S U M M A R Y
ON

RECENT TRENDS IN SECTION 138 OF THE NEGOTIABLE INSTRUMENTS ACT.

1] Negotiable Instruments have been used in commercial world for a long period of time as one of the convenient modes for transferring money. Development in Banking sector and with the opening of new branches, cheque become one of the favourite Negotiable Instruments. When cheques were issued as a Negotiable Instruments, there was always possibility of the same being issued without sufficient amount in the account. With a view to protect drawee of the cheque need was felt that dishonour of cheque he made punishable offence. With that purpose Sec.138 to 142 are inserted by Banking Public Financial Institutions and Negotiable Instruments clause (Amendment) Act, 1988. This was done by making the drawer liable for penalties in case of bouncing of the cheque due to insufficiency of funds with adequate safeguards to prevent harassment of the honest drawer.

OBJECT

The object of this amendment Act is :-

1. To regulate the growing business, trade, commerce and Industrial activities.
2. To promote greater vigilance in financial matters.
3. To safeguard the faith of creditors in drawer of cheque. *(Krishna vs. Dattatraya 2008(4) Mh.L.J.354 (Supreme Court)*

2] However, it was found that punishment provided was inadequate, the procedure prescribed cumbersome and the courts were unable to dispose of the cases expeditiously and in time bound manner. Hence, the Negotiable Instruments (Amendment and Miscellaneous provisions Act 2002) was passed. The provisions of sec.143 to 147 were newly inserted and provisions of section 148, 141, 142 were amended.

INGREDIENTS

3] The ingredients of the offence as contemplated under Sec.138 of the Act are as under :

1. The cheque must have been drawn for discharge of existing debt or liability.

2. Cheque must be presented within 6 months or within validity period whichever is earlier.

3. Cheque must be returned unpaid due to insufficient funds or it exceeds the amount arranged.

4. Fact of dishonour be informed to the drawer by notice within 30 days.

5. Drawer of cheque must fail to make payment within 15 days of receipt of the notice.

4] A mere presentation of delivery of chqeue by the accused would not amount to acceptance of any debt or liability. Complainant has to show that cheque was issued for any existing debt or liability. Thus, if cheque is issued by way of gift and it gets dishonoured offence u/s. 138 of the will not be attracted.

PRESUMPTIONS

5] There is presumptions under Section 118 and 139 of the Negotiable Instruments Act in favour of holder of the cheque. Until contrary is proved, presumption is in favour of holder of cheque that it was drawn for discharge of debt or liabilities. However, it is rebutable one and accused can rebut it without entering into witness box, through cross-examination of the prosecution witnesses. Complainant is not absolved from liability to show that cheque was issued for legally enforceable debt or liability. Burden on accused in such case would not be as light as it is in the cases under sec.114 of the Evidence Act. In case of " *Goa Plast Pvt. Ltd. vs. Shri Chico Ursula D' Souza 1996 (4) All MR 40*" relations between accused and complainant were of employee and employer. No evidence led to show that accused was liable to pay any due or part thereof and thus liability was not proved. Similarly, it was not proved that the cheque was given towards those liabilities. Accused much earlier to presentation of cheques to the

Bank had appraised the complainant that he is not liable to pay any amount, and therefore, stopped payment. The Hon'ble Bombay High Court had observed that complainant failed to prove that the cheque was issued for discharge of legal liabilities.

6] Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption u/s 139. It merely raises a presumption in favour of holder of the cheque that the same has been

issued for discharge of any debt or other liability.

7] Many times cheques are issued bearing no date or post dated cheques. The holder of the cheque enters the date, and thereafter, cheques are presented. The Hon'ble Bombay High Court in case of *Purushottamdas Gandhi vs. Manohar Deshmukh 2007 (1) Mh.L.J. 210* observed that inserting such date does not amount to tampering or alteration but by delivery of such undated cheque the drawer authorizes the holder to insert date and the period of 6 months for presentation of such cheque to the Bank would start from the date which bears on the cheque.

(*Ashok Badwe vs. Surendra Nighojkar A.I.R. 2001, S.C. 1315)*

8] The return of cheque is itself an indication that funds are not forthcoming. The words "refer to drawer" or "account closed" are covered under the term "insufficient funds". Thus, the liability of the

drawer cannot be avoided if he closes the account and cheque is dishonoured. A safeguard has been made to prevent hasty action is that the payee or holder in due course of the cheque shall make a demand for payment of amount covered by the cheque by giving notice in writing to the drawer within 30 days.

9] Offence u/s. 138 is computed only when payment is not made by drawer on expiry of 15 days after service of the notice as prescribed by proviso (c) of Sec. 138.

JURISDICTION

10] Considering the ingredients of sec.138 referred above the

Hon'ble Apex Court in case of *K. Bhaskaran vs. Shankaran AIR 1999, SC 3762*, had given jurisdiction to initiate the prosecution at any of the following places.

1. Where cheque is drawn.
2. Where payment had to be made.
3. Where cheque is presented for payment
4. Where cheque is dishonoured.
5. Where notice is served upto drawer.

11] However, recently in case of *Dashrath Rupsingh Rathod vs. State of Maharashtra, reported in MANU /SC/ 0655/ 2014* interpreted various provisions of Sec.138 of Negotiable Instruments Act and held,

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i) An offence under Section 138 of the Negotiable Instruments Act, 1881 is committed no sooner a cheque drawn by the accused on an account being maintained by him in a bank for discharge of debt/liability is returned unpaid for insufficiency of funds or for the reason that the amount exceeds the arrangement made with the bank.

ii) Cognizance of any such offence is however forbidden under Section 142 of the Act except upon a complaint in writing made by the payee or holder of the cheque in due course within a period of one month from the date the cause of action accrues to such payee or holder under clause (c) of proviso to Section 138.

iii) The cause of action to file a complaint accrues to a complainant /payee/ holder of a cheque in due course if,

(a) the dishonoured cheque is presented to the drawee bank

within a period of six months from the date of its issue.

(b) If the complainant has demanded payment of cheque amount within thirty days of receipt of information by him from the bank regarding the dishonour of the cheque and

(c) If the drawer has failed to pay the cheque amount within fifteen days of receipt of such notice.

iv) The facts constituting cause of action do not constitute the ingredients of the offence under Section 138 of the Act.

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v) The proviso to Section 138 simply postpones/ defers institution of criminal proceedings and taking of cognizance by the Court till such time cause of action in terms of clause (c) of proviso accrues to the complainant.

vi) Once the cause of action accrues to the complainant, the jurisdiction of the Court to try the case will be determined by reference to the place where the cheque is dishonoured.

vii) The general rule stipulated under Section 177 of Cr.P.C. applies to cases under Section 138 of the Negotiable Instruments Act. Prosecution in such cases can, therefore, be launched against the drawer of th 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.

NOTICE

12] Notice must be in writing informing that cheque is returned unpaid also a demand of chqeue amount must be made and it

should be within 30 days from receipt of information of dishonour. When notice by registered post returned unclaimed there is presumption of service.

1. *Rahul vs. Arihant Fertilizers 2008(4) Mh.L.J. 365 (SC)*
2. *K. Bhaskaran vs. Shankaran Vidhyabalan 1999 AIR SCW, 3809.*

13] Initially, it was held by various High Courts and Apex court that cheque may be presented severally within period of its validity or within 6 months. However, once notice is served and amount is not paid within stipulated period, the cause of action to prosecute starts. Thereafter the complaint is to be filed within period of 30 days. However, in case of *MSR Leathers vs. Palaniappan and others 2013, Cr.L.J. S.C. 1112*. The Apex court held that failure to prosecute on basis of first default in payment does not result in forfeiture of right of holder/ payee to prosecute. Nothing in the N.I. Act that prohibits holder / payee of cheque from issuing fresh demand notice and then launching prosecution. Limitation of one month from accrual of cause of action for taking cognizance u/s. 142 does not militate against accrual of successive cause of action.

14] The payee is not prevented from combing the causes of action by covering multiple instances of dishonour of cheques in single

notice, in such a case all the transactions covered by notice would be

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regarded as a single transaction permitting a single trial. However, in a case where cheques were issued on different dates, presented on different dates and separate notices are issued in respect of each default. The transactions cannot be held to be a single transaction. Section 219 of Cr.P.C. will not be attracted to such cases. *Rajendra Vs. State of Mah. 2007, (1) Mh L.J. 370.*

15] The apex court in case of *K. Bhaskaran vs. Shankaran 2000 (1) Mh.L.J. 193* observed that giving notice is not the same as receipt of notice. Giving is a process of which receipt is accomplishment. It is for the payee to perform formal process by sending notice to the drawer at correct address..... the payee can send notice for doing his part of giving the notice. Once it is dispatched, his part is over and next depends on what sendee does. It is well settled that notice refused to be accepted by addressee can be presumed to have been served on him. Where notice is returned as unclaimed and not as a refused, it can be deemed to have been served on sendee unless he proves that it was not really served and that he was not really responsible for such non-service.

16] The Hon'ble Supreme Court in case of *Saket India Ltd. vs. India Securities Ltd. AIR 1999, SC 1090* held that the period of one month is to be reckoned according to British Calender as defined in the General Clauses Act and the date on which cause of action arose must

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be excluded for this purpose. When neither postal acknowledgement

nor postal cover is received back by payee the presumption is that notice is served. (*Central Bank of India vs. Saxena Pharma, AIR 1999 SC 3607.)*

WHO CAN FILE COMPLAINT

17] Payee or holder in due course is a competent person to file complaint. Complaint must by corporal person capable of making physical appearance in the court. In case of company and firm natural person should represent it. Complaint can be filed by Power of Attorney Holder. It is not requirement that the person whose statement was taken on oath at the first instance should alone represent the company till the proceeding have ended. Even if the person sent earlier had no authority, the company can at subsequent stage send a person competent to represent the company. (*Associated Cement Company Ltd. vs. Keshavanand (1998) 91 company cases - 3619 SC*.)

18] It is further observed in the above case that a complaint which is made in the name and behalf of company can be made by any officer of that company and that the section does not require that complaint must be signed and presented only by authorized agent or a person empowered under the Articles of association or by any resolution of the Board of Directors.

LIABILITY OF DIRECTORS / PARTNERS

19] Section 141 of Negotiable Instruments Act shows that person who is in charge or responsible to the company is *ip so facto* liable and deemed to be guilty. Only if offence is committed with his consent connivance or due to any neglect on his part. Similar is the

case with any Director, Manager, Secretary or other officer of the company. If such person shows that offence was committed without his knowledge or that he had exercised on due diligence to prevent the commission of such offence, he may be immune from prosecution. Similarly, Directors nominated by Central Government or State Government by virtue of their holding any office or employment in such Government or Financial Corporation owned or controlled by such Government are kept outside the purview of such section.

20] It is primary duty of the Magistrate to find out whether the complainant has shown that accused persons falls into one of the categories of persons envisaged in sec. 141. What is required is the specific accusation against each Director of the role played by him. Onus is on the complainant to make out prima facie case i.e. to show that accused was at the time of commission of the offence, in charge of and responsible to the company. Such person need not be a Director, Manager, Secretary or other officer of the company. In case of *A.K. Singhania vs. Gujrat State Fertilizers Company Ltd. 2014, Cr.L.J. 340 (SC)*.

The apex court further observed that it is not necessary that complaint should contain averments as to who were in charge and responsible for conduct of the business of company. Court held that it is sufficient if reading of complaint shows substance of accusation disclosing necessary averments.

21] In case of *K. Shrikant Singh vs. North East Security Ltd. and others, J.T. 2007 (9) SC 449.* The Hon'ble Apex court observed that vicarious liability on the part of a person must be pleaded and proved and not inferred.

22] In case of *Aparna A Shaha vs. Sheth Developers Pvt. Ltd. 2014 (1) Mh L.J*. The apex court took a view that Joint Account holder cannot be prosecuted unless cheque is signed by each and every person who is Joint Account holder. In this case the cheque was signed by husband of the appellant. The apex court quashed the proceeding against the appellant. Court observed that as a natural corollary each and every joint account holder must sign the cheque before they are considered for criminal action under sec. 138 of the N.I. Act.

23] In case of " *Shushatna J. Sarkar & other -v- State of Mah. 2014(1) MhLJ 214 "* complaint was not showing as to what role played by petitioner Directors in the alleged offence. The allegations were vague and were not specifying role of each of the petitioners. It was observed that averments in complaint were not sufficient enough to

make them vicariously liable for offence u/s 138. It was further observed that ' It is necessary for the complainant to make specific averments disclosing role of Directors in the alleged offence. Criminal offence, Criminal liability can be fastened only on those who at the time of commission of offence were in charge of and were responsible for conduct of business of company..... It is obligatory on the part of complainant to state in brief as to how and in what manner the directors, who are sought to be made accused were responsible for the conduct of business of company at relevant time.

24] Earlier it was observed that prosecution of the company is not *sine qua non* for the prosecution of the either persons who are in charge of and responsible for the business of company or any Director,

Manager, Secretary or other officers of company. However, finding that offence was committed by company is *sine qua non* for convicting those other persons (*Anil Hada vs. Indian Acrylic Ltd. (2002) of 1999 Comp. Cases 36 (SC*). However, recently in case of *Anil Gupta vs. Star India Pvt. Ltd. Co. & another 2014 Cr.L.J.3884* the Hon'ble Supreme Court laid down that only drawer of cheque falls within ambit of sec.138 of the Act whether human being or a body corporate or even a firm ..... The Hon'ble Apex court further observed that "we arrived at the irresistable conclusion that for maintain the prosecution u/s 141 of the

Act, arraigning of the company as a accused is to imperative". The Hon'ble Apex court overruled the decision in Anil Khada's case

referred above.

25] ***Cause of action*** arises when notice is served on the drawer and drawer fails to make payment of the amount of cheque within 15 days. Limitation to file complaint is one month from the date of cause of action. However, by Amendment Act of 2002 court is empowered to take cognizance of the offence even if complaint is filed beyond one month by condoning the delay if sufficient cause is shown.

It has been held in various other cases that offence is not made out -

1. When cheque returned as defective one *(Babulal vs. Khilji 1998 (3) Mh L.J. 762)*
2. When no notice is given to company and cheque is drawn by company (*P. Raja Rathinalm vs. State of Maharashtra 1999 (1) Mh.L.J. 815)*
3. Cheque is given as a gift.
4. Complainant was not a payee.
5. Signature of drawer on the cheque is incomplete. *(Vinod*

vs. Jahir 2003 (1) Mh L.J. 456.)

PUNISHMENT

26] After the amendment of 2002 the imprisonment that may be imposed may extend to two years, while fine may extend to twice the amount of cheque. However, the trial is conducted in summary way, then Magistrate can pass sentence of imprisonment not exceeding one year and amount of fine exceeding Rs.5,000/-. There is no limitation for awarding compensation.

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27] The sentence should be such that it gives proper effect to the object of the legislation. No drawer can be allowed to take advantage of cheque issued by him lightly. Apex court has cautioned against imposing flee bite sentences. In case of *Sujanti Suresh Kumar vs. Jagdeeshan 2002 Cr.L.J. 1003* Prior to the amendment of 2002 a sentence of fine in excess of Rs.5,000/-by Judicial Magistrate, First Class or Metropolitan Magistrate was held to be illegal. However, after the amendment the Magistrate are empowered to impose fine exceeding Rs.5,000/-. In case of *Dilip vs. Kotak Mahindra Company Ltd. 2008 (1) Mh L.J. 22* it was enunciated that the amount of compensation sought to be imposed must be reasonable and not arbitrary. Before issuing a direction to pay compensation the capacity of the accused to pay the same must be judged. An inquiry in this behalf even in summary way may be necessary. Sub section 3 of Sec. 357 does not impose any limitation but the powers thereunder should be exercised only in appropriate cases. Ordinarily it should be lesser than the amount which can be granted by Civil Court upon appreciation of evidence. A criminal case is not a substitution for civil suit.

PROCEDURE

28] Section 142 of the N. I. Act creates bar against taking cognizance of the offence u/s. 138 of the N. I. Act except upon

complaint in writing by payee or holder in due course. Complaint may be instituted by Power of Attorney Holder. However, if the holder of the Power of Attorney has merely lodged the complaint without being aware of the facts, then recording the statement of the payee becomes imperative.

29] Once Magistrate is satisfied that there is proper compliance of the proviso to Sec.138 N. I. Act and jurisdictional conditions are fulfilled, Magistrate shall issue the process. Service of summons by speed post or approved courier is recognized by Sec. 144 of N. I. Act. If the accused does not appear in response to the summons or remain absent subsequent, a coercive process needs to be taken by the court. In case of *Bhaskar Industries Ltd. vs. M/s Bhiwani – Denim and Apparens Ltd. 2001 All M.R. (Criminal) 1961).* The advocate who appeared in absence of accused was allowed to plea on behalf of accused.

30] Section 145 (1) of the Act permits the recording of evidence of complainant on affidavit. Even evidence of accused and witnesses can be recorded on affidavit. This was for expedite disposal of the cases. The bank slips are held as a primary evidence and admissible directly.

31] The accused are given effective opportunity to defend the

case. Considering presumptions under sec.118 and 139 of the N.I. Act effective opportunity is to be given to the accused to cross-examine the witnesses.

32] It is common experience that in cases u/s 138 of N.I. Act evidence is recorded by one Judicial Officer and before delivery of Judgment he is transferred, in such situation the successor has to proceed with de-novo trial. However, in case of *Mehsana Nagarik Sahakari Bank Ltd. vs. Shreeji CAB company ltd. and others 2014 Cr.L.J. 1953*. The apex court held that if evidence is recorded in full and not in summary manner, then evidence recorded by predecessor can be acted upon.

33] Though the provision contained in Sec.143 of the N. I. Act provides that cases u/s.138 are to be tried in summary way, they should be tried as a regular summons cases. If it appears to the Magistrate that nature of case is such that sentence of imprisonment for a term exceeding one year may have to be passed, or that it is for any other reasons undesirable to try the case summarily, Magistrate shall after hearing the parties record and order to that effect and try the case as a regular summons case.

34] Recently in case of *Indian Bank Association and others vs. Union of India & others reported in AIR 2014 Supreme Court 2528*, general directions have been given by the Apex court. The directions are worth quoting and they are as under :-

1. Metropolitan Magistrate/ Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.
2. MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. Court in appropriate cases, may take the assistance of the police or the nearby court to serve notice to the accused. For notice of appearance, a short date be fixed. If the summons is received back un-served, immediate follow up action be taken.
3. Court may indicate in the summons that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, Court may pass appropriate orders at the earliest.

4. Court should direct the accused, when he appears to furnish a bail bond, the ensure his appearance during trial and ask him to take notice under Section 251, Cr.P.C. to enable him to enter his plea of defence and fix the case for

defence evidence, unless an application is made by the accused under Section 145(2) for recalling a witness for cross-examination.

5. The court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within tree months of assigning the case. The court has option of accepting affidavits of the witnesses, instead of examining them in Court. Witnesses to the complainant and accused must be available for cross-examination as and when there is direction to this effect by the Court.

Some important principles laid down by the Hon'ble High Courts and Apex Court are as under :-

1. Cheque to pay time barred debt is enforceable by virtue of section 25 (3) of Contract Act, *(Kadir vs. Dattatraya 2005 (3) Mh L.J. 1076)*
2. Legal heirs of complainant can continue the complaint (*Revi Selval vs. Navin 2000 (2) Bombay Cri. Cases, 23.)*

3. However, legal representatives of accused cannot be made to face trial. *(Smt. Dropadi @ Maya Shippi vs. State of Rajasthan 2000(3) Crimes 6045.)*
4. Part payment made does not absolve to the drawer from liability *(Ramnarayan Madanlal Khandelwar vs. Proprietor Daulat Enterprise, 2005 (4) Mh L.J. 796)*
5. Cheque issued as a security are in discharge of liability as

a guarantor attracts Sec. 138 *(ICBS Ltd. vs. Beena Shabeer 2002 AIR SCW 3358)*

6. "Any liability does not include any other's liability unless there is agreement between drawer and original debtor *(Hinten Sagar and another vs. IMC Ltd. And another 2001 (3) Mh L.J. 659)"*

7. Demanding cheque amount interest, damages, separately in the notice would not invalidate the notice (*Suman Shetty vs. Ajay A. Chudiwal AIR 2000 (SC) 828.)*

8. A single complaint in respect of dishonoured cheques is maintenable though consolidated single notice is sent and single complaint is maintenable. *(Charashni Kumar Talwani vs. M/s. Malhotra Poultries 2014 Cr.L.J. 2908)*

(P.M. Dunedar)
District Judge -1 and
Addl.Sessions Judge, Gadchiroli.

(P.M. Dunedar)
District Judge -1 and
Addl.Sessions Judge, Gadchiroli.

O.W. No. /2014.
District Court, Gadchiroli.
To, Date- 2 .11.2014.

The

Subject:- Submission of report for premature release under the 14 Year Rule of Prisoners serving life sentence.

Ref'nce :- Your letters -

Sir,

With reference to the subject referred above the required information and opinion is submitted as under.

Hence submitted.

Yours,

Gadchiroli,
Date- .10.2014.

(P.M. Dunedar)
District Judge- 1 and
Addl. Sessions Judge, Gadchiroli.