



AN OVERVIEW OF SECTION 138 OF THE NEGOTIABLE INSTRUMENT ACT, 1881

S.ILAVENIL

Advocate & Guest Lecturer, Govt Law College, Coimbatore-641 007 Tamilnadu, India

E-mail: ilavenilss.adv@gmail.com

ABSTRACTS

Negotiable Instruments have been used in commercial world for a long period of time as one of the convenient modes for transferring money. Before 1988 there was no effective legal provision to restrain people from issuing cheques without having sufficient funds in their account or any stringent provision to punish them. Of course, on dishonour of cheques, a civil liability accrued. With a view to protect drawee of the cheque need was felt that dishonour of cheque be made punishable offence. With that purpose Sec.138 to 142 were inserted by Banking, Public Financial Institutions and Negotiable Instruments Laws (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. However, in due course it was observed that the courts were unable to dispose of the cases expeditiously and in time bound manner. The loop holes were rectified by the amendment of the year 2002 and 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 138, 141, 142 were amended.

Keywords : Negotiable Instruments, dishonour of cheque, Section 138

I. INTRODUCTION

Negotiable Instrument is a combination of two words Negotiable and Instrument with subject to their different meaning as “Negotiable is transferrable” and “Instrument is written document”. Two modes are being used for the Negotiable Instrument for its transferability either it can be delivered or by endorsement, passes to the transferee a bona fide title to payment according to its tenor and irrespective of the title, transferor is bearing, provided that he is a bona fide holder for Instrument without any of notice of defect attaching to the instrument or in the title of the transferor, the principle of *Nemo dat quod non habet* does not apply. Negotiable Instrument should be of as such nature that it should be in the form of writing, signed by the maker or drawer, an unconditional promise or order to pay, a fixed amount of money to be stated, freely transferrable from one person to another person, be payable to order or to bearer, lastly be payable on demand or at a definite time.

II. Negotiable Instrument meaning:

According to Section 13 of the Negotiable

Instrument Act, 1881, Negotiable Instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer. 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.

Explanation as to bare provisions,

The 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 - Where a promissory note, bill of exchange or cheque, either originally or by endorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

III. Types of Negotiable Instrument

1. **Promissory Note:** Promissory note are one of the legal document or an instrument by which rights are conferred and party promises to pay a certain or a fixed amount of money to another person at a demand of the payee. Promissory notes is unconditional as to other Instruments and is signed by the maker.

Maker: Person who makes the Promissory note and promises to pay a certain amount.

Payee: A person to whom the payment is to made.

Section 4 states as a “Promissory note” is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

Essential Ingredients for promissory note are as follows:

- i. Promissory Note to be in writing.
- ii. It should be unconditional.
- iii. It should be payable to a definite person.
- iv. Sign on Promissory Note to be done by Maker or Payee.
- v. Amount to be paid on demand or at a fixed period of time.
- vi. Instrument shall bear a stamp

Illustrations:

A Signs instruments in the following terms:

(a) “I promise to pay B or order Rs. 500.”

(b) “I acknowledge myself to be indebted to B in Rs. 1,000, to be paid on demand, for value received.”

2. **Bills of Exchange:** It is Negotiable Instrument in form of a written promissory document for a person to pay a certain

amount of money to the required payee. Three Parties are here in the Bills of Exchange as they are drawer, drawee and payee. It includes an unconditional order which is signed by maker for directing a person to pay.

Section 5 of The Negotiable Instrument Act states Bill of Exchange as: A “bill of exchange” is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

A promise or order to pay is not “conditional”, within the meaning of this section and section 4, by reason of the time for payment of the amount or any instalment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified even which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain.

The sum payable may be “certain”, within the meaning of this section and section 4, although it includes future interest or is payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an instalment, the balance unpaid shall become due.

The person to whom it is clear that the direction is given or that payment is to be made may be a “certain person”, within the meaning of this section and section 4, although he is mis-named or designated by description only.

3. **Cheques:** Cheque is an order to the bank to pay the certain amount of money to the account of the drawer, Cheque basically crossed in its back to end its negotiability and it is always accepted into the account of the payee.

Section 6 of the Negotiable Instrument Act states cheque

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.

IV. Section 138 of Negotiable Instrument Act

Section 138 of the Negotiable Instrument Act, 1881, talks about the dishonour of cheque for insufficiency, etc., of funds in the account, as it states about the essential ingredients, exceptions, punishment and fine.

Essential Ingredients

1. Cheque to be drawn by a person,
2. To banker,
3. For payment of any amount of money to another person,
4. To discharge in part any debt or other liability,
5. Cheque returned by the bank unpaid,
6. Amount of the money in the bank a/c is insufficient to dishonour the cheque,
7. Or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank,

Exceptions:

1. the cheque has been presented to the bank within a period of three months from the date on which it is drawn or within the period of its validity, whichever is earlier.
2. 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.
3. 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.

Punishment:

1. Imprisonment for two years,
2. Fine which may extend to twice the amount of the cheque,
3. Imprisonment and fine both.

V. Cognizance of Offence under Section 138

Section 142 of the Negotiable Instrument Act, states the cognizance, procedure and jurisdiction of the offence u/s 138.

Procedure:

- i. Complaint to be filled in writing.
- ii. By the payee or the holder in due course of the cheque.
- iii. Complaint to be made within 1 month of the date on which the cause of action arises.
- iv. Metropolitan Magistrate or a Judicial Magistrate of the Ist Class shall try any offence punishable under Section 138 of NIA.

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

Jurisdiction: Offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction, - 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; 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.

VI. Documents required for filing Complaint u/s 138 of NIA.

Some of the basic documents that are necessary required to file complaint under the Section 138 of NIA are as follows.

- i. Memo of Parties
- ii. Complaint u/s 138 of NIA, 1881.
- iii. Pre-summoning Evidence/ Affidavit
- iv. List of Witnesses
- v. List of Documents
- vi. Vakalatnama.
- vii. Copy of the resolution authorizing Complainant's Attorney (in case of Company, firm etc).
- viii. Original dishonored cheques
- ix. Returning memo dated _____
- x. Copy of legal notice dated _____
- xi. Postal Receipt No. _____ dated _____
- xii. UPC Dated _____
- xiii. Limitation Document

VII. Offences by Company

Subject to the Provisions for the Cheque Bounce in the Negotiable Instrument Act, Section 141 of the Negotiable Instrument Act states about the liability of the Company or directors or both in offence of Section 138.

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

Exception: i. 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.

ii. 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.

iii. Person who is in charge or responsible to the company by that very fact or act be deemed to be guilty and will be liable for the said offence under the section 138 of Negotiable Instrument Act.

VIII. Compensation under the NIA Act S.143 A and appeal S.148.

A. As with the time amendments are being done and with respect to it 2018 amendment inserted Provision for payment of **interim compensation** to the complainants. Section 143A of the Negotiable Instrument Act, provides for the compensation, as it empowers the court to order the drawer of the cheque to pay interim compensation as to the complainant.

- i. In case of a summary trial or a summons case, where the drawer pleads not guilty to the allegations made in the complaint, and
- ii. In any other case, upon framing of the charges.

In case of Quantum of Compensation – Compensation amount shall not exceed 20% of the amount of cheque.

Acquittal - In case where the drawer is acquitted then the payee may be directed to refund the entire amount of interim compensation along with the RBI's Prevailing interest rate, to the drawer.

Time Frame - The interim compensation shall be paid within 60 days from the date of the order by the court which may be further extended by an additional period of 30 days, subject to the sufficient reasons being shown.

B. With respect to section 143A as Section 148 was also inserted by the amendment in the Negotiable Instrument Act, 1881. As Section 148 empowers the Appellate Court to order payment pending the appeal against the conviction as u/s 138 of the NIA.

- i. The Appellate Court may order the appellant to deposit an amount which shall be a minimum of 20% of the fine or compensation awarded by the trial Court.

- ii. This amount shall be in addition to the amount already paid by the appellant under Section 143A.
- iii. This deposit may be released by an order for payment to the complainant at anytime during the pendency of the appeal.

On Acquittal - In case of the appellant being acquitted, the court shall direct the complainant to refund the entire deposit amount along with the RBI's prevailing interest rate to the appellant.

Time Frame - The deposit amount shall be paid within 60 days from the date of the order by the court which may be further extended by an additional period of 30 days, subject to the sufficient reasons being shown.

IX. Compounding of Offence

Section 147 of the Negotiable Instrument states about the compounding of offence, it says that the if the appellant or original complainant comes to the Court who has taken the cognizance and says that he wants to withdraw from the side of the prosecution on account of compromise and he has compounded the matter, then the sentence and conviction have to be set aside anyhow.

X. Landmark Judgments on Major Areas of Negotiable Instruments Act.

Jurisdiction: In the case of *K. Bhaskaran v. Shankaran AIR 1999 SC 3762*, Hon'ble Supreme Court had given jurisdiction to initiate the prosecution at any of the following places.

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

Procedure: In the case of *Indian Bank Association and others v. Union of India & Others AIR 2014 SC 2528*, general directions have been given by the Apex Court.

- i. Metropolitan Magistrate/ Judicial Magistrate, on the day when the complaint u/s 138 of the NIA 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.

- ii. Metropolitan Magistrate/ Judicial Magistrate should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by email 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 unserved, immediate follow action be taken.
- iii. 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 an application is made, Court may pass appropriate order at the earliest.
- iv. The court should direct the accused when he appears to furnish a bail bond, ensure his appearance during the trial and ask him to take notice u/s. 251, Cr.P.c. to enable him to enter his plea of defense and fix the case for defense evidence, unless an application is made by the accused u/s. 145(2) for recalling a witness for cross-examination.
- v. The Court concerned must ensure that the Examination in chief, Cross-Examination, and re-examination of the complainant must be conducted within three months of assigning the case. The court has the 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 a direction to this effect by the Court.

Liability of Partner: The Apex Court in case of *Aparna A Shaha v. Sheth Developers Pvt. Ltd. 2014 (1) Mh L.J.* took a view that a Joint Account holder cannot be prosecuted unless the cheque is signed by each person who is Joint Account Holder. In the present case, the cheque was signed by the husband of the appellant. The Apex Court quashed the proceeding against the appellant. The court observed that as a natural corollary each

joint account holder must sign the cheque before they are considered for criminal action under section 138 of NIA.

The drawer of Cheque only liable: The Supreme Court in the case of Anil Gupta v. Star India Pvt. Ltd. Co, & anr. 2014 Cr.L.J. 3884, laid down that only drawer of cheque falls within ambit of Section 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 irresistible conclusion that for maintain the prosecution u/s 141 of the Act, arraigning of the company as a accused is to imperative".

Compounding - consent of parties: In the case of *Meters and Instruments (P) Ltd. v. Kanchan Mehta*, (2018) 1 SCC 560, it was held that the though the compounding requires consent of both parties, even in absence of such consent, the court, in the interest of justice, on being satisfied that the complainant has been duly compensated, can its discretion close the proceedings and discharge the accused.

Recent Development

The Central Government through The Negotiable Instrument (Amendment) Act, 2018 has notified amendments to the NI Act by incorporating several new provisions which came into effect from September 1, 2018. The provisions now allows the Court trying an offence related to cheque bouncing, to direct the drawer to pay interim compensation not exceeding 20% of the cheque amount to the complainant within 60 days of the trial court's order to pay such compensation. This interim compensation may be paid either in a summary trial or in a summons case where the drawer pleads 'not guilty' to the accusation made in the complaint; or upon framing of charge in any other case.

XI. Conclusion

It is well observed from the above context that, Negotiable Instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer, various provisions of Negotiable Instrument Act are being enumerated above regarding the dishonour of the cheque and liability of an director, company and an individual as with the context to section 138 of Negotiable

Instrument Act. Landmark judgments have been stated for the better understanding regarding the procedure and liability and of the compounding. This Journal is created with an initiative of providing a ground work for further research and highlights the Negotiable Instrument Act major provisions for better and clear understanding.

The amendments to the Act are a great effort aimed at strengthening efficacy and expediency. It will help in speedy disposal of cases and also discourage the frivolous and unnecessary litigation. Further, it upholds the interests of the complainant by providing interim compensation and ordering payment by the accused in case of appeal against conviction

References

- [1]. <https://www.lexology.com/library/detail.aspx?g=c1f86808-e817-4ed7-ab7a-b6361d5c3c64>
- [2]. <https://www.investopedia.com/terms/n/negotiable-instrument.asp>
- [3]. <https://www.thehindubusinessline.com/opinion/cheque-bounce-cases-need-to-be-settled-fast/article34628389.ece>
- [4] Brannan, Joseph Doddridge, 1848-1930, editor. *The Negotiable Instruments Law Annotated, with Reference to the English Bills of Exchange Act and Cases.* Cincinnati :W. H. Anderson company, 1932