¹⁴

2. Liability of the Drawee of Cheque (Section 31) -

The person who draws a cheque i.e drawer having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required to do so and, or in default of such payment, he shall compensate the drawer for any loss or damage caused by such default.

The drawee of a cheque will always be a banker. As a cheque is a bill of exchange, drawn on a specified banker by the drawer, the banker is bound to pay the cheque of the drawer, i.e., the customer. For the following conditions are need to be satisfied:

- (i) Sufficient amount of funds to the credit of customer's account should be there with the banker.
- (ii) Such funds are required to be properly applied against the payment of such cheque, e.g., the funds are not under any kind of lien etc.
- (iii) The cheque is duly required to be paid, during banking hours and on or after the date on which it is made payable.

If the banker unjustifiably refuses to honour the cheque of its customer, it shall be liable for damages.¹⁵

¹⁴ <https://indiankanoon.org/doc/1968425/>

3. Liability of Acceptor of Bill and Maker of Note (Section 32) -

As per section 32 of negotiable instrument act, in the absence of a contract to the contrary, the maker of a promissory note and the acceptor before the maturity of a bill of exchange are under the liability to pay the amount thereof at maturity.

They need to pay the amount according to the apparent tenor of the note or acceptance respectively. The acceptor of a bill of exchange at or after maturity is liable to pay the amount thereof to the holder on demand.

The liability of the acceptor of a bill or the maker of a note is absolute and unconditional but is subject to a contract to the contrary and may be excluded or modified by a collateral agreement.¹⁶

4. Liability of Endorser (Section 35) -

An endorser is the one who endorses and delivers a negotiable instrument before maturity. Every endorser has a liability to the parties that are subsequent to him.

Also, he is bound thereby to every subsequent holder in case of dishonour of the instrument by the drawee, acceptor or maker, to compensate such holder of any loss or damage caused to him by such dishonour. However, he is to compensate only after the fulfilment of the following conditions:

- (i) There is no contract to the contrary
- (ii) The Endorser has not expressly excluded, limited or made conditional his own liability
- (iii) And, such endorser shall receive due notice of dishonour¹⁷

¹⁵<https://devgan.in/nia/section/31/#:~:text=The%20drawee%20of%20a%20cheque,damage%20caused%20by%20such%20default.>

¹⁶ <https://indiankanoon.org/doc/1578249/>

¹⁷https://www.indiacode.nic.in/showdata?actid=AC_CEN_198_0_00001_202101_1636538981512§ionId=58625§ionno=35&orderno=35

5. Liability of Prior Parties (Section 36) -

Until the instrument is duly satisfied, every prior party to a negotiable instrument has a liability towards the holder in due course. The prior parties include the maker or drawer, the acceptor and all the intervening endorsers. Also, there liability to a holder in due course is joint and several. In the case of dishonour, the holder in due course may declare any or all prior parties liable for the amount.

6. Liability Inter-se -

Every liable party has a different footing or stand with respect to the nature of liability of each one of them.

7. Liability of Acceptor when Endorsement is Forged (Section 41) -

An acceptor of a bill of exchange who had already endorsed the bill is not relieved from liability even if such endorsement is forged. This is so even if he knew or had reason to believe that the endorsement was forged when he accepted the bill.¹⁸

8. Acceptor's Liability when Bill is drawn in a Fictitious Name -

An acceptor of a bill of exchange who draws a bill in a fictitious name, payable to the drawer's order will be liable to pay any holder in due course. He or she will not be relieved from such liability by reason that such name is fictitious.¹⁹

Dishonor Of Cheque

According to Section 6. of the Negotiable Instruments Act, the check is defined as the bill of exchange issued on a particular banker & expressed to be payable other than on demand. Includes the electronic image of the truncated check & a check in the electronic form. In the banking scenario, the honored cheque indicates the successful transaction of the amt. cited on the check to the beneficiary concerned i.e. payee. Conversely, if the Bank refuses to dispense

¹⁸ <https://indiankanoon.org/doc/1932246/>

¹⁹ https://www.indiacode.nic.in/showdata?actid=AC_CEN_2_33_00042_00042_1523271998701§ionId=45617

the cheque sum to the beneficiary, it will be treated as a dishonored cheque so, it refers to a scenario where the Bank refuses to dispense the check amount to the payee.²⁰

A.Reference to the term 'dishonor' made in Section 91 & 92 of the Negotiable Instruments Act, 1881.

S. 91. Dishonor by non-acceptance- A bill of exchange is stated or deemed to be dishonoured ,only if the drawee or one of the multiple drawees .not being the partners refuses to accept it , defaults on an acceptance after being duly obliged to accept the bill, or when presentment is excused & bill isn't accepted.so in other words it can be said that the bill can said to be or considered as dishonored If the drawee is unable to contract or when the acceptance is qualified.²¹

Section 92: Dishonor by Non-Payment

A bill or a cheque is said to be dishonored by non-acceptance only If maker of the'note' /the acceptor of the bill/ the drawee of the cheque defaults on payment after duly required to pay the same.

Therefore, if at the presentation the banker does not pay, then there is dishonor and the bearer immediately acquires the right of recourse against the drawer& against the other parts of the cheque.²²

Section 138 Negotiable Instruments Act 1881

The Negotiable Instruments (Amendment And Miscellaneous Provisions) Act, 2002, has made the following changes to Section 138. of the Negotiable Instruments Act:

²⁰ <https://www.legalserviceindia.com/legal/article-7575-dishonor-of-cheques.html>

²¹ <https://devgan.in/ni/section/91>

²²https://www.indiacode.nic.in/showdata?actid=AC_CEN_2_33_00042_00042_1523271998701§ionId=45670§ionno=92&orderno=95

138. Cheque dishonour due to 'insufficient funds' in the account:

If a cheque drawn by a person on an account maintained by him with a banker is returned by the bank unpaid for payment of any amount of money to another person from that account for the discharge, in whole or in part, of any debt or other liability, Such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a period of not less than one year if the amount of money standing to the credit of that account is insufficient to honour the cheque or if it exceeds the amt. arranged to be paid from that account, by an agreement made with that particular bank.

Provided provided in this section, nothing in this section shall apply unless:

the cheque has been handed to the bank within six months of the date on which it was drawn, or during the validity term of the cheque, whichever comes first;

within thirty days after receiving information from the bank regarding the return of the cheque as unpaid, the payee or holder of the cheque, as the case may be, makes a claim for payment of the specified amount of money by giving a notice in writing to the drawer of the cheque; and

within 'fifteen days' of receiving the said notice, the drawer of such cheque fails to make payment of the said sum of money to the payee or to the holder, in due course.²³

Scope of S.138 of NI act , 1881(Negotiable Instruments Act,1881):

Section 138 makes it as statutory offence dishonour cheques because there are insufficient funds in a person's bank account with the banker, and the amount arranged to be paid from that account by an agreement made with that bank is greater than the amount arranged to be paid from that account by an agreement made with that bank as specified in the act.

However, there are a number of reasons for cheque dishonour, such as signature mismatch, payment stopped by the drawer, account closed by the drawer, and so on.

Whenever a cheque for the discharge of any legally enforceable debt or other liability is dishonoured by the bank for lack of funds and payment is not made by the drawer inspite of a

²³ <https://districts.ecourts.gov.in/sites/default/files/study%20circles.pdf>

legal notice of demand, it shall be considered a criminal offence. The Act considers cheque dishonour to be a criminal offence, but it is only enforcing a civil right in a summary manner.²⁴

Ingredients of offence:

The essential ingredients of sec138 are:

1. Drawing a check by a person on an account of any debt or other liability.
2. Presentation of the check to the bank within a period of six months from the date of its drawing or within the period of its validity.
3. Return of the unpaid check by the drawee bank.
4. Written notice to the cheque drawer within 30 days of receipt of information relating to the return of the cheque as unpaid in the form of an advance debit or return memo.
5. Non-payment by the drawer within fifteen days of receipt of the notice.²⁵

The High Court of Maharashtra held in **Vishnu S/O Amthalal Patel v. State of Maharashtra & Anr.** that the accused's cheque could not be regarded a legally enforceable debt or liability. The evidence fell short of establishing that the applicant/accused owes a legally enforceable debt or liability for which the cheque was given. As a result, the applicant/accused has met his or her burden and refuted the presumption based on the aforementioned provisions of the Act.²⁶

Reasons for Dishonour Of Cheque

1. Stop payment:

In case of Electronics Trade and Technology Development Corporation India Vs Indian Technologies and Engineers (Electronics) Pvt. Ltd. It was held by hon'ble court that if the drawer issues a notice to the payee or holder in due course not to present the cheque for payment, and

²⁴<https://www.thelawadvice.com/articles/the-scope-of-sec-138-of-the-negotiable-instrument-act>

²⁵ <https://chambersofnitinchopra.wordpress.com/2023/01/30/ingredients-of-the-offence-under-section-138-of-the-negotiable-instruments-act/>

²⁶ <https://indiankanoon.org/doc/59151600/>

the cheque is still presented and dishonoured on the drawer's instructions, Section 138 ii applies. However, in another case, Modi Cement Ltd. vs Kuchil Kumar Nandi, the Supreme Court reversed its earlier findings and stated that section 138 would apply even if a cheque was dishonoured due to a "Stop Payment" instructions to the bank.²⁷

2. Bank Account Closed:

The dishonour of a cheque on the grounds that the drawer of the cheque has closed the account is a violation of S.138. Account Closed means that :

Despite the fact that the account was active at the time the cheque was issued, the account has since been closed. It indicates that the drawer has no intention of paying.

Closing an account is one of the ways a drawer can make his account insufficient to honour a cheque he has issued; thus, closing an account would not allow the accused to avoid his liability under section 138 of the Act.' In N. A. Issac vs. Jeeman P. Abraham & Anrol, it was held by hon'ble court that if a cheque is issued after an account has been closed, Section 138 will apply.²⁸

3. Refer to the Drawer:

In the usual sense, "refer to drawer" refers to a bank statement, as in we are not paying, go back to the drawer and ask why, or go back to the drawer and ask him to pay. The words implies that' the cheque has been returned due to a lack of funds in the drawer's account, as is 'customary in banking'. It's a polite approach for a bank to indicate that it won't be able to honour the cheque due to a lack of funds.

In the case of **M/s Electronic Trade & Technology Development Corporation Ltd. v. M/s Indian Technologist & Engineer (Electronic) Pvt. Ltd.** It was held by the hon'ble court that that

²⁷ <https://www.legalserviceindia.com/articles/nego.html>

²⁸ <https://www.sconline.com/blog/post/2021/12/04/account-closed-and-cheque-returned/>

if a cheque is returned with the endorsement "Refer to drawer" or "Instructions for stoppage of payment" or exceeds the arrangement, it constitutes cheque dishonour.²⁹

4. Post Dated Cheque:

A post dated cheque is a bill of exchange, when it's written or drawn, it becomes a cheque when it is payable on demand. Because a post-dated cheque cannot be presented to the bank, the issue of its return does not arise. S.138 of NI Act, comes into action, only when a post-dated cheque becomes a cheque having effect from the date displayed on the face of the said cheque.³⁰

Circumstances in which a Banker is Justified in Dishonouring Customers Cheque

1. Payment Countermanded by the Drawer

When the cheque drawer of the cheque countermands the payment, that is it issues the instruction to the bank not to make the payment. On receipt of a valid stop payment order, the cheque must be returned unpaid with the remark "payment countermanded by drawer"

2. Notice of Drawers Death

On receipt of the confirmed news of death of account holder, cheques signed by him should be returned unpaid with the remark "Drawer deceased".

3. Notice of Customers Insanity

Where the account holder is certified as insane by a recognised medical practitioner then the cheques signed by him should be returned unpaid.

4. Notice of Customers Insolvency

Where a customer is adjudged insolvent, the banker must refuse to pay cheques drawn by the customer.

²⁹ <https://judgementsincriminallaw.wordpress.com/2022/01/01/what-does-one-mean-by-refer-to-drawer-in-cheque-bounce-scenarios/>

³⁰ https://www.taxmanagementindia.com/visitor/detail_article.asp?ArticleID=10829

5. Liquidation of Company

When a bank receives notice from the liquidator in accordance with the provisions of Companies Act, requiring to pay the balance to liquidator's account, all the cheques by the companies should be returned unpaid.³¹

Offence by Company

A juristic person like incorporated companies and partnership firms are also made liable for the offence of dishonour of cheque described under section 138.

Under Section 141 –

- If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence

Provided further that where a person is nominated as a Director of a Company by virtue of his holding any office or employment in the central Government or State Government or a financial corporation owned or controlled by the Central Government as the case may be, he shall not be liable for prosecution under this chapter.

- Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of or is attributable to, any neglect on the part of, any director, manager, secretary, or other officer and shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

³¹ <https://www.bms.co.in/circumstances-under-which-a-cheque-may-be-dishonoured/>

Explanation- For the purpose of this section –

1. “Company” means any body corporate and includes a firm or other association of individuals; and
2. “Director” in relation to a firm, means a partner in the firm.

Section 141 covers 3 categories of person liable for offence under Section 138-

1. The company as principal offender
2. Persons who were in charge and were responsible for the business of company
3. Any other person who is director or a manager or secretary or officer of the company

There must be a specific accusation against each of the persons alleged as accused that such person was in charge of and responsible for the conduct of the business of the company or the firm at the relevant time when the alleged offence was committed by the company or the firm.³²

In the case **SMS Pharmaceuticals v. Neeta Bhalla**

The Supreme Court has categorically held that there has to be specific averment in the complaint to the effect that such a person was not only in charge of and responsible to the company for the conduct of its business but it was also required to be stated as to how and in what manner he was so responsible.

Cognizable of Offence

Section 142 of Negotiable Instrument Act of 1881 deals with cognizance of offences.

Condition Essential for Cognizance

For initiating proceedings against the drawer of dishonoured cheque drawee has to fulfil following conditions –

³² [https://www.drishtijudiciary.com/current-affairs/offence-by-company-under-section-141-nact#:~:text=Section%](https://www.drishtijudiciary.com/current-affairs/offence-by-company-under-section-141-nact#:~:text=Section%20141)

1. The payee or the holder in due course has to file a written complaint.
2. The complaint is to be made within one month of the date on which the cause of action arose under clause (c) of the proviso to Section 138.
3. Only the court of Metropolitan Magistrate or a Judicial Magistrate of First Class is empowered to try the offence defined under the provision of Section 138.³³

Jurisdiction

Dashrath Rupsingh Rathod v State of Maharashtra & Anr:

The Supreme Court's recent landmark decision has altered the essential criteria for initiating criminal complaints for cheque dishonour under Section 138 of the Negotiable Instruments Act. Previously, the holder of the cheque could file a case under Section 138 at his place of business or residence.

However, the Hon'ble Supreme Court has ruled that the complaint must be filed in the location where the bank branch on which the cheque was drawn is located, and that the judgement will apply retrospectively, that is, lakhs of cases pending in various Courts across the country will see an interstate transfer of cheque bouncing cases.³⁴

Case Laws

1. John K. Abraham v. Simon C. Abraham, (2014) 2 SCC 236

The SC held in this case where the cheque was issued to repay the loan advanced by the complainant, the burden of proof was on the complainant to draw a presumption under section 119 read with section 139 of NI Act. The complainant should have proved that he had requisite funds for the advancement of the Rs.1,50,000/- to the accused, that the accused issued the cheque to repay that loan, and that the accused had agreed towards such an arrangement. However, in the present case the complainant could not prove the date and place of the advancement and

³³ <https://ibclaw.in/section-142-cognizance-of-offences/>

³⁴ <https://www.livelaw.in/judgment-dashrath-rupsingh-rathod-regarding-territorial-jurisdiction-cheque-bouncing-case-prospective-category-cases>

made contradictory statements in cross-examination as to who wrote the cheque. The accused was therefore acquitted.³⁵

2. Kaushalya Devi Massand v. Roopkishore Khore, (2011) 4 SCC 593

Held the gravity of complaint under NI Act cannot be equated with an offence under the provisions of the Penal Code, 1860 or other criminal offences.³⁶

3. Vijay v. Laxman, (2013) 3 SCC 86 It was held in this case by the Supreme Court that the standard of proof necessary to rebut the assumptions of section 118 and 139 is not as high as that required of the prosecution. Doctrine of preponderance of probabilities applies.³⁷

4. Nishant Aggarwal v. Kailash Kumar Sharma, (2013) 10 SCC 72

The SC held that issuance of notice alone was not sufficient and that communication of the same was mandatory. Also, only after the notice has been served and there has been a failure of payment within the next 15 days, can the offence under section 138 be said to be completed.³⁸

Conclusion

The law related to Negotiable Instruments is a law of commercial world that was enacted to facilitate trade and commerce by providing for the sanctification of a credit instrument that would be deemed convertible into money and easily transferable from one person to another. In absence such instruments, trade and commerce activities were expected to be affected, as it was not practical for the trading community to continue using the bulk of the currency in force.

The Act's key objective is to legalize the manner by which the instruments covered by it can be passed from hand to hand through negotiation, just like any other good. Though the penal provisions have served to reduce the issue of cheques in a lighthearted or playful manner, or with a dishonest intention, the trading community today feels more comfortable in receiving payment by cheques.

³⁵ <https://supremetoday.ai/doc/judgement/00500025877>

³⁶ <https://indiankanoon.org/search/?formInput=kaushalya%20devi%20mass>

³⁷ <https://indiankanoon.org/doc/53206885/>

³⁸ <https://www.casemine.com/judgement/in/56099476e4b01497113a00fb>

However, because there is no provision for recovering the amount covered by the dishonoured cheque, if an accused is convicted under section 138 and has served his or her sentence, but is unable to deposit the fine then it is the complainant's sole choice is to file a civil suit. However, the process of seeking civil justice is notoriously slow, and recovering damages through a civil suit can take an inordinate amount of time. If the Government of India could establish a tribunal to deal with cheque dishonour and the liability that arises from it, the process of recovering damages for the aggrieved party could be accelerated.

