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STATEMENT OF THE PROBLEM

OBJECTIVES

HYPOTHESIS (ES)

RESEARCH METHODOLOGY

RESULTS & DISCUSSION

FINDINGS

RECOMMENDATIONS/SUGGESTIONS

CONCLUSIONS

LIMITATIONS

SCOPE FOR FURTHER RESEARCH

REFERENCES

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COURTS' JURISDICTION FOR TAKING COGNIZANCE OF CRIMINAL COMPLAINTS FILED UNDER SECTION 142 OF NEGOTIABLE INSTRUMENTS ACT 1881 - THE NEGOTIABLE INSTRUMENTS (AMENDMENT) ACT 2015 – IT'S CAUSE AND CURE

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ABSTRACT

This paper attempts to describe the criminal liability for offence committed in cheque bouncing cases, the new chapter XVII containing sections 138 – 142 was inserted, in the Negotiable Instrument Act 1881, by amendment made by Act 66 of 1988 with effect from 01.04.1989. When the cheque presented for collection was returned unpaid by the drawee bank, for the reason "insufficient funds" in the drawer's account or that the cheque amount exceeded the amount arranged to be paid, the drawer of the cheque shall, notwithstanding any other provision in the Code of Criminal Procedure, be deemed to have committed a criminal offence warranting sentence of imprisonment which may extend to two years or fine which may extend to twice the cheque amount or both. Not infrequently, the complainants are faced with the dilemma to choose the court having territorial jurisdiction to file the complaint. The main objective of the study is to clear the ambiguity, on the point of courts' jurisdiction to take cognizance of the complaints in cheque bouncing cases. For this purpose, various inconsistent decisions of the courts and the amendment made in the N.I. Act in 2015 are analysed in this study. Firstly, the complaint is to be filed before the court where the branch of the bank is situated, where the payee or the holder in due course maintains his account and secondly when the cheque is presented for payment over the counter the complaint is to be filed before the Court where the drawer maintains his account.

KEYWORDS

concatenation, dishonour of cheque, negotiable instrument, offence, sine qua non.

INTRODUCTION

Dishonour of cheques, has become the cancer of economy that would cause incalculable damage destroying the morale, faith and confidence in business dealings. Proper and smooth functioning of business transactions, especially of cheques as negotiable instruments, primarily depends upon the credibility, sincerity and honesty of the persons involved. It is not unusual that in a large number of trading activities, it is found that cheques were issued even merely as a device not only to stall repayment of loan but even to defraud the creditors. Despite stringent criminal provisions are made applicable for offences committed under section 138 of N.I. Act, cheque bouncing cases continued to swell day by day. Dishonour of cheques not only causes fiscal stalemate and cripple the economic development of the nation, M.N.Cs, Banks, Financial institutions, Industries, corporate entities etc., but also causes trust deficit, injury and inconvenience to the entire credibility among the business community, both domestic and international.

Before the amendment, dishonour of cheques was considered only as a civil wrong. Under the Indian Penal Code dishonour of cheques becomes a criminal offence, only where dishonest or fraudulent intention or ***mens rea*** on the part of the drawer is established. India and many other countries, brought in amendments in the existing law relating to negotiable instruments, to user in a healthy commercial morality through the instrumentality of criminal law.

OBJECT OF AMENDMENT

The objective is to remove ambiguity on the point of law, relevant to territorial jurisdiction for filing a complaint against cheque bouncing case. This has been done to protect the interests of the complainant by clarifying the territorial jurisdiction for trying the cases for dishonour of cheques.

EVOLUTION OF AMENDMENTS IN NEGOTIABLE INSTRUMENTS ACT 1881

To curtail the abuse of cheque bouncing, Negotiable Instruments Act 1881, has been amended by the Act 66 of 1988 which added a new chapter XVII, inserting new sections 138 to 142. After this amendment, section 138 of the N.I. Act mandates that when a cheque issued for discharge of a valid debt or liability, was returned by the bank unpaid, the drawer of the dishonoured cheque shall be deemed to have committed an offence, punishable with a sentence of imprisonment for a term which may extend to two years or with a fine which may extend to twice the amount of the cheque amount or both. The drawer of the cheque has to face criminal liability, notwithstanding, any other provisions contained in the Code of Criminal Procedure. These newly inserted sections became operative with effect from 01.04.1989.

A First Class Judicial Magistrate, who is empowered to try a case for offence committed under section 138 of N.I. Act can pass a sentence of fine not exceeding Rs. 5000/- (section 29(2) of Criminal Procedure Code.)

In 2002 N.I. Act was again amended (Amendment Act 55 of 2002) inserting new sections 143 to 147 - with effect from 06.02.2003. The statement of objects and reasons claim "These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument. The existing provisions in the Negotiable Instruments Act, 1881, namely, Sections 138 to 142 in Chapter XVII have been found deficient in dealing with dishonour of cheques. Not only the punishment provided in the Act has proved to be inadequate, the procedure prescribed for the courts to deal with such matters has been found to be cumbersome. The courts are unable to dispose of such cases expeditiously in a time bound manner in view of the procedure contained in the Act."

In case of any conviction in a summary trial under this section, the first proviso to section 143 (as amended by Act 55 of 2002), empowers the Magistrate to pass a sentence for a term not exceeding one year and an amount of fine exceeding five thousand rupees.

Regarding the adequacy of punishment for offence under N.I. Act, it is apt to mention the observation of Hon'ble Supreme Court, "unlike that for other forms of crime, the punishment here in so far as *a means to ensure payment of money.* The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. *The threat of jail is only a mode to ensure recovery.* As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque". ***Damodar S. Prabu v Syed Bapulal (2010) 5 SCC 663.***

TIME (WHEN) TO FILE A CRIMINAL COMPLAINT AGAINST THE DRAWER OF THE DISHONOURED CHEQUE

Under section 138 of N.I. Act, Cause of action, that gives legal right to file a criminal complaint against the drawer of the dishonoured cheque, will accrue to the payee/ holder only on the strict compliance of the following three steps:

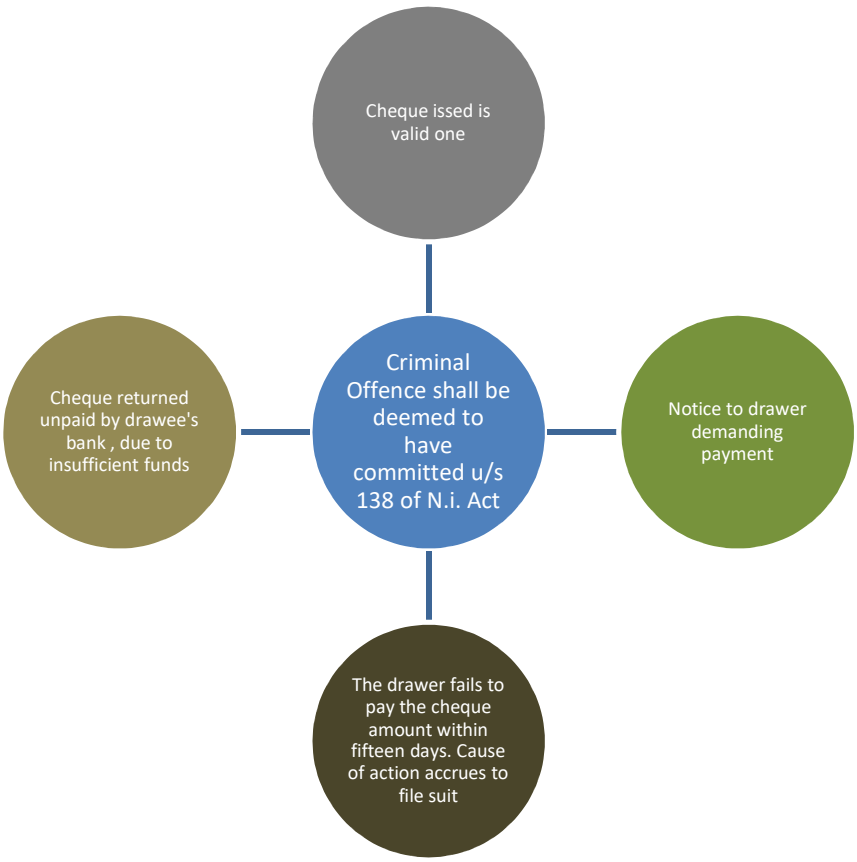
(i) The cheque should have been presented before the drawee bank within three months from the date of the cheque, for collection - proviso (a).,

(ii) The payee/holder makes a demand, for the payment of the cheque amount, by giving a notice in writing, to the drawer within thirty (30) days of the receipt of information from the drawee bank, - proviso (b).

(iii) The drawer of the cheque fails to make the payment of the said amount within fifteen (15) days of receipt of the notice - proviso (c).,

Cause of action arises to the payee/holder, when the drawer fails to make the payment as per proviso (c).

FIG. 1



The next step is to file a complaint, by the payee/holder in due course. The complaint should be filed in writing, within one month from the date on which the cause of action arises under clause (c) of the proviso to section 138 of N.I. Act, in the Metropolitan Magistrate Court or First Class Judicial Magistrate Court.

The Law Commission of India in its 213th Report has claimed that more than 38 lakhs cases involving dishonour of cheques are pending in Indian courts as of October 2008. More than five lakhs cases are pending in criminal courts in Delhi alone as of 01.06.2008. Similar situation prevails in all major cities in the country. The affected parties, multinationals, finance institutions, companies, other commercial entities and agencies have filed complaints u/s 142 of N.I. Act before courts situated in places from where the payee/holder issued statutory notices under section 138 proviso (b) of N. I. Act. Criminal courts found it difficult to take cognizance of complaints against defaulted drawers residing in different parts of the country.

Now the moot question is which Magistrate court is having jurisdiction to entertain a criminal case for the offence committed u/s 138 of N.I. Act. For example, a cheque was drawn by the debtor in Chennai on a bank in Chennai, made payable to the payee in New Delhi, towards discharge of a debt or liability. The payee deposited the cheque for collection within validity period through his bank account in New Delhi. The cheque was returned by the drawee bank unpaid for the reason "insufficient funds." The payee, in New Delhi issued notice in writing under proviso (b) to section 138 N.I. Act demanding the cheque payment within fifteen days time. The drawer of the cheque in Chennai did not pay the amount within the time. Thereupon the payee filed a criminal complaint in the Metropolitan Magistrate Court, New Delhi against the drawer residing in Chennai. The New Delhi Court however rejected the complaint stating that this court has no territorial jurisdiction over the drawer residing in Chennai. An unintended critical situation arises, to the payee/ holder who has already been deprived of his money, in finding the competent court to file the complaint against the drawer of the cheque.

Both the Hon'ble Supreme Court and High Courts are not consistent in their judgments regarding courts having territorial jurisdiction to entertain complaint under N.I. Act. Over eighteen lakhs cases are pending disposal in different courts, facing challenges upon territorial jurisdiction.

JUDGMENTS GIVEN IN CHEQUE BOUNCING CASES IN HIGH COURTS AND SUPREME COURT

1. This issue has been considered by the Hon'ble Supreme Court in the case ***K.Bhaskaran V. Shankaran Vaidyan Balan and Another (1999) Supp (3) SCR 271 judgment dated 29.09.1999.*** This is a strange case between two brothers in Kerala, the cheque bounced was to pay one lakh rupees. The cheque was presented for collection on 29.01.1993. The question of jurisdiction of court to try the case was the main issue before the trial court. Hon'ble Kerala High Court has confirmed the sentence of imprisonment (six months) and a fine of one lakh, imposed on the defaulter of the cheque. S.L.P. has been filed before the apex court challenging the High court order. The Hon'ble Supreme court granted time to settle the matter by both the brothers, but in vain. In this case the Hon'ble apex court has given a very peculiar and impracticable judgment. The court in its judgment has held, "the offence under the act can be completed only with the concatenation of a number of acts. Following are the acts which are components of the said offence: (1) Drawing of the cheque, (2) Presentation of the cheque to the bank, (3) Returning the cheque unpaid by the drawee bank, (4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) Failure of the drawer to make payment within 15 days of the receipt of the notice.

It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at 5 different localities. But concatenation of all the above five is a *sine qua non* for the completion of the offence under Section 138 of the Code.

2. The judgment in ***K. Baskaran,*** confers the right to choose the territorial jurisdiction of the court to file the complaint on, the payee/ holder in due course. Suppose the drawer issued five cheques to the creditor; and all the five cheques were bounced, the creditor at his discretion could file the complaint in five different places. This would cause an honest business man, unintended harassment to face the trial in five different places.
3. However, the Hon'ble ***apex court in Harman Electronics (P) Ltd and another v. National Panasonic India Private Ltd., (2009) 1 SCC 720, judgment dated 12.12. 2008,*** had diluted the five places theory given in ***K. Baskaran's*** case. In this case the drawer of the cheque was carrying on business in Chandigarh. The payee has a branch at Chandigarh although its head office was at New Delhi. A cheque was issued by the drawer at Chandigarh favouring the payee i.e. National Panasonic India (P) Ltd., The cheque was presented at Chandigarh and it was dishonoured at Chandigarh with the remarks "Payment stopped by the drawer". However a notice was issued in terms of section 138 of the N.I.Act, from the payee's head office at New Delhi demanding the drawer to pay the amount. The notice was served on the drawer at Chandigarh. Despite the notice the drawer did not pay the amount within fifteen days from the date of receipt of the notice. There upon the payee's head office at New Delhi filed a complaint in the court of Addl. Sessions Judge, New Delhi. Cognizance of offence was taken by the court in New Delhi against the drawer living in Chandigarh. The drawer contended that himself and the payee were carrying on business at Chandigarh and further the cheque was presented with the bankers at Chandigarh, that the cheque was dishonoured at Chandigarh, but only notice was issued from New Delhi where payee's head office functions. It was contended that the New Delhi court has no jurisdiction over the drawer who lives in Chandigarh on the only ground that notice was issued from New Delhi. But the New Delhi court has dismissed the contention of the accused. The accused filed appeal before the Hon'ble Supreme court against this decision.
4. The Hon'ble Supreme Court has held "we cannot as things stand to-day, be oblivious of the fact that a banking institution holding several cheques signed by the same borrower can, not only present the cheque for its encashment at four different places but may also serve notices from four different places so as to enable it to file four complaint cases at four different places. This only causes harassment to the accused. It is therefore necessary in a case of this nature to strike a balance between the right of the complainant and the right of the accused vis-a vis the provisions of the Code of Criminal Procedure." Accordingly, it was held that the Delhi High Court has no jurisdiction to try this case and directed that the case be transferred to the Chandigarh Court."
5. The Hon'ble Supreme court In the landmark case ***Dashrath Rupsing Rathod v. State of Maharashtra and another (2014) 9 SCC, 129 judgment dated 01.08.2014,*** has overruled ***K. Baskaran's*** ruling, which has been followed by courts in the past fifteen years. This judgment, made abundantly clear that (i) the place of issuance of statutory notice, or (ii) the place of deposit of cheque in a bank by the payee or (iii) the place of receipt of notice by the accused demanding payment, would not confer jurisdiction upon courts of the place.
6. In this case, the Hon'ble Supreme Court has held that prosecution can be launched against the drawer of the cheque only before the court within whose jurisdiction the dishonour takes place.
7. Reading of section 178 and 179 of the Criminal Procedure Code it becomes obvious that every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction the offence was committed.

INGREDIENTS TO FILE A COMPLAINT UNDER SECTION 142 OF NEGOTIABLE INSTRUMENT ACT

For filing the criminal complaint under section 142 of N.I. Act, the following ingredients shall be strictly complied with: viz.

(i) The cheque should have been presented with drawee bank for collection within three months from the date of issue.
(ii) When the cheque was returned, the payee/holder in due course issued a notice in writing within thirty days of receipt of information, to the drawer, demanding payment of the cheque amount.
(iii) The drawer failed to pay the amount within fifteen days of receipt of the notice.

WHERE TO FILE THE COMPLAINT

The payee/holder in due course, shall file the criminal complaint in writing before the Metropolitan Magistrate Court or First Class Judicial Magistrate Court, having territorial jurisdiction to entertain the complaint. Now the complainant before filing the complaint is faced with the dilemma to choose the court having territorial jurisdiction to entertain the complaint. After nearly fifteen years the Hon'ble Supreme court in a landmark case ***Dashrath Rupsing Rathod v. State of Maharashtra and another (2014) 9 SCC, 129 judgment dated 01.08.2014,*** has overruled ***K. Baskaran's*** ruling. This judgment made abundantly clear that "prosecution can be launched against the drawer of the cheque only before the court within whose jurisdiction the dishonour takes place."

REASONS OF THE N.I. (AMENDMENT) ACT, 2015

To address the difficulties faced by the payees of such cheques or the lenders of the money in filing cases under N.I. Act, when large number of cases are stuck, facing challenges of jurisdiction to try such cases, the Government found it necessary to bring in amendment in the N. I. Act to overcome the ruling given in ***Dashrath Rupsing Rathod*** case. This amendment act had the effect of overruling the judgment of the Supreme Court in ***Devendra Kishanlal Dagalia v. Dwarkesh Diamonds Pvt. Ltd and Others (2014) 2 SCC 246 judgement dt. 25.11.2013.***

NEGOTIABLE INSTRUMENTS (AMENDMENT) ACT, 2015

Government of India in order to overcome the hurdles faced by criminal courts, found necessary to bring an Ordinance to remove the ambiguity in this matter. Parliament has passed the Negotiable Instruments (Amendment) Act, 2015 which was approved by the President on 15.12.2015., the amendment takes effect retrospectively from 15.06.2015. Under the amendment a new section 142 (2) has been inserted in chapter XVII of N. I. Act that reads "the offence under section 138 shall be inquired in to and tried only by a court with whose local jurisdiction, -(a) *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 (b) 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.*

Explanation: – For the purposes of Clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.

NEW SECTION 142 A WAS INSERTED BY AMENDMENT ACT 2015 that reads: Validation for transfer of pending cases. –

(i) "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or any judgement, decree, order or direction of any court, all cases transferred to the court having jurisdiction under sub – section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, shall be deemed to have been transferred under this Act, as if that sub – section had been in force at all material times.
(ii) "Notwithstanding anything contained in sub – section (2) of section 142 or sub – section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under sub – section (2) of section 142 or the case has been transferred to that court under sub – section (1) and such compliant is pending in that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.
(iii) "If, on the date of the commencement of the Negotiable Instruments (Amendment) Act, 2015, more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub – section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, before which the first case was filed and is pending, as if that sub – section had been in force at all material times."

SUGGESTION

The Negotiable Instruments (Amendment) Act, 2015, is a laudable forward step taken by the central government, to reduce the large number of cases pending before various courts in the country holding millions of rupees in abeyance. The amendment act would benefit the payee/ holder in due course, to file the criminal complaint having territorial jurisdiction as per the amended law. Special fast track courts may be formulated by the Government specifically to try cases filed under section 142 of N.I. Act, summarily. Under the existing provisions the courts trying cases filed under section 142 of N.I. Act, have no power to direct the accused to pay the cheque amount., courts can only impose sentence of imprisonment or fine or both for the offence committed. Courts should be empowered to make the accused to pay 50% of the cheque amount, when the question of jurisdiction of court was only raised by the accused.

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