

AN ANALYSIS OF SECTION 138 OF THE NEGOTIABLE INSTRUMENTS ACT, 1881 WITH REFERENCE TO 420 OF IPC

Written by *Rudraksh Gupta*

3rd year B.A LL.B student, Christ (Deemed to be University), Bengaluru, India

ABSTRACT

The first draft of the Negotiable Instruments Act was created in 1866, and it was implemented in 1881. It was once a colonial statute and is still commonly used today. With the passage of Section 4 of the Banking, Public Financial Institutions and Negotiable Instruments (Amendment) Act, 1988, Chapter XVII, Sections 138 to 142 were added to the Act after a century (Act 66 of 1988). The penalty for dishonouring a cheque is covered under Section 138 of the Act. The cheque is a payable document drawn on a certain banker and does not expressly state that it is payable to someone else on demand. The researcher is analysing section 420 of IPC with Section 148 of Negotiable Instruments act. Section 420 deals with punishment up to seven years in case of cheating with regard to failure on delivering of property. The researcher will analyse all the key loopholes in the provisions of Negotiable Instruments and accordingly present the findings. The researcher will further rely on doctoral method of finding data.

Keywords: Statue, Section 138, section 420, punishment, Findings

INTRODUCTION

The dishonour of checks in India is addressed under Section 138 of the Negotiable Instruments Act, 1881. The courts are becoming overburdened with the numerous cases that have been filed in accordance with this provision.

The crime of cheating as defined by the IPC is conceptually quite distinct from that of torts and contracts. The defendant's dishonest purpose in this case is the key element. To take advantage of another person, one must dishonestly persuade him to act in a certain way. The two criteria that cause the offence of cheating are deception and inducement. Under the IPC, the act of cheating must result in either unlawful loss or wrongful gain.

Although there are many difficulties the Indian judiciary must overcome, little is known about the issue of delays in the Indian legal system. In this sea of cases, the instances involving the dishonour of checks constitute a recognised but unexplored black hole. The crime of dishonouring a cheque due to a lack of money in the account on which it is written is covered under Section 138 of the Negotiable Instruments (NI) Act, 1881. There are between 38 and 40 lakh cases of cheque bounce, which are suffocating the country's justice delivery system, according to the 213th Law Commission Report and several newspaper reports, which makes it clear that this one category of cases accounts for a significant portion of all pending cases in the judicial system.

The law of negotiable instruments is not unique to India; it is a corpus of rules that govern business and commercial transactions across the world. The word 'negotiable instrument' refers to any written statement offered as security, often for the payment of money, that may be transferred by endorsement or delivery and vests in the party to whom it is passed. One of them is a cheque, the use (and misuse) of which is controlled by Section 138 of the Negotiable Instrument Act.

RESEARCH QUESTION

1. The rule of double jeopardy and the constitutional validity?
2. Civil and criminal liability incurred on the both the parties?

3. Conflict of provision between Criminal Procedure Code,1973 and Negotiable Instrument act,1881?

RESEARCH METHODOLOGY

To understand how cases filed under Section 138 of the NI Act and 420 of IPC move through the courts, an empirical analysis will be carried out and data will be taken from DAKSH database.

SCOPES AND LIMITATION

The researcher finds that the courts which have a rooster pertaining to Negotiable Act,1881 have to adopt a speedy mechanism for settling the disputes otherwise the massive load of cases will keep on piling and will hinder the principle of justice. There is no clarity given by courts in context of criminal liability on dishonour of cheques.

THE RULE OF DOUBLE JEOPARDY AND THE CONSTITUTIONAL VALIDITY

The mere filing of a complaint under Section 138 Instruments Act of 1881 does not exclude a person from being punished under Section 420 of the Indian Penal Code. The procedures under the Negotiable Instruments Act are for the offences of issuing a cheque without adequate cash, whilst the actions under the Indian Penal Code are for a person's criminal conduct.

When prosecuting under 138 of the Negotiable Instruments Act, considerations such as fraud or dishonest intent at the time of issuance of the cheque are not necessary to be shown; however, when prosecuting under section 420 of the IPC, all such circumstances must be proven because the penalty under this provision is more serious and lengthier, punishable with up to seven years in prison.

Furthermore, what is punished under criminal law is the accused's behaviour or the consequences of that behaviour. The court observed “If a fact or the consequences of an act form more than one offence, the accused may be tried and punished for all such offences, whether they are punishable under general penal law as provided in the IPC or separately under general criminal and special criminal law”.

The sheer fact that an act is illegal under special legislation does not exclude it from being penalised under common criminal law.

LIABILITY OF DRAWER OF CHEQUE

The individual who prepares the exchange note is known as the drawer. A drawee is a person who is compelled to pay a certain amount of cash - to the payee or Holder of Exchange Bill - to discharge an obligation, and the drawee becomes the Acceptor of Exchange Bill after signing or conveying the Bill of Exchange to the Holder or a party representing the Holder. The Payee or Holder of an Exchange Bill is the person who owns the Exchange Bill (in his own name) and has the authority to recover the amount owed from another party.

The Negotiable Instruments Act of 1881 defines cheque dishonour in two ways: Dishonour by Non-Payment refers to a situation in which the Drawee is unable to contract or the acceptance is qualified, thus exceeding the provisions of the Indian Contract Act, and Dishonour by Non-Payment refers to a situation in which the drawee of the cheque is unable to pay the required amount to the payee or holder. A debt is a legally enforceable sum owed to another person.

The principal responsibility of the drawee is to pay the holder or payee of the cheque. The cheque must be provided to the bank for this to work. If the payee's banks fail to make the promised payment, the drawer has an implied assumption, promise, and duty to repay the drawee for the payment default.

This payment default, as expressly stated in the Act governing Negotiable Instruments of 1881, may occur owing to two factors: For starters, it might be owing to a lack of cash in the drawer's bank. Second, the amount stated on the cheque may have exceeded the agreement reached between both the drawee and the drawer. In this case, agreement refers to a circumstance in

which the drawer has used his bank's overdraft (credit) facility known as "Exceeds Arrangement" owing to a lack of cash in his account. This credit facility, however, has an allowed limit. The cheque is considered to be dishonoured in an agreement if the cheque amount exceeds the allowed overdraft limit amount.

The terms "insufficiency of funds" and "exceeds arrangement" are legally distinct but practically the same: The bottom line is that the money in the drawer's bank is inadequate to honour the cheque.

a. "Stop Payment or Instructions for Payment Stoppage -" The Supreme Court of India observed that "if the payee is given notice before the cheque is presented for payment not to issue the cheque for payment, and the cheque is presented even after the drawer's instructions, the cheque is said to be dishonoured and carries liability under Section 138 of the Negotiable Instruments Act, 1881".

b. "Closed Bank Account -" It refers to a circumstance in which the drawer has cancelled his account despite the fact that it was open at the time the cheque was signed. This is known as a "Account Closed" condition. Therefore, indicates that the drawer has no intention of honouring the cheque, and it is punishable under Section 183 of the Negotiable Instruments Act of 1881.

c. "Refer to the Drawer -" "It is a polite manner in which the drawer's bank informs the holder of the cheque that the cheque could not be honoured due to lack of funds in the drawer's account". The payee or bearer of the cheque is instructed to approach the drawer.

d. "Date Stamped Cheques -" A "Post-Dated Cheque" is a drawn or prepared bill of exchange. This Exchange Bill would become a "Cheque" when it is due on demand, i.e., when the payee demands payment. Only when such an exchange bill becomes a cheque, comes under ambit of Section 138 of the NI Act become applicable.

LIABILITY OF DRAWEE OF CHEQUE

The Drawee bank is obligated to honour the payee's cheque if there are adequate money in the Drawer's account and the cheque is correctly drawn. If the cheque is dishonours by mistake, then, it must pay the Drawer for any loss or harm to the Drawer's reputation, or integrity.

Because the connection between the Drawee and the Customer. Drawer is not a debtor-creditor one, the Customer has the right to seek damages. As an equitable sense of trust, the banker has various rights and obligations, one of which is to pay money from the user's bank account as and when requested.

When there is no proof of unique loss or damages experienced by a non-trader, nominal damages are granted. In the instance of a trader, however, considerable damages must be granted in the absence of the aforementioned proof of exceptional loss or harm. A simple declaration of sorrow by the Drawee Bank is insufficient to release it from its obligation. When adequate funds are available in the drawer's account, the Drawee bank is expected to honour the cheque. However, if there is failure to do so, the payee must pay the drawer. It is a truth and a well-established concept that the Drawee will be subject to the tortious notion of "Strict Liability" for carelessly honouring a counterfeit cheque.

On the other hand, there may be occasions when the Drawee bank may legitimately dishonour the cheque, such as when a Drawer freezes his bank account immediately after the issuing of the cheque and before the presentment of the cheque, and this dishonest purpose safeguards the Drawee from any form of obligation under breach of fiduciary obligations because the drawer is at fault.

When a stale cheque is submitted, that is after the payment date, it is withdrawn and dishonoured. As a result, any conduct carried out lawfully and responsibly by the Drawee Bank that results in cheque dishonour owing to the Drawer's error would discharge the Drawee's obligation under Section 138 of the NI Act, and is regarded as "rightful dishonour". "In the event of an electronic picture of a truncated cheque, the clearing house is responsible for obtaining confirmation from the other party that the image communicated and received by the clearing house is the same as that approved by the other party".

CONCLUSION

The Drawer is responsible for compensation equal to twice the amount of the Cheque. Because one cannot be held criminally liable for the activities of another, the concept of vicarious responsibility does not apply to the drawers' liability. If both Joint Account Holders signed the

cheque, they might face legal consequences under Section 138 of the Negotiable Instruments Act of 1881. If just one of the Joint Account Holders signed the cheque, that individual is held responsible as the Drawer. There are two kinds of remedies available to the Payee: civil and criminal. The payee may initiate a civil suit against the Drawer in order to collect the money. Alternatively, the payee may initiate a criminal suit against the Drawer for fraud.

