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Section 138 of Negotiable Instruments Act, 1881

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Abstract

The law relating to negotiable instruments is not the law of one country, or of one nation, rather it is the law of commercial world in general, for it consists of certain principles of usage and equity which general convenience and justice had established to regulate the dealings of merchants and mariners in all commercial countries of the civilized world. Even now, the laws in several countries in Europe are, so far as general principles are concerned, similar in many aspects. Of course, on questions of detail, different countries have solved the various problems in different ways, but the essentials are same, and the similarity of law is the pre-requisite for the vast international transactions that are carried among various countries. The object of this article is regarding, "Acknowledge, support and analysis of the statutory provision regarding the jurisdiction for the cases of dishonour of cheque and the aspect given by the Apex court on the same. It also identifies relevant steps taken under the statute for the protection and betterment of plaintiff and accused and a thorough study of the latest Apex court decision on the jurisdictional aspect."

Keywords: *Apex court, Negotiable, Document, Demand, Amount, Bank Notes*

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INTRODUCTION

Negotiable instrument is a written order or unconditional promise to pay a fixed sum of money on demand or at a certain time. A negotiable instrument can be transferred from one person to another. Once the instrument is transferred, the holder obtains full legal title to the instrument. The transfer should be unrestricted and in good faith. Therefore, a negotiable instrument is a document guaranteeing the payment of a specific amount of money, either on demand, or at a set time, with the payer named on the document. It is an indebtedness to pay an amount and the negotiable instrument is an unconditional guarantee for the same.

Some examples of negotiable instruments are promissory notes, cheques, bills of exchange, bearer bonds, bank notes, etc.

The Amendment

- Negotiable Instruments are being used in commercial transactions for a handsome period being one of the convenient modes of transferring money.
- When cheques are issued as negotiable instruments, there always remains a possibility of the same being issued without enough funds in the drawer's account, and with a view to protect the drawee of the cheque, the need for making dishonour of cheque a criminal offence was felt.
- Thus, Sections 138–142 were inserted by Banking Public Financial Institutions and Negotiable Instruments Amendment Act, 1988.This was done by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds with adequate safeguards to prevent harassment of the honest drawer.

What Is a Cheque?

Section 6ofNegotiable Instruments Act defines a cheque as:
A "cheque" is 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 the electronic form.

Explanation—I. For the purposes of this Section, the expressions:
(a) "a cheque in the electronic form" means a cheque which contains the exact mirror

image of a paper 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 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.

What Is an E-Cheque?

Electronic cheque (e-cheque) is the image of a normal paper cheque generated, written, and signed in a secure system using digital signature and asymmetric crypto system. Simply said an electronic cheque is nothing more than an ordinary cheque produced on a computer system and instead of signing it in ink, it is signed using the digital equivalent of ink. After the coming into force of The *Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002,* legal recognition has been accorded to e-cheques and they have been brought at par with the normal cheques. Now, a 'cheque' includes an e-cheque.

Section 138 Negotiable Instruments Act, 1881 [1]

Section 138of the Negotiable Instruments Act, as it is at present after coming into force of The *Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002*.

Section 138. Dishonor of Cheque for Insufficiency, etc., of Funds in the Account

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 honor 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 provisions of this Act, be punished with imprisonment for19 months (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 makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, 20 [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 to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation III—For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability

Ingredients

The ingredients of offence as contemplated under this section are:

- The cheque must have been drawn for discharge of existing debt or liability.
- Cheque must be presented within six months or within validity period, whichever is earlier.
- Cheque must be returned unpaid due to insufficient funds or it exceeds the amount specified.
- Fact of dishonour be informed to the drawer by notice within 30 days.
- Drawer of cheque must fail to make payment within 15 days of receipt of notice.

Presumptions

- Until contrary is proved, the presumption is in favor of the holder of the cheque that it was drawn for discharge of debt or liability. In case of *Goa Plast Pvt Ltd v Shri Chicho Ursula 1996 (4) All MR 40*, relations between accused and complainant were of employee and employer. There was no evidence to prove the liability of the accused. The Honourable Bombay High Court held that the complainant failed to prove that the cheque was issued for discharge of liability.
- Many a time, the cheque is issued bearing no date or is issued post-dated. Inserting the date subsequently won't amount to tampering.
- The return of cheque is itself an indication that funds aren't forth coming. Thus, the liability of the drawer cannot be avoided if he closes the account and the cheque is dishonored.
- Offence u/s 138 is computed only when the payment is not made by the drawer on expiry of 15 days after service of the notice as prescribed by proviso(c) of Sec.138.

Jurisdiction

Considering the matter of jurisdiction, the Apex court in *K Bhaskaran v Shankaran AIR 1999 SC 3762*, has given jurisdiction to initiate the prosecution in 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 dishonored.
5. Where notice is served to the drawer.

However, recently in case of *Dasrath Rupsingh Rathod v State of Maharashtra*, reported in MANU/SC/0655/2014, it was held that:

1. 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.
2. The facts constituting cause of action do not constitute the ingredients of the offence under Section 138 of the Act.
3. 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.
4. 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 dishonored.

Statutory Laws on Dishonour and Its Jurisdiction

Section 138 of Negotiable Instrument Act, 1881, regarding dishonor of cheque attracts criminal liability. Offence under Section 138 is an offence without any malafide intention. It is not a criminal offence in real sense as it does not require *mens rea*, like in a few other criminal offences, but as public interest is hampered by such offence, so it has been made a punishable offence. It includes strict liability. Making of the strict liability is an effective measure by encouraging greater surveillance to prevent usual callous attitude of drawers of cheques in discharge of debts.

Most often, people don't know about the place where criminal complaint can be filed under the NI Act, as the act is silent on this matter. Because the criminal courts are approached, the issue needs to be examined from the point of view of the Criminal Procedure Code.

Section 177 of Cr. P. C [2] provides that every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed.

Section 178 of Cr. P. C [3] provides that the offence may be tried by a court having jurisdiction over any of the local areas where offence is committed. It is possible that an offence may be committed in several local areas or partly in one area and in another area. It is also possible that sometimes the offence may consist of several acts done in different areas. In all the above situations, the court having jurisdiction over any of such local areas may try the offence.

Section 179 of Cr. P. C [4]: Offence triable where act is done, or consequence ensues – 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 whose local jurisdiction such thing has been done or such consequence has ensued.

Notice

Notice must be in writing informing that the cheque is returned unpaid and it should be paid within 30 days from receipt of information of dishonor.

The Apex courtin *K Bhaskaran v Shankaran 2000 (1) Mh LJ 193,* observed that giving notice is not the same as receipt of notice.

Who Can File Complaint?

Payee or holder in due course is a competent person to file the complaint. The complaint must be made by corporal person capable of making physical appearance in the court. In case of a company and firm, a natural person should represent it. Complaint can also be filed by a power of attorney holder.

(Associated Cement Company Ltd v Keshavnand (1998) 91 Company Cases 3619 SC.)

Cause of Action

It arises when notice is served on the drawer and the drawer fails to make payment of the amount of cheque within 15 days. Limitation is 1 month. However, by amendment of 2002, the court is empowered to take cognizance of the offence even if the complaint is filed beyond 1 month by condoning the delay, if sufficient cause is shown.

Punishment

Imprisonment extendable to 2 years –after 2002 amendment, while fine extends to twice the amount of the cheque.

In *Dilip v Kotak Mahendra Company Ltd. 2008 (1) Mh LJ 22*, the court decided that the amount of compensation sought to be imposed must be reasonable and not arbitrary.

Precedents Ruling

The ruling in *Bhaskaran* case was diluted in *Harman Electronics Pvt. Ltd. v. National Panasonic India Pvt. Ltd.* [5]. The court addressed the issue of whether a Delhi court would have jurisdiction solely because the statutory notice under Section138of the Act was issued from Delhi. The court held that:

1. There was a world of difference between issue of a notice, on the one hand, and receipt thereof on the other. Issue of notice did not give rise to a cause of action while receipt did, it was declared by the court.
2. A notice is one of the ingredients for maintaining the complaint. It is only on receipt of the notice that the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138, therefore, must be read together. Issuance of notice would not by itself give rise to a cause of action, but communication of the notice would.
3. If presentation of the cheque or issue of notice was to constitute a good reason for vesting courts with jurisdiction to try offences under Section 138, it would lead to harassment of the drawer of the cheque thereby calling for the need to strike a balance between the rights of the parties to the transaction.

So, the jurisdictional perspective as given in *Bhaskaran* case was diluted and the logic behind vesting of jurisdiction based on the place from where the notice was issued questioned. Even presentation of the cheque as a reason for assumption of jurisdiction to take cognizance was doubted, for a unilateral act of the payee of the cheque could without any further or supporting reason create jurisdiction on a court within whose territorial limits nothing except the presentation of the cheque had happened.

The judgments in *Bhaskaran* and *Harman* cases show the liberal and the strict view, respectively, on the issue of territorial jurisdiction for trial of the offence of dishonor of cheques under Section138of the Act.

Thereafter the Hon'ble Supreme Court decided on 1stof August 2014, in the case of *Dashrath Rupsingh Rathod vs. State of Maharashtra & Anr*., bearing criminal Appeal No. 2287 of 2009. Hon'ble Mr. Justice T. S. Thakur held that applying the general rule recognized under

Section 177 of the Cr. P. C. that all offences are local, the place where the dishonor occurs is the place for commission of the offence vesting the court exercising territorial jurisdiction over the area with the power to try the offences.

We have, with utmost respect to the Judges constituting the Bench that heard the above cases, found it difficult to follow suit and subscribe to the view stated in Bhasakaran.

Justice Thakur summarized the principles as follows:

1. An offence under Section 138 of the Negotiable InstrumentsAct,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 is returned unpaid for insufficiency of funds or for the reason that the amount is more than the arrangement made with the bank.
2. Cognizance of any such offence is, however, prohibited under Section142 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.
3. The cause of action to file a complaint accrues to a complainant/payee/holder of a cheque in due course if

i. the dishonored cheque is given to the drawee bank within a period of six months from the date of its issue;
ii. If the complainant wants payment of the cheque amount with in thirty days of receipt of information by him from the bank regarding the dish on or of the cheque.
iii. If the drawer cannot pay the cheque amount within fifteen days of receipt of such notice.
iv. The facts constituting cause of action do not comprise the ingredients of the offence under Section 138 of the Act.
v. The proviso to Section 138 simply postpones/defers institution of criminal proceedings and taking of cognizance by the court till such time as 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 suit will be determined by reference to the place where the cheque is dishonored.
vii. The general rule conditioned under Section 177 of Cr. P. C. applies to cases under Section 138 of the Negotiable Instruments Act. Prosecution in such suits can, therefore, be launched against the drawer of the cheque only before the court within whose jurisdiction the dish on or takes place except in situations where the offence of dish on or of the cheque punishable under Section 138 is committed along with other offence sin a single transaction within the meaning of Section 220(1) read with Section 184 of the Cr. P.C. or is covered by the provisions of Section 182(1) read with Sections 184 and 220 thereof.
viii. 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 the cheque only before the court within whose jurisdiction the dish on or takes place except in situations where the offence of dish on or of the cheque punishable under Section 138 is committed along with other offence sin a single transaction within the meaning of Section 220(1) read with Section 184 of the Cr. P.C. or is covered by the provisions of Section 182(1) read with Sections 184 and 220 thereof.

So by this case, the position of territorial jurisdiction of Negotiable Instruments Act under Section 138 (cheque bouncing cases) changed and now a petitioner can only file a complaint with regard to dishonor of a cheque in a court which has the territorial jurisdiction over the place where the cheque is dishonored by the bank on which it is drawn.

Example: if you are the payee of a cheque and if you present this cheque for clearing at Delhi, the suit cannot be filed at Delhi. Thus, the uncertainty about the place where such a case can be filed was removed.

The positive impact of this judgement is that the payee of a cheque could not unnecessarily harass the drawer of the cheque by filing the cheque bouncing case at the place of his choice by deliberately choosing a different place for presenting the cheque or for sending the notice, etc.

The negative impact of this judgment is that the drawee needs to file the case where the cheque is dishonored other means where the payee bank account, even if the fault is by the payee.

This judgment was not clear. What will happen in situation where the cheque is "payable at par at all branches of the bank"?

CONCLUSION

In the analysis of the above laws and the quoted Hon'ble Supreme Court decisions, it is crystal clear that the place, site or venue of judicial inquiry and trial of the offence u/s 138 of Negotiable Instrument Act, 1881, must logically be restricted to where the drawer bank is located and this can also be inferred from the bare reading of Section 138 of N.I. Act, read with Section 177 of the Criminal Procedure Code, 1973, which leaves no iota of doubt that return of cheque by the drawee bank constitutes the commission of offence and indicates the place where the offence is committed. While taking into consideration the territorial aspect on the same of "At Par Cheques", the Hon'ble High Court of Bombay held that the cheques issued at par provide the complainant an option to choose the place of jurisdiction. But because this verdict is by the Hon'ble High Court of Bombay, so it is not binding to all and that is why restricted within the territory of the jurisdiction of the Hon'ble High Court of Bombay and having no binding effect on other territories though it may be considered by them. So, till now according to Art. 141 of the Constitution of India, the decision of Hon'ble Supreme Court in the case of *Dashrath Rupsingh Rathod* is binding on all and so the jurisdiction is restricted to where the drawer bank is located.

REFERENCES

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2. Section 177 of Criminal Procedure Code, 1973.
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