

**Effect of Recent Amendments in Negotiable Instruments Act on the pending Cases as Well as Appeals.**

**1. Evolution of Negotiable Instrument Act, 1881 with reference to amendments (From 2002 to 2015).**

The Negotiable Instrument Act was originally drafted in 1866 by the 3rd Indian Law Commission and introduced in December, 1867 in the Council and it was referred to a Select Committee. Objections were raised by the mercantile community to the numerous deviations from the English Law, which it contained. The Bill had to be redrafted in 1877. After the lapse of a sufficient period for criticism by the Local Governments, the High Courts and the chambers of commerce, the Bill was revised by a Select Committee. In spite of this Bill could not reach the final stage. In 1880 by the Order of the Secretary of State, the Bill had to be referred to a new Law Commission. On the recommendation of the new Law Commission the Bill was re-drafted and again it was sent to a Select Committee which adopted most of the additions recommended by the new Law Commission. The draft thus prepared for the fourth time was introduced in the Council and was passed into law in 1881 being the Negotiable Instruments Act, 1881 (Act No.26 of 1881)

Negotiable Instruments have been used in commercial world for a long period of time as one of the convenient modes of transferring money. Development in banking sector and with the opening of new branches, cheque became one of the favourite Negotiable Instrument. A cheque is an acknowledged bill of exchange that is readily accepted in lieu of payment of money and it is negotiable. However, by the fall of moral standards, even these Negotiable Instruments like cheques issued, started losing their credibility by not being honoured on presentment. It was found that an action in the civil court for collection of the proceeds of negotiable instrument like a cheque tarried, thus defeating the very purpose of recognizing a negotiable instrument as a speedy vehicle of commerce. Consequently, Section 4 of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988, inserted Chapter XVII in the Negotiable Instruments Act, 1881. Negotiable Instruments

Act is based on principles of English law and where no special consideration arise with reference to Indian circumstances, Courts are justified in construing statute conformably to provisions of English Law which follows the general commercial law of the rest of the world.

There are certain differences between the English Act and the Indian Act which preceded the former by a year. But substantially the two Acts correspond.

Contract Act is general statute dealing with contracts. Negotiable Instruments Act is statute dealing with particular form of contract and law laid down for special cases must always overrule provisions of general character.

The Negotiable Instruments Act was prima facie intended to lay down the whole law regarding cheques, bill of exchange and promissory notes.

Section 6 of the Negotiable Instruments Act defines a **cheque** as 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 electronic form.

According to explanation I - For the purpose of this section the expression

a) a cheque in the electronic form means a cheque which contains the exact mirror image of a bearer cheque, and is generated, written and signed in a secure system ensuring the minimum safety standards with the use of digital signature (with or without biometrics signature) and asymmetric crypto system.

b) a truncated cheque means a cheque which is truncated during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.

Explanation II. - For the purposes of this section, the expression clearing house means the clearing house managed by the Reserve Bank of India or a clearing house recognized as such by the Reserve Bank of India.

**As per section 9 of the Negotiable Instruments Act - Holder in**

**due course** means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if (payable to order) before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

**As per section 11 of the Negotiable Instruments Act - Inland instrument means** – a promissory note, bill of exchange or cheque drawn or made in (India) and made payable in, or drawn upon any person resident in (India) shall be deemed to be an inland instrument.

**As per section 13 of the Negotiable Instruments Act - Negotiable Instrument** – A negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer.

**Explanation i** – A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

**Explanation ii** – A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank.

**Explanation iii** – A negotiable instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees.

The Parliament in its wisdom had chosen to bring section 138 on the Statute book in order to introduce financial discipline in business dealings. Prior to insertion of section 138 of the Negotiable Instruments Act, a dishonoured cheque left the person aggrieved with the only remedy of filing a claim. The object and purpose of bringing new provisions in the Act was to make the persons dealing in commercial transactions work with a sense of responsibility and for that reason, under the amended provisions of law, lapse on their part to honour their commitment renders the person liable for criminal prosecution.

In our country, in a large number of commercial transactions, it

was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. The Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment, enacted the aforesaid provisions.

The remedy available in Civil Court is a long drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee.

As per section 138 of the Negotiable Instruments Act - where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both.

Provided that nothing contained in this section shall apply unless -

a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque (within thirty days) of the receipt of information by him from the bank regarding the return of the cheque as unpaid and

c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation – For the purposes of this section, debt or other liability means a legally enforceable debt or other liability.

**As per section 141 of the Negotiable Instrument Act – offence by companies** – 1) 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 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 or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

**As per Section 142 of the Negotiable Instrument Act – cognizance of offences –**

a) no Court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be the holder in due course of the cheque.

b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138.

Provided that, the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

c) no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138.

As per **Section 143 of the Negotiable Instrument** – power of Court to try cases summarily – all the offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 of the Code of Criminal procedure so as far as may be apply to such trials.

## **2. Amendment of the Negotiable Instrument Act of 2002**

Having regard to the working of these penal provisions on dishonour of cheques and the bottlenecks that have surfaced in strictly implementing these provisions, Parliament enacted the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 (55 of 2002)<sup>1</sup>, which is intended to plug the loopholes. This amendment Act inserts five new sections from 143 to 147 touching various limbs of the Parent Act and the amendment Act had been brought into force on Feb. 6, 2002. Section 143 is intended to achieve speedy trial. By applying provisions of Sections 262 to 265 CrPC, it enables a Judicial Magistrate or Magistrate of the First Class to conduct the trial. Then it contemplates summary trial and provides for continuous day-to-day hearing of the case till its conclusion and further stipulates that the trial is to be completed within **6 months** from the date of filing of the complaint. It further empowers the Magistrate to pass a sentence for imprisonment for a term not exceeding one year or a fine not exceeding twice the amount of the cheque notwithstanding anything contained to the contrary in CrPC.

The new **Section 144** deals with the service of summons. It would now enable the Magistrate not to follow the elaborate procedure for serving summons as required by Sections 61 to 90 CrPC. The sub-section of this section allows the summons to be served through the speed-post and notified private couriers besides the normal process. Precisely speaking, this section has brought about the concept of "constructive service". This provision is analogous to the principle incorporated in Section 27 of the General Clauses Act, 1897. According to this where the sender has dispatched the notice by post with correct address written on it, then it can be deemed to have been served on the sender unless he proves that it was really not served. This is the position which got endorsed by

the Supreme Court in **K. Bhaskaran** case. Also on refusal to take delivery of the summons, the Court can declare that the summons have been duly served.

According to **Section 145** the complainant can give his evidence by way of an affidavit and the same may be attached with the complaint and if the accused wants to contradict the contents of the affidavit the complainant may be called for examination.

Then Section 146 provides for presumption to bank memorandums. Earlier whenever a question arose whether there was insufficient funds in the account of the drawer of the cheque, it was conceived to be a matter of evidence being a question of fact and onus was placed on the complainant and for discharging this onus the bank personnel was to be examined. This naturally delayed things. It has, therefore, been provided that based on the bank slip the Court would presume the fact of dishonour, unless and until such fact is disproved.

Now lastly, **Section 147** provides for compounding of offences under this Act. There was a difference of opinion in different High Courts on the question whether offences under the provisions of the Act were compoundable or not. The Kerala High Court's view was in the negative whereas the view of the Andhra Pradesh High Court was in the affirmative. Unfortunately the matter did not reach the Apex Court. Parliament, therefore, has resolved the controversy and provided that offences under the Act would be compoundable.

Besides this Sections 138, 141 and 142 have also been amended by enhancing the imprisonment term from one year to two years and the period of time to issue demand notice to the drawer from 15 days to 30 days and by providing immunity from prosecution for nominee director. It has also been provided that the Magistrate can condone the delay in filing the complaint in special and peculiar circumstances.

An objective perusal of the aforesaid amendment would reveal that the Act has become a self-contained statute wherein an "in-house mechanism" has been provided in the Act itself, which would take care that the trial is a speedy one, no undue delay occurs, the bouncer is booked and he does not escape the rope on flimsy grounds and that a more deterrent punishment is

provided. Similarly the service of summons has been made easy and the offence is made compoundable. It, therefore, follows that the amendment has addressed itself squarely to the shortcomings that were perceived and exposed hitherto in its administration right from the 1988 amendment. Simultaneously procedural norms have been simplified and some "determinatives" have been put forth, which would take care of every conceivable contingency, which could permit the bouncer to rock the boat of proceedings during trial as all the bottlenecks have been unplugged. Let "bouncers" be more beware now.

### **3. JURISDICTIONAL DEVELOPMENT UNDER SECTION 138**

The Act is silent on the matter pertaining to the relevant jurisdiction with respect to filing of criminal complaint in case the offence of Dishonour of the Cheque is committed 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 of CrPC provides that "Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed". Section 178 provides that "(a) When it is uncertain in which of several local areas an offence was committed, or (b) Where an offence is committed partly in one local area and partly in another, or (c) Where an offence is a continuing one, and continues to be committed in more local area has one, or (d) Where it consists of several acts done in different local areas, It may be inquired to or tried by a court having jurisdiction over any of such local areas."

Thus, in all the above situations, the court having jurisdiction over any of such local areas may try the offence.

The jurisdiction is explained with reference to the Landmark cases of K.Bhaskaran Vs. Sankaran VaidhyanBalan and Anr and the later case of Dashrath Rupsingh Rathod v. State of Maharashtra & Anr, while assessing the position before and after these judgements.

**Position Before “ K. BHASKARAN” Case**

- **Jugal Kishore Arun v. V.A. Neelakandan**  
 ( *Jugal Kishore Arun v. V.A. Neelakandan 1990 L.W. (Cri.) 492*)  
 Bellie, J. observed, that a prosecution for issuing of a cheque without sufficient funds in the Bank, will have to be instituted before the Court within whose jurisdiction the cheque was issued.
- **In P.K. Muraleedharan v/s C.K.Pareed and Anr**  
 (PK. Muraleedharan v/s C.K.Pareed and Anr 1993(1)ALT(Cri)424)  
 Kerala High court held that the place where the creditors resides or the place where the debtor resides cannot be said to be the place of payment unless there is any indication to that effect either expressly or impliedly. The cause of action as contemplated in S. 142 of the Act arises at the place where the drawer of the cheque fails to make payment of the money. That can be the place where the Bank to which the cheque was issued is located. It can also be the place where the cheque was issued or delivered. The Court within whose jurisdiction any of the above mentioned places falls has therefore got jurisdiction to try the offence under Section 138 of the Act.
- **M/s. Essbee Food Specialties and Ors. v. M/s. Kapoor Brother** (Essbee Food Specialties and Ors. v. M/s. Kapoor Brother 1992 (Suppl)MWN(Cri.132)  
 High Court of Punjab and Haryana on the question of jurisdiction stated as under: As to the question of jurisdiction, it is to be considered that the issuance of the cheques and their dishonoring are only a part of cause of action; the offence was complete only when the petitioner failed to discharge their liability to the respondent-firm. For discharging a debt, it is the debtor who has to find out his creditor and since in the present case, the respondent, who is the creditor, has its office at Panchkula, the Court at Ambala had the territorial jurisdiction.

- *Rakesh Nemkumar Porwal v/s Narayan Dhondu Joglekar and anr.*  
( *Rakesh Nemkumar Porwal v/s Narayan Dhondu Joglekar and anr*  
*Cri.L.J680*)

The anatomy of S. 138 comprises certain necessary components before the offence can be said to be complete, the last of them being the act of non-payment in spite of 15 days having elapsed after receipt of the final notice. It is true that the cheques may have been issued by the accused at his place of residence or business, the Bank on which it is drawn being often located at a second spot and inevitably the complainant or the payee has his place of residence or business at yet another location. It was for this reason that the Kerala High Court in the case of *PK.Muralendharan v. C.K.Pareed*<sup>15</sup>, took the view that any of the three Courts could exercise jurisdiction. In our considered view, where undoubtedly each of the components constitute a stage in the commission of the offence, the final non-payment being the ultimate one, S. 178 Cr.P.C. would clearly apply to an offence of this type."

- *Gautham T. V. Centre v. Apex Agencies ( 1993) Crimes 723*

High Court of Andhra Pradesh held that the Court within whose jurisdiction the cheque is given, or where the information of dishonour is received or where the office of the payee is situated, will have jurisdiction to try the offence.

- *Canbank Financial Services Ltd. v/s Gitanjali Motors and Ors*  
(*Canbank Financial Services Ltd. v/s Gitanjali Motors and Ors 1995*  
*Cri.L.J.1272*)

Delhi High Court held that the place where the cheque was given or handed over is relevant and the Courts within that area will have territorial jurisdiction. Also held, "Then as per Section 179 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 those legal jurisdiction such thing has been done or such

consequence has ensued. Payment of cheque against an account having sufficient funds to meet the liability under the cheque is one act while dishonor of the cheque is a consequence of such an act. Therefore as per Section 179 also the place where the cheque was given or handed over will have jurisdiction and the courts of that place will have jurisdiction to try the offence. Likewise for purposes of Section 178(b) payment of cheque may be one part of an offence and dishonor of the cheque may be another part and, therefore, both places i.e. place where the cheque was handed over and the place where it was dishonored will have jurisdiction."

- *Sanjai Makkar and Ors.Vs.Saraswati Industrial Syndicate Limited and Ors.* (SanjaiMakkar and Ors. Vs. Saraswati Industrial Syndicate Limite dand Ors 1999 Cri LJ 1958)  
The High Court of Allahabad held "...so far as territorial jurisdiction is concerned, the cause of action arises at a place where the cheque was drawn, or a place where the cheque was presented, or a place where the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period and at a place where the drawer failed to make the payment within 15 days of the receipt of notice."
- *Sunil SrivastavaVs.Shri Ashok Kalra*  
(*Sunil Srivastava Vs. Shri Ashok Kalra 101(2002)DLT245*)  
It is manifest from the law laid down in the aforementioned judgment that the cause of action for filing a complaint under Section 138 of the Act may also be at a place where the drawer of the cheque resided or the place where the payee resided for the place where either of them carried on business or the place where payment was to be made. The complaint can be filed before the court which has jurisdiction over any of these places. In the cited case a complaint under Section 138 was filed before a Magistrate at Adoor in Pathanamthitta District in Kerala. The accused challenged the territorial jurisdiction of the court of try the case. His

contention was that the cheque was dishonoured at the bank of the Branch at Kayamkulam, situated in another District. he also denied the issue of cheque and also receipt of notice of demand. The later two objections were decided against the accused. On the first question the Supreme Court enunciated the law as reproduced above.

- ***Shri Ishar Alloy Steels Ltd. v. JayaswalsNeco Ltd.* (Shri Ishar Alloy Steels Ltd. v. JayaswalsNeco Ltd (2001) 3 SCC 609)**  
The dishonoured cheque had been presented for encashment by the Complainant/holder in his bank within the statutory period of six months but by the time it reached the drawer's bank the aforementioned period of limitation had expired. The question before the Court was whether the bank within the postulation of Section 138 read with Sections 3 and 72 of the NI Act was the drawee bank or the collecting bank and this Court held that it was the former. It was observed that "non-presentation of the cheque to the drawee bank within the period specified in the Section would absolve the person issuing the cheque of his criminal liability under Section 138 of the NI Act, who otherwise may be liable to pay the cheque Page 8 8 amount to the payee in a civil action initiated under the law. This decision clarifies that the place where a complainant may present the cheque for encashment would not confer or create territorial jurisdiction
- ***Prem Chand Vijay Kumar v. Yashpal Singh* ( Prem Chand Vijay Kumar v. Yashpal Singh (2005) 4 SCC 417)**  
Held that upon a notice under Section 138 of the NI Act being issued, a subsequent presentation of a cheque and its dishonour would not create another 'cause of action' which could set the Section 138 machinery in motion. Instead of the five Bhaskaran concomitants, only four have been spelt out in the subsequent judgment in Prem Chand.

#### 4. **Position After “K. Bhaskaran” case**

It was held in paragraph 12 of the judgment of K. Bhaskaran case that "Under

Section 177 of the Code "every offence shall ordinarily be inquired into and tried in a court within whose jurisdiction it was committed. "The locality where the bank (which dishonored the cheque) is situated cannot be regarded as the sole criteria to determine the place of offence..... A place, for that purpose, would depend upon a variety of factors. It can either be at the place where the drawer resides or at the place where he payee resides or at the place where either of them carries on business. Hence, the difficult to fix up any particular locality as the place of occurrence for he offence under Section 138 of the Act.

Considering and reproducing 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 of all the above five is a sine qua non 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.....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".

A slightly new face to law existing post K. Bhaskaran case was given in Harman Electronics Pvt. Ltd. V/s. National Panasonic India Pvt. Ltd. (Cri.Appeal No.2021 of 2008 arising out of SLP (Criminal) No.1712 of 2004 Decision Dated 12/12/2008 Supreme Court of India)

In this case Hon'ble Supreme Court examined the question of jurisdiction yet again under Section 138 of the Act. Appellant, was from

Chandigarh and had issued a cheque which was returned dishonored, the cheque was issued in Chandigarh to the complainant where he had a branch and was actually present. Notice of payment for the dishonored cheque was issued from the head office of the complainant in Delhi to the accused office in Chandigarh. Due to failure on the part of the drawer a complaint was filed in Delhi. When the case came before the lower courts as well as high court, emphasis and reliance was laid down on 'K. Bhaskaran Case' and finally coming to a conclusion so as to that Delhi Court also have the 'jurisdiction'. The appellant/respondent contended that Chandigarh court had the jurisdiction to try the case but his contention was dismissed, finally, leading to an appeal to Supreme Court. Court held that the court derives its jurisdiction when a cause of action arises and jurisdiction can't be conferred on or for any act of omission on the part of the accused. Also, held, issuance wont but communication will give rise to cause of action. Hence, Delhi Court will not have jurisdiction to try the case. The court adjudged on 'whether a Delhi court would have jurisdiction merely on the ground that the- statutory notice under section 138 was issued from Delhi'. 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.

5. **Distinction between K. Bhaskaran's case and Harman's case-A Slight Dilution**

- There exists conflict between the two decisions inasmuch as in Bhaskaran's case (supra) it was held that the expression "giving of notice"

occurring in proviso (b) to Section 138 of the NI Act means "sending of notice" whereas in Harman's case (supra) it was held that the said expression means "receipt of notice". The Harman case has adopted a strict approach towards territorial jurisdictions of court. It thus correctly addressed the rampant misuse of the liberal interpretation in Bhaskaran's case.

- **Nishant Aggarwal v. Kailash Kumar Sharma ((2013) 10 SCC 72)**

Court was once again dealing with a case where the complaint had been filed in Court at Bhiwani in Haryana within whose territorial jurisdiction the complainant had presented the cheque for encashment, although the cheque was drawn on a bank at Gauhati in Assam. Relying upon the view taken in Bhaskaran this Court held that the Bhiwani Court had jurisdiction to deal with the matter. While saying so, the Court tried to distinguish the three-Judge Bench decision in Ishar Alloy Steels (supra) and that rendered in Harman Electronics case (supra) to hold that the ratio of those decisions did not dilute the principle stated in Bhaskaran case.

## **6. Impact of K. Bhaskaran Case**

- The aforesaid Bhaskaran case had many unintended consequences. As per the case, the cheque bouncing case can be registered either at locations, at the convenience of the payee as the cheque may be drawn at Location A, presented for payment and consequently dishonoured at Location B, and legal notice may be issued to the drawer of the cheque for payment of the cheque amount from his branch office located in Location C, as he may have several bank accounts in various places. This causes suffering to the drawer of the cheque, although gives flexibility to the payee of the cheque to choose the place where he was to file the cheque bouncing case. Sometimes, several cheques are issued at the same time by a person to the same payee, which are deliberately presented in different banks located at different places, and thereafter, cheque bouncing cases are filed at different places against the drawer of those cheques.

**7. New Dimensions To Law- Dashrath Rupsingh Rathod v. State of Maharashtra &Anr. (AIR 2014 SC 3519)**

After the K. Bhaskaran judgement, it was felt at large that the law in its wide expansive amplitude allowed the complainant to rather rampantly abuse and misuse the law to result in hardship and adversity to the drawer, with relative ease. It gave unrestricted power to the payee to singlehandedly confer jurisdiction on a place of his convenience, consequently, leading to harassment as the payer had, at times, no concern or relation with the distant places where the cheque was issued or which had no link to the transaction or drawer. The alteration in the law was thus welcomed as a much required change in prevalent laws as laid down by K.Bhaskaran. The leniency thus, was the cause of much upheaval. Thus, the new judgement by means of a strict approach sought to discourage the payer from misusing or carelessly issuing cheques. Due sympathy was thus shown or given to the drawer.

In fact the Hon. Supreme Court in Dashrat Rathod case has observed that "Courts are enjoined to interpret the law so as to eradicate ambiguity or nebulousness, and to ensure that legal proceedings are not used as a device for harassment, even of an apparent transgressor of the law. Law's endeavour is to bring the culprit to book and to provide succour for the aggrieved party but not to harass the former through vexatious proceedings. The court held that, the territorial jurisdiction according to section 138 or under the act should exclusively be determined and considered by place/location of the offence. The return of the cheque by the drawer bank only constitutes commission of offence under section 138. Hence, the courts within which drawer bank is located will only have the jurisdiction to try the case.

1. An offence under section 138 of the Act, will be considered committed as soon as the cheque drawn by the accused on an account maintained by him for the discharge of debt or liability is returned without honored, either due to insufficiency of funds of the said drawer's account or the amount exceeds the drawer's arrangement with the bank. But, the the cause of action could be derived or triggered only when:

2. The general rule stipulated under Section 177 of Cr.PC applies to cases under Section 138 of the Negotiable Instruments Act. Prosecution in such cases can, therefore, be launched against the drawer of the cheque only before the Court within whose jurisdiction the dishonour takes place except in situations where the offence of dishonour of the cheque punishable under Section 138 is committed along with other offences in a single transaction within the meaning of Section 220(1) read with Section 184 of the Code of Criminal Procedure or is covered by the provisions of Section 182(1) read with Sections 184 and 220 thereof.
3. The court clearly addressed the term 'cause of action' and held that the facts constituting cause of action do not constitute the ingredients of the offence under Section 138 of the Act. And, once the cause of action is triggered in favor of the complainant, the jurisdiction of the court to try the case will be determined by the place where the cheque was returned dishonored.
4. In respect of pending cases it distinguished them into following categories and suggested actions as follows: a. Cases in which trial has commenced: Cases in which summoning and appearance of the accused has taken place and recording of evidence has commenced will continue at the same court. These cases will be deemed to have been transferred from the court which had jurisdiction to the court where they are tried, as per the relaxation provided in public interest. b. Cases pending at the pre summoning stage: All other complaints including those where the accused/respondent has not been properly served, cases in which summons have not been issued will be maintainable only at the place where the cheque stands dishonored.

Position after DasrathRathod Case

***Vinay Kumar Shailendra v Delhi High Court Legal Services Committee &Anr.***

Supreme Court observed "The issue of a notice from Delhi or deposit of the cheque in a Delhi bank by the payee or receipt of the notice by the

accused demanding payment in Delhi would not confer jurisdiction upon the Courts in Delhi. What is important is whether the drawee bank who dishonoured the cheque is situated within the jurisdiction of the Court taking cognizance."

***Ramanbhai Mathurbhai Patel v. State of Maharashtra (2014) 4 Boc Cr(Cri) 126 (2014) 10 SCC 708***

In a case before the Bombay High Court, two cheques were issued, one before the Gandhinagar branch of the State Bank of India and one before the Bank of Maharashtra. The cheques being 'At par', i.e. multi-city cheques payable at par in all branches of the bank, were payable at all branches of the abovementioned banks. Factually, the cheque deposited by the complainant in the branches of the banks at Kurla, Mumbai, the nearest available branch of the banks and were dishonoured. So, the issue raised was that whether the complaint should be filed at Kurla or at Gandhinagar, as the cheques were payable at par across all the branches. It was held that by issuing cheques payable at all branches, the drawer is giving an option to get the cheques cleared from the nearest available branch of the bank and therefore the cause of action has arisen in the jurisdiction of the Metropolitan Magistrate, Kurla Court. The courts in Mumbai will have the jurisdiction to try the offence as the cheques were dishonoured in Mumbai. However, the above decision of the Bombay High Court was challenged in the Supreme Court vide SLP (Criminal) No. 7251 of 2014. This SLP was dismissed by the Supreme Court as withdrawn on 20 March 2015.

**8. Negotiable Instruments (Amendment) Act, 2015.**

In a Bill, 2015, it has been opined, in view of the rationale for changing the law with respect to jurisdiction under section 138 of the negotiable instruments act, 1881 that:

"The proposed amendments to the Negotiable Instruments Act, 1881 ("The NI Act") are focused on clarifying the jurisdiction related issues for filing cases for offence committed under section 138 of the NI Act. The

clarification of jurisdictional issues may be desirable from the equity point of view as this would be in the interests of the complainant and would also ensure a fair trial. The clarity on jurisdictional issue for trying the cases of cheque bouncing would increase the credibility of the cheque as a financial instrument. This would help the trade and commerce in general and allow the lending institution, including banks, to continue to extend financing to the economy, without the apprehension of the loan default on account of bouncing of a cheque. Concerns had been raised by various stakeholders (creditors, industry associations, financial institutions, etc) expressing apprehensions that the DasrathRathod decision will offer undue protection to defaulters at the expense of the aggrieved complainant; and would ignore the current realities of cheque clearing with the introduction of CTS (Cheque Truncation System). In CTS cheque clearance happens only through scanned image in electronic form and cheques are not physically required to be presented to the issuing branch (drawee bank branch) but are settled between the service branches of the drawee and payee banks.”

**A) The Amendment Act inserted Section 142(2) in the Principal Act. It reads as follows:**

“(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,-

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.- For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case

may be, maintains the account.”

**B) It also inserts a new Clause 142A, as follows :-**

142A. Validation for transfer of pending cases.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or any judgment, decree, order or direction of any court, all cases transferred to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, shall be deemed to have been transferred under this Act, as if that sub-section had been in force at all material times.

(2) Notwithstanding anything contained in sub-section (2) of section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under sub-section (2) of section 142 or the case has been transferred to that court under sub-section (1) and such complaint is pending in that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.

(3) If, on the date of the commencement of the Negotiable Instruments (Amendment) Act, 2015, more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, before which the first case was filed and is pending, as if that sub-section had been in force at all material times.]

The latest change and the present prevalent law being the

2015 Amendment Act, has the effect of nullifying the law as laid down by the Hon. Supreme Court in 2014, Dasrat Rathod case. The legal effect of the Amendment is that, so as to institute a complaint under Section 138, the same must be instituted as per :- If the cheque is delivered for collection through an account, the branch of the bank where the payee or holder, maintains the account, is situated; or If the cheque is presented for payment by the payee or holder otherwise through his account, the branch of the drawee bank where the drawer maintains the account, is situated. This law comes with a promise to solve and aid in not only the speedy disposal of the pending cases pertaining to complaints under 138, but also to bring a sanctity to the system by seeking to clamp down on defaults in payments. It clarifies the legal position as to jurisdiction and also seeks to keep up with the modern banking system.

9. **PRESUMPTIONS UNDER NEGOTIABLE INSTRUMENTS ACT.**

Section 118 of the N. I. Act speaks about certain presumptions. Sub-Section (a) under said section speaks about the presumption in concern of consideration. It is as:

“**of consideration** - that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration”;

under clause (b) there is presumption about **date**;

under Clause ( c ) there is presumption about **time of acceptance** ;

clause (d) speaks about presumption about **time of transfer**;

clause (e) speaks about the presumption **as to order of endorsements**;

clause (f) speaks about presumption about stamps; and

clause (g) speaks about the presumption that holder of the Negotiable instrument is a holder in due course.

Section 139 of the N. I. Act which is part of the Chapter XVII inserted by amendment in the year 1988 to provide penalties in the case of dishonour certain of certain cheques, strengthens the presumption of consideration under Section 118 (a) of the N. I. Act. It speaks that it shall be presumed until the contrary is proved, that the holder of a cheque received cheque of the nature referred to in Section 138 for the discharge while or in part of any debt or other liability.

The Hon'ble Apex Court in the case **Hiten P Dalal Vs. Bratindranath Banerjee**, [(2001) 6 S.C.C.16] : {2001 ALL MR (Cri) 1497}, laid down that it is obligatory upon the Court in terms of Sections 118 and 139 of the N. I. Act, to raise the presumption in every case where the factual basis of the raising of presumption has been established.

Prior to that the Hon'ble Apex Court in the case **K. Bhaskaran Vs. Sankaram Balan**, (AIR 1999 S.C. 3762) held that once the signature on the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 and 139 of the N. I. Act, can legally be inferred that the cheque was drawn for consideration on the date, which the cheque bears. The same view was reiterated by the Hon'ble Apex Court in the case of **K. N. Beena Vs. Muniyappan and Anr.**, {2002 (1) ALL MR 277 (S.C.)}.

In the case "**Krishna Janardhan Bhat Vs. Dattatraya Hegade** (2008 ALL MR (Cri) 1164 (S.C.) the Hon'ble Supreme Court held that the presumption under Section 118 (a) and 139 of the N.I. Act, does not cover presumption about the legally enforceable debt. This fact has to be proved by the complainant. But thereafter the Hon'ble three Judges Bench of the Hon'ble Supreme Court in the case of **Rangappa Vs. Shri Mohan** ( 2010 ALL SCR 1349) though did not over-rule, whole judgment in the case of **Krishna Janardhan Bhat** set aside the principle laid down therein in concern of legally enforceable debt. It would be proper to look para No. 14 of the said judgment which is taken as it is:

“In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable

debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) 20 may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the 21 test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a

defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.”

Through the above cited judgments the principle laid down by the Hon'ble Apex Court is that once the accused has admitted the presence of his signature on the cheque which is drawn on his account that the cheque was issued by the accused to discharge the legally enforceable debt. This presumption is the presumption of law.

Naturally the burden rests on the accused to rebut the presumption by leading cogent and clinching evidence. The burden to rebut this presumption is not so onerous as of the prosecution who has to prove the guilt of the accused beyond reasonable doubt. The para No. 14 which is referred to above taken through the judgment of the Hon'ble Apex Court in the case of **Rangappa** ( *cited supra* ) makes it clear that the standard of proof for the accused is not unduly hard. He has to probabalise his defence only. Once he has probabalised his defence, then the onus shifts to the complainant to prove that there was debt and it was legally enforceable. It is undoubtedly clear that mere suggestions of denial of debt would not work. The accused has to bring on record either through cross-examination of the complainant or his witnesses or by way of documentary evidence, the cogent and clinching evidence circumstances which would probabalise his stand. He need not for that purpose to enter into witness box.

Under Section 146 of the N. I. Act which is inserted by way of amendment in the year 2002 wherein the presumption in concern of bank's slip is available which is as:

**“146. Bank's slip *prima facie* evidence of certain facts.**

The Court shall, in respect of every proceeding under this Chapter, on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved”.

**10. The promise made in the cheque is an enforceable agreement as is directed in Section 25 (3) of the Indian Contract Act.**

Under Section 25 (3) of the Indian Contract Act, a promise can be made even in a case where the limitation for recovery of the amount has already expired. Such promise has to be in writing. It can be in the form of a cheque.

In view of Section 25 (3) of the Indian Contract Act, when a debt has become barred by limitation, a written promise to pay, furnishes a fresh cause of action.

It is observed and held by Hon'ble Delhi High Court in Suresh Kumar Joon Vs. Moolchand Motors & others' case (supra), decided on 22<sup>nd</sup> August, 2012 as follows :

It is true that the cheque does not contain an express promise in writing, to pay the amount of the cheque to the payee or the cheque. However, section 9 of the Indian Contract Act makes it very clear that the promise can be express as well as implied. In my view, when a debtor issues a cheque to his creditor, he makes an implied promise to him to pay the amount of the cheque being issued by him. It is only towards fulfillment of that such promise that a cheque is issued by the debtor to the creditor. Once it is alleged that the relationship between the parties was that of debtor and a creditor and it is further alleged that the cheque was issued by the debtor to the creditor, it would be difficult to dispute that a cheque contains an implied promise, in writing, to pay the amount of the cheque. Since, even a time - barred debt is saved by section 25 (3) of the Indian Contract Act, 1872, the issuance of a cheque toward repayment of a time barred debt constitutes a contract within the meaning of section 25 (3) of the Indian Contract Act, 1872.

Similar view was taken by the Kerala High Court in Gopinathan Vs. Sivadasan [2006 (4) KLT 779], wherein the Court, inter alia, held as under:

"8. Even assuming it to be time barred, when the cheque is written and signed, there is a promise to pay the amount to the payee, through the drawee of course. Such promise, even if the liability is barred, is valid and enforceable under law in view of section 25 (3) of the Contract Act. Thereafter, when the delivery takes place, the drawal is completed. Such cheque drawn is issued for the discharge of a liability, which is promised under the cheque itself. That being so, I do not find any reason to refer the matter to a Division Bench for further consideration. The argument of the learned Counsel for the petition that there must be another agreement - other than the cheque - in order to reckon the promise in the cheque to be a valid agreement for the purpose of section 25 (3) cannot obviously be accepted. The promise made in the cheque is an enforceable agreement as is directed in section 25 (3) of the Contract Act...."

### **: CONCLUSION :**

As we trace the history and evolution of the Negotiable Instruments Act, 1881 and focus on the jurisdictional debate under Section 138, which deals with dishonor of cheques, we analyse the necessities which forced the Courts and the Government to adopt landmark changes in the law. The legal effect of the Ordinance is that, so as to institute a complaint under Section 138, the same must be instituted as per : If the cheque is delivered for collection through an account, the branch of the bank where the payee or holder, maintains the account, is situated; or If the cheque is presented for payment by the payee or holder otherwise through his account, the branch of the drawee bank where the drawer maintains the account, is situated. This law comes with a promise to solve and aid in not only the speedy disposal of the pending cases pertaining to complaints under 138, but also to bring a sanctity to the system by seeking to clamp down on defaults in payments. It clarifies the legal position as to

jurisdiction and also seeks to keep up with the modern banking system.

**Submitted with respect :**

(Smt. S.M. Shinde)

District Judge-2, Latur

(Shri. M.S. Kulkarni)

District Judge-4, Latur

(Shri. H.A. Mulla)

Chief Judicial Magistrate, Latur

( Shri. S.C. Pathare)

3<sup>rd</sup> Jt. Civil Judge S.D. Latur

( Smt. A.A. Godse)

5<sup>th</sup> Jt. Civil Judge J.D., Latur