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# **CRITICAL ANALYSIS OF SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT, 1881**

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## **ABSTRACT**

One of the most commonly used Negotiable Instrument for any economic transaction or transferring of money for a very long time has been the Promissory notes, Bills of exchange and cheques. Among these “Cheques” have become the most used negotiable instrument which the banking sector rely upon. It is pertinent to mention, even though cheque is widely used across various sections of people looking at the authenticity, less risk and safer option, the same may have its own challenges and scenarios, one such scenario could be during the time of issuing the cheque the probability of insufficiency of amount in the account. To protect the interest of the payee and to provide him justice Section 138 to 142 where inserted in Negotiable Instrument Act. This research paper focuses on the development, the objective, nature and the current IT development regarding decriminalization of sections relating to dishonoring of cheque in the Negotiable Instrument Act.

**Keywords:** Dishonor of Cheque, Negotiable Instruments Act, Section 138, Jurisdiction, Decriminalization.

## I. INTRODUCTION

The “Negotiable Instruments Act” was drafted in the year of 1866 and in the year of 1881 the act came into existence. More than hundred years after, in 1988 chapter XVII which contains the sections from 138 to 142 were added to this act. The section 138 of this act basically **“States the penal provision for the offence of dishonoring of cheque”**. To have a basic understanding A cheque can be described as **“a negotiable instrument drawn on a specified banker and not expressed to be payable otherwise on demand”**. In the chapter 2 of the Negotiable Instrument Act, Section 6, the definition of the cheque clearly states that it also includes **“an electronic image of a truncated cheque and a cheque in electronic form.”** Off late, if there happened a case of dishonor of cheque, the criminal proceeding against the accused and subsequently any punishment to that effect was not present, it is indeed a recent inclusion, prior to this it was only Civil and Alternate Dispute Resolution (ADR) techniques which were available for the payee of the cheque but now both Civil and criminal remedies are available for the payee. The payee can file a civil suit in the case of civil remedy and recover the damages as far as criminal remedy it is available under section 138 of the Negotiable Instrument Act which does not state to exclude the filing of a civil suit.

### (A) OBJECTIVE OF SECTION 138

When talking about the commercial world, the law which takes the center stage is the negotiable instrument, the purpose of which is to simplify the activities in trade and Commerce by giving sanctity to the instruments of credit which would be deemed to be convertible into money and easily passable from one to another.”

For example in **Modi Cement Limited Vs Kuchil Kumar Nandi**<sup>1</sup> the Hon’ble court opined that the main object underlying “the section 138 of Negotiable Instrument Act is to promote the efficiency of Banking operations and to ensure all credibility in transacting business through cheques.

The objective and rationale behind the enactment of the section 138 by the Hon’ble court was brought forward in **Dalmia Cement Bharat Limited vs M/S. Galaxy traders and Agencies**

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<sup>1</sup><https://blogs.compliancecalendar.in/modi-cements-ltd-vs-shri-kuchil-kumar-nandi-1998-3-scc-249-supreme-court-fcs-deepak-p-singh-2937>

## Limited and others<sup>2</sup>

The Hon'ble court also stated that "The negotiable instruments are in fact the instruments of credit being convertible on account of legality of being negotiated and are easily transferable from one person to another. The legislature, in its wisdom did take this point into consideration that a provisions in the Act be conferred which would have the privileges wrt the mercantile instruments considered under it and to provide special penalties and procedure in case the obligations under the instruments which are not discharged." The aim of this was to attain the objectives of the Act.

In the case of **D.VinodShivappa Vs Nanda Valliappa**<sup>3</sup> the court stated that "section 138 of the Negotiable Instrument Act is not to protect unscrupulous drawers who does not have the intention to honour the cheques issued by them it being a part of their modus operandi to punish the unscrupulous person."

## CONDITIONS TO COMMIT THE OFFENCE UNDER SECTION 138 OF NI ACT 1881

Section 13 of the Negotiable Instrument Act states the definition of "Negotiable Instrument" which defines it as "a promissory note, bills of exchange or cheque payable either to order or to bearer". This implies that the NI's mentioned above are sort of document which guarantees the bear era sum of money which will be payable on demand or at any future date. The penal provision related to NI's are in Section 138 and it specifically states the punishments in the case of dishonour of cheque. Circumstances which makes dishonour of cheque an offence and the ingredients therein are in the section itself, further it provides the following

1. If there exists any/some liability, then only a person as a drawer should draw a cheque for the payment of money to another person.
2. ThechequeshouldbepresentedtothedraweeBankandthechequeisreturnedbythebankun paid because of insufficient or lack of funds or the amount exceeds from "the amount arranged to be paid from that account by an agreement made with the bank".
3. Important point to note is that the cheque should be presented in the bank within 6

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<sup>2</sup><https://www.the-laws.com>

<sup>3</sup><https://indiankanoon.org/doc/844480>

months from the date on which it was drawn or within the period of its validity whichever is earlier.

4. A “Cheque return memo” be immediately given to the payee by the bank if the cheque is dishonored by the bank.

5. After that a demand notice to be sent by the cheque holder who is the payee to the cheque drawer within the 30 days of receiving the memo regarding the return of the cheque which is not paid.

6. The drawer has to make the payment within 15 days of receiving such notice and if the payment is not done within such time limit then legal action can be taken by the payee within 30 days after the completion of the 15 days.

No offence will be imposed on the drawer, if the drawer is able to pay the money within 15 days’ time frame. The punishment would be imposed only in such circumstances where the person has not been able to pay the debt within that 15 days and this would be regulated under section 138 of the Act.

In the case of *Yogendra Pratap Singh vs Savitri Pandey*<sup>4</sup> The Hon’ble Supreme Court observed that “there should be no cause of action to have arisen until the period of 15 days elapsed therefore the court is barred from taking cognizance of a complaint made before the expiry of 15 days.”

“Section 142 of the Negotiable Instrument Act makes it compulsory that the complaint must be filed by the payee or holder in due course of the check where a Payee is a natural person he can file a complaint and when the pay is a form of a company registered person it must be represented by a natural person.” The court held this in the case of *Shankar Finance Investment vs State of Andhra Pradesh and others*.

## II. LIABILITIES

Two type of Liabilities arise whenever the case of dishonor of cheque happens

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<sup>4</sup><https://www.legalserviceindia.com/legal/article-6425-yogendra-pratap-singh-v-s-savitri-pandey-premature-filing-under-section-138-of-negotiable-instrument-act-stands-dismissed-during-notice-period.html>

- a. Civil
- b. Criminal

The remedies for both the offences are prevalent under both civil procedure code and Indian Penal Code.

In the case of Civil Liability	In the case of Criminal Liability
<p>As per section 138 of the Negotiable Instrument Act it imposes a fine which is double the amount of dishonored cheque and if the payee files a suit under the order 37 of code of civil procedure 1908 to recover the amount and the judgement comes in the favour of the payee then a drawer have to pay the amount ordered by the court.</p>	<p>Section 138 of the Act states the punishment of imprisonment which can be extended up-to 2 years or fine which can be extend up to the twice of the amount of the cheque or both. The offence is bailable compoundable and non-cognizable and the drawer of the cheque will be prosecuted under section 417 which is punishment for cheating and 420 of Indian penal code.</p>

The cognizance of the case can be taken by “Judicial magistrate First Class” or “Metropolitan Magistrate”. Section 29 of The Criminal Procedure Code States that the judicial magistrate of first class cannot impose a fine more than Rs.10,000, so by the Amendment Act Number 55 of the Year 2002 inserted the section 143 (1 )of the Negotiable Instrument Act, which eventually provided the liberty to the Magistrates to impose the fine exceeding their prescribed limits under the code which can be double the amount of cheque.

### III. JURISDICTION

While understanding the appropriate jurisdiction to file a criminal complaint under the section 138 of the NI Act 1881, the act particularly does not define the matter regarding the appropriate jurisdiction, the reason being the Criminal Court has the power to take cognizance of the issue needed to be solved with the help of Criminal Procedure Code 1973 section 177 and 178(d).

In the case of **K.Bhaskaran Vs. Sankaran Vaidhyan Balan and Anr**<sup>5</sup> the Hon'ble court in paragraph 12 of the judgment observed that according to section 177 of the Criminal Procedure Code " every offence shall ordinarily be inquired into and tried in a court within whose jurisdiction it was committed."

An observation emerged post K. Bhaskaran Judgement, which was that the law allowed the complainant to abuse and misuse the law which can lead to hard ship for the drawer. That is the complainant or the payee, once the judgement is conferred may resort to unreasonable and arbitrary power to confer the jurisdiction on places according to his convenience, "which can lead to harassment as the payee has no concern or relation with a distance places where the cheque was issued and which had no link to the transaction ordrawer."

After this case in the year 2014 regarding the jurisdiction in the case of the **Dashrath Rup Singh Rathod vs State of Maharashtra and Anr**<sup>6</sup> The Honorable Supreme Court held that "there is a discernibly defined difference between the commission of an offence and cognizance of the offence. Cognizance leads to cause of action. For Section 138 complaints the cause of action arises only when the drawer fails to pay the defaulted payment.

The Complaints can be filed only in the courts within whose jurisdiction the check is presented for encashment" and the judgement also stated that this will only be applicable in a retrospective effect, the Hon'ble Supreme Court also stated that "only those cases where after completing the summoning and the appearance of the alleged accused the recording of the evidence has commenced as mentioned under the section145(2) of the Negotiable Instrument Act the proceeding will carry on at that place and other complaints which should also include those where the accused or the respondent has not been properly served shall be returned to the complainant to file it in the proper court ."

There has been amendment in the act and as per the Negotiable Instruments(Amendment) Act2015 "a complaint can be filed under the section 138 of Negotiable Instrument Act for dishonour of cheque at a court within whose local jurisdiction the branch of the bank is located and the payee or the holder maintains an account."

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<sup>5</sup>[https://jajharkhand.in/wp/wp-content/judicial\\_updates\\_files/16\\_Negotiable\\_Instruments\\_Act/05\\_Territorial\\_Jurisdiction/K.\\_Bhaskaran\\_Vs\\_Sankaran\\_Vaidhyan\\_Balan\\_And\\_Anar\\_On\\_29\\_September\\_1999.Pdf](https://jajharkhand.in/wp/wp-content/judicial_updates_files/16_Negotiable_Instruments_Act/05_Territorial_Jurisdiction/K._Bhaskaran_Vs_Sankaran_Vaidhyan_Balan_And_Anar_On_29_September_1999.Pdf)

<sup>6</sup><https://calr.in/case-analysis-dashrath-rupsingh-rathod-v-state-of-maharashtra-and-anr>

#### IV. NATURE OF SECTION 138

Recently in the year 2021 under the bench comprising of Rohinton Dali, Nariman and B.R. Gavai, wrt the case of **P Mohanraj vs M/S. Shah Brothers Ispat Pvt. Ltd**<sup>7</sup>, While dealing with the issue of moratorium under section 14 of IBC bars the proceedings under the section 138 of NI Act **against** corporate debtor, the bench commented that proceedings which are under the section 138 of the NI Act can be called as a “Civil sheep” in a “criminal wolf’s clothing” and in this case Shri Aman Lekhi learned “Additional Solicitor General” who presented the Union of India comprehensively went through the sections of negotiable instrument act and argued that “the proceedings mentioned in the section 138 can only be described as criminal proceedings not as a quasi criminal proceedings” but here the court rejected this argument and called it a **misnomer**.

Section 138 of the act provides the punishment for dishonoring of cheque which is mentioned above and also follows the Criminal procedure Code dealing with these type of cases this describes the quasi criminal nature of the section.

##### (A) Following the Criminal Procedure Code

#### 1. Compounding of Offences

An offence can be made compoundable under the Section 147 of the NI Act, even if it is committed under the section of 138. It states that “Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable”.

#### 2. Trying the offences Summarily

Section 143 of the Negotiable Instrument Act gives the power to Magistrates to try the cases summarily only if the Magistrate thinks that the alleged accused is not going to be sentenced more than one year and amount more than 5000 rupees and efforts should be made in all the cases under this section to conclude the trial within 6 months from filing the complaint.

#### 3. Applicability of Section 319 CrPC

Section 319 (1) of Criminal Procedure Code states that “Where, in the course of any inquiry

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<sup>7</sup><https://indiankanoon.org/doc/126341023>

into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.” This rule is also applicable in the case of offence which is committed under section 138. The Hon’ble Supreme Court In the case of **N. Harihara Krishnan v. J. Thomas**<sup>8</sup> opined that “the offence under Section 138 is person-specific hence cognizance against the person not being accused till now has to be taken in the same manner in which cognizance was first taken against the earlier accused.”

When a person is sentenced or convicted under the criminal proceeding under section 138 of NI Act he cannot take this as an alternative to civil proceedings the accused will be convicted under both civil and criminal liability, one can not absolve the other.

#### **V. DECRIMINALIZATION OF SECTION 138 OF NI ACT 1881**

In the year 2020 Minister of Finance published public notice of “decriminalization of minor offences for improving business sentiment and unclogging the court processes” . For taking the suggestions and comments from the stakeholders regarding the decriminalization of number of offences which also includes the offence under the section 138 of the Negotiable Instrument Act 1881.

There are basically five reasons which caused this proposal “ inspiring confidence among investors; keeping economic growth, national security and public interest as paramount; evaluate non-compliance keeping mens rea in mind as opposed to negligence or inadvertent omissions; and the habitual nature of non-compliance.”<sup>15</sup>

The main objective behind this proposal by the government it is to ease the process of business and to encourage investment but according to me the decriminalization of Section 138 will not fulfill this objective the intent and the main objective behind this section was to create a deterrent effects and discourage people from not honoring their commitment by way of making payment through cheque. Now cheques are used very much in every day economic and banking transactions and the holder of the cheque because of the penal provisions in the section 138 feels relieved that he has a a a chance to enforce the payment in the case of dishonour of that cheque but by criminalizing this provision the assurance and the safety will

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<sup>8</sup><https://www.indianemployees.com/judgments/details/n-harihara-krishnan-versus-j-thomas>



be lost and the confidence which people have in the case of transactions through cheque will adversely effect which will eventually affect the economy.

Another objective behind this proposal was to unlock the judicial system through the process of decriminalization but this objective also will not be fulfilled as there are already many pending cases in the magistrate courts and the disposal of the cases are also very late and by, decriminalization the problem will be increased as the strain and burden which was faced by the criminal courts will shift to the Civil courts because as as the holder of the cheque will not be have any remedy in the criminal court then he will only be only left with the option of recovery suit.

## **VI. CONCLUSION**

In the case of **P Mohanraj vsM/S. Shah Brothers Ispat Pvt. Ltd**<sup>9</sup>, the Hon'ble court observed that "the primary object of the provision of Section 138 of the NI Act is not to penalise the wrongdoer but to compensate the victim."with time there are many landmark judgments which caused significant development regarding the objective of the section and jurisdiction in case of offence committed under this section. The legislature has started making suggestion for the decriminalization of the act but it still an offence.

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<sup>9</sup> Civil Appeal No.10355 Of 2018