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## AWARDING COMPENSATION IN DISHONOR OF CHEQUE CASES

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### ABSTRACT

In business and other money transactions, Cheque is used as a instrument of payment. In few transactions, dishonor of Cheque happens unintentionally. Sometimes, purposely to defraud the payee also dishonor of Cheques are committed. This type of purposive dishonor of a cheque affects the faith and credibility of Cheques. It became important to make the act of dishonoring a cheque an offense and to penalise it in order to increase trust and acceptability of cheques. Sections 138 to 142 of a new Chapter XVII were created in 1988 for that reason. According to this law, the cheque's payee may submit a complaint and have the cheque's drawer punished. Even in that case, the payee must launch a civil lawsuit to obtain the cheque amount from the cheque drawer. Due to the progression of cheque dishonor cases, the payee can obtain the cheque amount without initiating a separate civil suit or incurring legal costs by receiving compensation of the cheque amount plus interest from the fine awarded and collected from the cheque drawer. In order to accomplish the goal of Chapter XVII's introduction, this article discusses the clauses that should be added in order to compensate the payee or holder of the cheque in due course.

**Key words:** - Dishonor of Cheques, Negotiable Instrument, Insufficiency of funds, Interim compensation, Award of compensation.

## **1.0. INTRODUCTION:**

Generally speaking, if someone is prosecuted for a crime and the crime is proven beyond a reasonable doubt at the end of the trial, they will be punished in accordance with the penal rules. As the state's guardian of its inhabitants, it is its responsibility to prosecute those who commit crimes. As a result, the State maintains the criminal justice system. Any crime may result in a fine, jail time, or both. The Government Treasury receives the fine that was imposed and collected from the accused. The satisfaction of "Accused is punished" is the only benefit that either the victim or the victim's legal heirs and dependents will receive under the aforementioned system. The Code of Criminal Procedure's Section 357 addresses the ordering of compensation to anyone who has been harmed or lost anything as a result of the offense.

## **2.0. OFFENSE U/s. 138 OF ACT AND COMPENSATION:**

### **2.1. Dishonor of Negotiable Instruments: -**

In the Negotiable Instruments Act, Section 91 speaks about "Dishonor by non-acceptance and whereas Section 92 deals with "Dishonor by non-payment". The bill is considered dishonored by non-acceptance when the drawee of the Negotiable Instrument, or any one of the several drawees who are not partners, defaults in acceptance upon being required to accept the bill, when the Negotiable Instrument is presented and the bill is not accepted, when the drawee of the instrument is incompetent to contract, or if the acceptance is unqualified. The Negotiable Instrument is "Dishonored for non-payment" when a pro-note, bill of exchange, or cheque is past due and the executor of the cheque, bill of exchange, and pro-note fails to make payment.

### **2.2. Dishonor of Cheque: -**

When a cheque drawn by an individual to settle a debt is returned by the bank as unpaid due to non-availability of enough funds in the account on which it was drawn or because the cheque amount exceeds the arrangements the drawer made with the banker for his account, it is considered to be "dishonored."

### **2.3. Dishonor of Cheque – Penal Offense: -**

A new chapter XVII was established and went into effect on April 1, 1989, in accordance with the Negotiable Instruments Act Amendment Act 66 of 1988. The aforementioned modification makes Section 138 of the Act, which deals with dishonoring cheques, a criminal provision. Dishonoring a cheque is considered a criminal offense.

Therefore, dishonoring a cheque now carries a maximum sentence of two years in jail, a maximum fine of double the value of the cheque, or both.

#### **2.4. Offense under Section 138 of Act: -**

According to section 138 of the Act, dishonoring a cheque is a unique offense. The cheque is issued by the drawer in order to refund any debt or liability that he is legally required to pay; if the cheque is returned unpaid, the drawer is responsible for paying the specified amount. Therefore, the drawer's obligation to pay back the debt or duty is a civil violation that is punishable by jail time and a fine.

#### **2.5. M/s Meters And Instructions Private Limited Vs Kanchan Mehra<sup>1</sup>**

The Honourable Supreme Court noted that "(i) Offense as per Section 138 of the Act is primarily a civil wrong" in paragraph 18 of the ruling. Because of the presumption under Section 139, the burden of proof is on the accused. However, "Preponderance of Probabilities" is the requirement for such proof. The same must typically be tried summarily in accordance with the Cr.P.C.'s summary trial provisions, with any modifications that may be necessary for procedures under Chapter XVII of the Act."

#### **2.6. Mens Rea:**

To prove any offense defined under the Indian Penal Code, now Bharathiya Nyaya Sanhita, 2023 (Offenses and Penalites), the intention of the accused to commit such offense is to be looked into and proved. The mental intention of the person is called as "Mens rea". The Criminal jurisprudence explains in detail regarding the "Mens rea" Concept and the lack of the accused's mental purpose that the crime was committed inadvertently or that it was an act of abrupt provocation and self-defence. So for punishing a person for the commission of an offense, the "Mens rea" is the important factor that is to be established and proved. That is, the accused has committed the offense with mental intention is to be proved beyond a reasonable doubt.

However, "Mens rea" is not required because dishonoring a cheque is considered a crime as per Section 138 of the Act and is punishable by jail time and a fine. It means the complainant need not prove that the accused/Drawer issued the cheque with the mental intention of cheating the complainant issued the cheque without having sufficient amount in his bank account.

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<sup>1</sup> AIR 2017 SC 4594

### **2.7. Dasharash Rupsingh Rathod Vs State of Maharastra<sup>2</sup>**

The Hon'ble Supreme Court noted in this ruling that "Any provision in the IPC is not speak about the offense in Section 138 of the Act and both the Act describes the offenses independently." Mens Rea is very much essential for every offense. Enhancing the use of Cheques than other Negotiable Instruments to improve trade activities is the object of the parliament and hence, proving of mens rea in case of offence U/s.138 of Act exempted. Because of this exemption to section 138 of Act, it leads to providing exemption of mens rea to the other two sections i.e., Section 138 and 140 of Act. So, mens rea need not be proved for section 138, 139 and 140 of Act."

### **2.8. Section 138 of Act itself provides a presumption:-**

According to the penal provision of Section 138 of the Act, which defines the offense of dishonor of cheque and the punishment for that offense, If a cheque is provided by the drawer to satisfy an obligation, either in full or in part, and the bank returns the cheque, it is presumed that the drawer has committed the crime of dishonor of cheque.

### **2.9. Himanshu Vs B.Shivamurthy<sup>3</sup>**

The following crucial requirements must be met in order to establish an offense as per Section 138 of the Act, 1881, that constitutes the crime of dishonoring a cheque. (i) The cheque must be delivered to the bank within six months before the cheque's expiration date. (ii) Within 30 days of learning from the bank that the cheque is being returned, the issuer of the cheque must get a written notification asking for the cheque amount. (iii) The cheque's drawer or holder neglected to pay the entire amount owed within 15 days of being informed. The issuer of the cheque is considered to have violated Section 138 of the Act if these three requirements are met.

### **2.10. Presumption Under Section 139 and 140 of the Act:-**

#### **Section 139:-Presumption infavour of holder:-<sup>4</sup>**

"Unless and otherwise the contrary is proven, it is presumed that the person who received the cheque of the type specified in section 138 received the cheque for the complete or partial discharge of any legal debt or other liability."

<sup>2</sup> (2014)9 SCC 129

<sup>3</sup> (2019) 3 SCC page 797

<sup>4</sup> Section 139 of the Negotiable Instruments Act

### **2.11. Section 140:-Defense Not Permitted in Any Prosecution Under Section 138:-<sup>5</sup>**

"The drawer's lack of knowledge at the time of the cheque's issuance that it might be dishonored upon presentation for the reason specified in that section shall not be taken as defence in a prosecution for an offense under section 138."

So the above two provisions speak about the other presumptions. As per Section 139, if the drawer issued a cheque in favour of a payee, then it is to be presumed that the cheque is given for the repayment of a debt in whole or in part or other liability. As per section 140, the drawer cannot take a defence that at the time of issuing the cheque, he has no reason to believe the cheque may be returned or dishonored.

### **2.12. T.P. Murugan Vs Bojan <sup>6</sup>**

According to Section 139 of the Act, it is maintained that if the drawer signed and issued the cheque, it is assumed that the cheque was issued to settle any legally enforceable obligation owed. However, the aforementioned presumption can be refuted by presenting appropriate proof that the cheque was issued for security, and the issuer of the cheque can also refute the supposition.

### **2.13. Indian Renewable Energy Development Agency Ltd. v. Sampelly Satyanarayana Rao**

Criminal procedures for dishonor of a postdated cheque. The details of each case determine whether a cheque is issued to settle a debt or liability. A postdated cheque is a widely accepted form of payment. If the date of the cheque's issuance and the admission of its signature would create a presumption of a legally enforceable debt in the holder's favour, Section 138 of the Act is applicable. The accused must refute this assumption.

### **2.14. Ripudaman Singh Vs. Balkrishna<sup>7</sup>**

It is held that for an agreement to sell a Cheque is issued and it is like legally enforceable liability and attracts action U/s.138 of the Act. The said agreement may not create any right or interest over the immovable property, but it makes the contract between the parties enforceable. If, under the said agreement, any payment is made, then it is for the purpose of Section 138, a duly enforceable liability or debt.

<sup>5</sup> Section 140 of the Negotiable Instruments Act

<sup>6</sup> (2018) 8 SCC page 469

<sup>7</sup> (2019) 4 SCC page 767

### **2.15. Krishnan Rao Vs. Shankargonda<sup>8</sup>**

According to the Supreme Court, there is no use in formally rejecting debt extensions. Only the presumption U/s.138 may fail if the accused presented adequate evidence to create a rebuttable defence regarding extensions of legally enforceable debt or duty.

### **2.16. Punishment of imprisonment or fine for the offense U/s.138 Act**

Following its implementation, Section 138 of the Act changed the punishment for dishonoring a cheque to a maximum one-year jail sentence, a fine equal to twice the amount on the cheque, or both. But a one-year jail term under Section 138 of the Act was subsequently extended to two years by the Amendment Act 55 of 2002, which came into force from February 6, 2003. Hence, the present punishment for dishonoring a cheque is imprisonment for up to two years and double the amount of the cheque, or both.

As a result, either at the time of provision 138 of the Act was inserted or later on through numerous revisions and the introduction of a new provision pertaining to trial processes until 2018. The Act does not direct the issuer of the cheque to give the holder of the cheque any money during the cheque's normal course of trail.

## **3.0. NEED AND PURPOSE OF AWARDING COMPENSATION AND INTERIM COMPENSATION:**

As pointed out earlier the Act of dishonor of Cheque U/s.138 of Act is described as primarily a 'Civil Wrong'. As pointed out by the Hon'ble Apex Court in M/s. Meters.. Pvt. Ltd., Vs. Kanchan Mehta<sup>9</sup>. Further, unlike other offenses defined in the Indian Penal Code or in Bharatiya Nyaya Sanhitha, 2023, the offense of dishonor of a cheque does not arise out of causing any injury or hurt to any other's body or property, and it is only a breach of contract of non compliance of his part of the promise. And the end result of the said Act of dishonor of Cheque is non-payment of the cheque amount, that is, the complainant is not able to get the Cheque amount even after completion of the trial proceedings U/s.138 of Act. Normally, the main purpose of the Complaint is to get the cheque amount or recovery of the Cheque amount from the Accused/Drawer of the cheque, and punishing the drawer is mostly secondary. But there is no provision for the Complainant to recover the Cheque amount from the drawer in the proceedings U/s.138 of Act. If the complainant has a right to get back the Cheque amount in the same proceedings, then his need will be fulfilled and the prosecution U/s.138 of Act will

<sup>8</sup> (2018) 8 SCC page 165

<sup>9</sup> AIR 2017 SC page 4594

become a complete solution for the issue of dishonor of a cheque and further the reason and purpose of insertion of section 138 of Act which are,

- i. to promote the culture of the use of cheques and
- ii. to increase the acceptance of Cheques for business transactions.<sup>10</sup>

All the above-stated objectives will be met completely and complainants will be satisfied. More specifically, there is no need to bring civil proceedings before the Court to claim the Cheques' value, and this is a great comfort for them.

Therefore, repayment or recovery of the Cheque amount by way of compensation is the need and purpose of the hour to reach the goal or object of Section 138 of Act.

### **3.1. Provisions for compensation**

Since the dishonor of cheque cases, criminal trial proceedings are followed, we looked into section 357(3) and 357 A of the Criminal Procedure code, 1973 which speaks about compensation.

Section 357(3) of Criminal Procedure code<sup>11</sup>,

When a court finds an accused person guilty and imposes a jail sentence without a fine, the court may mandate that the accused pay compensation, including the amount to be given to the individual who was harmed or lost something.

Section 357(A) of Criminal Procedure code,

(3) If the Trial Court is convinced that the compensation mandated by Section 357 is insufficient for reimbursement, or if the accused is released or found not guilty and the victim of the offense needs rehabilitation, it may suggest compensation.

The new law known as the Bharatiya Nagarik Suraksha Sanhita (BNSS) of 2023 replaces the Criminal Procedure Code, 1973 (Act 2 of 1974). Sections 395 and 396 of the BNSS of 2023 are identical to Section 357 of the Criminal Procedure Code, and both sections grant the court the authority to mandate that victims of crime get compensation.

Section 395 of BNSS, 2023<sup>12</sup>

Section 395 – (1) (d) states that if someone is found guilty of any crime, such as theft, criminal misappropriation, criminal breach of trust, or cheating, or if they have dishonestly received, retained, or willingly assisted in the disposal of stolen property knowing or having reasonable suspicion that it is stolen, they must compensate any legitimate buyer for the loss

<sup>10</sup> Purpose and reasons of Act No.66 of 1988

<sup>11</sup> The Code of Criminal Procedure, 1973 (Act 2 of 1974) Section 357(3)

<sup>12</sup> Bharatiya Nagarik Suraksha Sanhita, 2023 – Section 395

of the property if it is returned to the person who is entitled to it.

Section 396(3) of BNSS, 2023<sup>13</sup>,

Section 396 (3)--- is

The trial court, at the time of conclusion of trial, if satisfied, award compensation under section 395 is not adequate for rehabilitation, or where the case end in acquittal or discharge, if the victim is to be rehabilitated, the court may make recommendation for compensation.

Sections 357 A (1) and (2) of the Criminal Procedure Code,1973, are identical to Sections 396 (1) and 396 (2) of the Bharatiya Nagarik Suraksha Sanhita, 2023.

Therefore, in accordance with the Clauses of Sections 357 (3) and 357 A (1), (2) of the Criminal Procedure code, 1973 or the new Sections 395 (1) (d), 395 (3), and 396 of the BNSS 2023, the victims of the offense should receive compensation from the person who was responsible for the offense.

### **3.2. Interim Compensation:**

In circumstances of cheque dishonor, receiving of the cheque amount from the accused or issuer to the cheque, by the payee or holder in due course of the cheque is already at a disadvantage. In a few instances, the accused or drawer of the cheque was required to pay a portion of the sum as compensation. Amendment Act 20 of 2018 was introduced with two additional parts (parts 143-A and 148 in the Act) to eliminate the aforementioned disadvantage following the Supreme Court's and other High Courts' rulings and direction in the Vijayan v. Baby case.

The drawer of the Cheque if he pleads not guilty of the offense of dishonor of the Cheque or on conviction if he files an appeal against the said order, the court is empowered to order for interim compensation of an amount of not exceeding 20% of the value of the dishonored Cheque or 20% of the fine or compensation, respectively.

### **3.3. Interim Compensation At Trial stage of the case:**

The Act now has a new section 143A through the Amendment Act 20 of 2018. The drawer of the dishonored cheque must pay the payee interim compensation, which is equal to no more than 20% of the dishonored cheque's value, whether the charge is framed in any other case, or if the drawer enters a not guilty plea to the charge of dishonor of cheque in a summary trial or summons case.

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<sup>13</sup>Bharatiya Nagarik Suraksha Sanhita, 2023 – Section 396

In the event that the cheque drawer is found not guilty, the court will order the complainant to reimburse the interim compensation that the drawer paid. Additionally, the Court may mandate that interim compensation be repaid with interest at the bank rate in effect at the start of the applicable year.

### **3.4. Interim Compensation in Appeal:**

Further, in the said amendment, section 148 is also inserted, where interim compensation provisions applicable to appeal proceedings are included. In case of an appeal filed by the drawer against the verdict passed regarding the dishonor of the cheque case, the appellate court has the right to pass an order for making deposits of not less than 20 per cent of the fine/compensation awarded by the trial court. Additionally, the aforementioned 20% of the fine or compensation must be paid in addition to whatever interim compensation that the appellant or drawer has already paid.

## **4.0. APPROACH OF COURTS REGARDING COMPENSATION:**

Though there is no provision for awarding compensation regarding the dishonored cheque amount under Chapter XVII of Act, the Courts have slowly considered the Civil nature and provided for repayment of the Cheque amount to the payee or holder in due course, applied Section 357(3) of the Criminal Procedure Code, 1973 and awarded compensation. The decisions that laid a new path towards getting the dishonored Cheque amount as compensation are discussed here.

### **4.1. Vijayan Vs. Sadanandan. K and Another (Supreme Court dated 05.05.2009)<sup>14</sup>**

According to Section 357(3) of the Cr.P.C., the Magistrate Court sentenced the offender under Section 138 to simple imprisonment for a year. Rs. 8,25,000 in compensation was ordered, and failure to comply would result in six months of simple imprisonment. The Kerala High Court amended the order to revoke the one-year sentence of simple imprisonment till the court's raising and confirmed that the complainant will receive compensation of Rs. 8,25,000/- U/s. 357 (3) Cr.P.C., and that failure to do so would result in six months of simple imprisonment. This SLP is against the aforementioned order.

According to the rulings in (1) Hari Singh's case<sup>15</sup> and (2) Suganthi Suresh Kumar's

<sup>14</sup> Indiankanoon – <http://indiankanoon.org/doc/1806949>

<sup>15</sup> Hari Singh Vs Sukhbir Singh (1998) 4 SCC Page 551

case,<sup>16</sup> the Hon'ble Supreme Court held that the law has been correctly established, stating that the authority to impose a default sentence is recognised in cases where compensation ordered under Section 357(3) of the Cr.P.C. is not paid. It is further noted that where the compensation amount is not paid, the Court may pronounce a default sentence by combining the provisions of Section 357(3) and Section 431 of the Cr.P.C., read with Section 64 of the IPC. The Apex Court denied the SLP in light of the aforementioned discussions.

#### **4.2. Damodar.S.Prabhu Vs. Syed Babalal<sup>17</sup>**

In this ruling, the Supreme Court's three-judge bench stated: (i) According to paragraph 12, in the majority of cases of cheque dishonor, the complainant is more interested in recovering the cheque money than in putting the cheque drawer in jail because imprisonment simply serves to intimidate the drawer into paying the cheque amount. Further, if we compare the number of cases settled or compromised before pronouncing judgment and the number of cases that proceeded to trial up to judgment, we will find that the number of cases settled is maximum and only the minimum number will proceed up to judgment. Therefore, the remedy of compensation is to be given priority over the punitive aspect.

#### **4.3. R.Vijavan Vs. Baby and another<sup>18</sup>**

The Honourable Supreme Court noted and held the following in its ruling. Since the Hon'ble Apex Court's observations in paragraphs 15 through 18 are the most pertinent, pertinent passages from those paragraphs are included here.

According to paragraph 15, the proceedings under Section 138 are intended to penalise the cheque drawer for the offense of dishonoring the cheque rather than to recover the cheque amount, for which a civil complaint should be launched. However, rather than punishing the cheque drawer for the offense of dishonoring the cheque, the majority of financial institutions employ this Section 138 procedure to recover the amount of the cheque.

In para 16, it is pointed out by the Supreme Court that if the Cheque amount is not ordered as compensation and before deciding the criminal case, in many cases filing suit for recovery of the cheque amount becomes time-barred and causes difficulty to the complainant.

In para 17, it is held that for the same type of Cheque dishonored cases only some courts while convicting the Accused order for compensation and it creates uncertainty and

<sup>16</sup> Suganthi Suresh Kumar Vs. Jagadeesen (2002) 2 SCC Page 420

<sup>17</sup> AIR 2010 SC page 1907

<sup>18</sup> AIR 2012 Supreme Court page 528

inconsistency regarding Court functioning. Though Section 143(3) of the Act directs to conclude the Cheque dishonor cases within six months, practically it takes three or four years of time and by the time the limitation for filing civil case for Cheque amount recovery will be lapsed. The criminal Courts dealing with cheque dishonor cases shall act consistently and uniformly and ensure payment of compensation to the successful complainants.

The Supreme Court notes in paragraph 18 that additional provisions should be added to Chapter XVII so that the courts convicting the accused for the crime of dishonoring a cheque should also impose a fine large enough to cover the cheque amount plus 9% interest and order the complainant to receive compensation from the fine amount. This would avoid multiplicity of proceedings such as filing civil suit for Cheque amount recovery and uniformity in deciding the Cheque cases and it would also be helpful to achieve the object of Chapter XVII of Act. But the above aspect is a matter to be considered by the law commission.

### **5. CONCLUSION:**

As the Hon'ble Apex Court noted in the aforementioned ruling in R. Vijayaan Vs Baby, due to proceedings under Section 138 of the Act, the complainant in the cheque case, is unable to get the cheque amount, and the three-year period for launching a civil claim frequently expires. Even though the Hon'ble Supreme Court noted in the aforementioned ruling in 2012, there are still no measures taken as law for receiving the cheque amount as compensation. It is therefore insisted that Chapter XVII of the Act should be suitably amended to force the accused to pay the cheque amount, interest, and court fees within the specified time frame in the event that they are found guilty. Only that will increase the Cheque's utility and fulfil the object of the introduction of Section 138 of the Negotiable Instruments Act.